# Weber Round 3

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#### We meet – contextual ev

Guiora, 12 [Amos, Professor of Law, SJ Quinney College of Law, University of Utah, author of numerous books dealing with military law and national security including Legitimate Target: A Criteria-Based Approach to Targeted Killing, “Drone Policy: A Proposal Moving Forward,” <http://jurist.org/forum/2013/03/amos-guiora-drone-policy.php>]

To re-phrase, this strict scrutiny test seeks to strike a balance by enabling the state to act sooner but subjecting that action to significant restrictions. This paradigm would be predicated on narrow definitions of imminence and legitimate targets. Rather than enabling the consequences of the DOJ memo, the strict scrutiny test would ensure implementation of person-specific operational counterterrorism. That is the essence of targeted killing conducted in accordance with the rule of law and morality in armed conflict.

#### “Statutory restrictions” can mandate judicial review, but are *enacted* by congress

Mortenson 11 (Julian Davis Assistant Professor, University of Michigan Law School, “Review: Executive Power and the Discipline of History Crisis and Command: The History of Executive Power from George Washington to George W. Bush John Yoo. Kaplan, 2009. Pp vii, 524,” Winter 2011, University of Chicago Law Review 78 U. Chi. L. Rev. 377)

At least two of Yoo's main examples of presidential power are actually instances of presidential deference to statutory restrictions during times of great national peril. The earliest is Washington's military suppression of the Whiskey Rebellion (III, pp 66-72), a domestic disturbance that Americans viewed as implicating adventurism by European powers and threatening to dismember the new nation. n60 The Calling Forth Act of 1792 n61 allowed the President to mobilize state militias under federal control, but included a series of mandatory procedural checks--including judicial [\*399] approval--that restricted his ability to do so. n62 Far from defying these comprehensive restrictions at a moment of grave crisis, Washington satisfied their every requirement in scrupulous detail. He issued a proclamation ordering the Whiskey Rebels to disperse. n63 When they refused to do so, he submitted a statement to Justice James Wilson of the Supreme Court describing the situation in Pennsylvania and requesting statutory certification. n64 Only when Wilson issued a letter precisely reciting the requisite statutory language (after first requiring the President to come back with authentication of underlying reports and verification of their handwriting n65) did Washington muster the troops. n66 Washington's compliance with statutory restrictions on his use of force continued even after his forces were in the field. Because Congress was not in session when he issued the call-up order, Washington was authorized by statute to mobilize militias from other states besides Pennsylvania--but only "until the expiration of thirty days after the commencement of the ensuing [congressional] session." n67 When it became clear that the Pennsylvania campaign would take longer than that, Washington went back to Congress to petition for extension of the statutory time limit that would otherwise have required him to [\*400] disband his troops. n68 Far from serving as an archetypal example of presidential defiance, the Whiskey Rebellion demonstrates exactly the opposite. FDR's efforts to supply the United Kingdom's war effort before Pearl Harbor teach a similar lesson. During the run-up to America's entry into the war, Congress passed a series of Neutrality Acts that supplemented longstanding statutory restrictions on providing assistance to foreign belligerents. Despite these restrictions, FDR sent a range of military assistance to the future Allies. n69 Yoo makes two important claims about the administration's actions during this period. First, he claims the administration asserted that "[a]ny statutory effort by Congress to prevent the President from transferring military equipment to help American national security would be of 'questionable constitutionality'" (III, p 300). Second, he suggests that American military assistance in fact violated the neutrality statutes (III, pp 295-301, 310, 327-28).

#### In the area of means a certain scope

Elizabeth Miura 12, China Presentation, prezi.com/tccgenlw25so/chin165a-final-presentation/

"in the area of" refers to a certain scope

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

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

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

### CMR DA

#### CMR Low – Military and Civilian officials ignore each other, fight in public, and leak stories to the media

Zenko 9-25 [MICAH ZENKO, Douglas Dillon fellow in the Center for Preventive Action at the Council on Foreign Relations; worked for Harvard’s Kennedy School of Government, at Congressional Research Service, and State Department's Office of Policy Planning, “The Soldier and the State Go Public: Civil-military relations haven't been this bad in decades,” SEPTEMBER 25, 2013, <http://www.foreignpolicy.com/articles/2013/09/25/the_soldier_and_the_state_go_public>, wyo-sc]

