# CP – Supreme Court – BFHR 7wk

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## 1NC

### 1NC — CP: Supreme Court

#### The United States federal judiciary should prohibit security cooperation with the North Atlantic Treaty Organization.

#### That reverses current precedent of non-interference — otherwise, executive unilateralism and adventurism will accelerate.

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A common definition of ~~insanity~~ [irrationality] is doing the same thing over and over again and expecting different results. That’s not a bad summary of the decades-old debate over the scope of the president’s constitutional authority to use military force without congressional authorization, which has been rekindled by the military operation against Qasem Soleimani — and the Trump administration’s constantly evolving legal justifications for the strike. Over and over, from the Nixon administration onward, scholars and executive branch lawyers have debated the circumstances in which the Constitution allows the president to go it alone. And over and over, those debates have ended without any formal resolution of who was right and who was wrong. All we’re left with, as seems increasingly likely with respect to Soleimani’s death, is the creation of yet another historical precedent for the executive branch to point to when defending unilateral presidential warmaking in the future.

The reason for the indeterminacy of this debate is simple enough: Over the past half-century, federal courts have essentially stopped even attempting to resolve disputes between Congress and the White House over war powers. But the Constitution does not require such judicial passivity — and the Soleimani strike helps to drive home its very real costs. Ultimately, we may not agree with how the courts would police the separation of war powers between the political branches. But allowing them to do so may be increasingly preferable to letting things continue this way.

The idea that courts have little role to play in war powers disputes is of entirely recent vintage. From the Quasi-War with France that began in 1798 through the conflict in Korea, the Supreme Court routinely settled major war powers questions — often in the middle of the relevant conflict. Indeed, the justices’ only significant discussion of the scope of the president’s inherent constitutional war powers came in March 1863, when, with the outcome of the Civil War very much in doubt, a divided court ruled, 5 to 4, that President Abraham Lincoln’s blockade of Confederate ports at the outset of hostilities had been legal. During World War I, the court weighed in, among other things, on the constitutionality of the draft. More than two decades later, the justices convened a special session in the middle of World War II to consider the legality of trying Nazi saboteurs before a military commission. And one of the court’s most significant separation-of-powers decisions came in June 1952, when the justices invalidated President Harry S. Truman’s unilateral seizure of steel mills to avoid having a strike interfere with military production during the Korean War. Although the justices often disagreed about the results in these cases, they never disputed that it was appropriate for the court to resolve them.

That changed during Vietnam, as justices twisted themselves into pretzels to avoid weighing in on the legality of various aspects of U.S. military operations in Southeast Asia, and lower courts followed suit. Among other things, the courts repeatedly relied upon “justiciability” doctrines to hold that different cases did not properly raise the underlying separation-of-powers questions, involved the wrong plaintiffs, sought the wrong kind of relief or were premature or moot. The result of this sideline-sitting was to leave the debate entirely to the political process — which, not surprisingly, never produced a conclusive resolution as to the limits on the president’s constitutional power. Even the War Powers Resolution, which Congress enacted over President Richard M. Nixon’s veto at the end of the conflict in an attempt to rein in future unilateral presidential warmaking, didn’t attempt to draw a substantive line between the president’s power and the legislature’s; all it did was impose a series of procedural constraints — most of which have proved woefully ineffective.

Five myths about war powers

Compared with Vietnam, the courts have been marginally more involved in post-Sept. 11 counterterrorism cases. But the substantive rulings have come almost exclusively in cases brought by detainees — where an individual’s liberty hangs in the balance. Thus, courts have never weighed in on whether the 2001 Authorization for Use of Military Force applies to the fight against the Islamic State — one of the central legal questions in contemporary counterterrorism policy — at least largely because the United States has, perhaps deliberately, not held any ISIS detainees long enough for their cases to be resolved. Thus, as Justice Stephen G. Breyer recently complained, even as the war Congress authorized days after Sept. 11, 2001, enters its 19th year, a number of its central legal questions remain unanswered. Reasonable people may disagree about what the answers ought to be. But the lack of any answers only favors the executive branch, for better or worse.

Of course, there is no reason to expect the courts to reverse this trend on their own. And Congress could try to assert itself in other ways, including by cutting off funding for military operations of which it disapproves. But any attempt by Congress to reclaim substantive authority would likely raise additional legal questions — and so we would be right back where we started. Instead, or in addition, Congress could give the courts a nudge — by passing legislation designed to make it easier for the judicial system to reach the merits of these cases. For instance, Congress could clarify who can sue in such cases; what kinds of claims they are allowed to bring; and what kind of relief they are allowed to pursue. The Constitution still will impose some limits on the contours of such a statute, but it’s hard to imagine courts being quite as skeptical in the face of affirmative legislation inviting them to intervene — especially if, as I’ve proposed elsewhere, the suits are only allowed after the fact and don’t ask the courts to block ongoing U.S. military operations.

The idea of judicial intervention in war powers disputes will certainly strike some as radical. But it hasn’t been historically. And even in modern times, it seems increasingly preferable to the alternative — in which the executive branch, across different administrations and political parties, will only continue to accumulate more and more power to use military force on its own, and the only realistic checks on that power will come at the ballot box. It is hard to imagine that this is the separation of powers the Founding Fathers had in mind — or that the current Supreme Court would champion. But even if it is, it seems increasingly clear that it would be better to have the matter settled, rather than waiting to have the same debate all over again the next time the president goes it alone.

#### Extinction.

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The Untenability of Unilateral Action

Yet, there is surely merit in taking this potentially apocalyptic decision out of the hands of one individual. History shows that, at times, prior presidents acted while impaired, be it John Kennedy under of the influence of pain killers or Richard Nixon intoxicated from alcohol. In the case of Trump, many questioned his decision-making processes, viewing him as emotional and acting on impulse, often ignoring his advisers. Because of Joe Biden’s age — at 78 years old, he is the oldest man to be elected president — some people wonder how long he will be able to bring clarity and stamina to the job. That is enough to merit bringing in others for concurrence on a momentous nuclear weapons decision, but the issue extends far beyond even these examples. No single individual, no matter how wise and temperate, should hold the sole power to potentially initiate the destruction of the world.

### 1NC — CP: Supreme Court — ! — PQD

#### The CP unravels the PQD.

Karnes ’12 — Jennifer; J.D. Candidate at SUNY Buffalo Law School, B.A. from New York University. May 2012; “Pirates Incorporated: Kiobel v. Royal Dutch Petroleum Co. and the Uncertain State of Corporate Liability for Human Rights Violations Under the Alien Tort Statute”; Buffalo Law Review, Volume 60; Accessed Online via University of Michigan Libraries

Judge Bork, on the other hand, dismissed the case on the ground that "[n]either the law of nations nor any of the relevant treaties provides a cause of action that appellants may assert in courts of the United States," reasoning that Congress's grant of ATS jurisdiction did not, in itself, create a cause of action that individuals could enforce in municipal courts. Judge Bork found that the plaintiffs did not seek to enforce a statutory nor a constitutional right, as required to invoke the power of the court. Relying on (1) the political question doctrine --which contends that some issues, such as foreign policy issues, are better left to the political process than judicial intervention; and (2) the act of state doctrine --in which sovereign immunity precludes the U.S. courts from inquiring into the validity of the acts of a foreign sovereign in its own territory, Judge Bork further reasoned that separation of powers principles prevented the court from establishing a cause of action. Recognizing a new cause of action, in Judge Bork's opinion, would require [\*832] the court to analyze principles of international law that are not clearly defined and may touch "sharply on national nerves," and create an exception to the general rule that international law only binds state actors. Further, it follows from Filartiga's reasoning that if there exists an individual right to bring claims under the law of nations, then there also exists a cause of action for any violation of the treaties to which the United States is a party. Bork cautioned that this line of reasoning was absurd, because it would mean, "all existing treaties became, and all future treaties will become, in effect, self-executing when ratified." Bork also noted that there was no international consensus on whether terrorism violated the law of nations, that no treaty provided individuals with a right to seek damages, and that at the time of the enactment of ATS, the concept of international human rights law simply did not exist. Bork concluded that "unless a modern statute, treaty, or executive agreement provided a private cause of action for violations of new international norms which do not themselves contemplate private enforcement," it was not the role of the court to develop new causes of action under ATS.

Judge Bork contended that the Filartiga court's formulation of ATS would run contrary to the Constitution by allowing the court to meddle in the other branches' powers to decide matters of foreign relations under Articles I and II. Following this reasoning, Judge Robb found that the case could not be adjudicated on the basis of the political [\*833] question doctrine. Judge Robb further warned that adjudicating controversial foreign policy issues was a slippery slope, given each nation's differing notions of terrorism, and that "each supposed scenario carries with it an incredibly complex calculus of actors, circumstances, and geopolitical considerations." This debate over the foreign policy implications of ATS jurisdiction persists today, and appears in Kiobel as a basis for rejecting corporate liability. Judges Bork's and Robb's concurrences were very influential during the twenty-year period between Tel-Oren and the Supreme Court's decision in Sosa v. Alvarez-Machain. During this time, only the Second and Ninth Circuits allowed ATS claims--other courts continued to rely on Tel-Oren to conclude that ATS jurisdiction did not apply over ATS plaintiffs' alleged claims.

#### PQD erodes norms on drone warfare.

Hafetz ’17 — Jonathan; Professor of Law at Seton Hall University, J.D. from Yale University, M. Phil. From Oxford University, B.A. from Amherst College; January 6, 2017; “The Troubling Application of the Political Question Doctrine to Congressional Force Authorizations”; *Just Security*; <https://www.justsecurity.org/36021/troubling-application-political-question-doctrine-congressional-force-authorizations/>

The U.S. District Court for the District of Columbia on Nov. 21 dismissed the suit brought by U.S. Army Captain Nathan Michael Smith challenging the legality of the military campaign against ISIS under Operation Inherent Resolve. The opinion by Judge Colleen Kollar-Kotelly rejecting the suit on political question grounds is troubling. (Judge Kollar-Kotelly also denied Smith had standing based on his claim that continuing to fight in an unauthorized military action against ISIS would violate his oath to support and defend the Constitution). The Obama administration’s release last month of its Report on the Legal and Policy Frameworks Guiding and Limiting the United States’ Use of Military Force and Related National Security Considerations (“Framework Report”), while admirable in several respects (see Marty Lederman’s comprehensive summary), crystalizes concerns about the potential ramifications of the political question ruling in Smith v Obama.

In Smith, the plaintiff maintained that neither the 2001 nor 2002 Authorization for Use of Military Force (AUMF)—the former enacted for al Qaeda and the Taliban, the latter for Iraq—constituted authorization for military action against ISIS. Such action, the plaintiff therefore argued, was unlawful under the 60-day time limit imposed by the War Powers Resolution. The district court held that the suit presented a nonjusticiable political question because the issues raised were primarily ones committed to the political branches of government and because the court lacked judicially manageable standards. This holding, as Michael Glennon has argued here, and Marty has argued here, here, and here, misconstrues and misapplies the political question doctrine. In short, a suit asking a court to interpret the scope and meaning of a congressional force statute—and, particularly, what entities it applies to—presents a legal question squarely within the province and ability of the judiciary to decide.

Smith’s suit, in the court’s view, would have failed anyway for lack of standing. But the court’s political question ruling sweeps more widely and if followed, would bar suit by future plaintiffs raising similar merits claims even where they unquestionably had standing. Those future plaintiffs could include, for example, individuals detained by the United States or harmed by U.S. drone strikes (including family members of individuals killed in such strikes). The ruling would foreclose those persons from claiming that the U.S. action was illegal if it were predicated on their connection to ISIS or to another group that fell outside current force authorizations.

The Obama administration’s Framework Report underscores these concerns, particularly as executive power is handed to a Trump administration that could jettison existing policy constraints while further enlarging America’s forever war against terrorist groups.

The Framework Report highlights several broader trends. First, it reinforces that the U.S. armed conflict against al Qaeda and the Taliban seems only to expand, not contract, with time. Since 2001, it has extended to other groups, whether because they fall under the al Qaeda umbrella (like ISIS) or are deemed associated forces (as al-Shabaab recently was).

Second, the Report underscores that, under the current framework, the president generally has authority—even if he does not exercise it—to detain and target individuals based solely on their purported membership in a military group covered by the 2001 AUMF. That authority thus permits status-based detention or targeting, without resort to claims of self-defense.

Third, the Report reinforces that additional restrictions on this broad legal authority exist only as a matter of policy. As such, they may be discarded by the next administration. Further, the policies themselves—which apply heightened requirements for using lethal force outside areas of active hostilities—have proven susceptible to workarounds in practice (See the valuable New York Times reporting by Charlie Savage, Eric Schmitt, and Mark Mazzetti on how in Somalia the U.S. military has avoided limitations in the May 2013 Presidential Policy Guidance through assertions of an independent power of collective self-defense, which includes assistance to U.S. partners on the ground).

Courts remain an important check on elastic counterterrorism powers. This check will become even more important in a Trump administration that expansively interprets existing—or future—force authorizations while disregarding restraints. In the past, suits challenging particular drone strikes—both ex-ante and ex-post—have been dismissed on threshold justiciability grounds. Smith, however, is the first decision to hold that the central underlying question—the meaning and scope of executive power under a congressional force authorization—is itself a political question. As Smith explained “Plaintiff asks the Court to second-guess the Executive’s application of these statutes to specific facts on the ground in an ongoing combat mission halfway around the world” (emphasis in original). Smith’s rationale would prevent other challenges to the application of force authorizations not only to ISIS, but also to other, yet unidentified, groups.

#### Extinction — both miscalculated and intentional nuclear war.

Boyle ’13 — Michael; Professor of Political Science at La Salle University, former Lecture in International Relations and Research Fellow in the Centre for the Study of Terrorism and Political Violence; 2013; “The Costs and Consequences of Drone Warfare”; *International Affairs*, Volume 89; Accessed Online via University of Michigan Libraries

The race for drones

An important, but overlooked, strategic consequence of the Obama administration’s embrace of drones is that it has generated a new and dangerous arms race for this technology. At present, the use of lethal drones is seen as acceptable to US policy-makers because no other state possesses the ability to make highly sophisticated drones with the range, surveillance capability and lethality of those currently manufactured by the United States. Yet the rest of the world is not far behind. At least 76 countries have acquired UAV technology, including Russia, China, Pakistan and India.120 China is reported to have at least 25 separate drone systems currently in development.121 At present, there are 680 drone programmes in the world, an increase of over 400 since 2005.122 Many states and non-state actors hostile to the United States have begun to dabble in drone technology. Iran has created its own drone, dubbed the ‘Ambassador of Death’, which has a range of up to 600 miles.123 Iran has also allegedly supplied the Assad regime in Syria with drone technology.124 Hezbollah launched an Iranian-made drone into Israeli territory, where it was shot down by the Israeli air force in October 2012.125

A global arms race for drone technology is already under way. According to one estimate, global spending on drones is likely to be more than US$94 billion by 2021.126 One factor that is facilitating the spread of drones (particularly non-lethal drones) is their cost relative to other military purchases. The top-of-the line Predator or Reaper model costs approximately US$10.5 million each, compared to the US$150 million price tag of a single F-22 fighter jet.127 At that price, drone technology is already within the reach of most developed militaries, many of which will seek to buy drones from the US or another supplier. With demand growing, a number of states, including China and Israel, have begun the aggressive selling of drones, including attack drones, and Russia may also be moving into this market.128 Because of concerns that export restrictions are harming US competitiveness in the drones market, the Pentagon has granted approval for drone exports to 66 governments and is currently being lobbied to authorize sales to even more.129 The Obama administration has already authorized the sale of drones to the UK and Italy, but Pakistan, the UAE and Saudi Arabia have been refused drone technology by congressional restrictions.130 It is only a matter of time before another supplier steps in to offer the drone technology to countries prohibited by export controls from buying US drones. According to a study by the Teal Group, the US will account for 62 per cent of research and development spending and 55 per cent of procurement spending on drones by 2022.131 As the market expands, with new buyers and sellers, America’s ability to control the sale of drone technology will be diminished. It is likely that the US will retain a substantial qualitative advantage in drone technology for some time, but even that will fade as more suppliers offer drones that can match US capabilities.

The emergence of this arms race for drones raises at least five long-term strategic consequences, not all of which are favourable to the United States over the long term. First, it is now obvious that other states will use drones in ways that are inconsistent with US interests. One reason why the US has been so keen to use drone technology in Pakistan and Yemen is that at present it retains a substantial advantage in high-quality attack drones. Many of the other states now capable of employing drones of near-equivalent technology—for example, the UK and Israel—are considered allies. But this situation is quickly changing as other leading geopolitical players, such as Russia and China, are beginning rapidly to develop and deploy drones for their own purposes. While its own technology still lags behind that of the US, Russia has spent huge sums on purchasing drones and has recently sought to buy the Israeli-made Eitan drone capable of surveillance and firing air-to-surface missiles.132 China has begun to develop UAVs for reconnaissance and combat and has several new drones capable of long-range surveillance and attack under development.133 China is also planning to use unmanned surveillance drones to allow it to monitor the disputed East China Sea Islands, which are currently under dispute with Japan and Taiwan.134 Both Russia and China will pursue this technology and develop their own drone suppliers which will sell to the highest bidder, presumably with fewer export controls than those imposed by the US Congress. Once both governments have equivalent or near-equivalent levels of drone technology to the United States, they will be similarly tempted to use it for surveillance or attack in the way the US has done. Thus, through its own over-reliance on drones in places such as Pakistan and Yemen, the US may be hastening the arrival of a world where its qualitative advantages in drone technology are eclipsed and where this technology will be used and sold by rival Great Powers whose interests do not mirror its own.

A second consequence of the spread of drones is that many of the traditional concepts which have underwritten stability in the international system will be radically reshaped by drone technology. For example, much of the stability among the Great Powers in the international system is driven by deterrence, specifically nuclear deterrence.135 Deterrence operates with informal rules of the game and tacit bargains that govern what states, particularly those holding nuclear weapons, may and may not do to one another.136 While it is widely understood that nuclear-capable states will conduct aerial surveillance and spy on one another, overt military confrontations between nuclear powers are rare because they are assumed to be costly and prone to escalation. One open question is whether these states will exercise the same level of restraint with drone surveillance, which is unmanned, low cost, and possibly deniable. States may be more willing to engage in drone overflights which test the resolve of their rivals, or engage in ‘salami tactics’ to see what kind of drone-led incursion, if any, will motivate a response.137 This may have been Hezbollah’s logic in sending a drone into Israeli airspace in October 2012, possibly to relay information on Israel’s nuclear capabilities.138 After the incursion, both Hezbollah and Iran boasted that the drone incident demonstrated their military capabilities.139 One could imagine two rival states—for example, India and Pakistan—deploying drones to test each other’s capability and resolve, with untold consequences if such a probe were misinterpreted by the other as an attack. As drones get physically smaller and more precise, and as they develop a greater flying range, the temptation to use them to spy on a rival’s nuclear programme or military installations might prove too strong to resist. If this were to happen, drones might gradually erode the deterrent relationships that exist between nuclear powers, thus magnifying the risks of a spiral of conflict between them.

Another dimension of this problem has to do with the risk of accident. Drones are prone to accidents and crashes. By July 2010, the US Air Force had identified approximately 79 drone accidents.140 Recently released documents have revealed that there have been a number of drone accidents and crashes in the Seychelles and Djibouti, some of which happened in close proximity to civilian airports.141 The rapid proliferation of drones worldwide will involve a risk of accident to civilian aircraft, possibly producing an international incident if such an accident were to involve an aircraft affiliated to a state hostile to the owner of the drone. Most of the drone accidents may be innocuous, but some will carry strategic risks. In December 2011, a CIA drone designed for nuclear surveillance crashed in Iran, revealing the existence of the spying programme and leaving sensitive technology in the hands of the Iranian government.142 The expansion of drone technology raises the possibility that some of these surveillance drones will be interpreted as attack drones, or that an accident or crash will spiral out of control and lead to an armed confrontation.143 An accident would be even more dangerous if the US were to pursue its plans for nuclear-powered drones, which can spread radioactive material like a dirty bomb if they crash.144

Third, lethal drones create the possibility that the norms on the use of force will erode, creating a much more dangerous world and pushing the international system back towards the rule of the jungle. To some extent, this world is already being ushered in by the United States, which has set a dangerous precedent that a state may simply kill foreign citizens considered a threat without a declaration of war. Even John Brennan has recognized that the US is ‘establishing a precedent that other nations may follow’.145 Given this precedent, there is nothing to stop other states from following the American lead and using drone strikes to eliminate potential threats. Those ‘threats’ need not be terrorists, but could be others— dissidents, spies, even journalists—whose behaviour threatens a government.

