## 1NC

### 1

#### The aff’s invocation of death impacts is necrophilia, a blind obsession with body counts that ends in extinction. Vote neg to reject death impacts—this is a gateway issue—if they win death impacts are good, the rest of the 1NC applies—we won’t cross-apply to prove links

Erich **Fromm 64**, PhD in sociology from Heidelberg in 1922, psychology prof at MSU in the 60’s, “Creators and Destroyers”, The Saturday Review, New York (04. January 1964), pp. 22-25

People are aware of the possibility of nuclear war; they are aware of the destruction such a war could bring with it--and yet they seemingly make no effort to avoid it. Most of us are puzzled by this behavior because we start out from the premise that people love life and fear death. Perhaps we should be less puzzled if we questioned this premise. Maybe there are many people who are indifferent to life and many others who do not love life but who do love death. There is an orientation which we may call love of life (biophilia); it is the normal orientation among healthy persons. But there is also to be found in others a deep attraction to death which, following Unamuno's classic speech made at the University of Salamanca (1938), I call necrophilia. It is the attitude which a Franco general, Millán Astray, expressed in the slogan "Long live death, thus provoking Unamuno’s protest against this "necrophilous and senseless cry." Who is a necrophilous person? He is one who is attracted to and fascinated by all that is not alive, to all that is dead; to corpses, to decay, to feces, to dirt. Necrophiles are those people who love to talk about sickness, burials, death. They come to life precisely when they can talk about death. A clear example of the pure necrophilous type was Hitler. He was fascinated by destruction, and the smell of death was sweet to him. While in the years of success it may have appeared that he wanted only to destroy those whom he considered his enemies, the days of the Götterdämmerung at the end showed that his deepest satisfaction lay in witnessing total and absolute destruction: that of the German people, of those around him, and of himself. The necrophilous dwell in the past, never in the future. Their feelings are essentially sentimental; that is, they nurse the memory of feelings which they had yesterday--or believe that they had. They are cold, distant, devotees of "law and order." Their values are precisely the reverse of the values we connect with normal life; not life, but death excites and satisfies them. If one wants to understand the influence of men like Hitler and Stalin, it lies precisely in their unlimited capacity and willingness to kill. For this they' were loved by the necrophiles. Of the rest, many were afraid of them and so preferred to admire, rather than to be aware of, their fear. Many others did not sense the necrophilous quality of these leaders and saw in them the builders, saviors, good fathers. If the necrophilous leaders had not pretended that they were builders and protectors, the number of people attracted to them would hardly have been sufficient to help them seize power, and the number of those repelled by them would probably soon have led to their downfall. While life is characterized by growth in a structured, functional manner, the necrophilous principle is all that which does not grow, that which is mechanical. The necrophilous person is driven by the desire to transform the organic into the inorganic, to approach life mechanically, as if all living persons were things. All living processes, feelings, and thoughts are transformed into things. Memory, rather than experience--having, rather than being--are what counts. The necrophilous person can relate to an object--a flower or a person--only if he possesses it; hence, a threat to his possession is a threat to himself; if he loses possession he loses contact with the world. That is why we find the paradoxical reaction that he would rather lose life than possession, even though, by losing life, he who possesses has ceased to exist. He loves control, and in the act of controlling he kills life. He is deeply afraid of life, because it is disorderly and uncontrollable by its very nature. The woman who wrongly claims to be the mother of the child in the story of Solomon's judgment is typical of this tendency; she would rather have a properly divided dead child than lose a living one. To the necrophilous person justice means correct division, and they are willing to kill or die for the sake of what they call, justice. "Law and order" for them are idols, and everything that threatens law and order is felt as a satanic attack against their supreme values. The necrophilous person is attracted to darkness and night. In mythology and poetry (as well as in dreams) he is attracted to caves, or to the depth of the ocean, or depicted as being blind. (The trolls in Ibsen's Peer Gynt are a good example.) All that is away from or directed against life attracts him. He wants to return to the darkness {23} of the womb, to the past of inorganic or subhuman existence. He is essentially oriented to the past, not to the future, which he hates and fears. Related to this is his craving for certainty. But life is never certain, never predictable, never controllable; in order to make life controllable, it must be transformed into death; death, indeed, is the only thing about life that is certain to him. The necrophilous person can often be recognized by his looks and his gestures. He is cold, his skin looks dead, and often he has an expression on his face as though he were smelling a bad odor. (This expression could be clearly seen in Hitler's face.) He is orderly and obsessive. This aspect of the necrophilous person has been demonstrated to the world in the figure of Eichmann. Eichmann was fascinated by order and death. His supreme values were obedience and the proper functioning of the organization. He transported Jews as he would have transported coal. That they were human beings was hardly within the field of his vision; hence, even the problem of his having hated or not hated his victims is irrelevant. He was the perfect bureaucrat who had transformed all life into the administration of things. But examples of the necrophilous character are by no means to be found only among the inquisitors, the Hitlers and the Eichmanns. There are any number of individuals who do not have the opportunity and the power to kill, vet whose necrophilia expresses itself in other and (superficially seen) more harmless ways. An example is the mother who will always be interested in her child's sickness, in his failures, in dark prognoses for the future; at the same time she will not be impressed by a favorable change nor respond to her child's joy, nor will she notice anything new that is growing within him. We might find that her dreams deal with sickness, death, corpses, blood. She does not harm the child in any obvious way, yet she may slowly strangle the child's joy of life, his faith--in growth, and eventually infect him with her own necrophilous orientation. My description may have given the impression that all the features mentioned here are necessarily found in the necrophilous person. It is true that such divergent features as the wish to kill, the worship of force, the attraction to death and dirt, sadism, the wish to transform the organic into the inorganic through "order" are all part of the same basic orientation. Yet so far as individuals are concerned, there are considerable differences with respect to the strength of these respective trends. Any one of the features mentioned here may be more pronounced in one person than in another. Furthermore, the degree to which a person is necrophilous in comparison with his biophilous aspects and the degree to which a person is aware of necrophilous tendencies and rationalizes them vary considerably from person to person. Yet the concept of the necrophilous type is by no means an abstraction or summary of various disparate behavior trends. Necrophilia constitutes a fundamental orientation; it is the one answer to life that is in complete opposition to life; it is the most morbid and the most dangerous among the orientations to life of which man is capable. It is true perversion; while living, not life but death is loved--not growth, but destruction. The necrophilous person, if he dares to be aware of what he feels, expresses the motto of his life when he says: "Long live death!" The opposite of the necrophilous orientation is the biophilous one; its essence is love of life in contrast to love of death. Like necrophilia, biophilia is not constituted by a single trait but represents a total orientation, an entire way of being. It is manifested in a person's bodily processes, in his emotions, in his thoughts, in his gestures; the biophilous orientation expresses itself in the whole man. The person who fully loves life is attracted by the process of life in all spheres. He prefers to construct, rather than to retain. He is capable of wondering, and he prefers to see something new to the security of finding the old confirmed. He loves the adventure of living more than he does certainty. His approach to life is functional rather than mechanical. He sees the whole rather than only the parts, structures rather than summations. He wants to mold and to influence by love, by reason, by his example--not by force, by cutting things apart, by the bureaucratic manner of administering people as if they were things. He enjoys life and all its manifestations, rather than mere excitement. Biophilic ethics has its own principle of good and evil. Good is all that serves life; evil is all that serves death. Good is reverence for life (this is the main thesis of Albert Schweitzer, one of the great representatives of the love of life--both in his writings and in his person), and all that enhances life. Evil is all that stifles life, narrows it down, {24} cuts it into pieces. Thus it is from the standpoint of life-ethics that the Bible mentions as the central sin of the Hebrews: "Because thou didst not serve thy Lord with joy and gladness of heart in the abundance of all things." The conscience of the biophilous person is not one of forcing oneself to refrain from evil and to do good. It is not the superego described by .Freud, a strict taskmaster employing sadism against oneself for the sake of virtue. The biophilous conscience is motivated by its attraction to life and joy; the moral effort consists in strengthening the life loving side in oneself. For this reasons the biophile does not dwell in remorse and guilt, which are, after all, only aspects of self-loathing and sadness. He turns quickly to life and attempts to do good. Spinoza's Ethics is a striking example of biophilic morality. "Pleasure," he says, "in itself is not bad but good; contrariwise, pain in itself is bad." And in the same spirit: "A free man thinks of death least of all things; and his wisdom is a meditation not of death but of life." Love of life underlies the various versions of humanistic philosophy. In various conceptual forms these philosophies are in the same vein as Spinoza's; they express the principle that the same man loves life; that man's aim in life is to be attracted by all that is alive and to separate himself from all that is dead and mechanical. The dichotomy of biophilia-necrophilia is the same as Freud's life-and-death instinct. I believe, as Freud did, that this is the most fundamental polarity that exists. However, there is one important difference. Freud assumes that the striving toward death and toward life are two biologically given tendencies inherent in all living substance that their respective strengths are relatively constant, and that there is only one alternative within the operation of the death instinct--namely, that it can be directed against the outside world or against oneself. In contrast to these assumptions I believe that necrophilia is not a normal biological tendency, but a pathological phenomenon--in fact, the most malignant pathology that exists in mail. What are we, the people of the United States today, with respect to necrophilia and biophilia? Undoubtedly our spiritual tradition is one of love of life. And not only this. Was there ever a culture with more love of "fun" and excitement, or with greater opportunities for the majority to enjoy fun and excitement? But even if this is so, fun and excitement is not the same as joy and love of life; perhaps underneath there is indifference to life, or attraction to death? To answer this question we must consider the nature of our bureaucratized, industrial, mass civilization. Our approach to life becomes increasingly mechanical. The aim of social efforts is to produce things, and. in the process of idolatry of things we transform ourselves into commodities. The question here is not whether they are treated nicely and are well fed (things, too, can be treated nicely); the question is whether people are things or living beings. People love mechanical gadgets more than living beings. The approach to man is intellectualabstract. One is interested in people as objects, in their common properties, in the statistical rules of mass behavior, not in living individuals. All this goes together with the increasing role of bureaucratic methods. In giant centers of production, giant cities, giant countries, men are administered as if they were things; men and their administrators are transformed into things, and they obey the law of things. In a bureaucratically organized and centralized industrialism, men's tastes are manipulated so that they consume maximally and in predictable and profitable directions. Their intelligence and character become standardized by the ever-increasing use of tests, which select the mediocre and unadventurous over the original and daring. Indeed, the bureaucratic-industrial civilization that has been victorious in Europe and North America has created a new type of man. He has been described as the "organization man" and as homo consumens. He is in addition the homo mechanicus. By this I mean a "gadget man," deeply attracted to all that is mechanical and inclined against all that is alive. It is, of course, true that man's biological and physiological equipment provides him with such strong sexual impulses that even the homo mechanicus still has sexual desires and looks for women. But there is no doubt that the gadget man's interest in women is diminishing. A New Yorker cartoon pointed to this very amusingly: a sales girl trying to sell a certain brand of perfume to a young female customer recommends it by remarking, "It smells like a new sports car." Indeed, any observer of men's behavior today will confirm that this cartoon is more than a clever joke. There are apparently a great number of men who are more interested in sports-cars, television and radio sets, space travel, and any number of gadgets than they are in women, love, nature, food; who are more stimulated by the manipulation of non-organic, mechanical things than by life. Their attitude toward a woman is like that toward a car: you push the button and watch it race. It is not even too farfetched to assume that homo mechanicus has more pride in and is more fascinated by, devices that can kill millions of people across a distance of several thousands of miles within minutes than he is frightened and depressed by the possibility of such mass destruction. Homo mechanicus still likes sex {25} and drink. But all these pleasures are sought for in the frame of reference of the mechanical and the unalive. He expects that there must be a button which, if pushed, brings happiness, love, pleasure. (Many go to a psychoanalyst under the illusion that he can teach them to find the button.) The homo mechanicus becomes more and more interested in the manipulation of machines, rather than in the participation in and response to life. Hence he becomes indifferent to life, fascinated by the mechanical, and eventually attracted by death and total destruction. This affinity between the love of destruction and the love of the mechanical may well have been expressed for the first time in Marinetti's Futurist Manifesto (1909). "A roaring motor-car, which looks as though running on a shrapnel is more beautiful than the Victory of Samothrace. … We wish to glorify war--the only health-giver of the world-militarism, patriotism, the destructive arm of the Anarchist, the beautiful Ideas that kill the contempt for woman." Briefly then, intellectualization, quantification, abstractification, bureaucratization, and reification--the very characteristics of modern industrial society--when applied to people rather than to things are not the principles of life but those of mechanics. People living in such a system must necessarily become indifferent to life, even attracted to death. They are not aware of this. They take the thrills of excitement for the joys of life and live under the illusion that they are very much alive when they only have many things to own and to use. The lack of protest against nuclear war and the discussion of our "atomologists" of the balance sheet of total or half-total destruction show how far we have already gone into the "valley of the shadow of death."1 To speak of the necrophilous quality of our industrial civilization does not imply that industrial production as such is necessarily contrary to the principles of life. The question is whether the principles of social organization and of life are subordinated to those of mechanization, or whether the principles of life are the dominant ones. Obviously, the industrialized world has not found thus far an answer, to the question posed here: How is it possible to create a humanist industrialism as against the bureaucratic mass industrialism that rules our lives today? The danger of nuclear war is so grave that man may arrive at a new barbarism before he has even a chance to find the road to a humanist industrialism. Yet not all hope is lost; hence we might ask ourselves whether the hypothesis developed here could in any way contribute to finding peaceful solutions. I believe it might be useful in several ways. First of all, an awareness of our pathological situation, while not yet a cure, is nevertheless a first step. If more people became aware of the difference between love of life and love of death, if they became aware that they themselves are already far gone in the direction of indifference or of necrophilia, this shock alone could produce new and healthy reactions. Furthermore, the sensitivity toward those who recommend death might be increased. Many might see through the pious rationalizations of the death lovers and change their admiration for them to disgust. Beyond this, our hypothesis would suggest one thing to those concerned with peace and survival: that every effort must be made to weaken the attraction of death and to strengthen the attraction of life. Why not declare that there is only one truly dangerous subversion, the subversion of life? Why do not those who represent the traditions of religion and humanism speak up and say that there is no deadlier sin than love for death and contempt for life? Why not encourage our best brains--scientists, artists, educators--to make suggestions on how to arouse and stimulate love for life as opposed to love for gadgets? I know love for gadgets brings profits to the corporations, while love for life requires fewer things and hence is less profitable. Maybe it is too late. Maybe the neutron bomb, which leaves entire cities intact, but without life, is to be the symbol of our civilization. But again, those of us who love life will not cease the struggle against necrophilia.

### 2

The affirmative re-inscribes the primacy of liberal legalism as a method of restraint—that paradoxically collapses resistance to Executive excesses.

**Margulies ‘11**

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In an observation more often repeated than defended, we are told that the attacks of September 11 “changed everything.” Whatever merit there is in this notion, it is certainly true that 9/11—and in particular the legal response set in motion by the administration of President George W. Bush—left its mark on the academy. Nine years after 9/11, it is time to step back and assess these developments and to offer thoughts on their meaning. In Part II of this essay, we analyze the post-9/11 scholarship produced by this “emergency” framing. We argue that legal scholars writing in the aftermath of 9/11 generally fell into one of three groups: unilateralists, interventionists, and proceduralists. Unilateralists argued in favor of tilting the allocation of government power toward the executive because the state’s interest in survival is superior to any individual liberty interest, and because the executive is best able to understand and address threats to the state. Interventionists, by contrast, argued in favor of restraining the executive (principally through the judiciary) precisely to prevent the erosion of civil liberties. Proceduralists took a middle road, informed by what they perceived as a central lesson of American history.1 Because at least some overreaction by the state is an inevitable feature of a national crisis, the most one can reasonably hope for is to build in structural and procedural protections to preserve the essential U.S. constitutional framework, and, perhaps, to minimize the damage done to American legal and moral traditions. Despite profound differences between and within these groups, legal scholars in all three camps (as well as litigants and clinicians, including the authors) shared a common perspective—viz., that repressive legal policies adopted by wartime governments are temporary departures from hypothesized peacetime norms. In this narrative, metaphors of bewilderment, wandering, and confusion predominate. The country “loses its bearings” and “goes astray.” Bad things happen until at last the nation “finds itself” or “comes to its senses,” recovers its “values,” and fixes the problem. Internment ends, habeas is restored, prisoners are pardoned, repression passes. In a show of regret, we change direction, “get back on course,” and vow it will never happen again. Until the next time, when it does. This view, popularized in treatments like All the Laws but One, by the late Chief Justice Rehnquist,2 or the more thoughtful and thorough discussion in Perilous Times by Chicago’s Geoffrey Stone,3 quickly became the dominant narrative in American society and the legal academy. **This narrative also figured heavily in the many challenges to Bush-era policies,** including by the authors. The narrative permitted litigators and legal scholars to draw upon what elsewhere has been referred to as America’s “civic religion”4 and to cast the courts in the role of hero-judges5 **whom we hoped would restore legal order.**6 But by framing the Bush Administration’s response as the latest in a series of regrettable but temporary deviations from a hypothesized liberal norm, the legal academy ignored the more persistent, and decidedly illiberal, authoritarian tendency in American thought to demonize communal “others” during moments of perceived threat. Viewed in this light, what the dominant narrative identified as a brief departure caused by a military crisis is more accurately seen as part of a recurring process of intense stigmatization tied to periods of social upheaval, of which war and its accompanying repressions are simply representative (and particularly acute) illustrations. It is worth recalling, for instance, that the heyday of the Ku Klux Klan in this country, when the organization could claim upwards of 3 million members, was the early-1920s, and that the period of greatest Klan expansion began in the summer of 1920, almost immediately after the nation had “recovered” from the Red Scare of 1919–20.7 Klan activity during this period, unlike its earlier and later iterations, focused mainly on the scourge of the immigrant Jew and Catholic, and flowed effortlessly from the anti-alien, anti-radical hysteria of the Red Scare. Yet this period is almost entirely unaccounted for in the dominant post-9/11 narrative of deviation and redemption, which in most versions glides seamlessly from the madness of the Red Scare to the internment of the Japanese during World War II.8 And because we were studying the elephant with the wrong end of the telescope, we came to a flawed understanding of the beast. In Part IV, we argue that the interventionists and unilateralists came to an incomplete understanding by focusing almost exclusively on what Stuart Scheingold called “the myth of rights”—the belief that if we can identify, elaborate, and secure judicial recognition of the legal “right,” **political structures and policies will adapt their behavior to the requirements of the law** and change will follow more or less automatically.9 Scholars struggled to define the relationship between law and security primarily through exploration of structural10 and procedural questions, and, to a lesser extent, to substantive rights. And they examined the almost limitless number of subsidiary questions clustered within these issues. Questions about the right to habeas review, for instance, generated a great deal of scholarship about the handful of World War II-era cases that the Bush Administration relied upon, including most prominently Johnson v. Eisentrager and Ex Parte Quirin. 11 Regardless of political viewpoint, a common notion among most unilateralist and interventionist scholars was that when law legitimized or delegitimized a particular policy, **this would have a direct and observable effect on actual behavior**. The premise of this scholarship, in other words, was that policies “struck down” by the courts, or credibly condemned as lawless by the academy, would inevitably be changed—and that this should be the focus of reform efforts. Even when disagreement existed about the substance of rights or even which branch should decide their parameters, it reflected shared acceptance of the primacy of law, often to the exclusion of underlying social or political dynamics. Eric Posner and Adrian Vermeule, for instance, may have thought, unlike the great majority of their colleagues, that the torture memo was “standard fare.”12 But their position nonetheless accepted the notion that if the prisoners had a legal right to be treated otherwise, then the torture memo authorized illegal behavior and must be given no effect.13 Recent developments, however, cast doubt on two grounding ideas of interventionist and unilateralist scholarship—viz., that post-9/11 policies were best explained as responses to a national crisis (and therefore limited in time and scope), and that the problem was essentially legal (and therefore responsive to condemnation by the judiciary and legal academy). One might have reasonably predicted that in the wake of a string of Supreme Court decisions limiting executive power, apparently widespread and bipartisan support for the closure of Guantánamo during the 2008 presidential campaign, and the election of President Barack Obama, which itself heralded a series of executive orders that attempted to dismantle many Bush-era policies, the nation would be “returning” to a period of respect for individual rights and the rule of law. Yet the period following Obama’s election has been marked by an increasingly retributive and venomous narrative surrounding Islam and national security. **Precisely when the dominant narrative would have predicted change** and redemption, we have seen retreat and retrenchment. This conundrum is not adequately addressed by dominant strands of post-9/11 legal scholarship. In retrospect, it is surprising that much post-9/11 scholarship appears to have set aside critical lessons from previous decades as to the relationship among law, society and politics.14 Many scholars have long argued in other contexts that rights—or at least the experience of rights—are subject to political and social constraints, particularly for groups subject to historic marginalization. Rather than self-executing, rights are better viewed as contingent political resources, capable of mobilizing public sentiment and generating social expectations.15 From that view, a victory in Rasul or Boumediene no more guaranteed that prisoners at Guantánamo would enjoy the right to habeas corpus than a victory in Brown v. Board16 guaranteed that schools in the South would be desegregated.17 Rasul and Boumediene, therefore, should be seen as part (and probably only a small part) of a varied and complex collection of events, including the fiasco in Iraq, the scandal at the Abu Ghraib prison, and the use of warrantless wiretaps, as well as seemingly unrelated episodes like the official response to Hurricane Katrina. These and other events during the Bush years merged to give rise to a powerful social narrative critiquing an administration committed to lawlessness, content with incompetence, and engaged in behavior that was contrary to perceived “American values.”18 Yet the very success of this narrative, culminating in the election of Barack Obama in 2008, produced quiescence on the Left, even as it stimulated massive opposition on the Right. The result has been the emergence of a counter-narrative about national security that has produced a vigorous social backlash such that most of the Bush-era policies will continue largely unchanged, at least for the foreseeable future.19 Just as we see a widening gap between judicial recognition of rights in the abstract and the observation of those rights as a matter of fact, there appears to be an emerging dominance of proceduralist approaches, which take as a given that rights dissolve under political pressure, and, thus, are best protected by basic procedural measures. But that stance falls short in its seeming readiness to trade away rights in the face of political tension. First, it accepts the tropes du jour surrounding radical Islam—namely, that it is a unique, and uniquely apocalyptic, threat to U.S. security. In this, proceduralists do not pay adequate heed to the lessons of American history and sociology. And second, it endorses too easily the idea that procedural and structural protections will protect against substantive injustice in the face of popular and/or political demands for an outcome-determinative system that cannot tolerate acquittals. Procedures only provide protection, however, if there is sufficient political support for the underlying right. Since the premise of the proceduralist scholarship is that such support does not exist, it is folly to expect the political branches to create meaningful and robust protections. In short, a witch hunt does not become less a mockery of justice when the accused is given the right to confront witnesses. And a separate system (especially when designed for demonized “others,” such as Muslims) cannot, by definition, be equal. In the end, we urge a fuller embrace of what Scheingold called “the politics of rights,” which recognizes the contingent character of rights in American society. We agree with Mari Matsuda, who observed more than two decades ago that rights are a necessary but not sufficient resource for marginalized people with little political capital.20 To be effective, therefore, we must look beyond the courts and grapple with the hard work of long-term change with, through and, perhaps, in spite of law. These are by no means new dilemmas, but the post-9/11 context raises difficult and perplexing questions that deserve study and careful thought as our nation settles into what appears to be a permanent emergency.