Washington has found itself in a crisis over the proper relationship between senior civilian and military officials. This has played out in recent op-eds ("[**A War the Pentagon Doesn't Want**](http://articles.washingtonpost.com/2013-09-05/opinions/41798832_1_u-s-army-war-college-syria-next-war)") and articles ("[**Some U.S. Military Officers Not Happy With Syrian War Prep**](http://swampland.time.com/2013/09/09/mal-shaping-the-syrian-battlefield/#ixzz2fYJlVC8Y)"), which have been countered by other op-eds ("[**No Military Consensus on Syria**](http://www.theatlantic.com/politics/archive/2013/09/it-isnt-the-militarys-place-to-weigh-in-on-the-syria-debate/279759/)" and "[**U.S. War Decisions Rightfully Belong to Elected Civilian Leaders, Not the Military**](http://articles.washingtonpost.com/2013-09-12/opinions/42006453_1_u-s-army-war-college-civilian-control-consensus)"). It's a tension that shows little sign of abating, regardless of how the Syria issue plays out: Underlying forces seem guaranteed to make it worse.¶ Every administration has its share of disputes with the Pentagon, but when it comes to where and how U.S. armed forces will be used, civil-military relations have not been this tense and precarious since the end of the Cold War. Military officers are increasingly willing to express their personal opinions about interventions, while civilian policymakers are increasingly willing to disregard professional military advice. Worse, a growing number of individuals from both "sides" seem unaware of the appropriate civilian and military roles and relationships, and their conflicts play out in public more prominently and immediately than ever before.¶ For example, senior civilian officials have strongly contested Gen. Martin Dempsey's doubts about intervening in the Syrian civil war. The *New York Times*[**reported**](http://www.nytimes.com/2013/09/14/us/politics/syria-crisis-underlines-pentagons-move-to-the-back-seat.html?pagewanted=all) last week that Dempsey, the chairman of the Joint Chiefs of Staff, is "adamant that he not influence the public debate about whether to strike Syria," but Obama administration civilians and Capitol Hill staffers will tell you that the general has emphasized only the risks and costs associated with intervening. "They," meaning the military, "just don't want to do it" is a common refrain. Sen. John McCain has even characterized Dempsey's assessment as "beyond anything that any rational military thinker that I know would ever contemplate," and earlier this month he [said](http://www.thedailybeast.com/articles/2013/09/03/dempsey-obama-s-delay-impacts-syria-strike.html): "I really don't pay a lot of attention to General Dempsey anymore. With me he just doesn't have any credibility."¶ The Pentagon has taken to selectively leaking its strong opposition to intervening to journalists and think tank analysts. (I have not met a senior officer who supports a direct military role in Syria.) Similarly, a certain State Department bureau that covers the territory including Syria, as well as those who work closely with Secretary John Kerry, will tell anyone who listens about their enthusiasm for no-fly zones or airstrikes.

#### And multiple issues thump the disad—political change, demographic and economic pressure and allies

Munson, 2012

[Peter, Peter J. Munson is a Marine officer, author, and Middle East specialist. He is the author of War, Welfare, and Democracy: Rethinking America's Quest for the End of History (Potomac, 2013) and Iraq in Transition: The Legacy of Dictatorship and the Prospects for Democracy (Potomac, 2009) and . A frequent contributor to multiple journals and blogs, including his own, he was also the Editor of the Small Wars Journal from January 2012 to June 2013, A Caution on Civil-Military Relations, 11-12-12, http://smallwarsjournal.com/jrnl/art/a-caution-on-civil-military-relations] /Wyo-MB

In this it is important to recognize that our political institutions are undergoing a crisis of their own. Trust in government is at its lowest ebb in recent history. Political polarization is at its highest mark since the Great Depression. Demographic and economic pressures will multiply in coming years not only on the US, but more significantly on its key allies in Europe. The world will see a significant transformation of its power structure in the coming decades, all of which will put great strain on the country’s civil-military relations. Thus, it is of critical importance that we discuss, address, and correct any flaws in this dynamic now before they reach crisis proportions in the years to come.

