**Aff Answers**

**2ac no spillover**

**No spillover --- esp given partisan Congress**

**Nzelibe 11** [Jide Nzelibe, Professor of Law, Northwestern University Law School. PARTISAN CONFLICTS OVER PRESIDENTIAL AUTHORITY. WILLIAM AND MARY LAW REVIEW, Vol. 53:389. 2011]

This Essay argues that politicians may sometimes **strategically manipulate** the contours of the **President’s** constitutional **authority** in order to achieve **partisan objectives**. At first glance, the notion that societal groups may ever stake out conflicting visions of presidential authority seems puzzling. After all, it is difficult to envision how any view of presidential authority can systematically confer one-sided benefits on any partisan or interest group, because presumably each group will sometimes lose and gain from any particular constraint on presidential authority. Thus, given the implicit veil of ignorance that underpins the separation of powers, one may think that the incentives of judges and elected officials to embrace visions of presidential authority that advance the specific objectives of any political party will be blunted. Unsurprisingly, much of the contemporary scholarship on presidential power has **ignored partisan factors** and has instead focused on how incentives **inherent** in the **institutional nature** of the various branches of government shape preferences for expansive presidential authority.2

This Essay suggests a **contrary view**: if certain conditions hold, partisan power holders can often calculate how an **expansive or narrow** view of presidential authority over **discrete issues** is likely to affect their electoral and ideological objectives. More specifically, staking out partisan positions on the allocation of presidential authority is likely to be rational when such authority can be **unbundled** on an **issue-by-issue basis**.3 Under these conditions, parties are likely to **favor** a vision of **presidential authority** that will **enable them** to **carry out** those **issues** in which **they have** an **electoral advantage** over the opposition, but that make it **more difficult** for the **opposition** to **carry out** its favored **issues**. For instance, when the presidential authority to negotiate human rights **treaties** can be effectively **unbundled** from the **war**-making **power**, Republicans may prefer more **constraints** on the President’s treatymaking authority in human rights, but less on his **war**-making authority.4 By contrast, Democrats or left-leaning constituencies will likely adopt the opposite set of preferences regarding presidential authority on war and human rights. Similarly, Democratic administrations may be more willing to indulge a greater role for courts in adjudicating human rights controversies even at the expense of the President’s interpretive discretion over international law, whereas Republican administrations are more likely to view such adjudications as interfering with the President’s flexibility to conduct foreign affairs.5

**2ac at: drones**

**No drone prolif impact**

**Horowitz, et al, 16**—associate professor of political science and associate director of Perry World House at the University of Pennsylvania (Michael, with Sarah Kreps and Matthew Fuhrman, “Separating Fact from Fiction in the Debate over Drone Proliferation,” International Security, Vol. 41, No. 2 (Fall 2016), pp. 7–42, dml)

This article assesses the consequences of current-generation drone proliferation, concluding that both of the above perspectives are misguided. Examining the effects of UAVs in six different contexts—counterterrorism, interstate conflict, crisis onset and deterrence, coercive diplomacy, domestic control and repression, and use by nonstate actors for the purposes of terrorism—we show that, although current-generation drones will introduce **some unique capabilities** into conflicts around the world, they are **unlikely to produce the dire consequences** that some analysts fear. In particular, drone proliferation carries potentially significant consequences for counterterrorism operations and domestic control in authoritarian regimes. Drones lower the costs of using force by eliminating the risk that pilots will be killed, making some states— especially democracies, which may be especially casualty sensitive—more likely to carry out targeted attacks against suspected militants. In addition, using drones could provide autocratic leaders with a new tool to bolster their domestic regime security.8

Yet, in general, current-generation drones are likely to have a **minimal impact** on interstate relations. Armed or advanced unarmed drones are **unlikely to provoke international crises** or **incite regional instability**. In addition, current-generation drones offer **little utility for coercion** against other governments. Contrary to the conventional wisdom, moreover, drones might **enhance security** in disputed border regions by providing states with a **greater ability to monitor contested regions** persistently at lower cost. Monitoring can help to **reassure states** that potential adversaries are not attempting to change the status quo through force. The limited significance of current-generation drones in interstate contexts beyond monitoring stems from a key technological limitation: drones currently in operation are vulnerable to air defense systems, so they are much less likely to be effective when operating in hostile airspace.9

**1ar drones**

**Drones inevitable, no impact, they deter**

**Horowitz, et al, 16**—associate professor of political science and associate director of Perry World House at the University of Pennsylvania (Michael, with Sarah Kreps and Matthew Fuhrman, “DRONE PROLIFERATION MATTERS, BUT NOT FOR THE REASONS YOU THINK,” <https://warontherocks.com/2016/12/drone-proliferation-matters-but-not-for-the-reasons-you-think/>, dml)

With President-elect Donald Trump poised to become commander-in-chief, a number of debates have arisen about the legacies that will be left behind by his predecessor and the ways those legacies shape the options available to Trump. Last month in an interview, President Obama outlined five moments that he believed defined his presidency. One of them involved the use of drones to track and kill suspected militants. In a world where a U.S. president has an arsenal of drones at his or her disposal, Obama recalled, America will soon find itself with a president who can carry on perpetual wars all over the world, “and a lot of them covert, without any accountability or democratic debate.”

The notion that drones make it easier for leaders to use military force has raised questions about the proliferation of drones globally, from groups like Human Rights Watch concerned about illicit uses of force to debates in the U.S. government about how to balance proliferation concerns and export policy choices. Discussion of these issues is understandable — the United States is perceived as having been relatively unconstrained with its use of drones around the world. President Obama stated that drones have become a ubiquitous ingredient in our strategy for combatting counterterrorism and are likely to remain so.

What would the world look like if drones played a similarly large role for all modern militaries? This is an important question not just because of the recent U.S. election – which produced a president-elect who will begin formulating a vision for American foreign policy – but also global trends.

Almost a dozen countries now have armed drones. Countries like China and Israel have become major drone exporters. Armed drones are becoming an increasingly mainstream capability.

There are two major schools of thought on the impact of drone proliferation. The first, primarily made up of skeptics about drone strikes outside the U.S. government, suggests that the consequences would be dismal. This view holds that other countries would extrapolate from the U.S. experience and be more inclined to carry out drone strikes of their own, leading to enormous ripple effects – especially in East Asia and the Middle East.

Another perspective, however, is somewhat more sanguine about drone proliferation. Drones, according to this view, do not change the decision-making calculus for states contemplating the use of force. As former Director of Central Intelligence and Secretary of Defense Leon Panetta stated in his memoirs

To call our campaign against Al Qaeda a “drone program” is a little like calling World War I a “machine gun program.” Technology has always been an aspect of war…what is most crucial is not the size of the missile or the ability to deploy it from thousands of miles away” [but how the munitions are used].

In a newly-published article in International Security, we evaluate these two competing perspectives. It turns out, the reality is more context-specific than either side in the drone debate has acknowledged. We examine the consequences of current-generation drone proliferation in six different contexts — counterterrorism, interstate conflict, crisis onset and deterrence, coercive diplomacy, domestic control and repression, and use by non-state actors for the purposes of terrorism – to see how the increasing use of drones might change military outcomes, or even the global balance of power.

Counterterrorism: The operational advantages of drones, including their precision and low risk to their operators, have made drones invaluable to the United States for counterterrorism, and they will likely prove useful to other countries for similar purposes. Drones are effective here in part because regions where counterterrorism strikes are most active, whether Gaza, the tribal regions of Pakistan, or Yemen, lack sophisticated air defenses that are otherwise quite lethal against drones that fly low and slow.

Interstate conflict: Because of their vulnerability to anti-air defenses, current-generation drones are likely to have a minimal impact on interstate relations (or internationalized disputes like the one against the Islamic State). Indeed, as Micah Zenko and Sarah Kreps point out, drones will be unable to take and hold foreign territory because of limits to current drones’ range, speed, and lethality. And because they, like other forms of airpower, cannot take and hold territory on their own.

Crisis onset and deterrence: There are reasons to think that drones could be a stabilizing force in some types of border disputes, especially those among interstate rivals. Drones could give both sides in a crisis real-time information about the situation at lower cost than inhabited intelligence, surveillance, and reconnaissance (ISR) assets – especially for countries without the extensive ISR capabilities of the United States – and with lower risk to personnel, than is possible at present. Similarly, drones could decrease the ability of potential aggressors to conduct surprise attacks. With the aid of surveillance drones, potential targets may be more likely to see attacks coming and prepare accordingly. Drones, then, may be useful for deterrence by denial: If the potential aggressor is dependent on the element of surprise, but knows that drones flying near the border would give the other side adequate notice, it may be less likely to launch an attack.

**Drone collisions/crashes don’t escalate**

**Horowitz, et al, 16**—associate professor of political science and associate director of Perry World House at the University of Pennsylvania (Michael, with Sarah Kreps and Matthew Fuhrman, “Separating Fact from Fiction in the Debate over Drone Proliferation,” International Security, Vol. 41, No. 2 (Fall 2016), pp. 7–42, dml)

The concerns outlined above certainly have merit. Still, it is important not to overstate the risk of drone deployments for regional or international stability. For example, none of the aforementioned incidents led to armed military engagement. On the contrary, emerging norms regarding the consequences of shooting down a drone, though clearly still in the early stages, suggest that states distinguish between the shooting down of manned and unmanned systems. Thus, even if there is an accident and a drone is brought down, it is less likely to trigger a crisis or military escalation than those in the pessimistic camp imply. For example, when Pakistan shot down an Indian surveillance drone in the Kashmir region in the summer of 2015 that it said strayed beyond the line of control, India did not escalate the long-simmering conflict to war.106 Similarly, compare the muted international discussion when Turkey shot down a drone flying on its border with Syria in the fall of 2015 with the diplomatic crisis between Turkey and Russia that erupted when Turkey brought down a manned SU-24.107 Countries appear to know that opponents will value drones differently from manned aircraft, and behave accordingly. Thus, drones carrying out surveillance and reconnaissance missions need not be destabilizing. This may not always be the

**2ac flex good**

**CP’s judicial micro-management causes extinction and there’s no impact to the NB**

**Blomquist** **10** [Robert, spring, Valparaiso university law review, “The Jurisprudence Of American National Security Presiprudence”, <http://scholar.valpo.edu/cgi/viewcontent.cgi?article=1063&context=vulr>]

