# 1nc

### 1

#### First interp- Restrict means prohibit, they don’t

Jean Schiedler-Brown 12, Attorney, Jean Schiedler-Brown & Associates, Appellant Brief of Randall Kinchloe v. States Dept of Health, Washington, The Court of Appeals of the State of Washington, Division 1, http://www.courts.wa.gov/content/Briefs/A01/686429%20Appellant%20Randall%20Kincheloe%27s.pdf

3. The ordinary definition of the term "restrictions" also does not include the reporting and monitoring or supervising terms and conditions that are included in the 2001 Stipulation. ¶ Black's Law Dictionary, 'fifth edition,(1979) defines "restriction" as; ¶ A limitation often imposed in a deed or lease respecting the use to which the property may be put. The term "restrict' is also cross referenced with the term "restrain." Restrain is defined as; To limit, confine, abridge, narrow down, restrict, obstruct, impede, hinder, stay, destroy. To prohibit from action; to put compulsion on; to restrict; to hold or press back. To keep in check; to hold back from acting, proceeding, or advancing, either by physical or moral force, or by interposing obstacle, to repress or suppress, to curb. ¶ In contrast, the terms "supervise" and "supervisor" are defined as; To have general oversight over, to superintend or to inspect. See Supervisor. A surveyor or overseer. . . In a broad sense, one having authority over others, to superintend and direct. The term "supervisor" means an individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but required the use of independent judgment. ¶ Comparing the above definitions, it is clear that the definition of "restriction" is very different from the definition of "supervision"-very few of the same words are used to explain or define the different terms. In his 2001 stipulation, Mr. Kincheloe essentially agreed to some supervision conditions, but he did not agree to restrict his license.

#### B. Standards:

#### 1. Limits – The topic is already huge – 4 areas times 2 mechanisms all with separate literature and unique advantages – its an impossible research burden without prohibition

#### 2. Bidirectionality – Absent prohibition they can create conditions that functionally increase authority

#### Vote negative- Topicality is a prima facie burden and should be evaluated as a question of competing interpretations.

### 2

#### Contemporary security is contingent on lashing out against those who are strange or unknown out of a fear of death that generates ressentiment

Der Derian, 1995

(James, IR theorist and Philosopher, On Security “The Value of Security: Hobbes, Marx, Nietzsche and Baudrillard. Ed Ronnie Lipshutz” Online)

Nietzsche transvalues both Hobbes's and Marx's interpretations of security through a genealogy of modes of being. His method is not to uncover some deep meaning or value for security, but to destabilize the intolerable fictional identities of the past which have been created out of fear, and to affirm the creative differences which might yield new values for the future. 33 Originating in the paradoxical relationship of a contingent life and a certain death, the history of security reads for Nietzsche as an abnegation, a resentment and, finally, a transcendence of this paradox. In brief, the history is one of individuals seeking an impossible security from the most radical "other" of life, the terror of death which, once generalized and nationalized, triggers a futile cycle of collective identities seeking security from alien others--who are seeking similarly impossible guarantees. It is a story of differences taking on the otherness of death, and identities calcifying into a fearful sameness. Since Nietzsche has suffered the greatest neglect in international theory, his reinterpretation of security will receive a more extensive treatment here. One must begin with Nietzsche's idea of the will to power, which he clearly believed to be prior to and generative of all considerations of security. In Beyond Good and Evil , he emphatically establishes the primacy of the will to power: "Physiologists should think before putting down the instinct of self-preservation as the cardinal instinct of an organic being. A living thing seeks above all to discharge its strength--life itself is will to power; self-preservation is only one of the most frequent results." 34 The will to power, then, should not be confused with a Hobbesian perpetual desire for power. It can, in its negative form, produce a reactive and resentful longing for only power, leading, in Nietzsche's view, to a triumph of nihilism. But Nietzsche refers to a positive will to power, an active and affective force of becoming, from which values and meanings--including self-preservation--are produced which affirm life. Conventions of security act to suppress rather than confront the fears endemic to life, for ". . . life itself is essentially appropriation, injury, overpowering of what is alien and weaker; suppression, hardness, imposition of one's own forms, incorporation and at least, at its mildest, exploitation--but why should one always use those words in which slanderous intent has been imprinted for ages." 35 Elsewhere Nietzsche establishes the pervasiveness of agonism in life: "life is a consequence of war, society itself a means to war." 36 But the denial of this permanent condition, the effort to disguise it with a consensual rationality or to hide from it with a fictional sovereignty, are all effects of this suppression of fear. The desire for security is manifested as a collective resentment of difference--that which is not us, not certain, not predictable. Complicit with a negative will to power is the fear-driven desire for protection from the unknown. Unlike the positive will to power, which produces an aesthetic affirmation of difference, the search for truth produces a truncated life which conforms to the rationally knowable, to the causally sustainable. In The Gay Science , Nietzsche asks of the reader: "Look, isn't our need for knowledge precisely this need for the familiar, the will to uncover everything strange, unusual, and questionable, something that no longer disturbs us? Is it not the instinct of fear that bids us to know? And is the jubilation of those who obtain knowledge not the jubilation over the restoration of a sense of security?" 37 The fear of the unknown and the desire for certainty combine to produce a domesticated life, in which causality and rationality become the highest sign of a sovereign self, the surest protection against contingent forces. The fear of fate assures a belief that everything reasonable is true, and everything true, reasonable. In short, the security imperative produces, and is sustained by, the strategies of knowledge which seek to explain it. Nietzsche elucidates the nature of this generative relationship in The Twilight of the Idols : The causal instinct is thus conditional upon, and excited by, the feeling of fear. The "why?" shall, if at all possible, not give the cause for its own sake so much as for a particular kind of cause --a cause that is comforting, liberating and relieving. . . . That which is new and strange and has not been experienced before, is excluded as a cause. Thus one not only searches for some kind of explanation, to serve as a cause, but for a particularly selected and preferred kind of explanation--that which most quickly and frequently abolished the feeling of the strange, new and hitherto unexperienced: the most habitual explanations. 38 A safe life requires safe truths. The strange and the alien remain unexamined, the unknown becomes identified as evil, and evil provokes hostility--recycling the desire for security. The "influence of timidity," as Nietzsche puts it, creates a people who are willing to subordinate affirmative values to the "necessities" of security: "they fear change, transitoriness: this expresses a straitened soul, full of mistrust and evil experiences." 39 The unknowable which cannot be contained by force or explained by reason is relegated to the off-world. "Trust," the "good," and other common values come to rely upon an "artificial strength": "the feeling of security such as the Christian possesses; he feels strong in being able to trust, to be patient and composed: he owes this artificial strength to the illusion of being protected by a god." 40 For Nietzsche, of course, only a false sense of security can come from false gods: "Morality and religion belong altogether to the psychology of error : in every single case, cause and effect are confused; or truth is confused with the effects of believing something to be true; or a state of consciousness is confused with its causes." 41 Nietzsche's interpretation of the origins of religion can shed some light on this paradoxical origin and transvaluation of security. In The Genealogy of Morals , Nietzsche sees religion arising from a sense of fear and indebtedness to one's ancestors: The conviction reigns that it is only through the sacrifices and accomplishments of the ancestors that the tribe exists --and that one has to pay them back with sacrifices and accomplishments: one thus recognizes a debt that constantly grows greater, since these forebears never cease, in their continued existence as powerful spirits, to accord the tribe new advantages and new strength. 42 Sacrifices, honors, obedience are given but it is never enough, for The ancestors of the most powerful tribes are bound eventually to grow to monstrous dimensions through the imagination of growing fear and to recede into the darkness of the divinely uncanny and unimaginable: in the end the ancestor must necessarily be transfigured into a god . 43 As the ancestor's debt becomes embedded in institutions, the community takes on the role of creditor. Nietzsche mocks this originary, Hobbesian moment: to rely upon an "artificial strength": "the feeling One lives in a community, one enjoys the advantages of communality (oh what advantages! we sometimes underrate them today), one dwells protected, cared for, in peace and trustfulness, without fear of certain injuries and hostile acts to which the man outside , the "man without peace," is exposed . . . since one has bound and pledged oneself to the community precisely with a view to injury and hostile acts. 44 The establishment of the community is dependent upon, indeed it feeds upon, this fear of being left outside. As the castle wall is replaced by written treaty, however, and distant gods by temporal sovereigns, the martial skills and spiritual virtues of the noble warrior are slowly debased and dissimulated. The subject of the individual will to power becomes the object of a collective resentment. The result? The fear of the external other is transvalued into the "love of the neighbor" quoted in the opening of this section, and the perpetuation of community is assured through the internalization and legitimation of a fear that lost its original source long ago. This powerful nexus of fear, of external and internal otherness, generates the values which uphold the security imperative. Indeed, Nietzsche locates the genealogy of even individual rights, such as freedom, in the calculus of maintaining security: - My rights - are that part of my power which others not merely conceded me, but which they wish me to preserve. How do these others arrive at that? First: through their prudence and fear and caution: whether in that they expect something similar from us in return (protection of their rights); or in that they consider that a struggle with us would be perilous or to no purpose; or in that they see in any diminution of our force a disadvantage to themselves, since we would then be unsuited to forming an alliance with them in opposition to a hostile third power. Then : by donation and cession. 45 The point of Nietzsche's critical genealogy is to show that the perilous conditions that created the security imperative--and the western metaphysics that perpetuate it--have diminished if not disappeared; yet, the fear of life persists: "Our century denies this perilousness, and does so with a good conscience: and yet it continues to drag along with it the old habits of Christian security, Christian enjoyment, recreation and evaluation." 46 Nietzsche's worry is that the collective reaction against older, more primal fears has created an even worse danger: the tyranny of the herd, the lowering of man, the apathy of the last man which controls through conformity and rules through passivity. The security of the sovereign, rational self and state comes at the cost of ambiguity, uncertainty, paradox--all that makes a free life worthwhile. Nietzsche's lament for this lost life is captured at the end of Daybreak in a series of rhetorical questions: Of future virtues--How comes it that the more comprehensible the world has grown the more solemnities of every kind have decreased? Is it that fear was so much the basic element of that reverence which overcame us in the presence of everything unknown and mysterious and taught us to fall down before the incomprehensible and plead for mercy? And has the world not lost some of its charm for us because we have grown less fearful? With the diminution of our fearfulness has our own dignity and solemnity, our own fearsomeness , not also diminished? 47 It is of course in Nietzsche's lament, in his deepest pessimism for the last man, that one finds the celebration of the overman as both symptom and harbinger of a more free-spirited yet fearsome age. Dismissive of utopian engineering, Nietzsche never suggests how he would restructure society; he looks forward only so far as to sight the emergence of "new philosophers" (such as himself?) who would restore a reverence for fear and reevaluate the security imperative. Nietzsche does, however, go back to a pre-Christian, pre-Socratic era to find the exemplars for a new kind of security. In The Genealogy of Morals , he holds up Pericles as an example, for lauding the Athenians for their "rhathymia "--a term that incorporates the notion of "indifference to and contempt for security." 48 It is perhaps too much to expect Nietzsche's message to resonate in late modern times, to expect, at the very time when conditions seem most uncertain and unpredictable, that people would treat fear as a stimulus for improvement rather than cause for retrenchment. Yet Nietzsche would clearly see these as opportune times, when fear could be willfully asserted as a force for the affirmation of difference, rather than canalized into a cautious identity constructed from the calculation of risks and benefits.

#### The Alternative is an affirmation of chance—life is should be seen under a Dionysian paradigm

Deleuze 83 [Giles Deleuze, Prof of Philosophy @ U of Lyon, Paris, and Lycees, “Nietzsche and Philosophy,” p. 25-27]

The game has two moments which are those of a dicethrow — the dice that is thrown and the dice that falls back. Nietzsche presents the dicethrow as taking place on two distinct tables, the earth and the sky. The earth where the dice are thrown and the sky where the dice fall back: "if ever I have played dice with the gods at their table, the earth, so that the earth trembled and broke open and streams of fire snorted forth; for the earth is a table of the gods, and trembling with creative new words and the dice throws of the gods" (Z III "The Seven Seals" 3 p. 245). "0 sky above me, you pure and lofty sky! This is now your purity to me, that there is no eternal reason-spider and spider's web in you; that you are to me a dance floor for divine chances, that you are to me a god's table for divine dice and dicers" (Z III "Before Sunrise" p. 186). But these two tables are not two worlds. They are the two hours of a single world, the two moments of a single world, midnight and midday, the hour when the dice are thrown, the hour when the dice fall back. Nietzsche insists on the two tables of life which are also the two moments of the player or the artist; "We temporarily abandon life, in order to then temporarily fix our gaze upon it." The dicethrow affirms becoming and it affirms the being of becoming.¶ It is not a matter of several dicethrows which, because of their number, finally reproduce the same combination. On the contrary, it is a matter of a single dicethrow which, due to the number of the combination produced, comes to reproduce itself as such. It is not that a large number of throws produce the repetition of a combination but rather the number of the combination which produces the repetition¶ of the dicethrow. The dice which are thrown once are the affirmation of chance, the combination which they form on falling is the affirma-tion of necessity. Necessity is affirmed of chance in exactly the sense that being is affirmed of becoming and unity is affirmed of multip-licity. It will be replied, in vain, that thrown to chance, the dice do not necessarily produce the winning combination, the double six which brings back the dicethrow. This is true, but only insofar as the player did not know how to affirm chance from the outset. For, just as unity does not suppress or deny multiplicity, necessity does not suppress or abolish chance. Nietzsche identifies chance with multiplicity, with fragments, with parts, with chaos: the chaos of the dice that are shaken and then thrown. Nietzsche turns chance into an affirmation. The sky itself is called "chance-sky", "innocence-sky" (Z III "Before¶ Sunrise"); the reign of Zarathustra is called "great chance" (Z IV "The Honey Offering" and III "Of Old and New Law Tables"; Zarathustra calls himself the "redeemer of chance"). "By chance, he is the world's oldest nobility, which I have given back to all things; I have released them from their servitude under purpose . . . I have found this happy certainty in all things: that they prefer to dance on the feet of chance" (Z III "Before Sunrise" p. 186); "My doctrine is `Let chance come to me: it is as innocent as a little child!' " (Z III "On the Mount of Olives" p. 194). What Nietzsche calls necessity (destiny) is thus never the abolition but rather the combination of chance itself. Necessity is affirmed of chance in as much as chance itself affirmed. For there is only a single combination of chance as such, a single way of combining all the parts of chance, a way which is like the unity of multiplicity, that is to say number or necessity. There are many numbers with increasing or decreasing probabilities, but only one number of chance as such, one fatal number which reunites all the fragments of chance, like midday gathers together the scattered parts of midnight. This is why it is sufficient for the player to affirm chance once in order to produce the number which brings back the dice- throw ."¶ To know how to affirm chance is to know how to play. But we do not know how to play, "Timid, ashamed, awkward, like a tiger whose leap has failed. But what of that you dicethrowers! You have not learned to play and mock as a man ought to play and mock!" (Z IV "Of the Higher Man" 14 p. 303). The bad player counts on several throws of the dice, on a great number of throws. In this way he makes¶ use of causality and probability to produce a combination that he sees as desirable. He posits this combination itself as an end to be obtained, hidden behind causality. This is what Nietzsche means when he speaks of the eternal spider, of the spider's web of reason, "A kind of spider of imperative and finality hidden behind the great web, the great net of causality — we could say, with Charles the Bold when he opposed Louis XI, "I fight the universal spider" (GM III 9). To abolish chance by holding it in the grip of causality and finality, to count on the repetition of throws rather than affirming chance, to anticipate a result instead of affirming necessity — these are all the operations of a bad player. They have their root in reason, but what is the root of reason? The spirit of revenge, nothing but the spirit of revenge, the spider (Z II "Of the Tarantulas"). Ressentiment in the repetition of throws, bad conscience in the belief in a purpose. But, in this way, all that will ever be obtained are more or less probable relative numbers. That the universe has no purpose, that it has no end to hope for any more than it has causes to be known — this is the certainty necessary to play well (VP III 465). The dicethrow fails because chance has not been affirmed enough in one throw. It has not been affirmed enough in order to produce the fatal number which necessarily reunites all the fragments and brings back the dicethrow. We must therefore attach the greatest importance to the following conclusion: for the couple causality-finality, probability-finality, for the opposition and the synthesis of these terms, for the web of these terms, Nietzsche substitutes the Dionysian correlation of chance- necessity, the Dionysian couple chance-destiny. Not a probability distributed over several throws but all chance at once; not a final, desired, willed combination, but the fatal combination, fatal and loved, amor fati; not the return of a combination by the number of throws, but the repetition of a dicethrow by the nature of the fatally obtained number. 23

### 3

**The plan would uniquely decimate Obama and the military’s ability to calm alliances and deter enemies ---- makes terrorism and global nuclear war more likely**

**WAXMAN 2013** - law professor at Columbia Law School, co-chairs the Roger Hertog Program on Law and National Security (Matthew Waxman, “The Constitutional Power to Threaten War,” August 27, 2013, http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2316777)