#### Review inevitable – now is better for flexibility

Wittes 8 (Benjamin Wittes is a Senior Fellow in Governance Studies at the Brookings Institution, where he is the Research Director in Public Law, “The Necessity and Impossibility of Judicial Review,” https://webspace.utexas.edu/rmc2289/National%20Security%20and%20the%20Courts/Law%20and%20the%20Long%20War%20%20Chapter%204.pdf)

WE COME, then, to the question of what judicial review ought to look like in the war on terror if one accepts that it should exist more robustly than the administration prefers but should not be of an unbridled or general nature, as human rights advocates wish to see. The answer is conceptually simple, though devilishly complicated in operation: Judicial review should be designed for the relatively narrow purpose of holding the executive to clearly articulated legislative rules, not to the often vague standards of international legal instruments that have not been implemented through American law. Judges should have an expanded role in the powers of presidential preemption in the antiterrorism arena, for the judiciary is essential to legitimizing the use of those powers. Without them, the powers themselves come under a barrage of criticism which they cannot easily withstand. And eventually the effort to shield them from judicial review fails, and the review that results from the effort is more intrusive, more suspicious, and less accommodating of the executive's legitimate need for operational flexibility. Judges, in other words, should be a part of the larger rules the legislature will need to write to govern the global fight against terrorism. Their role within these legal regimes will vary-from virtually no involvement in cases of covert actions and overseas surveillance to extensive involvement in cases of long-term detentions. The key is that the place of judges within those systems is not itself a matter for the judges to decide. The judiciary must not serve as the designer of the rules.

#### Judicial review of the military is critical to balanced civil-military relations- Congress and the Executive cannot check themselves

Gilbert, Lieutenant Colonel, 98 (Michael, Lieutenant Colonel Michael H. Gilbert, B.S., USAF Academy; MSBA, Boston University; J.D., McGeorge School of Law; LL.M., Harvard Law School. He is a member of the State Bars of Nebraska and California. “ARTICLE: The Military and the Federal Judiciary: an Unexplored Part of the Civil-Military Relations Triangle,” 8 USAFA J. Leg. Stud. 197, lexis)

The legislative, executive, and judicial branches of the federal government comprise and form a triangle surrounding the military, each branch occupying one side of the civil-military triangle. Commentators have written countless pages discussing, analyzing, and describing the civil-military relationship that the Congress and the President have with the armed forces they respectively regulate and command. Most commentators, however, have neglected to consider the crucial position and role of the federal judiciary. This article examines the relationship between the judiciary and the military in the interest of identifying the role that the judiciary, specifically the United States Supreme Court, plays in civil-military relations. Without an actual, meaningful presence of the judiciary as a leg of the civil-military triangle, the triangle is incomplete and collapses. In its current structure, the judiciary has adopted a non-role by deferring its responsibility to oversee the lawfulness of the other two branches to those branches themselves. This dereliction, which arguably is created by the malfeasance of the United States Supreme Court, has resulted in inherent inequities to the nation, in general, and to service members, in particular, as the federal courts are reluctant to protect even basic civil rights of military members. Judicial oversight is one form of civilian control over the military; abrogating this responsibility is to return power to the military hierarchy that is not meant to be theirs. [\*198] Under the United States Constitution, Congress has plenary authority over the maintenance and regulation of the armed forces, and the President is expressly made the Commander-in-Chief of the armed forces. The unwillingness of the Court to provide a check and balance on these two equal branches of the federal government creates an area virtually unchallengeable by the public. As a result, a large group of people, members of the military services, lack recourse to address wrongs perpetrated against them by their military and civilian superiors. Ironically, the very men and women dedicating their lives to protect the U.S. Constitution lack many of the basic protections the Constitution affords everyone else in this nation. The weakness in the present system is that the Supreme Court has taken a detour from the Constitution with regard to reviewing military issues under the normally recognized requirements of the Constitution. The federal judiciary, following the lead of the Supreme Court, has created de facto immunity from judicial interference by those who seek to challenge policy or procedure established by the other two branches and the military itself. When the "Thou Shalt Nots" of the Amendments to the Constitution compete with the necessities of the military, the conflict is resolved in favor of the military because it is seen as a separate society based upon the constitutionally granted authority of Congress to maintain and regulate the armed forces. 1 Essentially, the Court permits a separate world to be created for the military because of this regulation, distinguishing and separating the military from society. 2 The Court needs to reexamine their almost complete deference on military matters, which is tantamount to an exception to the Bill of Rights for matters concerning members of the military. Unless the Court begins to provide the oversight that is normally dedicated to many other areas of law fraught with complexity and national importance, judicial review of the military will continue to be relegated to a footnote in the annals of law. Combined with the downsizing and further consequent decline of interaction between the military and general society, 3 this exile from the protection of the Constitution could breed great injustices within the military. Perhaps even more importantly, the military might actually begin to believe that they are indeed second-class citizens, separate from the general [\*199] population, which could create dire problems with civil-military relations that are already the subject of concern by many observers. 4