Supreme Court Justices—along with legal advocates—need to conceptualize and prioritize big theoretical matters of institutional design and form and function in the American national security tripartite constitutional system. By way of an excellent introduction to these vital issues of legal theory, the Justices should pull down from the library shelf of the sumptuous Supreme Court Library in Washington, D.C. (or more likely have a clerk do this chore) the old chestnut, The Legal Process: Basic Problems in the Making and Application of Law by the late Harvard University law professors Henry M. Hart and Albert M. Sacks.7 Among the rich insights on institutional design coupled with form and function in the American legal system that are germane to the Court’s interpretation of national security law-making and decision-making by the President are several pertinent points. First, “Hart and Sacks’ intellectual starting point was the interconnectedness of human beings, and the usefulness of law in helping us coexist peacefully together.”8 By implication, therefore, the Court should be mindful of the **unique** constitutional **role** played by the POTUS [president of the United States] in **preserving peace** and should prevent imprudent judicial actions that would **undermine** American **national security.** Second, Hart and Sacks, continuing their broad insights of social theory, noted that legal communities establish “institutionalized[] procedures for the settlement of questions of group concern”9 and regularize “different procedures and personnel of different qualifications . . . appropriate for deciding different kinds of questions”10 because “every modern society differentiates among social questions, accepting one mode of decision for one kind and other modes for others—e.g., courts for ‘judicial’ decisions and legislatures for ‘legislative’ decisions”11 and, extending their conceptualization, an executive for “executive” decisions.12 Third, Professors Hart and Sacks made seminal theoretical distinctions between rules, standards, principles, and policies.13 While all four are part of “legal arrangements in an organized society,”14 and all four of these arrangements are potentially relevant in judicial review of presidential national security decisions, principles and policies15 **are of special concern** because of the sprawling, inchoate, **and rapidly changing** nature of national **security threats** and the **imperative** of hyper-energy in the Executive branch **in responding** to these threats.16 The Justices should also consult Professor Robert S. Summers’s masterful elaboration and amplification of the Hart and Sacks project on enhancing a flourishing legal system: the 2006 opus, Form and Function in a Legal System: A General Study. 17 The most important points that Summers makes that are relevant to judicial review of American national security presiprudence are three key considerations. First, a "conception of the overall form of the whole of a functional [legal] unit is needed to serve the founding purpose of defining, specifying, and organizing the makeup of such a unit so that it can be brought into being and can fulfill its own distinctive role"18 in synergy with other legal units to serve overarching sovereign purposes for a polity. The American constitutional system of national security law and policy should be appreciated for its **genius** in making the POTUS the national security sentinel with vast, but not unlimited, powers to protect the Nation from **hostile**, potentially **catastrophic**, **threats**. Second, "a conception of the overall form of the whole is needed for the purpose of organizing the internal unify of relations between various formal features of a functional [legal] unit and between each formal feature and the complementary components of the whole unit."19 Thus, Supreme Court Justices should have a thick understanding of the form of national security decision- making conceived by the Founders to center in the POTUS; the ways the POTUS and Congress historically organized the processing of national security through institutions like the National Security Council and the House and Senate intelligence committees; and the ways the POTUS has structured national security process through such specific legal forms as Presidential Directives, National Security Decision Directives, National Security Presidential Decision Directives, Presidential Decision Directives, and National Security Policy Directives in classified, secret documents along with typically public Executive Orders.20 Third, according to Summers, "a conception of the overall form of the whole functional (legal] unit is needed to organize further the mode of operation and the instrumental capacity of the [legal] unit."21 So, the Supreme Court should be aware that **tinkering** with **national security decisions of the POTUS** [president of the United States] —unless clearly necessary to counterbalance an indubitable violation of the text of the Constitution—may lead to **unforeseen negative** **second-order** **consequences** in the ability of the POTUS (with or without the help of Congress) to preserve, protect, and **defend the Nation**.22 [\*886] B. Geopolitical Strategic Considerations Bearing on Judicial Interpretation Before the United States Supreme Court Justices form an opinion on the legality of national security decisions by the POTUS, they should immerse themselves in judicially-noticeable facts concerning what national security expert, Bruce Berkowitz, in the subtitle of his recent book, calls the "challengers, competitors, and threats to America's future." n23 Not that the Justices need to become experts in national security affairs, n24 but every Supreme Court Justice should be aware of the following five basic national security facts and conceptions before sitting in judgment on presiprudential national security determinations. (1) "National security policy . . . is harder today because the issues that are involved are more numerous and varied. The problem of the day can change at a moment's notice." n25 While "[y]esterday, it might have been **prolif**eration; today, **terrorism**; tomorrow, **hostile regional powers**" n26, the twenty-first century reality is that "[t]hreats are also more likely to be intertwined--proliferators use the same networks as narco-traffickers, narco-traffickers support terrorists, and terrorists align themselves with regional powers." n27 (2) "Yet, as worrisome as these immediate concerns may be, the long-term challenges are even harder to deal with, and the stakes are higher. Whereas the main Cold War threat--the Soviet Union--was brittle, most of the potential adversaries and challengers America now faces are resilient." n28 (3) "The most important task for U.S. national security today is simply to retain the strategic advantage. This term, from the world of military doctrine, refers to the overall ability of a nation to control, or at least influence, the course of events." n29 Importantly, "[w]hen you hold [\*887] the strategic advantage, situations unfold in your favor, and each round ends so that you are in an advantageous position for the next. When you do not hold the strategic advantage, they do not." n30 (4) While "keeping the strategic advantage may not have the idealistic ring of making the world safe for democracy and does not sound as decisively macho as maintaining American hegemony," n31 maintaining the American "**strategic advantage is critical**, because it is essential for just about everything else America hopes to achieve--promoting freedom, protecting the homeland, defending its values, **preserving peace**, and so on." n32 (5) **The U**nited **S**tates **requires national security "agility**." n33 It not only needs "to refocus its resources repeatedly; it needs to do this faster than an adversary can focus its own resources." n34 [\*888] As further serious preparation for engaging in the jurisprudence of American national security presiprudence in hotly contested cases and controversies that may end up on their docket, our Supreme Court Justices should understand that, as Walter Russell Mead pointed out in an important essay a few years ago, n35 the average American can be understood as a Jacksonian pragmatist on national security issues. n36 "Americans are determined to keep the world at a distance, while not isolating ourselves from it completely. If we need to take action abroad, we want to do it on our terms." n37 Thus, recent social science survey data paints "a picture of a country whose practical people take a practical approach to knowledge about national security. Americans do not bother with the details most of the time because, for most Americans, the details do not matter most the time." n38 Indeed, since the American people "do know the outlines of the big picture and what we need to worry about [in national security affairs] so we know when we need to pay greater attention and what is at stake. This is the kind of knowledge suited to a Jacksonian." n39 Turning to how the Supreme Court should view and interpret American presidential measures to oversee national security law and policy, our Justices should consider a number of important points. First, given the robust text, tradition, intellectual history, and evolution of the institution of the POTUS as the American national security sentinel, n40 and the unprecedented dangers to the United States national security after 9/11, n41 national security presiprudence should be accorded **wide latitude** by the Court in the adjustment (and tradeoffs) of trading liberty and security. n42 Second, Justices should be aware that different presidents [\*889] institute changes in national security presiprudence given their unique perspective and knowledge of threats to the Nation. n43 Third, **Justices should be restrained in second-guessing the POTUS [president of the United States]**  and his subordinate national security experts concerning both the existence and duration of national security emergencies and necessary measures to rectify them. "During emergencies, the institutional advantages of the executive are enhanced", n44 moreover, "[b]ecause of the importance of **secrecy, speed, and flexibility**, **courts, which are slow, open, and rigid**, have less to contribute to the formulation of national policy than they do during normal times." n45 Fourth, Supreme Court Justices, of course, should not give the POTUS a blank check--even during times of claimed national emergency; but, how much deference to be accorded by the Court is "always a hard question" and should be a function of "the scale and type of the emergency." n46 Fifth, the Court should be **extraordinarily deferential** to the POTUS and his executive subordinates regarding questions of executive determinations of the international laws of war and military tactics. As cogently explained by Professors Eric Posner and Adrian Vermeule, n47 "the United States should comply with the laws of war in its battle against Al Qaeda"--and I would argue, other lawless terrorist groups like the Taliban--"only to the extent these laws are beneficial to the United States, taking into account the likely response of [\*890] other states and of al Qaeda and other terrorist organizations," n48 as determined by the POTUS and his national security executive subordinates.

**1ar flex impact**

**Executive freedom from judicial management in security operations is an impact filter – it deters and de-escalates tension globally by suppressing hotspots and terrorist activities**

**New legal checks are existentially dangerous**

John **Yoo 17**, J.D. from Yale, Emanuel Heller Professor of Law and director of the Korea Law Center, the California Constitution Center, and the Law School’s Program in Public Law and Policy, "Trump’s Syria Strike Was Constitutional", National Review, https://www.nationalreview.com/2017/04/trump-syria-strike-constitutional-presidents-have-broad-war-powers/

Our Constitution has **succeeded** because it favors **swift presidential action in war**, later checked by Congress’s funding power. If a president continues to wage war without congressional authorization, as in Libya, Kosovo, or Korea, it is only because Congress has chosen not to exercise its easy check. We should not confuse a desire to escape political responsibility for a defect in the Constitution. A **radical change in the system** for making war might appease critics of presidential power. But it could also **seriously threaten American national security**. In order to **forestall another 9/11** attack, or take advantage of a window of opportunity to **strike terrorists** or **rogue nations**, the executive branch needs **flexibility**. It is not hard to think of situations where congressional consent cannot be obtained in time to act. Time for congressional deliberation, which can lead to passivity and isolation and not smarter decisions, will come at the price of **speed** and **secrecy**. The Constitution creates a presidency that can respond forcefully to prevent serious threats to our national security. Presidents can take the initiative, and Congress can use its funding power to check presidents. Instead of demanding a **legalistic process** to begin war, the Framers left war to politics. As we confront the new challenges of **terrorism**, **rogue nations**, and **WMD proliferation**, now is **not the time** to introduce **sweeping**, **untested changes** in the way we make war.

**4th generation conflicts outweigh**

**Gable 11** [William R., Associate Professor of Political Science at the University of Michigan, March 14, 2011, Strategy Research Project, AN ERA OF PERSISTENT CONFLICT]

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

**Bioterror causes extinction**

**Mhyvold 13** [Nathan, doctorate in theoretical and mathematical physics and a master's degree in mathematical economics from Princeton University; founded Intellectual Ventures after retiring from his position as chief strategist and chief technology officer of Microsoft, “Strategic Terrorism: A Call to Action,” 2013, <http://www.lawfareblog.com/wp-content/uploads/2013/07/Strategic-Terrorism-Myhrvold-7-3-2013.pdf>]