One danger is that drone use might undermine the normative prohibition on the assassination of leaders and government officials that most (but not all) states currently respect. A greater danger, however, is that the US will have normalized murder as a tool of statecraft and created a world where states can increasingly take vengeance on individuals outside their borders without the niceties of extradition, due process or trial.146 As some of its critics have noted, the Obama administration may have created a world where states will find it easier to kill terrorists rather than capture them and deal with all of the legal and evidentiary difficulties associated with giving them a fair trial.147

Fourth, there is a distinct danger that the world will divide into two camps: developed states in possession of drone technology, and weak states and rebel movements that lack them. States with recurring separatist or insurgent problems may begin to police their restive territories through drone strikes, essentially containing the problem in a fixed geographical region and engaging in a largely punitive policy against them. One could easily imagine that China, for example, might resort to drone strikes in Uighur provinces in order to keep potential threats from emerging, or that Russia could use drones to strike at separatist movements in Chechnya or elsewhere. Such behaviour would not necessarily be confined to authoritarian governments; it is equally possible that Israel might use drones to police Gaza and the West Bank, thus reducing the vulnerability of Israeli soldiers to Palestinian attacks on the ground. The extent to which Israel might be willing to use drones in combat and surveillance was revealed in its November 2012 attack on Gaza. Israel allegedly used a drone to assassinate the Hamas leader Ahmed Jabari and employed a number of armed drones for strikes in a way that was described as ‘unprecedented’ by senior Israeli officials.148 It is not hard to imagine Israel concluding that drones over Gaza were the best way to deal with the problem of Hamas, even if their use left the Palestinian population subject to constant, unnerving surveillance. All of the consequences of such a sharp division between the haves and have-nots with drone technology is hard to assess, but one possibility is that governments with secessionist movements might be less willing to negotiate and grant concessions if drones allowed them to police their internal enemies with ruthless efficiency and ‘manage’ the problem at low cost. The result might be a situation where such conflicts are contained but not resolved, while citizens in developed states grow increasingly indifferent to the suffering of those making secessionist or even national liberation claims, including just ones, upon them.

Finally, drones have the capacity to strengthen the surveillance capacity of both democracies and authoritarian regimes, with significant consequences for civil liberties. In the UK, BAE Systems is adapting military-designed drones for a range of civilian policing tasks including ‘monitoring antisocial motorists, protesters, agricultural thieves and fly-tippers’.149 Such drones are also envisioned as monitoring Britain’s shores for illegal immigration and drug smuggling. In the United States, the Federal Aviation Administration (FAA) issued 61 permits for domestic drone use between November 2006 and June 2011, mainly to local and state police, but also to federal agencies and even universities.150 According to one FAA estimate, the US will have 30,000 drones patrolling the skies by 2022.151 Similarly, the European Commission will spend US$260 million on Eurosur, a new programme that will use drones to patrol the Mediterranean coast.152 The risk that drones will turn democracies into ‘surveillance states’ is well known, but the risks for authoritarian regimes may be even more severe. Authoritarian states, particularly those that face serious internal opposition, may tap into drone technology now available to monitor and ruthlessly punish their opponents. In semi-authoritarian Russia, for example, drones have already been employed to monitor pro-democracy protesters.153 One could only imagine what a truly murderous authoritarian regime—such as Bashar al-Assad’s Syria—would do with its own fleet of drones. The expansion of drone technology may make the strong even stronger, thus tilting the balance of power in authoritarian regimes even more decisively towards those who wield the coercive instruments of power and against those who dare to challenge them.

Conclusion

Even though it has now been confronted with blowback from drones in the failed Times Square bombing, the United States has yet to engage in a serious analysis of the strategic costs and consequences of its use of drones, both for its own security and for the rest of the world. Much of the debate over drones to date has focused on measuring body counts and carries the unspoken assumption that if drone strikes are efficient—that is, low cost and low risk for US personnel relative to the terrorists killed—then they must also be effective. This article has argued that such analyses are operating with an attenuated notion of effectiveness that discounts some of the other key dynamics—such as the corrosion of the perceived competence and legitimacy of governments where drone strikes take place, growing anti-Americanism and fresh recruitment to militant networks—that reveal the costs of drone warfare. In other words, the analysis of the effectiveness of drones takes into account only the ‘loss’ side of the ledger for the ‘bad guys’, without asking what America’s enemies gain by being subjected to a policy of constant surveillance and attack.

In his second term, President Obama has an opportunity to reverse course and establish a new drones policy which mitigates these costs and avoids some of the long-term consequences that flow from them. A more sensible US approach would impose some limits on drone use in order to minimize the political costs and long-term strategic consequences. One step might be to limit the use of drones to HVTs, such as leading political and operational figures for terrorist networks, while reducing or eliminating the strikes against the ‘foot soldiers’ or other Islamist networks not related to Al-Qaeda. This approach would reduce the number of strikes and civilian deaths associated with drones while reserving their use for those targets that pose a direct or imminent threat to the security of the United States.

Such a self-limiting approach to drones might also minimize the degree of political opposition that US drone strikes generate in states such as Pakistan and Yemen, as their leaders, and even the civilian population, often tolerate or even approve of strikes against HVTs. Another step might be to improve the levels of transparency of the drone programme. At present, there are no publicly articulated guidelines stipulating who can be killed by a drone and who cannot, and no data on drone strikes are released to the public.154 Even a Department of Justice memorandum which authorized the Obama administration to kill Anwar al-Awlaki, an American citizen, remains classified.155 Such non-transparency fuels suspicions that the US is indifferent to the civilian casualties caused by drone strikes, a perception which in turn magnifies the deleterious political consequences of the strikes. Letting some sunlight in on the drones programme would not eliminate all of the opposition to it, but it would go some way towards undercutting the worst conspiracy theories about drone use in these countries while also signalling that the US government holds itself legally and morally accountable for its behaviour.156

A final, and crucial, step towards mitigating the strategic consequences of drones would be to develop internationally recognized standards and norms for their use and sale. It is not realistic to suggest that the US stop using its drones altogether, or to assume that other countries will accept a moratorium on buying and using drones. The genie is out of the bottle: drones will be a fact of life for years to come. What remains to be done is to ensure that their use and sale are transparent, regulated and consistent with internationally recognized human rights standards. The Obama administration has already begun to show some awareness that drones are dangerous if placed in the wrong hands. A recent New York Times report revealed that the Obama administration began to develop a secret drones ‘rulebook’ to govern their use if Mitt Romney were to be elected president.157

The same logic operates on the international level. Lethal drones will eventually be in the hands of those who will use them with fewer scruples than President Obama has. Without a set of internationally recognized standards or norms governing their sale and use, drones will proliferate without control, be misused by governments and non-state actors, and become an instrument of repression for the strong. One remedy might be an international convention on the sale and use of drones which could establish guidelines and norms for their use, perhaps along the lines of the Convention on Certain Conventional Weapons (CCW) treaty, which attempted to spell out rules on the use of incendiary devices and fragment-based weapons.158 While enforcement of these guidelines and adherence to rules on their use will be imperfect and marked by derogations, exceptions and violations, the presence of a convention may reinforce norms against the flagrant misuse of drones and induce more restraint in their use than might otherwise be seen. Similarly, a UN investigatory body on drones would help to hold states accountable for their use of drones and begin to build a gradual consensus on the types of activities for which drones can, and cannot, be used.159 As the progenitor and leading user of drone technology, the US now has an opportunity to show leadership in developing an international legal architecture which might avert some of the worst consequences of their use.

## Competition

### 2NC — AT: PDB — PQD

#### The perm lets the Court duck the question.

Tribe ’16 — Laurence; Professor of Law at Harvard University, J.D. from Harvard University. July 18, 2016; “Transcending the Youngstown Triptych: A Multidimensional Reappraisal of Separation of Powers Doctrine”; *Yale Law Journal*, Volume 126; Accessed Online via University of Michigan Libraries

Time and again, the Court has thus underscored its commitment to an independent judiciary free to expound the Constitution decisively and without political interference. But despite the Roberts Court’s recent turn away from the political question doctrine and the Court’s juricentric focus, in separation-of-powers cases the Court often ducks hard constitutional questions and defers to the political branches even when there is no principled justification for doing so. One doctrinal culprit here turns out to be the very lodestar of the Court’s separation-of-powers jurisprudence: the canonical tripartite framework enunciated by Justice Jackson’s oft-quoted Youngstown concurrence.[25](https://www.yalelawjournal.org/forum/transcending-the-youngstown-triptych" \l "_ftnref25)

The surface elegance of that concurring opinion contributed to its mesmerizing appeal. But despite its rhetorical power and seemingly clear categorical lines, the Youngstown framework actually provides precious little guidance in some of the hardest separation-of-powers cases: those involving executive action in the absence of either congressional authorization or prohibition—action in the face of legal silence. What’s more, the Youngstown framework finds no place at all for significant dimensions of the separation-of-powers picture that are orthogonal to, and often absent from, the customary two-dimensional matrix of executive versus congressional powers, including such vexing and currently salient issues as the scope of prosecutorial discretion and federal power vis-à-vis the States, as well as transcendent concerns about individual rights. In neglecting such issues, the Court shirks its vital role in defining and policing the intricate structure of government established by the Constitution—a structure that must be preserved both to enable effective and politically accountable policymaking and to protect individual liberty.

I. The Problem of Congressional Silence

Even on its face, the nearly sacrosanct triptych is deeply ambiguous on the key question of what to make of congressional silence. Jackson’s Youngstown concurrence tells us that in category two—where there is an “absence of either a congressional grant or denial of authority”—the President “can only rely upon his own independent powers.”[26](https://www.yalelawjournal.org/forum/transcending-the-youngstown-triptych" \l "_ftnref26) Yet in the very next breath Jackson’s concurrence undercuts this pivotal assertion, insisting instead that “congressional inertia, indifference or quiescence may sometimes . . . enable, if not invite, measures of independent presidential responsibility.”[27](https://www.yalelawjournal.org/forum/transcending-the-youngstown-triptych" \l "_ftnref27)

The truth is that Youngstown offers no meaningful baseline against which to assess the operative legal significance of Congress’s silence.[28](https://www.yalelawjournal.org/forum/transcending-the-youngstown-triptych" \l "_ftnref28) Nothing in Youngstown, including Jackson’s classic concurrence, sets out a normative framework for deciding: (1) which kinds of presidential action in the relevant sphere are void unless plainly authorized by Congress ex ante; (2) which are valid unless plainly prohibited by Congress ex ante; and (3) which are of uncertain validity when Congress has been essentially “silent” on the matter although dropping hints about its supposed “will.” Nor does the canonical Jackson concurrence speak to (4) what considerations should guide the resolution of cases within this uncertain third category.

In saying virtually nothing about the appropriate framework for evaluating presidential exercises of power along that normative constitutional axis—and instead charting presidential power only along the descriptive axis of congressional “will” on the matter—the Youngstown triptych left future courts maximum wiggle room—but only by setting up innumerable occasions for unaccountable, and frustratingly opaque, buck-passing among the branches.

Instead of formulating a tripartite scheme for mapping exercises of presidential authority against the backdrop of what it called the “will” of Congress, the Court should at least have begun the process of articulating a body of underlying principles to govern the constitutionality of various types of executive action when—apart from dubious efforts at reading the tea leaves of an imagined congressional “mind”—one simply cannot say either that Congress authorized the executive action at issue or that Congress instead prohibited it. Those underlying principles ought presumably to guide not only the Judicial Branch in reviewing contested presidential choices, but also the Executive Branch in making those choices and publicly defending them.

### 2NC — AT: PDB — Constitutional Crisis DA

#### The permutation has the DOD explicitly disobey the Court order — triggers a constitutional crisis. Trump is a brink, not a thumper.

Gans ’18 — David; Director of the Human Rights, Civil Rights & Citizenship Program at the Constitutional Accountability Center. June 2018; The President’s Duty To Obey Court Judgments; *Constitutional Accountability Center*; <https://www.theusconstitution.org/wp-content/uploads/2018/06/Trump-Obey-Court-Judgments-Issue-Brief.pdf>; //CYang

Trump’s verbal assault on the judiciary has sought to delegitimize judicial decisions he disagrees with, leaving a deep stain on the rule of law. Were he to go a step further and seek to flout court orders — whether in response to the Mueller investigation, or litigation challenging his refusal to comply with the Foreign and Domestic Emoluments Clauses, or litigation challenging other unconstitutional policies of his — he would precipitate a constitutional crisis. Under our constitutional system — as scholars left, right, and center all recognize — “the President is legally bound to execute federal court judgments.”8 Even Presidents committed to the idea that each branch has an independent duty to interpret the Constitution in the exercise of their powers — known as departmentalism — have acknowledged “the legally binding force and obligation to execute a judicial judgment with which they disagreed.”9 A long list of scholars across the ideological spectrum, including those who take an extremely broad view of the powers of the President, have recognized that the President has a “duty to enforce judgments.” 10 “When the judiciary issues a judgment, others must regard it as the final disposition of a dispute.” 11 As Professor William Baude has made the point, “the judicial power forecloses any presidential ability to re-decide the case.”12

If President Trump directed his subordinates to disobey a court order, he would be at war with the Constitution’s text, history, and most basic values. A system of government in which the President held an effective veto over court judgments “would be not so much a system of constitutional government as it would be a system of rule by an elected Napoleonic strongman.”13 The “judiciary would be reduced to an adjunct of the executive branch. Instead of the three-branch system of government created by the Constitution, we would have in effect a two-branch system, with the executive serving as both prosecutor and court of last resort.”14 In place of the rule of law, we would have chaos and instability. That is not the Constitution our Framers designed.

#### Extinction.

Winters ’21 — Michael Sean; author of Left At the Altar: How Democrats Lost The Catholics And How Catholics Can Save The Democrats (Basic Books, 2008). His biography of the Rev. Jerry Falwell, God's Right Hand: How Jerry Falwell Made God a Republican and Baptized the American Right was published by Harper One in January 2012 to critical acclaim. September 29, 2021; "Robert Kagan's warning about the US constitutional crisis: It is 1932"; *National Catholic Reporter*; https://www.ncronline.org/news/opinion/robert-kagans-warning-about-us-constitutional-crisis-it-1932; //CYang

First, his bracing opening:

The United States is heading into its greatest political and constitutional crisis since the Civil War, with a reasonable chance over the next three to four years of incidents of mass violence, a breakdown of federal authority, and the division of the country into warring red and blue enclaves. The warning signs may be obscured by the distractions of politics, the pandemic, the economy and global crises, and by wishful thinking and denial.

Why have honest and decent people who happen to be conservative Republicans assented to laws that promise to make elections prone to political manipulation? Why are Democrats bickering among themselves when they need to pass some safeguards for our electoral process? And to make sure that government is seen to work for the people and not just for the plutocrats?

Second, Kagan's frightening historical analogy:

As has so often been the case in other countries where fascist leaders arise, their would-be opponents are paralyzed in confusion and amazement at this charismatic authoritarian. They have followed the standard model of appeasement, which always begins with underestimation.

We forget that German President Paul von Hindenburg thought he would be able to control Adolph Hitler once he named him chancellor in 1933. We forget that there was no "March on Rome" by Mussolini's black shirts in 1922: The thugs gathered outside the city and could have been stopped by the army. The fascist leader got to Rome by train and King Victor Emmanuel III invited him to form a government. Later, the myth of the March on Rome was created. The acquiescence of the Western liberal democracies to the rearmament of Germany is too well-known to need repeating and has forever turned an otherwise useful word, appeasement, into a derisive and foul concept.

For those of us who have opposed Donald Trump from the start, the third most important thing Kagan writes has to do with Trump's supporters and true American exceptionalism. He writes:

Most Trump supporters are good parents, good neighbors and solid members of their communities. Their bigotry, for the most part, is typical white American bigotry, perhaps with an added measure of resentment and a less filtered mode of expression since Trump arrived on the scene. But these are normal people in the sense that they think and act as people have for centuries. They put their trust in family, tribe, religion and race. Although zealous in defense of their own rights and freedoms, they are less concerned about the rights and freedoms of those who are not like them. That, too, is not unusual. What is unnatural is to value the rights of others who are unlike you as much as you value your own.

As it happens, however, that is what the American experiment in republican democracy requires. It is what the Framers meant by "republican virtue," a love of freedom not only for oneself but also as an abstract, universal good; a love of self-government as an ideal; a commitment to abide by the laws passed by legitimate democratic processes; and a healthy fear of and vigilance against tyranny of any kind.

Liberal democracy takes work. The National Education Association published a report in 2017 on the decline in civics education over the years, a decline that has cost us dearly. The professionalization of political campaigns, beginning in the 1970s, has severed elections from governance in a way they were not before, leading to cynicism and accelerating polarization. Neoliberalism sent blue collar jobs overseas, and neither party found the will to do much about it, leaving large swaths of working poor feeling disconnected from the political process altogether, ripe targets for an authoritarian.

At a Sept. 27 webinar co-sponsored by Boston University's Global Development Policy Center and the United Nations Conference on Trade and Development, Damon Silvers, policy director at the AFL-CIO, spoke about the neoliberal trade ideology, saying its "fundamental feature was a race to the bottom on wages." He said:

What the Biden worker-centered approach really is is a return to the philosophy that animated the post-war settlement and the Bretton Woods agreements — the idea that international economic structures and policies must have democratic legitimacy, they must support broad-based global economic growth, and most of all they must support rising real wages.

Then came a warning akin to Kagan's:

The events of recent years should make it very clear that the alternative to President Biden's approach is not a return to the neoliberal mythology of the 1990s. Plan B is not the 1990s. Plan B is the 1930s — the rise of authoritarianism inside the world's major economies, and strife among them.

The stakes could scarcely be higher, and the principal responsibility for saving the country from a Trumpian future lies with Republican leaders. They have policy differences with President Joe Biden and the Democrats, but American democracy has always allowed for the adjudication of policy differences. This is not about policy, but about the prospect of a fascist takeover and the end of liberal democracy. Kagan writes:

### 2NC — ! — Democracy

#### The US is key to global democracy and Trump doesn’t thump.

Diamond ’19 — Larry; American political sociologist and leading contemporary scholar in the field of democracy studies. He is a professor of Sociology and Political Science at Stanford University and a senior fellow at the Hoover Institution, a Stanford University-affiliated public policy think tank. June 11, 2019; “Ill Winds: Saving Democracy from Russian Rage, Chinese Ambition, and American Complacency”; *Penguin Books*; Accessed Online via University of Michigan Libraries; //CYang

In every region of the world, autocrats are seizing the initiative, democrats are on the defensive, and the space for competitive politics and free expression is shrinking. Established democracies are becoming more polarized, intolerant, and dysfunctional. Emerging democracies are facing relentless scandals, sweeping citizen disaffection, and existential threats to their survival. From Turkey and Hungary to the Philippines, wily autocrats are destroying constitutional checks and balances. And with the global winds blowing their way, authoritarian leaders are becoming more nakedly dictatorial. These unfavorable gusts are not simply the exhaust fumes of decaying democracies. They are blowing hard from the two leading centers of global authoritarianism, Russia and China.

And if the United States does not reclaim its traditional place as the keystone of democracy, Vladimir Putin, Xi Jinping, and their admirers may turn autocracy into the driving force of the new century. Many other analyses are missing this crucial point. The extraordinary progress of democracy from the mid-1970s to the early 2000s was a global phenomenon, heavily facilitated by the strength, idealism, and energetic support of the United States and Western Europe. The gathering retreat of freedom is also a global phenomenon, driven this time from Moscow and Beijing. A reviving autocracy and an emerging Communist superpower are investing heavily — and often effectively — in efforts to promote disinformation and covertly subvert democratic norms and institutions. Their increasingly brazen challenge demands a vigorous global response: a reassertion of global democratic leadership, rooted in Washington’s renewed understanding of its far-reaching responsibilities, and a new worldwide campaign to promote democratic values, media, and civic institutions.

Part of that, I argue, must involve a serious attack on the soft underbelly of these autocracies: kleptocracy. The money being looted from public coffers in corrupt autocracies is not only sustaining abusive rulers; it is also being laundered into the banking and property systems of the world’s democracies, corroding our own rule of law and undermining our will to confront the spread of despotism. We can be the kleptocrats’ foes or their bankers, but not both. By fighting kleptocracy and money laundering, we can help reverse authoritarian trends both at home and abroad. But as the old saying goes, you can’t beat something with nothing.

We cannot defend and renew free government around the world unless we do so at home. Stopping the desecration of democratic norms and institutions by Donald Trump (and budding autocrats elsewhere) is vital but insufficient. The decline of American democracy did not begin with Trump, and it will not end with his departure from the White House. Our republic’s sickness has its roots in decades of rising political polarization that has turned our two parties into something akin to warring tribes, willing to skirt bedrock principles of fairness and inclusion for pure partisan advantage.