Legalism underpins the violence of empire and creates the conditions of possibility for liberal violence – the alt is to endorse political, rather than legal restrictions

Dossa ‘99

Shiraz, Department of Political Science, St. Francis Xavier University, Antigonish, Nova Scotia, “Liberal Legalism: Law, Culture and Identity,” The European Legacy, Vol. 4, No. 3, pp. 73-87,1

No discipline in the rationalized arsenal of modernity is as rational, impartial, objective as the province of law and jurisprudence, in the eyes of its liberal enthusiasts. Law is the exemplary countenance of the conscious and calculated rationality of modern life, **it is the** emblematic face of liberal civilization. Law and legal rules symbolize the spirit of science, the march of human progress. As Max Weber, the reluctant liberal theorist of the ethic of rationalization, asserted: judicial formalism enables the legal system to operate like a technically **rational machine**. Thus it guarantees to individuals and groups within the system a relative of maximum of freedom, and greatly increases for them the possibility of predicting the legal consequences of their action. In this reading, law encapsulates the western capacity to bring order to nature and human beings, to turn the ebb and flow of life into a "rational machine" under the tutelage of "judicial formalism".19 Subjugation of the Other races in the colonial empires was motivated by power and rapacity, but it was justified and indeed rationalized, by an appeal to the civilizing influence of religion and law: western Christianity and liberal law. To the imperialist mind, "the civilizing mission of law" was fundamental, though Christianity had a part to play in this program.20 Liberal colonialists visualized law, civilization and progress as deeply connected and basic, they saw western law as neutral, universally relevant and desirable. The first claim was right in the liberal context, the second thoroughly false. In the liberal version, the mythic and irrational, emblems of thoughtlessness and fear, had ruled all life-forms in the past and still ruled the lives of the vast majority of humanity in the third world; in thrall to the majesty of the natural and the transcendent, primitive life flourished in the environment of traditionalism and lawlessness, hallmarks of the epoch of ignorance. By contrast, liberal ideology and modernity were abrasively unmythic, rational and controlled. Liberal order was informed by knowledge, science, a sense of historical progress, a continuously improving future. But this canonical, secular, bracing self-image, is tendentious and substantively illusory: it blithely scants the bloody genealogy and the extant historical record of liberal modernity, liberal politics, and particularly liberal law and its impact on the "lower races" (Hobson). In his Mythology of Modern Law, Fitzpatrick has shown that the enabling claims of liberalism, specifically of liberal law, are not only untenable but implicated in canvassing a racist justification of its colonial past and in eliding the racist basis of the structure of liberal jurisprudence.21 Liberal law is mythic in its presumption of its neutral, objective status. Specifically, the liberal legal story of its immaculate, analytically pure origin obscures and veils not just law's own ruthless, violent, even savage and disorderly trajectory, but also its constitutive association with imperialism and racism.22 In lieu of the transcendent, divine God of the "lower races", modern secular law postulated the gods of History, Science, Freedom. Liberal law was to be the instrument for realizing the promise of progress that the profane gods had decreed. Fitzpatrick's invasive surgical analysis lays bare the underlying logic of law's self-articulation in opposition to the values of cultural-racial Others, and its strategic, continuous reassertion of liberalism's superiority and the civilizational indispensability of liberal legalism. Liberal law's self-presentation presupposes a corrosive, debilitating, anarchic state of nature inhabited by the racial Others and lying in wait at the borders of the enlightened modern West. This mythological, savage Other, creature of raw, natural, unregulated fecundity and sexuality, justified the liberal conquest and control of the racially Other regions.23 Law's violence and resonant savagery on behalf of the West in its imperial razing of cultures and lands of the others, has been and still is, justified in terms of the necessary, beneficial spread of liberal civilization. Fitzpatrick's analysis parallels the impassioned deconstruction of this discourse of domination initiated by Edward Said's Orientalism, itself made possible by the pioneering analyses of writers like Aime Cesaire and Frantz Fanon. Fitzpatrick's argument is nevertheless instructive: his focus on law and its machinations unravels the one concrete province of imperial ideology that is centrally modern and critical in literally transforming and refashioning the human nature of racial Others. For liberal law carries on its back the payload of "progressive", pragmatic, **instrumental modernity**, its ideals of order and rule of law, its articulation of human rights and freedom, its ethic of procedural justice, its hostility to the sacred, to transcendence or spiritual complexity, its recasting of politics as the handmaiden of the nomos, its valorization of scientism and rationalization in all spheres of modern life. Liberal law is not synonymous with modernity tout court, but it is the exemplary voice of its rational spirit, **the custodian of its civilizational ambitions.** For the colonized Others, no non-liberal alternative is available: a non-western route to economic progress is inconceivable in liberal-legal discourse. For even the truly tenacious in the third world will never cease to be, in one sense or another, the outriders of modernity: their human condition condemns them to **playing perpetual catch-up**, eternally subservient to Western economic and technological superiority in a epoch of self-surpassing modernity.24 If the racially Other nations suffer exclusion globally, the racially other minorities inside the liberal loop enjoy the ambiguous benefits of inclusion. As legal immigrants or refugees, they are entitled to the full array of rights and privileges, as citizens (in Canada, France, U.K., U.S—Germany is the exception) they acquire civic and political rights as a matter of law. Formally, they are equal and equally deserving. In theory liberal law is inclusive, but concretely it is routinely **partial and invidious**. Inclusion is conditional: it depends on how robustly the new citizens wear and deploy their cultural difference. Two historical facts account for this phenomenon: liberal law's role in western imperialism and the Western claim of civilizational superiority that pervades the culture that sustains liberal legalism. Liberal law, as the other of the racially Other within its legal jurisdiction, differentiates and locates this other in the enemy camp of the culturally raw, irreducibly foreign, making him an unreliable ally or citizen. Law's suspicion of the others socialized in "lawless" cultures is instinctive and undeniable. Liberal law's constitutive bias is in a sense incidental: the real problem is racism or the racist basis of liberal ideology and culture.25 The internal racial other is not the juridical equal in the mind of liberal law but the juridically and humanly inferior Other, the perpetual foreigner.

### 3

Interpretation—“Armed forces” are military personnel—the aff is distinct

Lorber, JD University of Pennsylvania, January 2013

(Eric, “Executive Warmaking Authority and Offensive Cyber Operations: Can Existing Legislation Successfully Constrain Presidential Power?” 15 U. Pa. J. Const. L. 961, Lexis)

As discussed above, critical to the application of the War Powers Resolution - especially in the context of an offensive cyber operation - are the **definitions of key terms**, **particularly** **"armed forces,"** as the relevant provisions of the Act are only triggered if the President "introduces armed forces] into hostilities or into situations [of] imminent ... hostilities," n172 or if such forces are introduced "into the territory, airspace, or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces." n173 The requirements may also be triggered if the United States deploys armed forces "in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation." n174 As is evident, the definition of "armed forces" is crucial to deciphering whether the WPR applies in a particular circumstance to provide congressional leverage over executive actions. The definition of "hostilities," which has garnered the majority of scholarly and political attention, n175 particularly in the recent Libyan conflict, n176 will be dealt with secondarily here because it only becomes important if "armed forces" exist in the situation. As is evident from a textual analysis, n177 an examination of the legislative history, n178 and the broad policy purposes behind the creation of the Act, n179 [\*990] **"armed forces" refers to U.S. soldiers and members of the armed forces**, **not weapon systems or capabilities** such as offensive cyber weapons. Section 1547 does not specifically define "armed forces," but it states that "the term "introduction of United States Armed Forces' includes the assignment of members of such armed forces to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government." n180 While this definition pertains to the broader phrase "introduction of armed forces," **the clear implication is that only members of the armed forces count for** the purposes of **the definition** under the WPR. Though not dispositive, the term "member" connotes a human individual who is part of an organization. n181 Thus, it appears that the term "armed forces" means **human members of the** United States **armed forces**. However, there exist two potential complications with this reading. First, the language of the statute states that "the term "introduction of United States Armed Forces' includes the assignment of members of such armed forces." n182 By using inclusionary - as opposed to exclusionary - language, one might argue that the term "armed forces" could include more than members. This argument is unconvincing however, given that a core principle of statutory interpretation, expressio unius, suggests that expression of one thing (i.e., members) implies the exclusion of others (such as non-members constituting armed forces). n183 Second, the term "member" does not explicitly reference "humans," and so could arguably refer to individual units and beings that are part of a larger whole (e.g., wolves can be members of a pack). As a result, though a textual analysis suggests that "armed forces" refers to human members of the armed forces, such a conclusion is not determinative. An examination of the legislative history also suggests that Congress clearly conceptualized "armed forces" as human members of the armed forces. For example, disputes over the term "armed forces" revolved around who could be considered members of the armed forces, not what constituted a member. Senator Thomas Eagleton, one of the Resolution's architects, proposed an amendment during the process providing that the Resolution cover military officers on loan to a civilian agency (such as the Central [\*991] Intelligence Agency). n184 This amendment was dropped after encountering pushback, n185 but the debate revolved around whether those military individuals on loan to the civilian agency were still members of the armed forces for the purposes of the WPR, **suggesting that Congress considered the term to apply only to soldiers in the armed forces**. Further, during the congressional hearings, the question of deployment of "armed forces" centered primarily on past U.S. deployment of troops to combat zones, n186 suggesting that Congress conceptualized "armed forces" to mean U.S. combat troops.

Vote negative for precise, predictable limits—our interpretation has an inclusive and exclusive definition for what constitutes armed forces—any alternative reading of the resolution snowballs into restricting different nuclear missions, CBWs, space weapons, etc—that’s an impossible negative burden.

### 3.5

The “war powers authority” of the President is his Commander-in-Chief authority

Gallagher, Pakistan/Afghanistan coordination cell of the U.S. Joint Staff, Summer 2011

(Joseph, “Unconstitutional War: Strategic Risk in the Age of Congressional Abdication,” *Parameters*, http://strategicstudiesinstitute.army.mil/pubs/parameters/Articles/2011summer/Gallagher.pdf)

First, consider the constitutional issue of power imbalance. Central to the Constitution is the foundational principle of power distribution and provisions to check and balance exercises of that power. This clearly intended separation of powers across the three branches of government ensures that no single federal officeholder can wield an inordinate amount of power or influence. The founders carefully crafted constitutional war-making authority with the branch most representative of the people—Congress.4

The Federalist Papers No. 51, “The Structure of Government Must Furnish the Proper Checks and Balances Between the Different Departments,” serves as the wellspring for this principle. Madison insisted on the necessity to prevent any particular interest or group to trump another interest or group.5 This principle applies in practice to all decisions of considerable national importance. **Specific to war powers authority**, **the Constitution empowers the legislative branch with the authority to declare war but endows the Executive with the authority to act as Commander-in-Chief.**6 This construct designates Congress, not the president, as the primary decisionmaking body to commit the nation to war—a decision that ultimately requires the consent and will of the people in order to succeed. By vesting the decision to declare war with Congress, the founders underscored their intention to engage the people—those who would ultimately sacrifice their blood and treasure in the effort.

“Authority” refers to specific, existing actions by the President

Vance, U.S. appeals judge for the Eleventh Circuit, 1983

(U.S. v. Frade, 709 F.2d 1387, Lexis)

Arguing for an expansive reading of this provision, the government strenuously contends that 31 C.F.R. § 515.415, prohibiting transactions incident to travel to, from, and within Cuba when in connection with the transportation of certain Cuban nationals from Cuba to the United States, falls within the category of authorities being exercised on July 1, 1977, because, on that date, Executive authority [\*\*32] under the TWEA was being exercised regarding Cuba through the Cuban Assets Control Regulations. The government argues that either Regulation 515.415 is a mere explanatory modification of the Cuban Assets Control Regulations, or, alternatively, the existence of some regulations regarding Cuba under the TWEA as of July 1, 1977, is a sufficient ground to invoke the grandfather clause as statutory authority for the promulgation of future regulations regarding Cuba. **While the ambiguous term**s "**authorities**" and "exercised" **may** appear to be **elastic** enough to encompass the interpretation for which the government argues, we agree with the recent first circuit opinion in Wald [\*1398] v. Regan, 708 F.2d 794, (1st Cir.1983), that **a narrow**, **restrictive interpretation is compelled** by the legislative history and purpose of the grandfather clause and by its function within the broader statutory scheme. First, the legislative history reveals that it was the intent of Congress **to** grandfather **only the ongoing uses of Executive authority**. "Throughout the committee hearings and the [\*\*33] House and Senate reports, **nearly every time a legislator referred to** the 'savings clause ' and to the exercise of the TWEA **'authorities**, ' he [SETH ADDED: **they**] **spoke of specific**, **existing** **'uses'** **of those authorities**." Wald v. Regan, 708 F.2d 794 at 798 [manuscript at 11] (emphasis in original). See Report of the Committee on International Relations on H.R. 7788: Trading With the Enemy Act Reform Legislation, H.R.Rep. No. 459, 95th Cong., 1st Sess. 2 (1977) (TWEA Reform) ("the current uses of these authorities . . . may continue"); id.at 10 ("'grandfathering' existing uses of these powers"); Emergency Controls on International Economic Transactions: Hearings before the Subcommittee on International Economic Policy and Trade of the House Committee on International Relations, 95th Cong., 1st Sess. 147 (1977) (Emergency Controls) (statement of R. Roger Majak, Staff Director of Subcommittee on International Economic Policy & Trade) ("There is a clear need to grandfather or deal in some special way with existing uses of section 5(b) authorities"); id. at 168 (statement of Rep. Cavanaugh) ("where the powers of 5(b) are currently operative"); id. at 189 (statement of [\*\*34] Rep. Bingham) ("it was the purpose . . . to grandfather in existing uses of 5(b)"). **Language which would have given broader scope** to the grandfather clause **by permitting** "**any** other **authority conferred upon the President** by . . . section [5(b) to be] exercised to deal with the same set of circumstances," Amendments to the Trading With the Enemy Act: Subcommittee Working Draft of June 8, 1977, 95th Cong., 1st Sess. § 101(b), **was deliberately striken from the bill**. Representative Bingham, a principal sponsor of the 1977 amendment, explained "I think it boils down to a question of whether we are grandfathering a particular situation, and all the powers that may be necessary to deal with the situation, or whether we are grandfathering the particular authorities themselves and their usage . . . I don't know why it should be necessary to give [the President] authority to expand what has already been done." Emergency Controls, supra at 167.

Prefer this:

1. Limits – Presidential authority could extend into every foreign policy issue

2. Ground – the core controversy is how the President can fight wars – it’s a military topic

3. Precision – we define war powers authority as a phrase – most predictable

Topicality is a voting issue, or the aff will read a new uncontested aff every debate

### 4

The plan destroys presidential war power and makes nuclear escalation likely

John Norton Moore, Walter L. Brown Professor of Law at the University of Virginia School of Law, 1987, First Use of Nuclear Weapons: Under the Constitution, Who Decides?, p. 30-2

Second, quite apart from its effect on deterrence, the FAS proposal would seem to amplify a criticism made with respect to the War Powers Resolution that **it would undermine the ability of the United States to respond effectively in defense emergencies by creating a potential legal** confrontation between Congress and the President **when the Nation could least afford it**. As is Congress, the President is sworn to uphold the Constitution of the United States. If, in a critical NATO defense emergency, the President believed that nuclear weapons were required to stop an attack, and if the congressional committee disagreed, the President might be tempted to use nuclear weapons if he believed — as he would have good reason to believe — that the Act, establishing such a committee decision in the operational chain of command, were unconstitutional. And in such a setting, if he did use such weapons, the resulting disagreement about his legal authority could severely inhibit the effect of such use and invite miscalculation and escalation. A setting requiring a nuclear response against a massive Warsaw Pact attack against NATO would be a time of unimaginable strain. **Is it wise to fuse a possible simultaneous constitutional dispute about the respective powers of Congress and the President in such a setting?** For these and other reasons concerning negative effects on deterrence and crisis stability, as well as the network of real world checks on any presidential first use decision, existing mechanisms for executive and congressional branch coordination, and concerns that issues of such magnitude not be decided by a small committee of Congress not elected by the people of the Nation as a whole (that is not collectively representing the Nation as a whole as does Congress or the President), I believe the FAS proposal should be rejected on policy as well as constitutional grounds.

That goes nuclear

**Li ‘9**

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

A. The Emergence of Non-State Actors

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

### 5

The judiciary adheres to political question deference now—but doctrinal repudiation would reverse that.

Franck ‘12

Thomas, Murray and Ida Becker Professor of Law, New York University School of Law Wolfgang Friedmann Memorial Award 1999, *Political Questions/Judicial Answers*

Sensitive to this historical perspective, many scholars, but few judges, have openly decried the judiciary’s tendency to suspend at the water’s edge their jealous defense of the power to say what the law is. Professor Richard Falk, for example, has criticized judges’ “ad hoc subordinations to executive policy”5 and urged that if the object of judicial deference is to ensure a single coherent American foreign po1icy, then that objective is far more likely to be secured if the policy is made in accordance with rules “that are themselves not subject to political manipulation.”6 Moreover, as a nation publicly proclaiming its adherence to the rule of law, Falk notes, it is unedifying for America to refuse to subject to that rule the very aspect of its governance that is most important and apparent to the rest of the world.7 Professor Michael Tigar too has argued that the deference courts show to the political organs, when it becomes abdication, defeats the basic scheme of the Constitution because when judges speak of “the people” as “the ultimate guardian of principle” in political-question cases, they overlook the fact that “the people” are the “same undifferentiated mass” that “historically, unmistakably and, at times, militantly insisted that when executive power immediately threatens personal liberty, a judicial remedy must be available.” Professor Louis Henkin, while acknowledging that certain foreign relations questions are assigned by the Constitution to the discretion of the political branches, also rejects the notion that the judiciary can evade responsibility for deciding the appropriate limits to that discretion, particularly when its exercise comes into conflict with other rights or powers rooted in the Constitution or laws enacted in accordance with its strictures.9 His views echo earlier ones espoused by Professor Louis Jaffe, who argued that while the courts should listen to advice tendered by the political branches on matters of foreign pol icy and national security, “[t]his should not mean that the court must follow such advice, but that without it the court should not prostrate itself before the fancied needs of diplomacy and foreign policy. The claim of policy should be made concrete in the particular instance. Only so may its weight, its content, and its value be appreciated. The claims of diplomacy are not absolute; to question their compulsion is not treason.”° There has been little outright support from the judiciary for such open calls to repudiate the practice of refusing to adjudicate foreign affairs cases on their merits. While some judges do refuse to apply the doctrine, holding it inapplicable in the specific situation or passing over it in silence, virtually none have hitherto felt able to repudiate it frontally. On the other side, some judges continue to argue vigorously for the continued validity of judicial abdication in cases implicating foreign policy or national security. These proponents still rely occasion ally on the early shards of dicta and more rarely on archaic British precedents that run counter to the American constitutional ethos. More frequently today, their arguments rely primarily on a theory of constitutionalism—separation of powers—and several prudential reasons.