As horrible as this would be, such a pandemic is by no means the worst attack one can imagine, for several reasons. First, most of the classic bioweapons are based on 1960s and 1970s technology because the 1972 treaty halted bioweapons development efforts in the United States and most other Western countries. Second, the Russians, although solidly committed to biological weapons long after the treaty deadline, were never on the cutting edge of biological research. Third and most important, the science and technology of molecular biology have made enormous advances, utterly **transforming the field** in the last few decades. High school biology students routinely perform molecular-biology manipulations that would have been impossible even for the best superpower-funded program back in the heyday of biological-weapons research. The biowarfare methods of the 1960s and 1970s are now as antiquated as the lumbering mainframe computers of that era. Tomorrow’s terrorists will have vastly more deadly bugs to choose from. Consider this sobering development: in 2001, Australian researchers working on Mousepox, a nonlethal virus that infects mice (as chickenpox does in humans), accidentally discovered that a simple genetic modification transformed the virus.10, 11 instead of producing mild symptoms, the new virus killed 60% of even those mice already immune to the naturally occurring strains of Mousepox. The new virus, moreover, was unaffected by any existing vaccine or antiviral drug. a team of researchers at saint Louis University led by mark Buller picked up on that work and, by late 2003, found a way to improve on it: Buller’s variation on Mousepox was 100% lethal, although his team of investigators also devised combination vaccine and antiviral therapies that were partially effective in protecting animals from the engineered strain.12, 13 Another saving grace is that the genetically altered virus is no longer contagious. Of course, it is quite possible that future tinkering with the virus will change that property, too. Strong reasons exist to believe that the genetic modifications Buller made to Mousepox would work for other poxviruses and possibly for other classes of viruses as well. Might the same techniques allow chickenpox or another poxvirus that infects humans to be turned into a 100% lethal bioweapon, perhaps one that is resistant to any known antiviral therapy? I’ve asked this question of experts many times, and no one has yet replied that such a manipulation couldn’t be done. This case is just one example. Many more are pouring out of scientific journals and conferences every year. Just last year, the journal Nature published a controversial study done at the University of Wisconsin–Madison in which virologists enumerated the changes one would need to make to a highly lethal strain of bird flu to make it easily transmitted from one mammal to another.14 Biotechnology is advancing so rapidly that it is hard to keep track of all the new potential threats. Nor is it clear that anyone is even trying. In addition to lethality and drug resistance, many other parameters can be played with, given that the infectious power of an epidemic depends on many properties, including the length of the latency period during which a person is contagious but asymptomatic. Delaying the onset of serious symptoms allows each new case to spread to more people and thus makes the virus harder to stop. This dynamic is perhaps best illustrated by hiv, which is very difficult to transmit compared with smallpox and many other viruses. Intimate contact is needed, and even then, the infection rate is low. The balancing factor is that hiv can take years to progress to aids, which can then take many more years to kill the victim. What makes hiv so dangerous is that infected people have lots of opportunities to infect others. This property has allowed hiv to claim more than 30 million lives so far, and approximately 34 million people are now living with this virus and facing a highly uncertain future.15 A virus genetically engineered to infect its host quickly, to generate symptoms slowly—say, only after weeks or months—and to spread easily through the air or by casual contact would be vastly more devastating than hiv. It could silently penetrate the population to unleash its deadly effects suddenly. This type of epidemic would be almost impossible to combat because most of the infections would occur before the epidemic became obvious. A technologically sophisticated terrorist group could develop such a virus and kill a large part of humanity with it. Indeed, terrorists may not have to develop it themselves: some scientist may do so first and publish the details. Given the rate at which biologists are making discoveries about viruses and the immune system, at some point in the near future, someone may create artificial pathogens that could **drive the human race to extinction**. Indeed, a detailed species-elimination plan of this nature was openly proposed in a scientific journal. The ostensible purpose of that particular research was to suggest a way to extirpate the malaria mosquito, but similar techniques could be directed toward humans.16 When I’ve talked to molecular biologists about this method, they are quick to point out that it is slow and easily detectable and could be fought with biotech remedies. If you challenge them to come up with improvements to the suggested attack plan, however, they have plenty of ideas. Modern biotechnology will soon be capable, if it is not already, of bringing about the demise of the human race— or at least of killing a sufficient number of people to end high-tech civilization and set humanity back 1,000 years or more. That terrorist groups could achieve this level of technological sophistication may seem far-fetched, but keep in mind that it takes only a handful of individuals to accomplish these tasks. Never has lethal power of this potency been accessible to so few, so easily. Even more dramatically than nuclear proliferation, modern biological science has frighteningly undermined the correlation between the lethality of a weapon and its cost, a fundamentally stabilizing mechanism throughout history. Access to extremely lethal agents—lethal enough to exterminate Homo sapiens—will be available to anybody with a solid background in biology terrorists included.

**Global power projection prevents nuclear war**

Thomas H. **Henricksen 17**, emeritus senior fellow at the Hoover Institution, 3/23/17, “Post-American World Order,” <http://www.hoover.org/research/post-american-world-order>

The tensions stoked by the assertive regimes in the Kremlin or Tiananmen Square could **spark a political or military incident** that might set off a chain reaction leading to a **large-scale war**. Historically, powerful rivalries nearly always lead to at least skirmishes, if not a full-blown war. The anomalous Cold War era **spared** the United States and Soviet Russia a direct conflict, largely from concerns that one would trigger a **nuclear exchange destroying** both states and much of **the world**. Such a repetition **might** reoccur in the unfolding three-cornered geopolitical world. It seems safe to acknowledge that an ascendant China and a resurgent Russia will persist in their geo-strategic ambitions. What Is To Be Done? The first marching order is to dodge any kind of perpetual war of the sort that George Orwell outlined in “1984,” which engulfed the three super states of Eastasia, Eurasia, and Oceania, and made possible the totalitarian Big Brother regime. A long-running Cold War-type confrontation would almost certainly take another form than the one that ran from 1945 until the downfall of the Soviet Union. What prescriptions can be offered in the face of the escalating competition among the three global powers? First, by **staying militarily and economically strong**, the United States will have the resources to deter its peers’ hawkish behavior that might otherwise trigger a **major conflict**. Judging by the history of the Cold War, the coming strategic chess match with Russia and China will prove tense and demanding—since **all the countries boast nuclear arms** and long-range ballistic missiles. Next, the United States should widen and sustain willing coalitions of partners, something at which America excels, and at which China and Russia fail conspicuously. There can be **little room for error** in fraught **crises among nuclear-weaponized** and **hostile powers**. Short- and long-term standoffs are likely, as they were during the Cold War. Thus, the playbook, in part, involves a **waiting game** in which each power looks to its rivals to suffer grievous internal problems which could entail a collapse, as happened to the Soviet Union.

**Unrestrained SOF solves all impacts, restricting it wrecks effectiveness**

Joseph **Norman &** Yaneer **Bar-Yam 18**. New England Complex Systems Institute. 2018. “Special Operations Forces: A Global Immune System?” Unifying Themes in Complex Systems IX, edited by Alfredo J. Morales et al., Springer International Publishing, pp. 486–498.