America’s constitutional order has long been scarred by racism, deep injustices in our criminal justice system, and the soft corruption of our systems of lobbying and campaign finance. Now these deep-rooted problems are quickening in a society that has forgotten the purpose of civic education and is increasingly in thrall to social media, which privileges the profits of sensationalism and groupthink above the prophets of facts and evidence-based debate. None of this is a cry of despair; all of it is a call to arms. As I explain in this book’s final chapters, it doesn’t have to go on like this. Promising and viable reforms are available. We can improve, empower, and heal our democracy — and much can be done even while Trump is in power. We can change this. We — democratic societies — must change this. But this effort starts with each of us as an individual.

#### Democracy solves every existential threat.

Kasparov ’17 — Garry; Chairman of the Human Rights Foundation and author of *Winter Is Coming: Why Vladimir Putin and the Enemies of the Free World Must Be Stopped*. February 16, 2017; “Democracy and Human Rights: The Case for U.S. Leadership Subcommittee on Western Hemisphere, Transnational Crime, Civilian Security, Democracy, Human Rights, and Global Women's Issues”; *Foreign Senate*; [https://www.foreign.senate.gov/imo/media/doc/021617\_Kasparov\_%20Testimony.pdf; //CYang](https://www.foreign.senate.gov/imo/media/doc/021617_Kasparov_%20Testimony.pdf;%20//CYang)

The Soviet Union was an existential threat, and this focused the attention of the world, and the American people. There existential threat today is not found on a map, but it is very real. The forces of the past are making steady progress against the modern world order. Terrorist movements in the Middle East, extremist parties across Europe, a paranoid tyrant in North Korea threatening nuclear blackmail, and, at the center of the web, an aggressive KGB dictator in Russia. They all want to turn the world back to a dark past because their survival is threatened by the values of the free world, epitomized by the United States. And they are thriving as the U.S. has retreated. The global freedom index has declined for ten consecutive years. No one like to talk about the United States as a global policeman, but this is what happens when there is no cop on the beat. American leadership begins at home, right here. America cannot lead the world on democracy and human rights if there is no unity on the meaning and importance of these things. Leadership is required to make that case clearly and powerfully. Right now, Americans are engaged in politics at a level not seen in decades. It is an opportunity for them to rediscover that making America great begins with believing America can be great.

The Cold War was won on American values that were shared by both parties and nearly every American. Institutions that were created by a Democrat, Truman, were triumphant forty years later thanks to the courage of a Republican, Reagan. This bipartisan consistency created the decades of strategic stability that is the great strength of democracies. Strong institutions that outlast politicians allow for long-range planning. In contrast, dictators can operate only tactically, not strategically, because they are not constrained by the balance of powers, but cannot afford to think beyond their own survival. This is why a dictator like Putin has an advantage in chaos, the ability to move quickly. This can only be met by strategy, by long-term goals that are based on shared values, not on polls and cable news.

The fear of making things worse has ~~paralyzed~~ [prevented] the United States from trying to make things better. There will always be setbacks, but the United States cannot quit. The spread of democracy is the only proven remedy for nearly every crisis that plagues the world today. War, famine, poverty, terrorism — all are generated and exacerbated by authoritarian regimes. A policy of America First inevitably puts American security last.

#### Democracies solve pandemics, economic crises, and every major threat — our evidence takes into account the biggest data set ever compiled.

Stipech ’20 — David; strategic communicator, versatile writer, engaging speaker and veteran media presence with a knack for crafting just the right message for the target audience. Insightful management IQ/EQ with an effective blend of creative talents and entrepreneurial/ROI mindset. Invested, proven professional with high-level leadership and relationship skills. April 14, 2020; “Democracy vs. disease: the role of freedom in facing pandemics”; *Nevada Today*; [https://www.unr.edu/nevada-today/news/2020/democracy-vs-disease; //CYang](https://www.unr.edu/nevada-today/news/2020/democracy-vs-disease;%20//CYang)

According to Kemmelmeier, the virus’ rapid spread occurred very early on due to two key ingredients: high mobility and an authoritarian government. “In a highly mobile society with a modern transportation system, people can come and go very quickly,” he said. “An outbreak in such a society coupled with a government that is mainly interested in suppressing, rather than addressing, the problem is a recipe for disaster.”

Meanwhile, back in the United States, the government’s handling of COVID-19 has been uneven — prompting some unfavorable comparisons with other governments’ approaches. Yet, over time, democratic societies appear to be more effective than authoritarian cultures in dealing with major threats that include disease epidemics. The finding is from a recent study by Kemmelmeier and social psychology doctoral student Kodai Kusano, completed prior to the pandemic. It was recently published in the journal Royal Society Open Science.

“I want to give some hope,” Kemmelmeier said. “Whatever we think about America at this moment, as a species, the ‘killer app’ (key attribute) for humans is cooperation. In times of crisis, cooperation increases. Freedoms are always related to our ability to cooperate. It turns out when people cooperate on a voluntary basis, they’re actually really, really good at reducing the threat from pandemics and from pathogens more generally.”

Kemmelmeier sees light at the end of the tunnel. “It’s something hopeful — in the long term, this is good news for us,” he said. “We’re in the middle of it, and it’s messy. That’s part of democracy. Democracies over the long haul — even with politics and division — to the extent they can foster trust in institutions, can be highly successful at addressing outbreaks.”

Kusano and Kemmelmeier analyzed the relationship between democracy and environment, and how societies adapt to a variety of ecological threats, including viruses and other disease agents known collectively as pathogens. To examine these dynamics, they created arguably the largest data set ever assembled, analyzing data from 1949-2016. They found that democracies both shape and are shaped by ecological factors in ways not previously understood.

The researchers looked at three factors in measuring democracy, in essence a society’s level of self-determination. They used these three components to represent a range of many relevant indicators of democracy: The electoral component — the extent to which citizens achieve democratic election free from irregularities such as bribery The liberal component — the extent to which citizens’ political activities are protected by civil liberties The participatory component — the extent to which citizens actively participate in all parts of the political processes. Kusano and Kemmelmeier’s findings are reflected in this overview of pathogen prevalence as an influencing factor on democracy, and vice versa:

High Pathogen → Low Democracy: The study’s findings suggest that pathogen prevalence impedes the development of a liberal democracy. During an outbreak, survival depends on people banding together — even if that means being unified separately while practicing today’s social distancing. Those with common bonds or interests stick together, while others may feel like or be seen as outsiders. Personal freedoms may be restricted.

Low Pathogen → High Democracy: A low prevalence of pathogens facilitates higher levels of democracy. A greater mix between groups across the social landscape is the norm because survival isn’t in the balance. When ecological pressures (including from pathogens) are low, there is much less of a need for social conformity. Individual freedoms can be high, as people decide by themselves what they want.

High Democracy → Low Pathogen: The data clearly show that functioning (high) democracies are better at reducing pathogen prevalence. In other words, high level democracies precede and lead to low pathogen prevalence. Democracies are accountable, as people are rewarded for identifying problems (a pat on the back, public recognition, a Pulitzer, for example).

Low Democracy → High Pathogen: Low (less functioning) democracies are less effective at reducing pathogen prevalence. The findings are very clear in this regard: Countries with a high level of democratization are likely to see a greater reduction of pathogens in the future, compared to countries with a lower level of democratization. Those living under authoritarian rule are generally powerless to hold the government accountable. Pointing out problems is not rewarded, while societal ills are suppressed.

Accountability is a key factor. “Essentially, democratic societies, which tend to emphasize individual rights, are actually better over the long haul at dealing with these kinds of threats,” Kemmelmeier said. “Democratically elected governments are accountable to the people. That is always going to be the vulnerability of every authoritarian regime, because they’re not accountable. They’re not necessarily doing the prevention; they are not necessarily building national capacity to respond to disasters. And they don’t reward people for sniffing out the problems.”

In the wake of a major crisis, public officials are more accountable through elections and other facets of democracies. “I don’t think there’s any politician who, in future pandemics, can say, ‘This is not a problem; there are just a few cases, and they’re going to go away by themselves,’” Kemmelmeier said. “Those days are gone because now it’s part of the political agenda and in everybody’s thinking, at least in our generation. Now, our kids’ generation will have to prove that they at least thought about the gravity of the situation.”

While there’s no predicting when the next disaster or pathogen event will occur, Kusano and Kemmelmeier’s research found that democratic cultures over time learn from one disaster and are better prepared for the next one — with casualties for future events dramatically reduced.

“In a more authoritarian society, however, in which the idea is ‘OK, get over this,’ nothing changes, and you suffer from this,” Kemmelmeier said. “The next time [in an authoritarian culture], you may have a higher level of casualties. This means you will have a lower workforce, lower productivity. It’s not only people and lives for the humanitarian reasons that these societies suffer, but also for economic reasons.”

In the long term, the study suggests that democracies’ effectiveness in mitigating major threats reduces stresses on their citizens, which can strengthen democracy. “Democracies continuously build the basis of their existence,” he said. “They need to prove that they can deal with the problems that people face. This means that democracy, when effective, can spread. But even democracies can fail if they’re corrupt or ineffective.”

According to Kemmelmeier, trust is another attribute of democracies, one that translates a dangerous situation into a response. “In a democracy, there is actually a fairly high level of trust,” he said. “People who are under siege tend to trust the institution, for things that institutions do for them that people can’t do for themselves. During a crisis, people trust democratic institutions to keep their best interests in mind, so when the order comes out from the government, everybody falls in line.”

How does Kemmelmeier view the United States’ battle to control the coronavirus’ spread? “The big problem right now is there are so many different voices,” he said. “But it’s not unusual. Democracy is always messy — that’s what makes democracies. The results depend primarily on leaders and their leadership in uniting the country. This is always an opportunity for leaders to bring people together. But leadership in a crisis is always risky.”

Which circles back to trust. “Democratic governments,” he said, “must not only have competent technocrats such as CDC and FEMA; they must trust them to handle the crisis, and they must also ensure that the public trusts them.” While the recent study covered nearly 70 years of world history, rarely has there been a more crucial moment for nations to demonstrate resilience than right now.

### 2NC — ! — Populism

#### Populism causes nuclear war.

Meier & Vieluf ’21 — Oliver Meier; Senior Researcher at the Institute for Peace Research and Security Policy. Prior to this, he was Deputy Head in the International Security Division of the German Institute for International and Security Affairs. Maren Vieluf; Researcher at Institute for Peace Research and Security Policy. December 16, 2021; "Upsetting the nuclear order: how the rise of nationalist populism increases nuclear dangers"; *The Nonproliferation Review*; Accessed Online via University of Michigan Libraries; //CYang

Nationalist populists as leaders of states that possess nuclear weapons undermine the nuclear order and increase nuclear dangers in novel, significant, and persistent ways. Such leaders talk differently about nuclear weapons; they can put nuclear policy making and crisis management in disarray; and they can weaken international alliances and multilateral nuclear institutions. The rise of nationalist populists in nuclear-armed states, including some of the five nuclear-weapon states recognized under the 1968 Treaty on the Nonproliferation of Nuclear Weapons, shatters the presumed distinction between responsible and irresponsible nuclear powers and complicates attempts to heal rifts in the international order. Policies to wait out populists or to balance their influence in multilateral institutions seem to have had limited success. A sustainable strategy to deal with the challenge posed by populists would need to start by recognizing that we can no longer assume that nuclear weapons are safe in the hands of some states but not in others’.

Introduction

The rise of nationalist populists1 to power in nuclear-armed states and their allies is undermining the nuclear order and raising the risks of nuclear war. That populists such as Boris Johnson, Narendra Modi, Vladimir Putin, and Donald Trump were able to take charge of nuclear arsenals, including in some of the nuclear powers recognized under the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (NPT), challenges the assumption that established nuclear-weapon states behave responsibly. Nationalist populism,2 understood as a nationalist, anti-elitist, illiberal, and anti-pluralist set of ideas and politics conducted in the supposed interests of “the people” — that is, the domestic constituencies of the nationalist-populist leaders—has been on the rise globally since the mid-2000s. It has come to include the leadership of a growing number of countries3 and has begun to influence the effectiveness of time-honored institutions of the nuclear order.

We argue that this rise of nationalist populists and their foreign and defense policies weakens the nuclear order in novel, significant, and persistent ways. Three characteristics are typical of nationalist populists’ nuclear policies: they talk differently about nuclear weapons; they have a specific way of getting involved in national decision making on nuclear-weapon issues; and their approach to international alliances and institutions is unique. The fact that nationalist-populist leaders have assumed control over nuclear weapons in countries at the core of the nuclear order shatters the presumed distinction between “responsible” and “irresponsible” nuclear powers. These leaders threaten the nuclear order built on the principled acceptance of a logic of restraint by the nuclear-weapon states.

### 2NC — AT: Perm — Prohibition =/= Restriction

#### The perm is a limitation, not a prohibition — that’s functionally distinct.

Supreme Court of Delaware ’95 — September 13, 1995; *Snell v. Engineered Systems Designs, Inc*.; <https://casetext.com/case/snell-v-engineered-systems-designs-inc>; //CYang

The interpretation of the statute is aided by the synopsis to a recent amendment to Section 2825. This synopsis states that the amendment "clarifies the limitations on the public use of the word engineering by those not authorized to practice engineering for the general public." 68 Del.Laws, c. 24 (emphasis added). Had the General Assembly intended to ban all uses of the word "engineer" by those not certified, it would have been more logical for it to have used the word "prohibition" (or the equivalent) rather than the word "limitations" in the synopsis.[7] Section 2825 must be analyzed, therefore, with the understanding that it bans only uses of the term "engineer" which would "lead to the 18\*18 belief that such person is entitled to practice eng.ineering" — i.e., a misleading use of any derivative of the word "engineer."

#### Or it’s a regulation.

Kansas City Court of Appeals ’50 — February 6, 1950; *City of Meadville v. Caselman*; <https://casetext.com/case/city-of-meadville-v-caselman-1>; //CYang

"Under power conferred on cities of the fourth class `to regulate and license' dramshops, there is no authority to wholly prohibit or suppress. Where there is mere power in a municipality to regulate in a state, with a general policy of conducting licensed saloons, authority to prohibit is excluded. The difference between regulation and prohibition is clear and well marked. The former contemplates the continuance of the subject-matter in existence or in activity. The latter implies its entire destruction or cessation.'" (Citing text writers and cases.)

#### Exceptions void a prohibition.

Vallespinos ’20 — Martin; LLM, University of Michigan Law School; Manager at Ernst & Young Detroit. Fall 2020; “Can the WTO Stop the Race to the Bottom? Tax Competition and the WTO”; *Virginia Tax Review*, Volume 40, Number 1; Accessed Online via University of Michigan Libraries; //CYang

Prohibited subsidies, as described in Article 3 of the SCM Agreement, are disallowed outright, and WTO members can unilaterally impose countervailing measures against the country sponsoring them. This category [\*146] includes (i) subsidies that are contingent, in law 237or in fact 238upon export performance 239and (ii) subsidies that are contingent upon the use of domestic over imported goods.

Export contingency can be "de jure" or "de facto." De jure export contingency derives from "the very words of the relevant legislation, regulation[,] or other legal instrument constituting the measure." 240De facto export contingency is met when "the facts demonstrate that the granting of a subsidy ... is in fact tied to actual or anticipated exportation or export earnings." 241The WTO jurisprudence regarding "de facto" contingency, however, is not uniform and WTO panels have set forth various alternative tests. In Australia-Automotive Leather II, the Panel established a standard of "close connection" between the grant of a subsidy and export performance. 242In Canada-Aircraft, the Panel and the Appellate Body ("AB") implemented the so called but-for test, which interprets the "tied to" language to be equivalent to a relationship of "conditionality" between the grant of a subsidy and export performance. 243Therefore, de facto contingency is met when "the facts demonstrate that the tax benefit would not have been granted ... but for anticipated exportation or export earnings." 244In the same case, the AB clarified that "it does not suffice to demonstrate solely that a government granting a subsidy anticipated that exports would result." 245This means that, in the AB's view, the granting authority's expectations on exports may not be sufficient to meet the standard, so the subsidy must be objectively contingent upon export [\*147] performance. 246In pursuit of a more objective criteria, the AB suggested that, "where relevant evidence exists, the assessment could be based on a comparison between, on the one hand, the ratio of anticipated export and domestic sales of the subsidized product ... and on the other hand, the situation in the absence of the subsidy." 247But both the Panel and AB further clarified that an assessment based on ratios is incapable by itself of establishing that a given subsidy is de facto contingent on export performance "in the absence of any meaningful analysis regarding how a subsidy's design and structure contributes to the presence of an incentive for a recipient to [favor] export sales over domestic sales." 248

With respect to domestic use contingency, Article 3.1(b) contains no reference to contingency in law or in fact. Nevertheless, the AB has found that Article 3.1(b)'s scope covers both de jure and de facto contingency. 249Also, both the Panel and the AB have concluded that the general guidance regarding evaluations of de facto export contingency should be applicable to de facto domestic use contingency. Finally, it should be mentioned that the Panel and AB decisions are not binding precedential authority but rather can be only strongly persuasive authority. Therefore, countries should be aware of all these alternative tests when designing their tax policies, as there is no certainty as to which criteria WTO decision makers may apply in the event of a dispute (e.g. but-for test, close connection test, assessments based on ratios, etc.).

A subsidy that is not considered "prohibited" can still satisfy the specificity criteria and become an actionable subsidy if it meets the two following requirements:

(1) Specificity: an actionable subsidy is considered specific when the eligibility to receive the benefits is limited to certain enterprises, industries, or areas; 250and

(2) Adverse effect: an actionable subsidy is considered adverse when it produces a serious prejudice to the interests of another member, an injury to its domestic industry, or a nullification or impairment of benefits accruing directly or indirectly to other members under the GATT. 251

#### “Prohibitions” must be an across the board ban---bans with exceptions are “regulations.”

Justice White 87, California v. Cabazon Band of Mission Indians, 480 US 202, Supreme Court, 1987

Following its earlier decision in Barona Group of Capitan Grande Band of Mission Indians, San Diego County, Cal. v. Duffy, 694 F. 2d 1185 (1982), cert. denied, 461 U. S. 929 (1983), which also involved the applicability of § 326.5 of the California Penal Code to Indian reservations, the Court of Appeals rejected this submission. 783 F. 2d, at 901-903. In Barona, applying what it thought to be the civil/criminal dichotomy drawn in Bryan v. Itasca County, the Court of Appeals drew a distinction between state "criminal/prohibitory" laws and state "civil/regulatory" laws: if the intent of a state law is generally to prohibit certain conduct, it falls within Pub. L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub. L. 280 does not authorize its enforcement on an Indian reservation. The shorthand test is whether the conduct at issue violates the State's public policy. Inquiring into the nature of § 326.5, the Court of Appeals held that it was regulatory rather than prohibitory.[8] This was the analysis employed, with similar results, 210\*210 by the Court of Appeals for the Fifth Circuit in Seminole Tribe of Florida v. Butterworth, 658 F. 2d 310 (1981), cert. denied, 455 U. S. 1020 (1982), which the Ninth Circuit found persuasive.[9]

We are persuaded that the prohibitory/regulatory distinction is consistent with Bryan's construction of Pub. L. 280. It is not a bright-line rule, however; and as the Ninth Circuit itself observed, an argument of some weight may be made that the bingo statute is prohibitory rather than regulatory. But in the present case, the court reexamined the state law and reaffirmed its holding in Barona, and we are reluctant to disagree with that court's view of the nature and intent of the state law at issue here.

There is surely a fair basis for its conclusion. California does not prohibit all forms of gambling. California itself operates a state lottery, Cal. Govt. Code Ann. § 8880 et seq. (West Supp. 1987), and daily encourages its citizens to participate in this state-run gambling. California also permits parimutuel horse-race betting. Cal. Bus. & Prof. Code Ann. §§ 19400-19667 (West 1964 and Supp. 1987). Although certain enumerated gambling games are prohibited under Cal. Penal Code Ann. § 330 (West Supp. 1987), games not enumerated, including the card games played in the Cabazon card club, are permissible. The Tribes assert that more than 400 card rooms similar to the Cabazon card club flourish in California, and the State does not dispute this fact. Brief for 211\*211 Appellees 47-48. Also, as the Court of Appeals noted, bingo is legally sponsored by many different organizations and is widely played in California. There is no effort to forbid the playing of bingo by any member of the public over the age of 18. Indeed, the permitted bingo games must be open to the general public. Nor is there any limit on the number of games which eligible organizations may operate, the receipts which they may obtain from the games, the number of games which a participant may play, or the amount of money which a participant may spend, either per game or in total. In light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery, we must conclude that California regulates rather than prohibits gambling in general and bingo in particular.[10]

### AT: Perm Do CP

#### ‘Increase’ must be a mandated function, not an outcome.

Newby ‘4 [Howard; September 30; BA and PhD from the University of Essex, Chair of the Higher Education Funding Council for England, Former Vice-Chancellor of the University of Liverpool; Memorandum from the Higher Education Funding Council for England, “Joint Committee on the Draft Charities Bill - Written Evidence,” <http://www.publications.parliament.uk/pa/jt200304/jtselect/jtchar/167/167we98.htm>]

9.1 The Draft Bill creates an obligation on the principal regulator to do all that it "reasonably can to meet the compliance objective in relation to the charity".[ 45] The Draft Bill defines the compliance objective as "to increase compliance by the charity trustees with their legal obligations in exercising control and management of the administration of the charity". [46]

9.2 Although the word "increase" is used in relation to the functions of a number of statutory bodies,[47] such examples demonstrate that "increase" is used in relation to considerations to be taken into account in the exercise of a function, rather than an objective in itself.