Judicial involvement in nuclear weapons is a recipe for disaster

Lori Damrosch, Columbia University Associate Law Professor, 1986, BOOK REVIEW: BANNING THE BOMB: LAW AND ITS LIMITS, 86 Colum. L. Rev. 653

Professor Miller's assessment of the dim prospects for judicial action against nuclear arms is correct, but he does not do justice to the reasons for judicial self-restraint. His vision is of a judiciary that would move boldly to dismantle a military structure based on nuclear arms, just as Brown v. Board of Education n12 required the dismantling of segregated school systems. Brown did not change the world overnight, but it was a spur to action, a rallying cry for revitalizing the political struggle, and ultimately a symbol of our society's commitment to human dignity. Unfortunately for Professor Miller's thesis, the hypothetical case of Brown v. The Pentagon could not fill the same bill. It is not just that the law suit would inevitably founder for threshold reasons such as standing, ripeness, or the political question doctrine, as noted in the brief [\*657] comments following Professor Miller's piece. n13 Nor is it that judges are temperamentally resistant to becoming involved in controversial issues or breaking new ground, as some of Professor Miller's characterizations imply. More basically, the problem is that in the unlikely event of a judicial hearing on what to do to preserve the human race from nuclear disaster, judges would have to find a principled basis for endorsing some solution in place of the policies developed by executive and congressional officials, who presumably are committed to that very effort. Professor Miller asserts that he makes no plea for unilateral disarmament (p. 238), but that would seem to be the only relief that a court persuaded by his argument could order. Surely the Supreme Court could not supervise the conduct of negotiations for mutual reductions, or even decide whether space-based defenses are likely to render nuclear weapons impotent. The constitutional responsibility to prevent the horror of nuclear war must lie where the constitutional power is n14 -with Congress and the President.

PQD key to global intelligence and cooperation—solves terrorism

Dhooge ‘7

Lucien, Sue and John Staton Professor of Law, Georgia Institute of Technology, “THE POLITICAL QUESTION DOCTRINE AND CORPORATE COMPLICITY IN EXTRAORDINARY RENDITION,” 21 Temp. Int'l & Comp. L.J. 311 2007

The complaint alleges the existence of a clandestine U.S. intelligence program involving the apparent cooperation of foreign intelligence services and law enforcement authorities **throughout the world**. 145 Adjudicating the complaint would result in further disclosures regarding the means and methods utilized to seize suspected terrorists by the United States and its allies to an **undesirable degree**. Such disclosures may include the policies and practices underlying **rendition**, including the number and identity of participants in rendition operations; the identity of their employer; the extent of CIA participation; operational details associated with the flights serviced by Jeppesen; and the other operational details which have not been publicly disclosed. This information **is essential** to prove the underlying human rights violations committed by the CIA and Jeppesen's complicity as a conspirator and aider and abettor. Access to this information would also be necessary, given the enhanced degree of specificity required of claims of conspiracy and aiding and abetting, as well as claims asserted pursuant to the ATS. 146 Access could also be justified based on the serious nature of the allegations and their potential to cause considerable financial injury to Jeppesen through the magnitude of potential damage awards and resulting harm to corporate reputation. The disclosure of such information would virtually **create an extraordinary rendition playbook.** The creation of such a playbook, however, interferes with the President's responsibility for national security and authority over foreign affairs. The **continued viability of antiterrorism programs** is essential to preserving national security, a responsibility clearly within the President's constitutional obligations and which includes authority to protect national security information. 147 Publishing the details of the extraordinary rendition program, necessitated by the complaint, to a branch of the government ill-suited to evaluate the consequences of the release of such sensitive information can only further harm the program and, as a result, weaken a course of action selected by the executive branch in furtherance of fulfilling its national security obligations. 148 The possibility of compulsive disclosures regarding the extraordinary rendition program may also disrupt U.S. diplomatic relations. The extraordinary rendition program has proven controversial; it has already led to two national investigations by British and Swedish authorities, with several more currently pending.149 Further strain may be placed on U.S. relations with European states as a result of the investigation conducted by the Council of Europe into the complicity of numerous national governments in extraordinary renditions. The number of potentially impacted relations with European states is significant and includes some of the United States' closest allies in the so-called "war on terror," such as Italy, Poland, Spain, and the United Kingdom. 150 Diplomatic relations with non-European states that have permitted extraordinary renditions to occur within their territories may also be negatively impacted. This group of states includes numerous crucial allies in U.S. antiterrorism efforts such as **Canada**, **Indonesia**, **Pakistan, and Turkey**. Another set of potentially impacted diplomatic relations are those with foreign states that have accepted persons subject to rendition and have subsequently utilized detention and interrogation methods that do not comport with U.S. law or international standards. States that fall within this category include Afghanistan, **Egypt, Iraq, Jordan, Morocco, Pakistan, Poland, Syria, Romania, Thailand, and Uzbekistan**.' 51 The vast majority of these states are key participants in combating terrorism on the basis of their own struggles against terrorist organizations. Such disclosures regarding the extent of national cooperation or indifference to extraordinary renditions occurring within their territories may embarrass these governments. Western European states may suffer embarrassment for their failure to uphold human rights protections deeply engrained in their national cultures as well as in regional and global instruments. Other governments may be reluctant to confirm their cooperation with U.S. intelligence forces in extraordinary renditions for other reasons, including previous denials of such cooperation, maintenance of standing in the international community, concerns about abdication of national sovereignty, and potential inflammation of public opposition within their constituencies. Particularly susceptible governments in this regard include states with populations deeply skeptical of U.S. foreign policy in general and those with antiterrorism initiatives such as Egypt, Indonesia, Iraq, Pakistan, and Turkey. Some of these governments may re-evaluate further operations with U.S. intelligence services if their complicity is exposed. 152 Such a result is not only inimical to present U.S. foreign policy goals and future initiatives, but also undermines the international consensus **necessary** to successfully combat the spread of global terrorism. **This potential impact upon U.S. foreign relations** **compel** imposition of the political question doctrine.

Extinction

Barrett et al. 13—PhD in Engineering and Public Policy from Carnegie Mellon University, Fellow in the RAND Stanton Nuclear Security Fellows Program, and Director of Research at Global Catastrophic Risk Institute—AND Seth Baum, PhD in Geography from Pennsylvania State University, Research Scientist at the Blue Marble Space Institute of Science, and Executive Director of Global Catastrophic Risk Institute—AND Kelly Hostetler, BS in Political Science from Columbia and Research Assistant at Global Catastrophic Risk Institute (Anthony, 24 June 2013, “Analyzing and Reducing the Risks of Inadvertent Nuclear War Between the United States and Russia,” Science & Global Security: The Technical Basis for Arms Control, Disarmament, and Nonproliferation Initiatives, Volume 21, Issue 2, Taylor & Francis)

War involving significant fractions of the U.S. and Russian nuclear arsenals, which are by far the largest of any nations, could have globally catastrophic effects such as severely reducing food production for years, 1 potentially leading to collapse of modern civilization worldwide, and even the extinction of humanity. 2 Nuclear war between the United States and Russia could occur by various routes, including accidental or unauthorized launch; deliberate first attack by one nation; and inadvertent attack. In an accidental or unauthorized launch or detonation, system safeguards or procedures to maintain control over nuclear weapons fail in such a way that a nuclear weapon or missile launches or explodes without direction from leaders. In a deliberate first attack, the attacking nation decides to attack based on accurate information about the state of affairs. In an inadvertent attack, the attacking nation mistakenly concludes that it is under attack and launches nuclear weapons in what it believes is a counterattack. 3 (Brinkmanship strategies incorporate elements of all of the above, in that they involve intentional manipulation of risks from otherwise accidental or inadvertent launches. 4 ) Over the years, nuclear strategy was aimed primarily at minimizing risks of intentional attack through development of deterrence capabilities, and numerous measures also were taken to reduce probabilities of accidents, unauthorized attack, and inadvertent war. For purposes of deterrence, both U.S. and Soviet/Russian forces have maintained significant capabilities to have some forces survive a first attack by the other side and to launch a subsequent counter-attack. However, concerns about the extreme disruptions that a first attack would cause in the other side's forces and command-and-control capabilities led to both sides’ development of capabilities to detect a first attack and launch a counter-attack before suffering damage from the first attack. 5 Many people believe that with the end of the Cold War and with improved relations between the United States and Russia, the risk of East-West nuclear war was significantly reduced. 6 However, it also has been argued that inadvertent nuclear war between the United States and Russia has continued to present a substantial risk. 7 While the United States and Russia are not actively threatening each other with war, they have remained ready to launch nuclear missiles in response to indications of attack. 8 False indicators of nuclear attack could be caused in several ways. First, a wide range of events have already been mistakenly interpreted as indicators of attack, including weather phenomena, a faulty computer chip, wild animal activity, and control-room training tapes loaded at the wrong time. 9 Second, terrorist groups or other actors might cause attacks on either the United States or Russia that resemble some kind of nuclear attack by the other nation by actions such as exploding a stolen or improvised nuclear bomb, 10 especially if such an event occurs during a crisis between the United States and Russia. 11 A variety of nuclear terrorism scenarios are possible. 12 Al Qaeda has sought to obtain or construct nuclear weapons and to use them against the United States. 13 Other methods could involve attempts to circumvent nuclear weapon launch control safeguards or exploit holes in their security. 14 It has long been argued that the probability of inadvertent nuclear war is significantly higher during U.S.–Russian crisis conditions, 15 with the Cuban Missile Crisis being a prime historical example. It is possible that U.S.–Russian relations will significantly deteriorate in the future, increasing nuclear tensions. There are a variety of ways for a third party to raise tensions between the United States and Russia, making one or both nations more likely to misinterpret events as attacks. 16

### 6

#### The executive branch of the United States federal government should prohibit the introduction of US nuclear forces into hostilities from a launch on warming posture.

The US federal judiciary should rule that sever enviro damage and unsustainable development constitute a crime against future generations.

Executive declaration solves the 1AC internal links

Harold A. Feiveson, senior research scientist, and co-director of the Program on Science and Global Security at the Woodrow Wilson School at Princeton University and Ernst Jan Hogendoorn is a Ph.D. student at the Woodrow Wilson School, 2003, No First Use of Nuclear Weapons, http://cns.miis.edu/npr/pdfs/102feiv.pdf

Countries advocating a legally binding no-first-use commitment emphasize that the commitment should go beyond simple declarations of intent, which could be unilaterally revoked. Rather, the commitments should involve something more, possibly embedded in a protocol of some kind to the NPT, a new treaty, or a UN Security Council resolution. **There would be great value in such a commitment regardless of the** exact **form it would take**. Nevertheless, the primary focus of this viewpoint is not this type of legally binding commitment, but rather the declaratory policy **of the nuclear weapon states themselves, especially the U**nited **S**tates. Along with the distinction between legally binding and declaratory commitments, there is also the question of whether the commitments should be directed only to non-nuclear-weapon states that are parties to the NPT, thereby giving further incentives to nonparties, such as India, Pakistan, and Israel, to join the NPT as non-nuclearweapon states. With this question too, the distinction between legally binding and declaratory commitments is relevant. And a strong case may be made for extending legally binding commitments directly to the non-nuclearweapon state parties to the NPT. But for declaratory policies more generally (considering first the United States alone), in our view, the simplest, most direct, and most powerful approach is an unambiguous U.S. commitment not to use nuclear weapons first under any circumstances. The present formulation focusing on pledges to non-nuclear-weapon states may have seemed prudent when we were devising ways to persuade non-nuclear countries to agree to an indefinite extension of the NPT, or when we were concerned with Soviet aggression in Europe or elsewhere. But, such an approach is no longer necessary. To hold open the option for nuclear use against another nuclear weapon state is unnecessary and awkward, at a time when the United States is drawing closer to Russia and China, and U.S. relationships with India, Pakistan, or Israel are not conflictual. Even if not legally binding, strong, unhedged no-first-use commitments by the United States and other nuclear weapon states would strengthen the nonproliferation regime, and possibly also help set the stage for later, more binding, commitments. It would be valuable for strong no-first-use commitments to be made by all the nuclear-weapon states, and one would hope that such commitments would follow a U.S. lead. But there is no reason for the United States to insist upon an international agreement before acting. The United States has undertaken unilateral initiatives in the past with the hope, later proven, that other states would follow suit—the most recent example being the 1991 decision by President George H.W. Bush to withdraw most U.S. tactical nuclear weapons from active deployment. In the case of a no-first-use pledge, a unilateral declaration by the United States would greatly increase pressure on other nuclear weapons states also to commit to no first use of nuclear weapons.

### solvency

#### Legal constraints inevitably fail—emergencies and ambiguity ensure cirmcumvention

Eric Posner, Professor of Law, The University of Chicago Law School, and Adrian Vermeule, Professor of Law, Harvard Law School, March 2011, The Executive Unbound, p. 91-3

A year later, however, Schmitt broke with his own earlier view and sharpened his critique of the rule of law.26 In a work titled Political Theology, Schmitt offered a more radical account of emergencies, arguing that liberal democracies committed to the rule of law have no theory of exceptional states and that "sovereign is he who decides on the exception."27 The many interpretive ambiguities surrounding this work should not obscure its main import. The legal systems of the liberal democracies cannot hope to specify the substantive conditions that will count as an emergency, because emergencies are by their nature unanticipated, or even the procedures that will be used to trigger and allocate emergency powers, because those procedures will themselves be vulnerable to being discarded when an emergency so requires.' In general, "One cannot use law to determine when legality should be suspended."29 At most, Schmitt thought, liberal legalism can specify who has the power to determine whether there is an emergency," but not the procedures or substantive conditions by which and under which emergency powers are triggered.

Schmitt's complex thought has given rise to an ever-growing body of commentary, especially after 9/11 restored the topic of emergency powers to prominence.31 A great deal of this work is jargon-laden, excessively conceptual and obscure, as is indeed a great deal of Schmitt's own work. Once the layers of interpretive dross and continental conceptualisms are cleaned off of Schmitt's thinking, what remains are several important midsized and largely institutional or empirical insights: emergencies cannot realistically be governed by ex ante, highly specified rules, but at most by vague ex post standards; it is beyond the institutional capacity of lawmakers to specify and allocate emergency powers in all future contingencies; practically speaking, legislators in particular will feel enormous pressure to create vague standards and escape hatches—for emergencies and otherwise—in the code of legal procedure that governs the mine-run of ordinary cases in the administrative state, because legislators know they cannot subject the massively diverse body of administrative entities to tightly specified rules, and because they fear the consequences of lashing the executive too tightly to the mast in future emergencies. As we will see, all of these institutional features are central to American administrative law, and they create the preconditions for the emergence of the legal black holes and legal grey holes that are integral to its structure.

THE RULE OF (ADMINISTRATIVE) LAW

Schmittian ideas have come in for important criticism after 9/ 11. For concreteness, we will focus on a recent book by David Dyzenhaus, which offers a powerful critique of Schmitt and a powerful expression of the aspirations of liberal legalism. Dyzenhaus distinguishes between the "rule of law" and "rule by law,"" a distinction that is roughly equivalent to the jurisprudential distinction between the "thick" and "thin" versions of the rule of law. "Rule by law" (or the thin rule of law) is compliance with whatever duly-enacted positive laws there happen to be. By contrast, the "rule of law" (or the thick rule of law) requires more than compliance with whatever duly-enacted laws there happen to be; it also requires adherence to a broader set of principles of legality; most famously expressed by Lon Fuller.33 Rule by law lacks content, whereas the rule of law adds a broad set of procedural and substantive norms associated with liberal legalism and, in the Anglo-American and Commonwealth countries, the common law. In this sort of schema, "rule by law" authorizes legislators or other lawmakers to create legal black holes—law-free zones that are themselves created by law. Lawmakers may also create grey holes, which appear to comport with the rule of law but really do not; imagine a statute or other legal rule specifying that notice will be given of new executive rules, except when the executive deems it a bad idea to do so.

Against this backdrop, liberal legalist critics such as Dyzenhaus urge the elimination of legal black holes and (especially) grey holes.34 They say that a body of law containing black holes and grey holes is inconsistent with the rule of law, by which they mean the thick rule of law. They worry that rule by law is a bad approach to regulating executive action during actual or perceived emergencies; the exclusion of the rule of law will end up by giving away even rule by law, resulting in a law-free zone of unfettered executive discretion. Dyzenhaus suggests that the appropriate lens for understanding these issues is the thought of Schmitt.35 On Dyzenhaus' rendition, " [i] f we are to answer Schmitt's challenge, we have to be able to show that contrary to his claims the exception can be banished from the legal order."36

The desired end-state for liberal legal theorists is a legal regime for regulating executive action during emergencies that does not contain either black or grey holes. We claim, by contrast, that **black and grey holes will inevitably be integral to administrative law**, and that **because their presence is inevitable, there is no point condemning them; to do so is quixotic**. The claim is not that our system of administrative law is maximally Schmittian. One could easily imagine a system whose black holes and grey holes are far larger than in our system. In this counterfactual system of administrative law, there would be a presumption against judicial review of executive action, unless Congress clearly indicated otherwise; stringent requirements for access to courts; and aggressively broad construction of the APA’s various exceptions for administrative action relating to military affairs and foreign affairs and for emergency administrative action. Our system is not like that, not always anyway.

At the other end of the continuum, however, liberal legalists imagine a system of administrative law that is minimally Schmittian or even not Schmittian at all. In this sort of system, all administrative action would be subject to review under "ordinary" legal tests for statutory authority and procedural validity and reasoned decision-making. There would be no categorical exclusions of executive action, no exceptions for military or diplomatic functions or for emergencies, and perhaps not even any special "deference" to executive decision-making on the merits. Rather, judges would quite simply decide whether, in their view, executive action comported with relevant statutes and constitutional rules, and would take a hard look at the reasonableness of agency policy choices. Crucially, in answering those questions, judges would draw upon thick background principles of legality, of procedural regularity and fairness.

**This too is a hopeless fantasy**. Our administrative law is not like that either, and it never will be. Rather **our** **system has substantial black holes and grey holes and will, for institutional** rather than conceptual **reasons,** inevitably **continue to do so**. That the black holes and grey holes could be still larger is, for present purposes, neither here nor there.