As a prescriptive matter, Part II also shows that examination of threatened force and the credibility requirements for its effectiveness calls into question many orthodoxies of the policy advantages and risks attendant to various allocations of legal war powers, including the existing one and proposed reforms.23 Most functional arguments about war powers focus on fighting wars or hostile engagements, but that is not all – or even predominantly – what the United States does with its military power. Much of the time it seeks to avert such clashes while achieving its foreign policy objectives: to bargain, coerce, deter.24 The President’s flexibility to use force in turn affects decision-making about threatening it, with major implications for securing peace or dragging the United States into conflicts. Moreover, constitutional war power allocations affect potential conflicts not only because they **may constrain U.S. actions** but because **they** maysend **signal**s **and shape** other states’ (including adversaries’) expectations of U.S. actions.25 That is, most analysis of war-powers law is inward-looking, focused on audiences internal to the U.S. government and polity, but thinking about threatened force prompts us to look outward, at how war-powers law affects external perceptions among adversaries and allies. Here, extant political science and strategic studies offer few clear conclusions, but they point the way toward more sophisticated and realistic policy assessment of legal doctrine and proposed reform. More generally, as explained in Part III, analysis of threatened force and war powers exposes an under-appreciated relationship between constitutional doctrine and grand strategy. Instead of proposing a functionally optimal allocation of legal powers, as legal scholars are often tempted to do, this Article in the end denies the tenability of any such claim. Having identified new spaces of war and peace powers that legal scholars need to take account of in understanding how those powers are really exercised, this Article also highlights the extent to which any normative account of the proper distribution of authority over this area depends on many matters that cannot be predicted in advance or expected to remain constant.26 Instead of proposing a policy-optimal solution, this Article concludes that the allocation of constitutional war powers is – and should be –geopolitically and strategically contingent; the actual and effective balance between presidential and congressional powers over war and peace in practice necessarily depends on fundamental assumptions and shifting policy choices about how best to secure U.S. interests against potential threats.27 I. Constitutional War Powers and Threats of Force Decisions to go to war or to send military forces into hostilities are immensely consequential, so it is no surprise that debates about constitutional war powers occupy so much space. But one of the most common and important ways that the United States uses its military power is by threatening war or force – and the constitutional dimensions of that activity receive almost no scrutiny or even theoretical investigation. A. War Powers Doctrine and Debates The Constitution grants Congress the powers to create military forces and to “declare war,”28 which the Supreme Court early on made clear includes the power to authorize limited uses of force short of full-blown war.29 The Constitution then vests the President with executive power and designates him commander in chief of the armed forces,30 and it has been well-accepted since the Founding that these powers include unilateral authority to repel invasions if the United States is attacked.31 Although there is nearly universal acceptance of these basic starting points, there is little legal agreement about how the Constitution allocates responsibility for the vast bulk of cases in which the United States has actually resorted to force. The United States has declared war or been invaded only a handful of times in its history, but it has used force – sometimes large-scale force – hundreds of other times.32 Views split over questions like when, if ever, the President may use force to deal with aggression against third parties and how much unilateral discretion the President has to use limited force short of full-blown war. For many lawyers and legal scholars, at least one important methodological tool for resolving such questions is to look at historical practice, and especially the extent to which the political branches acquiesced in common practices.33 Interpretation of that historical practice for constitutional purposes again divides legal scholars, but most would agree at least descriptively on some basic parts of that history. In particular, most scholars assess that from the Founding era through World War II, Presidents and Congresses alike recognized through their behavior and statements that except in certain narrow types of contingencies, congressional authorization was required for large-scale military operations against other states and international actors, even as many Presidents pushed and sometimes crossed those boundaries.34 Whatever constitutional constraints on presidential use of force existed prior to World War II, however, most scholars also note that the President asserted much more extensive unilateral powers to use force during and after the Cold War, and many trace the turning point to the 1950 Korean War.35 Congress did not declare war in that instance, nor did it expressly authorize U.S. participation.36 From that point forward, presidents have asserted broad unilateral authority to use force to address threats to U.S. interests, including threats to U.S. allies, and that neither Congress nor courts pushed back much against this expanding power.37 Concerns about expansive presidential war-making authority spiked during the Vietnam War. In the wind-down of that conflict, Congress passed – over President Nixon’s veto – the War Powers Resolution,38 which stated its purpose as to ensure the constitutional Founders’ original vision that the “collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.”39 Since then, presidentialists have argued that the President still retains expansive authority to use force abroad to protect American interests,40 and congressionalists argue that this authority is tightly circumscribed.41 These constitutional debates have continued through the first decade of the 21st century. Constitutional scholars split, for example, over President Obama’s power to participate in coalition operations against Libya without congressional authorization in 2011, especially after the War Powers Resolution’s 60-day clock expired.42 Some argue that President Obama’s use of military force without specific congressional authorization in that case **reflects the broad constitutional discretion presidents** now **have** to protect American interests, at least short of full-blown “war”, while others argue that it is the latest in a long record of presidential violations of the Constitution and the War Powers Resolution.43 B. Threats of Force and Constitutional Powers These days it is usually taken for granted that – whether or not he can make war unilaterally – the President is constitutionally empowered to threaten the use of force, implicitly or explicitly, through diplomatic means or shows of force. It is never seriously contested whether the President may declare that United States is contemplating military options in response to a crisis, or whether the President may move substantial U.S. military forces to a crisis region or engage in military exercises there. To take the Libya example just mentioned, is there any constitutional limitation on the President’s authority to move U.S. military forces to the Mediterranean region and prepare them very visibly to strike?44 Or his authority to issue an ultimatum to Libyan leaders that they cease their brutal conduct or else face military action? Would it matter whether such threats were explicit versus implicit, whether they were open and public versus secret, or whether they were just a bluff? If not a constitutional obstacle, could it be argued that the War Powers Resolution’s reporting requirements and limits on operations were triggered by a President’s mere ultimatum or threatening military demonstration, insofar as those moves might constitute a “situation where imminent involvement in hostilities is clearly indicated by the circumstances”? These questions simply are not asked (at least not anymore).45 If anything, most lawyers would probably conclude that the President’s constitutional powers to threaten war **are not just expansive but largely beyond Congress’s authority** to regulate directly. From a constitutional standpoint, to the extent it is considered at all, the President’s power to threaten force is probably regarded to be at least as broad as his power to use it. One way to look at it is that the power to threaten force is a lesser included element of presidential war powers; the power to threaten to use force is simply a secondary question, the answer to which is bounded by the primary issue of the scope of presidential power to actually use it. If one interprets the President’s defensive war powers very broadly, to include dealing with aggression not only directed against U.S. territories but also against third parties,46 then it might seem easy to conclude that the President can also therefore take steps that stop short of actual armed intervention to deter or prevent such aggression. If, however, one interprets the President’s powers narrowly, for example, to include only limited unilateral authority to repel attacks against U.S. territory,47 then one might expect objections to arguably excessive presidential power to include his unilateral threats of armed intervention. Another way of looking at it is that in many cases, threats of war or force might fall within even quite narrow interpretations of the President’s inherent foreign relations powers to conduct diplomacy or his express commander in chief power to control U.S. military forces – or some combination of the two – depending on how a particular threat is communicated. A President’s verbal warning, ultimatum, or declared intention to use military force, for instance, could be seen as merely exercising his role as the “sole organ” of U.S. foreign diplomacy, conveying externally information about U.S. capabilities and intentions.48 A president’s movement of U.S. troops or warships to a crisis region or elevation of their alert level could be seen as merely exercising his dayto- day tactical control over forces under his command.49 Generally it is not seriously contested whether the exercise of these powers alone could so affect the likelihood of hostilities or war as to intrude on Congress’s powers over war and peace.50 We know from historical examples that such unilateral military moves, even those that are ostensibly pure defensive ones, can provoke wars – take, for example, President Polk’s movement of U.S. forces to the contested border with Mexico in 1846, and the resulting skirmishes that led Congress to declare war.51 Coming at the issue from Congress’s Article I powers rather than the President’s Article II powers, the very phrasing of the power “To declare War” puts most naturally all the emphasis on the present tense of U.S. military action, rather than its potentiality. Even as congressionalists advance interpretations of the clause to include not merely declarative authority but primary decision-making authority as to whether or not to wage war or use force abroad, their modern-day interpretations do not include a power to threaten war (except perhaps through the specific act of declaring it). None seriously argues – at least not any more – that the Declare War Clause precludes presidential threats of war. This was not always the case. During the early period of the Republic, there was a powerful view that beyond outright initiation of armed hostilities or declaration of war, more broadly the President also could not unilaterally take actions (putting aside actual military attacks) that would likely or directly risk war,52 provoke a war with another state,53 or change the condition of affairs or relations with another state along the continuum from peace to war.54 To do so, it was often argued, would usurp Congress’s prerogative to control the nation’s state of peace or war.55 During the Quasi-War with France at the end of the 18th century, for example, some members of Congress questioned whether the President, absent congressional authorization, could take actions that visibly signaled an intention to retaliate against French maritime harassment,56 and even some members of President Adams’ cabinet shared doubts.57 Some questions over the President’s power to threaten force arose (eventually) in relation to the Monroe Doctrine, announced in an 1823 presidential address to Congress and which in effect declared to European powers that the United States would oppose any efforts to colonize or reassert control in the Western Hemisphere.58 “Virtually no one questioned [Monroe’s proclamation] at the time. Yet it posed a constitutional difficulty of the first importance.”59 Of course, Monroe did not actually initiate any military hostilities, but his implied threat – without congressional action – risked provoking rather than deterring European aggression and by putting U.S. prestige and credibility on the line it limited Congress’s practical freedom of action if European powers chose to intervene.60 The United States would have had at the time to rely on British naval power to make good on that tacit threat, though a more assertive role for the President in wielding the potential for war or intervention during this period went hand in hand with a more sustained projection of U.S. power beyond its borders, especially in dealing with dangers emanating from Spanish-held Florida territory.61 Monroe’s successor, John Quincy Adams, faced complaints from opposition members of Congress that Monroe’s proclamation had exceeded his constitutional authority and had usurped Congress’s by committing the United States – even in a non-binding way – to resisting European meddling in the hemisphere.62 The question whether the President could unilaterally send militarily-threatening signals was in some respects a mirror image of the issues raised soon after the Constitution was ratified during the 1793 Neutrality Controversy: could President Washington unilaterally declare the United States to be neutral as to the war among European powers. Washington’s politically controversial proclamation declaring the nation “friendly and impartial” in the conflict between France and Great Britain (along with other European states) famously prompted a back-and-forth contest of public letters by Alexander Hamilton and James Madison, writing pseudonymously as “Pacificus” and “Helvidius”, about whether the President had such unilateral power or whether it belonged to Congress.63 Legal historian David Currie points out the irony that the neutrality proclamation was met with stronger and more immediate constitutional scrutiny and criticism than was Monroe’s threat. After all, Washington’s action accorded with the principle that only Congress, representing popular will, should be able to take the country from the baseline state of peace to war, whereas Monroe’s action seemed (at least superficially) to commit it to a war that Congress had not approved.64 Curiously (though for reasons offered below, perhaps not surprisingly) this issue – whether there are constitutional limits on the President’s power to threaten war – has almost vanished completely from legal discussion, and that evaporation occurred even before the dramatic post-war expansion in asserted presidential power to make war. Just prior to World War II, political scientist and presidential powers theorist Edward Corwin remarked that “[o]f course, it may be argued, and has in fact been argued many times, that the President is under constitutional obligation not to incur the risk of war in the prosecution of a diplomatic policy without first consulting Congress and getting its consent.”65 “Nevertheless,” he continued,66 “the supposed principle is clearly a maxim of policy rather than a generalization from consistent practice.” In his 1945 study World Policing and the Constitution, James Grafton Rogers noted: [E]xamples of demonstrations on land and sea made for a variety of purposes and under Presidents of varied temper and in different political climates will suffice to make the point. The Commander-in-Chief under the Constitution can display our military resources and threaten their use whenever he thinks best. The weakness in the **diplomatic weapon** is the possibility of **dissidence at home** which may cast doubt on our serious intent. The danger of the weapon is war.67 At least since then, however, the importance to U.S. foreign policy of threatened force has increased dramatically, while legal questions about it have receded further from discussion. In recent decades a few prominent legal scholars have addressed the President’s power to threaten force, though in only brief terms.

Taylor Reveley noted in his volume on war powers the importance of allocating constitutional responsibility not only for the actual use of force but also “[v]erbal or written threats or assurances about the circumstances in which the United States will take military action …, whether delivered by declarations of American policy, through formal agreements with foreign entities, by the demeanor or words of American officials, or by some other sign of national intent.”68 Beyond recognizing the critical importance of threats and other non-military actions in affecting war and peace, however, Reveley made little effort to address the issue in any detail. Among the few legal scholars attempting to define the limiting doctrinal contours of presidentially threatened force, Louis Henkin wrote in his monumental Foreign Affairs and the Constitution that: Unfortunately, the line between war and lesser uses of force is often elusive, sometimes illusory, and the use of force for foreign policy purposes can almost imperceptibly become a national commitment to war. Even when he does not use military force, the President can incite other nations or otherwise plunge or stumble this country into war, or force the hand of Congress to declare or to acquiesce and cooperate in war. As a matter of constitutional doctrine, however, one can declare with confidence that a President begins to exceed his authority if he willfully or recklessly moves the nation towards war…69 The implication seems to be that the President may not unilaterally threaten force in ways that are dramatically escalatory and could likely lead to war, or perhaps that the President may not unilaterally threaten the use of force that he does not have the authority to initiate unilaterally.70 Jefferson Powell, who generally takes a more expansive view than Henkin of the President’s war powers, argues by contrast that “[t]he ability to warn of, or threaten, the use of military force is an ordinary and essential element in the toolbox of that branch of government empowered to formulate and implement foreign policy.”71 For Powell, the President is constantly taking actions as part of everyday international relations that carry a risk of military escalation, and these are well-accepted as part of the President’s broader authority to manage, if not set, foreign policy. Such brief mentions are in recent times among the rare exceptions to otherwise barren constitutional discussion of presidential powers to threaten force. That the President’s authority to threaten force is so well-accepted these days as to seem self-evident is not just an academic phenomenon. It is also reflected in the legal debates among and inside all three branches of government. In 1989, Michael Reisman observed: Military maneuvers designed to convey commitment to allies or contingent threats to adversaries … **are matters of presidential competence**. Congress does not appear to view as within its bailiwick many low-profile contemporaneous expressions of gunboat diplomacy, i.e., the physical interposition of some U.S. war-making capacity as communication to an adversary of United States’ intentions and capacities to oppose it.72 This was and remains a correct description but understates the pattern of practice, insofar as even major and high-profile expressions of coercive diplomacy are regarded among all three branches of government as within presidential competence. In Dellums v. Bush – perhaps the most assertive judicial scrutiny of presidential power to use large-scale force abroad since the end of the Cold War – the district court dismissed on ripeness grounds congressmembers’ suit challenging President George H. W. Bush’s intended military operations against Iraq in 1991 and seeking to prevent him from initiating an offensive attack against Iraq without first securing explicit congressional authorization for such action.73 That at the time of the suit the President had openly threatened war – through ultimatums and deployment of several hundred thousand U.S. troops – but had not yet “committed to a definitive course of action” to carry out the threat meant there was no justiciable legal issue, held the court.74 The President’s threat of war did not seem to give the district court legal pause at all; quite the contrary, the mere threat of war was treated by the court as a non-issue entirely.75 There are several reasons why constitutional questions about threatened force have dropped out of legal discussions. First, the more politically salient debate about the President’s unilateral power to use force has probably swallowed up this seemingly secondary issue. As explained below, it is a mistake to view threats as secondary in importance to uses of force, but they do not command the same political attention and their impacts are harder to measure.76 Second, the expansion of American power after World War II, combined with the growth of peacetime military forces and a set of defense alliance commitments (developments that are elaborated below) make at least some threat of force much more common – in the case of defensive alliances and some deterrent policies, virtually constant – and difficult to distinguish from other forms of everyday diplomacy and security policy.77 Besides, for political and diplomatic reasons, presidents rarely threaten war or intervention without at least a little deliberate ambiguity. As historian Marc Trachtenberg puts it: “It often makes sense … to muddy the waters a bit and avoid direct threats.”78 Any legal lines one might try to draw (recall early attempts to restrict the President’s unilateral authority to alter the state of affairs along the peacetime-wartime continuum) have become blurrier and blurrier. In sum, if the constitutional power to threaten war ever posed a serious legal controversy, it does so no more. As the following section explains, however, threats of war and armed force have during most of our history become a greater and greater part of American grand strategy, defined here as long-term policies for using the country’s military and non-military power to achieve national goals. The prominent role of threatened force in U.S. strategy has become the focus of political scientists and other students of security strategy, crises, and responses – but constitutional study has not adjusted accordingly.79 C. Threats of Force and U.S. Grand Strategy While the Korean and Vietnam Wars were generating intense study among lawyers and legal scholars about constitutional authority to wage military actions abroad, during that same period many political scientists and strategists – economists, historians, statesmen, and others who studied international conflict – turned their focus to the role of threatened force as an instrument of foreign policy. The United States was building and sustaining a massive war-fighting apparatus, but its security policy was not oriented primarily around waging or winning wars but around deterring them and using the threat of war – including demonstrative military actions – to advance U.S. security interests. It was the potential of U.S. military might, not its direct application or engagement with the enemy, that would do much of the heavy lifting. U.S. military power would be used to deter the Soviet Union and other hostile states from taking aggressive action. It would be unsheathed to prompt them to back down over disputes. It would reassure allies that they could depend on U.S. help in defending themselves. All this required that U.S. willingness to go to war be credible in the eyes of adversaries and allies alike. Much of the early Cold War study of threatened force concerned nuclear strategy, and especially deterrence or escalation of nuclear war. Works by Albert Wohlstetter, Herman Kahn, and others not only studied but shaped the strategy of nuclear threats, as well as how to use limited applications of force or threats of force to pursue strategic interests in remote parts of the globe without sparking massive conflagrations.80 As the strategic analyst Bernard Brodie wrote in 1946, “Thus far the chief purpose of our military establishment has been to win wars. From now on its chief purpose must be to avert them.”81 Toward that end, U.S. government security and defense planners during this time focused heavily on preserving and improving the credibility of U.S. military threats – while the Soviet Union was doing likewise.82 The Truman administration developed a militarized version of containment strategy against the Soviet empire, emphasizing that stronger military capabilities were necessary to prevent the Soviets from seizing the initiative and to resist its aggressive probes: “it is clear,” according to NSC-68, the government document which encapsulated that strategy, “that a substantial and rapid building up of strength in the free world is necessary to support a firm policy intended to check and to roll back the Kremlin's drive for world domination.”83 The Eisenhower administration’s “New Look” policy and doctrine of “massive retaliation” emphasized making Western collective security both more effective and less costly by placing greater reliance on deterrent threats – including threatened escalation to general or nuclear war. As his Secretary of State John Foster Dulles explained, “[t]here is no local defense which alone will contain the mighty landpower of the Communist world. Local defenses must be reinforced by the further deterrent of massive retaliatory power.”84 As described in Evan Thomas’s recent book, Ike’s Bluff, Eisenhower managed to convince Soviet leaders that he was ready to use nuclear weapons to check their advance in Europe and elsewhere. In part due to concerns that threats of massive retaliation might be insufficiently credible in Soviet eyes (especially with respect to U.S. interests perceived as peripheral), the Kennedy administration in 1961 shifted toward a strategy of “flexible response,” which relied on the development of a wider spectrum of military options that could quickly and efficiently deliver varying degrees of force in response to foreign aggression.85 Throughout these periods, the President often resorted to discrete, limited uses of force to demonstrate U.S. willingness to escalate. For example, in 1961 the Kennedy administration (mostly successfully in the short-run) deployed intervention-ready military force immediately off the coast of the Dominican Republic to compel its government's ouster,86 and that same year it used military exercises and shows of force in ending the Berlin crisis;87 in 1964, the Johnson administration unsuccessfully used air strikes on North Vietnamese targets following the Tonkin Gulf incidents, failing to deter what it viewed as further North Vietnamese aggression.88 The point here is not the shifting details of U.S. strategy after World War II – during this era of dramatic expansion in asserted presidential war powers – but the central role of credible threats of war in it, as well as the interrelationship of plans for using force and credible threats to do so. Also during this period, the United States abandoned its long-standing aversion to “entangling alliances,”89 and committed to a network of mutual defense treaties with dependent allies. Besides the global collective security arrangement enshrined in the UN Charter, the United States committed soon after World War II to mutual defense pacts with, for example, groups of states in Western Europe (the North Atlantic Treaty Organization)90 and Asia (the Southeast Asia Treaty Organization,91 as well as a bilateral defense agreement with the Republic of Korea,92 Japan,93 and the Republic of China,94 among others). These alliance commitments were part of a U.S. effort to “extend” deterrence of Communist bloc aggression far beyond its own borders.95 “Extended deterrence” was also critical to reassuring these U.S. allies that their security needs would be met, in some instances to head off their own dangerous rearmament.96 Among the leading academic works on strategy of the 1960s and 70s were those of Thomas Schelling, who developed the theoretical structure of coercion theory, arguing that rational states routinely use the threat of military force – the manipulation of an adversary’s perceptions of future risks and costs with military threats – as a significant component of their diplomacy.97 Schelling distinguished between deterrence (the use of threats to dissuade an adversary from taking undesired action) and compellence (the use of threats to persuade an adversary to behave a certain way), and he distinguished both forms of coercion from brute force: “[B]rute force succeeds when it is used, whereas the power to hurt is most successful when held in reserve. It is the threat of damage to come that can make someone yield of comply. It is latent violence that can influence someone’s choice.”98 Alexander George, David Hall, and William Simons then led the way in taking a more empirical approach, reviewing case studies to draw insights about the success and failure of U.S. coercive threats, analyzing contextual variables and their effects on parties’ reactions to threats during crises. Among their goals was to generate lessons informed by history for successful strategies that combine diplomatic efforts with threats or demonstrations of force, recognizing that the United States was relying heavily on threatened force in addressing security crises. Coercive diplomacy – if successful – offered ways to do so with minimal actual application of military force.99 One of the most influential studies that followed was Force Without War: U.S. Armed Forces as a Political Instrument, a Brookings Institution study led by Barry Blechman and Stephen Kaplan and published in 1977.100 They studied “political uses of force”, defined as actions by U.S. military forces “as part of a deliberate attempt by the national authorities to influence, or to be prepared to influence, specific behavior of individuals in another nation without engaging in a continued contest of violence.”101 Blechman and Kaplan’s work, including their large data set and collected case studies, was important for showing the many ways that threatened force could support U.S. security policy. Besides deterrence and compellence, threats of force were used to assure allies (thereby, for example, avoiding their own drive toward militarization of policies or crises) and to induce third parties to behave certain ways (such as contributing to diplomatic resolution of crises). The record of success in relying on threatened force has been quite mixed, they showed. Blechman and Kaplan’s work, and that of others who built upon it through the end of the Cold War and the period that has followed,102 helped understand the factors that correlated with successful threats or demonstrations of force without resort or escalation to war, especially the importance of credible signals.103 After the Cold War, the United States continued to rely on coercive force – threatened force to deter or compel behavior by other actors – as a central pillar of its grand strategy. During the 1990s, the United States wielded coercive power with varied results against rogue actors in many cases that, without the overlay of superpower enmities, were considered secondary or peripheral, not vital, interests: Iraq, Somalia, Haiti, Bosnia, and elsewhere. For analysts of U.S. national security policy, a major puzzle was reconciling the fact that the United States possessed overwhelming military superiority in raw terms over any rivals with its difficult time during this era in compelling changes in their behavior.104 As Daniel Byman and I wrote about that decade in our study of threats of force and American foreign policy: U.S. conventional and nuclear forces dwarf those of any adversaries, and the U.S. economy remains the largest and most robust in the world. Because of these overwhelming advantages, the United States can threaten any conceivable adversary with little danger of a major defeat or even significant retaliation. Yet coercion remains difficult. Despite the United States’ lopsided edge in raw strength, regional foes persist in defying the threats and ultimatums brought by the United States and its allies. In confrontations with Somali militants, Serb nationalists, and an Iraqi dictator, the U.S. and allied record or coercion has been mixed over recent years…. Despite its mixed record of success, however, coercion will remain a critical element of U.S. foreign policy.105 One important factor that seemed to undermine the effectiveness of U.S. coercive threats during this period was that many adversaries perceived the United States as still afflicted with “Vietnam Syndrome,” unwilling to make good on its military threats and see military operations through.106 Since the turn of the 21st Century, major U.S. security challenges have included non-state terrorist threats, the proliferation of nuclear and other weapons of mass destruction (WMD), and rapidly changing power balances in East Asia, and the United States has accordingly been reorienting but retaining its strategic reliance on threatened force. The Bush Administration’s “preemption doctrine” was premised on the idea that some dangerous actors – including terrorist organizations and some states seeking WMD arsenals – are undeterrable, so the United States might have to strike them first rather than waiting to be struck.107 On one hand, this was a move away from reliance on threatened force: “[t]he inability to deter a potential attacker, the immediacy of today’s threats, and the magnitude of potential harm that could be caused by our adversaries’ choice of weapons, do not permit” a reactive posture.108 Yet the very enunciation of such a policy – that “[t]o forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively”109 – was intended to persuade those adversaries to alter their policies that the United States regarded as destabilizing and threatening. Although the Obama administration pulled back from this rhetoric and placed greater emphasis on international institutions, it has continued to rely on threatened force as a key pillar of its strategy with regard to deterring threats (such as aggressive Iranian moves), intervening in humanitarian crises (as in Libya), and reassuring allies.110 With regard to East Asia, for example, the credible threat of U.S. military force is a significant element of U.S. strategy for deterring Chinese and North Korean aggression as well as reassuring other Asian powers of U.S. protection, to avert a destabilizing arms race.111 D. The Disconnect Between Constitutional Discourse and Strategy There is a major disconnect between the decades of work by strategists and many political scientists on American security policy and practice since the Second World War and legal analysis and scholarship of constitutional war powers during that period. Lawyers and strategists have been relying on not only distinct languages but distinct logics of military force – in short, when it comes to using U.S. military power, lawyers think in terms of “going to war” while strategists focus on potential war and processes leading to it. These framings manifest in differing theoretical starting points for considering how exercises of U.S. military might affect war and peace, and they skew the empirical insights and normative prescriptions about Presidential power often drawn from their analyses. 1. Lawyers’ Misframing Lawyers’ focus on actual uses of force – especially engagements with enemy military forces – as constitutionally salient, rather than including threats of force in their understanding of modern presidential powers tilts analysis toward a one-dimensional strategic logic, rather than a more complex and multi-dimensional and dynamic logic in which the credible will to use force is as important as the capacity to do so. As discussed above, early American constitutional thinkers and practitioners generally wanted to slow down with institutional checks decisions to go to war, because they thought that would make war less likely. “To invoke a more contemporary image,” wrote John Hart Ely of their vision, “it takes more than one key to launch a missile: It should take quite a number to start a war.”112 They also viewed the exercise of military power as generally a ratchet of hostilities, whereby as the intensity of authorized or deployed force increased, so generally did the state of hostilities between the United States and other parties move along a continuum from peace to war.113 Echoes of this logic still reverberate in modern congressionalist legal scholarship: the more flexibly the President can use military force, the more likely it is that the United States will find itself in wars; better, therefore, to clog decisions to make war with legislative checks.114 Modern presidentialist legal scholars usually respond that rapid action is a virtue, not a vice, in exercising military force.115 Especially as a superpower with global interests and facing global threats, presidential discretion to take rapid military **action** – endowed with what Alexander Hamilton called “[**d]ecision, activity, secrecy, and dispatch**”116 – **best protects American interests**. In either case the emphasis tends overwhelmingly to be placed on actual military engagements with adversaries. Strategists and many political scientists, by contrast, view some of the most significant use of military power as starting well before armed forces clash – and including important cases in which they never actually do. Coercive diplomacy and strategies of threatened force, they recognize, often involve a set of moves and countermoves by opposing sides and third parties before or even without the violent engagement of opposing forces. It is often the parties’ perceptions of anticipated actions and costs, not the actual carrying through of violence, that have the greatest impact on the course of events and resolution or escalation of crises. Instead of a ratchet of escalating hostilities, the flexing of military muscle can increase as well as decrease actual hostilities, inflame as well as stabilize relations with rivals or enemies. Moreover, those effects are determined not just by U.S. moves but by the responses of other parties to them – or even to anticipated U.S. moves and countermoves.117 Indeed, as Schelling observed, strategies of brinkmanship sometimes operate by “the deliberate creation of a recognizable risk of war, a risk that one does not completely control.”118 This insight – that effective strategies of threatened force involve not only great uncertainty about the adversary’s responses but also sometimes involve intentionally creating risk of inadvertent escalation119 – poses a difficult challenge for any effort to cabin legally the President’s power to threaten force in terms of likelihood of war or some due standard of care.120 2. Lawyers’ Selection Problems Methodologically, a lawyerly focus on actual uses of force – a list of which would then commonly be used to consider which ones were or were not authorized by Congress – vastly undercounts the instances in which presidents wield U.S. military might. It is already recognized by some legal scholars that studying actual uses of force risks ignoring instances in which President contemplated force but refrained from using it, whether because of political, congressional, or other constraints.121 The point here is a different one: that some of the most significant (and, in many instances, successful) presidential decisions to threaten force do not show up in legal studies of presidential war powers that consider actual deployment or engagement of U.S. military forces as the relevant data set. Moreover, some actual uses of force, whether authorized by Congress or not, were preceded by threats of force; in some cases these threats may have failed on their own to resolve the crisis, and in other cases they may have precipitated escalation. To the extent that lawyers are interested in understanding from historical practice what war powers the political branches thought they had and how well that understanding worked, they are excluding important cases. Consider, as an illustration of this difference in methodological starting point, that for the period of 1946-1975 (during which the exercise of unilateral Presidential war powers had its most rapid expansion), the Congressional Research Service compilation of instances in which the United States has utilized military forces abroad in situations of military conflict or potential conflict to protect U.S. citizens or promote U.S. interests – which is often relied upon by legal scholars studying war powers – lists only about two dozen incidents.122 For the same time period, the Blechman and Kaplan study of political uses of force (usually threats) – which is often relied upon by political scientists studying U.S. security strategy – includes dozens more data-point incidents, because they divide up many military crises into several discrete policy decisions, because many crises were resolved with threat-backed diplomacy, and because many uses of force were preceded by overt or implicit threats of force.123 Among the most significant incidents studied by Blechman and Kaplan but not included in the Congressional Research Service compilation at all are the 1958-59 and 1961 crises over Berlin and the 1973 Middle East War, during which U.S. Presidents signaled threats of superpower war, and in the latter case signaled particularly a willingness to resort to nuclear weapons.124 Because the presidents did not in the end carry out these threats, these cases lack the sort of authoritative legal justifications or reactions that accompany actual uses of force. It is therefore difficult to assess how the executive branch and congress understood the scope of the President’s war powers in these cases, but historical inquiry would probably show the executive branch’s interpretation to be very broad, even to include full-scale war and even where the main U.S. interest at stake was the very credibility of U.S. defense commitments undergirding its grand strategy, not simply the interests specific to divided Germany and the Middle East region.