9.3 HEFCE is concerned that an obligation on principal regulators to "increase" compliance per se is unworkable, in so far as it does not adequately define the limits or nature of the statutory duty. Indeed, the obligation could be considered to be ever-increasing.

## Solvency

### 2NC — S — AT: Disobeys

#### It’s universally perceived as binding — all actors follow on.

Gans ’19 — David; Director of the Human Rights, Civil Rights and Citizenship Program at Constitutional Accountability Center, J.D. from Yale Law University, B.A. from Columbia University; September 10, 2019; “Will Trump Administration Defy the Supreme Court?”; *CNN*; <https://www.cnn.com/2019/07/10/opinions/will-trump-administration-defy-supreme-court-gans/index.html>

In our system of government, no officer—not even the President—is so far above the rest of us that he is above the law. Courts have the authority to issue binding judgments, including against the President. The Constitution denied the President any veto power over the judiciary. The Framers rebelled against the notion that court judgments could be set aside by the other branches of government. That would be fundamentally inconsistent with the independent judiciary the Framers created to the enforce the Constitution's limits and prevent abuse of power.

These views are widely shared today by virtually everyone, including prominent conservatives who are some of the strongest advocates of presidential authority.

For example, Professor Stephen Calabresi—co-founder of the Federalist Society, widely considered the nation's most influential conservative legal organization—has written that a system in which the President held an effective veto over court judgments "would be not so much a system of constitutional government as it would be a system of rule by an elected Napoleonic strongman."

Just last month, in Gamble v. United States, Justice Clarence Thomas—the Court's die-hard, rock-ribbed conservative originalist—too, assented to this basic proposition, writing, "[C]onsistent with the nature of the 'judicial Power,' the federal courts' judgments bind all parties to the case, including Government officials and agencies."

Past presidents, from the founding to the modern era, agree. The Jefferson, Madison, and Lincoln administrations all believed that court judgments were binding on the White House. President Abraham Lincoln detested the Supreme Court's ruling in Dred Scott v. Sandford—widely regarded as the worst Supreme Court opinion in history—but he recognized that the President does not get to pick and choose which court orders to follow. It would be far worse, Lincoln recognized, to invest the President with tyrannical powers. Even President Richard Nixon surrendered the Watergate Tapes, although that was the death knell of his presidency.

President Trump does not stand outside the Constitution. Whether on the census or any other issue, Trump may not decide which court orders he will follow and which ones he will defy. The Constitution is clear: He must obey all of them.

#### The decision will be fully enforced — everyone complies.

Baum ’18 — Lawrence; Professor of Political Science at Ohio State University, Ph.D. in Political Science from the University of Wisconsin-Madison; 2018; *The Supreme Court*, Pages 206-208; Accessed Online via University of Michigan Libraries

Summing Up: The Effectiveness of Implementation

We know far too little to make confident judgments about how well judges and administrators carry out Supreme Court decisions, even if that question is simplified to the question of compliance and noncompliance. Still, a few generalizations are possible.

When judges and administrators address issues on which the Supreme Court has ruled, most of the time they readily apply the Court’s ruling. They often do so even when that requires them to depart from positions on legal policy they had adopted before the Court’s decision. These actions typically get little attention because they accord with most people’s assumption that judges and administrators will follow the Court’s lead and carry out its decisions fully.

Contrary to this assumption, however, implementation of the Court’s policies is often quite imperfect. For Supreme Court decisions, like congressional statutes, the record of implementation is mixed. Some Court rulings are carried out more effectively than others, and specific decisions often are implemented better in some places or situations than in others.

Implementation of the Court’s decisions is most successful in lower courts, especially appellate courts. When the Court announces a new rule of law, judges generally do their best to follow its lead. And when a series of decisions indicates that the Court has changed its position in a field of policy, lower courts tend to follow the new trend. For this reason, Court decisions that require only action by lower courts tend to be carried out more effectively than decisions that involve other policymakers.36

But even appellate judges sometimes diverge from the Court’s rulings. Seldom do they explicitly refuse to follow the Court’s decisions. More common is what might be called implicit noncompliance, in which a court purports to follow the Supreme Court’s lead but actually evades the implications of the Court’s ruling.

The higher frequency of implementation problems for Supreme Court decisions in the executive branch reflects several conditions. One condition is that administrators are likely to feel less obligation to follow the Court’s lead than do judges. Another is that carrying out the Court’s decisions is more likely to create practical problems for administrators. Even so, the Court enjoys considerable success in getting compliance from administrative bodies.

Responses by Legislatures and Chief Executives

Congress, the president, and their state counterparts also respond regularly to Supreme Court decisions. Their responses shape the impact of the Court’s decisions, and some responses by Congress and the president affect the Court itself.

#### Empirics — compliance is absolute.

Grove ’18 — Tara; Professor of Law at the College of William & Mary. 2018; “The Power of ‘So-Called Judges’”; *New York University Law Review*, Volume 93; Accessed Online via University of Michigan Libraries

The Strength of the Norm at the Federal Level

Since the civil rights era, federal executive officials have consistently complied with federal court orders.22 One of the most instructive examples is the George W. Bush administration’s obedience in the wake of the September 11 terrorist attacks. The Bush administration made bold claims about the scope of executive authority in the war on terror—leading some scholars to worry that the administration might not obey a judicial order restricting its power.23 Yet when the Supreme Court held that Guantanamo Bay detainees could file federal habeas corpus petitions to challenge their confinement,24 President Bush announced: “We’ll abide by the Court’s decision. That doesn’t mean I have to agree with it.”25

Recent episodes, however, raise questions about the continuing adherence to this convention. One cause for concern is President Trump’s rhetoric denouncing federal judges that interfere with his travel ban. Although other presidents have criticized the judiciary, most have not mounted seemingly personal attacks against specific judges.26 Another worrisome sign is the pardon of former Arizona Sherriff Joe Arpaio. In 2016, Arpaio was convicted of criminal contempt for violating a federal court order, which restricted his authority to arrest and detain undocumented immigrants.27 On August 25, 2017, President Trump pardoned Arpaio28—a move that could be seen as an endorsement of not only the sheriff’s aggressive law enforcement tactics but also his defiance of the federal court.

Nevertheless, I believe there are good reasons to expect continued compliance by the executive branch, at least for the foreseeable future. Several factors serve to reinforce the convention requiring obedience to all federal court orders. The first is the fact that both Republican and Democratic presidential administrations have consistently complied from the 1970s to the present day.29 That historical record alone places some pressure on current executive officials to continue to adhere to federal court decrees.

## Unilateralism NB

### 2NC — UQ — AT: Zivotofsky

#### *Zivotofsky* doesn’t solve executive recklessness.

Goldsmith ’15 — Jack; Henry L. Shattuck Professor of Law, Harvard Law School. November 2015; “Zivotofsky II As Precedent in The Executive Branch”; *Harvard Law Review*; <http://harvardlawreview.org/wp-content/uploads/2015/11/vol129_goldsmith.pdf>

Zivotofsky II is a victory for presidential foreign relations power. But it almost certainly does not portend a new era of judicial indulgence of broad exercises of that power.

Separation-of-powers disputes between the branches in foreign relations — including direct clashes of the sort at issue in Zivotofsky II — arise all the time but are rarely adjudicated. The main reason this is so is the absence of a plaintiff with standing and a cause of action, but other reasons include the political question doctrine (which despite Zivotofsky I is not dead) and related justiciability and practical factors, including secrecy, ripeness, jurisdictional limitations, and more.132 Judicial review is unavailable for most of the instances in which Presidents arguably stretch or defy congressional authorizations, or act contrary to congressional restraints in diplomatic, intelligence, and military affairs. Zivotofsky II is unusual not just for its analysis and holding, but also for the uncommon set of circumstances that led it to be resolved in court at all.133

Even when foreign relations clashes reach the Court, Zivotofsky II’s internal logic will not likely have predictable consequences there. The Supreme Court has no institutional predilection in favor of presidential power, and if anything has shown a tendency to read it narrowly in the foreign relations context in recent years.134 Especially in foreign relations cases, as Zivotofsky II suggests, judicial outcomes and the doctrines used to justify them are largely driven, as Justice Jackson said in a narrower context, by “imperatives of events and contemporary imponderables rather than on abstract theories of law.”135 In the next foreign relations dispute between the branches, the judiciary can latch on to Zivotofsky II’s stated limitations, or ignore the mess it made of Jackson’s third category, or distinguish its odd use of constitutional structure and historical practice as unique to the recognition and passport context.

To say that Zivotofsky II lacks predictable consequences in the judiciary is not to say that it lacks predictable consequences on presidential power. It will have such consequences in the executive branch, which operates under very different principles and incentives than the judiciary. Unlike judges, executive branch lawyers have an institutional predilection to read presidential power broadly. They will accordingly tend to construe Zivotofsky II’s holding, dicta, and ambiguities in the President’s favor.

### 2NC — ! — T/L

#### Nuclear war. No link to turns — it pacifies decision-making without wrecking flexibility.

Waxman ’19 — Matthew; Liviu Librescu Professor of Law at Columbia Law School and an adjunct senior fellow for Law and Foreign Policy at the Council on Foreign Relations. November 19, 2019; "War Powers Oversight, Not Reform"; *War on the Rocks*; https://warontherocks.com/2019/11/war-powers-oversight-not-reform/

Moreover, focusing only on formal congressional action obscures the more subtle but substantial ways in which Congress influences decisions about military intervention. Crucially, the fact that the president often initiates military campaigns without express authorization by Congress does not mean that congressional checks are altogether absent. Political science and history strongly suggest that, notwithstanding the often-weak electoral incentives of congressional members to formally approve or disapprove military interventions at their outset, congressional politics weigh heavily in presidential decision-making.

Studies show that congressional politics affect both the frequency with which presidents use force abroad and the probability that they will respond militarily to crises. There are many ways in which Congress influences presidential uses of force, which include not only the introduction of legislation to authorize or curtail a use of force but also congressional oversight hearings and influencing public debate over military policymaking. Congressional action or inaction also sends signals about domestic resolve to foreign parties — both adversaries and allies alike — thereby affecting the president’s calculus regarding using force. Such political checks are especially pronounced when Congress and the presidency are controlled by opposing parties. Focusing solely on whether and how Congress formally approves military action on the front end often neglects these other significant ways Congress can influence the use of force and how they might be enhanced.

The Diverse Forms of Modern Conflict

Military conflicts and interventions arise in too many ways and forms to regulate them effectively with a single statutory scheme or a single form of authorization. For the existing War Powers Resolution and some of the proposals to strengthen it, relatively clear lines are often seen as a virtue, because they reduce — though don’t eliminate — opportunities to interpret away requirements. However, trying to draw statutory lines at specific thresholds like armed “hostilities” (as in the War Powers Resolution) or “significant armed conflicts” (as in the proposed War Powers Consultation Act) is a poor way of deciding which types of conflicts should require formal congressional approval.

From the earliest days of the republic, the United States faced varied military contingencies for which neither war declarations nor simple congressional force authorizations were well suited. In the modern era, American conflicts and security crises are even more diverse. They could begin because of a U.S. first strike or an enemy first strike, an attack by or against a U.S. ally, or a breakdown in deterrence or a miscalculation. They might include large-scale ground wars, one-off airstrikes, or a combination of the two, and increasingly they feature cyber operations as well. They can be overt or covert, or both. They may be geographically confined or global, or expected to be short or long. They are waged against states or nonstate groups, with or against a state’s proxy forces, and with or without the help of allies.

Recent controversies over war powers illustrate this point. In 2019, concerns about insufficiently checked presidential war powers have arisen in three vastly different contexts: continuation of a geographically sprawling and indefinite war against terrorist groups, support for a Saudi war in Yemen, and the possibility of a major U.S. war with Iran. The first began after a direct attack on the U.S. homeland, the second is a regional proxy war, and the third could arise through deliberate preemptive U.S. action, a miscalculated spiral of violence, or some other way. Stepping back, the key policy questions about force in each case differ widely. The first is mostly about where and what type of force is used, the second has to do with whether to cut off operational support to a partner, and the third is about how to wield threats of force for deterrence and coercive diplomacy.

Although recent war powers debates have sometimes focused on regional conflicts in which the United States does not put many troops directly in harm’s way (at least not initially), a key aim of war powers reform is often said to be making sure that “big” wars — those that put many vulnerable American boots on the ground — are formally authorized by Congress. Historically, however, the Korean War stands out as the only exception to the tendency of presidents to seek congressional authorization in advance of large ground wars. In any event, these are the types of conflicts for which political checks often work most effectively.

Smaller-scale and less visible conflicts attract less public attention, but their consequences can be significant. “As a matter of democratic principle,” Jack Goldsmith and I have argued, treating low-intensity warfare waged stealthily and from a distance (or in cyberspace) as more appropriately conducted unilaterally than large-scale ground campaigns “probably has matters backwards”:

Light-footprint warfare is still lethal and very consequential warfare, and the lightness of the tools make them relatively easy for a President to deploy extensively. Light-footprint warfare thus has large foreign policy, strategic, and reputational consequences for the United States, akin to much heavier deployments, yet much less public examination. The President’s legal theories treat this as a feature of such warfare. But it is also a bug for U.S. democracy, since the stealthy features mean that public debate and political checks—which reduce error as well as excess, and promote legitimacy—function ineffectively.

This arguably indicates the need to expand or clarify the War Powers Resolution’s definition of the situations requiring explicit congressional approval. But any politically plausible attempts to delineate with bright-line rules which types of military action require specific forms of congressional authorization will probably function poorly in practice, where contextual variables are complex and fast-moving. Such attempts may also still exclude those conflicts for which stronger congressional scrutiny is appropriate. Alternatively, a more flexible legal standard would likely be even easier for the executive branch to bypass. A wide range of military conflicts and challenges warrant a wide range of congressional oversight tools. Moreover, as explained below, requiring congressional approval at the beginning of a military intervention often fails to encourage the right kind of congressional scrutiny.

The Purposes of Legislative Checks

Periodic pushes from both members of Congress and the public for stronger congressional checks on war powers can conceal divisions and uncertainty about why those checks are needed. Some of the goals of these efforts for congressional oversight also point to different solutions.

Sometimes, supporters of war powers reform are pushing for change simply as a matter of constitutional principle. If one believes that Article I’s directive that Congress has the power to declare war includes any use of military force (other than in defending against invasion), and one believes that the president’s Article II roles as chief executive and commander-in-chief confer no authority to initiate such actions, then nothing short of formal congressional authorization for any military intervention is likely to be satisfactory. But there have always been gaps and ambiguities in these constitutional clauses, and many (though not all) war powers reformers believe in evolving constitutional interpretation to meet evolving national conditions in other areas of law. There are good arguments to justify adapting the original allocations of military powers given the dramatic changes over 200 years in American military power, strategy, and interests, as well as dramatic changes in the way other, related constitutional powers are exercised. Reasonable people may disagree about the strength of those arguments and even whether they work in favor of or against presidential discretion, but rigid formalism does not point toward a practical solution.

Other proponents of stronger and formal congressional checks justify them in policy terms: Imposing legislative requirements would help to restrain military adventurism. The expectation here is often that the need to obtain congressional authorization serves as a brake on military responses to crises, whether because Congress is slower to act than the executive branch or because it is more sensitive to certain costs and risks, or just because more procedural hurdles means less action. Strategically, though, foreign policy retrenchment — or even perceptions of it — carries its own dangers. How well requirements for formal congressional force authorization contribute to peace and stability is also far from clear, since some conflicts stem from breakdowns in deterrence. Politically, commitment to this goal is also often tied to who holds presidential office, and is therefore fleeting.

A third justification for war powers reform is that requiring congressional authorization promotes sounder policy through interbranch deliberation. Such requirements, the argument often goes, push the executive and legislative branches to consult one another more thoroughly, and the processes of persuasion and consensus-building result in more consistent and sustainable security policy. This claim has logical appeal, though empirical support is uneven. The 1991 and 2003 Iraq Wars were both authorized: The second turned out to be badly misguided and congressional scrutiny of the first failed to question core planning assumptions that turned out to be wrong. In any event, a legislative overhaul is not needed to achieve better interbranch deliberation.

Improving Legislative Oversight

For all of these reasons, war powers reform should not focus on strengthening any single, formal congressional approval requirement. Instead, Congress should improve the use of its existing tool set for overseeing security and defense policy. As noted above, Congress has a range of tools available to shape and restrain military policy. These include hearings, spending bills, and actions to shape public opinion. Importantly and unlike legislative overhaul proposals, some of these tools do not require Congress as a whole to act — they can be wielded by individual members, especially in key committee positions. In recent years, Congress’ foreign policy and defense committees have atrophied, holding fewer oversight hearings than in the past. A first step to boosting influence is ensuring that foreign relations, armed services, and intelligence committee members have adequate experience and resources, as well as a commitment to shaping and auditing security strategy.

Wars rarely begin out of the blue, but instead are the result of a long series of steps and counter-steps, actions and inactions. This means that Congress needs to focus more heavily on overall military strategy and how American military resources are wielded well in advance of a crisis, rather than treating the outbreak of a crisis as Congress’ moment for influence. Regularly scheduled posture hearings and annual defense authorization bills, for example, should be understood and treated as core parts of Congress’ war powers.

Fixating on congressional authorization of conflicts risks distracting or relieving lawmakers from the important duty of overseeing their conduct. Recent authorized wars in Afghanistan and Iraq show that congressional action at the front end of a conflict does not equate to thorough scrutiny — let alone consensus — of whether means and ends are well aligned or planning assumptions well tested. Congressional oversight of military intervention and conflict should be continuous and focused more heavily on the conduct of campaigns long after their initiation. So, for instance, the outdated 2001 Authorization for Use of Military Force directed at al-Qaeda and its allies ought to be revised, but as an addition to, not a substitute for, unremitting congressional review of how the various parts of that conflict are waged. The energy of reformists in Congress would be better spent on overseeing ongoing conflicts than on pushing new overarching frameworks that are unlikely to be adopted. Plus, the prospect of probing oversight during conflicts would bolster Congress’ political influence over decisions to intervene militarily to begin with.

Some will criticize this oversight agenda as too modest. And yet, it stands a more realistic chance of addressing the problems and improving the political checks laid out above than a dramatic legislative revamping would. Others will criticize it as politically unworkable, essentially asking for a different type of congressional membership, with different political incentives and institutional commitments, than the one that exists. That may be so. If that is the case, though, then ambitions for a radical legislative overhaul — especially one that sticks — do not stand a chance.

### 2NC — ! — AT: Biden Solves

#### Biden’s an impact magnifier — creates scenarios for escalation in Syria, Africa, Russia and China.

Sjursen ’21 — Danny; a retired US Army officer, contributing editor at Antiwar.com, senior fellow at the Center for International Policy, and director of the soon-to-launch Eisenhower Media Network. January 23, 2021; “What Our Forever Wars Will Look Like Under Biden.”; *The Nation*; [https://www.thenation.com/article/politics/biden-endless-war/; //CYang](https://www.thenation.com/article/politics/biden-endless-war/;%20//CYang)

Hard as it is to believe in this time of record pandemic deaths, insurrection, and an unprecedented encore impeachment, Joe Biden is now officially at the helm of the US war machine. He is, in other words, the fourth president to oversee America’s unending and unsuccessful post-9/11 military campaigns. In terms of active US combat, that’s only happened once before, in the Philippines, America’s second-longest (if often forgotten) overseas combat campaign.

Yet that conflict was limited to a single Pacific archipelago. Biden inherits a global war — and burgeoning new Cold War — spanning four continents and a military mired in active operations in dozens of countries, combat in some 14 of them, and bombing in at least seven. That sort of scope has been standard fare for American presidents for almost two decades now. Still, while this country’s post-9/11 war presidents have more in common than their partisan divisions might suggest, distinctions do matter, especially at a time when the White House almost unilaterally drives foreign policy.

So, what can we expect from Commander in Chief Biden? In other words, what’s the forecast for US service members who have invested their lives and limbs in future conflict, as well as for the speculators in the military-industrial complex and anxious foreigners in the countries still engulfed in America’s war on terror who usually stand to lose it all?

Many Trumpsters, and some libertarians, foresee disaster: that the man who, as a leading senator facilitated and cheered on the disastrous Iraq War, will surely escalate American adventurism abroad. On the other hand, establishment Democrats and most liberals, who are desperately (and understandably) relieved to see Donald Trump go, find that prediction preposterous. Clearly, Biden must have learned from past mistakes, changed his tune, and should responsibly bring US wars to a close, even if at a time still to be determined.