Judicial-legal restrictions cede power to the President—turns the case and their precedent arguments

Eric Posner, Professor of Law, The University of Chicago Law School, and Adrian Vermeule, Professor of Law, Harvard Law School, March 2011, The Executive Unbound, p. 52-4

We now turn from Congress to the courts, the other main hope of liberal legalism. In both economic and security crises, courts are marginal participants. Here two Schmittian themes are relevant: that courts come too late to the crisis to make a real difference in many cases, and that courts have pragmatic and political incentives to defer to the executive, whatever the nominal standard of review. The largest problem, underlying these mechanisms, is that courts possess legal authority **but not robust political legitimacy**. Legality and legitimacy diverge in crisis conditions, and the divergence causes courts to assume a restrained role. We take up these points in turn. The Timing of Review A basic feature of judicial review in most Anglo-American legal systems is that courts rely upon the initiative of private parties to bring suits, which the courts then adjudicate as "cases and controversies" rather than as abstract legal questions. This means that there is always a time lag, of greater or lesser duration, between the adoption of controversial government measures and the issuance of judicial opinions on their legal validity Common lawyers sometimes praise this delayed review precisely because the delay ensures that courts are less likely to set precedents while crises are hot, precedents that will be warped by the emotions of the day or by the political power of aroused majorities." Delayed review has **severe costs**, however. For one thing, courts often face a fait accompli. Although it is sometimes possible to strangle new programs in the crib, once those measures are up and running, it is all the more difficult for courts to order that they be abolished. This may be because new measures create new constituencies or otherwise entrench themselves, creating a ratchet effect, but the simpler hypothesis is just that officials and the public believe that the measures have worked well enough. Most simply, returning to the pre-emergency status quo by judicial order seems unthinkable; **doing so would just re-create the conditions that led the legislature and executive to take emergency measures in the first place.** For another thing, even if courts could overturn or restrict emergency measures, by the time their review occurs, those measures will by their nature already have worked, or not. If they have worked, or at least if there is a widespread sense that the crisis has passed, then the legislators and public may not much care whether the courts invalidate the emergency measures after the fact. By the time the courts issue a final pronouncement on any constitutional challenges to the EESA, the program will either have increased liquidity and stabilized financial markets, or not. In either case, the legal challenges will interest constitutional lawyers, but will lack practical significance. Intensity of Review Another dimension of review is intensity rather than timing. At the level of constitutional law, the overall record is that courts tend to defer heavily to the executive in times of crisis, only reasserting themselves once the public sense of imminent threat has passed. As we will discuss in chapter 3, federal courts deciding administrative cases after 9/11 have tended to defer to the government's assertion of security interests, although more large-number work is necessary to understand the precise contours of the phenomenon. Schmitt occasionally argued that the administrative state would actually increase the power of judges, insofar as liberal legislatures would attempt to compensate for broad delegations to the executive by creating broad rights of judicial review; consider the Administrative Procedure Act (APA), which postdates Schmitt's claim. It is entirely consistent with the broader tenor of Schmitt's thought, however, to observe that the very political forces that constrain legislatures to enact broad delegations in times of crisis also hamper judges, including judges applying APA-style review. While their nominal power of review may be vast, the judges cannot exercise it to the full in times of crisis. Legality and Legitimacy At a higher level of abstraction, the basic problem underlying judicial review of emergency measures is the divergence between the courts' legal powers and their political legitimacy in times of perceived crisis. As Schmitt pointed out, emergency measures can be "exceptional" in the sense that although illegal, or of dubious legality; they may nonetheless be **politically legitimate,** if they respond to the public's sense of the necessities of the situation.71 Domesticating this point and applying it to the practical operation of the administrative state, courts reviewing emergency measures may be on strong legal ground, but will tend to lack the political legitimacy needed to invalidate emergency legislation or the executive's emergency regulations. Anticipating this, courts pull in their horns. When the public sense of crisis passes, legality and legitimacy will once again pull in tandem; courts then have more freedom to invalidate emergency measures, but it is less important whether or not they do so, as the emergency measure will in large part have already worked, or not. The precedents set after the sense of crisis has passed may be calmer and more deliberative, and thus of higher epistemic quality—this is the claim of the common lawyers, which resembles an application of the Madisonian vision to the courts—but the public will not take much notice of those precedents, and they will have little sticking power when the next crisis rolls around.

International law can’t constrain the executive

Eric Posner, Professor of Law, The University of Chicago Law School, and Adrian Vermeule, Professor of Law, Harvard Law School, March 2011, The Executive Unbound, p. 156-7

The relationship between the UN charter and an international rule of law, then, is tenuous at best. The charter does contain rules that could in principle constrain powerful states—notably, restrictions on the use of military force—but these rules are consistent with a wide range of ideologies and do not seem particularly liberal. Restrictions on the use of military force, if obeyed, reduce interstate violence, but also enforce the status quo—a system of independent states that can use violence against their own people, and enforce illiberal norms domestically. The institutional structure of the UN, as noted, is essentially an unchecked oligarchy of powerful states,2 far from the Kantian federation of free states, to say nothing of the modern global representative institutions of which Kant's descendants dream. A common response to this point is that the UN can be reformed. Its representativeness can be improved, its powers enhanced.' However, the idea of international governance reproduces the problem that occupied the earlier chapters of this book, except at the international rather than national level. International governance, such as it is, mainly involves responding to crises—wars and threats of war, natural disasters, economic and financial collapses. Just as liberal political systems have proven unable to generate norms that adequately provide for national crises and constrain the executive in times of crisis, international law has failed in its similar goal of guiding and constraining national governments. The United Nations system has not stopped war—dozens of unauthorized wars have taken place since the system began in 1945.4 The drafters of the charter's simple rules—no war except in self-defense or with Security Council authorization—could not envision and account for the tremendous variety of conflicts that would ensue, and the complicated political and moral issues that they would pose. The violent civil conflicts that accompanied decolonization, for example, were largely regarded as legitimate in the third world, as it was then called, and illegitimate in the first world; the United Nations charter had nothing to say about them. The problem has appeared in its most acute form in connection with humanitarian intervention. In 1999, the United States and its allies launched a military intervention in Serbia to stop Serbian forces from engaging in ethnic cleansing in Kosovo. The Security Council refused to authorize this military intervention, yet the humanitarian case for the intervention was compelling, leading a group of notables to declare the intervention "illegal but legitimaters as if to quote Carl Schmitt. The legal norms ran out. No international executive exists, but a group of powerful countries implicitly declared a state of exception and acted so as to preserve the legitimacy of the international order despite itself. The failure of international law to constrain powerful states like the United States, which leaves freedom of action for national executives, cannot be attributed to some minor remedial defect in international law, one that can be corrected in due course. It results from the very nature of crisis governance.

### enviro

**No extinction**

Easterbrook 3(Gregg, senior fellow at the New Republic, “We're All Gonna Die!”, <http://www.wired.com/wired/archive/11.07/doomsday.html?pg=1&topic=&topic_set>=)

If we're talking about doomsday - the end of human civilization - many scenarios simply don't measure up. A single nuclear bomb ignited by terrorists, for example, would be awful beyond words, but life would go on. People and machines might converge in ways that you and I would find ghastly, but from the standpoint of the future, they would probably represent an adaptation. Environmental collapse might make parts of the globe unpleasant, but considering that the biosphere has survived ice ages, it wouldn't be the final curtain. Depression, which has become 10 times more prevalent in Western nations in the postwar era, might grow so widespread that vast numbers of people would refuse to get out of bed, a possibility that Petranek suggested in a doomsday talk at the Technology Entertainment Design conference in 2002. But Marcel Proust, as miserable as he was, wrote *Remembrance of Things Past* while lying in bed.

#### Getting better

Ronald Bailey, adjunct scholar at the Cato Institute, May 2k,http://reason.com/0005/fe.rb.earth.shtml

Earth Day 1970 provoked a torrent of apocalyptic predictions. “We have about five more years at the outside to do something,” ecologist Kenneth Watt declared to a Swarthmore College audience on April 19, 1970. Harvard biologist George Wald estimated that “civilization will end within 15 or 30 years unless immediate action is taken against problems facing mankind.” “We are in an environmental crisis which threatens the survival of this nation, and of the world as a suitable place of human habitation,” wrote Washington University biologist Barry Commoner in the Earth Day issue of the scholarly journal Environment. The day after Earth Day, even the staid New York Times editorial page warned, “Man must stop pollution and conserve his resources, not merely to enhance existence but to save the race from intolerable deterioration and possible extinction.” Very Apocalypse Now. Three decades later, of course, the world hasn’t come to an end; if anything, the planet’s ecological future has never looked so promising. With half a billion people suiting up around the globe for Earth Day 2000, now is a good time to look back on the predictions made at the first Earth Day and see how they’ve held up and what we can learn from them. The short answer: The prophets of doom were not simply wrong, but *spectacularly wrong*. More important, many contemporary environmental alarmists are similarly mistaken when they continue to insist that the Earth’s future remains an eco-tragedy that has already entered its final act. Such doomsters not only fail to appreciate the huge environmental gains made over the past 30 years, they ignore the simple fact that increased wealth, population, and technological innovation don’t degrade and destroy the environment. Rather, such developments preserve and enrich the environment. If it is impossible to predict fully the future, it is nonetheless possible to learn from the past. And the best lesson we can learn from revisiting the discourse surrounding the very first Earth Day is that passionate concern, however sincere, is no substitute for rational analysis.

Existing carbon triggers the impact

Daniel **Rirdan 12**, founder of The Exploration Company, “The Right Carbon Concentration Target”, June 29, <http://theenergycollective.com/daniel-rirdan/89066/what-should-be-our-carbon-concentration-target-and-forget-politics?utm_source=feedburner&utm_medium=feed&utm_campaign=The+Energy+Collective+%28all+posts%29>

James Hansen and other promi­nent cli­ma­tol­o­gists are call­ing to bring the CO2 atmos­pheric level to 350 parts per million. In fact, an orga­ni­za­tion, 350.org, came around that ral­ly­ing cry. This is far more radical than most politicians are willing to entertain. And it is not likely to be enough. The 350ppm target will not reverse the clock as far back as one may assume. It was in 1988 that we have had these level of car­bon con­cen­tra­tion in the air. But wait, there is more to the story. 1988-levels of CO2 with 2012-levels of all other green­house gases bring us to a state of affairs equiv­a­lent to that around 1994 (2.28 w/m2). And then there are aerosols. There is good news and bad news about them. The good news is that as long as we keep spewing mas­sive amounts of particulate matter and soot into the air, more of the sun’s rays are scattered back to space, over­all the reflec­tiv­ity of clouds increases, and other effects on clouds whose over­all net effect is to cool­ing of the Earth sur­face. The bad news is that once we stop polluting, stop run­ning all the diesel engines and the coal plants of the world, and the soot finally settles down, the real state of affairs will be unveiled within weeks. Once we fur­ther get rid of the aerosols and black car­bon on snow, we may be very well be worse off than what we have had around 2011 (a pos­si­ble addi­tion of 1.2 w/m2). Thus, it is not good enough to stop all green­house gas emis­sions. In fact, it is not even close to being good enough. A carbon-neutral econ­omy at this late stage is an unmit­i­gated disaster. There is a need for a carbon-negative economy. Essentially, it means that we have not only to stop emitting, to the tech­no­log­i­cal extent pos­si­ble, all green­house gases, but also capture much of the crap we have already out­gassed and lock it down. And once we do the above, the ocean will burp its excess gas, which has come from fos­sil fuels in the first place. So we will have to draw down and lock up that carbon, too. We have taken fos­sil fuel and released its con­tent; now we have to do it in reverse—hundreds of bil­lions of tons of that stuff.

#### 6 degree warming inevitable

**AP 9** (Associated Press, Six Degree Temperature Rise by 2100 is Inevitable: UNEP, September 24, <http://www.speedy-fit.co.uk/index2.php?option=com_content&do_pdf=1&id=168>)

Earth's temperature is likely to jump six degrees between now and the end of the century even if every country cuts greenhouse gas emissions as proposed, according to a United Nations update. Scientists looked at emission plans from 192 nations and calculated what would happen to global warming. The projections take into account 80 percent emission cuts from the U.S. and Europe by 2050, which are not sure things. The U.S. figure is based on a bill that passed the House of Representatives but is running into resistance in the Senate, where debate has been delayed by health care reform efforts. Carbon dioxide, mostly from the burning of fossil fuels such as coal and oil, is the main cause of global warming, trapping the sun's energy in the atmosphere. The world's average temperature has already risen 1.4 degrees since the 19th century. Much of projected rise in temperature is because of developing nations, which aren't talking much about cutting their emissions, scientists said at a United Nations press conference Thursday. China alone adds nearly 2 degrees to the projections. "We are headed toward very serious changes in our planet," said Achim Steiner, head of the U.N.'s environment program, which issued the update on Thursday. The review looked at some 400 peer-reviewed papers on climate over the last three years. Even if the developed world cuts its emissions by 80 percent and the developing world cuts theirs in half by 2050, as some experts propose, the world is still facing a 3-degree increase by the end of the century, said Robert Corell, a prominent U.S. climate scientist who helped oversee the update. Corell said the most likely agreement out of the international climate negotiations in Copenhagen in December still translates into a nearly 5-degree increase in world temperature by the end of the century. European leaders and the Obama White House have set a goal to limit warming to just a couple degrees. The U.N.'s environment program unveiled the update on peer-reviewed climate change science to tell diplomats how hot the planet is getting. The last big report from the Nobel Prize-winning Intergovernmental Panel on Climate Change came out more than two years ago and is based on science that is at least three to four years old, Steiner said. Global warming is speeding up, especially in the Arctic, and that means that some top-level science projections from 2007 are already out of date and overly optimistic. Corell, who headed an assessment of warming in the Arctic, said global warming "is accelerating in ways that we are not anticipating." Because Greenland and West Antarctic ice sheets are melting far faster than thought, it looks like the seas will rise twice as fast as projected just three years ago, Corell said. He said seas should rise about a foot every 20 to 25 years.

### at: accidents

**No accidental launch**

**Williscroft 10** (Six patrols on the *John Marshall* as a Sonar Technician, and four on the *Von Steuben* as an officer – a total of twenty-two submerged months. Navigator and Ops Officer on *Ortolan* & *Pigeon* – Submarine Rescue & Saturation Diving ships. Watch and Diving Officer on *Oceanographer* and *Surveyor*. “Accidental Nuclear War” http://www.argee.net/Thrawn%20Rickle/Thrawn%20Rickle%2032.htm)

Is there a realistic chance that we could have a nuclear war by accident? Could a ballistic submarine commander launch his missiles without specific presidential authorization? Could a few men conspire and successfully bypass built-in safety systems to launch nuclear weapons? The key word here is “realistic.” In the strictest sense, yes, these things are possible. But are they realistically possible? This question can best be answered by examining two interrelated questions. Is there a way to launch a nuclear weapon by accident? Can a specific accidental series of events take place—no matter how remote—that will result in the inevitable launch or detonation of a nuclear weapon? Can one individual working by himself or several individuals working in collusion bring about the deliberate launch or detonation of a nuclear weapon? We are protected from accidental launching of nuclear weapons by mechanical safeguards, and by carefully structured and controlled mandatory procedures that are always employed when working around nuclear weapons. Launching a nuclear weapon takes the specific simultaneous action of several designated individuals. System designers ensured that conditions necessary for a launch could not happen accidentally. For example, to launch a missile from a ballistic missile submarine, two individuals must insert keys into separate slots on separate decks within a few seconds of each other. Barring this, the system cannot physically launch a missile. There are additional safeguards built into the system that control computer hardware and software, and personnel controls that we will discuss later, but—in the final analysis—without the keys inserted as described, there can be no launch—it’s not physically possible. Because the time window for key insertion is less than that required for one individual to accomplish, it is physically impossible for a missile to be launched accidentally by one individual. Any launch must be deliberate. One can postulate a scenario wherein a technician bypasses these safeguards in order to effect a launch by himself. Technically, this is possible, but such a launch would be deliberate, not accidental. We will examine measures designed to prevent this in a later column. Maintenance procedures on nuclear weapons are very tightly controlled. In effect always is the “two-man rule.” This rule prohibits any individual from accessing nuclear weapons or their launch vehicles alone. Aside from obvious qualification requirements, two individuals must be present. No matter how familiar the two technicians may be with a specific system, each step in a maintenance procedure is first read by one technician, repeated by the second, acknowledged by the first (or corrected, if necessary), performed by the second, examined by the first, checked off by the first, and acknowledged by the second. This makes maintenance slow, but absolutely assures that no errors happen. Exactly the same procedure is followed every time an access cover is removed, a screw is turned, a weapon is moved, or a controlling publication is updated. Nothing, absolutely nothing is done without following the written guides exactly, always under two-man control. This even applies to guards. Where nuclear weapons are concerned, a minimum of two guards—always fully in sight of each other—stand duty. There is no realistic scenario wherein a nuclear missile can be accidentally launched...ever...under any circumstances...period!

Accidental launch lands in the ocean

**Slocombe 9**

Frmr Under Secretary of Defense for Policy; Caplin & Drysdale Attorneys (Walter, De-Alerting: Diagnoses, Prescriptions, and Side-Effects, <http://www.ewi.info/system/files/Slocombe.pdf>,)

Moreover, in recent years, both the US and Russia, as well as Britain and China, have modified their procedures so that even if a nuclear-armed missile were launched, it would go not to a “real” target in another country but – at least in the US case - to empty ocean. In addition to the basic advantage of insuring against a nuclear detonation in a populated area, the fact that a missile launched in error would be on flight path that diverged from a plausible attacking trajectory should be detectable by either the US or the Russian warning systems, reducing the possibility of the accident being perceived as a deliberate attack. De-targeting, therefore, provides a significant protection against technical error. These arrangements – PALs and their equivalents coupled with continued observance of the agreement made in the mid-90s on “de-targeting” – do not eliminate the possibility of technical or operator-level failures, but they come very close to providing absolute assurance that such errors cannot lead to a nuclear explosion or be interpreted as the start of a deliberate nuclear attack.6 The advantage of such requirements for external information to activate weapons is of course that the weapons remain available for authorized use but not susceptible of appropriation or mistaken use. The drawback from a deterrence and operational point of view is, of course, that the system for transmitting the information must not be susceptible of interruption – that is, there must be assurance that an authorized decision maker will be able to act and have the decision – and the accompanying authenticated orders and unlock combinations – communicated to and received by the operators of the weapon systems. Accordingly, a system of combination-locked safeties requires a highly survivable network for decision and communication with the operators. Otherwise there would be pressures for early transmission of the codes, with their insertion subject to a later execute order or even more dangerous, pre-delegation of authority to issue the execute orders. In this, as in other aspects of measures to meet the “never” requirement, a highly capable and highly survivable command and control system is essential.

US and Russia act to maximize time – never seen as obligatory

Ford 8 (10/7/08 Christopher A., Presented to the International Peace Institute Policy Forum, “Dilemmas of Nuclear Force “De-Alerting”,” <http://www.hudson.org/files/documents/De-Alerting%20FINAL2%20%282%29.pdf>, ngoetz)

Though one should always be wary of assuming that the other side shares one’s own perceptions and assumptions, it seems likely that both Russian and American nuclear forces are today planned and postured in order to provide their national leadership with maximum decision-making time and flexibility. This means neither depending upon LoW nor entirely ruling it out, each side thereby hoping better to deter its opponent by denying the other side any conceivable basis for a conclusion that launching a first strike would elicit no retaliation. Even the Canberra Commission Report of 1996, while unstinting in its advocacy of “de-alerting,” conceded that both U.S. and Soviet/Russian forces were in fact “structured to be able to ride out a first nuclear strike,” complaining merely that these forces possessed “‘launch-on-warning’ or ‘launch-underattack’ options.” 17 Yet there is a world of difference between simply being capable of launching quickly and having such rapid launch be considered obligatory, on account of radical “useor-lose” vulnerability or simply a doctrinal choice. Fortunately, the latter circumstance does not appear to be the case: the nuclear superpowers do not face each other with “hair-trigger” launch-on-warning postures. Most of the de-alerting debate, therefore, is based upon a misconception about U.S. and Russian nuclear policy.

Russia doesn’t rely on their warning system

Shull 5

(Tod, Major USAF, “ Conventional Prompt Global Strike: Valuable Military Option or Threat to Global Stability?” September 2005, http://www.dtic.mil/cgi-bin/GetTRDoc?Location=U2&doc=GetTRDoc.pdf&AD=ADA439830)

Pavel Podvig sees the deterioration of the Russian system as an opportunity for stability, not as a prescription for disaster. In his view, the Russian early-warning system…has virtually lost it importance as an integral component of the command and control system of nuclear forces. The quality of information about missile launches that the system can provide and its reliability seem to be so low that it is highly unlikely that this information will ever be used as a basis for a decision to initiate a launchon- warning strike. The only marginal capability the system seems to provide is a detection of a massive missile attack.394 His philosophy is “if it is broken, don’t fix it.”395 If the Russian early-warning system were to eventually fail completely as a result of gradual degradation, the potential for hasty, possibly erroneous retaliation decisions would fade away with it.

High alert’s over

Ball 6 (Desmond, Special Professor at the Strategic and Defence Studies Centre at the Australian National University, “The Probabilities of ‘On the Beach,’” May, rspas.anu.edu.au/papers/sdsc/wp/wp\_sdsc\_401.pdf)

The prospects of a nuclear war between the United States and Russia must now be deemed fairly remote. There are now no geostrategic issues that warrant nuclear competition and no inclination in either Washington or Moscow to provoke such issues. US and Russian strategic forces have been taken off day-to-day alert and their ICBMs ‘de-targeted’, greatly reducing the possibilities of war by accident, inadvertence or miscalculation. On the other hand, while the US-Russia strategic competition is in abeyance, there are several aspects of current US nuclear weapons policy which are profoundly disturbing. In December 2001 President George W. Bush officially announced that the United States was withdrawing from the Anti-Ballistic Missile (ABM) Treaty of 1972, one of the mainstays of strategic nuclear arms control during the Cold War, with effect from June 2002, and was proceeding to develop and deploy an extensive range of both theatre missile defence and national missile defence (NMD) systems. The first anti-missile missile in the NMD system, designed initially to defend against limited missile attacks from China and North Korea, was installed at Fort Greely in Alaska in July 2004. The initial system, consisting of sixteen interceptor missiles at Fort Greely and four at Vandenberg Air Force in California, is expected to be operational by the end of 2005. The Bush Administration is also considering withdrawal from the Comprehensive Test Ban Treaty and resuming nuclear testing. (The last US nuclear test was on 23 September 1992). In particular, some key Administration officials believe that testing is necessary to develop a ‘new generation’ of nuclear weapons, including low-yield, ‘bunker-busting’, earth-penetrating weapons specifically designed to destroy very hard and deeply buried targets (such as underground command and control centres and leadership bunkers).