Of course, one might argue that because the threatened military actions were never carried out in these cases, it is impossible to know if the President would have sought congressional authorization or how Congress would have reacted to the use of force; nonetheless, it is easy to see that in crises like these a threat by the President to use force, having put U.S. credibility on the line in addition to whatever other foreign policy stakes were at issues, would have put Congress in a bind. 3. Lawyers’ Mis-Assessment Empirically, analysis of and insights gleaned from any particular incident – which might then be used to evaluate the functional merits of presidential powers – looks very different if one focuses predominantly on the actual use of force instead of considering also the role of threatened force. Take for example, the Cuban Missile Crisis – perhaps the Cold War’s most dangerous event. To the rare extent that they consider domestic legal issues of this crisis at all, lawyers interested in the constitutionality of President Kennedy’s actions generally ask only whether he was empowered to initiate the naval quarantine of Cuba, because that is the concrete military action Kennedy took that was readily observable and that resulted in actual engagement with Soviet forces or vessels – as it happens, very minimal engagement.125 To strategists who study the crisis, however, the naval quarantine is not in itself the key presidential action; after all, as Kennedy and his advisers realized, a quarantine alone could not remove the missiles that were already in Cuba. The most consequential presidential actions were threats of military or even nuclear escalation, signaled through various means including putting U.S. strategic bombers on highest alert.126 The quarantine itself was significant not for its direct military effects but because of its communicative impact in showing U.S. resolve. If one is focused, as lawyers often are, on presidential military action that actually engaged the enemy in combat or nearly did, it is easy to dismiss this case as not very constitutionally significant. If one focuses on it, as strategists and political scientists often do, on nuclear brinkmanship, it is arguably the most significant historical exercise of unilateral presidential powers to affect war and peace.127 Considering again the 1991 Gulf War, most legal scholars would dismiss this instance as constitutionally a pretty uninteresting military conflict: the President claimed unilateral authority to use force, but he eventually sought and obtained congressional authorization for what was ultimately – at least in the short-run – a quite successful war. For the most part this case is therefore neither celebrated nor decried much by either side of legal war powers debates,128 though some congressionalist scholars highlight the correlation of congressional authorization for this war and a successful outcome.129 Political scientists look at the case differently, though. They often study this event not as a successful war but as failed coercive diplomacy, in that the United States first threatened war through a set of dramatically escalating steps that ultimately failed to persuade Saddam Hussein to withdraw from Kuwait.130 Some political scientists even see U.S. legal debate about military actions as an important part of this story, assessing that adversaries pay attention to congressional arguments and moves in evaluating U.S. resolve (an issue taken up in greater detail below) and that congressional opposition to Bush’s initial unilateralism in this case undermined the credibility of U.S. threats.131 Whether one sees the Gulf War as a case of (successful) war, as lawyers usually do, or (unsuccessful) threatened war, as political scientists usually do, colors how one evaluates the outcome and the credit one might attach to some factors such as vocal congressional opposition to initially-unilateral presidential moves. Notice also that legal analysis of Presidential authority to use force is sometimes thought to turn partly on the U.S. security interests at stake, as though those interests are purely contextual and exogenous to U.S. decision-making and grand strategy. In justifying President Obama’s 2011 use of force against the Libyan government, for example, the Justice Department’s Office of Legal Counsel concluded that the President had such legal authority “because he could reasonably determine that such use of force was in the national interest,” and it then went on to detail the U.S. security and foreign policy interests.132 The interests at stake in crises like these, however, are altered dramatically if the President threatens force: doing so puts the credibility of U.S. threats at stake, which is important not only with respect to resolving the crisis at hand but with respect to other potential adversaries watching U.S. actions.133 The President’s power to threaten force means that he may unilaterally alter the costs and benefits of actually using force through his prior actions.134 The U.S. security interests in carrying through on threats are partly endogenous to the strategy embarked upon to address crises (consider, for example, that once President George H.W. Bush placed hundred of thousands of U.S. troops in the Persian Gulf region and issued an ultimatum to Saddam Hussein in 1990, the credibility of U.S. threats and assurances to regional allies were put on the line).135 Moreover, interests at stake in any one crisis cannot simply be disaggregated from broader U.S. grand strategy: if the United States generally relies heavily on threats of force to shape the behavior of other actors, then its demonstrated willingness or unwillingness to carry out a threat and the outcomes of that action affect its credibility in the eyes of other adversaries and allies, too.136 It is remarkable, though in the end not surprising, that the executive branch does not generally cite these credibility interests in justifying its unilateral uses of force. It does cite when relevant the U.S. interest in sustaining the credibility of its formal alliance commitments or U.N. Security Council resolutions, as reasons supporting the President’s constitutional authority to use force.137 The executive branch generally refrains from citing the similar interests in sustaining the credibility of the President’s own threats of force, however, probably in part because doing so would so nakedly expose the degree to which the President’s prior unilateral strategic decisions would tie Congress’s hands on the matter. \* \* \* In sum, lawyers’ focus on actual uses of force – usually in terms of armed clashes with an enemy or the placement of troops into hostile environments – does not account for much vaster ways that President’s wield U.S. military power and it skews the claims legal scholars make about the allocation of war powers between the political branches. A more complete account of constitutional war powers should recognize the significant role of threatened force in American foreign policy. II. Democratic Checks on Threatened Force The previous Parts of this Article showed that, especially since the end of World War II, the United States has relied heavily on strategies of threatened force in wielding its military might – for which credible signals are a necessary element – and that the President is not very constrained legally in any formal sense in threatening war. Drawing on recent political science scholarship, this Part takes some of the major questions often asked by students of constitutional war powers with respect to the actual use of force and reframes them in terms of threatened force. First, as a descriptive matter, in the absence of formal legal checks on the President’s power to threaten war, is the President nevertheless informally but significantly constrained by democratic institutions and processes, and what role does Congress play in that constraint? Second, as a normative matter, what are the strategic merits and drawbacks of this arrangement of democratic institutions and constraints with regard to strategies of threatened force? Third, as a prescriptive matter, although it is not really plausible that Congress or courts would ever erect direct legal barriers to the President’s power to threaten war, how might legal reform proposals to more strongly and formally constrain the President’s power to use force indirectly impact his power to threaten it effectively? For reasons discussed below, I do not consider whether Congress could legislatively restrict directly the President’s power to threaten force or war; in short, I set that issue aside because assuming that were constitutionally permissible, even ardent congressionalists have exhibited no interest in doing so, and instead have focused on legally controlling the actual use of force. Political science insights that bear on these questions emerge from several directions. One is from studies of Congress’ influence on use of force decisions, which usually assume that Congress’s formal legislative powers play only a limited role in this area, and the effects of this influence on presidential decision-making about threatened force. Another is international relations literature on international bargaining138 as well as literature on the theory of democratic peace, the notion that democracies rarely, if ever, go to war with one another.139 In attempting to explain the near-absence of military conflicts between democracies, political scientists have examined how particular features of democratic governments – electoral accountability, the institutionalized mobilization of political opponents, and the diffusion of decision-making authority regarding the use of force among executive and legislative branches – affect decision-making about war.140 These and other studies, in turn, have led some political scientists (especially those with a rational choice theory orientation) to focus on how those features affect the credibility of signals about force that governments send to adversaries in crises.141 My purpose in addressing these questions is to begin painting a more complete and detailed picture of the way war powers operate, or could operate, than one sees when looking only at actual wars and use of force. This is not intended to be a comprehensive account but an effort to synthesize some strands of scholarship from other fields regarding threatened force to inform legal discourse about how war powers function in practice and the strategic implications of reform. The answers to these questions also bear on raging debates among legal scholars on the nature of American executive power and its constraint by law. Initially they seem to support the views of those legal scholars who have long believed that in practice law no longer seriously binds the President with respect to war-making.142 That view has been taken even further recently by Eric Posner and Adrian Vermeule, who argue that “[l]aw does little constraint the modern executive” at all, but also observe that “politics and public opinion” operate effectively to cabin executive powers.143 The arguments offered here, however, do more to support the position of those legal scholars who describe a more complex relationship between law and politics, including that law is constitutive of the processes of political struggle.144 That law helps constitute the processes of political struggles is true of any area of public policy, though, and what is special here is the added importance of foreign audiences – including adversaries and allies, alike – observing and reacting to those politics, too. Democratic Constraints on the Power to the Threaten Force Whereas most lawyers usually begin their analysis of the President’s and Congress’s war powers by focusing on their formal legal authorities, political scientists usually take for granted these days that the President is – in practice – the dominant branch with respect to military crises and that Congress wields its formal legislative powers in this area rarely or in only very limited ways. A major school of thought, however, is that congressional members nevertheless wield significant influence over decisions about force, and that this influence extends to threatened force, so that Presidents generally refrain from threats that would provoke strong congressional opposition. Even without any serious prospect for legislatively blocking the President’s threatened actions, Congress under certain conditions can loom large enough to force Presidents to adjust their policies; even when it cannot, congressional members can oblige the President expend lots of political capital. As Jon Pevehouse and William Howell explain: When members of Congress vocally **oppose a use of force, they undermine the president’s ability to convince** foreign states that he will see a fight through to the end. Sensing hesitation on the part of the United States, **allies may be reluctant to contribute** to a military campaign, **and adversaries are likely to fight harder and longer** when conflict erupts— thereby raising the costs of the military campaign, decreasing the president’s ability to negotiate a satisfactory resolution, and increasing the probability that American lives are lost along the way. Facing a limited band of allies willing to participate in a military venture and an enemy emboldened by domestic critics, presidents may choose to curtail, and even abandon, those military operations that do not involve vital strategic interests. 145 This statement also highlights the important point, alluded to earlier, that force and threatened force are not neatly separable categories. Often limited uses of force are intended as signals of resolve to escalate, and most conflicts involve bargaining in which the threat of future violence – rather than what Schelling calls “brute force”146 – is used to try to extract concessions. The formal participation of political opponents in legislative bodies provides them with a forum for registering dissent to presidential policies of force through such mechanisms floor statements, committee oversight hearings, resolution votes, and funding decisions.147 These official actions prevent the President “from monopolizing the nation’s political discourse” on decisions regarding military actions can thereby make it difficult for the President to depart too far from congressional preferences.148 Members of the political opposition in Congress also have access to resources for gathering policy relevant information from the government that informs their policy preferences. Their active participation in specialized legislative committees similarly gives opponent party members access to fact-finding resources and forums for registering informed dissent from decisions within the committee’s purview.149 As a result, legislative institutions within democracies can enable political opponents to have a more **immediate** and informed **impact** on executive’s decisions regarding force than can opponents among the general public. Moreover, studies suggest that Congress can actively shape media coverage and public support for a president’s foreign policy engagements.150 In short, these findings among political scientists suggest that, even without having to pass legislation or formally approve of actions, Congress often operates as an important check on threatened force by providing the president’s political opponents with a forum for registering dissent from the executive’s decisions regarding force in ways that attach domestic political costs to contemplated military actions or even the threats to use force. Under this logic, Presidents, anticipating dissent, will be more selective in issuing¶ threats in the first place, making only those commitments that would not incite¶ widespread political opposition should the threat be carried through.151 Political¶ opponents within a legislature also have few electoral incentives to collude in an¶ executive’s bluff, and they are capable of expressing opposition to a threatened use of¶ force in ways that could expose the bluff to a threatened adversary.152 This again narrows¶ the President’s range of viable policy options for brandishing military force. Counter-intuitively, given the President’s seemingly unlimited and unchallenged¶ constitutional power to threaten war, it may in some cases be easier for members of¶ Congress to influence presidential decisions to threaten military action than presidential¶ war decisions once U.S. forces are already engaged in hostilities. It is widely believed¶ that once U.S. armed forces are fighting, congress members’ hands are often tied: policy¶ opposition at that stage risks being portrayed as undermining our troops in the field.153¶ Perhaps, it could be argued, the President takes this phenomenon into account and¶ therefore discounts political opposition to threatened force; he can assume that such¶ opposition will dissipate if he carries it through. Even if that is true, before that point¶ occurs, however, members of Congress may have communicated messages domestically¶ and communicated signals abroad that the President will find difficult to counter.154 The bottom line is that a body of recent political science, while confirming the¶ President’s dominant position in setting policy in this area, also reveals that policymaking¶ with respect to threats of force is significantly shaped by domestic politics and¶ that Congress is institutionally positioned to play a powerful role in influencing those¶ politics, even without exercising its formal legislative powers. Given the centrality of¶ threatened force to U.S. foreign policy strategy and security crises, this suggests that the¶ practical war powers situation is not so imbalanced toward the President as many assume. B. Democratic Institutions and the Credibility of Threats A central question among constitutional war powers scholars is whether robust¶ checks – especially congressional ones – on presidential use of force lead to “sound”¶ policy decision-making. Congressionalists typically argue that legislative control over¶ war decisions promotes more thorough deliberation, including more accurate weighing of¶ consequences and gauging of political support of military action.155 Presidentialists¶ usually counter that the executive branch has better information and therefore better¶ ability to discern the dangers of action or inaction, and that quick and decisive military¶ moves are often required to deal with security crises.156 If we are interested in these sorts of functional arguments, then reframing the¶ inquiry to include threatened force prompts critical questions whether such checks also¶ contribute to or detract from effective deterrence and coercive diplomacy and therefore¶ positively or negatively affect the likelihood of achieving aims without resort to war.¶ Here, recent political science provides some reason for optimism, though the scholarship¶ in this area is neither yet well developed nor conclusive. To be sure, “soundness” of policy with respect to force is heavily laden with¶ normative assumptions about war and the appropriate role for the United States in the¶ broader international security system, so it is difficult to assess the merits and¶ disadvantages of constitutional allocations in the abstract. That said, whatever their¶ specific assumptions about appropriate uses of force in mind, constitutional war powers¶ scholars usually evaluate the policy advantages and dangers of decision-making¶ allocations narrowly in terms of the costs and outcomes of actual military engagements¶ with adversaries. The importance of credibility to strategies of threatened force adds important new¶ dimensions to this debate. On the one hand, one might intuitively expect that robust democratic checks would generally be ill-suited for coercive threats and negotiations –¶ that institutional centralization and secrecy of decision-making might better equip nondemocracies¶ to wield threats of force. As Quincy Wright speculated in 1944, autocracies¶ “can use war efficiently and threats of war even more efficiently” than democracies,157¶ especially the American democracy in which vocal public and congressional opposition¶ may undermine threats.158 Moreover, proponents of democratic checks on war powers¶ usually assume that careful deliberation is a virtue in preventing unnecessary wars, but¶ strategists of deterrence and coercion observe that perceived irrationality is sometimes¶ important in conveying threats: “don’t test me, because I might just be crazy enough to¶ do it!”159 On the other hand, some political scientists have recently called into question this¶ view and concluded that the institutionalization of political contestation and some¶ diffusion of decision-making power in democracies of the kind described in the previous¶ section make threats to use force rare but especially credible and effective in resolving¶ international crises without actual resort to armed conflict. In other words, recent¶ arguments in effect turn some old claims about the strategic disabilities of democracies¶ on their heads: whereas it used to be generally thought that democracies were ineffective¶ in wielding threats because they are poor at keeping secrets and their decision-making is¶ constrained by internal political pressures, a current wave of political science accepts this¶ basic description but argues that these democratic features are really strategic virtues.160 Rationalist models of crisis bargaining between states assume that because war is¶ risky and costly, states will be better off if they can resolve their disputes through¶ bargaining rather than by enduring the costs and uncertainties of armed conflict.161¶ Effective bargaining during such disputes – that which resolves the crisis without a resort¶ to force – depends largely on states’ perceptions of their adversary’s capacity to wage an¶ effective military campaign and its willingness to resort to force to obtain a favorable¶ outcome. A state targeted with a threat of force, for example, will be less willing to resist¶ the adversary’s demands if it believes that the adversary intends to wage and is capable of¶ waging an effective military campaign to achieve its ends. In other words, if a state¶ perceives that the threat from the adversary is credible, that state has less incentive to¶ resist such demands if doing so will escalate into armed conflict. The accuracy of such perceptions, however, is often compromised by¶ informational asymmetries that arise from private information about an adversary’s¶ relative military capabilities and resolve that prevents other states from correctly¶ assessing another states’ intentions, as well as by the incentives states have to¶ misrepresent their willingness to fight – that is, to bluff.162 Informational asymmetries¶ increase the potential for misperception and thereby make war more likely; war,¶ consequentially, can be thought of in these cases as a “bargaining failure.”163 Some political scientists have argued in recent decades – contrary to previously common wisdom – that features and constraints of democracies make them better suited than non-democracies to credibly signal their resolve when they threaten force. To bolster their bargaining position, states will seek to generate credible signals of their resolve by taking actions that can enhance the credibility of such threats, such as mobilizing military forces or making “hand-tying” commitments from which leaders cannot back down without suffering considerable political costs domestically.164 These domestic audience costs, according to some political scientists, are especially high for leaders in democratic states, where they may bear these costs at the polls.165 Given the potentially high domestic political and electoral repercussions democratic leaders face from backing down from a public threat, they have considerable incentives to refrain from bluffing. An adversary that understands these political vulnerabilities is thereby more likely to perceive the threats a democratic leader does issue as highly credible, in turn making it more likely that the adversary will yield.166 Other scholars have recently pointed to the special role of legislative bodies in signaling with regard to threatened force. This is especially interesting from the perspective of constitutional powers debates, because it posits a distinct role for Congress – and, again, one that does not necessarily rely on Congress’s ability to pass binding legislation that formally confines the President. Kenneth Schultz, for instance, argues that the open nature of competition within democratic societies ensures that the interplay of opposing parties in legislative bodies over the use of force is observable not just to their domestic publics but to foreign actors; this inherent transparency within democracies – magnified by legislative processes – **provides more information to adversaries** regarding the unity of domestic opponents around a government’s military and foreign policy decisions.167 Political opposition parties can undermine the credibility of some threats by the President to use force if they publicly voice their opposition in committee hearings, public statements, or through other institutional mechanisms. Furthermore, legislative processes – such as debates and hearings – make it difficult to conceal or misrepresent preferences about war and peace. Faced with such institutional constraints, Presidents will incline to be more selective about making such threats and avoid being undermined in that way.168 This restraining effect on the ability of governments to issue threats simultaneously makes those threats that the government issues more credible, if an observer assumes that the President would not be issuing it if he anticipated strong political opposition. Especially when members of the opposition party publicly support an executive’s threat to use force during a crisis, their visible support lends additional credibility to the government’s threat by demonstrating that political conditions domestically favor the use of force should it be necessary.169 In some cases, Congress may communicate greater willingness than the president to use force, for instance through non-binding resolutions.170 Such powerful signals of resolve should in theory make adversaries more likely to back down. The credibility-enhancing effects of legislative constraints on threats are subject to dispute. Some studies question the assumptions underpinning theories of audience costs – specifically the idea that democratic leaders suffer domestic political costs to failing to make good on their threats, and therefore that their threats are especially credible171 – and others question whether the empirical data supports claims that democracies have credibility advantages in making threats.172 Other scholars dispute the likelihood that leaders will really be punished politically for backing down, especially if the threat was not explicit and unambiguous or if they have good policy reasons for doing so.173 Additionally, even if transparency in democratic institutions allows domestic dissent from threats of force to be visible to foreign audiences, it is not clear that adversaries would interpret these mechanisms as political scientists expect in their models of strategic interaction, in light of various common problems of misperception in international relations.174 These disputes are not just between competing theoretical models but also over the links between any of the models and real-world political behavior by states. At this point there remains a dearth of good historical evidence as to how foreign leaders interpret political maneuvers within Congress regarding threatened force. Nevertheless, at the very least, strands of recent political science scholarship cast significant doubt on the intuition that democratic checks are inherently disadvantageous to strategies of threatened force. Quite the contrary, they suggest that legislative checks – or, indeed, even the signaling functions that Congress is institutionally situated to play with respect to foreign audiences interpreting U.S. government moves – can be harnessed in some circumstances to support such strategies. C. Legal Reform and Strategies of Threatened Force Among legal scholars of war powers, the ultimate prescriptive question is whether the President should be constrained more formally and strongly than he currently is by legislative checks, especially a more robust and effective mandatory requirement of congressional authorization to use force. Calls for reform usually take the form of narrowing and better enforcement (by all three branches of government) of purported constitutional requirements for congressional authorization of presidential uses of force or revising and enforcing the War Powers Resolutions or other framework legislation requiring express congressional authorization for such actions.175 As applied to strategies of threatened force, generally **under these proposals the President would lack authority to make good on them** unilaterally (except in whatever narrow circumstances for which he retains his own unilateral authority, such as deterring imminent attacks on the United States). Whereas legal scholars are consumed with the internal effects of war powers law, such as whether and when it constrains U.S. government decision-making, the analysis contained in the previous section shifts attention externally to whether and when U.S. law might influence decision-making by adversaries, allies, and other international actors. In prescriptive terms, if the President’s power to use force is linked to his ability to threaten it effectively, then any consideration of war powers reform on policy outcomes and longterm interests should include the important secondary effects on deterrent and coercive strategies – and how U.S. legal doctrine is perceived and understood abroad.176 Would stronger requirements for congressional authorization to use force reduce a president’s opportunities for bluffing, and if so would this improve U.S. coercive diplomacy by making ensuing threats more credible? Or would it undermine diplomacy by taking some threats off the table as viable policy options? Would stronger formal legislative powers with respect to force have significant marginal effects on the signaling effects of dissent within Congress, beyond those effects already resulting from open political discourse? These are difficult questions, but the analysis and evidence above helps generate some initial hypotheses and avenues for further research and analysis. One might ask at this point why, though, having exposed as a hole in war powers legal discourse the tendency to overlook threatened force, this Article does not take up whether Congress should assert some direct legislative control of threats – perhaps statutorily limiting the President’s authority to make them or establishing procedural conditions like presidential reporting requirements to Congress. This Article puts such a notion aside for several reasons. First, for reasons alluded to briefly above, such limits would be very constitutionally suspect and difficult to enforce.177 Second, even the most ardent war-power congressionalists do not contemplate such direct limits on the President’s power to threaten; they are not a realistic option for reform. Instead, this Article focuses on the more plausible – and much more discussed – possibility of strengthening Congress’s power over the ultimate decision whether to use force, but augments the usual debate over that question with appreciation for the importance of credible threats. A claim previously advanced from a presidentialist perspective is that stronger legislative checks on war powers is harmful to coercive and deterrent strategies, because it establishes easily-visible impediments to the President’s authority to follow through on threats. This was a common policy argument during the War Powers Resolution debates in the early 1970s. Eugene Rostow, an advocate inside and outside the government for executive primacy, remarked during consideration of legislative drafts that any serious restrictions on presidential use of force would mean in practice that “no President could make a credible threat to use force as an instrument of deterrent diplomacy, even to head off explosive confrontations.”178 He continued: In the tense and cautious diplomacy of our present relations with the Soviet Union, as they have developed over the last twenty-five years, the authority of the President to set clear and silent limits in advance is perhaps **the *most* important** of all the powers in our constitutional armory to prevent confrontations that could **carry nuclear implications**. … [I]t is the **diplomatic power the President needs** most under the circumstance of modern life—the power to make a credible threat to use force in order to prevent a confrontation which might escalate.179 In his veto statement on the War Powers Resolution, President Nixon echoed these concerns, arguing that **the law would undermine the credibility of U.S. deterrent** and coercive threats in the eyes of both adversaries and allies – they would know that presidential authority to use force would expire after 60 days, so absent strong congressional support they could assume U.S. withdrawal at that point.180 In short, those who oppose tying the president’s hands with mandatory congressional authorization requirements to use force sometimes argue that doing so incidentally and dangerously ties his hands in threatening it. A critical assumption here is that presidential flexibility, preserved in legal doctrine, enhances the credibility of presidential threats to escalate.