In a sense, both may prove right — and in another sense, both wrong. The guess of this long-time war-watcher (and one-time war fighter) reading the tea leaves: Expect Biden to both eschew big new wars and avoid fully ending existing ones. At the margins (think Iran), he may improve matters some; in certain rather risky areas (Russian relations, for instance), he could worsen them; but in most cases (the rest of the Greater Middle East, Africa, and China), he’s likely to remain squarely on the status-quo spectrum. And mind you, there’s nothing reassuring about that.

It hardly requires clairvoyance to offer such guesswork. That’s because Biden basically is who he says he is and who he’s always been, and the man’s simply never been transformational. One need look no further than his long and generally interventionist past record or the nature of his current national-security picks to know that the safe money is on more of the same. Whether the issues are war, race, crime, or economics, Uncle Joe has made a career of bending with the prevailing political winds and it’s unlikely this old dog can truly learn any new tricks. Furthermore, he’s filled his foreign policy squad with Obama-Clinton retreads, a number of whom were architects of — if not the initial Iraq and Afghan debacles — then disasters in Libya, Syria, West Africa, Yemen, and the Afghan surge of 2009. In other words, Biden is putting the former arsonists in charge of the forever-war fire brigade.

There’s further reason to fear that he may even reject Trump’s “If Obama was for it, I’m against it” brand of war-on-terror policy-making and thereby reverse The Donald’s very late, very modest troop withdrawals in Afghanistan, Iraq, and Somalia. Yet even if this new old hand of a president evades potentially existential escalation with nuclear Russia or China and offers only an Obama reboot when it comes to persistent low-intensity warfare, what he does will still matter — most of all to the global citizens who are too often its victims. So, here’s a brief region-by-region flyover tour of what Joe’s squad may have in store for both the world and the American military sent to police that world.

THE MIDDLE EAST: OLD PRESCRIPTIONS FOR OLD BUSINESS

It’s increasingly clear that Washington’s legacy wars in the Greater Middle East — Iraq and Afghanistan, in particular — are generally no longer on the public’s radar. Enter an elected old man who’s charged with handling old business that, at least to most civilians, is old news. Odds are that Biden’s ancient tricks will amount to safe bets in a region that past US policies essentially destroyed. Joe is likely to take a middle path in the region between large-scale military intervention of the Bush or Obama kind and more prudent full-scale withdrawal.

As a result, such wars will probably drag on just below the threshold of American public awareness, while avoiding Pentagon or partisan charges that his version of cutting-and-running endangered US security. The prospect of “victory” won’t even factor into the equation (after all, Biden’s squad members aren’t stupid), but political survival certainly will. Here’s what such a Biden-era future might then look like in a few such sub-theaters.

The war in Afghanistan is hopeless and has long been failing by every one of the US military’s own measurable metrics, so much so that the Pentagon and the Kabul government classified them all as secret information a few years back. Actually dealing with the Taliban and swiftly exiting a disastrous war likely to lead to a disastrous future with Washington’s tail between its legs is, in fact, the only remaining option. The question is when and how many more Americans will kill or be killed in that “graveyard of empires” before the United States accepts the inevitable. Toward the end of his tenure, Trump signaled a serious, if cynical, intent to so. And since Trump was by definition a monster and the other team’s monsters can’t even occasionally be right, a coalition of establishment Democrats and Lincoln-esque Republicans (and Pentagon officials) decided that the war must indeed go on. That culminated in last July’s obscenity in which Congress officially withheld the funds necessary to end it. As vice president, Biden was better than most in his Afghan War skepticism, but his incoming advisers weren’t, and Joe’s nothing if not politically malleable. Besides, since Trump didn’t pull enough troops out faintly fast enough or render the withdrawal irreversible over Pentagon objections, expect a trademark Biden hedge here.

Syria has always been a boondoggle, with the justifications for America’s peculiar military presence there constantly shifting from pressuring the regime of Bashar al-Assad, to fighting the Islamic State, to backing the Kurds, to balancing Iran and Russia in the region, to (in Trump’s case) securing that country’s meager oil supplies. As with so much else, there’s a troubling possibility that, in the Biden years, personnel once again may become destiny. Many of the new president’s advisers were bullish on Syrian intervention in the Obama years, even wanting to take it further and topple Assad. Furthermore, when it comes time for them to convince Biden to agree to stay put in Syria, there’s a dangerous existing mix of motives to do just that: the emotive sympathy for the Kurds of known gut-player Joe; his susceptibility to revived Islamic State (ISIS) fear-mongering; and perceptions of a toughness-testing proxy contest with Russia.

When it comes to Iran, expect Biden to be better than the Iran-phobic Trump administration, but to stay shackled “inside the box.” First of all, despite Joe’s long-expressed desire to reenter the Obama-era nuclear deal with Iran that Trump so disastrously pulled out of, doing so may prove harder than he thinks. After all, why should Tehran trust a political basket case of a negotiating partner prone to significant partisan policy-pendulum swings, especially given the way Washington has waged nearly 70 years of interventions against Iran’s politicians and people? In addition, Trump left Biden the Trojan horse of Tehran’s hardliners, empowered by dint of The Donald’s pugnacious policies. If the new president wishes to really undercut Iranian intransigence and fortify the moderates there, he should go big and be transformational — in other words, see Obama’s tension-thawing nuclear deal and raise it with the carrot of full-blown diplomatic and economic normalization. Unfortunately, status-quo Joe has never been a transformational type.

KEEP AN EYE ON AFRICA

Though it garners far less public interest than the US military’s long-favored Middle Eastern playground, Africa figures significantly in the minds of those at the Pentagon, in the Capitol, and in Washington’s influential think tanks. For interventionist hawks, including liberal ones, that continent has been both a petri dish and a proving ground for the development of a limited power-projection paradigm of drones, Special Operations forces, military advisers, local proxies, and clandestine intelligence missions.

It mattered little that over eight years of the Obama administration — from Libya to the West African Sahel to the Horn of East Africa — the war on terror proved, at best, problematic indeed, and even worse in the Trump years. There remains a worrisome possibility that the Biden posse might prove amenable yet again to the alarmism of US Africa Command (AFRICOM) about the rebirth of ISIS and the spread of other Al Qaeda–inked groups there, bolstered by fear-mongering nonsense masquerading as sophisticated scholarship from West Point’s Combating Terrorism Center, and the Pentagon’s perennial promises of low-investment, low-risk, and high-reward opportunities on the continent. So, a savvy betting man might place chips on a Biden escalation in West Africa’s Sahel and the Horn of East Africa, even if for different reasons.

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Don’t be surprised if French President Emmanuel Macron asks for help and Biden agrees to bail him out. Despite their obvious age gap, Joe and Emmanuel could prove the newest and best of chums. (What’s a few hundred extra troops between friends?)

Especially since Obama-era Secretary of State Hillary Clinton and her then-favored errand boy, incoming national security adviser Jake Sullivan, could be said to have founded the current coalition of jihadis in Mali and Niger. That’s because when the two of them championed a heavy-handed regime-change intervention against Libyan autocrat Moammar El-Gadhafi in 2011, thousands of his Tuareg fighters blew back into that region in a big way with more than just the clothes on their backs. They streamed from post-Gadhafi Libya into their Sahel homelands loaded with arms and anger. It’s no accident, in other words, that Mali’s latest round of insurgency kicked off in 2012. Now, Sullivan might push new boss Biden to attempt to clean up his old mess.

On the other side of the continent, in Somalia, where Trump began an eleventh-hour withdrawal of a long-failing and aimless US troop presence (sending most of those soldiers to neighboring countries), there’s a real risk that Biden could double-down in the region, adding soldiers, special operators, and drones. After all, if Trump was against it, even after exponentially increasing bombing in the area, then any good Democrat should be for it, especially since the Pentagon has, for some time now, been banging the drum about Somalia’s al-Shabaab Islamist outfit being the biggest threat to the homeland.

However, the real selling point for Biden might be the fantasy that Russia and China are flooding into the region. Ever since the 2018 National Defense Strategy decisively shifted the Pentagon’s focus from counterterrorism wars to “great power competition,” or GPC, AFRICOM has opportunistically altered its own campaign plan to align with the new threat of the moment, honing in on Russian and Chinese influence in the Horn region. As a result, AFRICOM’S come-back-to-the-Horn pitch could prove a relatively easy Biden sell.

TOUGHNESS TRAPS: POKING RUSSIAN BEARS, RAMMING CHINESE (SEA) DRAGONS

With that new GPC national security obsession likely to be one Trump-era policy that remains firmly in place, however ill-advised it may be, perhaps the biggest Biden risk is the possibility of stoking up a “new,” two-theater, 21st century version of the Cold War (with the possibility that, at any moment, it could turn into a hot one). After making everything all about Russia in the Trump years, the ascendant Democrats might just feel obliged to follow through and escalate tensions with Moscow that Trump himself already brought to the brink (of nuclear catastrophe). Here, too, personnel may prove a key policy-driver.

Biden’s nominee for secretary of state, Anthony Blinken, is a resident Russia hawk and was an early “arm Ukraine” enthusiast. Jake Sullivan already has a tendency to make mountains out of molehills on the subject, as when he described a minor road-rage incident as constituting “a Russian force in Syria aggressively attack[ing] an American force and actually injur[ing] American service members.” Then there’s the troubling signal of Victoria Nuland, the recent nominee for undersecretary of state for political affairs, a pick that itself should be considered a road-rage-style provocation. Nuland has a history of hawkish antagonism toward Moscow and is reportedly despised by Russian President Vladimir Putin. Her confirmation will surely serve as a conflict accelerant.

Nevertheless, China may be the lead antagonist in the Biden crew’s race to risk a foolhardy cataclysm. Throughout the election campaign, the new president seemed set on out-hawking Trump in the Western Pacific, explicitly writing about “getting tough” on China in a March 2020 piece he penned in Foreign Affairs. Joe had also previously called Chinese President Xi Jinping “a thug.” And while Michèle Flournoy may (mercifully) have been passed over for secretary of defense, her aggressive posture toward Beijing still infuses the thinking of her fellow Obama alums on Biden’s team.

As TomDispatch regular Andrew Bacevich pointed out last September, a Flournoy Foreign Affairs article illuminated the sort of absurdity she (along with assumedly various Biden appointees) thinks necessary to effectively deter China. She called for “enhancing U.S. military capabilities so that the United States can credibly threaten to sink all of China’s military vessels, submarines, and merchant ships in the South China Sea within 72 hours.” Consider that Dr. Strangelove-style strategizing retooled for an inbound urbane imperial presidency.

#### Shorter version of the above card.

Sjursen ’21 — Danny; a retired US Army officer, contributing editor at Antiwar.com, senior fellow at the Center for International Policy, and director of the soon-to-launch Eisenhower Media Network. January 23, 2021; “What Our Forever Wars Will Look Like Under Biden.”; *The Nation*; [https://www.thenation.com/article/politics/biden-endless-war/; //CYang](https://www.thenation.com/article/politics/biden-endless-war/;%20//CYang)

Hard as it is to believe in this time of record pandemic deaths, insurrection, and an unprecedented encore impeachment, Joe Biden is now officially at the helm of the US war machine. He is, in other words, the fourth president to oversee America’s unending and unsuccessful post-9/11 military campaigns. In terms of active US combat, that’s only happened once before, in the Philippines, America’s second-longest (if often forgotten) overseas combat campaign.

Yet that conflict was limited to a single Pacific archipelago. Biden inherits a global war — and burgeoning new Cold War — spanning four continents and a military mired in active operations in dozens of countries, combat in some 14 of them, and bombing in at least seven. That sort of scope has been standard fare for American presidents for almost two decades now. Still, while this country’s post-9/11 war presidents have more in common than their partisan divisions might suggest, distinctions do matter, especially at a time when the White House almost unilaterally drives foreign policy.

So, what can we expect from Commander in Chief Biden? In other words, what’s the forecast for US service members who have invested their lives and limbs in future conflict, as well as for the speculators in the military-industrial complex and anxious foreigners in the countries still engulfed in America’s war on terror who usually stand to lose it all?

Many Trumpsters, and some libertarians, foresee disaster: that the man who, as a leading senator facilitated and cheered on the disastrous Iraq War, will surely escalate American adventurism abroad. On the other hand, establishment Democrats and most liberals, who are desperately (and understandably) relieved to see Donald Trump go, find that prediction preposterous. Clearly, Biden must have learned from past mistakes, changed his tune, and should responsibly bring US wars to a close, even if at a time still to be determined.

In a sense, both may prove right — and in another sense, both wrong. The guess of this long-time war-watcher (and one-time war fighter) reading the tea leaves: Expect Biden to both eschew big new wars and avoid fully ending existing ones. At the margins (think Iran), he may improve matters some; in certain rather risky areas (Russian relations, for instance), he could worsen them; but in most cases (the rest of the Greater Middle East, Africa, and China), he’s likely to remain squarely on the status-quo spectrum. And mind you, there’s nothing reassuring about that.

It hardly requires clairvoyance to offer such guesswork. That’s because Biden basically is who he says he is and who he’s always been, and the man’s simply never been transformational. One need look no further than his long and generally interventionist past record or the nature of his current national-security picks to know that the safe money is on more of the same. Whether the issues are war, race, crime, or economics, Uncle Joe has made a career of bending with the prevailing political winds and it’s unlikely this old dog can truly learn any new tricks. Furthermore, he’s filled his foreign policy squad with Obama-Clinton retreads, a number of whom were architects of — if not the initial Iraq and Afghan debacles — then disasters in Libya, Syria, West Africa, Yemen, and the Afghan surge of 2009. In other words, Biden is putting the former arsonists in charge of the forever-war fire brigade.

### 2NC — ! — Africa

#### Causes war in Africa.

Sjursen ’21 — Danny; a retired US Army officer, contributing editor at Antiwar.com, senior fellow at the Center for International Policy, and director of the soon-to-launch Eisenhower Media Network. January 23, 2021; “What Our Forever Wars Will Look Like Under Biden.”; *The Nation*; [https://www.thenation.com/article/politics/biden-endless-war/; //CYang](https://www.thenation.com/article/politics/biden-endless-war/;%20//CYang)

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#### Africa is the site of a new Cold War — causes great power conflict and transnational terror.

Folack ’22 — Hippolyte; chief and director of research and international cooperation at the African Export-Import Bank. May 19, 2022; "Africa and the new Cold War: Africa’s development depends on regional ownership of its security"; *Brookings*; https://www.brookings.edu/blog/africa-in-focus/2022/05/19/africa-and-the-new-cold-war-africas-development-depends-on-regional-ownership-of-its-security/; //CYang

The securitization of development — the subordination of growth and development objectives to security priorities — has failed to deliver security and has only ever undermined development. As I argue in my recent paper, “Dawn of a second Cold War and the ‘scramble for Africa,’” outsourcing domestic security has failed to bring peace and instead enabled foreign powers to meddle in domestic insurgencies and prolong conflicts. These undermine regional integration and economic development, as is apparent today in Libya and Mali, which have been theaters of war for more than a decade.

THE RISE OF TRANSNATIONAL TERRORIST NETWORKS AND THE NEW COLD WAR

Recently, the dramatic increase in high-intensity conflicts and conflict-related deaths in the region has coincided with the expansion of transnational terrorist networks, which have been sustained by a glut of itinerant foreign fighters and the proliferation of foreign military bases amid geopolitical realignments and rising tensions. Even though the Ukraine crisis has reinvigorated the East-West tensions that defined the latter half of the previous century, new geopolitical alliances are emerging shaped by the triangulation that dominated the first Cold War.

That geopolitical realignment has been in full swing in Africa where proxy wars are raging — including in Ethiopia, which hosts the African Union’s headquarters — as competing powers vie for control of natural resources and strategic trade routes. This butting of heads between superpowers has set the world on the path toward a new Cold War, and Africa has again emerged as an arena in which to exercise their rivalries.

Across all continents, Africa now has the largest number of foreign countries carrying out military operations on its soil — no fewer than 13, of which most have several military bases spread throughout the region. Per the most recent official estimates, Africa is home to at least 47 foreign outposts, with the U.S. controlling the largest share, followed by former colonial power France. Both China and Japan elected to establish their first overseas military bases since the Second World War in Djibouti, which happens to be the only country in the world to host both American and Chinese outposts.

REPERCUSSIONS FOR AFRICA OF THE FIRST COLD WAR

The scars of the first Cold War — which claimed millions of African lives and undermined both regional integration and economic development, with conflicts reducing economic growth in affected countries by about 2.5 percent on average — are still fresh, and the region cannot possibly afford to fall prey to a second.

In addition to immeasurable human and economic costs, including the destruction of economic and physical infrastructure required for productivity growth and export diversification, the political fragmentation that arose as countries aligned themselves with one of the two superpower blocs was a major ramification of the first Cold War. That fragmentation sustained market segmentation, hardening colonial borders and undermining cross-border trade and regional integration. A second Cold War, on the heels of the proliferation of foreign military bases and the outsourcing of national security, would likewise undermine efforts to defragment African economies and accelerate the process of structural transformation to realize the potential of the African Continental Free Trade Agreement (AfCFTA), which has been touted as a game changer.

#### Nuclear terror goes global.

Arguello & Buis ’18 — Irma Arguello is founder and chair of the NPSGlobal Foundation, and head of the secretariat of the Latin American and Caribbean Leadership Network. She holds a degree in physics, a Master’s in business administration, and completed graduate studies in defense and security. Arguello previously worked on nuclear projects for the Argentine National Atomic Energy Commission. Emiliano Buis is a lawyer specializing in international law. He holds a PhD from the University of Buenos Aires (UBA), a Master’s in Human and Social Sciences from the University of Paris/Panthéon-Sorbonne, and a postgraduate diploma in national defense from the National Defense School. February 21, 2018; "The global impacts of a terrorist nuclear attack: What would happen? What should we do?"; *Bulletin of the Atomic Sciences*, Volume 74; Accessed Online via University of Michigan Libraries; //CYang

A small and primitive 1-kiloton fission bomb (with a yield of about one-fifteenth of the one dropped on Hiroshima, and certainly much less sophisticated; cf. Figure 1), detonated in any large capital city of the developed world, would cause an unprecedented catastrophic scenario.

An estimate of direct effects in the attack’s location includes a death toll of 7,300-to-23,000 people and 12,600-to-57,000 people injured, depending on the target’s geography and population density. Total physical destruction of the city’s infrastructure, due to the blast (shock wave) and thermal radiation, would cover a radius of about 500 meters from the point of detonation (also known as ground zero), while ionizing radiation greater than 5 Sieverts — compatible with the deadly acute radiation syndrome — would expand within an 850-meter radius. From the environmental point of view, such an area would be unusable for years. In addition, radioactive fallout would expand in an area of about 300 square kilometers, depending on meteorological conditions (cf. Figure 2).

But the consequences would go far beyond the effects in the target country, however, and promptly propagate worldwide.

Global and national security, economy and finance, international governance and its framework, national political systems, and the behavior of governments and individuals would all be put under severe trial. The severity of the effects at a national level, however, would depend on the countries’ level of development, geopolitical location, and resilience. Global security and regional/national defense schemes would be strongly affected. An increase in global distrust would spark rising tensions among countries and blocs, that could even lead to the brink of nuclear weapons use by states (if, for instance, a sponsor country is identified). The consequences of such a shocking scenario would include a decrease in states’ self-control, an escalation of present conflicts and the emergence of new ones, accompanied by an increase in military unilateralism and military expenditures.

Regarding the economic and financial impacts, a severe global economic depression would rise from the attack, likely lasting for years. Its duration would be strongly dependent on the course of the crisis. The main results of such a crisis would include a 2 percent fall of growth in global Gross Domestic Product, and a 4 percent decline of international trade in the two years following the attack (cf. Figure 3). In the case of developing and less-developed countries, the economic impacts would also include a shortage of high-technology products such as medicines, as well as a fall in foreign direct investment and a severe decline of international humanitarian aid toward low-income countries. We expect an increase of unemployment and poverty in all countries. Global poverty would raise about 4 percent after the attack, which implies that at least 30 million more people would be living in extreme poverty, in addition to the current estimated 767 million.

In the area of international relations, we would expect a breakdown of key doctrines involving politics, security, and relations among states. These international tensions could lead to a collapse of the nuclear order as we know it today, with a consequent setback of nuclear disarmament and nonproliferation commitments. In other words, the whole system based on the Nuclear Non- Proliferation Treaty would be put under severe trial. After the attack, there would be a reassessment of existing security doctrines, and a deep review of concepts such as nuclear deterrence, no-first use, proportionality, and negative security assurances.