#### Dead hand can’t cause accidents – still in human control

Thompson, 2009

Nicholas Thompson, senior editor, 9-21-2009, “Inside the Apocalyptic Soviet Doomsday Machine,” Wired, http://www.wired.com/politics/security/magazine/17-10/mf\_deadhand?currentPage=all

As Yarynich describes Perimeter with pride, I challenge him with the classic critique of such systems: What if they fail? What if something goes wrong? What if a computer virus, earthquake, reactor meltdown, and power outage conspire to convince the system that war has begun? Yarynich sips his beer and dismisses my concerns. Even given an unthinkable series of accidents, he reminds me, there would still be at least one human hand to prevent Perimeter from ending the world. Prior to 1985, he says, the Soviets designed several automatic systems that could launch counterattacks without any human involvement whatsoever. But all these devices were rejected by the high command. Perimeter, he points out, was never a truly autonomous doomsday device. "If there are explosions and all communications are broken," he says, "then the people in this facility can—I would like to underline can—launch."

#### Cyberattacks impossible – empirics and defenses solve

**Rid 12** (Thomas Rid, reader in war studies at King's College London, is author of "Cyber War Will Not Take Place" and co-author of "Cyber-Weapons.", March/April 2012, “Think Again: Cyberwar”, http://www.foreignpolicy.com/articles/2012/02/27/cyberwar?page=full)

"Cyberwar Is Already Upon Us." No way. "Cyberwar is coming!" John Arquilla and David Ronfeldt predicted in a celebrated Rand paper back in 1993. Since then, it seems to have arrived -- at least by the account of the U.S. military establishment, which is busy competing over who should get what share of the fight. Cyberspace is "a domain in which the Air Force flies and fights," Air Force Secretary Michael Wynne claimed in 2006. By 2012, William J. Lynn III, the deputy defense secretary at the time, was writing that cyberwar is "just as critical to military operations as land, sea, air, and space." In January, the Defense Department vowed to equip the U.S. armed forces for "conducting a combined arms campaign across all domains -- land, air, maritime, space, and cyberspace." Meanwhile, growing piles of books and articles explore the threats of cyberwarfare, cyberterrorism, and how to survive them. Time for a reality check: Cyberwar is still more hype than hazard. Consider the definition of an act of war: It has to be potentially violent, it has to be purposeful, and it has to be political. The cyberattacks we've seen so far, from Estonia to the Stuxnet virus, simply don't meet these criteria. Take the dubious story of a Soviet pipeline explosion back in 1982, much cited by cyberwar's true believers as the most destructive cyberattack ever. The account goes like this: In June 1982, a Siberian pipeline that the CIA had virtually booby-trapped with a so-called "logic bomb" exploded in a monumental fireball that could be seen from space. The U.S. Air Force estimated the explosion at 3 kilotons, equivalent to a small nuclear device. Targeting a Soviet pipeline linking gas fields in Siberia to European markets, the operation sabotaged the pipeline's control systems with software from a Canadian firm that the CIA had doctored with malicious code. No one died, according to Thomas Reed, a U.S. National Security Council aide at the time who revealed the incident in his 2004 book, At the Abyss; the only harm came to the Soviet economy. But did it really happen? After Reed's account came out, Vasily Pchelintsev, a former KGB head of the Tyumen region, where the alleged explosion supposedly took place, denied the story. There are also no media reports from 1982 that confirm such an explosion, though accidents and pipeline explosions in the Soviet Union were regularly reported in the early 1980s. Something likely did happen, but Reed's book is the only public mention of the incident and his account relied on a single document. Even after the CIA declassified a redacted version of Reed's source, a note on the so-called Farewell Dossier that describes the effort to provide the Soviet Union with defective technology, the agency did not confirm that such an explosion occurred. The available evidence on the Siberian pipeline blast is so thin that it shouldn't be counted as a proven case of a successful cyberattack. Most other commonly cited cases of cyberwar are even less remarkable. Take the attacks on Estonia in April 2007, which came in response to the controversial relocation of a Soviet war memorial, the Bronze Soldier. The well-wired country found itself at the receiving end of a massive distributed denial-of-service attack that emanated from up to 85,000 hijacked computers and lasted three weeks. The attacks reached a peak on May 9, when 58 Estonian websites were attacked at once and the online services of Estonia's largest bank were taken down. "What's the difference between a blockade of harbors or airports of sovereign states and the blockade of government institutions and newspaper websites?" asked Estonian Prime Minister Andrus Ansip. Despite his analogies, the attack was no act of war. It was certainly a nuisance and an emotional strike on the country, but the bank's actual network was not even penetrated; it went down for 90 minutes one day and two hours the next. The attack was not violent, it wasn't purposefully aimed at changing Estonia's behavior, and no political entity took credit for it. The same is true for the vast majority of cyberattacks on record. Indeed, there is no known cyberattack that has caused the loss of human life. No cyberoffense has ever injured a person or damaged a building. And if an act is not at least potentially violent, it's not an act of war. Separating war from physical violence makes it a metaphorical notion; it would mean that there is no way to distinguish between World War II, say, and the "wars" on obesity and cancer. Yet those ailments, unlike past examples of cyber "war," actually do kill people. "A Digital Pearl Harbor Is Only a Matter of Time." Keep waiting. U.S. Defense Secretary Leon Panetta delivered a stark warning last summer: "We could face a cyberattack that could be the equivalent of Pearl Harbor." Such alarmist predictions have been ricocheting inside the Beltway for the past two decades, and some scaremongers have even upped the ante by raising the alarm about a cyber 9/11. In his 2010 book, Cyber War, former White House counterterrorism czar Richard Clarke invokes the specter of nationwide power blackouts, planes falling out of the sky, trains derailing, refineries burning, pipelines exploding, poisonous gas clouds wafting, and satellites spinning out of orbit -- events that would make the 2001 attacks pale in comparison. But the empirical record is less hair-raising, even by the standards of the most drastic example available. Gen. Keith Alexander, head of U.S. Cyber Command (established in 2010 and now boasting a budget of more than $3 billion), shared his worst fears in an April 2011 speech at the University of Rhode Island: "What I'm concerned about are destructive attacks," Alexander said, "those that are coming." He then invoked a remarkable accident at Russia's Sayano-Shushenskaya hydroelectric plant to highlight the kind of damage a cyberattack might be able to cause. Shortly after midnight on Aug. 17, 2009, a 900-ton turbine was ripped out of its seat by a so-called "water hammer," a sudden surge in water pressure that then caused a transformer explosion. The turbine's unusually high vibrations had worn down the bolts that kept its cover in place, and an offline sensor failed to detect the malfunction. Seventy-five people died in the accident, energy prices in Russia rose, and rebuilding the plant is slated to cost $1.3 billion. Tough luck for the Russians, but here's what the head of Cyber Command didn't say: The ill-fated turbine had been malfunctioning for some time, and the plant's management was notoriously poor. On top of that, the key event that ultimately triggered the catastrophe seems to have been a fire at Bratsk power station, about 500 miles away. Because the energy supply from Bratsk dropped, authorities remotely increased the burden on the Sayano-Shushenskaya plant. The sudden spike overwhelmed the turbine, which was two months shy of reaching the end of its 30-year life cycle, sparking the catastrophe. If anything, the Sayano-Shushenskaya incident highlights how difficult a devastating attack would be to mount. The plant's washout was an accident at the end of a complicated and unique chain of events. Anticipating such vulnerabilities in advance is extraordinarily difficult even for insiders; creating comparable coincidences from cyberspace would be a daunting challenge at best for outsiders. If this is the most drastic incident Cyber Command can conjure up, perhaps it's time for everyone to take a deep breath. "Cyberattacks Are Becoming Easier." Just the opposite. U.S. Director of National Intelligence James R. Clapper warned last year that the volume of malicious software on American networks had more than tripled since 2009 and that more than 60,000 pieces of malware are now discovered every day. The United States, he said, is undergoing "a phenomenon known as 'convergence,' which amplifies the opportunity for disruptive cyberattacks, including against physical infrastructures." ("Digital convergence" is a snazzy term for a simple thing: more and more devices able to talk to each other, and formerly separate industries and activities able to work together.) Just because there's more malware, however, doesn't mean that attacks are becoming easier. In fact, potentially damaging or life-threatening cyberattacks should be more difficult to pull off. Why? Sensitive systems generally have built-in redundancy and safety systems, meaning an attacker's likely objective will not be to shut down a system, since merely forcing the shutdown of one control system, say a power plant, could trigger a backup and cause operators to start looking for the bug. To work as an effective weapon, malware would have to influence an active process -- but not bring it to a screeching halt. If the malicious activity extends over a lengthy period, it has to remain stealthy. That's a more difficult trick than hitting the virtual off-button. Take Stuxnet, the worm that sabotaged Iran's nuclear program in 2010. It didn't just crudely shut down the centrifuges at the Natanz nuclear facility; rather, the worm subtly manipulated the system. Stuxnet stealthily infiltrated the plant's networks, then hopped onto the protected control systems, intercepted input values from sensors, recorded these data, and then provided the legitimate controller code with pre-recorded fake input signals, according to researchers who have studied the worm. Its objective was not just to fool operators in a control room, but also to circumvent digital safety and monitoring systems so it could secretly manipulate the actual processes. Building and deploying Stuxnet required extremely detailed intelligence about the systems it was supposed to compromise, and the same will be true for other dangerous cyberweapons. Yes, "convergence," standardization, and sloppy defense of control-systems software could increase the risk of generic attacks, but the same trend has also caused defenses against the most coveted targets to improve steadily and has made reprogramming highly specific installations on legacy systems more complex, not less.

#### Nuclear war is likely

Perkins, 7 – Staff Writer @ My Wire (Sid, [http://www.mywire.com/a/ScienceNews/Sudden-chill-even-limited](http://www.mywire.com/a/ScienceNews/Sudden-chill-even-limitednuclear/2906831?page=2)

[nuclear/2906831?page=2](http://www.mywire.com/a/ScienceNews/Sudden-chill-even-limitednuclear/2906831?page=2))

"While there's a perception that a nuclear build down by the world's major powers in recent decades has somehow resolved the global nuclear threat, a more accurate portrayal is that we're at a perilous crossroads," says Brian Toon, an atmospheric scientist at the University of Colorado at Boulder and one of the researchers who first floated the idea of a nuclear winter. Today's threat stems from a variety of factors, Toon and his colleagues say. Nations are joining the nuclear club with unnerving regularity, others are suspected of having ambitions to do so, and dozens more have enough uranium and plutonium on hand to build at least a few Hiroshima-size bombs. The leaders of some of these nations may have no qualms about using such weapons, even against a nonnuclear neighbor. Increasingly, people are living in large cities, which make tempting targets. Finally, the results of today's climate simulations--which are much more sophisticated than those that were available in the 1980s--suggest that even a nuclear exchange of just a few dozen weapons could cool Earth substantially for a decade or more. The current combination of nuclear proliferation, political instability, and urban demographics "forms perhaps the greatest danger to the stability of human society since the dawn of man," warns Toon. Recognizing this danger, on Jan. 17, the Bulletin of the Atomic Scientists moved the minute hand on its "doomsday clock" 2 minutes closer to midnight. "It's been 60 years since nuclear weapons have been used in war, but the psychological barriers that have helped limit the potential for the use of nuclear weapons in this country and others seems to be breaking down" says Lawrence M. Krauss, a member of the group and a physicist at Case Western Reserve University in Cleveland. JOIN THE CLUB In 1950, there were two nuclear powers--the United States, whose Manhattan Project developed the bombs dropped on Hiroshima and Nagasaki at the end of World War II, and the Soviet Union, which conducted its first nuclear test in August 1949. By 1968, when the Treaty on Non-Proliferation of Nuclear Weapons was proposed, France, the United Kingdom, and China had joined the pack. Outside that treaty from its beginning, India, Pakistan, and North Korea have developed weapons and conducted tests. Also, Israel is widely suspected of possessing nuclear weapons. A handful of nations once possessed nuclear weapons but abandoned them. Belarus, Ukraine, and Kazakhstan inherited warheads when the Soviet Union fell apart in 1991 but have since transferred those weapons to Russia. South Africa has admitted constructing, but later disassembling, six nuclear devices, possibly after one test, says Toon. In total, he says, at least 19 nations are now known to have programs to develop nuclear weapons or to have previously pursued that goal. Many more nations, through their power-generating and research nuclear reactor programs, have the raw materials for constructing nuclear devices, he and his colleagues reported in December 2006 at a meeting of the American Geophysical Union in San Francisco. Those raw materials aren't scarce: At least 40 nations have enough uranium and plutonium on hand to construct substantial nuclear arsenals. Disturbingly, some of the nations with abundant bomb material have or have recently had strained relations with their neighbors. At the end of 2003, for example, Brazil probably had enough plutonium on hand to make more than 200 Hiroshima-size bombs, while its former rival Argentina could have produced 1300 such bombs. Although North Korea probably has enough nuclear material to fabricate only a handful of the devices, South Korea has enough plutonium to construct at least 4,400. Pakistan could make 100 or more nuclear bombs, and its neighbor India could put together well over 10 times as many, the researchers estimate. Today, at least 13 nations operate facilities that enrich uranium, plutonium, or both, says Toon. Altogether, 45 nations are known to have previous nuclear weapons programs, current weapons stockpiles, or the potential to become nuclear states.

## 2NC

### 2nc courts

Decentralized structure and relative disadvantages make circumvention inevitable

Eric Posner, Professor of Law, The University of Chicago Law School, and Adrian Vermeule, Professor of Law, Harvard Law School, March 2011, The Executive Unbound, p. 29-31

COURTS

Problems for Judicial Oversight of the Executive Information asymmetries

The gap between the executive and the judiciary, in information and expertise, is even wider than between the executive and Congress. Whereas many legislators have a narrowly defined field of policy expertise, particularly in the House of Representatives, federal judges are mostly generalists, barring a few specialized courts. Furthermore, the partial insulation from current politics that federal judges enjoy, by virtue of life tenure and salary protection, brings with it a kind of informational impoverishment.25 Legislators, who must please other people at least some of the time, interact with the outside world far more systematically than generalist judges, whose main source of information is the briefs and arguments of litigants. When the executive says that resolving a plaintiff's claim would require disclosure of "state secrets," with dangerous consequences for national security, judges know that either an ill-motivated or a well-motivated executive might be making the claim and that they have no easy means to assess whether the claim is credible.

Collective action problems and decentralization

If congressional monitoring of executive discretion is hampered by collective action problems, judicial monitoring is hampered by a similar condition, the decentralized character of the federal judiciary. The judiciary too is a "they," not an "it," and is decentralized along mainly geographic lines. Different judges on different courts have different views of the costs and benefits of oversight and of the appropriate level of monitoring. **The Supreme Court is incapable of fully resolving these structural conflicts.** Because the Court presides over a large institutional system and lacks the capacity to review more than a fraction of cases submitted to it, its role is restricted by necessity to the declaration of general principles of law and episodic, ad hoc intervention in the system.

The legitimacy deficit

In the federal system, appointed judges are not overtly partisan, though they are sometimes covertly so. The very condition that enables this relative lack of overt politicization—that federal judges are, at least in one familiar conception, legal technocrats appointed for their expertise rather than elected on a partisan basis—also creates a serious legitimacy deficit for the judiciary, understanding legitimacy in a strictly sociological sense.26 Aroused publics concerned about issues such as national security may have little tolerance for robust judicial oversight of executive discretion, which can always be condemned as "activism" by "unelected judges?' This charge sometimes succeeds and sometimes fails, but for the judges it is always a concern that acts as a drag on attempts to monitor executive behavior.

Here too, we do not claim that judicial oversight is a total failure. Doctrinal lawyers focus, sometimes to excess, on a handful of great cases in which judges have checked or constrained discretionary executive action, even in domains involving foreign policy or national security. Cases such as Youngstown,27 the Pentagon Papers case,28 and recently Boumediene v. Bush29 head this list. Undoubtedly, however, there is a large gap between executive discretion and judicial capacities, or even between executive discretion and the sum of congressional and judicial capacities working in tandem. In times of emergency, especially, both Congress and the judiciary almost always defer to the executive. Boumediene, which held that alleged enemy combatants detained at Guantanamo Bay could bring habeas corpus claims, was strictly procedural in character; it ordered no one to be released, something that the judges who issued it doubtless appreciated. Legislators and judges understand that the executive's comparative institutional advantages in secrecy, force, and unity are all the more useful during emergencies, so that it is worthwhile transferring more discretion to the executive even if it results in an increased risk of executive abuse. The result is that cases such as Boumediene are the exception, not the rule, especially during the heat of the emergency.

Empirics prove the executive won’t comply

Deborah Pearlstein, Woodrow Wilson School for Public and International Affairs, Visiting Scholar, Princeton University Law and Security Program Director, Fall 2005, ARTICLE: Finding Effective Constraints on Executive Power: Interrogation, Detention, and Torture, 81 Ind. L.J. 1255

As with the professional military and civil society, the federal courts have been far from uniform in their response to executive detention and interrogation policy; they have ruled for the executive as well as against. n157 Likewise, the government's response has, despite a series of adverse rulings, **seemed** at times startlingly intransigent in failing to recognize the constraints **judicial decisions appeared to place squarely on its conduct**. While the Supreme Court in 2004 deferred deciding the merits of the case of Jose Padilla (the U.S. citizen "enemy combatant" arrested at Chicago's O'Hare Airport), the Court's 8-1 ruling in the parallel case of U.S. citizen "enemy combatant" Yaser Hamdi (picked up in Afghanistan) rejected the President's broadest assertion of executive power--to hold U.S. citizens indefinitely as "enemy combatants" with no set process for resolving their status--and should have put the executive on notice that its existing strategy in Padilla's case was untenable. Yet it was not until November 2005--nearly a year and a half after the Court's Hamdi decision, and more than three years since Padilla's initial arrest--that the government finally indicted Padilla on criminal charges. And **even then, the government has refused to renounce the power to designate** Padilla himself--or any other U.S. citizen the President might choose--**an "enemy combatant**" again. n158 Finally, it is important to note that many of the most important questions of executive power to engage in coercive interrogation have yet to come before the courts in the post-September 11 era. n159

### 2nc overview

Their topic is limitless

Lobel, 8

Professor of Law, University of Pittsburgh Law School (Jules, “Conflicts Between the Commander in Chief and Congress: Concurrent Power over the Conduct of War” 392 OHIO STATE LAW JOURNAL [Vol. 69:391, <http://moritzlaw.osu.edu/students/groups/oslj/files/2012/04/69.3.lobel_.pdf>)

The third theory—based on the distinction between general rules and specific tactics—also has surface appeal, but is unworkable when applied to specific issues because the line between policy and tactic is too amorphous and hazy to be useful in real world situations. For example, how does one decide whether the use of waterboarding as a technique of interrogation is a policy or specific tactic? Even if it is arguably a specific tactic, Congress could certainly prohibit that tactic as antithetical to a policy prohibiting cruel and inhumane treatment. So too, President Bush’s surge strategy in Iraq could be viewed as a tactic to promote a more stable Iraq, or as a general policy which Congress should be able to limit through use of its funding power. Congress can limit tactical decisions to use particular weapons such as chemical weapons, nuclear weapons, or cluster bombs by forbidding the production or use of such weapons, or simply refusing to fund them.42 Congress could also, however, enact more limited and specific restrictions to prohibit the use of nuclear weapons or land mines in a particular conflict or even a particular theater of war. Indeed, most specific tactics could be permitted or prohibited by a rule. In short, the distinctions between strategies and tactics, rules and detailed instructions, or policies and tactics are simply labels which are virtually indistinguishable. Labeling an activity with one of these terms is largely a distinction without a difference. Accordingly, these labels are not helpful to the real problem of determining the respective powers of Congress and the President.43

Their interp moots the educational purpose of the topic

Lorber, JD University of Pennsylvania, January 2013

(Eric, “Executive Warmaking Authority and Offensive Cyber Operations: Can Existing Legislation Successfully Constrain Presidential Power?” 15 U. Pa. J. Const. L. 961, Lexis)

The broad purpose of the Resolution aimed to prevent the large-scale but unauthorized deployments of U.S. troops into hostilities. n187 While examining the broad purpose of a legislative act is increasingly relied upon only after examining the text and legislative history, here it provides further support for those two alternate interpretive sources. n188 As one scholar has noted, "the War Powers Resolution, for example, is concerned with **sending U.S.** troops **into harm's way**." n189 The historical context of the War Powers Resolution is also important in determining its broad purpose; as the resolutions submitted during the Vietnam War and in the lead-up to the passage of the WPR suggest, **Congress was concerned about its ability to effectively regulate the President's deployments of large numbers of U.S. troops** to Southeast Asia, n190 as well as prevent the President from authorizing troop incursions into countries in that region. n191 The WPR was a reaction to the President's continued deployments of these troops into combat zones, and as such suggests that Congress's broad purpose was to prevent the unconstrained **deployment of U.S. personnel**, not weapons, **into hostilities**.