#### Even if Obama doesn’t use it – future administrations could proves risk of flex link

Cora Currier Staff Writer 12-7-2012 Primer: Indefinite Detention And The NDAA http://www.beachwoodreporter.com/politics/about\_indefinition\_detention\_a.php

Congress left that deliberately unspecified last year, essentially punting the issue to the courts. The language in the bill didn’t outright permit or prohibit indefinite detention of U.S. citizens. The act stated that it wouldn’t affect “existing law or authorities relating to the detention of United States citizens, lawful resident aliens of the United States, or any other persons who are captured or arrested in the United States.” But existing laws and authorities don’t actually give a definitive answer. There were cases involving U.S. citizens held by the military under President George W. Bush, but no precedents were established. The Supreme Court ruled only narrowly on the case of Yaser Hamdi, on the basis that he was captured on the battlefield in Afghanistan. (Hamdi was releasedand went to Saudi Arabia in 2004.)In a second case, Jose Padilla was transferred to a civilian court. (For more legal details, see these backgrounders from the blog Lawfare and the Congressional Research Service.) In signing the bill last year, Obama said that his administration “will not authorize the indefinite military detention without trial of American citizens.” Critics were quick to point out that this was a non-binding policy, and that the law left the door open for future administrations to interpret it differently.

### 4

#### The Executive Branch of the United States should prohibit the president’s ability to indefinitely detain persons legally located within the United States.

#### The United States federal government should integrate a system of local neighborhood politicking into their counterterrorism apparatus.

#### Solves – their evidence

Innes 6 – senior lecturer in sociology at the University of Surrey

(Martin, “Policing Uncertainty: Countering Terror through Community Intelligence and Democratic Policing,” The ANNALS of the American Academy of Political and Social Science 2006; 605; 222 DOI: 10.1177/0002716206287118)

I will propose that one possible solution to this uncertainty is to better integrate a system of local neighborhood policing (NP) into the counterterrorism apparatus. Based upon providing local communities with a degree of direct democratic influ- ence over how they are policed, NP officers will be well positioned to build levels of interpersonal trust with members of Muslim and other minority communities upon which the communication of intelligence is often contingent. As such, NP processes, in addition to their everyday functions of policing volume crime and dis- order, can be used for detecting the subtle indicators of suspicion that people may develop about activities connected to terrorism in their communities. To advocate better integrating NP into the counterterrorism effort is not to suggest that such maneuvers will be unproblematic. Rather more pragmatically, such moves may be more effective and ultimately less damaging to democratic traditions than extend- ing covert policing methods and the sorts of reactionary legislative reform propos- als that governments tend to issue in the wake of major terrorist incidents.

#### Self-binding creates accountability—court enforcement and political alienation for rollback

Posner and Vermeule 2010 [Eric A. , Professor of Law at the University of Chicago Law School and Editor of The Journal of Legal Studies; Adrian , Harvard Law Professor, The Executive Unbound: After the Madisonian Republic, Oxford Press, p. 138-139//wyo-sc]

Many of our mechanisms are unproblematic from a legal perspective, as they involve presidential actions that are clearly lawful. But a few raise legal questions; in particular, those that involve self-binding.59 Can a president bind himself to respect particular first-order policies? With qualifications, the answer is "yes, at least to the same extent that a legislature can." Formally, a duly promulgated executive rule or order binds even the executive unless and until it is validly abrogated, thereby establishing a new legal status quo.60 The legal authority to establish a new status quo allows a president to create inertia or political constraints that will affect his own future choices. In a practical sense, presidents, like legislatures, have great de facto power to adopt policies that shape the legal landscape for the future. A president might commit himself to a long-term project of defense procurement or infrastructure or foreign policy, narrowing his own future choices and generating new political coalitions that will act to defend the new rules or policies. More schematically, we may speak of formal and informal means of selfbinding: 1. The president might use formal means to bind himself. This is possible in the sense that an executive order, if otherwise valid, legally binds the president while it is in effect and may be enforced by the courts. It is not possible in the sense that the president can always repeal the executive order if he can bear the political and reputational costs of doing so. 2. The president might use informal means to bind himself. This is not only possible but frequent and important. Issuing an executive rule providing for the appointment of special prosecutors, as Nixon did, is not a formal self-binding.61 However, there may be political costs to repealing the order. This effect does not depend on the courts' willingness to enforce the order, even against Nixon himself. Court enforcement makes the order legally binding while it is in place, but only political and reputational enforcement can protect it from repeal. Just as a dessert addict might announce to his friends that he is going on a no-dessert diet in order to raise the reputational costs of backsliding and thus commit himself, so too the repeal of an executive order may be seen as a breach of faith even if no other institution ever enforces it. In what follows, we will invoke both formal and informal mechanisms. For our purposes, the distinction between the authority to engage in de jure self-binding (legally limited and well-defined) and the power to engage in de facto self-binding (broad and amorphous) is secondary. So long as policies are deliberately chosen with a view to generating credibility, and do so by constraining the president’s own future choices in ways that impose greater costs on ill-motivated presidents than on well-motivated ones, it does not matter whether the constraint is formal or informal.

### Terrorism

#### The plan isn’t key to solve terrorism---Arab populations won’t turn to Al Qaeda, even though they don’t like US policies

Michael **Allen,** Editor of Democracy Digest. Special Assistant to the Vice President, Government & External Relations, NED, 2011, Arab Spring ‘the strongest answer’ to jihadist ideology behind 9/11, 9/9/11, <http://www.demdigest.net/blog/2011/09/arab-spring-the-strongest-answer-to-jihadist-ideology-behind-911/>

Have the non-violent pro-democracy movements of the Arab Spring destroyed the appeal of the violent ideology that motivated the 9/11 attacks? Or **does the West’s failure to win the war of ideas mean that radical Islamism still represent a threat?** “**There is a newfound conviction that protests**, strikes **and civil action are more effective than fighting** and force,” **said** Marwan **Shehadeh, a Jordan-based expert on radical Islamist groups and ideology**. **The Muslim Brotherhood**, which long ago disavowed violence, **has participated in the political process for years** in Jordan and Egypt. But **now**…. **those who identify as jihadis**, **so-called Salafis, are also participating. The result**, he said, **will force a contest of ideas between the moderates and the radicals who** for decades **were able to sell their line of thinking to an audience made receptive by repression** and the failure of the political process to produce change. **The Arab Spring has vindicated the conviction “that** Arab dictatorships were inherently unstable and that **democracy has more appeal to the people of the Middle East than jihadist violence and ideology**,” writes Carl Gershman, President of the National Endowment for Democracy, the Washington-based democracy assistance group. Even more than the killing of Osama bin Laden, **the revolts** in Egypt, Libya, Tunisia, Syria, Yemen, and Bahrain “have not only shaken the very foundation of the regional authoritarian order but **threatened to unravel our narrative about terrorism,”** **writes** Fawaz **Gerges, author of The Far Enemy**: Why Jihad Went Global and Journey of the Jihadist: Inside Muslim Militancy: **As the uprisings gained momentum, Al Qaeda was notably absent**. **The Arab Spring reinforced what many of us have known for a while: Al Qaeda’s core message is in conflict with the universal aspirations of the Arab world. Despite the group’s best efforts, Arabs** and Muslims **do not hate the West**. Rather, **they admire its democratic institutions**, including free elections, peaceful transition of leadership, and separation of powers. The millions of Arabs involved have neither burned American and Western flags nor blamed the West for their predicament. **The region’s pro-democracy surge killed the myth of Arab exceptionalism, according to** the FT’s Gideon **Rachman, but also demonstrated the need for political reform to be home-grown and locally-owned**: **The “Arab spring”** has provided support for the neoconservative notion that the Arab world could not – and should not – be exempt from a global trend towards democracy. But it has also **illustrated that durable change is much more likely to come from within, than via US intervention**. Recent events confirm that **Arab citizens have been moved to protest largely by** socio-economic **grievances and demands that radical Islamists cannot begin to address**: **people want jobs not jihad, democracy not dogma**. “The Arab Spring and the clamor for democracy across the world shows how redundant **al-Qaida has** become – it has **lost all relevance; its vision** of some pan-Islamic Caliphate **is not what people want**,” **according to** Anthony Tucker-**Jones, author of The Rise of Militant Islam**. “Ultimately, **religious dogma is no substitute for social aspiration and economic achievement**.” The region’s pro-democracy movements are “the strongest answer” to the fanaticism that motivated the 9/11 attacks a decade ago, the European Union said today. “Ten years on, the people in the streets of Tunis, Cairo, Benghazi and across the Arab world have sent a strong signal for freedom and democracy,” said EU president Herman Van Rompuy and European Commission president Jose Manuel Barroso in a joint statement. “This is the strongest answer to the fatuous hate and blind fanaticism of the 9/11 crimes. “**The Sept. 11 attacks were in part inspired by a radical ideology** and belief **that the fundamental problems plaguing Arab** and Muslim **people could be resolved by attacking foreign powers, those** propping up dictators, **promoting Western culture**, oppressing Islam **and corrupting civilization,” according to** Michael **Slackman and** Mona **El-Naggar**: The Arab Spring has turned that formula inside out, negating premises fundamental to a world that bore and nurtured Osama bin Laden. **Arab majorities, still harboring resentment toward Western policies, are first looking inward to promote change, blaming their own leaders for decades of political, economic and cultural decline**. **There is a degree of societal introspection taking place**, one that was pointless in totalitarian societies that discouraged, and often punished, civic participation.

#### PRISM destroys legitimacy

Migranyan 7/5 (Andranik is the director of the Institute for Democracy and Cooperation in New York. He is also a professor at the Institute of International Relations in Moscow, a former member of the Public Chamber and a former member of the Russian Presidential Council. “Scandals Harm U.S. Soft Power,” 2013, http://nationalinterest.org/commentary/scandals-harm-us-soft-power-8695)

For the past few months, the United States has been rocked by a series of scandals. It all started with the events in Benghazi, when Al Qaeda-affiliated terrorists attacked the General Consulate there and murdered four diplomats, including the U.S. ambassador to Libya. Then there was the scandal exposed when it was revealed that the Justice Department was monitoring the calls of the Associated Press. The Internal Revenue Service seems to have targeted certain political groups. Finally, there was the vast National Security Agency apparatus for monitoring online activity revealed by Edward Snowden. Together, these events provoke a number of questions about the path taken by contemporary Western societies, and especially the one taken by America.¶ Large and powerful institutions, especially those in the security sphere, have become unaccountable to the public, even to representatives of the people themselves. Have George Orwell’s cautionary tales of total government control over society been realized?¶ At the end of the 1960s and the beginning of the 1970s, my fellow students and I read Orwell’s 1984 and other dystopian stories and believed them to portray fascist Germany or the Soviet Union—two totalitarian regimes—but today it has become increasingly apparent that Orwell, Huxley and other dystopian authors had seen in their own countries (Britain and the United States) certain trends, especially as technological capabilities grew, that would ultimately allow governments to exert total control over their societies. The potential for this type of all-knowing regime is what Edward Snowden revealed, confirming the worst fears that the dystopias are already being realized.¶ On a practical geopolitical level, the spying scandals have seriously tarnished the reputation of the United States. They have circumscribed its ability to exert soft power; the same influence that made the U.S. model very attractive to the rest of the world. This former lustre is now diminished. The blatant everyday intrusions into the private lives of Americans, and violations of individual rights and liberties by runaway, unaccountable U.S. government agencies, have deprived the United States of its authority to dictate how others must live and what others must do. Washington can no longer lecture others when its very foundational institutions and values are being discredited—or at a minimum, when all is not well “in the state of Denmark.”¶ Perhaps precisely because not all is well, many American politicians seem unable to adequately address the current situation. Instead of asking what isn’t working in the government and how to ensure accountability and transparency in their institutions, they try, in their annoyance, to blame the messenger—as they are doing in Snowden’s case. Some Senators hurried to blame Russia and Ecuador for anti-American behavior, and threatened to punish them should they offer asylum to Snowden.¶ These threats could only cause confusion in sober minds, as every sovereign country retains the right to issue or deny asylum to whomever it pleases. In addition, the United States itself has a tradition of always offering political asylum to deserters of the secret services of other countries, especially in the case of the former Soviet Union and other ex-socialist countries. In those situations, the United States never gave any consideration to how those other countries might react—it considered the deserters sources of valuable information. As long as deserters have not had a criminal and murderous past, they can receive political asylum in any country that considers itself sovereign and can stand up to any pressure and blackmail.¶ Meanwhile, the hysteria of some politicians, if the State Department or other institutions of the executive branch join it, can only accelerate the process of Snowden’s asylum. For any country he might ask will only be more willing to demonstrate its own sovereignty and dignity by standing up to a bully that tries to dictate conditions to it. In our particular case, political pressure on Russia and President Putin could turn out to be utterly counterproductive. I believe that Washington has enough levelheaded people to understand that fact, and correctly advise the White House. The administration will need sound advice, as many people in Congress fail to understand the consequences of their calls for punishment of sovereign countries or foreign political leaders that don’t dance to Washington’s tune.¶ Judging by the latest exchange between Moscow and Washington, it appears that the executive branches of both countries will find adequate solutions to the Snowden situation without attacks on each other’s dignity and self-esteem. Russia and the United States are both Security Council members, and much hinges on their decisions, including a slew of common problems that make cooperation necessary.¶ Yet the recent series of scandals has caused irreparable damage to the image and soft power of the United States. I do not know how soon this damage can be repaired. But gone are the days when Orwell was seen as a relic of the Cold War, as the all-powerful Leviathan of the security services has run away from all accountability to state and society. Today the world is looking at America—and its model for governance—with a more critical eye.