Finally, the behavior of governments and individuals would also change radically. Internal chaos fueled by the media and social networks would threaten governance at all levels, with greater impact on those countries with weak institutional frameworks. Social turbulence would emerge in most countries, with consequent attempts by governments to impose restrictions on personal freedoms to preserve order — possibly by declaring a state of siege or state of emergency — and legislation would surely become tougher on human rights. There would also be a significant increase in social fragmentation — with a deepening of antagonistic views, mistrust, and intolerance, both within countries and towards others — and a resurgence of large-scale social movements fostered by ideological interests and easily mobilized through social media.

### 2NC — ! — China

#### Causes war with China.

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Nevertheless, China may be the lead antagonist in the Biden crew’s race to risk a foolhardy cataclysm. Throughout the election campaign, the new president seemed set on out-hawking Trump in the Western Pacific, explicitly writing about “getting tough” on China in a March 2020 piece he penned in Foreign Affairs. Joe had also previously called Chinese President Xi Jinping “a thug.” And while Michèle Flournoy may (mercifully) have been passed over for secretary of defense, her aggressive posture toward Beijing still infuses the thinking of her fellow Obama alums on Biden’s team.

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#### Goes nuclear quickly.

Pettyjohn & Wasser ’22 — Stacie; senior fellow and director of the defense program at the Center for a New American Security. Becca; fellow in the defense program and co-lead of The Gaming Lab at the Center for a New American Security. May 20, 2022; "A Fight Over Taiwan Could Go Nuclear"; *Foreign Affairs*; <https://www.foreignaffairs.com/articles/china/2022-05-20/fight-over-taiwan-could-go-nuclear>; //CYang

Russia’s invasion of Ukraine has raised the specter of nuclear war, as Russian President Vladimir Putin has placed his nuclear forces at an elevated state of alert and has warned that any effort by outside parties to interfere in the war would result in “consequences you have never seen.” Such saber-rattling has understandably made headlines and drawn notice in Washington. But if China attempted to forcibly invade Taiwan and the United States came to Taipei’s aid, the threat of escalation could outstrip even the current nerve-wracking situation in Europe.

A recent war game, conducted by the Center for a New American Security in conjunction with the NBC program “Meet the Press,” demonstrated just how quickly such a conflict could escalate. The game posited a fictional crisis set in 2027, with the aim of examining how the United States and China might act under a certain set of conditions. The game demonstrated that China’s military modernization and expansion of its nuclear arsenal — not to mention the importance Beijing places on unification with Taiwan — mean that, in the real world, a fight between China and the United States could very well go nuclear.

Beijing views Taiwan as a breakaway republic. If the Chinese Communist Party decides to invade the island, its leaders may not be able to accept failure without seriously harming the regime’s legitimacy. Thus, the CCP might be willing to take significant risks to ensure that the conflict ends on terms that it finds acceptable. That would mean convincing the United States and its allies that the costs of defending Taiwan are so high that it is not worth contesting the invasion. While China has several ways to achieve that goal, from Beijing’s perspective, using nuclear weapons may be the most effective means to keep the United States out of the conflict.

China is several decades into transforming its People’s Liberation Army (PLA) into what the Chinese President Xi Jinping has called a “world-class military” that could defeat any third party that comes to Taiwan’s defense. China’s warfighting strategy, known as “anti-access/area denial,” rests on being able to project conventional military power out several thousand miles in order to prevent the American military, in particular, from effectively countering a Chinese attack on Taiwan. Meanwhile, a growing nuclear arsenal provides Beijing with coercive leverage as well as potentially new warfighting capabilities, which could increase the risks of war and escalation.

China has historically possessed only a few hundred ground-based nuclear weapons. But last year, nuclear scholars at the James Martin Center for Nonproliferation Studies and the Federation of American Scientists identified three missile silo fields under construction in the Xinjiang region. The Financial Times reported that China might have carried out tests of hypersonic gliders as a part of an orbital bombardment system that could evade missile defenses and deliver nuclear weapons to targets in the continental United States. The U.S. Department of Defense projects that by 2030, China will have around 1,000 deliverable warheads — more than triple the number it currently possesses. Based on these projections, Chinese leaders may believe that as early as five years from now the PLA will have made enough conventional and nuclear gains that it could fight and win a war to unify with Taiwan.

A fight between China and the United States could very well go nuclear.

Our recent war game — in which members of Congress, former government officials, and subject matter experts assumed the roles of senior national security decision makers in China and the United States — illustrated that a U.S.-China war could escalate quickly. For one thing, it showed that both countries would face operational incentives to strike military forces on the other’s territory. In the game, such strikes were intended to be calibrated to avoid escalation; both sides tried to walk a fine line by attacking only military targets. But such attacks crossed red lines for both countries, and produced a tit-for-tat cycle of attacks that broadened the scope and intensity of the conflict.

For instance, in the simulation, China launched a preemptive attack against key U.S. bases in the Indo-Pacific region. The attacks targeted Guam, in particular, because it is a forward operating base critical to U.S. military operations in Asia, and because since it is a territory, and not a U.S. state, the Chinese team viewed striking it as less escalatory than attacking other possible targets. In response, the United States targeted Chinese military ships in ports and surrounding facilities, but refrained from other attacks on the Chinese mainland. Nevertheless, both sides perceived these strikes as attacks on their home territory, crossing an important threshold. Instead of mirror-imaging their own concerns about attacks on their territory, each side justified the initial blows as military necessities that were limited in nature and would be seen by the other as such. Responses to the initial strikes only escalated things further as the U.S. team responded to China’s moves by hitting targets in mainland China, and the Chinese team responded to Washington’s strikes by attacking sites in Hawaii.

A NEW ERA

One particularly alarming finding from the war game is that China found it necessary to threaten to go nuclear from the start in order to ward off outside support for Taiwan. This threat was repeated throughout the game, particularly after mainland China had been attacked. At times, efforts to erode Washington’s will so that it would back down from the fight received greater attention by the China team than the invasion of Taiwan itself. But China had difficulty convincing the United States that its nuclear threats were credible. In real life, China’s significant and recent changes to its nuclear posture and readiness may impact other nations’ views, as its nuclear threats may not be viewed as credible given its stated doctrine of no first use, its smaller but burgeoning nuclear arsenal, and lack of experience making nuclear threats. This may push China to preemptively detonate a nuclear weapon to reinforce the credibility of its warning.

China might also resort to a demonstration of its nuclear might because of constraints on its long-range conventional strike capabilities. Five years from now, the PLA still will have a very limited ability to launch conventional attacks beyond locations in the “second island chain” in the Pacific; namely, Guam and Palau. Unable to strike the U.S. homeland with conventional weapons, China would struggle to impose costs on the American people. Up until a certain point in the game, the U.S. team felt its larger nuclear arsenal was sufficient to deter escalation and did not fully appreciate the seriousness of China’s threats. As a result, China felt it needed to escalate significantly to send a message that the U.S. homeland could be at risk if Washington did not back down. Despite China’s stated “no-first use” nuclear policy, the war game resulted in Beijing detonating a nuclear weapon off the coast of Hawaii as a demonstration. The attack caused relatively little destruction, as the electromagnetic pulse only damaged the electronics of ships in the immediate vicinity but did not directly impact the U.S. state. The war game ended before the U.S. team could respond, but it is likely that the first use of a nuclear weapon since World War II would have provoked a response.

The most likely paths to nuclear escalation in a fight between the United States and China are different from those that were most likely during the Cold War. The Soviet Union and the United States feared a massive, blot-from-the-blue nuclear attack, which would precipitate a full-scale strategic exchange. In a confrontation over Taiwan, however, Beijing could employ nuclear weapons in a more limited way to signal resolve or to improve its chances of winning on the battlefield. It is unclear how a war would proceed after that kind of limited nuclear use and whether the United States could de-escalate the situation while still achieving its objectives.

AN OUNCE OF PREVENTION

The clear lesson from the war game is that the United States needs to strengthen its conventional capabilities in the Indo-Pacific to ensure that China never views an invasion of Taiwan as a prudent tactical move. To do so, the United States will need to commit to maintaining its conventional military superiority by expanding its stockpiles of long-range munitions and investing in undersea capabilities. Washington must also be able to conduct offensive operations inside the first and second island chains even while under attack. This will require access to new bases to distribute U.S. forces, enhance their survivability, and ensure that they can effectively defend Taiwan in the face of China’s attacks.

Moreover, the United States needs to develop an integrated network of partners willing to contribute to Taiwan’s defense. Allies are an asymmetric advantage: the United States has them, and China does not. The United States should deepen strategic and operational planning with key partners to send a strong signal of resolve to China. As part of these planning efforts, the United States and its allies will need to develop war-winning military strategies that do not cross Chinese red-lines. The game highlighted just how difficult this task may be; what it did not highlight is the complexity of developing military strategies that integrate the strategic objectives and military capacities of multiple nations.

Moving forward, military planners in the United States and in Washington’s allies and partners must grapple with the fact that, in a conflict over Taiwan, China would consider all conventional and nuclear options to be on the table. And the United States is running out of time to strengthen deterrence and keep China from believing an invasion of Taiwan could be successful. The biggest risk is that Washington and its friends choose not to seize the moment and act: a year or two from now, it might already be too late.

### 2NC — ! — Syria

#### Causes war in Syria.

Sjursen ’21 — Danny; a retired US Army officer, contributing editor at Antiwar.com, senior fellow at the Center for International Policy, and director of the soon-to-launch Eisenhower Media Network. January 23, 2021; “What Our Forever Wars Will Look Like Under Biden.”; *The Nation*; [https://www.thenation.com/article/politics/biden-endless-war/; //CYang](https://www.thenation.com/article/politics/biden-endless-war/;%20//CYang)

Syria has always been a boondoggle, with the justifications for America’s peculiar military presence there constantly shifting from pressuring the regime of Bashar al-Assad, to fighting the Islamic State, to backing the Kurds, to balancing Iran and Russia in the region, to (in Trump’s case) securing that country’s meager oil supplies. As with so much else, there’s a troubling possibility that, in the Biden years, personnel once again may become destiny. Many of the new president’s advisers were bullish on Syrian intervention in the Obama years, even wanting to take it further and topple Assad. Furthermore, when it comes time for them to convince Biden to agree to stay put in Syria, there’s a dangerous existing mix of motives to do just that: the emotive sympathy for the Kurds of known gut-player Joe; his susceptibility to revived Islamic State (ISIS) fear-mongering; and perceptions of a toughness-testing proxy contest with Russia.

When it comes to Iran, expect Biden to be better than the Iran-phobic Trump administration, but to stay shackled “inside the box.” First of all, despite Joe’s long-expressed desire to reenter the Obama-era nuclear deal with Iran that Trump so disastrously pulled out of, doing so may prove harder than he thinks. After all, why should Tehran trust a political basket case of a negotiating partner prone to significant partisan policy-pendulum swings, especially given the way Washington has waged nearly 70 years of interventions against Iran’s politicians and people? In addition, Trump left Biden the Trojan horse of Tehran’s hardliners, empowered by dint of The Donald’s pugnacious policies. If the new president wishes to really undercut Iranian intransigence and fortify the moderates there, he should go big and be transformational — in other words, see Obama’s tension-thawing nuclear deal and raise it with the carrot of full-blown diplomatic and economic normalization. Unfortunately, status-quo Joe has never been a transformational type.

#### Syria escalates, spills over and draws in great powers.

Jeffrey ’21 — James; Chair of the Middle East Program at the Wilson Center. He served as a Foreign Service officer in seven U.S. administrations, most recently as Special Representative for Syria Engagement and Special Envoy to the Global Coalition to Defeat ISIS. December 13, 2021; “A Deal Is Still Possible in Syria”; *Foreign Affairs*; [https://www.foreignaffairs.com/articles/syria/2021-12-13/deal-still-possible-syria; //CYang](https://www.foreignaffairs.com/articles/syria/2021-12-13/deal-still-possible-syria;%20//CYang)

As U.S. President Joe Biden and his team focus on the Iran nuclear file, the war in Syria remains a festering wound at the heart of the Middle East. Although the current administration has made no dramatic departures from the approach of previous administrations, its decision to deprioritize the conflict comes at a particularly bad time. Opportunities to find a solution to the Syria crisis are now emerging — and the United States should devote the diplomatic energy necessary to seize them. The keys to success after years of failure include not just high-level engagement but a realistic assessment of what can be achieved in any deal.

The risks in keeping Syria on the back burner are significant. The conflict is already a strategic train wreck: a victory by President Bashar al-Assad’s regime would send a message to autocrats across the globe that mass murder is a viable tactic for retaining power and signal the regional ascendance of Assad’s Russian and Iranian enablers. It has also spawned geopolitical threats, from the rise of the Islamic State (also known as ISIS), to the deployment of Iranian precision missiles that target Israel, to the massive refugee flows that threaten to destabilize neighboring states and Europe. And for Syrians themselves, the decade-long civil war has resulted in horrendous casualties, displaced half the population from their homes, and left most citizens destitute. If left unaddressed, these dynamics will threaten to destabilize the Middle East for years to come.

Syria’s war has also drawn in the U.S., Israeli, and Turkish militaries, and the risk of clashes between them and Iranian, Russian, and Syrian forces remains very real. Washington views the Syrian Democratic Forces’ (SDF) enclave in northeastern Syria as an important ally against ISIS, but Ankara views the Kurdish group as a terrorist threat. Two recent provocations — Assad’s violation in July of a 2017 cease-fire in the southwest that had been negotiated between U.S. President Donald Trump and Russian President Vladimir Putin and an attack by Iranian-backed fighters in October against U.S. forces at their al-Tanf base in southern Syria — came without noticeable American response and could encourage Assad or the Iranians to escalate in areas patrolled by Turkish or U.S. troops.

### 2NC — ! — Russia

#### Causes Russia war.

Sjursen ’21 — Danny; a retired US Army officer, contributing editor at Antiwar.com, senior fellow at the Center for International Policy, and director of the soon-to-launch Eisenhower Media Network. January 23, 2021; “What Our Forever Wars Will Look Like Under Biden.”; *The Nation*; [https://www.thenation.com/article/politics/biden-endless-war/; //CYang](https://www.thenation.com/article/politics/biden-endless-war/;%20//CYang)

TOUGHNESS TRAPS: POKING RUSSIAN BEARS, RAMMING CHINESE (SEA) DRAGONS

With that new GPC national security obsession likely to be one Trump-era policy that remains firmly in place, however ill-advised it may be, perhaps the biggest Biden risk is the possibility of stoking up a “new,” two-theater, 21st century version of the Cold War (with the possibility that, at any moment, it could turn into a hot one). After making everything all about Russia in the Trump years, the ascendant Democrats might just feel obliged to follow through and escalate tensions with Moscow that Trump himself already brought to the brink (of nuclear catastrophe). Here, too, personnel may prove a key policy-driver.

Biden’s nominee for secretary of state, Anthony Blinken, is a resident Russia hawk and was an early “arm Ukraine” enthusiast. Jake Sullivan already has a tendency to make mountains out of molehills on the subject, as when he described a minor road-rage incident as constituting “a Russian force in Syria aggressively attack[ing] an American force and actually injur[ing] American service members.” Then there’s the troubling signal of Victoria Nuland, the recent nominee for undersecretary of state for political affairs, a pick that itself should be considered a road-rage-style provocation. Nuland has a history of hawkish antagonism toward Moscow and is reportedly despised by Russian President Vladimir Putin. Her confirmation will surely serve as a conflict accelerant.

#### US-Russia war causes extinction

Farqhuar et al. ‘17 — Stephen; Computer Science DPhil Student at the University of Oxford. John Halstead, Political Philosophy DPhil at the University of Oxford. Dr. Owen Cotton-Barratt, Pure Math DPhil at the University of Oxford. Dr. Stefan Schubert, Philosophy PhD at Lund University. Haydn Belfield, a BA. Andrew Snyder-Beattie, Philosophy PhD Student at the University of Oxford; 2017; “Existential Risk — Diplomacy and Governance”; *Global Priorities Project*; <https://www.fhi.ox.ac.uk/xrisk-diplomacy/>; //CYang

The aftermath could be much worse: the burning of flammable materials could send massive amounts of smoke into the atmosphere, which would absorb sunlight and cause sustained global cooling, severe ozone loss, and agricultural disruption — a nuclear winter. According to one model 9 , an all-out exchange of 4,000 weapons10 could lead to a drop in global temperatures of around 8°C, making it impossible to grow food for 4 to 5 years. This could leave some survivors in parts of Australia and New Zealand, but they would be in a very precarious situation and the threat of extinction from other sources would be great. An exchange on this scale is only possible between the US and Russia who have more than 90% of the world’s nuclear weapons, with stockpiles of around 4,500 warheads each, although many are not operationally deployed.11 Some models suggest that even a small regional nuclear war involving 100 nuclear weapons would produce a nuclear winter serious enough to put two billion people at risk of starvation,12 though this estimate might be pessimistic.13 Wars on this scale are unlikely to lead to outright human extinction, but this does suggest that conflicts which are around an order of magnitude larger may be likely to threaten civilisation. It should be emphasised that there is very large uncertainty about the effects of a large nuclear war on global climate. This remains an area where increased academic research work, including more detailed climate modelling and a better understanding of how survivors might be able to cope and adapt, would have high returns.

It is very difficult to precisely estimate the probability of existential risk from nuclear war over the next century, and existing attempts leave very large confidence intervals. According to many experts, the most likely nuclear war at present is between India and Pakistan.14 However, given the relatively modest size of their arsenals, the risk of human extinction is plausibly greater from a conflict between the United States and Russia. Tensions between these countries have increased in recent years and it seems unreasonable to rule out the possibility of them rising further in the future.

## PQD NB

### 2NC — UQ — T/L

#### PQD precedent now.

Driesen ’21 — David; University Professor, Syracuse University. 2021; “The Political Remedies Doctrine “; *Emory Law Journal*, Volume 71, Issue 1; https://scholarlycommons.law.emory.edu/elj/vol71/iss1/1; //CYang

Most of the lower courts treated Goldwater primarily as a case signaling an extreme hands-off approach to foreign affairs, at least at first.53 Certainly, Justice Rehnquist’s opinion seems to put foreign affairs cases in a special justiciability category. Even though he claimed that the question of treaty termination constitutes a political question, that conclusion required an extremely unusual approach to the doctrine.54 Federal courts usually find a political question when a case involves a “lack of judicially discoverable and manageable standards” for resolving the question before the Court.55 The Supreme Court relied on this factor in 2019 in holding that questions about the fairness of political gerrymandering constitute political questions, and it also helps explain the one case Justice Rehnquist relied upon, Coleman v. Miller. 56 Nobody claimed that the issue of treaty termination poses a manageable standards problem, which may explain why the entire D.C. Circuit unanimously rejected President Carter’s political question defense. 57 The two other Supreme Court cases that somewhat recently found political questions found “a textually demonstrable constitutional commitment of the issue to a coordinate political department.”58 In one of these cases, the Court held that questions about the procedures Congress uses to handle impeachments constitute political questions because the Constitution commits impeachment to Congress.59 In the other case, it held that the Constitution assigns regulation of the National Guard to Congress and the President.60 Justice Rehnquist’s opinion, however, does not claim that the Constitution assigns the decision about who has a right to terminate a treaty to another branch of government.61

#### Roberts upholds it.

Miller ’21 — Russell; J.B. Stombock Professor of Law at the Washington & Lee University School of Law and the Head of the Max Planck Law Network. February 12, 2021; “We Don’t Need to Reform the Supreme Court”; *Just Security*; <https://www.justsecurity.org/74655/we-dont-need-to-reform-the-supreme-court/>; //CYang

Its best defense is its own circumspection and modesty. The certiorari power allows the Court to avoid hearing cases. The political question doctrine allows it to avoid ruling even after it has agreed to hear a case. And the justices’ institutional sensibilities also are important. It is widely understood that this is a driving concern for Chief Justice Roberts, who has surprised observers and advocates by joining the Court’s liberal-wing in a few sensational cases where doing so was seen to be necessary to preserve the Court’s integrity.

### 2NC — UQ — AT: *Roe*

#### *Roe* doesn’t thump — get rid of Twitter misinformation!

Britzky ’6-27 — Haley; joined Task & Purpose as the Army reporter in January 2019. She previously worked at Axios covering breaking news. She reports on important developments within the service, from new uniforms to new policies; the realities of military life facing soldiers and their families; and broader cultural issues that expand outside of the Army, touching each of the military services. June 27, 2022; "No, the Pentagon is not defying the Supreme Court’s ruling on abortion"; *Task & Purpose*; https://taskandpurpose.com/news/pentagon-supreme-court-roe-v-wade/; //CYang

Despite viral tweets claiming otherwise, the Pentagon is not defying the Supreme Court’s decision to overturn Roe v. Wade, a landmark 1973 decision that established a constitutional right to abortion.

In the wake of the Supreme Court’s overturning of Roe v Wade on Friday, Defense Secretary Lloyd Austin said he was “committed to taking care of our people,” and that the Pentagon is “examining this decision closely and evaluating our policies to ensure we continue to provide seamless access to reproductive health care as permitted by federal law.”