### at w/m—people

Their we meet is legally imprecise

Healey & Wilson 13 – Jason Healey is the director of the Cyber Statecraft Initiative at the Atlantic Council. AND\*\*\* A.J. Wilson is a visiting fellow at the

Atlantic Council, 2013, “Cyber Conflict and the War Powers

Resolution: Congressional Oversight

of Hostilities in the Fifth Domain,” jnslp.com/wp-content/uploads/2010/08/11\_Dycus.pdf‎

War Powers and Offensive Cyber Operations¶ In a report submitted to Congress in November 2011, pursuant to a mandate in section 934 of the National Defense Authorization Act for fiscal year 2011, the Pentagon, quoting the WPR’s operative language, stated that:8 **Cyber operations might not include the introduction of armed forces personnel into the area of hostilities.** Cyber operations may, however, be a component of larger operations that could trigger notification and reporting in accordance with the War Powers Resolution. The Department will continue to assess each of its actions in cyberspace to determine when the requirements of the War Powers Resolution may apply to those actions. With the focus on “personnel,” this passage makes clear that the WPR will typically not apply to exclusively cyber conflicts. With cyber warriors executing such operations from centers inside the United States, such as the CYBERCOM facility at Fort Meade, Maryland, at a significant distance from the systems they are attacking and well out of harm’s way. Thus, there is no relevant “introduction” of armed forces. Without such an “introduction,” even the reporting requirements are not triggered. ¶ The view that there can be no introduction of forces into cyberspace **follows naturally from the administration’s argument that the purpose of the WPR is simply to keep US service personnel out of harm’s way** unless authorized by Congress. If devastating unmanned missions do not fall under the scope of the resolution, it is reasonable to argue that a conflict conducted in cyberspace does not either.

Hostilities implies units of US armed forces engaged in an active exchange of fire with opposing units–the best scholarship proves.

David W. Opderbeck 13, Professor of Law, Seton Hall University School of Law, 8/2/13, “Drone Courts,” <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2305315>

The WPR does not indicate that Congress has any authority to oversee or control the President’s deployment of armed forces in circumstances other than those involving actual or immanent “hostilities.” Recently the Obama administration has interpreted what “hostilities” means in this context very narrowly in connection with U.S. military involvement in the revolution that overthrew Libyan leader Mohammar Quadaffi.176 As Harold Koh, Legal Advisor to the Department of State, testified before the Senate Committee on Foreign Relations in 2011, “as virtually every lawyer recognizes, the operative term, ‘hostilities,’ is an ambiguous standard, which is nowhere defined in the statute.”177 Koh further noted that “[a]pplication of these provisions often generates difficult issues of interpretation that must be addressed in light of a long history of military actions abroad, without guidance from the courts, involving a Resolution passed by a Congress that could not have envisioned many of the operations in which the United States has since become engaged.”178 In light of these ambiguities, Koh testified, the Executive branch, in league with Congress, has engaged in casuistic efforts to determine when a particular situation does or does not involve “hostilities.”179 Koh noted that a particularly influential effort to frame principles for application was developed in 1975 by his predecessor Monroe Leigh and Defense Department General Counsel Martin Hoffmann, in a letter that has become canonical in this context.180 The Leigh-Hoffmann letter states that “hostilities” implies “a situation in which units of the U.S. armed forces are actively engaged in exchanges of fire with opposing units of hostile forces.”181 As Koh interpreted the Leigh-Hoffman letter, if the mission, exposure of U.S. forces, and risk of elevation are each limited, the military forces are not engaged in “hostilities.”182 Koh therefore argued that the involvement of U.S. forces in airstrikes against Quaddafi’s forces did not constitute “hostilities.” If the practice of previous administrations supplies guiding precedent, Koh’s argument was sound. As Koh noted, the WPR’s requirements for “hostilities” were not invoked for military operations in Grenada, Lebanon, El Salvador, Iraq (Operation Desert Storm), Kosovo, or Somalia.183 It seems that the use of combat drones for targeted strikes also would not ordinarily constitute “hostilities,” since there is usually no “exchange of fire” under such circumstances.

Into means entry—that excludes forces at home.

Meriam Webster 13, http://www.merriam-webster.com/dictionary/into

Full Definition of INTO

1—used as a function word to indicate entry, introduction, insertion, superposition, or inclusion <came into the house> <enter into an alliance>

There’s a clear brightline that excludes the aff.

Gordon Prather, Antiwar writer, 2009, Abolish Civilian Control Over Nukes?, www.antiwar.com/prather/?articleid=14210

Under the terms of the Atomic Energy Act of 1946, the responsibilities for all aspects of our nuclear energy related programs – not just nuclear weapons related – were invested in a **civilian agency**, the Atomic Energy Commission. The commission, itself, was comprised of five full-time civilian presidential appointees and a civilian General Manager who administered the day-to-day operations of four divisions: research, production, engineering and military applications. The Director of the Division of Military Application was required to be a serving member of the armed forces, and the Act established a Military Liaison Committee, comprised of Pentagon representatives, whose function was to provide the AEC its military requirements. Finally, the Act established the truly extraordinary Joint [House-Senate] Committee on Atomic Energy, endowed with both authorization and appropriation responsibilities. **The Act** further **authorized the President to** direct the AEC "from time to time" to **transfer** AEC civilian-produced nuclear "weapons to the armed forces for such use as he deems necessary, in the interest of national defense." Under the Act, the AEC was to be the "exclusive owner" of its facilities, but could let contracts to operate them. Hence, the AEC continued to contract with the Board of Regents of the University of California to operate – essentially pro bono – the Los Alamos nuclear-weapons design laboratory, and persuaded AT&T to establish the Sandia Corporation, to operate – essentially pro bono – the AEC nuclear-weapons engineering facility in nearby Albuquerque.

### at c/i

USAF = regular components of DOD

Farlex 13 The Free Dictionary By Farlex, “United States Armed Forces,” Accessed 7-23, http://www.thefreedictionary.com/United+States+Armed+Forces

Used to denote collectively only the regular components of the Army, Navy, Air Force, Marine Corps, and Coast Guard. See also Armed Forces of the United States.

US Code excludes weapons from the air force

US Code No Date – "10 USC § 8062 - Policy; composition; aircraft authorization" www.law.cornell.edu/uscode/text/10/8062

(a) It is the intent of Congress to provide an Air Force that is capable, in conjunction with the other armed forces, of—¶ (1) preserving the peace and security, and providing for the defense, of the United States, the Commonwealths and possessions, and any areas occupied by the United States;¶ (2) supporting the national policies;¶ (3) implementing the national objectives; and¶ (4) overcoming any nations responsible for aggressive acts that imperil the peace and security of the United States.¶ (b) There is a United States Air Force within the Department of the Air Force.¶ (c) In general, the Air Force includes aviation forces both combat and service not otherwise assigned. It shall be organized, trained, and equipped primarily for prompt and sustained offensive and defensive air operations. It is responsible for the preparation of the air forces necessary for the effective prosecution of war except as otherwise assigned and, in accordance with integrated joint mobilization plans, for the expansion of the peacetime components of the Air Force to meet the needs of war.¶ (d) The Air Force consists of—¶ (1) **the Regular Air Force, the Air National Guard of the United States, the Air National Guard while in the service of the United States, and the Air Force Reserve;**¶ (2) all persons appointed or enlisted in, or conscripted into, the Air Force without component; and¶ (3) all Air Force units and other Air Force organizations, with their installations and supporting and auxiliary combat, training, administrative, and logistic elements; and all members of the Air Force, including those not assigned to units; necessary to form the basis for a complete and immediate mobilization for the national defense in the event of a national emergency.¶ (e) Subject to subsection (f) of this section, chapter 831 of this title, and the strength authorized by law pursuant to section 115 of this title, the authorized strength of the Air Force is 70 Regular Air Force groups and such separate Regular Air Force squadrons, reserve groups, and supporting and auxiliary regular and reserve units as required.¶ (f) There are authorized for the Air Force 24,000 serviceable aircraft or 225,000 airframe tons of serviceable aircraft, whichever the Secretary of the Air Force considers appropriate to carry out this section. **This subsection does not apply to guided missiles.**¶ (g)¶ (1) Effective October 1, 2011, the Secretary of the Air Force shall maintain a total aircraft inventory of strategic airlift aircraft of not less than 301 aircraft. Effective on the date that is 45 days after the date on which the report under section 141(c)(3) of the National Defense Authorization Act for Fiscal Year 2013 is submitted to the congressional defense committees, the Secretary shall maintain a total aircraft inventory of strategic airlift aircraft of not less than 275 aircraft.¶ (2) In this subsection:¶ (A) The term “strategic airlift aircraft” means an aircraft—¶ (i) that has a cargo capacity of at least 150,000 pounds; and¶ (ii) that is capable of transporting outsized cargo an unrefueled range of at least 2,400 nautical miles.¶ (B) The term “outsized cargo” means any single item of equipment that exceeds 1,090 inches in length, 117 inches in width, or 105 inches in height.¶ (h)¶ (1) Beginning October 1, 2011, the Secretary of the Air Force may not retire more than six B–1 aircraft.¶ (2) The Secretary shall maintain in a common capability configuration not less than 36 B–1 aircraft as combat-coded aircraft.¶ (3) In this subsection, the term “combat-coded aircraft” means aircraft assigned to meet the primary.

The nuclear arsenal is under civilian control

Lanouette, former senior analyst for energy and science at the GAO, May 2009

(William, “Civilian Control Of Nuclear Weapons,” *Arms Control Association*, http://www.armscontrol.org/print/3643)

What exactly is meant by "civilian control" of nuclear weapons? Over the last seven decades, this elusive and evolving topic has blended and sometimes blurred two related concepts: authority and administration. The authority to order the use of nuclear weapons rests with the president, based on the U.S. Constitution. The administration of the nuclear complex and arsenal is based on legislation that created **a civilian nuclear authority** and specified new roles for the president. **Authority comes from the** "**civilian control of the military**" that the Constitution guarantees by giving Congress power to declare war while making the president commander-in-chief. As commander-in-chief, **the president and his civilian secretary of defense have the authority to order the use of nuclear weapons**. That authority has never been in dispute.

Those can’t be hostilities—this is a distinct violation

Raven-Hansen, professor of law at George Washington University, December 1998

(Peter, “The War Powers Resolution: Origins, History, Criticism and Reform: Chapter 2: Scope of the War Powers Resolution: Section 2,” 2 J. Nat'l Security L. 23, Lexis)

Law Enforcement Operations

Presumably, overseas law enforcement is principally conducted by small contingents of **DEA agents or other civilian police forces**, armed with sidearms or light automatic weapons. WPR uncertainty arises when U.S. Navy combat vessels are used on the high seas to interdict suspected shipping and when U.S. military forces augment DEA agents or civilian or foreign police units.

Despite theoretical uncertainties, however, the WPR has been ignored in this area. Therefore, considering the general lack of reaction from Congress, it is unlikely that the WPR's provisions cover small military detachments operating with the consent of foreign governments in their territory against nonmilitary foes. Additionally, **although the forces involved may be** "**likely to incur or inflict casualties**," n106 **their purpose is not to engage in any form of open warfare** against another sovereign nation or political group. In view of the legislative history of the WPR, **law enforcement operations are** not **what Congress envisioned when it used the word** **"**hostilities**."** n107

### at fisher

Congress intended to exclude the aff—this isn’t “ahistorical nonsense”

Peter Raven-Hansen October 1989; Professor of Law, George Washington University National Law Center “SPECIAL ISSUE: THE UNITED STATES CONSTITUTION IN ITS THIRD CENTURY: FOREIGN AFFAIRS: DISTRIBUTION OF CONSTITUTIONAL AUTHORITY: NUCLEAR WAR POWERS” The American Society of International Law, American Journal of International Law 83 A.J.I.L. 786; Lexis Nexis Academic

The statutory argument against delegation rests on the War Powers Resolution. Section 8(a)(1) of the Resolution provides that authorization for the introduction of U.S. armed forces into hostilitiesshall not be inferred from any provision of law (whether or not in effect before the date of the enactment of this joint resolution), including any provision contained in any appropriation Act, unless such provision specifically authorizes [such introduction] and states that it is intended to constitute specific statutory authorization within the meaning of this joint resolution. n35 Congress has never specifically delegated nuclear war power to the President. How specific that delegation would have to be to satisfy this provision of the Resolution is unclear. The Court has long applied a canon of liberal statutory construction to legislation affecting the war powers, n36 and it has declined "to require the Congress to employ magical passwords" to satisfy the same kind of rule of construction in the Administrative Procedure Act. n37 It would not make sense, moreover, to require appropriations acts or other legislation predating the Resolution to contain "magical passwords" acknowledging an intent to authorize military force within the meaning of the Resolution. Nor, in light of its legislative history, is it tenable to argue that the Resolution itself cut off all prior delegations of nuclear war power resting on appropriations. During debate on an early version of the war powers legislation, the Senate overwhelmingly defeated an amendment that would have required "the prior, explicit authorization of Congress" for first use of nuclear weapons. n38 Even Senator Eagleton, a vigorous opponent of presidential claims of independent war power, argued and voted against the amendment, explaining that "[t]his bill is not the proper vehicle for restricting the President's use of weapons previously appropriated by Congress to the executive arsenal. . . ." n39

### AT: Reasonability

#### Reasonability is impossible – it’s arbitrary and undermines research and preparation

Resnick, assistant professor of political science – Yeshiva University, ‘1

(Evan, “Defining Engagement,” Journal of International Affairs, Vol. 54, Iss. 2)

In matters of national security, establishing a clear definition of terms is a precondition for effective policymaking. Decisionmakers who invoke critical terms in an erratic, ad hoc fashion risk alienating their constituencies. They also risk exacerbating misperceptions and hostility among those the policies target. Scholars who commit the same error undercut their ability to conduct valuable empirical research. Hence, if scholars and policymakers fail rigorously to define "engagement," they undermine the ability to build an effective foreign policy.

### AT: Object Fiat

#### Internal constraints are key neg ground – it matches the academic debate

Sinnar, assistant professor of law at Stanford Law School, May 2013

(Shirin, “Protecting Rights from Within? Inspectors General and National Security Oversight,” 65 Stan. L. Rev. 1027, Lexis)

More than a decade after September 11, 2001, the debate over which institutions of government are best suited to resolve competing liberty and national security concerns continues unabated. While the Bush Administration's unilateralism in detaining suspected terrorists and authorizing secret surveillance initially raised separation of powers concerns, the Obama Administration's aggressive use of drone strikes to target suspected terrorists, with little oversight, demonstrates how salient these questions remain. Congress frequently lacks the [\*1029] information or incentive to oversee executive national security actions that implicate individual rights. Meanwhile, courts often decline to review counterterrorism practices challenged as violations of constitutional rights out of concern for state secrets or institutional competence. n1

These limitations on traditional external checks on the executive - Congress and the courts - have led to increased academic interest in potential checks within the executive branch. Many legal scholars have argued that executive branch institutions supply, or ought to supply, an alternative constraint on executive national security power. Some argue that these institutions have comparative advantages over courts or Congress in addressing rights concerns; others characterize them as a second-best option necessitated by congressional enfeeblement and judicial abdication.

#### CP focuses the debate on policy specifics – that’s key

Bradley, professor of law at Duke, and Morrison, professor of law at Columbia, May 2013

(Curtis A. and Trevor W., PRESIDENTIAL POWER, HISTORICAL PRACTICE, AND LEGAL CONSTRAINT, 113 Colum. L. Rev. 1097, Lexis)

**The relationship between law and presidential power is** **not merely a matter of academic debate**. **Whether**, **how**, **and to what extent presidential decisionmaking is subject to legal constraint is a central issue in the practice of modern government**, as illustrated by two recent episodes. First, in March 2011, the Obama Administration initiated military operations against Libya without congressional authorization, and then continued them past the statutory sixty-day limit set forth in the War Powers Resolution. Critics treated this episode as evidence that the executive branch did not take seriously constitutional and statutory limits [\*1100] on the use of military force. n8 Despite a low likelihood that courts would resolve the dispute, however, the Obama Administration offered public legal justifications, based heavily on arguments from historical practice, for both the initial deployment of military force in Libya and its continuation past the sixty-day point. n9 The felt need of the executive branch to justify itself in legal terms might be puzzling if the law were not playing any constraining role, but it is difficult to discern precisely what that role might have been.

Second, in the summer of 2011, a confrontation developed between the Obama Administration and Republican leaders in Congress over whether to raise the statutory debt ceiling to accommodate the government's increased borrowing. When a legislative extension of the ceiling appeared unlikely, some commentators suggested, based on either novel constitutional arguments or pure policy grounds, that the President could and should unilaterally exceed the debt ceiling. n10 Others insisted that such unilateral action would be unconstitutional because it would usurp Congress's constitutional authority "to borrow money on the credit of the United States." n11 President Obama did not attempt to address the issue unilaterally and instead continued to seek a legislative extension of the ceiling, which he ultimately obtained. Nor did the President attempt or even threaten a unilateral extension when the issue resurfaced in late 2012 and early 2013 in connection with the so-called "fiscal cliff," by which time such an action appeared to be off the table altogether. It might be that the President felt constrained not to pursue a unilateral extension by legal concerns about such a course of action, but it is also possible that political considerations would have driven the President to a similar decision. n12 In this context too, then, the role of law is unclear.

Episodes like these underscore the importance of thinking carefully not just about the general question whether the President is constrained by law, but **more particularly about what it means to say that the President is so constrained**, **and how such constraints operate**. On issues of executive power unlikely to come before the courts, one familiar idea - espoused by James Madison in The Federalist Papers - is that members of Congress have sufficient personal motivations and professional resources to protect Congress's institutional prerogatives [\*1101] from executive incursions. n13 A number of scholars have concluded, however, that such checking is not as consistent or robust as is often assumed, and that whether Congress curbs presidential power depends more often on partisan political considerations or situation-specific policy objections than on any systematic effort to protect institutional prerogatives. n14 If Congress is not as reliable a check on presidential power as Madison and others envisioned, there is arguably a greater need for other mechanisms of constraint in this area, including legal constraints. In the absence of judicial review, however, it is fair to ask how the legal constraints might operate.

### --- Durable Fiat / AT: Rollback

#### And executive orders have the force of law:

Oxford Dictionary of English 2010

(Oxford Reference, Georgetown Library)

executive order

▶ noun US (Law) a rule or order issued by the President to an executive branch of the government and having the force of law.

#### Executive orders are permanent

Duncan, Associate Professor of Law at Florida A&M, Winter 2010

(John C., “A Critical Consideration of Executive Orders,” 35 Vt. L. Rev. 333, Lexis)

The trajectory of the evolution of the executive power in the United States, as seen through the prism of the growing edifice of executive orders have become increasingly formal and permanent. The evolution of executive power in the United States has shifted executive orders from mere legislative interpretation to ancillary legislation. **Executive orders continue to influence subsequent presidents**. The elaboration of executive order promulgation, as an autopoietic process was necessary to the very existence of presidential power. That is, the mechanisms for formalizing executive orders have always existed in the executive power in a government whose legitimacy lives in written pronouncements treated as delicate, sacred, and worth protecting at all cost. **Part of this formalization is** a consequence of **the reverence for precedent**. Thus, **prior presidents influence future presidents**, less because future presidents wish to mimic their predecessors, but more **because future presidents act within an edifice their predecessors have already erected**. Thus, the growth and elaboration of an ever more robust structure of executive orders resembles an autopoietic process. n561

#### CP constrains future Presidents – it creates a legal framework

Brecher, JD University of Michigan, December 2012

(Aaron, Cyberattacks and the Covert Action Statute, 111 Mich. L. Rev. 423, Lexis)

The executive might also issue the proposed order, even though it would limit her freedom in some ways, because of the possible benefits of **constraining future administrations** or preempting legislative intervention. n149 For example, in this context, an administration may choose to follow the finding and reporting requirements in order to convince Congress that legislative intervention is unnecessary for proper oversight. This is acceptable if the covert action regime is in fact adequate on its own. Moreover, if greater statutory control over cyberattacks is needed, the information shared with Congress may give Congress the tools and knowledge of the issue necessary to craft related legislation. n150 Additionally, while executive orders are hardly binding, **the inertia following adoption of an order may help constrain future administrations**, which may be more or less trustworthy than the current one. **Creating a presumption through an executive order** also **establishes a stable legal framework** for cyberattacks that allows law to follow policy in this new field, and permits decisionmakers to learn more about the nature of cyberoperations before passing detailed statutes that may result in unintended consequences.