5 Multiscale Military Theory and the Functional Role of SOF Much like an organism, our global civilization is composed of a set of distinct social tissues, each with unique character, mode of internal operation, and interfaces with other tissues. Healthy, well-functioning social tissues have internal behaviors that **sustain the individuals composing them**, such as **agriculture**, **goods production**, **trading** and **markets**, **health services**, **social** gatherings and celebrations, as well as fruitful external interactions with other social systems such as the buying and selling of **commodities, products, and services**. When healthy and functional social tissue is disrupted, opportunities are created for **malignant forces** to gain footholds and grow. This dynamic can be seen, for instance, in the unintended consequences of the invasion of **Iraq**, which created the opportunity for terrorist networks and other harmful actors to increase their power and influence as normal life was disrupted and power vacuums were created. Moreover, the harm and risks generated by the growth of malignant forces are not confined to the local area where they first manifest. Because of our global interconnectedness and interdependence, effects cascade causing **disruption in other tissues**, leading to a **domino effect** with no straightforward mechanism to halt the **expanding impacts** [11,12]. The recent and ongoing **migrant crisis in Europe and beyond** provides an example of one form such cascading effects can take. Global interdependency means any **large-scale** military intervention, by virtue of disrupting the normal functioning of society, will generate both local and **non-local unintended consequences** even when desired effects are achieved. This is not to suggest that large-scale action is never necessary, but the potential for generating new crises must be weighed carefully whenever it is considered as an option. In many cases, action that does not disrupt local, healthy social behavior is possible, but it requires the right action and agent. The parallels of the effects of tissue disruption in organisms and in sociocultural systems highlights the need for a ‘sociocultural immune system’—a finegrained system for sensing and acting on environmental disturbances at scales smaller than conventional forces are able. In this regard, conventional forces can be likened to the large-scale neuromuscular system in organisms. Acting instead at a small-scale presents the possibility of maintaining healthy social tissue and allowing it to flourish. Just as for the immune system, this is not a matter of differentiating ‘native’ and ‘foreign’, but understanding whether an agent is disruptive to overall health. SOF are **uniquely positioned** to fulfill this role, possessing the requisite **personnel**, **skills**, and **training**. For this to be realized, policies that impact SOF must be such that they enable their **unique capabilities** in meeting the high complexity demand of **local cultural systems**. We identify three conditions that must be satisfied in order for SOF to serve such a role: special operators with advanced training and distinctive capabilities, persistent presence and enduring engagements, and local autonomy and decision-making. We discuss each in turn. 5.1 Distinctive Capabilities Much like the cells in the immune system have special forms and functions to fulfill their roles, the distinctive capabilities of special operators enable them to operate in **highly complex sociocultural environments**. Advanced **language and cultural training** allows **unmediated interaction with local peoples**. Special operators’ experience in making decisions in the face of uncertainty allow them to operate in ill-defined ‘gray zone’ conditions. The need to produce special operators with distinctive capabilities highlights the role of SOF’s high-selectiveness, and emphasizes the necessity of advanced training in language and culture in addition to combat. These values are articulated in the SOF truths “Humans are more important than hardware” and “SOF cannot be mass produced” [13]. Preparing special operators to interact directly and make difficult decisions in complex psychosocial, sociocultural, and kinetic environments must be a priority of SOF and their enabling agencies. 5.2 Persistent Presence The immune system is embedded throughout the tissues of the body to develop and maintain sensitivity to the character of local tissue and respond rapidly to disruptors [14]. Similarly, **persistent presence** of SOF allows for **nuanced relationships to unfold over time**, and for **cultural attunement** to be developed at both the individual and institutional levels. SOF embeddedness engenders an understanding of normal conditions and a sensitivity to changes in those conditions and whether they pose a threat. Moreover, presence is necessary for applying **rapid and effective action** to achieve desired effects with minimal disruption. Just as SOF must recognize ‘self’ in multiple contexts, local cultures must not react to SOF as a foreign entity, i.e. mutual trust must be present, developed through shared history. Policies should enhance continuity of interaction between SOF and a given sociocultural system even, or especially, when there is no immediate or visible threat. The only way to prevent the growth of malignancies is to be present and active before they grow. This is reflected in the SOF truth “competent SOF cannot be created after emergencies occur” [13] and Admiral William McRaven’s oft-cited comment that one “can’t surge trust” [15]. 5.3 Local Autonomy and Decision-Making As the cells of the immune system sense, decide, and act locally in a decentralized manner, being fine-tuned to the character of their local tissues, so too must **SOF** have the ability to **sense, decide, and act locally** using their nuanced understanding and experience. The semi-**autonomy** of SOF is **necessary** for requisite variety to be achieved in interfacing with high-complexity, fine-grained environments and disruptors. In human systems, these disruptors manifest at the psychosocial and sociocultural scales. It is possible to take effective action at these scales to eliminate harmful agents without disrupting healthy social tissue functioning. This becomes impossible as the scale of a malignancy grows larger: social tissue will inevitably be damaged by both the malignancy itself and any large-scale force applied in response. When the **decision-making agent** is both **far removed from** and **insensitive** to the local context, as well as receiving multiple information streams about which decisions must be made, the **sensitivity**, **nuance**, and **understanding** of **local** SOF is lost. Consequently, the ability to stem malignant forces while they remain small in scale is diminished, and the likelihood of disrupting a social system either accidentally or out of necessity as the scale of harmful actors grows larger increases. To enable SOF to act without disrupting social tissue, the **institutions overseeing SOF must not over-constrain their behavior**. As policy- and decisionmakers look increasingly to SOF to overcome complex challenges, it is critical that they do not become overly-bureaucratized. Imperatives that are communicated to SOF must be guided by their role as a protector of local tissue function. Protections from the potential for harm to local tissues, i.e. by civilian collateral damage from operations, must be instituted in a way that retains local autonomy. Detailed instructions on how to carry out missions will prevent them from behaving as necessary for success in highcomplexity environments. In technical terms, placing too many constraints on their behavior will reduce their variety below the (requisite) threshold for sensing and acting on fine-grained disruptors. The consequences of this are twofold: (1) SOF will lack the ability to sense and eliminate threats while they remain small, and (2) disruption and destruction of healthy social tissue becomes inevitable as malignant forces grow and large-scale intervention becomes the only means of engagement. 6 Challenges and Implementation While SOF are uniquely positioned to fulfill an immune-system-like function, there remain significant challenges to successful implementation. Here we summarize some of these challenges. Developing SOF who are both culturally and **linguistically competent**, as well as able to execute reconnaissance and surveillance and direct action missions demands significant investment in training and preparation. Moreover, for any individual operator there is a tradeoff in developing proficiency in any given domain. However, SOF must be able to perform the entire range of activities, from sensing nuanced changes in social conditions to taking actions to eliminate harmful disruptors, to preserving social tissue health. Fundamental limitations on individual capabilities lead to a need for diversification of roles of SOF. This is manifest already in different types of SOF, as it is in the immune system which uses cells of various types, each of which serves particular roles that complement one another. The relative levels of activity for the different cell-types vary depending on circumstance; some cells primarily sense tissue conditions and detect disruptors, while others act to confine and eliminate harmful agents once they are identified. During an infection rapid clonal reproduction (replication) of effective types occurs. Similarly, SOF may embrace and develop specialization of expertise, and should be flexible enough to adapt force size and composition in response to changing circumstances. Maintaining the mental health of special operators must be a priority, and appropriate support systems should be put in place for this. The high complexity of tasks translates into the psychological symptoms of stress, depression and burnout, common in a high complexity society more generally but surely for SOF. Moreover, adapting to diverse local contexts creates challenges when switching to home and family environments, a potential component of post traumatic stress disorder (PTSD). This is a challenge for both the SOF and their families. Giving special operators a significant degree of autonomy presents challenges and risks that are distinct from those of conventional command-and-control systems. Care must be taken to ensure social tissue is not damaged by unintentional friendly fire, collateral damage or intentional ‘rogue operators’. The potential for disfunction is not unlike auto-immune disorders in complex organisms and the immune system has developed mechanisms for prevention, though no mechanism is failure proof. Local feedback systems including multiple specialized roles rather than centralized control ones must be in place that put checks on the actions of operators.The structure of these feedback mechanisms must be the subject of intensive study. Rapid growth in recent years has led to institutionalization of SOF using concepts that may be incorrectly adopted from command control military traditions. Bureaucratization runs counter to the ability of SOF for performing the functions we have identified. Rather then enabling SOF function as it grows, institutionalization may result in undermining the effectiveness of SOF as it becomes more like conventional forces. Alternative structures must be developed. They may be inferred from fundamental complex systems analyses, including correspondence with immune system functions or well designed experimentation. Institutional structures and relationships between SOCOM and other enabling agencies, including those within DoD, and other departments of the executive branch such as the State Department, need to be carefully considered. For example, how the agenda of an ambassador of a given region and local SOF should interrelate is an open question. If command and control structures do not appropriately interface with SOF, their unique capabilities will not be utilized effectively. This includes knowing when and, crucially, when not to utilize SOF to achieve a desired effect. This article is intended to contribute to this clarification. 7 SOF in the 21st Century There is no doubt that as a global civilization we will continue to face fine-grained, **high-complexity disruptors** that have the potential to **grow into larger-scale malignancies**. The only way to combat this is to promote and enable the flourishing of healthy **social tissues**. Multiscale control systems theory makes clear the need for an immune-like system embedded within human social systems. It must be sensitive to and embedded within **high-complexity psychosocial and sociocultural environments** to make decisions locally based on understanding of a given social system, its nuances, and distinctive qualities. Like the various tissues arranged into functional organs throughout the body, cultures and social systems do not all look, behave, or function alike. Part of a global strategy for the 21st century must be the recognition that cultures **can not simply be ‘exported’ or ‘projected’ onto others without pushback**, and that behavioral diversity at the collective scale is a natural and healthy part of our human civilization. SOF possess the unique organizational capabilities to be sensitive to the healthy behavior of these diverse ‘social tissues’, while providing the direct and indirect action capabilities to neutralize malignant forces when identified. Moving forward, a major part of the SOF repertoire must include relationship building. **Interpersonal relationships with local individuals** form the **basis** of understanding necessary to **discern between harmful and beneficial (or neutral) forces to social health**. The ability to perceive and understand local tensions, grievances, typical and atypical interactions, customs, and other nuanced features can serve to generate solutions before the normal functioning of healthy social tissue is threatened. The highly-complex and fine-grained nature of this endeavor makes it an unsuitable role for **conventional** forces – they can not sense nor act on such a fine scale. A focus on direct action is important when specific disruptors have been identified, and not otherwise. SOF is uniquely positioned to serve as a **global immune system**, **keeping the diverse set of social tissues healthy**, and reserving large-scale intervention for when it is necessary.

**1ar courts link**

**Court interventions destroy flex- creates burdensome interventions without the relevant interventions that destroys the speed necessary to respond to emerging threats- that’s Bloomquist**

**The CP sets a precedent for judicial micromanagement – it hinders executive flexibility and undermines the war on terror**

**Bork and Rivkin, 5** - Robert H. Bork, a senior fellow at the Hudson Institute, was solicitor general of the United States from 1973 to 1977 and later a judge on the U.S. Court of Appeals for the District of Columbia. David B. Rivkin Jr. is a Washington lawyer who served in the Justice Department in the Reagan and George H.W. Bush administrations (“A War the Courts Shouldn't Manage” Washington Post, 1/21, <http://www.washingtonpost.com/wp-dyn/articles/A25275-2005Jan20.html>)

As speculation mounts about President Bush's nominees to the federal judiciary, and particularly to the Supreme Court, one factor that should be of paramount importance is too often overlooked. Curbing or reversing the Supreme Court's usurpation of so many domestic issues is crucial. But perhaps even more important is avoiding judicial micromanagement of America's war against radical Islamic terrorists. Already there are disturbing signs of judicial overreaching that is constitutionally illegitimate and, in practical terms, potentially debilitating. The vast majority of war opponents and attorneys for captured terrorists are pressing for a full-fledged criminal law model never before applied to enemy combatants. Realizing that Congress and the president will not adopt their position, these litigants are resorting to the federal courts. Real abuses that inevitably occur in war, as well as in peacetime prisons, are being punished by our military, but that does not assuage critics who have an agenda other than justice. They allege that the abuses stem from the administration's legal analysis and that the analysis is contrary to the Constitution and to international norms. That is wrong on both counts. A pair of confusing Supreme Court decisions handed down June 28 plowed the ground for astounding lower-court activism. Hamdi v. Rumsfeld, involving a petition for habeas corpus on behalf of a U.S. citizen held by the military as an enemy combatant fighting in Afghanistan, was a qualified victory for the government. The court approved the use of military tribunals but held that Yaser Esam Hamdi must have an opportunity to contest his status as an enemy combatant. It left unclear how that opportunity could be exercised, and it is difficult to see how it could be without calling witnesses from the combat zone, a procedure that would divert American soldiers from waging war. Rasul v. Bush, on the other hand, was a disaster for the war effort. Aliens held at Guantanamo Bay, not a part of the United States or within the jurisdiction of any federal court, were held to have a right to a habeas petition. The result would seem to be that captured alien combatants held by the U.S. military anywhere in the world can henceforth litigate their status in federal courts. Some lower federal courts have not resisted the temptation to insert themselves further into the conduct of the war. In doing so, they have interfered with the war effort while fostering the false impression that the executive branch is trampling on constitutional liberties. The district court's decision in Hamdan v. Rumsfeld (2004) is a prime example. The judge applied the Geneva Conventions in contradiction of the legal framework laid down in Hamdi, misread the conventions and severely encroached upon the president's war powers. In Omar Abu Ali v. Ashcroft (2004), another district court outdid the Supreme Court by finding that it had, at least potentially, authority to determine the legality of a foreign government's detention of an accused dual-nationality terrorist because of an allegation that the United States had prompted the detention. Nearly 70 years ago, the court held in a famous decision (Curtiss-Wright Export Corp. v. United States) that the executive branch's extensive prerogatives in foreign affairs are grounded in its unique expertise, information and unitary nature. Courts have neither the constitutional authority nor the expertise and information to override the president's determinations on issues such as whether we are in armed conflict or what kind of anti-terrorist cooperation we should engage in with foreign governments. For obvious reasons, the executive cannot share all the relevant information with judges. Nor has the judiciary the necessary unitary nature, unless every case is decided by the Supreme Court. Thus, in addition to fighting legal battles in court, the administration would be well-advised to make a far stronger public case for its detention policies, which are designed not only to prevent enemy combatants from returning to fight against us but also to obtain intelligence that might save the lives of American soldiers and civilians as well as shorten the war. Although current detention and interrogation procedures can surely be improved, and additional safeguards against abuses should be adopted, these ought to be matters for the political branches. Freezing policies through constitutional rulings should be a last resort. The executive and Congress, as circumstances change and experience accumulates, can debate and resolve in a flexible manner the policy imperatives of individual liberty and America's reputation overseas, on one hand, vs. the demands of collective safety. But in doing so they must avoid trampling on the president's constitutional prerogatives. Congress should not lay down detailed prescriptions on what interrogation techniques are appropriate. And it should resist the temptation to grandstand; passing exhortations against torture is not the way to proceed. Sensitivity to these matters and the crucial but limited role of the judiciary should be taken into account in the choice of nominees to the courts and in the confirmation process. Too much is riding on the outcome of this war -- ultimately, perhaps, the survival of Western societies -- to choose judges who are unaware of the complexities of what is at stake.