But over the weekend, viral tweets inaccurately claimed that Austin and the Pentagon were defying the Supreme Court’s ruling.

The Occupy Democrats Twitter account said the Pentagon was defying “the extremist Supreme Court, announced that it will not recognize any anti-abortion laws enacted by states.” A similar tweet from an account called BNN Newsroom falsely claimed the Pentagon had announced that abortion laws “enacted as a result of the Supreme Court’s decision will not be recognized.”

Those claims are, of course, not true. But it didn’t stop the tens of thousands of retweets and likes from pouring in, including combative responses from lawmakers like Rep. Marjorie Taylor Greene (R-Ga.), who further amplified the misinformation.

### 2NC — UQ/Link — PQD Foreign Affairs

#### Foreign policy is a unique realm where courts have abstained due to the PQD — *Goldwater*!

Schwarzschild ’22 — Maimon; Professor of Law, JD, 1976, Columbia University, BA, 1973, Columbia University. Schwarzschild served in the U.S. Department of Justice in Washington, D.C. during the Carter administration. He has practiced law as a barrister in London and with the Chadbourne law firm in New York. He was an accredited journalist at the United Nations for five years and had White House press credentials during the Nixon administration. He has been a visiting professor at the Hebrew University in Jerusalem, the Sorbonne in Paris, and the University of California, San Diego. 2022; “Judicial Power and Political Questions in the United States”; *Challenged Justice: In Pursuit of Judicial Independence*, Chapter 18, Pages 333-344; Accessed Online via University of Michigan Libraries; //CYang

D. Foreign Policy and War

There are a few other subjects to which the formal political question doctrine is commonly said to apply, notably foreign or war policy and the mapping of electoral constituencies: but judicial abstention — that is, the prospect that the courts will decline to intervene — on some of these issues is even less certain than it is for Guarantee Clause and impeachment cases.

In recent decades, the two leading cases on foreign affairs and on war as non-justiciable political questions were (1) a case involving the presidential abrogation of a treaty and (2) a case in which a member of Congress challenged the constitutionality of a use of military force in the absence of a congressional declaration of war.

The Constitution provides for the President to make treaties “by and with the advice and consent of the Senate”, two-thirds of the Senators concurring, but the Constitution says nothing about how a treaty can be brought to an end (or “denounced” in foreign relations jargon). In 1979 President Carter abrogated a US treaty with the Republic of China (Taiwan) in order to open diplomatic relations with the People’s Republic of China. A group of Senators, led by Barry Goldwater, sued on the ground that the Senate had not approved the abrogation of the Taiwan treaty, and hence that the President had acted unconstitutionally. The Supreme Court dismissed the suit, with four Justices — but not five, who would have been needed for a majority — saying that this was a political question involving executive and congressional power over foreign relations, and nonjusticiable by the courts.

#### PQD is firm now — particularly in foreign affairs.

Love ’17 — John; Corporate Associate at Debevoise & Plimpton, J.D. from Columbia University; 2017; “On the Record: Why the Senate Should Have Access to Treaty Negotiating Documents”; *Vanderbilt Law Review*, Volume 113; Accessed Online via University of Michigan Libraries

The political question doctrine is not without its critics. One influential scholar has argued that the purported application of the doctrine is in reality merely an adjudication of the constitutionality of the alleged act. 172 Others have argued that the doctrine, although perhaps viable at one point, has fallen out of favor with the Supreme Court. 173 The Supreme Court itself, affirming its duty "to say what the law is," 174 has repeatedly undertaken to interpret vague constitutional provisions and given them substance. 175 However, these arguments have not gone uncontested, especially with regard to the doctrine's applicability to foreign affairs - an area in which some scholars argue that "the doctrine is thriving and growing." 176 This particular application of the political question doctrine therefore warrants examination insofar as the treaty power touches on foreign affairs.

2. The Political Question Doctrine, Foreign Affairs, and Advice and Consent.

Foreign affairs hold a special place in the canon of political question jurisprudence. With perhaps more consistency than in any other area of the law, the Supreme Court has ruled that issues relating to foreign affairs are political questions falling outside its purview. 177

Like the political question doctrine in general, the doctrine's unique application to foreign affairs finds its roots in Marbury v. Madison. Expounding on which types of cases are unfit for judicial review, Justice Marshall wrote that an executive officer's foreign affairs actions "can never be examinable by the courts." 178 Indeed, some scholars have argued that the notion that courts should avoid passing judgment on the foreign affairs actions of a President precedes the founding of the country itself. 179

### 2NC — I/L — Spillover

#### One case is sufficient---compelling enforcement makes separating the court’s role impossible.

Price ’16 [Zachary; 2016; Associate Professor in the Hastings College of the Law at the University of California, J.D. from Harvard University, A.B. from Stanford University; Notre Dame Law Review, “Law Enforcement as Political Question,” vol. 91]

This Article proposes a framework for nonenforcement’s reviewability— one rooted in considerations of “suitability” for review rather than notions of preclusive executive prerogative. In prior work, I have addressed the scope of executive nonenforcement authority in its own right and directly questioned the origins and validity of a supposed preclusive nonenforcement prerogative.10 Here, I build on this account by exploring reasons why executive enforcement obligations may nonetheless defy complete judicial elaboration. In particular, although courts have often invoked notions of Article II prerogative to justify their passivity with respect to nonenforcement,11 I argue that institutional limitations on courts—limitations with a broader resonance in constitutional and administrative law doctrines—provide a cogent descriptive and normative justification for judicial deference to executive nonenforcement.

The Constitution by its terms obligates the President to “take Care that the Laws be faithfully executed.”12 Yet courts confront very real practical and institutional challenges in ensuring faithful execution of prohibitory statutes by enforcement officials. To begin with, directly compelling an enforcement suit in any particular case would raise acute separation-of-powers concerns, as it would collapse the constitutional separation of judicial and executive power and compromise the court’s neutrality in adjudicating the resulting lawsuit. Beyond this particular formal problem, moreover, insofar as enforcement officials must pick and choose between cases because they cannot do everything, courts will rarely have objective benchmarks for assessing whether enforcement agencies are focusing on the right priorities, or indeed whether they are genuinely doing their best at all. The upshot is that exercise of executive nonenforcement authority, like certain other core executive functions, is effectively a political question, in the peculiar sense of the “political question doctrine”—it is an area where institutional limitations on courts place a gap between what executive officials ideally should do and what courts will require from them. What is more, the twin criteria used to identify political questions more generally, “textual assignment” to a political branch and absence of “judicially manageable standards,”13 provide key guideposts for the limits on judicial power over executive enforcement. Bringing enforcement suits and prosecutions in particular cases is a textually assigned function of the executive branch, while the broader executive task of setting priorities for enforcement frequently presents a judicially unmanageable inquiry.

#### Spills over to lower courts.

Fix & Randazzo ’10 — Michael Fix & Kirk Randazzo; department of Political Science at University of South Carolina. January-April 2010; “Judicial Deference and National Security: Applications of the Political Question and Act of State Doctrines”; *Democracy and Security*; Volume 6, Number 1, Pages 1-16; Accessed Online via University of Michigan Libraries; //CYang

In sum, it is apparent that the political question doctrine remains a viable tool for the lower federal courts to avoid reaching the merits of cases that challenge national security and foreign policy. This continued use reinforces the judicial branch’s deferential nature to the political branches of government. Additionally, in three of the four cases discussed above, the US Supreme Court later denied certiorari. While this does not show explicit support by the Supreme Court for these rulings, it illustrates how vehicles for abolishing the use of the political question doctrine have been available. Therefore, while the Court may have decreased its reliance on this doctrine, it has not attempted to instruct the lower courts to do so; they continue to apply this threshold issue to cases involving questions of national security. As a result, the political question doctrine continues to encourage judicial deference to the executive in national security cases.

## AT: War Powers Good

### ! — War Powers Bad — T/L

#### Executive unilateralism is existential.

Warren & Perry ’21 — Elizabeth Warren is a senator from Massachusetts. William J. Perry served as secretary of Defense under President Bill Clinton. February 1, 2021; "No president should have unilateral power to use nuclear weapons: Sen. Warren and Sec. Perry"; *USA TODAY*; https://www.usatoday.com/story/opinion/2021/01/25/after-trump-end-nuclear-launch-authority-for-presidents-column/4235023001/; //CYang

No, Trump was not the first president to raise these concerns, and he is unlikely to be the last. We must change the underlying policy that gives presidents this godlike power. We must end — for all presidents to come — the policy that gives them sole authority to launch even if we have not been attacked.

This is an existential issue for the United States that deserves the highest attention from the new administration and Congress. Here is what we must do:

First, we must prohibit the “first use” of nuclear weapons — meaning we would declare that we would only use nuclear weapons in response to a nuclear attack. We would all rest easier today if we knew that Trump could only legally order the use of nuclear weapons in retaliation to a confirmed nuclear attack. There would be no chance, say, of him using his last days in office to end his “maximum pressure” campaign against Iran by dropping a few atomic bombs that could kill millions.

President Joe Biden has said that he supports a declaration that the sole purpose of nuclear weapons is to deter their use by others. This is a sensible position, and such a policy could also be designed to prohibit first use, including preemptive nuclear attacks and launches on warning of attack. These scenarios dangerously increase the risk of starting nuclear war by mistake.

Some argue that prohibiting first use would undermine deterrence. Not so. Deterrence rests on our unquestioned ability to retaliate to a nuclear attack. The United States possesses the capability to retaliate even after being hit because of our nuclear-armed submarines hidden under the oceans. Any nuclear strike against the United States would be suicide for the attacker, as a massive U.S. retaliation would surely follow.

In addition to preventing an unhinged president from going nuclear, prohibiting first use would also help us avoid accidentally blundering into nuclear war. Early warning systems are vulnerable to false alarms, and cyberthreats to our nuclear systems are increasing. A quick decision to use nuclear weapons only increases that chance that nukes could be launched in response to a false alarm — essentially starting a nuclear war by mistake. We should do everything in our power to avoid such a nightmare.

#### Independent executive war-making is a long-term threat coming soon — Trump was not an outlier, but a demonstration of the acceleration.

Burns ’20 — Sarah; Associate Professor of Political Science at the Rochester Institute of Technology, a Fellow at the Quincy Institute, a Senior Fellow at the Institute for Humane Studies, and the author of The Politics of War Powers: The Theory and History of Presidential Unilateralism. November 11, 2020; "Presidents Were Never Meant to Have Unilateral War Powers"; Foreign Affairs; https://www.foreignaffairs.com/articles/united-states/2020-11-11/presidents-were-never-meant-have-unilateral-war-powers; //CYang

Trump’s agenda strayed from the norm, but his use of executive power did not. Presidents have dominated U.S. foreign policy decision-making since well before Trump. In fact, structural changes began to warp the separation of powers, allowing presidents tremendous leeway, more than 75 years ago. At first, those changes were difficult to enact: all three branches had to deny Congress the coequal status that the Constitution clearly confers on it. Congress made many efforts to guard the power it enjoyed during the first 150 years of the republic, but the altered relationship eventually became routine. By the twenty-first century, the branches had firmly established a new relationship: executives prosecute wars unilaterally, Congress provides little more than a fig-leaf of authorization (if any at all), and the courts rarely interfere. An accountable presidency attuned to the interests of the American people requires a legislature capable of restricting executive independence — and voters who insist on it.

ABANDONING CONSTRAINT

President George Washington never engaged in a military operation without prior congressional approval. In 1793, he proclaimed U.S. neutrality in the French Revolutionary Wars and ran up against principled resistance: James Madison argued that by declaring a state of peace, Washington had encroached on Congress’s power to declare war. The modern reader might wonder how, then, U.S. presidents since Harry Truman have managed to initiate full-scale wars with limited, if any, input from Congress.

The norm did not change right away or all at once. During his own presidency, Madison refrained from preparing for the War of 1812 until Congress had passed a declaration of war. James Polk appealed to Congress for funds and troops in order to prosecute the Mexican-American War. Congress was so powerful in 1898 that it all but forced William McKinley to start the Spanish-American War. Woodrow Wilson and Franklin Roosevelt each tried to get the United States into World War I and World War II respectively, but in both cases, Congress refused. It reconsidered its position only in response to the shocks of the sinking of the Lusitania and the attack on Pearl Harbor.

The attack on Pearl Harbor was, in fact, the catalyst not only for pulling the United States into World War II but also for fundamentally altering the separation of powers. Some members of Congress, especially in the Senate, had viewed the United States as a continental fortress, untouchable by the fighting in Europe or in the Pacific. Pearl Harbor shattered this worldview by proving that a resourceful enemy could harm the United States. Congress declared war and provided FDR with all of the appropriations he desired, giving the following instructions: “the President is hereby authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial Government of Japan, and to bring the conflict to a successful termination, all of the resources of the country are hereby pledged by the Congress of the United States.”

Although the declaration appears to confer a great deal of power on the president, it also implies significant constraint. Only Congress could authorize the president to start a war, only Congress could permit the president to spill blood and use treasure, and Congress defined the enemy — “the Imperial Government of Japan,” as opposed to the Japanese nation or any particular people. The president then used this declaration and those that followed against other World War II enemies to assert broad powers in carrying out the war. Members of Congress tried to avoid questioning the president’s decisions, and the public largely supported them, showing unity even in the darkest days of the war.

Such unity was normal in an existential crisis such as World War II, and the constitutional structure could accommodate this consolidation of immense power in the hands of the president. But once the Allies declared victory, first in Europe and later in the Pacific, Congress should have reasserted its coequal status and reclaimed its powers. Such had been the course after every prior conflict — so much so, in fact, that at the end of World War I, the Senate refused to pass Wilson’s League of Nations treaty, citing the concern that Congress, and not an international body, should retain exclusive control over when and where the United States went to war.

After World War II, however, those concerns apparently evaporated or were superseded. The Senate quickly and easily passed the UN and the NATO treaties — both of which gave other countries the ability to force the United States into conflict. Amid the wreckage of the war, from which the United States had emerged a superpower, members of the Senate did not see or did not care to acknowledge how much control they were ceding to international institutions, as they worried more perhaps about stopping another great-power war than about protecting their constitutional authority.

The provisions of those treaties were quickly put to the test: in 1950, the UN Security Council issued resolutions calling for member states to defend South Korea against North Korean aggression. Truman, unlike his predecessors, found himself in a position to make the decision without asking permission from Congress. With a large standing army at his disposal and the Soviet enemy at his back, Truman felt compelled to act, and he acted impulsively.

The Korean War demonstrates how important congressional checks on presidential action can be. Had Truman needed to appeal to Congress, he would have had to prove the legitimacy of the operation to the American people, and Congress could have used oversight to ensure accountability throughout the operation. Furthermore, Americans could hold members of Congress accountable when the war took a bad turn (as most wars do). But Truman acted on his own, leaving Congress with limited ability to constrain him. For if Congress does not assert control at the beginning of a war, it can use its powers only to draw down troops in dire circumstances. After all, once the military is in the field, members of Congress look unpatriotic if they fail to provide fighting men and women with the equipment they need to succeed.

Such was the case in Vietnam. Congress never declared war there — if it had, it might then have exercised some oversight over the conflict. But in 1964, President Lyndon Johnson pressed Congress to pass the Gulf of Tonkin Resolution, which authorized what he fancifully promised would be a limited engagement. With that legislation, Congress now found itself allowing the undeclared war in Vietnam to escalate at the president’s discretion rather than holding the executive accountable. After nearly a decade of fighting, the deaths of tens of thousands of soldiers, and no victory in sight, Congress attempted to reassert itself in 1973, passing the War Powers Resolution (WPR) over President Richard Nixon’s veto.

On its face, the WPR appeared to require the president to consult the legislature before and throughout foreign conflicts. But what looked like a reassertion of the separation of powers instead came to function as a form of permission. The WPR clearly stipulated that in the absence of an attack against the United States, a president could not commit American troops without first securing a declaration of war or a statutory authorization from Congress. The WPR went on, however, to say that the president might initiate operations unilaterally so long as he concluded them within 60 days and drew down troops within another 30 days. Presidents have used this language to justify small-scale operations ever since, including some that have grown larger and costlier than advertised, such as those in Kosovo and Libya.

### ! — Biden — Korea

#### Data suggests that Biden will escalate wars with North Korea.

Kivimäki ’20 — Timo; professor of international relations at the University of Bath, United Kingdom; August 20, 2020; “Would Biden’s Moral Interventionism Be Good for Peace in Korea?”; *National Interest*; <https://nationalinterest.org/blog/korea-watch/would-biden%E2%80%99s-moral-interventionism-be-good-peace-korea-167368>; //CYang

Here’s what some of the data suggest

Presidents of the United States are not the sole authors of the American foreign policy. Once in power, they tend to change foreign policies less drastically than their presidential campaigns would suggest. Joe Biden, if elected, would be more moralistic, more interventionist, and his North Korea policies would be less interested in merely “getting along” with Kim Jong-un. Yet the transition from Trump to Biden, if it happens, may not change everything.

Biden’s approach to North Korea as President can be predicted based on his vice-presidential record. He has been a strong supporter of President Barack Obama’s normative approach to foreign policies: atrocity crimes of terrorists and dictators need to be resisted even if it is not in the direct self-interest of the United States. Consequently, the Obama-Biden foreign policy brought America to war against terrorists and dictators in Yemen in December 2009, in Libya in March 2011 and August 2016, in Mali in January 2013, and in Syria and Iraq in August 2014. Furthermore, campaigns against terrorists in Afghanistan, Somalia, and Pakistan were intensified during the Obama-Biden administration and a proxy war was launched against Syria’s dictator even before the campaign against the country’s terrorists. Reviewing the statistics from the Uppsala Conflict Data Program’s Georeferenced Event Database, one can see that the number of fatalities in U.S. wars increased from the last year of President George W. Bush’s administration to the last year of the Obama-Biden administration by 496%, as illustrated in the graph below. Despite the humanitarian aims, more civilians died in countries where the United States participated in war.

While Trump has not, despite his several promises and declarations, brought American troops home from moralistic wars, he has de-intensified them. The number of fatalities in American conflicts has declined from 2016 to 2019 by 44%, as illustrated in the graph below. Only in Afghanistan have fatalities continued to increase dramatically. Yet even there, after the U.S.-Taliban Peace Agreement of February 29, 2020, the number of U.S. fatalities has decreased.

In North Korea, Trump has not managed to bring Kim Jong-un to justice or destroy his nuclear weapons capacity. Instead, Trump has focused on getting along with Kim Jong-un. While this seems insufficient, only by improving the relationship can the United States reduce Pyongyang’s fears that, according to South Korea’s presidential advisor Moon Chung-in, partly motivates the North Korean build-up of nuclear weapons.

While it would be easy to sympathize with Biden’s moral aims to change North Korea and the rest of the world, the fact is that the United States is not in a legitimate position to change other countries. Trying to do so tends to escalate rather than de-escalate violence in the world as the record of the Obama-Biden administration shows. Furthermore, illegitimate moralistic efforts at regime change may indeed support Kim Jong-un’s dictatorship. When North Korea is threatened by foreign powers, its dictatorial efforts to tamp down dissidence are easier to justify. Thus, a Biden presidency would be bad for peace in Korea.

#### Escalates to nuclear use.

Blanchette & Rimland ’17 — Nicholas Blanchette is a researcher in the Defense Strategies and Assessments Program at the Center for a New American Security. Benjamin Rimland is a researcher on Asia security issues currently based at the Inter-University Center for Japanese Language Studies in Yokohama. November 15, 2017; “All the Bombs in the World Won't Solve the North Korea Crisis (It Will Only Make It Worse); *National Interest*; https://nationalinterest.org/feature/nicholas-blanchette-benjamin-rimland-23214

Beyond the significant technical hurdles, an attempted preventive strike against North Korea may incite the escalation dynamics it intends to prevent. To function effectively, such a strike must be conducted with the utmost secrecy, so as to catch North Korea unawares. While North Korea may be able to glean information of a possible U.S. military buildup from public sources, the primitive nature of its reconnaissance system serves only to heighten North Korean anxiety of an impending attack. For the North Korean leadership, U.S. public statements intimating a policy of regime change or planned military exercises on the Korean peninsula may well fuel fears of an imminent attack and strengthen further the hair-trigger posture of the North Korean military.