#### The worst case scenario happened – no extinction

Dove 12

[Alan Dove, PhD in Microbiology, science journalist and former Adjunct Professor at New York University, “Who’s Afraid of the Big, Bad Bioterrorist?” Jan 24 2012, http://alandove.com/content/2012/01/whos-afraid-of-the-big-bad-bioterrorist/]

The second problem is much more serious. Eliminating the toxins, we’re left with a list of infectious bacteria and viruses. With a single exception, these organisms are probably near-useless as weapons, and history proves it.¶ There have been at least three well-documented military-style deployments of infectious agents from the list, plus one deployment of an agent that’s not on the list. I’m focusing entirely on the modern era, by the way. There are historical reports of armies catapulting plague-ridden corpses over city walls and conquistadors trying to inoculate blankets with Variola (smallpox), but it’s not clear those “attacks” were effective. Those diseases tended to spread like, well, plagues, so there’s no telling whether the targets really caught the diseases from the bodies and blankets, or simply picked them up through casual contact with their enemies.¶Of the four modern biowarfare incidents, two have been fatal. The first was the 1979 Sverdlovsk anthrax incident, which killed an estimated 100 people. In that case, a Soviet-built biological weapons lab accidentally released a large plume of weaponized Bacillus anthracis (anthrax) over a major city. Soviet authorities tried to blame the resulting fatalities on “bad meat,” but in the 1990s Western investigators were finally able to piece together the real story. The second fatal incident also involved anthrax from a government-run lab: the 2001 “Amerithrax” attacks. That time, a rogue employee (or perhaps employees) of the government’s main bioweapons lab sent weaponized, powdered anthrax through the US postal service. Five people died.¶ That gives us a grand total of around 105 deaths, entirely from agents that were grown and weaponized in officially-sanctioned and funded bioweapons research labs. Remember that.¶Terrorist groups have also deployed biological weapons twice, and these cases are very instructive. The first was the 1984 Rajneeshee bioterror attack, in which members of acult in Oregon inoculated restaurant salad bars with Salmonella bacteria (an agent that’s not on the “select” list). 751 people got sick, but nobody died. Public health authorities handled it as a conventional foodborne Salmonella outbreak, identified the sources and contained them. Nobody even would have known it was a deliberate attack if a member of the cult hadn’t come forward afterward with a confession. Lesson: our existing public health infrastructure was entirely adequate

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to respond to a major bioterrorist attack.¶ The second genuine bioterrorist attack took place in 1993. Members of the Aum Shinrikyo cult successfully isolated and grew a large stock of anthrax bacteria, then sprayed it as an aerosol from the roof of a building in downtown Tokyo. The cult was well-financed,and had many highly educated members, so **this** release over the world’s largest city really **represented a worst-case scenario**.¶ **Nobody got sick** or died. From the cult’s perspective, it was a complete and utter failure. Again, the only reason we even found out about it was a post-hoc confession. Aum members later demonstrated their lab skills by producing Sarin nerve gas, with far deadlier results. Lesson: one of the top “select agents” is extremely hard to grow and deploy even for relatively skilled non-state groups. It’s a really crappy bioterrorist weapon.¶ Taken together, these events point to an uncomfortable but inevitable conclusion: our biodefense industry is a far greater threat to us than any actual bioterrorists.

#### No risk of nuclear terrorism---too many obstacles

John J. Mearsheimer 14, R. Wendell Harrison Distinguished Service Professor of Political Science at the University of Chicago, “America Unhinged”, January 2, nationalinterest.org/article/america-unhinged-9639?page=show

Am I overlooking the obvious threat that strikes fear into the hearts of so many Americans, which is terrorism? Not at all. Sure, the United States has a terrorism problem. But it is a minor threat. There is no question we fell victim to a spectacular attack on September 11, but it did not cripple the United States in any meaningful way and another attack of that magnitude is highly unlikely in the foreseeable future. Indeed, there has not been a single instance over the past twelve years of a terrorist organization exploding a primitive bomb on American soil, much less striking a major blow. Terrorism—most of it arising from domestic groups—was a much bigger problem in the United States during the 1970s than it has been since the Twin Towers were toppled.¶ What about the possibility that a terrorist group might obtain a nuclear weapon? Such an occurrence would be a game changer, but the chances of that happening are virtually nil. No nuclear-armed state is going to supply terrorists with a nuclear weapon because it would have no control over how the recipients might use that weapon. Political turmoil in a nuclear-armed state could in theory allow terrorists to grab a loose nuclear weapon, but the United States already has detailed plans to deal with that highly unlikely contingency.¶ Terrorists might also try to acquire fissile material and build their own bomb. But that scenario is extremely unlikely as well: there are significant obstacles to getting enough material and even bigger obstacles to building a bomb and then delivering it. More generally, virtually every country has a profound interest in making sure no terrorist group acquires a nuclear weapon, because they cannot be sure they will not be the target of a nuclear attack, either by the terrorists or another country the terrorists strike. Nuclear terrorism, in short, is not a serious threat. And to the extent that we should worry about it, the main remedy is to encourage and help other states to place nuclear materials in highly secure custody.

**FIRST, Agroterrorist Attack Won’t Happen**

**A. Prevention Measures**

**IWS 05**

[Protecting America from Agroterrorism with Partnerships Across the land,

<http://www.iwar.org.uk/news-archive/2005/05-11-4.html>]

All of which is why the **FBI—working closely with a range of public and private sector partners—is taking concrete steps to prevent agroterrorism**, outlined by Director Mueller last week at the first-ever International Symposium on Agroterrorism in Kansas City, Missouri. **A few specific initiatives** and partnerships he **highlighted**: \* The Agriculture Intelligence Group. **A** high-level **group of government experts who get together regularly to discuss food security and partner their combined skills, technology, and resources**. \* Scientific Working Groups (Swigs), or FBI **scientists working** with their counterparts around the country **on specific issues**. Take, for example, one Swig analyzing animal and plant pathogens down to the DNA level to distinguish between deliberate and naturally occurring pathogens. \* AgriGard. **A secure web portal that lets the agricultural community share information and suspicious activities** with each other and with scientists, state and local law enforcement, and the FBI. \* The conference itself! Sponsored by the Bureau and led by the Heart of America Joint Terrorism Task Force, it brought together under one roof over 400 U.S. and international professionals and experts—from epidemiologists to veterinarians, from academicians to livestock and food security experts.

#### The end of the chesney and wittes article from their allies advantage votes neg—domestic detention is needed to ensure protection from terrorists

Chesney and Wittes, 13 (Robert Chesney, Professor of Law at the University of Texas School of Law and Non-Resident Senior Fellow at the Brookings Institution, and Benjamin Wittes, Senior Fellow at the Brookings Institution, “Protecting U.S. Citizens’ Constitutional Rights During the War on Terror”, 5/22/13<http://www.brookings.edu/research/testimony/2013/05/22-war-on-terror-chesney-wittes)>

What Should Congress Do?¶ In our view, Congress should put this issue to rest at last by clarifying that neither the AUMF nor the NDAA FY’12 should be read to confer detention authority over persons captured in the United States (regardless of citizenship). The benefits of keeping the option open in theory are slim, while the offsetting costs are substantial.¶ We say the benefits are slim chiefly because the executive branch has so little interest in using detention authority domestically. The Bush administration had little appetite for military detention in such cases all along, preferring in almost all instances involving al Qaeda suspects in the United States to stick with the civilian criminal justice system. The experiment of military detention with Padilla and al-Marri did little to encourage a different course, given the legal uncertainty the cases exposed. That uncertainty has, in turn, created an enormous disincentive for any administration—of whatever political stripe—to attempt this sort of detention again. A de facto policy thus developed in favor of using the criminal justice apparatus whenever humanly possible for terrorist suspects apprehended in the United States. And whenever humanly possible turned out to mean always; while military detention may remain potentially available as a theoretical matter, it is not functionally available for the simple reasons that (i) executive branch lawyers are not adequately confident that the Supreme Court would affirm its legality and (ii) in any event, they have a viable and far-more-reliable alternative in the criminal justice apparatus.¶ In September 2010, the Obama administration made this unstated policy official, announcing that it would use the criminal justice system exclusively both for domestic captures and for citizens captured anywhere in the world. In a speech at the Harvard Law School, then-White House official John Brennan stated:¶ it is the firm position of the Obama Administration that suspected terrorists arrested inside the United States will—in keeping with long-standing tradition—be processed through our Article III courts. As they should be. Our military does not patrol our streets or enforce our laws—nor should it.¶ . . .¶ Similarly, when it comes to U.S. citizens involved in terrorist-related activity, whether they are captured overseas or at home, we will prosecute them in our criminal justice system.¶ To put the matter simply, military detention for citizens or for terrorist suspects captured domestically, was tried a handful of times early in the Bush administration; the strategy was abandoned; it has been many years since there was any appetite in the executive branch—under the control of either party—for trying it again; and it has for some time been the stated policy of the executive branch not to attempt it under any circumstances. We do not expect any administration of either party to break blithely with the consensus that has developed absent some dramatically changed circumstance. The litigation risk is simply too great, and the criminal justice system’s performance has been too strong to warrant assuming this risk.¶ But ironically, even as this strong executive norm against military detention of domestic captures and citizens has developed, a fierce commitment to this type of detention has also developed in some quarters. The fact that the norm against detention is not currently written into law has helped fuel this commitment, enabling the persistent perception that there is greater policy latitude than functionally exists. The result is that every time a major terrorist suspect has been taken into custody domestically in recent years—the arrest of Djokhar Tsarnaev is only the most recent example—the country explodes in the exact same unproductive and divisive political debate. To caricature it only slightly, one side argues that the suspect should have been held in military custody, instead of being processed through the criminal justice system; it decries the reading of the suspect his Miranda rights; and it criticizes the administration, more generally, for a supposed return to a pre-9/11 law enforcement paradigm. The other side, meanwhile, defends the civilian justice system, while also demanding the closure of Guantánamo and attacking the performance of military commissions for good measure.¶ This kabuki dance of a debate is not merely a matter of rhetoric. Separate and apart from the U.S. citizen detention language we described above, in the course of producing the 2012 NDAA Congress also explored the option of mandating military detention for suspects (citizen or not) taken into custody within the United States. The administration resisted these efforts, and the resulting language in conference committee ultimately stopped far short of requiring military detention. The administration further softened the effects of that language, moreover, through its subsequent interpretation of the new language. All of which brings us back to our point: there is a big gulf between the real, functional state of play (in which the criminal justice system provides the exclusive means of processing terrorist suspects captured within the United States) and the perception in some quarters that military detention remains a viable option, perhaps even a norm, for domestic and citizen terrorist captures.¶ That gulf has real costs. Most obviously, it generates significant political friction every time a major terrorist arrest happens in the United States. It increases the apparent political polarization of an area that should be above politics—and in which the counterterrorism reality is far less polarized than the inter-branch relations over the issue would suggest. And it reinforces the perception that domestic military detention remains a viable option, needlessly alarming those who fear it and needlessly misleading those who wish to see it. The resulting confusion fuels sharp debate over something that is no longer meaningfully an option in functional terms. That debate even spills over at times into litigation, most notably—and disruptively—in the context of the Hedges case in New York (in which journalists and activists persuaded a district judge to enjoin enforcement of detention authority, despite the utter implausibility of the claim that they might be subjected to it).¶

#### <<KU EVIDENCE ENDS>>

To be clear, closing off the possibility of the executive branch’s trying such detention again in the future is not without potential costs. Consider the Padilla case once more. Contrary to the mythology that has developed about it over the years, the decision to move Padilla into military custody did not result from some ideological commitment on the part of the Bush administration to domestic military detention or to expanding executive power. It was, rather, a least-bad alternative in a circumstance in which options within the criminal justice system appeared to have run out. Recall that the government initially held Padilla in the criminal justice system. As then-Deputy Attorney General James Comey explained in 2004:¶ Padilla was arrested by the FBI in Chicago on a material witness warrant authorized by a federal judge in New York. And he was transferred to Manhattan where I was then the United States attorney.¶ He was appointed a lawyer at public expense. And we set about trying to see if he would tell the grand jury what he knew about al Qaeda.¶ With time running out in that process, on June 9th of 2002, just about two years ago, the president of the United States ordered that Padilla be turned over to the custody of the Department of Defense as an enemy combatant, where he remains.¶ . . .¶ Had we tried to make a case against Jose Padilla through our criminal justice system, something that I, as the United States attorney in New York, could not do at that time without jeopardizing intelligence sources, he would very likely have followed his lawyer's advice and said nothing, which would have been his constitutional right.¶ He would likely have ended up a free man, with our only hope being to try to follow him 24 hours a day, seven days a week, and hope—pray, really—that we didn't lose him.¶ It is certainly possible that we will one day again confront a case in which strong evidence exists that an individual member of an AUMF-covered group poses a huge threat within the United States, but in which the evidence supporting this view is either too sensitive to disclose or inadmissible for any of several reasons. In such a situation, legislation prohibiting the military detention of suspects captured in the United States in theory could precipitate an outcome like the one that Comey feared in 2002. From that perspective, the option of at least attempting to sustain military detention, despite the legal uncertainty we described above, would be attractive.

### Israel

#### Aff doesn’t solve Israeli detention- this is incoherent- no modeling-best social science

Micah Zenko, Douglas Dillon fellow in the Center for Preventive Action at the Council on Foreign Relations, 2-2-2013, “The Signal and the Noise,” www.foreignpolicy.com/articles/2013/02/20/the\_signal\_and\_the\_noise

Later, Gen. Austin observed of cutting forces from the Middle East: "Once you reduce the presence in the region, you could very well signal the wrong things to our adversaries." Sen. Kelly Ayotte echoed his observation, claiming that President Obama's plan to withdraw 34,000 thousand U.S. troops from Afghanistan within one year "leaves us dangerously low on military personnel...it's going to send a clear signal that America's commitment to Afghanistan is going wobbly." Similarly, during a separate House Armed Services Committee hearing, Deputy Secretary of Defense Ashton Carter ominously warned of the possibility of sequestration: "Perhaps most important, the world is watching. Our friends and allies are watching, potential foes -- all over the world." These routine and unchallenged assertions highlight what is perhaps the most widely agreed-upon conventional wisdom in U.S. foreign and national security policymaking: the inherent power of signaling. This psychological capability rests on two core assumptions: All relevant international audiences can or will accurately interpret the signals conveyed, and upon correctly comprehending this signal, these audiences will act as intended by U.S. policymakers. Many policymakers and pundits fundamentally believe that the Pentagon is an omni-directional radar that uniformly transmits signals via presidential declarations, defense spending levels, visits with defense ministers, or troop deployments to receptive antennas. A bit of digging, however, exposes cracks in the premises underlying signaling theories. There is a half-century of social science research demonstrating the cultural and cognitive biases that make communication difficult between two humans. Why would this be any different between two states, or between a state and non-state actor? Unlike foreign policy signaling in the context of disputes or escalating crises -- of which there is an extensive body of research into types and effectiveness -- policymakers' claims about signaling are merely made in a peacetime vacuum. These signals are never articulated with a precision that could be tested or falsified, and thus policymakers cannot be judged misleading or wrong. Paired with the faith in signaling is the assumption that policymakers can read the minds of potential or actual friends and adversaries. During the cycle of congressional hearings this spring, you can rest assured that elected representatives and expert witnesses will claim to know what the Iranian supreme leader thinks, how "the Taliban" perceives White House pronouncements about Afghanistan, or how allies in East Asia will react to sequestration. This self-assuredness is referred to as the illusion of transparency by psychologists, or how "people overestimate others' ability to know them, and...also overestimate their ability to know others." Policymakers also conceive of signaling as a one-way transmission: something that the United States does and others absorb. You rarely read or hear critical thinking from U.S. policymakers about how to interpret the signals from others states. Moreover, since U.S. officials correctly downplay the attention-seeking actions of adversaries -- such as Iran's near-weekly pronouncement of inventing a new drone or missile -- wouldn't it be safer to assume that the majority of U.S. signals are similarly dismissed? During my encounters with foreign officials, few take U.S. government pronouncements seriously, and instead assume they are made to appease domestic audiences.

#### No Israel impact-overhyped—no incentive

Stephen M Wait Professor of IR at Harvard 1-30-2012 Israel's not going to attack Iran – yet http://walt.foreignpolicy.com/posts/2012/01/30/Israel's\_not\_going\_to\_attack\_Iran\_yet

Having written a fair bit about the pros and cons (mostly the latter) of a war with Iran, I feel compelled to offer a brief comment on Ronan Bergman's alarmist article in yesterday's New York Times Magazine. I say this even though I think the article was essentially worthless. It's a vivid and readable piece of reportage, but it doesn't provide readers with new or interesting information and it tells you almost nothing about the likelihood of an Israeli strike on Iran. First off, the article is essentially a reprise of Jeffrey Goldberg's September 2010 Atlantic Monthly article on the same subject. The research method is identical: a reporter interviews a lot of big-shots in the Israeli security establishment, writes down what they say, and concludes that that Israel is very likely to attack. Bergman doesn't present new evidence or arguments, pro or con; it's just an updated version of the same old story. Second, the central flaw in this approach is that there is no way of knowing if the testimony of these various officials reflects their true beliefs or not. There are lots of obvious reasons why Israeli officials might want to exaggerate their willingness to use force against Iran, and this simple fact makes it unwise to take their testimony at face value. Maybe they really mean what they say. Or maybe they just want to keep Tehran off-balance Maybe they want to distract everyone from their continued expansion of West Bank settlements and other brutalities against Palestinians. Maybe they want to encourage Europe to support tougher economic sanctions against Iran, and they know that occasional saber-rattling helps makes sanctions look like an attractive alternative. Maybe it's several of these things at once, depending on who's talking. Who knows? By the way, I'm not accusing the officials that Bergman interviewed of doing anything wrong. I don't expect top officials of any country to tell the truth all the time, and I'm neither surprised nor upset when foreign officials try to manipulate fears of war in order to advance what they see as their interests. My point is that it is impossible to tell if they mean what they are saying or not, which is why an article based on interviews of this kind just isn't very informative. They might be telling the truth, or they might be lying, and nobody knows for sure. Lastly, as Gary Sick notes in an excellent post of his own, the Bergman piece ignores the considerable evidence suggesting that Iran is not in fact trying to build a nuclear weapon. Equally important are Sick's reminder that the IAEA still has lots of inspectors keeping a watchful eye on Iran's nuclear activities, and his observation that Israel cannot attack Iran without warning, because doing so would almost certainly kill a bunch of IAEA inspectors. His conclusion (and mine): until Iran expels the inspectors or Israel warns them that it is time to leave, there isn't going to be a war. And if that is the case, then Bergman's scary essay is just another example of empty alarmism.

#### Peace process fails – Israeli and Palestinian leadership aren’t willing to negotiate

Chuck Freilich, Senior Fellow at the International Security Program at the Belfer Center for Science and International Affairs, former deputy national security advisor in Israel and Adjunct Professor of Political Science at Harvard, New York, Columbia, and Tel Aviv Universities, 11-23-2012, “Renew the Mideast peace process? Not now” http://articles.latimes.com/2012/nov/23/opinion/la-oe-1125-freilich-mideast-peace-process-20121122

The last thing the Middle East needs today — especially Israelis and Palestinians — and the last thing the U.S. needs is another failed American-led peace process. And it would fail. What Bill Clinton and George W. Bush could not achieve on the basis of Israel's dramatic proposals in 2000 and 2008, Obama will not be able to do today. Regional conditions are far less propitious. Hamas, which was not in power when Clinton was in office, is a fundamentalist Islamist organization whose charter refers to Jews as donkeys and dogs and calls for Israel's destruction. It is not a partner for negotiations. The "moderate" president of the Palestinian Authority, Mahmoud Abbas, has refused even to negotiate for the last three years and has announced his determination to pursue U.N. recognition of Palestine as a non-state member later this month, despite repeated American, international and Israeli remonstrations. United Nations recognition will not bring the Palestinians one inch closer to actual statehood. Establishing a state will require compromise, and it is so much easier for Abbas to play to the automatic Third World choir in the U.N. and receive support for the establishment of a Palestinian state based on the 1967 borders than to negotiate seriously with Israel. Doing that would mean agreeing to some territorial changes and forgoing the fanciful dream of a return of refugees. On the Israeli side, Prime Minister Benjamin Netanyahu is likely to sweep the January elections and to continue his hard-line approach. He will be further buoyed by an electorate that has long despaired of any Palestinian willingness to compromise and will be further hardened by recent events.