**Court decisions on executive power risk catastrophic foreign policy consequences – they destroy flexibility and invite catastrophic mis-perception**

**Nzelibe, 4** - \*Bigelow Fellow and Lecturer in Law, University of Chicago Law School (Jide, “The Uniqueness of Foreign Affairs,” 89 IOWA L. REV. 941, lexis)

The costs associated with judicial error are most evident in cases involving controversies over the allocation of **war powers**. First, the nature of such controversies often requires immediate attention, and it may prove costly for the political branches to await the outcome of a judicial determination. Second, to the extent that a determination will turn on whether the executive branch has produced sufficient evidence to warrant the commencement of military hostilities without congressional authorization, the consequences of judicial error can be extremely high, if not **catastrophic**. Imagine, for instance, that the Supreme Court sets forth a standard for war powers controversies that requires the President to demonstrate that a foreign country imposes an imminent threat to national security before he can commence military hostilities without congressional authorization. If the Court errs in its assessment of the severity of an external threat, its judgment could leave the country **defenseless in the event of an attack.** Such difficulties underscore an important difference [\*993] between domestic controversies and foreign controversies. In a domestic controversy, the costs of judicial error are rarely so immediate and guaranteed to impact a wide number of the U.S. citizenry. It is also true that in the domestic context, the courts often have ample opportunity, over time, to correct any prior interpretive errors. This risk of judicial error is implicit in the decisions that treated the legality of the Vietnam War as a political question. For example, with respect as to whether the President's decision to mine the harbors of North Vietnam constituted an unauthorized escalation of war under the War Powers Act, the Second Circuit articulated the risk of that court's involvement in these terms: Judges, deficient in military knowledge, lacking vital information upon which to assess the nature of battlefield decisions, and sitting thousands of miles from the field of action, cannot reasonably or appropriately determine whether a specific military operation constitutes an "escalation" of the war or is merely a new tactical approach within a continuing strategic plan ... Are the courts required to oversee the conduct of the war on a daily basis, away from the scene of action? In this instance, it was the President's view that the mining of North Vietnam's harbors was necessary to preserve the lives of American soldiers in South Vietnam and to bring the war to a close. History will tell whether or not that assessment was correct, but without the benefit of such extended hindsight we are powerless to know. n225 Using this framework, the court concluded that political branches were better equipped to handle the foreign affairs and war strategy questions before it. One might object and argue that the circumstances described above would only apply when war or imminent threats to national security issues are at stake. While national security concerns best illustrate the dangers of judicial intervention, framing this factor exclusively in terms of war is not appropriate. First, as explained in Section A above, it is often difficult to separate national security issues from other soft diplomacy concerns. n226 Second, and more importantly, the costs of judicial intervention stem not so much from the fact that war may be a factor, but that the courts are incapable of predicting whether foreign nations may be affected by a judicial decision, or how **such nations may react to such a decision**. This latter consideration extends to issues affecting international trade and commerce, as well as international security. As explained by Justice Brennan in Container [\*994] Corp. of America v. Franchise Tax Board, n227 a case involving a tax dispute, "this Court has little competence in determining precisely when foreign nations will be offended by particular acts." n228 In the absence of a more precise understanding of the foreign interests that may be adversely affected by a judicial determination, the courts have appropriately left the resolution of such foreign affairs disputes to the political branches. An objection to this explanation might be that concerns regarding the effects of litigation on unrelated parties often arise in the domestic context, but that courts do not necessarily defer to the political branches in such cases. For instance, some commentators have described the judicial role in the prison reform litigation that started in the late 1960s as involving complex and multifaceted consequences that extended beyond the traditional adjudicatory model. n229 The late Abram Chayes aptly characterized these proceedings as one "which had widespread effects on persons not before the court and required the judge's continuous involvement in administration and implementation." n230 These domestic affairs controversies are significantly different from those affecting foreign affairs, however, because the non-party entities affected by judicial decisions in the domestic context operate largely within the same legal framework as the courts. On the other hand, in the foreign affairs context, the affected entities lie outside the jurisdiction of the domestic courts. Unlike in the domestic context, considerations of power often weigh as heavily as legal factors in determining the norms of inter-state behavior. n231 Therefore, there is greater risk that a court's determination in a foreign affairs dispute could have an impact on a wider range of actors outside the court's jurisdiction than it would in a domestic dispute. The significance of the complex interactions of political, security, and economic power at work in the realm of international relations also underscores another reason why the involvement of courts in foreign affairs might be detrimental to foreign policy. This rationale involves the inherent [\*995] limitations of the various remedial tools available to the courts when they confront foreign affairs controversies. For instance, in many international disputes or controversies, an approach that focuses on power-based diplomacy and negotiation may be more advantageous to the states involved than rule-based adjudications. n232 Even one of the leading proponents of a rule-based approach in international affairs admits that "in practice the observable international institutions and legal systems involve some mixture of both [rule-based and power-based diplomatic approaches]." n233 Given the continuous relevance of power as a factor in international relations, the remedial devices available to the courts - such as injunctions, writs, and declaratory relief - are inadequate and often inapplicable to foreign affairs controversies. This is because judicial remedies are often designed to address the concerns of conventional adjudication, which as Professor Fuller has explained, almost always involve "claims of right or accusation of faults." n234 In the international system, however, issues cannot be neatly broken down into legally cognizable wrong or right answers. In such circumstances, the affected actors may prefer a more flexible and open-ended resolution of a problem than would be achieved through a decision based on rules and standards. Understandably, courts have occasionally invoked this non-rule based aspect of international diplomacy to justify abstaining from foreign affairs controversies. n235

**Nuclear war**

**Knowles 9** – Acting Assistant Professor, New York University School of Law (Robert, Spring, “American Hegemony and the Foreign Affairs Constitution”, 41 Ariz. St. L.J. 87, Lexis Law)

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

**1ar courts bad / exec key to flex**

**The executive is superior to courts – expertise, accountability, and flexibility**

**Ku and Yoo, 6 -** \*Associate Professor of Law, Hofstra University School of Law; Visiting Associate Professor of Law, William & Mary Marshall-Wythe School of Law AND \*\* Professor of Law, University of California at Berkeley School of Law (Boalt Hall); Visiting Scholar, American Enterprise Institute (Julian and John, 23 Const. Commentary 179, “HAMDAN v. RUMSFELD: THE FUNCTIONAL CASE FOR FOREIGN AFFAIRS DEFERENCE TO THE EXECUTIVE BRANCH” lexis)

As Chevron recognized, n73 the executive branch possesses two institutional characteristics that make it superior to courts in the interpretations of certain kinds of laws. First, executive agencies usually possess expertise in the administration of certain statutes, particularly those in complex areas. Second, the executive branch is subject to greater political accountability than the judiciary, and the electorate could ultimately change unwanted interpretations. n74 As Justice Stevens himself explained in Chevron, "Judges are not experts in the field, and are not part of either political branch of the Government." n75 While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices - resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

[\*202] One way to think about the executive branch's comparative advantage is in terms of the likelihood of errors. Agencies which possess greater expertise over a complex and technical statute are less likely to depart from Congressional intent in their interpretations of those statutes, especially ambiguous provisions in those statutes. While agencies may well incur greater costs in making those decisions, such costs reflect the likelihood that they will seek a broader set of information about their legal interpretation than that presented to courts. Indeed, unlike courts, the executive branch is designed to develop specialized competence. In the area of foreign policy, the executive branch is composed of large bureaucracies solely focused on designing and implementing foreign policy.

The more common criticism of the executive branch is that it is likely to manipulate its expertise in the service of political goals. While this may seem like a criticism, it is actually a virtue in the context of resolving ambiguities in laws implicating foreign affairs. Such laws nearly always implicate broad policy decisions or political values and the political nature of the executive branch gives it advantages in making such decisions. If Congress leaves ambiguities in a foreign affairs statute, for instance, it is reasonable to assume it would prefer such ambiguities to be resolved by the more politically responsive institution. Indeed, it is doubtful that there is substantial popular support for transferring authority to the judiciary in cases where the law relates to how to deal with a serious external threat. n76

**Limited judicial information during a crisis increases the risk of disastrous decisionmaking**

**Posner and Vermeule, 7** – \*Kirkland and Ellis Professor of Law at the University of Chicago Law School AND \*\*professor at Harvard Law School (Eric and Adrian,Terror in the Balance: Security, Liberty, and the Courts p. 90-91)

As against this view, we suggest that the standard Carolene Products approach comes unglued during times of emergency. Judges face a risk of committing errors in two directions: they may erroneously validate policies that stem from democratic failure, or they may erroneously invalidate measures necessary for national security. The risks and costs of the first type of error are constant across both normal times and emergencies, but in emergencies the risks and costs of the second type of error spike upward. In times of emergency, the judges’ information is especially poor, their ability to sort justified from unjustified policies especially limited, and the cost of erroneously blocking necessary security measures may be disastrous. Included among those costs is the cost of delay, which amounts to a temporary blockage of new policies and which is especially serious during emergencies, where time is all. In general, the difference in the stakes between emergencies and normal times makes the limited capacities of judges decisive. Historically, the judges themselves have recognized this, remaining quiescent until the emergency decays and passes by. In times of emergency, judicial deference is both desirable and predictable, given the high stakes and the judges’ limited information and competence.

**Even if Congressional oversight is good, using the judiciary is the worst of all worlds- invites judicial scrutiny of foreign affairs broadly and undermines effective responses to terrorism, climate change, disease, and democratic backsliding**

**Martin ’15** (David A; Warner-Booker Distinguished Professor of International Law Emeritus at the University of Virginia, former principal deputy general counsel of the Department of Homeland Security, member of the Homeland Security Advisory Council, J.D. from Yale Law School; 2015; “Why Immigration’s Plenary Power Doctrine Endures”; <https://digitalcommons.law.ou.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1013&context=olr>; Oklahoma Law Review, Vol. 68, No. 1; accessed 6/26/18; TV)