#### Executive order binds future administrations

Jensen, JD Drake University, Summer 2012

(Jase, FIRST AMERICANS AND THE FEDERAL GOVERNMENT, 17 Drake J. Agric. L. 473, Lexis)

At the historic 1994 meeting with the tribes, President Clinton signed a Presidential memorandum which provided executive departments and agencies with principles to guide interaction with and policy concerning Indian tribes. n83 President Clinton sought to ensure that the government recognizes that it operates on a government-to-government relationship with the federally recognized tribes. n84 Agencies were to consult with tribes prior to taking action which would affect them, consider tribal impact regarding current programs and policies, and remove barriers to communication. n85

Toward the end of Clinton's second term he issued an executive order which provided the executive branch with more detailed directions on how to implement the broader policy of government-to-government tribal consultation set forth in the 1994 memorandum. n86 **The order had a stronger binding effect on future administrations**. President Clinton signed Executive Order 13175 on November 6, 2000, and the order went into effect on January 5, 2001. n87 The order was binding upon all executive departments and executive agencies and all independent agencies were encouraged to comply with the order on a voluntary basis. n88 Each agency was required to designate an official which is to head the crea [\*486] tion of a tribal consultation plan, prepare progress reports, and ensure compliance with Executive Order 13175. n89

### Sust

Only the presidential leadership solves—plan is meaningless

Janne Nolan, Ph.D., George Washington University IR Professor, James Holmes, 2008, The Bureaucracy of Deterrence, Bulletin of the Atomic Scientists, 64.1

Among the many factors working against fundamental change is the inherent resilience of bureaucratic culture. Large organizations tend to defend familiar, long-standing ways of doing business, resisting even urgently needed change. It is hard to get agencies to work together to undertake new directions even when told to do so by senior elected officials. As the Nuclear Posture Review conducted during the first-term Clinton administration illustrates, career officials are capable of mounting a devastating defense against initiatives put forth by political appointees. This is especially so when a president prioritizes other matters, defers too much toward certain agencies, or neglects the demands involved with executing such initiatives. **Only sustained, painstaking effort on the part of the** new president and senior appointees—no matter how heartfelt their aspiration for nuclear reform—**can** **possibly hope to surmount bureaucratic impediments to business as usual.** Bureaucratic institutions have two intrinsic shortcomings. First, they shroud themselves in administrative secrecy, defying public oversight and accountability. Second, well suited as they may be to routine functions, large organizations find it exceedingly difficult to shift course, even when the political context changes. Secrecy and resistance to change are particular hallmarks of the agencies responsible for determining the content and direction of U.S. nuclear strategy. For decades, the Strategic Air Command (now the U.S. Strategic Command) has refined elaborate targeting plans and operational criteria to guide the use of nuclear forces in a crisis. But **this apparatus, charged with implementing the substance of deterrence, remained** largely **immune from** systemic **political oversight** or participation for decades.

Presidential directives are the only determinant of operational changes.

Rebeccah Heinrichs and Baker Spring 11-30-2012; Rebeccah Heinrichs is a Visiting Fellow and Baker Spring is F. M. Kirby Research Fellow in National Security Policy in the Douglas and Sarah Allison Center for Foreign Policy Studies, a division of the Kathryn and Shelby Cullom Davis Institute for International Studies, at The Heritage Foundation. “Deterrence and Nuclear Targeting in the 21st Century”

<http://www.heritage.org/research/reports/2012/11/deterrence-and-nuclear-targeting-in-the-21st-century>

Principles for Contemporary Targeting Policy Nuclear targeting policy is ultimately established through presidential guidance, which typically takes the form of a directive. Meeting the demands of this guidance, more than anything else, **determines the overall size and structure of the U.S. nuclear force**. According to a recent report from the Government Accountability Office (GAO), the current guidance was issued in 2002, although new presidential guidance may be issued as soon as later this year.[24 ] Following the application of more detailed guidance from the Secretary of Defense and the Chairman of the Joint Chiefs of Staff, Strategic Command produces the Nuclear Forces Employment Plan. Given the overall structure of this process, presidential guidance has the potential to do enormous damage to U.S. national security if it is conceptually flawed.

Only that matters

Keir A. Lieber, Georgetown University IR Professor, and Daryl G. Press is Associate Professor of Government at Dartmouth College, 2007, U.S. Nuclear Primacy and the Future of the Chinese Deterrent, http://www.dartmouth.edu/~dpress/docs/Press\_US\_Nuclear\_Primacy\_CS.pdf

Finally, the importance of the shift in the nuclear balance does not hinge on the U.S. willingness to launch a nuclear attack on Russia or China, let alone on an assumption that a nuclear strike against one of those countries is guaranteed to succeed. Chinese and Russian military planners pay close attention to changes in the U.S. arsenal and are likely to adjust their force levels, deployment patterns, and alert status accordingly. Just as American planners put greater stock in actual Chinese military capabilities than in China’s stated intentions, we assume that **Chinese and Russian leaders pay more attention to changes in American** military capabilities **rather than the declarations from Washington about** America’s **goals and intentions**. Therefore, even if the United States would never launch a preemptive nuclear strike, the pursuit of nuclear primacy should be expected to trigger a response among U.S. adversaries.

Declaratory policy solves operational changes

Scott Sagan, Stanford University International Security and Cooperation Co-Director, Political Science Professor, June 2009, The Case for No First Use," Survival 51.3,

The second objection is that no-first-use declarations are simply not believable. For example, the late Michael Quinlan wrote in 2007 that 'I have never seen merit in promises of “no first use” such promises are in the last analysis mere window-dressing that can not change reality'.39 This sweeping criticism is unpersuasive for three reasons. Firstly, military leaders pay close attention to declaratory policy in ways that influence their plans and proclivities, at least in the United States. Secondly, declaratory policy is not about making 'promises' about future restraint; it is about signalling intent and therefore shaping the expectations of allies and adversaries alike, even if some residual uncertainty remains. Thirdly, no-first-use doctrines can be made more credible (that is, more likely to be believed), to the degree that nuclear operations the alert levels, military exercises, and deployments that produce the perceptions of 'reality' on which Quinlan rightly focused conform to such a doctrine. If a US declaration of no first use were followed by a decision to take US strategic nuclear weapons off their current high state of alert or if a major R&D programme to develop conventional offensive and defensive forces against chemical and biological weapons were instituted, for example, the credibility of a no-first-use declaratory policy would be significantly enhanced.

## 1NR

### t

Clifford Johnson, no date , theoretical physicist at the University of Southern California, CPSR/Palo Alto , computer professionals for corporate responsibility, <http://cpsr.org/prevsite/publications/newsletters/old/1980s/Spring1987.txt/>, “The Constitution

vs. The Arms Race”

The following text is excerpted from a speech first delivered at the University

of British Columbia, Vancouver, in November, 1986.

An Update on

Johnson v. Weinberger

Johnson v. Weinberger, C86 3334, was filed on June 17, 1986, in the U.S.

District Court, San Francisco. It alleges that the present U.S. Iaunch on

warning capability (LOWC) is unconstitutional on eight counts. The basic

argument is that the LOWC is error-prone, in that a false warning of attacking

missiles could trigger a massive accidental launch. Thus, it usurps the power of

the Congress to commence war. It also delegates nuclear release authority to the

military in violation of the Atomic Energy Act (42 USC 2122). Because the LOWC

is a peacetime threat to Johnson's life, it violates his due process rights.

Weinberger filed a motion to dismiss, arguing: "The atomic Energy Act does not

cover the military use or application of atomic weapons and Johnson cites 42 USC

2122 in error as authority . . . The Plaintiff has filed to show that . . . only

the President is vested by law with authority to launch such weapons."

Weinberger accused Johnson of "a tortured reading of the act." Newsweek ran a

story (Jan. 5, 1387) on Weinberger's response. Johnson replied, "Defendant's

chilling contention that the Atomic Energy Act does not guarantee civilian

control over the first launch of nuclear weapons is appalling, given his day-to-

day control of thousands of nuclear weapons on hair-trigger alert."

Weinberger responded with a sworn statement by Pentagon nuclear warplanner

Colonel Hope: "Only the President can authorize the use of nuclear weapons.

There are positive controls to preclude the use of such weapons without

Presidential authority. The specific details of our nuclear release procedures

are highly classified." But Weinberger did not admit error re the Atomic Energy

Act. He argued simply that the President had inherent Commander-in-Chief powers

to operate the alleged LOWC, regardless of the degree of automation,

congressional disapproval, and risk to Johnson's life.

### turns case

Shifting nuclear planning at all destroys deterrence

John Norton Moore, Walter L. Brown Professor of Law at the University of Virginia School of Law, 1987, First Use of Nuclear Weapons : Under the Constitution, Who Decides?, p. 30-2

Constitutional constraints can, if warranted, always be changed by constitutional amendment. And, short of this ultimate legal issue of constitutional revision, there is a dynamic interrelation between legal appraisal and policy proposals concerning structural changes in the mechanism for conduct of foreign policy. Accordingly, **any effort to artificially prohibit consideration of policy considerations** in responsible performance of all intellectual tasks **in legal appraisal** **— particularly in an area of such enormous human concern as war prevention** — **would seem grotesque**. I would briefly suggest the following as policy reasons that seem to me persuasive, even if the law were not negative, in decisively rejecting the FAS proposal: First, I believe the **FAS proposal would** at least marginally increase the risk of war and possible use of nuclear weapons — despite Dr. Stone ’ s clear intention to reduce the risk of war and nuclear use. For all its obvious problems, I believe the doctrine of flexible response in NATO is — at current comparative force levels — a significant contribution to deterrence. To modify that doctrine, even by the FAS procedural proposal, would, I believe, somewhat — and perhaps substantially — reduce deterrence. Page 31 **Deterrence would be affected by the probable** (and at least possible) **added time required to fully involve a congressional committee and to await a decision from such a body**. What, for example, is the possibility that key congressional committee members might be out of the country or otherwise unavailable during a crisis or that they simply could not agree in time? Deterrence would be affected by the enhanced likelihood of a negative decision if a veto were provided any additional decision maker. Indeed, it might be subject to reduction if a potential attacking power simply believed that a majority of any special committee favored no first use. And finally, since any no first use decision is only likely to arise in a setting where there has been a massive illegal attack and conventional forces are unable to hold, the perception in NATO Europe may well be that the purpose of such a congressional check is to permit a decoupling of the security of NATO and American strategic forces. This perception seems to me highly likely to result from such a policy whatever its motivation. And this perception alone could reduce deterrence, as well as the NATO political bond with the United States. The proposal might also serve to reduce deterrence by convincing a potential adversary that nuclear weapons might not be authorized in response but that if they were authorized then a preemptive nuclear strike might still be launched before retaliation because of the likely notice attendant on committee authorization. It is possible that committee authorizaton — or even erroneously perceived committee authorization — if committee decisions were secret, would even trigger a nuclear attack out of fear of such a first use. And if committee real time nuclear use decisions are to be different than simply a no first use or other congressionally mandated general policy, then the committee would have specific information concerning a decision to use nuclear weapons. Such an added intelligence target would be likely to trigger an enormous intelligence effort directed at the committee — and possible reduction in deterrence based even on leaks of erroneous information. To decrease the size of the committee and reduce this risk reduces any policy “ check ” offered by the committee but to have a larger more useful “ check ” increases this risk — probably geometrically rather than arithmetically under normal principles concerning access to intelligence information. And if the FAS proposal were clarified to involve the full Congress, I would regard these timing and secrecy issues as very substantially undermining deterrence and thus unworkable in the real world. These problems of Congress as a whole making real time command decisions concerning the conduct of hostilities were, after all, precisely the characteristics that wisely led the Framers to reject a role for Congress in the operational chain of command. 20

Causes key delays

Robert Turner, President, U.S. Institute for Peace; formerly Senior Fellow, Center for Law and National Security, University of Virginia School of Law, 1987, First Use of Nuclear Weapons: Under the Constitution, Who Decides?, p. 47-8

C. Its “ Leadership Committee ” Cannot Practically Act at All Given the propensity of legislative leaders for foreign travel, the proposed **legislation is almost** comical. It makes no provision, for example, for a massive Soviet attack against Western Europe and the United States during a congressional recess or period of adjournment. Under the FAS proposal, unless the President could track down a majority of the leaders of Congress, his hands would be tied — even if the Soviets were murdering tens of millions of Americans with a “ Yellow Rain ” and nerve gas attack. And if you doubt that it might be difficult to even locate a majority of congressional leaders during a recess — much less bring them together for the kind of detailed classified briefing and discussion that would be necessary for them to make an informed decision — I urge you to reflect upon the difficulties President Ford had during the Easter Recess of 1975 when he tried to “ consult ” with congressional leaders about the humanitarian evacuation of DaNang, Vietnam. As recounted in his autobiography, President Ford explained: Not a single leader of either party remained in the capital. Three of them were in Greece, two in the People ’ s Republic of China, two in Mexico, one in Europe, and another in the Middle East. The rest were in twelve widely scattered locations in the United States. Obviously, the “ consultation ” called for by the [War Powers Resolution] was impossible. 48 Of course, that was essentially in peacetime, and Ford was eventually able to get a message to the Senate Majority Leader by sending a cable through the United States Embassy in Peking. If an attack were to take place while a congres ­ Page 48 sional leadership delegation was visiting Moscow, **the** FAS **proposal would** presumably leave the President’s hands permanently tied (unless of course Congress was able to meet and repeal the law). I haven ’ t even addressed the security problems that would accompany such a statutory scheme. In the event of a war, it would be extremely difficult for the President to convene the special congressional leadership committee without the event coming to the attention of the press. Given its willingness to publish other sensitive national security secrets, there is little reason to believe the Washington Post would not speculate that the President might be seeking permission to launch a massive nuclear strike on an adversary. Even if the meeting were in fact only to brief the congressional leaders on the progress of the conflict — or perhaps to seek their advice on a peace proposal — such speculation might well be present. And even without the help of the press, our adversaries have sophisticated intelligence services that would almost certainly go to great efforts to monitor the comings and goings of congressional leaders in time of crisis. Given a report that the President was meeting with the individuals empowered to authorize an American nuclear first strike, might not an adversary decide to strike the United States first? Perhaps it is not surprising that, when a milder version of the FAS plan was put to a vote on the Senate floor in 1972 — with the sponsorship of the Chairman of the Foreign Relations Committee — it was defeated by a vote of 68 to 10.

Low threshold b/c crisis stability is delicate

John Norton Moore, Walter L. Brown Professor of Law at the University of Virginia School of Law, 1987, First Use of Nuclear Weapons : Under the Constitution, Who Decides?, p. 33-4

The proposal by Dr. Jeremy Stone is an imaginative proposal that unequivocally deserves a fair, on the merits, appraisal of both its legal and policy dimensions. Despite its laudable intentions to reduce the risk of nuclear use, however**, it should just as unequivocally be rejected**. It is, on multiple grounds, unconstitutional even if the existing ambiguity in congressional power to regulate the presidential power as commander in chief to conduct constitutionally authorized hostilities were to be resolved in favor of a congressional power to establish a general no first use policy — a conclusion which is far from established. And, **even more decisively, its real world effect would be to reduce deterrence and crisis stability**. There are more promising policies that deserve our attention in reducing the risk of nuclear use. All such alternative policies have in common an effort to deal directly with the unhappy real dilemma faced by NATO in light of the massive Warsaw Pact conventional forces and rough equivalence between United States and Soviet forces at the central strategic level. In contrast, the no first use proposals, in both their substantive and procedural variants, seem largely cosmetic and suggest the exchange during the Constitutional Convention when it was proposed that the armed forces of the United States be constitutionally limited to 3,000 men. General Washington was heard to whisper that perhaps the Constitution should also deny any foreign power the right to invade the United States with more than 3,000 troops.

Causes nuclear war

Robert Turner, President, U.S. Institute for Peace; formerly Senior Fellow, Center for Law and National Security, University of Virginia School of Law, 1987, First Use of Nuclear Weapons: Under the Constitution, Who Decides?, p. 37

One of the most alarming legislative proposals in recent years in my view is the proposal by the Federation of American Scientists (FAS) to empower a committee of congressional leaders with a veto over a presidential decision to use nuclear weapons in response to a foreign attack — unless the aggressor state used such weapons first. 1 I don ’ t question the sincerity of the people who propose this legislation, and I certainly share their view that a nuclear war would be horrendous. But after looking it over **I can ’ t find a single element in the proposed bill that is useful**. Such a law would in my view be flagrantly unconstitutional on at least two grounds, and rather than promote peace the bill would weaken our deterrent and make both conventional and nuclear war more likely.

### at: bradley

Detainee rulings don’t violate the PQD

Delery et al ‘12

STUART F. DELERY Principal Deputy Assistant Attorney General Civil Division RUPA BHATTACHARYYA Director, Torts Branch MARY HAMPTON MASON Senior Trial Counsel D.C. Bar No. 427461 /s/ Paul E. Werner PAUL E. WERNER (MD Bar, under LCvR 83.2(e)) Trial Attorney United States Department of Justice, “DEFENDANTS’ MOTION TO DISMISS,” <http://www.ccrjustice.org/files/Dec%2014-2012%20%20Defendants'%20Motion%20to%20Dismiss.pdf>

That is not to say that every claim that “touches foreign relations,” Baker, 369 U.S. at 211, or involves national security necessarily implicates the political question doctrine. For example, courts “have been willing to hear habeas petitions (from both U.S. citizens and aliens)” that implicate national security and foreign relations. Al-Aulaqi, 727 F. Supp. 2d at 49 (citing Boumediene v. Bush, 553 U.S. 723 (2008)). That is because “the Suspension Clause reflects a textually demonstrable commitment of habeas corpus claims to the Judiciary.” Id. (quotation marks omitted). But there “is no ‘constitutional commitment to the courts for review of a military decision to launch a missile at a foreign target.’” Id. at 50 (quoting El-Shifa, 607 F.3d at 849). Such matters “are textually committed not to the Judiciary, but to the political branches.” Id. Accordingly, the sorts of inquiries that would be triggered by any substantive examination of the Plaintiffs’ allegations squarely implicate issues with a “textually demonstrable constitutional commitment” to the political branches, and the first Bakerfactor warrants dismissal.

### at: nukes uq

War power arguments make no sense in the context of nuclear policy

Lori Damrosch, Columbia University Associate Law Professor, 1986, BOOK REVIEW: BANNING THE BOMB: LAW AND ITS LIMITS, 86 Colum. L. Rev. 653

Professor Miller's sketch of a **constitutional argument, while** doubtless **creative, is unsatisfying** because **it fails to confront, and** indeed **obscures, the serious constitutional issues inherent in the reality of living with nuclear weapons**. No lawyer's brief or judicial declaration can make nuclear weapons disappear, and thus the constitutional dialogue should grapple with how best to control them, not just how to condemn them. The proposition that "nuclear weapons are unconstitutional" may be an attention-getting slogan, but it does not go very far toward addressing the real problems of governance that concerned constitutional lawyers should have on their agenda. The heart of the constitutional conundrum of nuclear weapons is whether our instruments of democratic governance are capable of lowering the risk of nuclear conflict. Since the judiciary has little if any role to play in that endeavor, n15 we must turn in the first instance to the political branches of government and ultimately to gross-roots forms of political initiative. Fortunately, Professor Miller seems to recognize that the locus of constitutional responsibility for setting nuclear policy is with Congress and the President (pp. 243-47, 383-84), and there is considerable force to his criticism of Congress for having abdicated its share of that responsibility (p. 246). But **it is not enough to chastise Congress for passivity or excessive deference to the executive**: after all, Congress has been actively involved in the authorization of successive nuclear programs throughout the postwar era. n16 The real concerns are whether anything can be done within our constitutional system to enhance the role of Congress in efforts toward arms limitation. Are **there institutional disabilities -such as inadequate information or expertise, vulnerability to breaches of security, or porkbarrel politics** -**that prevent Congress from assuming this role**? If, so then the legal profession should rise to the challenge of designing constitutional, statutory, or legislative rule-ma8king techniques to make Congress a more effective participant in restraining the arms race. n17 The essays by Professor Miller and pieces by other contributors attack the constitutional legitimacy of the existing system for initiation of nuclear conflict solely on presidential authority (pp. 243-46, 339-54, 378). n18 Of course, since Miller's principal contention is that any resort to nuclear weapons would be unconstitutional, questions of allocation of constitutional power between Congress and the President cannot really be a central concern in his conceptual framework; nowhere does he suggest that the perceived constitutional defects could be cured by an express congressional declaration of war coupled with a specific authorization to the President to make a particular use of nuclear weapons. Nonetheless, the roles of the President and Congress in making the fateful decision as to whether and how nuclear weapons might ever be used deserve thorough constitutional analysis. Ironically, one of the most stimulating contributions to the constitutional discussion of presidential and congressional responsibilities for nuclear decision making has come from a nonlawyer (not represented in this volume), Jeremy [\*659] Stone of the Federation of American Scientists. Dr. Stone's recent article, provocatively entitled Presidential First Use Is Unlawful, n19 develops in detail the propositions that he and the Federation have been asserting for more than a decade: that the existing system of presidential control is unconstitutional, and that in any event Congress should exert its constitutional prerogatives to enact a legally binding mechanism for ensuring that congressional leaders participate in any United States decision to cross the nuclear threshold. One need not abandon a healthy skepticism about the merits of Dr. Stone's concept to recognize that he and other nonlawyers have made a valuable contribution in spurring legal debate over where the responsibility for nuclear decisions should lie in a constitutional framework. n20 Nuclear Weapons and Law would have been considerably enriched by the addition of one or more articles addressed to these difficult problems of bringing constitutional analysis to bear on actual problems of command and control. But the constitutional analysis should also be beyond a critical assessment of the responsibilities of the branches of the federal government concerning nuclear matters. If we are to accept the editors' premise of a purposive, pervasive constitutionalism transcending the usual paradigms of judicially enforceable restraints on governmental action, then we will have to understand how this view of the Constitution affects the rights and obligations of all citizens. Professor Miller and his colleagues tell us both that the government has affirmative duties to protect the citizenry from the threat of nuclear destruction and that the existing state of affairs only perpetuates and aggravates that threat. If our political leaders are as derelict in their duties as these authors imply, then our constitutional system should provide a means of redressing our collective grievance. Political science literature is already grappling with the reasons why nuclear problems seemingly elude democratic control. n21 Can constitutional law help find ways to reassert, or to begin to assert, such control? Since not even the authors realistically expect the courts to involve themselves in the control of nuclear weapons, then constitutional power must be found at its source -with the people. The people in a [\*660] democratic society are of course capable of giving explicit constitutional status to their renunciation of nuclear weapons, just as they may forswear such weapons by treaty or by declared public policy. Professor Miller and his colleagues would derive a similar constitutional value from the framers' creation of 1787, not on the basis of its words or the framer's intentions, to be sure, but rather as implicit in their purpose to create a lasting democratic society. The problem with basing a constitutional argument against nuclear weapons on the desire for self-preservation is that no one has yet devised a better way to defend the United States against nuclear destruction than through the maintenance of a credible nuclear force to deter the execution of external threats. The story is told that a proposal at the Constitutional Convention to place a limit on the number of men in the United States army and naval forces was rejected when General Washington pointed out that the Constitution would likewise have to prohibit any foreign force from invading the United States with more than that number. n22 The suggestion of a prohibition inherent in the Constitution against the very weapons targeted at us by another superpower has a similar ironic quality.