**Plan causes extraordinary rendition shift**

Kenneth **Anderson, 09**, Professor of International Law at American University, 5/31, “Security Issues Like Squeezing Jello? Reversion to the Mean? Jack Goldsmith on the Effects of Security Alternatives,” http://opiniojuris.org/2009/05/31/security-issues-like-squeezing-jello-reversion-to-the-mean-jack-goldsmith-on-the-effects-of-security-alternatives/#sthash.TB1xcePu.dpuf

**One way you might look at this is that there is a sort-of national security constant that remains in equilibrium over time,** using one tactic or another, **gradually evolving but representing over time a reversion to the national security mean.** Or you might say that national security, seen over time, looks a little like squeezing jello – if squeezed one place it pops out another. ¶ I think Jack is right that the administration – **any administration** – **tends to strive for a certain equilibrium, as it is confronted with a flow of threats** that the public discounts to near-zero but which it does not see itself quite so able to do, however much it might want to. However, as the op-ed also notes, and I agree, **these methods are not completely equivalent or compensating.** That is so not just with regards to third party costs, but also with respect to security as such. Intelligence gathering, by all accounts not very effective to begin with, has become much more difficult. This is not compensation, it is a seemingly permanent downward shift in the security mean. ¶ Besides the consequences that Jack identifies, I would add that **the current move to semi-compensating policies means two things. First, intelligence is likely to be increasingly outsourced to foreign intelligence services.** That can provide valuable information, but it will be increasingly uncorroborated and subject to filtering by those services. That is not good. ¶ **Second**, in a somewhat unrelated matter, **I would guess that future conflicts, where not fought by Predator, will be increasingly outsourced to proxy forces. ¶** In the focus on intelligence and security, I think **this second point has not received sufficient attention. The United States has a long familiarity with proxy forces as a form of deniability, among other things** – Ronald **Reagan**, for example, **faced with many limitations** placed by Congress on his uses of force, **found proxy forces an essential element of his foreign policy**, in Central America particularly. The domestic risks that policy can entail are illustrated by the Iran-Contra contra-temps; on the other hand, Reagan was reasonably successful in pursuing his administration’s anti-Communist and anti-Soviet policy aims in Salvador and Nicaragua, among other places, by proxy forces. ¶ But **I would be quite surprised if proxy war were not today** under active discussion for places like Somalia (where we have already undertaken measures close to it) and other places. More precisely, **I would surprised if it were not an active discussion among the New Liberal Realists** of the Obama administration, whatever the transnationalists say or think.¶ In any case, whether those last two speculations prove true or not, **the tendency of the administration to seek compensating policies seems likely at a minimum to complicate the issues of Guantanamo, Bagram, and other matters besides.**

**Means they solve nothing**

Anna-Katherine Staser **McGill 12**, School of Graduate and Continuing Studies in Diplomacy, Norwich University, David Gray, Campbell University, Summer 2012, “Challenges to International Counterterrorism Intelligence Sharing,” http://globalsecuritystudies.com/McGill%20Intel%20Share.pdf

**The CIA’s use of “extraordinary rendition”, the practice of transporting a suspect to a third country for interrogation, has also stoked the ire of many traditional allies**. Critics charge that **this** tactic **quite simply allows the CIA to sidestep international laws and obligations by conducting interrogations in nations with poor human-rights records.** In 2003, an Italian magistrate formally indicted 13 CIA agents for allegedly kidnapping an Italian resident and transporting him to a third country for interrogation. Ultimately 22 CIA agents and one US military officer were convicted in absentia of crimes connected to the abduction (Stewart, 1). **The case not only heightened criticism of the US in Italy but challenged U.S. strategic communications aimed at reducing anti-Americanism worldwide** (Reveron 462). According to Julianne Smith, director of the Europe program at the Center for Strategic and International Studies (CSIS), “[**extraordinary rendition] makes it extremely difficult [for European governments] to stand shoulder-to-shoulder with the U.S.**” (Heller 1).

#### Alt Cause: The only thing that would lead to peace talks is the BDS movement and the end of Israeli Settlements

Paul Wienberg, Political Analyst, 18 March 2014, “As peace talks flounder, Palestinians need more BDS, says Diana Buttu,” Rabble, http://rabble.ca/news/2014/03/peace-talks-flounder-palestinians-need-more-bds-says-diana-buttu?utm\_source=feedburner&utm\_medium=feed&utm\_campaign=Feed:%20rabble-news%20%28rabble.ca%20-%20News%20for%20the%20rest%20of%20us%29

John Kerry's inspired peace process since July between the Israelis and Palestinians is "worse than going nowhere," and so "the big question becomes what to do next," argues the Ramallah based Palestinian-Canadian human rights lawyer, Diana Buttu.¶ "There might be an extension to the talks, but that extension is actually going to be a bad thing, not a good thing. The longer negotiations go on, the worse the situation gets on the ground" she told rabble in a recent interview.¶ "The international community has been putting a lot of emphasis on the Kerry talks; the Palestinian people are not. They are recognizing it for what it is, which is a sham and a process to allow Israel to build more settlements and buy more time," Buttu continues.¶ The Toronto born Buttu is a past legal advisor to the PLO and a major catalyst in a high profile case opposing Israel's separation wall that resulted in a favourable landmark decision by the International Court of Justice in The Hague in 2004.¶ An independent consultant since 2005, Buttu is back home slated to give a reality check, courtesy of Canadians for Justice and Peace in the Middle East, delivering talks this week in Montreal, Ottawa and Toronto.¶ "People are putting all of their faith in Kerry and this idea that somehow he is going to resolve the problem, but without looking at it [and] stopping the bleeding that is continuing to take place."¶ Amnesty International recently released a report, "Trigger-happy, Israel's use of excessive force in the West Bank," which suggested that the Israeli military turned a blind eye towards peaceful protests. Israeli forces killed 22 Palestinian civilians in 2013 in the West Bank, of which 14 were involved in protests and the majority were under 25. ¶ The UN Office for the Coordination of Humanitarian Affairs - Occupied Palestinian Territory reported that during March 4-10 2014, two Palestinians were killed by Israeli forces and 29 others were injured by Israeli forces. In the same time period, 122 Palestinians in the West Bank were searched and arrested by Israeli forces. ¶ Buttu maintains that less attention is being paid by the international community to a "worsening" human rights situation experienced by Palestinians in the occupied West Bank and east Jerusalem and that the Israelis are acting with "impunity" when it comes to the increased violence and human rights violations.¶ Buttu notes that more settlement housing is being built on occupied Palestinian land in the West Bank and east Jerusalem "despite the fact that every government around the world has condemned the settlement as illegal under international law," and that there is a "a spike" in the displacement of Palestinians through home demolitions¶ To demonstrate the scale of Israel settlement construction, Haaretz has reported that the so-called settlement outposts (settlements built without government approval) are receiving millions of dollars in state funding even though they violate both Israel and international law.¶ The only alternative is an intensification of the Boycott-Divestment-Sanctions (BDS) campaign to pressure Israel, Buttu argues.¶ "I am trying to implore people to move beyond the negotiation process, and perhaps push to hold Israel accountable."¶ Buttu expects what she describes as moribund peace talks to drag on until possibly the end of the second term of Barack Obama's administration. She says it is in the interest of all three parties involved to maintain this status quo at the expense of the Palestinians.¶ "It is in the United States' interest to make it look as though they are doing something [and] unfortunately, it is in Mahmood Abbas's interest to extend these talks because he hasn't created any alternative to negotiations, and that's a bad thing. It is also in the Israelis interest to extend the talks, because all the while, while they are talking, nobody is condemning their ongoing actions on the ground."¶ U.S. Presidents since Jimmy Carter have shied away from using the word "illegal, under international law," in describing the Israeli building of housing on Palestinian land, notes Buttu.¶ Instead, they will make vague statements such as "continued settlement is illegitimate," without defining what that actually means.¶ In Obama's last statement, Buttu recalls, he made reference to these settlements being "unhelpful," but they haven't done really anything "to address" that problem.¶ Buttu notes that Palestinian civil society is spearheading the international BDS movement, which the Palestinian Authority (PA) and President Abbas have opposed. Instead, the latter has called for a more focused boycott of Israeli products made on Israel settlements.

**No risk of Middle East war.**

**Maloney and Takeyh 07**

[Susan Maloney and Ray Takeyh, 6/28/2007. Senior fellow for Middle East Policy at the Saban Center for Middle East Studies at the Brookings Institution and senior fellow for Middle East Studies at the Council on Foreign Relations. “Why the Iraq War Won’t Engulf the Mideast,” International Herald Tribune, <http://www.brookings.edu/opinions/2007/0628iraq_maloney.aspx>.

Yet, **the Saudis, Iranians, Jordanians, Syrians, and others are very unlikely to go to war** either to protect their own sect or ethnic group or to prevent one country from gaining the upper hand in Iraq. The reasons are fairly straightforward. First, **Middle Eastern leaders**, like politicians everywhere, **are primarily interested in one thing: self-preservation**. Committing forces to Iraq is an inherently risky proposition, which, **if the conflict went badly, could threaten domestic political stability. Moreover, most Arab armies are geared toward regime protection rather than projecting power and thus have little capability for sending troops** to Iraq. Second, there is cause for concern about the so-called blowback scenario **in which jihadis returning from Iraq destabilize their home countries**, plunging the region into conflict. Middle Eastern leaders are preparing for this possibility. Unlike in the 1990s, when Arab fighters in the Afghan jihad against the Soviet Union returned to Algeria, Egypt and Saudi Arabia and became a source of instability, **Arab security services are being vigilant about who is coming in and going from their countries.** In the last month, the Saudi government has arrested approximately 200 people suspected of ties with militants. Riyadh is also building a 700 kilometer wall along part of its frontier with Iraq in order to keep militants out of the kingdom. Finally, there is no precedent for Arab leaders to commit forces to conflicts in which they are not directly involved. The Iraqis and the Saudis did send small contingents to fight the Israelis in 1948 and 1967, but they were either ineffective or never made it. In the 1970s and 1980s, Arab countries other than Syria, which had a compelling interest in establishing its hegemony over Lebanon, never committed forces either to protect the Lebanese from the Israelis or from other Lebanese. The civil war in Lebanon was regarded as someone else's fight. Indeed, this is the way many leaders view the current situation in Iraq. To Cairo, Amman and Riyadh, the situation in Iraq is worrisome, but in the end it is an Iraqi and American fight. As far as Iranian mullahs are concerned, they have long preferred to press their interests through proxies as opposed to direct engagement. At a time when Tehran has access and influence over powerful Shiite militias, a massive cross-border incursion is both unlikely and unnecessary. So Iraqis will remain locked in a sectarian and ethnic struggle that outside powers may abet, but will remain within the borders of Iraq. **The Middle East is a region both prone and accustomed to civil wars. But given its experience with ambiguous conflicts, the region has also developed an intuitive ability to contain its civil strife and prevent local conflicts from enveloping the entire Middle East.**

# 2nc

## Israel

-Sharma:

Israeli releases now – 3rd of 4 planned as goodwill gesture

Jonathan Pollard thumps

-Niraj:

Respect rights but alt causes – less govt funding and banned political parties

Freedome of movement and settlement building

-Doyle:

If reverse causal then the releases of 2011 should have solved; released over 1000 prisoners

-No warrant why spills over to address other concerns. Assertion

-Bali:

Says that “israelization” of US policy, that the US FOLLOWS ISRAEL!

Doesn’t assume that the policies will liberalize, just become more fucked up. That’s not reverse causal

Doesn’t’ assume current admin rel w/ Net

-Williams:

Jewish settlemtn = alt cause

Hamas = alt cause

Inmate release now – 104 planned as good will; 26 already released in agusut

Prisoners for settlement

#### Talks wont work—land settlements are the only thing that matter—and that screws the talks

RT 3-20

[“Peace talks at 'impasse' over Israel's continued settlement building – Palestinians”

March 20, 2014, http://rt.com/news/israel-palestinian-impasse-talks-185/]

Israeli-Palestinian peace talks have come to a stalemate, given that Jewish settlement activity in the West Bank is proceeding with over 2,000 more units planned, a Palestinian spokesman said on Thursday.¶ "Israel's Settlement Activity Caused the Negotiations to fail and LED Them to an Impasse," Nabil Abu Rudeina, A Spokesman for Palestinian President Mahmud Abbas, Told AFP.¶ Rudeina's statement came in response to a decision by an Israeli Defense Ministry committee to proceed with plans to build 2,269 new West Bank homes, further complicating the US-backed peace talks ahead of the April 29 deadline for all negotiations.¶ A Defense Ministry spokesman said in February that the committee approved 1,015 housing units in Leshem, Beit El, and Almog, only needing Defense Minister Moshe Ya'alon's approval to go forward.¶ The committee also approved 1,254 units in Ariel, Shvut Rachel, and Shavei Shomron. These projects will be up for public comment before the committee will again consider them.¶ The peace talks are on life support, as Washington attempts to compel both sides to agree to a framework to extend negotiations.¶ Palestinians have turned away from any extension thus far, mainly over Israel's insistence on further settlement construction, which has not ceased since talks resumed last July.¶ On Wednesday, a municipal committee gave final approval for plans to construct 186 new homes in annexed Arab East Jerusalem.¶ Anti-Israeli Settlement Group advocacy Peace Now Said the New units further destabilize any Chance of A two-State solution, and That They are more Proof That Israel has "no intention to reach A peace Agreement and WAS doing everything it Could Force to Palestinian president Mahmud Abbas out of the process. "

#### Talks Won’t Lead to Peace, Israeli Settlements Anger Palestinians

AFP, “Israel Colonies Lead to Peace Talk Impasse,” 21 March 2014, Gulf News, http://gulfnews.com/news/region/palestinian-territories/israel-colonies-lead-to-peace-talks-impasse-1.1306840

Israel colonies lead to peace talks impasse¶ Ramallah: US-sponsored peace talks with Israel have reached an impasse because of Jewish colony activity, a Palestinian spokesman has said, as plans for over 2,000 West Bank units were moved forward.¶ The latest crisis comes as Washington scrambles for a formula to allow the Palestinians and Israelis to carry on the peace talks beyond an April 29 deadline.¶ “Israel’s settlement [colony] activity caused the negotiations to fail and led them to an impasse,” Nabeel Abu Rudeina, a spokesman for Palestinian president Mahmoud Abbas, told AFP.¶ Abu Rudeina was reacting to the decision of an Israeli defence ministry committee, revealed earlier on Thursday, to push forward with plans to build 2,269 new West Bank homes.¶ A ministry spokesman said last month the committee had approved the building of 1,015 units in Leshem, Beit El and Almog, leaving Defence Minister Moshe Yaalon’s approval as the final step.¶ The same committee approved 1,254 units in Ariel, Shvut Rachel and Shavei Shomron. Those projects will be published in the media for public comment before returning to the committee for further discussion.¶ Israeli-Palestinian peace talks are teetering on the brink of collapse, with Washington fighting an uphill battle to get the two sides to agree to a framework proposal to extend the negotiations to the year’s end.¶ US concerned¶ A US State Department spokeswoman, Jennifer Psaki, said that Secretary of State John Kerry had “expressed his concerns” to Israeli Prime Minister Netanyahu about recent remarks by Yaalon disparaging the US negotiations with Iran over its nuclear programme.¶ She added that, given the nearing deadline of April 29 for the Israeli-Palestinian talks, “we are not surprised that there has been an increase in rhetoric over the past couple of weeks given where we are in the process and the pivotal period. But we’re just going to keep our head down and focused on the process”.¶ So far, the Palestinians have flatly refused to consider any extension, partly over Israel’s persistent colony construction which has shown no let-up since talks resumed last July.¶ Israeli anti-colonist watchdog Peace Now said the planned new units would create “facts on the ground that distance us from the two-state solution”.¶ They were further proof that Israel had “no intention to reach a peace agreement and was doing everything it could to force Abbas out of the process”.

# 2nc

### terror

### no terror

#### First, Low risk of terrorist attack against the U.S.

Shinkman ‘12

[Paul D., Washington newsman, naturalized Capitol Hill citizen, now national security reporter at US News & World Report. Formerly with WTOP News, “Study: U.S. at 'Low' Risk of Terror Attack,” U.S.News & World Report LP, 12.05.2012. <<http://www.usnews.com/news/articles/2012/12/05/study-america-has-relatively-low-chance-of-terrorist-attack->>//wyo-hdm]

In an era of terrorist plots and WMD proliferation, this news may come as a slight relief: Among countries with the highest risk of terrorist attacks, the United States ranks "relatively low," according to a new study. The University of Maryland collected data on 104,000 instances of terrorism in 158 nations, and ranked the likelihood of each country witnessing a terrorist attack within its borders. Iraq, Pakistan and Afghanistan earn the top positions. The U.S. slides in at No. 41. "In global terms, this is a relatively low level of activity," according to the study, first reported by The Washington Times . "North America is the least-likely region to be involved in a terrorist attack, though this is not the general impression among many of its residents," says Steve Killelea with the Institute for Economics and Peace, which published the study using statistics and analysis from the University of Maryland's National Consortium for the Study of Terrorism and Responses to Terrorism . "The fatality rate in the U.S. is 19 times lower than Western Europe," he tells the Times. "Still, the level of terrorism elsewhere is too high. We're hoping the index can prompt a practical debate about the future of terrorism and some appropriate policy responses." Major U.S. allies land much higher on the list. Britain is ranked 28th, behind Turkey and Israel, which are 19th and 20th, respectively. The Philippines just squeaks into the top 10, right behind Russia at No. 9.

### Indits

-Chesney:

“alarming” “friction” isn’t wont cooperate

“isn’t dispositive” in un underlined position

-Terkel:

“Cred low” alt cause – not find wmd in Iraq,

“Container security initiative” already not in Middle East/Africa… not solve because not deal w/ it

“Afghanistan/Saudi Arabia” work = key to sovle financial – no UQ

Domestic

-Nachman

Actually detaining is key to this interal link

“Nationality based information and detention sweeps”

### at nuke

#### No scenario for nuclear terror---consensus of experts

Matt Fay ‘13, PhD student in the history department at Temple University, has a Bachelor’s degree in Political Science from St. Xavier University and a Master’s in International Relations and Conflict Resolution with a minor in Transnational Security Studies from American Military University, 7/18/13, “The Ever-Shrinking Odds of Nuclear Terrorism”, webcache.googleusercontent.com/search?q=cache:HoItCUNhbgUJ:hegemonicobsessions.com/%3Fp%3D902+&cd=1&hl=en&ct=clnk&gl=us&client=firefox-a

For over a decade now, one of the most oft-repeated threats raised by policymakers—the one that in many ways justified the invasion of Iraq—has been that of nuclear terrorism. Officials in both the Bush and Obama administrations, including the presidents themselves, have raised the specter of the atomic terrorist. But beyond mere rhetoric, how likely is a nuclear terrorist attack really?¶ While pessimistic estimates about America’s ability to avoid a nuclear terrorist attack became something of a cottage industry following the September 11th attacks, a number of scholars in recent years have pushed back against this trend. Frank Gavin has put post-9/11 fears of nuclear terrorism into historical context (pdf) and argued against the prevailing alarmism. Anne Stenersen of the Norwegian Defence Research Establishment has challenged the idea that al Qaeda was ever bound and determined to acquire a nuclear weapon. John Mueller ridiculed the notion of nuclear terrorism in his book Atomic Obsessions and highlighted the numerous steps a terrorist group would need to take—all of which would have to be successful—in order to procure, deliver, and detonate an atomic weapon. And in his excellent, and exceedingly even-handed, treatment of the subject, On Nuclear Terrorism, Michael Levi outlined the difficulties terrorists would face building their own nuclear weapon and discussed how a “system of systems” could be developed to interdict potential materials smuggled into the United States—citing a “Murphy’s law of nuclear terrorism” that could possibly dissuade terrorists from even trying in the first place.¶ But what about the possibility that a rogue state could transfer a nuclear weapon to a terrorist group? That was ostensibly why the United States deposed Saddam Hussein’s regime: fear he would turnover one of his hypothetical nuclear weapons for al Qaeda to use.¶ Enter into this discussion Keir Lieber and Daryl Press and their article in the most recent edition of International Security, “Why States Won’t Give Nuclear Weapons to Terrorists.” Lieber and Press have been writing on nuclear issues for just shy of a decade—doing innovative, if controversial work on American nuclear strategy. However, I believe this is their first venture into the debate over nuclear terrorism. And while others, such as Mueller, have argued that states are unlikely to transfer nuclear weapons to terrorists, this article is the first to tackle the subject with an empirical analysis.¶ The title of their article nicely sums up their argument: states will not turn over nuclear weapons terrorists. To back up this claim, Lieber and Press attack the idea that states will transfer nuclear weapons to terrorists because terrorists operate of absent a “return address.” Based on an examination of attribution following conventional terrorist attacks, the authors conclude:¶ [N]either a terror group nor a state sponsor would remain anonymous after a nuclear attack. We draw this conclusion on the basis of four main findings. First, data on a decade of terrorist incidents reveal a strong positive relationship between the number of fatalities caused in a terror attack and the likelihood of attribution. Roughly three-quarters of the attacks that kill 100 people or more are traced back to the perpetrators. Second, attribution rates are far higher for attacks on the U.S. homeland or the territory of a major U.S. ally—97 percent (thirty-six of thirty-seven) for incidents that killed ten or more people. Third, tracing culpability from a guilty terrorist group back to its state sponsor is not likely to be difficult: few countries sponsor terrorism; few terrorist groups have state sponsors; each sponsor terrorist group has few sponsors (typically one); and only one country that sponsors terrorism, has nuclear weapons or enough fissile material to manufacture a weapon. In sum, attribution of nuclear terror incidents would be easier than is typically suggested, and passing weapons to terrorists would not offer countries escape from the constraints of deterrence.¶ From this analysis, Lieber and Press draw two major implications for U.S. foreign policy: claims that it is impossible to attribute nuclear terrorism to particular groups or potential states sponsors undermines deterrence; and fear of states transferring nuclear weapons to terrorist groups, by itself, does not justify extreme measures to prevent nuclear proliferation.¶ This is a key point. While there are other reasons nuclear proliferation is undesirable, fears of nuclear terrorism have been used to justify a wide-range of policies—up to, and including, military action. Put in its proper perspective however—given the difficulty in constructing and transporting a nuclear device and the improbability of state transfer—nuclear terrorism hardly warrants the type of exertions many alarmist assessments indicate it should.