Justice Field, of course, does wind up treating the political branch’s conclusions, in this particular setting, as conclusive on the judiciary — but he does not rest that outcome on the idea that immigration control is a sovereign power outside the reach of the Constitution. Instead, he offers a statement about institutional roles seen as appropriate for the respective branches of government in this specific domain. In the foreign arena, he writes, as a matter of “self-preservation,”34 the government has the “highest duty” to “preserve . . . independence, and give **security against foreign aggression** and **encroachment**.”35 To achieve these ends, the government is **clothed with authority** to determine the occasion on which the powers shall be called forth; and its determinations, so far as the subjects affected are concerned, are necessarily conclusive upon all its departments and officers. . . . The **existence of war** would render the necessity of the proceeding only more obvious and pressing. The same necessity, in a less pressing degree, may arise when war does not exist, and the same authority which adjudges the necessity in one case must also determine it in the other. In both cases its determination is conclusive upon the judiciary.36 In other words, in 1888, the political branches judged necessary the application of a new absolute rule excluding Chinese laborers, in order to **achieve security** against what Congress deemed a type of foreign encroachment.37 Even with misgivings about the justice or fairness of the action, the courts **will not second-guess** that judgment of necessity. In realms touching upon **foreign relations** and potential **national self-preservation**, Field indicates, the nation must **speak with one voice**, and it is not for the courts to introduce a discordant sound. B. Complexity, Prophecy, and Experimentation in Foreign Affairs Decisionmaking Some critics of the plenary power doctrine question this asserted **linkage** between immigration and foreign affairs. Chinese exclusion was not a foreign affairs decision, they assert, but one driven by domestic political considerations — and in fact it worsened our relations with China.38 The invocation of foreign affairs is seen as a pretext covering up uglier motives, and the plenary power doctrine prevents courts from looking behind the mask.39 Therefore, some assert that courts should simply provide the ordinary measure of **constitutional scrutiny** — to smoke out invidious motives or at least to provide an appropriate evaluation of the weight of the governmental interest in light of the individual stake.40 This kind of pre-textual invocation certainly can occur. But here is the difficulty: We should not assume that pretexts in the foreign affairs arena are readily identifiable. As Justice Breyer observed in a recent political question case: Decisionmaking in [the foreign affairs] area typically is highly political. It is “**delicate**” and “**complex**.” It often rests upon information readily available to the Executive Branch and to the intelligence committees of Congress, but **not** readily **available to the courts**. It frequently is highly dependent upon what Justice Jackson called “prophecy.” And the creation of wise foreign policy typically lies well **beyond** the experience or professional capacity of **a judge**. At the same time, where foreign affairs is at issue, the practical need for the United States to speak “with one voice and ac[t] as one,” is particularly important.41 Many of the nation’s policy tools in the foreign arena are crude and imprecise, with uncertain impact. This very uncertainty may require **trial-and-error** application, with a need for **quick** policy **changes**, especially **in times of crisis**. Therefore, **deference** to the political branches is called for, not because we can always be sure that their motives are pure and nondiscriminatory — we cannot — but because subjecting these measures to detailed litigation would **interfere with the flexibility** often necessary to act beyond our borders. A too-ready judicial interference would also **impair our ability** to deploy uncertain tools — deriving from **immigration** control, trade regulation, or other components of our international relations — according to a single unified strategy.42 C. An Example: The Contrast to Domestic Measures Consider the **seizure of U.S. diplomats** by militants in Tehran in 1978. After the embassy invasion was ratified and defended by the new Iranian government, the U.S. government turned to a disparate variety of countermeasures to try to win release of the American hostages, including the seizure of billions of dollars in assets of Iran and of its companies and nationals, litigation in the International Court of Justice, an ill-fated military rescue attempt after Iran defied the International Court, diplomatic overtures through Algeria, and certain immigration-law-based restrictions imposed on Iranian nationals in the United States.43 There were even proposals at the time to use immigration or other powers to intern large numbers of Iranian nationals so they could perhaps be part of an exchange that would bring the diplomats home.44 Thankfully, such internment was never put into motion. Contrast the trial-and-error use of these generally **crude and scattershot measures** with how the government would respond to a domestic kidnapping and potential hostage situation. The police could deploy quickly to investigate who seized the victims and where they were currently located. In that process the authorities could use judicial search warrants to facilitate the inquiry, plus arrest warrants and compulsory grand jury subpoenas as appropriate. They could call on a wide range of assistance and technical support from a host of fully empowered domestic agencies, state and federal. Once the kidnappers were located, the police would establish perimeter control around the hostage site. No hostile militias would stand in the way (or if such appeared, other governmental power, including the National Guard, could be deployed). In a protracted standoff, judicially issued search warrants might help legitimate a forcible rescue operation. And the full weight of criminal punishment, imposed through efficiently functioning courts, could be expected for the kidnappers or hostage takers. This comparison helps reveal why courts are positioned to apply close constitutional **scrutiny of** official **domestic action**, whenever it is credibly challenged, but properly feel more **constrained in the international arena**. In the international arena, U.S. actors generally cannot invoke compulsory process or other reliable coercive means under their own government’s control. Moreover, the **stakes are** typically **higher**, as is the number of people potentially affected — not only by the immediate outcome but also by downstream effects, as the resolution either deters similar adverse actions in the future or instead stimulates them because the U.S. effort failed. With a domestic operation, judges can be confident that the government will still have plenty of capacity to deal with public safety threats, even in the presence of robust judicial review. One cannot have such confidence about the efficacy of alternative policy tools in the **global arena** if domestic judicial action begins to prevent or **second-guess or slow down** the use of those initially chosen by the political branches. Another difference between the two settings is relevant. In the domestic arena, we do not tolerate individuals using **tit-for-tat responses** to remedy wrongful behavior. I cannot justify seizing and carrying away my neighbor’s television on the ground that he borrowed my riding mower months ago and never returned it. But this prohibition on messy self-help obtains precisely because efficient hierarchical legal mechanisms, involving professional police and a developed court system, stand available to redress my neighbor’s wrongful act. In recent decades, the world has taken limited but hopeful steps toward investing transnational institutions with comparable powers, but progress remains quite uneven across different policy domains. The plenary power doctrine **manifests the** Supreme **Court’s judgment** that the kind of detailed constitutional scrutiny appropriate for the mature and developed domestic public order is **not workable in the** more primitive **international legal system**, marked primarily by horizontal action-and-response to try to rectify breaches. D. The Nongovernmental Component of Foreign Affairs Decisionmaking Foreign affairs are involved in **immigration decisionmaking** for another, more entangling reason, even when there is no clear effort to retaliate against or to influence a foreign government. Most high-level immigration decisions — by Congress or by the executive branch — are designed, at least in part, to **influence or shape behavior overseas** by individuals and nonstate actors, including both prospective immigrants (contemplating either legal or illegal channels) and smuggling organizations. For example, the decision (part of Operation Streamline45) to prosecute a high percentage of simple entrants without inspection caught along the southern border, causing them to spend some time in jail or prison before being repatriated, has been criticized as disproportionate to the inherent nature of this misdemeanor offense.46 But this critique misunderstands the policy decision. Operation Streamline is primarily meant to send a **deterrent** message to others contemplating a future clandestine crossing.47 The same is true of decisions to repatriate violators to a distant part of the land border rather than back to the border town from which they entered and where their coyote may be waiting to help them try again to enter.48 To take another example, in 1994, the Clinton administration decided to decouple the grant of work authorization from the simple act of filing for asylum, as had been provided under earlier regulations, though this change would mean that many applicants would be without a means of support, other than private or family charity, for as long as 180 days. This austere step was taken, in significant part, to **discourage people** planning to come to the United States to file an ill-founded claim that previously would have secured several years of residence and lawful work while they awaited a hearing.49 Changes to the treatment or opportunities of noncitizens in the United States, whether in the direction of restriction or liberalization, almost inevitably affect the decisions of people and organizations abroad who are thinking about organizing or participating in migration to the United States. Smuggling organizations, in fact, often build their business plans around finding and exploiting weak spots in immigration laws or processes.50 As a result, some U.S. government measures take on a more **severe or restrictive aspect** than might initially seem to be warranted by the acts of the individuals most immediately affected. This is because the policymakers mean the action not just for those who are the direct object of enforcement on U.S. soil but also for the message sent to others they want to deter. This dynamic appears to explain, in significant part, the Obama administration’s decisions to respond to the southwest border migration surge in summer of 2014 with a surprisingly **severe set of measures**, including sustained detention, even though the subjects were mainly children traveling with a mother or other relative. The executive branch also implemented accelerated removal processing where the law permitted such action, and assured substantial publicity for the flight whenever recent migrants were deported by airplane to their home country.51 Despite sharp criticism, these practices persisted, and they seem to have had much of the **desired deterrent impact** in the foreign nations at issue. In fact, monthly arrivals of unaccompanied minors from these countries declined from 10,631 in June 2014 to 2,432 in September.52 This kind of deterrence-based action, focused on overseas individuals and nongovernmental players, is also an **aspect of foreign affairs**, even though it falls below the plane of high-level geopolitics. It likewise may need to take the form of rough-hewn trial-and-error, like the more traditional foreign-relations actions directed at governments. The Supreme Court’s case law over the years appears to consider such policy choices **equally worthy of foreign-affairs deference**.53 This analysis is not meant as advocacy for the quick or expansive use of immigration restrictions to respond to objectionable or unwelcome actions of foreign governments or nonstate actors. For reasons of both policy and proportion, immigration sanctions of this type should be sparingly deployed. But the Court’s **doctrine of deference** in Chae Chan Ping and later cases is based on the recognition that even for relatively liberal foreign-affairs decisionmakers, **rough-hewn actions** that initially seem outsized or individually unfair might need to be in the mix to **respond to**, or to help shape, **actions** that others are taking **abroad**.54 III. Why the Court Resists Even Moderate Proposals for a More Active Judicial Role A more nuanced branch of the Chae Chan Ping criticism accepts that foreign affairs considerations may well be at stake in some immigration decisions, but would **modify the doctrine** to allow for a carefully structured **closer judicial look**.55 The courts, such observers contend, should not take political branch assertions as controlling, but instead should perform an initial judicial probe of the asserted reasons, to decide whether the challenged immigration restriction rests on a significant foreign affairs foundation. If the answer is yes, then the reviewing court should treat the political branches’ decision as dispositive — essentially, as a political question not subject to judicial review. But if not, then the court should apply ordinary modes of constitutional review, which might well bring a form of heightened scrutiny. At first glance, this kind of proposal would seem to offer an attractive middle ground to the Supreme Court. Yet the Court in practice has **manifested great resistance** to these scholarly invitations. Why? In my view, a majority of the Justices harbor a deep **skepticism that lower courts can be trusted** to give sufficient weight to foreign policy concerns in making any such threshold assessment. The very nature of immigration litigation in the courts of appeals, with an actual and often sympathetic human being front and center, makes a reviewing judge far more likely to overvalue the individual interests at stake and undervalue the more subtle and complex reasons why a particular measure may be **needed for** system **stability** or to **influence** behavior **beyond our borders** — connections that often would not become fully apparent until broader damage is manifested months or years after an interventionist judicial decision.56 Anna Law’s book, The Immigration Battle in American Courts, documents this disparity in outlook between the Supreme Court and the lower courts quite revealingly. She describes “how [lower court] judges can disregard congressional edicts limiting their scope of review in order to reach a desired result,”57 and can usually get away with it because the Supreme Court can review only a tiny fraction of their decisions.58 Professor Law regards this stance by the courts of appeals as a virtue, but the Supreme Court doubtless views it otherwise. Keeping the plenary power doctrine **categorical** gives the Supreme Court greater assurance that lower courts will **preserve the space** needed for government actions to meet real **foreign affairs imperatives** (even if this stance inevitably also leaves room for some ill-motivated actions adopted by the political branches). If this symposium were being held at the time of Chae Chan Ping’s centennial, in 1989, we might have had greater reason to expect some softening by the Supreme Court regarding the deference doctrine in the foreign affairs arena. Exactly twenty-five years before the week when this symposium convened in Norman, Oklahoma, the Berlin Wall fell, signaling that the Soviet bloc was coming apart, about to be replaced, in many instances, by democratic governments. Lengthy wars were ending in Latin America, and dictators were being forced from office. It appeared we were on the cusp of a far more **benign world order** — one that might permit the rapid flowering of more protective international legal institutions and thereby reduce reliance on **crude action-and-response** in the international arena. **Today’s global scene is** far more **grim**. Not only has the United States experienced the trauma of al Qaeda’s September 11 attacks, which revealed a genuine need for more vigilant immigration screening, but democratic nations are also facing new **global threats** from other **nongovernmental actors** who actually glorify the use of beheadings, crucifixion, and slavery, in addition to other players using more old-fashioned forms of **terrorism** directed at civilians. **Failed states** are more common, and well-armed insurgencies have **proliferated**. The march of **democracy** has slowed and, in several countries, reversed. **Climate change** and even plague-like **diseases** presage more complicated foreign policy challenges, many of which will have a **migration dimension**. The risks to the United States, if our government’s foreign-policy-linked initiatives are unsuccessful, now seem **far higher** than in 1989. Thus, I do not foresee the Supreme Court retreating significantly from the strong deference doctrines derived from Chae Chan Ping. 59

**Err negative – the cost of a judicial mistake in a crisis is higher than in normal times**

**Posner and Vermeule, 7** – \*Kirkland and Ellis Professor of Law at the University of Chicago Law School AND \*\*professor at Harvard Law School (Eric and Adrian,Terror in the Balance: Security, Liberty, and the Courts p. 94)

3. Judicial review should be less strict, more accommodating, or more deferential in emergencies than in normal times. Courts cannot systematically improve upon government’s first-order balancing of security and liberty. Whatever hope they have of doing so in normal times, as in ordinary criminal settings where security and liberty trade off against each other, is dramatically attenuated during times of emergency, because the judges’ information is especially poor and the **costs of judicial mistakes are especially high.**

**Courts lack institutional competence to rule on foreign policy questions**

**Ku and Yoo, 6 -** \*Associate Professor of Law, Hofstra University School of Law; Visiting Associate Professor of Law, William & Mary Marshall-Wythe School of Law AND \*\* Professor of Law, University of California at Berkeley School of Law (Boalt Hall); Visiting Scholar, American Enterprise Institute (Julian and John, 23 Const. Commentary 179, “HAMDAN v. RUMSFELD: THE FUNCTIONAL CASE FOR FOREIGN AFFAIRS DEFERENCE TO THE EXECUTIVE BRANCH” lexis)

While courts are the primary institutions in the U.S. system for interpreting and applying laws, some of their key institutional characteristics undercut their ability in the foreign affairs law context. In particular, courts have access to limited information in foreign affairs cases and are unable to take into account the broader factual context underlying the application of laws in such areas.