#### CMR resilient- Public is lenient and understanding

Hooker 11

[Colonel Richard D. Hooker, Graduated from the National War College in 2003 and is currently assigned to the Army Staff. He previously commanded 2/505 Parachute Infantry Regiment in the 82d Airborne Division and has served in the Office of the Chairman of the Joint Chiefs and with the National Security Council. Colonel Hooker holds a Ph.D. from the University of Virginia in international relations and is a member of the Council on Foreign Relations. “Soldiers of the State: Reconsidering American Civil-Military Relations”, Parameters41.4 (Winter 2011/2012): 1-14., Proquest, \\wyo-bb]

Though the primary function of the military is often described as "the application of organized violence," the military's conservative and group-centered bias is based on something even more fundamental. In the combat forces which dominate the services, in ethos if not in numbers, the first-order challenge is not to achieve victory on the battlefield. Rather it is to make the combat soldier face his own mortality. Under combat conditions the existence of risk cannot be separated from the execution of task. The military culture, while broadly conforming to constitutional notions of individual rights and liberties, therefore derives from the functional imperative and by definition values collective over individual good.¶ The American public intuitively understands this, as evidenced by polling data which demonstrate conclusively that a conservative military ethic has not alienated the military from society.13 On the contrary, public confidence in the military remains consistently high, more than a quarter century after the end of the draft and the drawdown of the 1990s, both of which lessened the incidence and frequency of civilian participation in military affairs. There is even reason to believe that the principal factors cited most often to explain the existence of the "gap"-namely the supposed isolation of the military from civilian communities and the gulf between civilian and military values-have been greatly exaggerated.¶ The military "presence" in civil society is not confined to serving members of the active-duty military. Rather, it encompasses all who serve or have served, active and reserve. For example, millions of veterans with firsthand knowledge of the military and its value system exist within the population at large. The high incidence of married service members and an increasing trend toward off-base housing mean that hundreds of thousands of military people and their dependents live in the civilian community. Reserve component installations and facilities and the reserve soldiers, sailors, airmen, and marines who serve there bring the military face to face with society every day in thousands of local communities across the country. Commissioned officers, and increasingly noncommissioned officers (NCOs), regularly participate in civilian educational programs, and officer training programs staffed by active, reserve, and retired military personnel are found on thousands of college and high school campuses. Military recruiting offices are located in every sizable city and town. Many military members even hold second jobs in the private sector. At least among middle-class and working-class Americans, the military is widely represented and a part of everyday life.14¶ Just as the military's isolation from society is often overstated, differences in social attitudes, while clearly present, do not place the military outside the mainstream of American life. The dangers posed by a "values gap" are highly questionable given the wide disparity in political perspectives found between the east and west coasts and the American "heartland"; between urban, suburban, and rural populations; between north and south; between different religious and ethnic communities; and between social and economic classes. It may well be true that civil society is more forgiving than the military for personal failings like personal dishonesty, adultery, indebtedness, assault, or substance abuse. But society as a whole does not condone these behaviors or adopt a neutral view. To the extent that there are differences, they are differences of degree. On fundamental questions about the rule of law, on the equality of persons, on individual rights and liberties, and on civilian control of the military in our constitutional system, there are no sharp disagreements with the larger society. Indeed, there is general agreement about what constitutes right and wrong behavior.15 The difference lies chiefly in how these ideals of "right behavior" are enforced. Driven by the functional imperative of battlefield success, the military as an institution views violations of publicly accepted standards of behavior more seriously because they threaten the unity, cohesion, or survival of the group.16 Seen in this light, the values "gap" assumes a very different character.¶ To be sure, sweeping events have altered the civil-military compact. The advent of the all-volunteer force, the defeat in Vietnam, the end of the Cold War, the drawdown of the 1990s, the impact of gender and sexual orientation policies, and a host of other factors have influenced civil-military relations in important ways. The polity no longer sees military service as a requirement of citizenship during periods of national crisis, or a large standing military as a wartime anomaly. Despite such fundamental changes, over time public support for the military and its values has remained surprisingly enduring, even as the level of public participation in military affairs has declined.