### AT Agro

**B. No Appeal**

**Neild 06**

[Barry Neild, CNN, Agroterrorism: How real is the threat?, September 25, 2006]

Not everyone is convinced of the risk. **Dr.** Jean **Weese, a professor of food science** at the University of Tennessee, **says that while the food chain is certainly vulnerable to attack, agricultural targets lack the deadly appeal of the World Trade Center** or the Pentagon. "Even if you contaminate all of the spinach in a field, although it sounds terrible to say, only one or two people die," she says. " **It is not going to reach the same level of devastation as flying a plane into a building**."

**SECOND, there is no impact**

**A. The impact would be contained**

**King 06**

[Lonnie King, Sneior Veterinaian, Testimony before Committee on Homeland Security, August 24, 2006. http://www.hhs.gov/asl/testify/t060824.html ]

At this time, the scope, scale, and consequences to human and animal health from zoonotic and agroterrorism threats are unprecedented. Preparing for zoonotic threats requires a merging of responsibilities at the animal-human interface, and this **preparation is leading to significant progress in CDC's ability to prepare for and respond to an agroterrorism event. Frequent collaboration** on outbreak detection and response **and close coordination** among Federal and State food safety, public health, law enforcement, and intelligence-gathering agencies **have resulted in enhancement to the nation's public health systems. These systems improve our nation's ability to respond to naturally occurring events and prepare the United States for a possible agroterrorism attack.** Thank you for this opportunity to discuss our preparedness efforts.. I would be pleased to respond to any questions.

### At BIO

#### There’s a low threshold for risk mitigation – we just have to win that terrorists would prefer convention means, not that they don’t want to attack at all.

Stratfor 8, (“Busting the Anthrax Myth,” July 30, <http://www.stratfor.com/print/120756>)

In fact, based on the past history of nonstate actors conducting attacks using biological weapons, we remain skeptical that a nonstate actor could conduct a biological weapons strike capable of creating as many casualties as a large strike using conventional explosives — such as the October 2002 Bali bombings that resulted in 202 deaths or the March 2004 train bombings in Madrid that killed 191. We do not disagree with Runge’s statements that actors such as al Qaeda have demonstrated an interest in biological weapons. There is ample evidence [4] that al Qaeda has a rudimentary biological weapons capability. However, there is a huge chasm of capability that separates intent and a rudimentary biological weapons program from a biological weapons program that is capable of killing hundreds of thousands of people. Misconceptions About Biological Weapons There are many misconceptions involving biological weapons. The three most common are that they are easy to obtain, that they are easy to deploy effectively, and that, when used, they always cause massive casualties. While it is certainly true that there are many different types of actors who can easily gain access to rudimentary biological agents, there are far fewer actors who can actually isolate virulent strains of the agents, weaponize them and then effectively employ these agents in a manner that will realistically pose a significant threat of causing mass casualties. While organisms such as anthrax are present in the environment and are not difficult to obtain, more highly virulent strains of these tend to be far more difficult to locate, isolate and replicate. Such efforts require highly skilled individuals and sophisticated laboratory equipment. Even incredibly deadly biological substances such as ricin [5] and botulinum toxin are difficult to use in mass attacks. This difficulty arises when one attempts to take a rudimentary biological substance and then convert it into a weaponized form — a form that is potent enough to be deadly and yet readily dispersed. Even if this weaponization hurdle can be overcome, once developed, the weaponized agent must then be integrated with a weapons system that can effectively take large quantities of the agent and evenly distribute it in lethal doses to the intended targets. During the past several decades in the era of modern terrorism, biological weapons have been used very infrequently and with very little success. This fact alone serves to highlight the gap between the biological warfare misconceptions and reality. Militant groups desperately want to kill people and are constantly seeking new innovations that will allow them to kill larger numbers of people. Certainly if biological weapons were as easily obtained, as easily weaponized and as effective at producing mass casualties as commonly portrayed, militant groups would have used them far more frequently than they have. Militant groups are generally adaptive and responsive to failure. If something works, they will use it. If it does not, they will seek more effective means of achieving their deadly goals. A good example of this was the rise and fall of the use of chlorine [6] in militant attacks in Iraq.

# 1nr

### Impact O/v

#### Extend Waxman—an unrestrained and flexible executive is the only institutional option to check uncontrolled WMD proliferation and to keep them from falling into the hands of terrorists and rogue states.

#### Strong executive is key to address any and all fourth gen threats to security including prolif of fourth gen weapons and aggressive rogue states.

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

1. 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 ideology who view the United States as an enemy. An excellent analysis of jihadist ideology and its implications for the rest of the world are presented by Professor Mary Habeck. 133 Professor Habeck identifies the centrality of the Qur'an, specifically a particular reading of the Qur'an and hadith (traditions about the life of Muhammad), to the jihadist terrorists. 134 The jihadis believe that the scope of the Qur'an is universal, and "that their interpretation of Islam is also intended for the entire world, which must be brought to recognize this fact peacefully if possible and through violence if not."' 135 Along these lines, the jihadis view the United States and her allies as among the greatest enemies of Islam: they believe "that every element of modern Western liberalism is flawed, wrong, and evil" because the basis of liberalism is secularism. 136 The jihadis emphasize the superiority of Islam to all other religions, and they believe that "God does not want differing belief systems to coexist."' 37 For this reason, jihadist groups such as al-Qaeda "recognize that the West will not submit without a fight and believe in fact that the Christians, Jews, and liberals have united against Islam in a war that will end in the complete destruction of the unbelievers.' 138 Thus, the adherents of this jihadist ideology, be it al-Qaeda or other groups, will continue to target the United States until she is destroyed. Their ideology demands it. 139 To effectively combat terrorist groups such as al-Qaeda, it is necessary to understand not only how they think, but also how they operate. Al-Qaeda is a transnational organization capable of simultaneously managing multiple operations all over the world."14 It is both centralized and decentralized: al-Qaeda is centralized in the sense that Osama bin Laden is the unquestioned leader, but it is decentralized in that its operations are carried out locally, by distinct cells."4 AI-Qaeda benefits immensely from this arrangement because it can exercise direct control over high-probability operations, while maintaining a distance from low-probability attacks, only taking the credit for those that succeed. The local terrorist cells benefit by gaining access to al-Qaeda's "worldwide network of assets, people, and expertise."' 42 Post-September 11 events have highlighted al-Qaeda's resilience. Even as the United States and her allies fought back, inflicting heavy casualties on al-Qaeda in Afghanistan and destroying dozens of cells worldwide, "al-Qaeda's networked nature allowed it to absorb the damage and remain a threat." 14 3 This is a far cry from earlier generations of warfare, where the decimation of the enemy's military forces would generally bring an end to the conflict. D. The Need for Rapid Reaction and Expanded Presidential War Power By now it should be clear just how different this conflict against the extremist terrorists is from the type of warfare that occupied the minds of the Framers at the time of the Founding. Rather than maintaining the geographical and political isolation desired by the Framers for the new country, today's United States is an international power targeted by individuals and groups that will not rest until seeing her demise. The Global War on Terrorism is not truly a war within the Framers' eighteenth-century conception of the term, and the normal constitutional provisions regulating the division of war powers between Congress and the President do not apply. Instead, this "war" **is a struggle for survival** and dominance against forces that threaten to destroy the United States and her allies, and the fourth-generational nature of the conflict, highlighted by an indiscernible distinction between wartime and peacetime, necessitates an evolution of America's traditional constitutional warmaking scheme. As first illustrated by the military strategist Colonel John Boyd, constitutional decision-making in the realm of war powers in the fourth generation should consider the implications of the OODA Loop: Observe, Orient, Decide, and Act. 44 In the era of fourth-generational warfare, **quick reactions**, proceeding through the OODA Loop rapidly, and disrupting the enemy's OODA loop are the keys to victory. "In order to win," Colonel Boyd suggested, "we should operate at a **faster tempo** or rhythm than our adversaries." 145 In the words of Professor Creveld, "[b]oth organizationally and in terms of the equipment at their disposal, the armed forces of the world will have to adjust themselves to this situation by changing their doctrine, doing away with much of their heavy equipment and becoming more like police."1 46 Unfortunately, the existing constitutional understanding, which diffuses war power between two branches of government, necessarily (by the Framers' design) slows down decision- making. In circumstances where war is undesirable (which is, admittedly, most of the time, especially against other nation-states), the deliberativeness of the existing decision-making process is a positive attribute. In America's current situation, however, in the midst of the conflict with al-Qaeda and other international terrorist organizations, the existing process of constitutional decision-making in warfare may prove a **fatal hindrance** to achieving the initiative **necessary** for victory. As a **slow-acting**, deliberative **body**, Congress does not have the ability to adequately deal with **fast-emerging situations** in fourth-generational warfare. Thus, in order to combat transnational threats such as al-Qaeda, the executive branch **must** have the ability to operate by taking offensive military action even without congressional authorization, because **only the executive branch** is capable of the swift decision-making and action necessary to prevail in fourth-generational conflicts against fourthgenerational opponents.

**Strong executive key to contain WMD threat of rogue states**

**Nzelibe & Yoo 06**

[Jide Nzelibe and John C. Yoo. , Yoo is a professor of law at the University of California at Berkeley School of Law , ,Rational war and constitutional design.(Symposium on Executive Power).

Yale Law Journal 115.9 (July 2006): p2512(30), uwyo//amp]

**The declining value of costly signals is counterbalanced by the benefit of using preemptive force against terrorists and rogue states**. As September 11 showed, terrorist attacks can occur without warning because their unconventional nature allows their preparation to be concealed within the normal activities of civilian life. Terrorists have no territory or regular armed forces from which to detect signs of an impending attack. To defend itself from such an enemy, the United States might need to use force earlier and more often than was the norm during a time when nation-states generated the primary threats to American national security. (63) As with terrorism, **the threat posed by rogue nations may again require the United States to use force earlier and more often** than it would like. (64**) Rogue nations may very well be immune to pressure short of force designed to stop their quest for WMD** or their threat to the United States. **Rogue nations**, for example, **have isolated themselves** from the international system, are less integrated into the international political economy, and repress their own populations. **This makes them less susceptible to** diplomatic or other means of resolving disputes short of force, such as economic **sanctions. Lack of concern for their own civilian populations renders the dictatorships that often govern rogue nations more resistant to deterrence. North Korea,** for example, **appears to have continued its development of nuclear weapons despite** years of diplomatic measures to change its course. (65) These new threats to American national security change the way we think about the relationship between the process and substance of the warmaking system. The international system as it existed at the end of the Cold War allowed the United States to choose a warmaking system that could have placed a premium on deliberation and the approval of multiple institutions, whether for purposes of political consensus (and hence institutional constraints that lower the expected value of war) or for purposes of signaling private information in the interests of reaching a peaceful bargain. If, however, the nature of threats has changed and the level of threats has increased, and military force is the most effective means for responding to those threats, then it may make more sense for the United States to use force preemptively. **Given the threats posed by WMD proliferation, rogue nations, and international terrorism**, at the very least it seems clear **that we should not adopt a warmaking process that contains a built-in presumption against using force abroad or that requires long and deliberate procedures. T**hese developments in the international system may demand that the United States have the ability to use force earlier and more quickly than in the past. In order to forestall a WMD attack, or to take advantage of a window of opportunity to strike at a terrorist cell**, the executive branch needs the flexibility to act quickly, possibly in situations in which congressional consent cannot be obtained in time to act on the intelligence**. These cases suggest that a permanent constitutional rule requiring **congressional permission to use force would be over-inclusive.** In certain situations, particularly when the United States is facing a nation-state with a similar political system or one that can draw on a sophisticated understanding of foreign nations, signaling through congressional participation may prove valuable. But **costly signals may prove ineffective in other situations, particularly when the opponent is a rogue state** or an international terrorist organization. There may be little value in revealing private information through legislative commitments if the opponent does not understand the meaning of congressional participation or does not share a common value system that would allow a bargain to be struck. In other words, the signaling model that underwrites the value of congressional participation breaks down when confronted with these opponents. In such cases, we might conclude that **the benefits of swift, even preemptive military action might outweigh the potential effectiveness of signaling.** These considerations suggest that a two-tier approach to war powers might be desirable, in which conflicts with similar nation-states should involve congressional authorization, which can only assist the executive branch in reaching a bargain with a foreign nation. But **if the opponent is a terrorist organization or a rogue nation, the United States might be better off retaining a system of executive initiative in war**. We should make an important clarification. Our argument does not preclude the possibility that some nondemocractic regimes could understand the informational value of legislative signaling, but it assumes that democratic regimes are more likely to appreciate such signals. In some circumstances, the President might seek legislative authorization for the use of force against nondemocractic states to improve the chances of a peaceful settlement. But it will depend on the circumstances and on whether the benefits of such a signal would be outweighed by the costs of delay. We believe that **the President is best suited, as a structural matter, to determine whether to seek to signal a nondemocractic regime with legislative authorization.**

**The plan’s restrictions straightjacket presidential flexibility – collapses deterrence making preemptive strikes likely.**

**Zeisberg, ‘4** [Mariah Zeisberg, PhD in Politics from Princeton, Postdoc Research Associate at the Political Theory Project of Brown University; “INTERBRANCH CONFLICT AND CONSTITUTIONAL MAINTENANCE: THE CASE OF WAR POWERS”; June 2004; found in Word document, can be downloaded from [www.brown.edu/Research/ppw/files/Zeisberg%20Ch5.doc](http://www.brown.edu/Research/ppw/files/Zeisberg%20Ch5.doc)]

The first significant argument of pro-Presidency insularists is that flexibility is a prime value in the conduct of foreign affairs, and especially war. Implicit in this argument is the recognition that the executive is functionally superior to Congress in achieving flexibility and swiftness in war operations, a recognition I share. The Constitution cannot be meant to curtail the very flexibility that may be necessary to preserve the nation; and yet, according to the insularists, any general norm which would include Congress in decision-making about going to war could only undermine that flexibility. Writing on the War Powers Act, Eugene Rostow predicts that it would, “put the Presidency in a straightjacket of a rigid code, and prevent new categories of action from emerging, in response to the necessities of a tense and unstable world.” In fact, Rostow believes, “[t]he centralization of authority in the president is particularly crucial in matters of national defense, war, and foreign policy, where a unitary executive can evaluate threats, consider policy choices, and mobilize national resources with a speed and energy that is far superior to any other branch.” Pro-presidency insularists are fond of quoting Hamilton, who argued that “[o]f all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand.” This need for flexibility, some insularists argue, is especially acute given modern conditions, where devastating wars can develop quickly. Today, “many foreign states have the power to attack U.S. forces - and some even the U.S. mainland - almost instantly,” and in such a world it is impracticable to require the President to seek advance authorization for hostilities. Such a requirement would simply be too risky to U.S. security. We furthermore face a nuclear age, and the system of deterrence that operates to contain that threat requires that a single person be capable of responding to nuclear attack with nuclear weapons immediately. Rostow writes, “the requirement for advance authorization would collapse the system of deterrence, making preemptive strikes by our enemies more likely.” Hence, “modern conditions” require the President to “act quickly, and often alone.” While this does not mean that Congress has no role to play in moments of crisis, it does mean that Congress should understand its role largely in terms of cooperating with the President to support his negotiations and decisions regarding relationships with foreign powers. Rostow writes, “Congress should be able to act effectively both before and after moments of crisis or potential crisis. It may join the President in seeking to deter crisis by publicly defining national policy in advance, through the sanctioning of treaties or other legislative declarations. Equally, Congress may participate formally in policymaking after the event through legislative authorization of sustained combat, either by means of a declaration of war, or through legislative action having more limited legal and political consequences. Either of these devices, or both in combination, should be available in situations where cooperation between the two branches is indicated at many points along an arc ranging from pure diplomacy at one end to a declaration of war at the other.” In other words, for Congress to understand itself as having any justifiable role in challenging executive security determinations, especially at moments of crisis, would be to undermine the strength that the executive requires in order to protect the nation. Conflict in this domain represents political degradation.

### Codifies restriction

**Padilla reversal proves- statutory restrictions on indefinite detention encroach on presidential power**

**Kaplan 2013**

[Lewis A. Kaplan, District Judge, 07/17/2013, Hedges v. Obama, <http://www.lawfareblog.com/wp-content/uploads/2013/07/Hedges.2d-Circuit-Opinion.pdf>, uwyo//amp]

2. Padilla **Padilla,** also an American citizen, was apprehended at Chicago’s O’Hare International Airport in May 2002 after allegedly receiving training from al-Qaeda in Afghanistan, becoming involved in a plan to detonate a “dirty bomb” here, and returning to the United States to conduct reconnaissance and facilitate attacks by al-Qaeda.21 **In December 2003—prior to Hamdi—this Court held that because Padilla was an American citizen arrested on domestic so**il away from a zone of combat**, his military detention violated the Non-Detention Act and could not be justified by the President’s Article II war powers.22 The Supreme Court reversed our decision** on procedural grounds on **the day it decided Hamdi** butdid not reach the lawfulness of Padilla’s detention.23 Following the Supreme Court’s reversal of our Padilla ruling, a new habeas petition was filed on his behalf. **The Fourth Circuit in 2005 concluded that Padilla was lawfully detained under the reasoning of Hamdi because it became known that he had been “armed and present in a combat zone during armed conflict between al Qaeda/Taliban forces and the armed forces of the United States**” while in Afghanistan prior to his return to the United States.24 Although Padilla had been apprehended in the United States, the Fourth Circuit concluded that Hamdi had not relied on the place of capture.**25 The government subsequently indicted Padilla and transferred him to civilian criminal custody. His petition for certiorari was denied.26**

**INFRINGES UPON PRESIDENTIAL AUTHORITY – SUPREME COURT RULINGS AND PRESUMPTION DOCTRINE PROVE**

**Taft 04**

[William H. Taft et al, Legal Advisor to the Department of States, Brief Respondents at 57, 124 S. Ct. 1494 (No. 03-334), March 2004, http://www.jenner.com/files/tbl\_s69NewsDocumentOrder/FileUpload500/170/respondent\_brief.pdf.]