These limitations are not a failing. They are part of the inherent design of the federal court system, which is intended to be independent from politics, to allow parties to drive litigation in particular cases, and to receive information in highly formal and limited ways. While these characteristics are helpful for the purposes of neutral decisionmaking, they also may render courts less effective tools in resolving ambiguities in laws designed to achieve national goals in international relations.

Courts do not actively gather information about a particular case or a particular law. Rather, that information is provided to them by the contending parties, in many cases through the expensive process of discovery. Any information provided to the court for evidentiary purposes must survive rules that impose tests for relevance, credibility, and reliability that are designed to ensure fairness toward the contending parties. In the criminal [\*200] context, such information is further limited to prevent violating a defendant's constitutional rights.

By contrast, the executive branch itself collects a wide variety of information through its own institutional experts and a wide global network of contacts without the necessity of strict rules of evidentiary exclusion. While this information may be presented to the executive branch at any time, a court generally cannot account for new information except in the context of a new case. n71 Courts also cannot update statutory mandates to reflect new information, but instead must continue to enforce policies even when they are no longer appropriate. For instance, once the political branches have enacted a statute or approved a treaty, the courts cannot alter or refuse to execute those laws, even if the original circumstances that gave rise to the statute or treaty have changed or even if the national interest would be harmed. n72

Aside from the judiciary's information-gathering limitations, there are strong reasons to doubt the ability of the members of the federal judiciary to resolve effectively foreign affairs laws ambiguities. Judges are not chosen based on their expertise in a particular field. Federal judges, with a few minor exceptions, handle a wide variety of cases without any subject matter specialties. None, for instance, is chosen because of his or her expertise on matters relating to foreign affairs or foreign affairs laws.

**Even if the executive is likely to make poor decisions – courts are comparatively more likely to do so**

**Ku and Yoo, 6 -** \*Associate Professor of Law, Hofstra University School of Law; Visiting Associate Professor of Law, William & Mary Marshall-Wythe School of Law AND \*\* Professor of Law, University of California at Berkeley School of Law (Boalt Hall); Visiting Scholar, American Enterprise Institute (Julian and John, 23 Const. Commentary 179, “HAMDAN v. RUMSFELD: THE FUNCTIONAL CASE FOR FOREIGN AFFAIRS DEFERENCE TO THE EXECUTIVE BRANCH” lexis)

None of this analysis, it bears repeating, suggests that the executive cannot make mistakes or poor judgments in the interpretations of laws relating to foreign affairs. The question is whether it will make more mistakes or poorer judgments and whether it is less costly to correct its mistakes. Both institutions can make mistakes, but our analysis suggests courts are more likely to make mistakes and that the costs of reversing those mistakes will be substantial. As the next Part explains, the failure to defer to executive interpretations in the Hamdan case could significantly [\*205] raise the costs for adjusting or conforming U.S. national policy toward the war on terrorism.

**1ar at: groupthink**

**Groupthink is wrong-**

**1---Empirics go neg – the best example of group-think was Iraq – where Bush requested Congressional authorization, submitted all of the flawed intel to Congress and received unanimous approval. Proves they don’t stop bad decisions- they just impose delays that reduce effectiveness.**

**2---No impact- small scale interventions don’t escalate**

**3---Executive is fragmented and pluralistic—Congress links harder**

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

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

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

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

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

**4---No groupthink- studies**

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

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

**1ar uq**

**The court will continue to be deferential – new court nominees make it more likely**

Richard **Wolf**, 7-12-**2018**, USA TODAY, "Supreme Court nominee Brett Kavanaugh's views on executive power may stir controversy", USA TODAY, https://www.usatoday.com/story/news/politics/2018/07/12/supreme-court-nominee-brett-kavanaugh-fan-presidential-powers/776292002/

WASHINGTON – Supreme Court nominee Brett Kavanaugh argued in 1998 that President Bill Clinton could be impeached for lying about his affair with Monica Lewinsky. For much of the next decade he worked inside the White House for President George W. Bush, where he came to the conclusion that "the job of president is far more difficult than any other civilian position in government." Thus it was that in 2009, after Barack Obama won the presidency, he suggested that presidents should be immune from criminal investigations and prosecutions, as well as personal civil suits, until after leaving office. "I believe it vital that the president be able to focus on his never-ending tasks with as few distractions as possible," he wrote. Kavanaugh's evolving views on executive power through the past three presidencies **are supported by mainstream conservatives** today. But they are viewed with suspicion by some who believe the presidency has grown more powerful than the framers of the Constitution intended. And Democrats are concerned that President Donald Trump's nomination of Kavanaugh for the Supreme Court is a reward for his espousal of presidential powers. Should he win confirmation, some of them say, he should recuse himself from cases involving Trump. "The president of the United States should not be above the law. The president of the United States should not be beyond a criminal investigation," said Sen. Cory Booker, D-N.J. "The president of the United States should not be able to pick the judge that will preside over questions involving his investigation." While Senate Democratic leader Chuck Schumer has said the focus of his party's effort to defeat Kavanaugh will be the judge's views on abortion and health care, his position on executive power is quickly emerging as a third front in the confirmation war. More: Will Brett Kavanaugh deliver the change conservatives crave? More: Brett Kavanaugh is President Trump's nominee for the Supreme Court More: For Trump, nomination may hinge on Kavanaugh's risks and rewards Like many conservatives, including most of those on the Supreme Court, Kavanaugh objects to one form of executive branch power: that exercised by federal regulators and, in particular, independent agencies. He is wary of green-lighting most agency rules under a 1984 Supreme Court decision, a process that has come to be known as "Chevron deference." Just this year, Kavanaugh dissented from a U.S. Court of Appeals for the District of Columbia Circuit ruling that upheld the structure of the Consumer Financial Protection Bureau, an independent agency created by Congress in 2010 in the wake of the financial crisis on Wall Street. He called such agencies "a headless fourth branch of the U.S. Government" that "hold enormous power over the economic and social life of the United States." Protecting the president For a primary author of independent counsel Kenneth Starr's occasionally explicit report detailing Clinton's transgressions, Kavanaugh traveled a long way to his 2009 article in the Minnesota Law Review recommending that presidents be free from prosecution. "This is not something I necessarily thought in the 1980s or 1990s," he wrote. But "looking back to the late 1990s, for example, the nation certainly would have been better off if President Clinton could have focused on Osama bin Laden without being distracted by the Paula Jones sexual harassment case and its criminal-investigation offshoots." Kavanaugh did not suggest that judges treat presidents differently, however. He said Congress should pass a law providing that civil suits and criminal investigations be deferred while the president is in office. If the president acts "dastardly," he said, "the impeachment process is available." The law review article – which also included recommendations for making agencies more accountable to the president and, interestingly, streamlining the judicial confirmation process – is certain to be a focus when Kavanaugh goes before the Senate Judiciary Committee later this summer or fall. Former Attorney General Alberto Gonzales, who supervised Kavanaugh in the White House counsel's office, said the nominee is "probably right" that a sitting president should be immune from indictment and prosecution while in office. "If appointed and this issue were to come before the court, I think it likely Brett would recuse on this issue," Gonzales said. 'Enormous concentration of power' In hundreds of opinions and dissents at the powerful appeals court, Kavanaugh **has backed the president's national security powers and has defended the use of military tribunals** for terrorism suspects. “Especially on national-security-related areas, he is likely to be with the more pro-executive power folks on the current court,” said Jonathan Adler, an expert on administrative law at Case Western Reserve University School of Law. That would not represent much of a change at the high court, where conservative justices **usually support the president on matters involving national security**. Just last month, the court ruled 5-4 – with retiring Justice Anthony Kennedy in the majority – that Trump acted legally and constitutionally in banning travelers from five predominantly Muslim nations.

**2ar at: yoo bad**

**The people bashing him are wrong**

**WSJ 10**, citing DOJ senior ethicist and Associate Deputy Attorney David Margolis, “Vindicating John Yoo”, https://www.wsj.com/articles/SB10001424052748704757904575078182303405948