Indeed, North Korea may seek to preempt an attack or otherwise retaliate. This spiral from a sharp, limited strike to all-out war is easy to envision. North Korean doctrine is thought to call for “automatic, reciprocal violence” in an attempt to maintain escalation dominance. North Korea could exercise its long-held conventional deterrent against Seoul through a devastating artillery bombardment of the city. To counteract this threat, the United States would need to balance the need to find and eliminate the North Korean leadership or missile systems with the demanding task of eliminating North Korean artillery pieces along the mountainous DMZ. This would place intense requirements upon U.S. intelligence and strike assets, as well as an already limited munitions supply. In addition to exercising its conventional escalatory capabilities, the need to preempt an American preventive strike generates significant pressures upon North Korea’s nuclear doctrine. As North Korean has not yet perfected a survivable nuclear capability, some analysis argues that its nuclear doctrine calls for a “demonstration” strike against an American military base in the region, followed by an explicit threat to target the continental United States. Worse still, North Korea, seeing little to lose, may attempt to preemptively strike an allied or American city with a nuclear ballistic missile. Though some, including President Trump, hold high confidence in U.S. ballistic missile defense capabilities to sufficiently offset North Korea’s nuclear threat, this conviction nonetheless rests upon a relatively unproven technology that offers odds “as good as a coin toss.”

### ! — War Powers Bad — Unsustainable

#### Unilateral executive flexibility is unsustainable.

Thorpe ’18 — Rebecca; Associate Professor of Political Science at the University of Washington. Her work has received national recognition, including the American Political Science Association's Richard Neustadt Award for best book on executive politics in 2015, the D. B. Hardeman Award presented by the Lyndon B. Johnson Foundation for the best book on the US Congress in 2016, and APSA’s Heinz Eulau Award for the best article in Perspectives on Politics in 2016. Thorpe received her Ph.D. in Political Science from the University of Maryland in 2010. She was a Research Fellow at The Brookings Institution from 2008-2009. During the 2009-2010 academic year she worked on Capitol Hill as an American Political Science Association Congressional Fellow. 2018; “US Empire in the Age of Trump”; *Class, Race and Corporate Power*, Volume 6, Issue 1; Accessed Online via University of Michigan Libraries; //CYang

The trends provoke fears that the waning US hegemon is destroying the international system that has kept the world more stable since 1945, while catapulting the plight of racial, ethnic and religious minorities into particularly sharp focus. Yet, while the US has withdrawn from multilateral institutions and endorsed isolationist (“America first”) rhetoric, the Pentagon’s military footprint remains outstretched in every corner of the globe. The US is still engaged in decades-long wars in Iraq and Afghanistan. Meanwhile, in 2016, the president ordered a cruise missile attack on Syrian government forces without congressional approval or legal justification; continued support for the Saudi-led coalition’s war in Yemen that has fueled one of the world’s worst humanitarian crises; and issued threats of “fire and fury” against North Korea raising the alarming prospect of nuclear war. Cold War-era arrangements empowering presidents to identify and eliminate threats by deploying the nation’s vast military arsenals, its invasive intelligence apparatus and even its nuclear stockpiles have faced little meaningful or sustained challenge from either political party.2

While the 2016 election has hastened and highlighted the erosion of liberal democratic norms, this slippage is not simply the result of a particular election, administration, policy or program. Rather, US presidents since World War II have promoted democracy, open markets and free trade by wielding gargantuan military arsenals and undertaking widespread surveillance of ordinary citizens. Many historians and legal scholars argue that the Cold War era gave rise to a permanent “state of executive exception” to the normal constitutional order — thus signifying the nation’s sustained deviation from the rule of law, civil liberties and human rights in national security realms.3 What is unprecedented today, then, is not so much the betrayal of liberal norms, but rather the degree to which liberal discourse has yielded to tacit and explicit support for authoritarian tactics and the extent to which liberal democratic principles, institutions and values are simultaneously being abandoned by large parts of the American population.4

To reflect on the decline of American influence in the geopolitical sphere, its internal fracturing and polarization, atrophying commitment to liberal democratic values and persistent tendency to confront global conflicts with military solutions raises crucial questions about whether American empire is sustainable, and whether it is in fact worth sustaining.5 First, how is it that a nation founded on liberal principles such as checks and balances, limited powers and individual rights has come to embrace its opposite — that is, virtually unbounded executive authority to stamp out security threats without regard for legal and ethical limitations? Second, what does an executive monopoly on a militarized national security state portend for liberal democratic institutions in an increasingly polarized, fragmented and unstable political climate?

In *The American Warfare State*, I argue that the nation’s unprecedented military mobilization during World War II created new political and economic interests in military spending and war that constitutional framers did not anticipate.6 I found that, in subsequent decades, large defense budgets were not only a response to heightened national security concerns, but also an integral component of many local and regional economies — particularly in geographically remote areas that lack diverse economies. Meanwhile, the public burdens historically associated with large military establishments and warfare shifted onto a small minority of military volunteers, future generations of taxpayers who will inherit the nation’s war debts and foreign populations where US wars take place. These new arrangements encourage legislators to support large defense budgets, while freeing presidents to launch military actions without congressional authorization or democratic deliberation — an outcome that the constitutional framers feared and tried to prevent.

In this essay I build on the argument advanced in The American Warfare State: I suggest that a constitutional framework built on liberal principles like separation of powers and democratic accountability has failed to reliably limit power or uphold the rule of law — and that evidence of the tilt toward a more authoritarian alternative has been apparent for many decades. Although previous administrations upheld verbal affirmations of liberal democratic norms, neither discourse nor institutional procedures alone guarantee fidelity to human rights and legal imperatives — at least not without a more robust commitment to these ideals and a political environment where “law is valued as principle rather than tactic.”7

To make this case, I document patterns of executive lawlessness in the conduct of national security policy, with a particular emphasis on military interrogations and targeted killings in the George W. Bush and Barack Obama administrations. Though I emphasize twenty-first century practices, these precedents are not new. Rather, since Congress authorized a national security apparatus in 1947 and provided new financial incentives to maintain a permanent military-industrial base, both real and perceived security threats have rationalized the use of force and relaxed moral and legal standards that may otherwise constrain executive conduct. Moreover, the rise of a national security state equipped to kill suspects anywhere in the world and cipher intelligence through extra-legal channels developed democratically and with little coherent resistance. Far from “ambition... counteracting ambition,” the different branches and levels of government have come to perceive mutually overlapping interests in expanding the national security state, swelling executive prerogative, and pursuing foreign policy through martial means.8

As a result, an executive monopoly over a heavily militarized, clandestine national security establishment is routinely deployed without regard for human rights, civil liberties or nation-state sovereignty. The consequences today, in an especially fraught and fragile political climate, are two-fold: First, this arrangement allows presidents — however volatile, intemperate, or characteristically unfit — to pursue their military and intelligence policies as they please, while the most violent and degrading consequences are borne by ethnic or religious minorities and foreign populations in countries where US security operations take place. Second, these practices also systematically weaken America’s democratic institutions, norms and values, rendering the regime more vulnerable to authoritarian challenges.

### ! — War Powers Bad — Groupthink

#### Executive unilateralism causes groupthink.

Streichler ’08 — Stuart; B.S. Mathematics, Bowling Green State University. J.D. University of Michigan Law School. Ph.D. Political Science, Johns Hopkins University. 2008; “Mad about Yoo, or Why Worry about the Next Unconstitutional War”; Journal of Law and Politics, Volume 24, Issue 93; Accessed Online via University of Michigan Libraries; //CYang

While every president consults with advisers, small group dynamics add another layer of difficulties in the executive decision-making process. Even talented White House staffers and independent-minded cabinet secretaries succumb to groupthink, as it has been called — the overt and subtle pressures driving group cohesiveness that can distort the decisionmaking process. This effect can be pronounced in foreign policy, with stressful crises that often involve morally difficult choices. Members of the president's team, not fully aware they are doing so, may overrate their own power or moral position, cut off the flow of information, downplay contrary views of outside experts, limit consideration of long-term consequences, underestimate the risks of a particular policy, or fail to develop contingency plans.''" Once the group coalesces around a particular view, it becomes increasingly difficult for individual members to press the group to reassess rejected alternatives. The unique circumstances of working for the president can make matters worse. Members of the administration generally share the president's outlook, ideology, and policy preferences. Internal decision-making may get skewed because executive officials give advice based on what they think the president wants to hear. Even if the president's subordinates differ with the chief executive on particular questions, they can only go so far to challenge the president.

### AT: Flex/Speed

#### Flexibility and speed warrants are wrong.

last paragraph directly indicts Yoo’s examples

Streichler ’08 — Stuart; B.S. Mathematics, Bowling Green State University. J.D. University of Michigan Law School. Ph.D. Political Science, Johns Hopkins University. 2008; “Mad about Yoo, or Why Worry about the Next Unconstitutional War”; Journal of Law and Politics, Volume 24, Issue 93; Accessed Online via University of Michigan Libraries; //CYang

When Yoo discusses the need for flexibility in the process for warmaking, he creates a false dilemma. He suggests that the president has discretionary power to start wars or that the president must secure prior authorization from Congress through a "fixed, legalistic process." For Yoo, the latter would inevitably hamper the government's ability to respond to terrorist threats. Yet even if Congress has the power to decide whether to go to war, the president retains substantial powers to respond quickly to defend the country. No lawmaker would insist on Congress deliberating while terrorists set off weapons of mass destruction in the United States. Americans who lived with the risk of nuclear attack during the Cold War accepted the president's authority to respond to the Soviet Union without waiting for the results of legislative debate. Additionally, Congress has demonstrated that it can move quickly to authorize the use of military force. Three days after September 11, the Senate voted 98-0 to authorize the president to use force in response to the attacks, and the House approved the measure a few hours later (420- 1). Another four days passed before the president signed it. The last time Congress declared war in response to an attack on the United States, it did not take lawmakers long to do so. The Senate (82-0) and the House (388-1) issued a declaration of war thirty-three minutes after President Franklin D. Roosevelt's "Day of Infamy" speech. Furthermore, whatever their capacity for dynamic response, presidents do not always react to security threats with speed and energy. While Yoo cleverly aligns his position with flexibility, there is more to constructing an adaptive foreign policy than letting the president initiate military hostilities. Executive decisions on war that appear, in the short term, to reflect a flexible approach may limit policy options over the long run, constraining foreign policymakers and military planners.

Yoo expresses no doubt that the president's capacity to make decisions in foreign affairs and defense — to "consider policy choices" and to "evaluate threats" — is "far superior" to Congress's. That overstates the case. Despite the imperfections of the legislative process, it is hard to reach such an unqualified conclusion. Seemingly for every example where executive decision-making works well, another can be cited exposing its deficiencies. President John F. Kennedy's management of the Cuban missile crisis, though not without its critics, is often cited as a classic model of decision-making in crisis. The same president's handling of the Bay of Pigs invasion has been roundly criticized.

#### It relies on a conflation of response and preventative self-defense.

Genovese & Adler ’18 — Michael Genovese received a Ph.D. from the University of Southern California in 1979. He currently holds the Loyola Chair of Leadership Studies, is Professor of Political Science, and Director of the Institute for Leadership Studies at Loyola Marymount University. David Gray Adler, President of the Alturas Institute. He was previously the Cecil D. Andrus Professor of Public Policy and director of the Andrus Center for Public Policy at Boise State University. Updated December 11, 2018; “The War Power in an Age of Terrorism”; Palgrave Macmillan; Accessed Online via University of Michigan Libraries; //CYang

The assertion of the need for speed and dispatch in the use of military force, at any juncture in American history, including the age of terror, is misguided, dangerous and overrated. Objections abound. The premise — that presidents need to act quickly to confront emergencies generated by terrorists, is simplistic. The president, as we have seen, possesses the authority as commander in chief to repel invasions of the United States. Everyone agrees with the Framers of the Constitution that if America is attacked, there is the greatest need to defend the nation. But there is a world of difference between repelling an invasion of the nation and initiating military hostilities abroad on the argument that America’s national security has been threatened. Maybe, but maybe not. There are grave risks associated with presidential determinations of the need to deploy troops and use force abroad.

### AT: Streichler Old

#### Date of writing is irrelevant — these are structural claims.

Streichler ’08 — Stuart; B.S. Mathematics, Bowling Green State University. J.D. University of Michigan Law School. Ph.D. Political Science, Johns Hopkins University. 2008; “Mad about Yoo, or Why Worry about the Next Unconstitutional War”; Journal of Law and Politics, Volume 24, Issue 93; Accessed Online via University of Michigan Libraries; //CYang

As Yoo presents his argument on executive decision-making, it does not matter who occupies the office of the president. In fact, that can make a good deal of difference. With the presidency structured around one individual, the decision-making process is shaped by the chief executive's native abilities, judgment, and experience. A whole range of personal qualities may affect the president's decision on whether to take the nation to war: how the president assesses risk (especially with the uncertain conditions that prevail in foreign affairs); whether he or she engages in wishful thinking; whether he or she is practical, flexible, and openminded.

### AT: John Yoo

#### Yoo is a fucking nutjob.

Hussein ’14 — Murtaza; Journalist and Political Commentator at The Intercept focusing on human rights, foreign policy, and cultural affairs, has covered foreign policy and civil liberties for the New York Times, The Guardian, Al Jazeera, The Globe and Mail, Salon, and Prism Magazine. 2014; “John Yoo’s despicable return: We must stop giving war criminals a platform”; *Salon*; <http://www.salon.com/2014/04/16/john_yoos_despicable_return_we_must_stop_giving_war_criminals_a_platform/>; //CYang

How depraved and incompetent do you have to be before people in America stop asking your opinion about things? Former Bush administration Department of Justice official John Yoo — the man who famously butchered the U.S. Constitution in order to give the CIA the legal authority to conduct medieval torture — this week decided to chime in with his opinion on the Pulitzer Prize being awarded to the publications that reported the Edward Snowden leaks. Unsurprisingly, he was not too thrilled about the decision:

“I’m not surprised the Pulitzer committee gave The Washington Post a prize for pursuing a sensationalist story, even when the story is a disaster for its own country….I don’t think we need automatically read the prize as a vindication for Snowden’s crimes. Awarding a prize to a newspaper that covered a hurricane does not somehow vindicate the hurricane, [and] awarding a Pulitzer for a photo of a murder does not somehow vindicate the crime.”

His statement is problematic for a few reasons. First, Yoo appears to have brought the same deft reasoning powers with which he argued it was legally justifiable to crush a child’s testicles to his very bizarre analysis of this event. The papers were not — as he apparently failed to grasp before commenting — awarded the Pulitzer for their reporting on Snowden’s “crimes” but rather for their reporting on the NSA’s surveillance programs. That was entirely what the award was for, as anyone who bothered looking at the Pulitzer committee statement could plainly see. It’s true that acts are not made justified simply by being reported in the news, but the only party to which that would be applicable in this situation is the NSA — not Snowden. And so, tragically, Yoo’s elaborate analogies about hurricane vindication are slightly undermined by the fact that they happen to make no fucking sense.

But a more important question to ask here is, why are people asking John Yoo’s opinion about things? In what universe does it seem appropriate to seek out a man whose actions resulted in the grievous torture and deaths of innumerable people and ask him to weigh in on the news of the day? John Yoo almost single-handedly shredded the U.S. Constitution — to say nothing of what he helped do to America’s moral standing in the world — and yet major news outlets and even universities continue to regularly seek out his advice as though he isn’t an incompetent reprobate of biblical proportions. Worse than that, he’s the monstrous figure who knowingly enabled the most unconscionable war crimes of the global war on terror. In any ~~sane~~ or just society, Yoo would be rotting in a prison cell instead of wearing tailored suits and sharing his opinions in polite company. But, alas, America as it stands today is somewhat wanting in the departments of both ~~sanity~~ and justice. While powerful ghouls such as Yoo completely escape legal consequences for their actions — no matter how morally despicable and disastrous for the country they were — ordinary Americans somehow continue to regularly land in jail for the slightest transgressions. In fact, Yoo is not only not in jail, he’s still somehow a media figure regularly weighing in on the issues of the day. Legal accountability for his moral failures aside, he hasn’t even really paid a career price for the monumental incompetence he displayed in his work.

To be fair, Yoo isn’t the only one in this situation who is taking advantage of the consequence-free world of the rich and politically connected. His fellow Iraq War criminals Karl Rove, Dick Cheney and Donald Rumsfeld can all still be seen in the news being regularly solicited for their commentary on various matters. They’re the people who helped kill, wound and displace millions of innocent Iraqis, tens of thousands of American servicemen, and whose collective mismanagement helped turned America into a giant smoldering wreckage by the time they exited government — but somehow they are still apparently shameless enough to offer criticisms of other people’s actions.

One can perhaps excuse these people for their lack of self-awareness. After all, they are part of the supremely insular universe of the wealthy and powerful where all criticism from the real world can comfortably be papered over. But why on earth do ostensibly reputable news organizations continue to seek out people like this — individuals who should rightly be awaiting their arraignments at The Hague — for quotations and analysis on current events? Doing so is as inexplicable as asking Ted Kaczynski for his opinion on the 2016 presidential race, or calling up Ratko Mladić to ask what he thinks of the Mets’ chances this year.

But perhaps the best example of America’s ironclad career security for the powerful is former Bush speechwriter David Frum. Never mind that the childishly facile “Axis of Evil” quote that became his trademark helped trigger a proxy war with Iran that destroyed America’s imperial projects in both Iraq and Afghanistan, and never mind his own fantastical delusions that the Iraq War would not only be a glorious triumph but would also end up revealing: “the flow of money from Iraq to … French and German corporations [and] senior political figures.”

His spectacular moral and professional failures have somehow not harmed Frum one bit. Far from jail or even obscurity, he’s still a voice in our national conversation. Indeed, America’s very own Baghdad Bob has remained on the airwaves consistently no matter how malevolent or criminally incompetent he’s been. Just this past month, on the 11th anniversary of the war he helped start, Frum was named the senior editor of the Atlantic magazine. Yet another example of America’s broken meritocracy; career security for no one except war criminals and Wall Street raiders.

It’s time to stop this. The perversity of continuing to refer for “expert” opinion to people who not only have consistent track records of failure but actual blood on their hands cannot continue if America is to have a healthy, ~~sane~~ and productive public discourse. No one should care what John Yoo thinks about the Pulitzer Prize, just like no one would’ve cared what Eichmann thought about the Bay of Pigs invasion or the civil rights movement or “Breakfast at Tiffany’s.” People like Yoo and his coterie of Iraq War perpetrators belong in prison cells, not the pages of major newsmagazines or the lecterns of universities. While we as a society may lack the power to bring these individuals to justice, the least we can do is stop giving their noxious views public airtime.

## 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 proliferation; today, terrorism; tomorrow, hostile regional powers" n26, the twenty-first century reality is that "[t]hreats are also more likely to be intertwined--proliferators use the same networks as narco-traffickers, narco-traffickers support terrorists, and terrorists align themselves with regional powers." n27 (2) "Yet, as worrisome as these immediate concerns may be, the long-term challenges are even harder to deal with, and the stakes are higher. Whereas the main Cold War threat--the Soviet Union--was brittle, most of the potential adversaries and challengers America now faces are resilient." n28 (3) "The most important task for U.S. national security today is simply to retain the strategic advantage. This term, from the world of military doctrine, refers to the overall ability of a nation to control, or at least influence, the course of events." n29 Importantly, "[w]hen you hold [\*887] the strategic advantage, situations unfold in your favor, and each round ends so that you are in an advantageous position for the next. When you do not hold the strategic advantage, they do not." n30 (4) While "keeping the strategic advantage may not have the idealistic ring of making the world safe for democracy and does not sound as decisively macho as maintaining American hegemony," n31 maintaining the American "strategic advantage is critical, because it is essential for just about everything else America hopes to achieve--promoting freedom, protecting the homeland, defending its values, preserving peace, and so on." n32 (5) The United States requires national security "agility." n33 It not only needs "to refocus its resources repeatedly; it needs to do this faster than an adversary can focus its own resources." n34 [\*888] As further serious preparation for engaging in the jurisprudence of American national security presiprudence in hotly contested cases and controversies that may end up on their docket, our Supreme Court Justices should understand that, as Walter Russell Mead pointed out in an important essay a few years ago, n35 the average American can be understood as a Jacksonian pragmatist on national security issues. n36 "Americans are determined to keep the world at a distance, while not isolating ourselves from it completely. If we need to take action abroad, we want to do it on our terms." n37 Thus, recent social science survey data paints "a picture of a country whose practical people take a practical approach to knowledge about national security. Americans do not bother with the details most of the time because, for most Americans, the details do not matter most the time." n38 Indeed, since the American people "do know the outlines of the big picture and what we need to worry about [in national security affairs] so we know when we need to pay greater attention and what is at stake. This is the kind of knowledge suited to a Jacksonian." n39 Turning to how the Supreme Court should view and interpret American presidential measures to oversee national security law and policy, our Justices should consider a number of important points. First, given the robust text, tradition, intellectual history, and evolution of the institution of the POTUS as the American national security sentinel, n40 and the unprecedented dangers to the United States national security after 9/11, n41 national security presiprudence should be accorded wide latitude by the Court in the adjustment (and tradeoffs) of trading liberty and security. n42 Second, Justices should be aware that different presidents [\*889] institute changes in national security presiprudence given their unique perspective and knowledge of threats to the Nation. n43 Third, Justices should be restrained in second-guessing the POTUS **[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

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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 United States 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.