In at least three key respects, **the force of the Court’s decision in Eisentrager has only grown** with time. 1. As explained above, the Court in **Eisentrager held that “nothing \* \* \* in our statutes” conferred jurisdiction over the habeas petition at issue**. 339 U.S. at 768. **Congress is presumed to be aware of this Court’s decisions**. It has legislated in the area of federal habeas jurisdiction on several occasions since 1950. **Yet Congress has never amended the habeas statutes to provide the jurisdiction that this Court held was absent in Eisentrager**. See Lorillard v. Pons, 434 U.S. 575, 580 (1978) (“Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change”); see also Keene Corp. v. United States, 508 U.S. 200, 212 (1993). At the same time, the current habeas statute is “very much the same” as the statute in effect at the time of Eisentrager. Pet. App. 18a; see 49-306 U.S. Br. at 2-3 n.1. Section 2241 of title 28 has been amended only once since 1950. In 1966, Congress added subsection (d), which relates to federal jurisdiction over claims filed on behalf of prisoners detained pursuant to state-court convictions. See 28 U.S.C. 2241 amendments; Act of Sept. 19, 1966, Pub. L. No. 89-590, 80 Stat. 1214. **Although Congress has narrowed federal habeas jurisdiction since 1950 over certain types of claims, see, e.g., Antiterrorism** and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 811, **it has never broadened habeas jurisdiction to cover** the sort of **claims at issue in Eisentrager**. There was, however, one failed legislative attempt to create such jurisdiction in the immediate aftermath of Eisentrager. In February 1951, a bill was introduced in Congress “[p]roviding for the increased jurisdiction of Federal courts in regard to the power to issue writs of habeas corpus in cases where officers of the United States are detaining persons in foreign countries, regardless of their status as citizens.” H.R. 2812, 82d Cong., 1st Sess. The bill provided “[t]hat the district court of the United States is given jurisdiction to issue writs of habeas corpus inquiring into the legality of any detention by any officer, agent, or employee of the United States, irrespective of whether the detention is in the United States or in any other part of the world, and irrespective of whether the person seeking the writ is a citizen or an alien.” Ibid. (emphasis added). The bill was never voted out of committee, much less enacted into law. Principles of separation of powers and stare decisis strongly counsel against revisiting Eisentrager and revising the habeas statutes in a manner that Congress itself considered and rejected. See Patterson v. McLean Credit Union, 491 U.S. 164, 175 n.1 (1989) (“As we reaffirm today, considerations of stare decisis have added force in statutory cases because Congress may alter what we have done by amending the statute.”); id. at 172; accord Hilton v. South Carolina Pub. Ry., 502 U.S. 197, 202 (1991) (“Congress has had almost 30 years in which it could have corrected our decision \* \* \* if it disagreed with it, and has chosen not to do so.”). **Since Eisentrager, this Court also has repeatedly emphasized its reluctance to presume that Congress intends a federal statute to have extraterritorial application.** As the Court observed in Sale v. Haitian Centers Council, Inc., 509 U.S. 155 (1993), a case involving a challenge to the United States’ treatment of Haitian refugees who were intercepted on the high seas and temporarily detained at Guantanamo, **“Acts of Congress normally do not have extraterritorial application unless such an intent is clearly manifested,” and “[t]hat presumption has special force when we are construing treaty and statutory provisions that may involve foreign and military affairs for which the President has unique responsibility.**” Id. at 188 (citing United States v. Curtiss- Wright Export Corp., 299 U.S. 304, 319 (1936)). **Those decisions bolster the Eisentrager Court’s refusal to interpret the federal habeas statutes to confer jurisdiction over challenges by aliens held outside the United States.**

**Presidential power is zero-sum- the branches compete**

**Barilleaux and Kelley 2010** [Ryan J. , Professor of Political Science at Miami, OH; and Christopher S. , Lecturer (Political Science) at Miami, OH, The Unitary Executive and the Modern Presidency, Texas A&M Press, p. P 196-197, 2010// wyo-sc]

In their book *The Broken Branch,* Mann and Ornstein paint a different view. They discuss a wider range of public policy areas than just uses of force. Their argument is that although party is important as a conditioning factor for times when Congress might try to restrain an aggressive or noncompliant executive, **there has** also **been a broad**er **degrading of institutional power that has allowed,** **in a zero-sum context**, **the president to expand executive power at the expense of** **Congress**. Mann and Ornstein thus posit that congressional willingness to subordinate its collective power to that of the president has occurred across domestic politics and foreign affairs. They argue that a variety of factors are at fault for this trend, including the loss of institutional identity, the willingness to abdicate responsibility to the president, the demise of "regular order," and most importantly that **Congress has lost its one key advantage as a legislative body—the decay of the deliberative process.** Thus, they do recognize that party politics has played an important role in the degrading of congressional power, but they see a larger dynamic at work, one that reaches beyond partisanship. While we agree with Howell and Pevehouse that Congress retains important mechanisms for constraining the president, we tend to agree with the Mann and Ornstein view that there has been a significant and sustained decline in Congress's willingness to use these mechanisms to challenge presidential power. This tendency has been more prevalent in foreign affairs but has occurred noticeably across the spectrum of public policy issues. Building from both of those perspectives, and others, we argue that it is helpful to understand the pattern of congressional complicity in the rise of presidential power by viewing Congress's aiding and abetting as the logical outcomes of a collective action problem.31 By constitutional design, **the legislative** branch **is in competition with the president for** institutional **power**, **yet Congress is less than** ideally **suited for** such **a political conflict**. **Congress's** comparative **disadvantage begins with its 535 "interests**" **that are** very **rarely aligned,** and if so, only momentarily. **Because** individual **reelection overshadows all** other **goals**, members of Congress naturally seek to take as much credit and avoid as much blame from their constituencies as possible.32 The dilemma this creates for members is how to use or delegate its collective powers in order to maximize credit and minimize blame in the making of public policy. Congress can choose to delegate power internally to committees and party leaders or externally to the executive branch. **One can conceptualize** the strategic situation of members of **Congress** **in** terms of **a prisoner's dilemma**.33 **If members cooperate** (that is, in Mann and Ornstein's parlance, if members identify with the institution), **they could** maintain and **advance Congress's** institutional **power**. **But they would have to bypass** some potential **individual payoffs** **that could come from defection**, **such as "running against Congress" as an electoral strategy**. **A stronger institution should make** all members of **Congress better off, but it** also **makes them responsible for policymaking**. **If members defect** from the institution, **they** thus seek to **maximize constituency interests** either by simply allowing power to fall by the wayside or by simply **delegating it to the president**. **As more** and more **members choose to defect** over time, **the "public good" of a strong Congress is not provided** for or maintained—and **Congress's** institutional **authority** **erodes and presidential power fills in the gap**. Why, in other words, is congressional activism so often "less than meets the eye," as Barbara Hinckley maintained in her book by that title? Or why has the ''culture of deference" that Stephen Weissman identified developed as it has?34 We argue that the collective action problem that exists in Congress leads to the development of these trends away from meaningful congressional stewardship of foreign policy andspending**.**

#### Even if Obama doesn’t use it – future administrations could proves risk of flex link

Cora Currier Staff Writer 12-7-2012 Primer: Indefinite Detention And The NDAA http://www.beachwoodreporter.com/politics/about\_indefinition\_detention\_a.php

Congress left that deliberately unspecified last year, essentially punting the issue to the courts. The language in the bill didn’t outright permit or prohibit indefinite detention of U.S. citizens. The act stated that it wouldn’t affect “existing law or authorities relating to the detention of United States citizens, lawful resident aliens of the United States, or any other persons who are captured or arrested in the United States.” But existing laws and authorities don’t actually give a definitive answer. There were cases involving U.S. citizens held by the military under President George W. Bush, but no precedents were established. The Supreme Court ruled only narrowly on the case of Yaser Hamdi, on the basis that he was captured on the battlefield in Afghanistan. (Hamdi was releasedand went to Saudi Arabia in 2004.)In a second case, Jose Padilla was transferred to a civilian court. (For more legal details, see these backgrounders from the blog Lawfare and the Congressional Research Service.) In signing the bill last year, Obama said that his administration “will not authorize the indefinite military detention without trial of American citizens.” Critics were quick to point out that this was a non-binding policy, and that the law left the door open for future administrations to interpret it differently.

#### Plan hamstrings the executives ability to detain terrorists in the US—that’s the end of your Chesney and wittes article read in the 1AC—their own evidence admits they link to the flex DA

### Syria

**[1.] Obama has built a solid basis for expanded Executive authority by pushing statutory and judicial limitations – Syria continues the trend**

Gordon **Silverstein**, Assistant Dean and Lecturer in Law at Yale Law School, and author of Law’s Allure: How Law Shapes, Constrains, Saves and Kills Politics, “Obama Just Increased Executive Power—Again,” New Republic, 9/4/2013

Bush-Cheney Administration alumni have risen from the ashes to denounce President Obama’s decision to force Congress to play its constitutional role in a decision to use military force in Syria. It is, they insist, yet another surrender of power by a feckless President presiding over the degradation of the Executive Branch itself, the empowerment of which was one of their central goals.¶ This is wrong on two dimensions: First, despite their aggressive efforts, **the Bush-Cheney administration left the Presidency weaker, and not stronger. And** second, far from degrading the power of the Executive, the **Obama** administration **has steadily, and significantly built up and exploited presidential power.¶** While it is too early to know if **Obama’s Syrian plan will continue this** trend, there are powerful reasons to think it will.¶ **The Bush-Cheney administration** famously asserted that when it came to foreign policy and national security, the President possessed nearly unlimited, autonomous, and unreviewable power. They insisted that the President could seize and hold prisoners at Guantanamo Bay; that the President alone could decide what and how much due process they were entitled to seek and that together with Congress, they could deny the independent federal courts, the third branch of government, the right to review their decisions. And they declared that the administration had the authority to redefine the meaning of torture.¶ All these **claims** and more were built on novel and poorly supported constitutional theories. **When** they were **challenged in Court, far from** enshrining the administration’s and **permanently shifting formal power to the Executive branch, these theories and claims were rejected, and** what had once been ambiguous and contested questions about **the allocation of power was settled, not by assigning it to the Executive but**, in fact, **by ruling that it belonged exclusively to Congress.¶** Jack Goldsmith, the head of the Office of Legal Counsel in the Bush-Cheney Justice Department, would later write that the administration advanced broad and unsupportable claims and arguments because “the President and Vice President wanted to leave the presidency stronger than they found it.” But, he concludes, “the approach they took achieved exactly the opposite effect. The central irony is that **people whose explicit goal was to expand presidential power have diminished it.”¶** Consider: In 2004 the Supreme Court ruled that the Executive could not independently order the detention of prisoners at Guantanamo, but could do so in this case because Congress had implicitly delegated this power to the President through the very open-ended language of the 2001 Authorization for the Use of Military Force. This was, in short, a power that now explicitly was assigned to Congress.¶ 2004 also was the year in which Goldsmith had to repudiate and withdraw a series of legal opinions his office had released—many authored by John Yoo—including the infamous memos ostensibly offering a legal rationale for the use of torture in interrogations.¶ The Bush-Cheney legal dream team failed again in 2006 in Hamdan v. Rumsfeld when the Supreme Court rejected their assertion that those same detainees could be tried by military commissions established by Executive Order. Commissions were possible, the Court ruled, but only if they were the produce of explicit congressional authorization. Another win for Congress. Another loss for fans of Executive prerogative.¶ But this dance was far from over. In Boumediene v. Bush in 2008, Justice Anthony Kennedy delivered a stinging blow to the Bush-Cheney project, ruling that prisoners at Guantanamo Bay had the right to file petitions for habeas corpus; that Congress and Congress alone could suspend habeas, but had to do so explicitly and could not simply forbid the Courts from hearing these appeals. A question that had been left in some shroud of ambiguity since Lincoln suspended the Great Writ in the Civil War was now clear: The power belongs to Congress alone.¶ John Yoo, one of the Bush-Cheney administration’s leading lawyers, realized in 2006 that the **Supreme Court would** actually **be a major barrier on their path to the constitutional fortification of Executive power.¶** After the Court handed the administration a defeat in the military commissions decision in Hamdan v. Rumsfeld, Yoo told the New York Times that the Justices were “attempting to suppress creative thinking.” The 2006 Hamdan decision, Yoo said, could undercut the entire legal edifice that had been built by the Bush lawyers.¶ What Yoo failed to acknowledge then (and fails to acknowledge even now) is that it was the Bush-Cheney overreach, their “creativity,” that had pressed even a conservative and friendly Supreme Court to undercut the administration’s claims to power, leaving the Executive weaker than it had been when Bush and Cheney walked into the White House in January 2001.¶ And Obama? While the Bush claims actually eroded and undercut Executive power which had built up steadily since World War II, it was the administration of Barack **Obama** that actually, quietly, **efficiently and with unerring focus has expanded, embedded and solidified Executive power.** And it has done so not by making “creative” constitutional claims, but instead **by steadily (and aggressively) building and exercising Executive power**—but doing so **by pressing existing statutes and judicial rulings, rather than unsupportable constitutional theories.**¶ **Turning to Congress now for formal authorization** to use military force **in Syria could** well be another example of this effort—and it may yet **have the same effect.¶** As I wrote in 2009, less than six months into the new administration, **in areas ranging from** the assertion of **the State Secrets privilege** in efforts **to** shut down lawsuits over warrantless **wiretapping and** extraordinary **rendition to** those concerning lawsuits over **detention and treatment in Guantanamo, and** the reach of habeas corpus to **Bagram** Air Force Base in Afghanistan, **Obama’s legal team was building up a far more impressive, far stronger and far more difficult to reverse set of precedents—winning in court after court—a trend that has continued ever since, including memos defending the legality of drone strikes** targeting U.S. citizens, **and** the sweeping authority for the **electronic surveillance** among many others. **Even** in their defense of **the use of force for limited strikes in Libya**, the Obama administration seemed to state that Congress must have a role in major military actions.¶ **These are aggressive claims. They are significant. They are new assertions of power—but they rest** far more squarely **on statutes, statutory interpretation and interpretations of judicial rulings than** did the military rationale offered by **Bush and Cheney**.¶ So—we have two models. The Bush-Cheney model, full of sound and fury which ultimately left the Executive branch weaker and not stronger, and the Obama model, which builds its case for executive power on the back of statutory authorization and judicial rulings.¶ And so, what are we to make of Obama’s decision to force Congress to play a role in a decision to use military force in Syria? Are the Bush apologists right? Is this—though a very difficult needle to thread—of a piece with Obama’s successful efforts to build executive power on a vastly firmer foundation than the constitutional “creativity” of the Bush legal team?¶ It may be, and here’s why:¶ Presidents in the modern era have turned to Congress for a fig-leaf of authorization before—in the 1964 Tonkin Gulf Resolution, or the 2001 Authorization for the Use of Military Force. But these were passed in the shadow of what was perceived to be a genuine emergency. There was no time for deliberation, no time to inspect the evidence. A vote for these authorizations was one that was all too easy for a regretful Congress to abandon as the wars they had ostensibly authorized dragged on and on.¶ This time there is time. Despite withering criticism from the Bush-Cheney apologists, Obama refused to call Congress back for an emergency session. Rather than giving them just hours to support the Commander in Chief in time of crisis, he has assured the nation that the military is confident that a few weeks will make no difference in our ability to achieve our military objectives.¶ A yes vote under this scenario means Congress fully shares the ownership of this policy (and its results). It means that whatever horror comes next in the Middle East, America’s policy there will be just that—America’s policy: The product of Congress acting together with the President, under the traditional rules and process laid out by the U.S. Constitution.¶ And if Congress votes no? Then we have one of two scenarios: The blame for the next atrocity, or the next deployment of chemical weapons in the Middle East or elsewhere is as much their heavy burden as it is Obama’s or, to prevent that, Congress will be compelled to actually deal with a serious policy issue and not simply vote a few dozen more times to repeal Obamacare.¶ **Turning to Congress in this fashion is** very much **in Obama’s self-interest**. But is also **in the national interest, and** quite possibly in **the best interest of those concerned about** preserving and **enhancing Executive power. Future Presidents** who will no doubt face complicated and risky security challenges, **will require the full force of a nation united behind them and** may now be more willing to **follow the precedent Obama has set**.

#### [2.] Syria clauses increase presidential powers-means presidents won’t have to consult anymore

Eppssep, 13

(“The Senate's Syria Resolution Has a Huge Secret Giveaway to the President”

[GARRETT EPPS](http://www.theatlantic.com/garrett-epps/)SEP former reporter for The Washington Post, is a novelist and legal scholar. He teaches courses in constitutional law and creative writing for law students at the University of Baltimore. Sept 6 2013, http://www.theatlantic.com/politics/archive/2013/09/the-senates-syria-resolution-has-a-huge-secret-giveaway-to-the-president/279421/) KH

The "Whereas" language in the draft AUMF gives significant support to the position that the President has some (uncertain) independent constitutional authority to use force in Syria, regardless of what Congress authorizes, and (perhaps) beyond what Congress authorizes. Since I believe that a unilateral presidential use of force in Syria would [go beyond all past OLC precedents](http://www.lawfareblog.com/2013/08/how-administration-lawyers-are-probably-thinking-about-the-constitutionality-of-the-syria-intervention-and-a-note-on-the-domestic-political-dangers-of-intervention/), the "Whereas" clause as currently drafted is especially important to the President's novel constitutional position.

Note that this astonishing language did not appear in [the administration's own draft authorization](http://www.cnn.com/2013/08/31/us/obama-authorization-request-text/index.html?hpt=hp_t1). Having been asked for broad authority already, the warriors on the Senate Foreign Relations Committee, for all their minimizing language, have in practice widened the White House's mandate -- to the point that, if it is adopted by Congress, neither Barack Obama nor any future president will likely have to come back for additional authority to fight against Syria and its chemical weapons anywhere in the region. And it will have written into law an explicit statement that the president doesn't need authorization to use force anywhere, any time he or she determines that "national security" demands it.

**[3.] Asking for authorization has made presidential war powers stronger-it is a political move designed to spread blame and he still believes he can act alone**

**Posner 13**

(Eric Andrew Posner is Kirkland and Ellis Professor of Law at the University of Chicago Law School. “Obama Is Only Making His War Powers Mightier”9-3-13 http://www.slate.com/articles/news\_and\_politics/view\_from\_chicago/2013/09/obama\_going\_to\_congress\_on\_syria\_he\_s\_actually\_strengthening\_the\_war\_powers.html//wyoccd)

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

#### [4.] Syria undermines Congress’ war powers

Eppssep, 13

(“The Senate's Syria Resolution Has a Huge Secret Giveaway to the President”

[GARRETT EPPS](http://www.theatlantic.com/garrett-epps/)SEP former reporter for The Washington Post, is a novelist and legal scholar. He teaches courses in constitutional law and creative writing for law students at the University of Baltimore. Sept 6 2013, http://www.theatlantic.com/politics/archive/2013/09/the-senates-syria-resolution-has-a-huge-secret-giveaway-to-the-president/279421/) KH

I have consulted my presidential-power gurus and there is widespread concern verging on horror. [Peter Shane](http://www.petermshane.com/), Jacob E. Davis and Jacob E. Davis II Chair in Law at the Ohio State University's Moritz College of Law, summarized for publication what I have been hearing from those I respect:

A Congressional resolution conceding, without limit, that the president "has authority under the Constitution to use force in order to defend the national security interests of the United States," is not only constitutionally wrong, but institutionally weird. As Stephen Griffin has documented, no president would have made such a strong claim before World War II, and no president since Truman -- whatever their rhetoric -- has committed U.S. forces to a major deployment abroad without congressional authorization. This "whereas" clause is contrary to the Constitution's original meaning, contrary to the War Powers Resolution, subversive of Congress's proper role in war powers decision making, and wholly unnecessary to frame the operational provisions of an AUMF on Syria..

### Ineffective

#### Executives won’t make emergencies up—Public and other branches will check

Posner and Vermeule 2010 [Eric A. , Professor of Law at the University of Chicago Law School and Editor of The Journal of Legal Studies; Adrian , Harvard Law Professor, The Executive Unbound: After the Madisonian Republic, Oxford Press, p. 208//wyo-sc]

What, then, prevents the executive from declaring spurious emergencies and using the occasion to consolidate its power—or for that matter, consolidating its power during real emergencies so that it retains that power even after normal times return? In many countries, notably in Latin America, presidents have done just that.3 Citing an economic crisis, or a military threat, or congressional gridlock, executives have shut down independent media, replaced judges with their cronies, suppressed political opposition, and ruled by dictate. Could this happen in the United States? The answer is, very probably, no. The political check on the executive is real. Declarations of emergency not justified by publicly visible events would be met with skepticism. Actions said to be justified by emergency would not be approved if the justification were not plausible. Separation of powers may be suffering through an enfeebled old age, but electoral democracy is alive and well.

#### This evidence is comparative- history denies errors with regard to presidential swiftness

Nzelibe & Yoo 06

[Jide Nzelibe and John C. Yoo. , Yoo is a professor of law at the University of California at Berkeley School of Law , , Rational war and constitutional design.(Symposium on Executive Power).

Yale Law Journal 115.9 (July 2006): p2512(30), uwyo//amp]

This Essay has sought to introduce a more sophisticated functional perspective to the war powers debate, without focusing on the normative question of what types of war the United States should fight. Previous arguments had raised a conflict between formalism and functionalism. Formalist claims in favor of a requirement that Congress pre-authorize hostilities are no longer as compelling as they once seemed. We believe that the better reading of formalist sources is that the Constitution creates a flexible system for malting war. If the formalist debate over war has reached a stalemate, then functionalist arguments only gain in importance. Functional analysis of war powers, however, has been fairly rudimentary. It has assumed that a Congress-first approach would slow down decision-malting regarding war, which would benefit the nation by reducing entry into imprudent wars. This assumption, however, ignores the possibility that Congress might not only reduce Type I errors, but might also increase Type II errors. A casual review of American history does not support the conclusion that congressional participation reduces either Type I or II errors when compared with a system of unilateral presidential initiative in war. A better functional approach views the war powers question as a principal-agent problem. The executive branch bears certain advantages in terms of speed, unity of purpose, and secrecy in launching wars; while agency costs may certainly arise, it is not clear that congressional participation ex ante would significantly reduce them. Congressional participation, however, while unwise to establish as a constitutional rule, may nonetheless benefit the nation in helping it to avoid costly wars. This occurs, however, not because congressional participation slows down the progress toward war, but because it allows the President to engage in costly signaling that could promote a negotiated settlement with a potential enemy. Such a dynamic would not make a significant difference in regard to rogue nations or international terrorist organizations that lack the proper incentives to appreciate such signals or that are uninterested in reaching a settlement. In those cases, the benefits of relying upon executive speed and unity outweigh any benefits that might arise from congressional participation.