So after **five years of investigation**, **partisan accusations** and **unethical media leaks**, the Justice Department's **senior ethicist** has concluded that Bush Administration lawyers John Yoo and Jay Bybee committed **no professional misconduct**. The issue now is whether the proteges of Attorney General Eric Holder who led this exercise at Justice's Office of Professional Responsibility (OPR) should themselves be in the dock. That's our reading of the analysis by Associate Deputy Attorney General David Margolis, a career official who reviewed both the Bush-era legal memos on interrogating terror suspects and their review by the lawyers at OPR. Remarkably, his report is far more scathing about OPR than it is about Messrs. Yoo and Bybee, who he says made legal errors but did so in good faith, out of honest legal analysis, and in the ethical service of their clients in the executive branch at a time of war. Mr. Margolis's review overrules both a draft OPR report whose contents were leaked to the media last year and a final OPR report that was released along with the Margolis review late Friday. Those OPR reports recommended disciplinary action and potential disbarment for Messrs. Bybee and Yoo for their advice while working in the Office of Legal Counsel in the frantic months after September 11. The leaks were themselves an **unethical attempt** to smear the reputations of the lawyers while they were under a gag order and unable to reply. House Judiciary Chairman John Conyers nonetheless leapt to praise Friday's release of earlier drafts, touting them as evidence that the OLC memos were "legally flawed and fundamentally unsound." Senate Judiciary Chairman Pat Leahy promptly called for Judge Bybee to resign from the federal bench. Both Democrats have scheduled more grandstanding, er, hearings, for the coming days. Justice is defending its pre-weekend document dump by saying that it had to release the entire record. But notably, Justice failed to release a 14-page January 19, 2009 letter from then-Attorney General Michael Mukasey and Deputy AG Mark Filip that eviscerated the first OPR draft. The Mukasey-Filip memo has since appeared on media Web sites, and its withering analysis clearly made an impression on Mr. Margolis. The selective disclosure by Mr. Holder suggests the political nature of this entire exercise. --- Readers can review the documents for themselves, but two OPR judgments deserve particular scorn. The first is the claim that Messrs. Yoo and Bybee were so close to their client, i.e., the White House, that they knew what the President and CIA wanted to hear. But it is perfectly appropriate for a lawyer to know what his client wants, and, by OPR's standard, 99% of professional lawyers could be considered guilty of misconduct. The ethicists at OPR also claim the Bush attorneys were wrong to stick to a legal analysis of interrogation practices and should have also considered their moral and policy implications. But the duty of the Office of Legal Counsel is precisely to offer legal advice, not to render policy judgments. Interrogation policy was determined by the **CIA and the White House**, as it should have been. The last thing the country needs is for lawyers to tell the CIA how to get actionable intelligence from enemy combatants. What's more, as Mr. Mukasey's memo makes clear, the legal canons of Washington, D.C. and many states expressly prohibit lawyers from offering such policy advice to sophisticated clients such as the U.S. government. This is precisely so lawyers don't muddy their legal counsel with policy bias. The rotten quality of the OPR efforts -- and Mr. Margolis's repudiation of them -- raises real questions about the lawyers who produced this work. H. Marshall Jarrett, who supervised the first OPR draft, is a protege of Mr. Holder who managed not to produce his draft report until the Bush Administration was preparing to leave office. After Mr. Mukasey "memorialized" his concerns, as his letter put it, the Jarrett draft was leaked without the Mukasey response. Mr. Holder reassigned Mr. Jarrett in April 2009 to lead the Executive Office for U.S. Attorneys, an arguably more powerful post. His OPR effort makes him unfit for such a job. Mr. Holder replaced Mr. Jarrett at OPR with Mary Patrice Brown, who tried to salvage OPR's original conclusions with a new but equally deficient argument. After abandoning OPR's earlier specific allegations that Messrs. Yoo and Bybee had violated D.C. Rule of Professional Conduct 1.1 to provide competent representation and rule 2.1 to exercise independent legal judgment, Mr. Margolis writes, Ms. Brown's final report "did not specify the rule or rules of professional conduct that were violated." Instead, she added consideration of a "best practices" memo and guiding principles. Mr. Margolis writes that these documents raise several concerns, not least that "neither of them existed at the time Yoo and Bybee worked at OLC." Ms. Brown is reportedly in line for a judicial nomination, and Republicans ought to keep her embarrassing performance in mind when they vote on confirmation. --- Mr. Margolis deserves credit for his independent analysis, but we also can't help but notice the striking change of tone in the last few pages of his report. Mr. Margolis's only duty was determining whether the Bush attorneys had adhered to proper ethical standards. **On that question, he is unequivocal in saying they did.** However, at the end of his 68-page review he indulges in some superfluous commentary that Messrs. Yoo and Bybee exhibited "poor judgment" and that some of their legal analysis was mistaken. This is a matter of opinion -- akin to writing an op-ed piece -- unrelated to the question of whether they behaved unethically, and it is precisely the kind of judgment that Mr. Margolis says earlier in the report that he will not render. His change of tone is notable enough that it raises a question of whether Mr. Margolis decided to add this concluding rhetoric as a way to propitiate Mr. Holder and to save at least some face for the AG's proteges. Republicans should ask Mr. Margolis about this if Democrats proceed with their hearings. The larger story here is the **vindication of Mr. Yoo** and the other Bush attorneys, who were **pilloried unfairly over ethics** in what was really a **policy dispute** in the war on terror. Democrats wanted to appease the anti-antiterror left, and they fixed on **punishing mid-level officials** as prominent enough to get public at:tention but not so prominent as to seem like a banana republic seeking revenge against a former President or Vice President. **Their campaign has now been exposed as a partisan, and unethical, smear.**

**Their indicts amount to naked partisanship**

**Eastman, 9** - dean at Chapman University School of Law and a professor of constitutional law (John, “His views spark important debate” Los Angeles Times, 4/9, <http://www.latimes.com/la-oe-eastman9-2009apr09,0,2922332.story>)

As the dean of the law school, I welcome his presence and the debate it has provoked. The opportunity to confront positions with which one disagrees is the hallmark of a first-rate education. As a constitutional law scholar, I should also note my disagreement with Yoo's detractors. In my view, the legal positions Yoo advanced in the post-9/11 memos are supported -- some well supported; others at least arguable -- by constitutional text, historical understanding and legal precedent. In fact, many of those positions were shared by Clinton administration officials now serving in the Obama administration. For example, one memo argued that the Geneva Convention does not apply to unlawful combatants, such as members of Al Qaeda, who target civilian populations and otherwise violate the rules of war. That position was shared at the time by Eric H. Holder Jr., now the U.S. attorney general. In 2002, in a CNN interview, Holder stated: "It seems to me that given the way in which they have conducted themselves, however, that they are not, in fact, people entitled to the protection of the Geneva Convention. They are not prisoners of war." Another controversial legal position advanced in the memos was that provisions of the Bill of Rights did not apply beyond the shores of the United States, particularly to wartime conduct. For authority, the memo cited the case of Harbury vs. Deutch, in which a three-judge panel of the D.C. Circuit Court of Appeals held in 2000 that the 5th Amendment does not apply abroad to claims of torture by CIA-paid agents against foreign nationals. At issue were allegations of torture that occurred over an 18-month period -- half of it during the first year of the Clinton administration and that, according to the complaint, included this: "They chained and bound him naked to a bed, beat and threatened him, and encased him in a fullbody cast to prevent escape." The appeals court accepted the arguments made by Wilma Lewis, a U.S. attorney during the Clinton administration, that the 5th Amendment does not apply to claims of torture involving "an alien rebel commander leading an attempt violently to overthrow a foreign government," even when the torture was alleged to have been committed by paid agents of, and at the request or at least full knowledge of, the CIA. The opinion was written by Judge David S. Tatel, a Clinton appointee, and joined by Judge Harry T. Edwards, a Carter appointee, and Judge Douglas H. Ginsburg, a Reagan appointee. Even the controversy about the 4th Amendment in the most recently released memo is not as clear-cut as Yoo's opponents would have it. The 1972 Supreme Court decision they rely on in their arguments indeed held that the 4th Amendment requires a warrant for electronic surveillance of U.S. citizens in domestic security matters. But the opinion for the court by Justice Lewis F. Powell expressly left open the question of whether those requirements would apply to domestic surveillance of agents of foreign powers. Powell strongly suggested that they would not, favorably citing a District Court decision that drew such a distinction because the Supreme Court had long recognized the president's "inherent power with respect to foreign relations." In other words, whether the 4th Amendment limited the president's commander-in-chief power to conduct surveillance of enemy agents on our soil, in time of war, was a close enough question that the Supreme Court had not resolved it. Yoo's position was therefore hardly incompetent and indefensible, as some of his detractors claim. Indeed, it would be incompetent and indefensible for Yoo to have ignored Powell's caveat and concluded that the case resolved a question the court explicitly left open. After 9/11, the lawyers at the Justice Department faced unprecedented legal questions. They had been given the task of identifying the executive powers that could legally be brought to bear to prevent future attacks. That they were aggressive in their legal interpretations should come as no surprise, given the circumstances. In the end, the president's options were more thoroughly vetted by lawyers than at any wartime era in our nation's history. There were no wholesale detentions based on race, such as occurred under President Roosevelt in World War II. No systematic suppression of antiwar speech, such as under President Wilson in World War I. That there is a great deal of disagreement about the constitutionality of the lines the lawyers drew is also no surprise -- the Constitution deliberately keeps the lines between congressional and executive wartime powers, and between those branches and the courts, deliberately ambiguous. But disagreement about closely contested issues hardly supports the exaggerated claims that Yoo and his colleagues shredded the Constitution, or that he should not be teaching law.

**2ac courts cp – theory/competition**

**U.S. isn’t all branches**

**Chicago 7** [University of Chicago Manual of Style, “Capitalization, Titles”, http://www.chicagomanualofstyle.org/CMS\_FAQ/CapitalizationTitles/CapitalizationTitles30.html]

Q. When I refer to the government of the United States in text, should it be U.S. Federal Government or U.S. federal government? A. The government of the **U**nited **S**tates is **not a single official entity**. Nor is it when it is referred to as the federal government or the U.S. government or the U.S. federal government. It’s just a government, which, like those in all countries, has some official bodies that act and **operate in the name of government**: the Congress, the Senate, the Department of State, etc.

**Courts make law**

**Meese 86** (Edwin III, Distinguished Fellow in Public Policy and Chair of the Center for Legal and Judicial Studies – Heritage Foundation, “The Tulane Speech: What I Meant”, Washington Post, 11-13, Lexis)

The burden of The Post's editiorial concerned what I believe about the force of Supreme Court decisions. Does a ruling have general applicability beyond the case itself? May public officials and private citizens choose to ignore them at will? Putting the worst construction on what I did not say, The Post wondered whether the speech might be "an invitation to constitutional chaos and an expression of contempt for the federal judiciary and the rule of law." I believe it is important not only to put these concerns to rest but also to emphasize again the point of the speech -- that our Constitution is the supreme or paramount law of the land. Supreme Court decisions do, of course, have general applicability. In addition to **binding the parties** in the case at hand, a decision is binding precedent on lower federal courts as well as state courts. Further, such decisions, as Lincoln once said, are "entitled to very high respect and consideration in all parallel cases" by the other departments of government, both federal  [\*1004]  and state. Arguments from prudence, the need for stability in the law, and respect for the judiciary will and should persuade officials of these other institutions to abide by a decision of the Court. It would be highly irresponsible for them not to conform their behavior to precedent. I quite agree with The Post that, for example, the general principle laid down in Brown v. Board of Education [1](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=69fd26de46e9a965404a3178eeeee7a4&docnum=2&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlb-zSkAW&_md5=0bd49b81389e2ea6efa18e8fc1a0908a&focBudTerms=Supreme+Court+decisions+do%2C+of+course%2C+have+general+applicability.+In+addition+to+binding&focBudSel=all#n1) governed not only Kansas, whence the case arose, but also all other states that had segregated schools. Or to use an example of a decision with which I do not agree, Roe v. Wade [2](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=69fd26de46e9a965404a3178eeeee7a4&docnum=2&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlb-zSkAW&_md5=0bd49b81389e2ea6efa18e8fc1a0908a&focBudTerms=Supreme+Court+decisions+do%2C+of+course%2C+have+general+applicability.+In+addition+to+binding&focBudSel=all#n2) struck down Texas abortion law, but also contained a principle that officials in other states were obliged to apply. Constitutional decisions by the Court are not "the supreme law of the land" in the sense that the Constitution is. But they are **law**, as I said at Tulane, and they are the law of the land in the sense that they do indeed have general applicability and deserve the greatest respect from all Americans.