### at: no link

The plan destroys presidential war power

John Norton Moore, Walter L. Brown Professor of Law at the University of Virginia School of Law, 1987, First Use of Nuclear Weapons : Under the Constitution, Who Decides?, p. 29-30

As this summary suggests, the real constitutional issue is not the power of the President to conduct hostilities absent specific statutory authority, but in what areas, if any, Congress can restrict that power regard it as a paradigm principle of American constitutional law that the President may conduct hostilities against an attacking nation, including in extremis making decisions to employ nuclear weapons in settings where, as here, Congress has not enacted any prohibition on such use. Thus, a premise of the Stone essay, embodied in its title, that “ Presidential First Use is Unlawful, ” seems to me, in a setting in which Congress has even rejected a no first use approach, as simply hyperbole by Dr. Stone. 14 As indicated, the more interesting — and real — constitutional issue is the power of Congress to place policy limits on the exercise by the President of his power as commander in chief to conduct hostilities. **Congress certainly cannot intervene to make day to day tactical command decisions** but it is arguable that it may under its power to make “ rules for the government ” of the army, or its other congressional powers, place certain policy restrictions on command decisions, such as those limiting conduct of hostilities by area or with nuclear weapons. **Even this proposition, however, is unclear and** certainly many command decisions are constitutionally exclusive in the President. Thus, Dr. Berdahl points out that a distinguished ex Justice of the Supreme Court, Charles E.Hughes, among others, viewed congressional efforts at area restrictions on use of forces as impermissible. Hughes wrote: “ There is no limitation upon the authority of Congress to create an army and it is for the President as commander in chief to direct the campaigns of that army wherever he may think they should be carried on. ” 15 The pervasive ambiguity on this issue is illustrated by the classic language in the 1893 Court of Claims case of Swaim v. United States: The President cannot, under the disguise of military orders, evade the legislative regulations by which he in common with the Army must be governed; and Congress cannot in the disguise of “ rules for the government ” of the Army impair the authority of the President as commander in chief. 16 The case of Myers v. United States 17 makesit clear in an area exclusively entrusted to the President under the Constitution, whatever the precise parameters of such areas in relation to the Presidential power to conduct hostilities, Congress is **powerless** to encroach.

Their answers don’t pass the common sense test

Robert Turner, President, U.S. Institute for Peace; formerly Senior Fellow, Center for Law and National Security, University of Virginia School of Law, 1987, First Use of Nuclear Weapons: Under the Constitution, Who Decides?, p. 45-6

Dr. Stone is not a lawyer, and I shouldn ’t be too critical of his attempts at constitutional analysis. However he is an intelligent man, and when he quotes one historian and two law professors in support of this position, and then writes: “ Accordingly, most legal scholars would seem to admit ... that Congress had the right to control ” the decision to first use nuclear weapons — **he fails to pass even the “ straight face ” test**. Dr. Stone notes that under the Continental Congress when George Washington was made “ commander in chief ” he was placed under the control of a congressional committee. From this he argues: “ In other words, commander in chief, as delegates understood the title, was subordinate to a strategy committee of the Continental Congress. ” Let us be courteous and note that Stone is also not an historian. The Federalist Papers and other histories of the Constitution establish beyond doubt that a major reason for placing the control of foreign affairs and the direction of whatever military force Congress provided in the hands of an independent President was precisely because the earlier system had been such a disaster. As already noted, John Jay referred precisely to this early failure in The Federalist No. 64 when he wrote: “ So often and so essentially have we heretofore suffered from the want of secrecy and dispatch, that the Constitution would have been inexcusably defective if no attention had been paid to those objects. ” 41 After discussing a number of alternative plans, the Founding Fathers agreed upon a system of three separate, co equal and independent branches of government, and rejected the idea that the President would be simply a subordinate agent of the legislature. War related powers were given to both the Congress and the President. Congress was given control of the size of the army, and also a specific veto on any executive proposal to launch a “ war ” against another state, as a guard against presidential adventurism. As Jefferson phrased it in a 1789 letter to James Madison: “ We have already given ... one effectual check to the dog of war, by transferring the power of declaring war from the executive to the legislative body, from those who are to spend, to those who are to pay. ” 42 **But I am aware of no evidence that the Founding Fathers intended to place impediments in the path of the executive in the event war** was forced upon the country by foreign attack. Indeed, in The Federalist No. 70 Hamilton explained that “ [ e]nergy in the executive ” was “ essential to the protection of the community against foreign attacks. ” 43 He added: That unity is conducive to energy will not be disputed. Decision, activity, secrecy, and dispatch will generally characterise the proceedings of one man, in a much more eminent degree, than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished. This unity may be destroyed in two ways; either by vesting the power in two or more magistrates of equal dignity and authority; or by vesting it ostensibly in one man, subject in whole or in part to the controul and co operation of others, in the capacity of counsellors to him ... . 44 Thus the strategic and tactical decisions on how best to subdue an enemy in wartime are granted by the Constitution expressly to the President. Just as Congress would exceed its authority by enacting legislation directing the President during hostilities to deploy a particular unit from one hill to another, it would also exceed its proper authority by seeking to direct the President (at least in a defensive setting) to use or not to use a particular weapon in the existing arsenal against an armed enemy. As Professor Wright explained, Congress may not “ limit [the President ’ s] legal power as commander in chief to employ the means at his disposal ” to subdue the enemy. 45

Its micromanagement of the military on a whole new level

Stephen Carter, Associate Professor of Law, Yale University, 1986, The Constitution and the Prevention of Nuclear Holocaust: A Reaction to Professor Banks, http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=3261&context=fss\_papers

**Little of this would be effective, of course, in "micromanaging" the President's choice of particular weapons systems** in any particular conflict. Yet the **change in constitutional language** from "make" to "**declare" strongly suggests that nobody thought micromanagement of that nature was an appropriate congressional role**. Thus if other mechanisms for permitting the Congress to playa direct role in approving the expenditure of particular weapons seem awkward or unworkable, this may simply be evidence that the system cannot be adapted to that purpose. The Congress can and should decide whether the nation will fight and-on the theory I have pressed-whether the nation should stop. But **once the battle is joined, the Constitution surely leaves the choice of weapons to the President**.49

### at: skinner

It was a statutory claim which is distinct—that has nothing to do with the broader doctrine—the distinction has already been factored in.

Michel ‘13

Chris, Yale Law Journal, “There's no such thing as a political question of statutory interpretation: the implications of Zivotofsky v. Clinton,” Yale Law Journal. 123.1 (Oct. 2013): p253

Statutory constraints on the executive also proved decisive in other early cases. (12) By contrast, **no case in which the Court recognized a political question stemmed from a statute**. Political questions arose only from constitutional or common law challenges to actions within the unquestioned discretion of a political branch, such as the President's recognition of a foreign government. (13) Modern political questions have coalesced into two primary categories. (14) First, courts will not adjudicate claims arising from "a textually demonstrable constitutional commitment of the issue to a coordinate political department." (15) The Court has applied this principle to claims under the Republican Guarantee Clause, (16) the Impeachment Trial Clause, (17) and, in dicta, Congress's power to examine the qualifications of its members. (18) Second, courts will not adjudicate claims that present "a lack of judicially discoverable and manageable standards." (19) The Court has invoked this rationale to dismiss suits challenging a state's procedures for ratifying a constitutional amendment (20) and seeking to establish protocols for the National Guard. (21) But **in no case has the Supreme Court ever found a political question arising from a statutory claim**. (22) By contrast, lower federal courts have increasingly embraced statutory political questions, (23) especially as statutory claims against the executive multiplied after September H, 2001. (24) This approach has provoked some disagreement, most notably a concurring opinion by Judge Kavanaugh denouncing the D.C. Circuit's invocation of the political question doctrine in a statutory case involving the Clinton Administration's bombing of a pharmaceutical factory in Sudan. (25) Yet the trend has persisted. (26) Scholars have nonetheless largely avoided the issue of statutory political questions, focusing instead on broader puzzles about the doctrine's scope. (27) Two recent casebooks ask rhetorically whether the doctrine applies to statutory claims, (28) but no answer arrived--until Zivotofsky reached the Supreme Court. II. CLARIFYING THE DOCTRINE: ZIVOTOFSKY V. CLINTON Menachem Binyamin Zivotofsky's unlikely role in the political question drama began on October 17, 2002, when he was born to American-citizen parents in a Jerusalem hospital. (29) Three weeks earlier, Congress had passed a law providing that "[f]or purposes of the ... issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary of State shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel." (30) This statutory directive contradicted official State Department policy that Jerusalem's status remains unresolved. President Bush signed the bill but declined to enforce the provision, section 214(d), because it would "impermissibly interfere with the President's constitutional authority to ... determine the terms on which recognition is given to foreign states." (31) Zivotofsky's parents sued to enforce his statutory rights. The district court accepted the government's argument that the claim presented a political question, and the D.C. Circuit affirmed. (32) Applying the "textual commitment" branch of the doctrine, the court of appeals explained that "[t]he President's exercise of the recognition power granted solely to him by the Constitution cannot be reviewed by the courts." (33) The court noted that "[w]e have never relied on the presence or absence of a statutory challenge in deciding whether the political question doctrine applies," and concluded that "Zivotofsky's claim presents a nonjusticiable political question because it trenches upon the constitutionally committed recognition power." (34) In a concurring opinion, Judge Edwards disagreed with the political question rationale and argued that the court should invalidate the statute on the merits. (35) The Supreme Court reversed, holding by an eight-to-one margin that Zivotofsky's statutory claim did not present a political question. (36) Chief Justice Roberts's opinion pointedly explained that the "existence of a statutory right ... is certainly relevant to the Judiciary's power to decide Zivotofsky's claims," and chided the D.C. Circuit for "not even mention[ing] [section] 214(d) until the fifth of its six paragraphs of analysis." (37) Because neither party disputed the interpretation of the statute, "the only real question for the courts [was] whether the statute is constitutional." (38) Because the lower courts had not answered this question, the Court remanded the case to the D.C. Circuit. (39) (A year later, the court of appeals held S 214(d) unconstitutional on the merits. (40) The Court never stated categorically that statutory claims could not present political questions. But Justices Sotomayor and Alito felt obliged to write separate opinions clarifying their view that, in Justice Alito's words, "determining the constitutionality of an Act of Congress may present a political question" in some cases. (41) Justice Breyer's solo dissent would have found a political question in Zivotofsky based on "prudential considerations" including the sensitivity of Middle East diplomacy and the Court's lack of foreign policy expertise. (42) III. THE RULE AGAINST STATUTORY POLITICAL QUESTIONS Given the controversial legal and political issues at stake, Zivotofsky generated surprisingly little attention. (43) The limited commentary has rejected a reading that makes "an entire category of cases" based on statutory claims "inherently justiciable." (44) But the Court's reasoning supports this broader result. Moreover, rejecting statutory political questions squares with longstanding doctrine, **vindicates structural separation of powers principles, and advances prudential considerations like access to courts** and clarity of the law. This Part thus contends that the rule against statutory political questions should be recognized as the law of the land.

## 2NR

### Card

New administration solves and NPT failure is non-unique—here’s the conclusion—blue highlighting!

Bunn & du Preez 07 - First general counsel @ U.S. Arms Control and Disarmament Agency & Director of the International Organizations and Nonproliferation Program @ Monterey Institute of International Studies. [George Bunn (Helped negotiate the nuclear Nonproliferation Treaty and later became U.S. ambassador to the Conference on Disarmament) & Jean du Preez, “More Than Words: The Value of U.S. Non-Nuclear-Use Promises,” Arms Control Today, July/August 2007, pg. http://www.armscontrol.org/act/2007\_07-08/NonUse]

Taking Back the Promises: The Clinton and Bush Legacies Soon after the U.S. representative made the promise of nonuse before the Security Council in 1995, the Department of Defense began urging exceptions to it. Probably as a result of this view, the Clinton administration argued that even under a nonuse commitment in a treaty such as the Latin American nuclear-weapon-free zone treaty, the United States would not be bound to refrain from a nuclear response to a chemical or biological attack from a member of the nuclear-weapon-free zone. President Bill Clinton’s secretary of defense, William Perry, said publicly that “if some nation were to attack the United States with chemical weapons, then they would fear the consequences of a response with any weapon in our inventory…. We could make a devastating response without use of nuclear weapons, but we would not forswear that possibility.“[6] In addition, NATO retained the option to use nuclear weapons first in future conflicts and, like the United States, reaffirmed its right to use nuclear weapons against a chemical or biological attack.[7] Thus, the United States and NATO refused to accept the NSAs as legally binding prohibitions on their use of nuclear weapons against non-nuclear-weapon NPT members. Toward the end of his administration, Clinton approved a modification of the B61-11 nuclear warhead for use as a “bunker buster” to attack biological or chemical weapons stored underground in hostile countries, weapons that U.S. officials believed could threaten the United States and its allies. Potential enemies, including some nonaligned countries, were suspected of digging deep underground bunkers for the purpose of sheltering biological or chemical weapons from enemy attack. The proposed bunker-buster nuclear weapons were intended to destroy these bunkers and what they contained before the biological or chemical weapons could be used in an attack on the United States or its allies. The Bush administration further changed U.S. nuclear weapons-use policy after the terrorist attacks of 2001. The Defense Department’s December 2001 Nuclear Posture Review (NPR), parts of which were made public in early 2002, reasserted the Clinton administration’s desire for earth-penetrating nuclear weapons to destroy biological weapons stored underground by an enemy. This position assumed first use of nuclear weapons in that engagement. In response to questions raised by this provision of the 2001 NPR, a Department of State spokesperson repeated the 1995 NSA that had been given by the United States to help gain votes for the extension of the NPT that year. He added that “the policy says that we will do whatever is necessary to deter the use of weapons of mass destruction against the United States, its allies, and its interests. If a weapon of mass destruction is used against the United States or its allies, we will not rule out any specific type of military response.” In September 2002, President George W. Bush issued a White House National Security Strategy (NSS) that declared that “rogue states and terrorists” were determined to acquire biological and chemical weapons and that the United States might one day need to use nuclear weapons to deal with such an acquisition. The statement seemed to call for the use of U.S. weapons, including nuclear ones, to destroy biological or chemical weapons before either could be used. [W]e must be prepared to stop rogue states and their terrorist clients before they are able to threaten or use weapons of mass destruction against the United States and our allies and friends…. If the legitimacy of preemption [by the United States is to depend] on the existence of an imminent threat, [we] must adapt the concept of legitimate threat to the capabilities and objectives of today’s adversaries [who] rely on acts of terror and, potentially, the use of weapons of mass destruction—weapons that can be easily concealed, delivered covertly, and used without warning…. The greater the threat, the greater the risk of inaction—and the more compelling the case for taking anticipatory action. To forestall such hostile attacks, the United States will, if necessary, act preemptively.[8] Under this strategy, preemptive action by the United States might include the use of nuclear weapons to counter a chemical weapon attack or to destroy a potential enemy’s stocks of biological weapons before they could be used. In the December 2002 “National Strategy to Combat Weapons of Mass Destruction,” the Bush administration added that U.S. counterproliferation forces “must possess the full range of operational capabilities to counter the threat and use of [weapons of mass destruction] by states and terrorists against the United States, our military forces, and friends and allies.”[9] These statements suggest that the United States reserves the right to first use of nuclear weapons to retaliate against attacks using chemical or biological weapons or to destroy enemy chemical or biological weapons stockpiles before they can be used in an attack.[10] Perhaps to implement such a strategy, the administration proposed a new nuclear warhead to Congress, the Robust Nuclear Earth Penetrator (RNEP). It was supposed to be used to attack “hard and deeply buried targets,” such as underground storage sites for biological and chemical weapons. Congress cut out the funds proposed by the Bush administration for the development of RNEP in the appropriations for the Department of Energy for the fiscal years 2005 and 2006. The department did not request such funds for fiscal years 2007 or 2008. The Bush administration in various ways has said that it is not bound to refrain from the use of nuclear weapons against non-nuclear-weapon NPT states-parties who attack with biological or chemical weapons. Indeed, the United States may well have contributed to the failure of the 2005 NPT review conference by refusing even to discuss NSAs there. If the security assurances provided by the United States to non-nuclear-weapon NPT members in 1995 appear to these members to have less value as result of the Bush administration’s statements, will this reduce the motivation of some NPT members to stay within the NPT? The Future of Negative Security Assurances To states without nuclear weapons not allied to states that do have them, a credible promise by the five NPT nuclear-weapon states not to use nuclear weapons against them should have value. Judging by the demands for such assurances from NAM, the largest caucus of NPT non-nuclear-weapon parties, the quest for legally binding NSAs will continue despite opposition from the United States and most of the P-5. At the 2000 NPT review conference, these NAM states together with the New Agenda Coalition (NAC), a smaller coalition of non-nuclear-weapon nations formed in 1998 to advance nuclear disarmament, were successful in extracting a clear acknowledgement by all NPT parties, in particular the P-5, that legally binding NSAs would strengthen the nonproliferation regime. The final document of the 2000 review conference also called on the Preparatory Committee (PrepCom) for the 2005 review conference to make recommendations on this issue. Despite several concrete proposals, including a draft nonuse protocol to the NPT submitted by the NAC, the PrepCom made no such recommendations. Indeed, the final PrepCom in 2004 reported Washington’s perception that the post-September 11, 2001, security environment obviated “any justification for expanding NSAs to encompass global legally binding assurances.” The U.S. delegation reacted to the PrepCom chairman’s summary by stating emphatically, “We did not, do not, and will not agree as stated in the summary that efforts to conclude a universal, unconditional, and legally binding instrument on security assurances to non-nuclear-weapon states should be pursued as a matter of priority.” This message foreshadowed Washington’s position at the 2005 conference, where it asserted that “the very real nuclear threats from NPT violators and non-state actors” eclipses the “relevance of non-use assurances.” An acrimonious debate about security assurances was among the reasons for the failed 2005 NPT review conference. The United States refused even to discuss them seriously at this conference or at its preparatory meetings, saying: [T]he end of the Cold War has further lessened the relevance of non-use assurances from the P-5 to the security of NPT [non-nuclear-weapon states], particularly when measured against the very real nuclear threats from NPT violators and non-state actors.… [L]egally binding assurances sought by the majority of states have no relation to contemporary threats to the NPT.[11] Options for the Next Administration Attempts to negotiate NSAs with the United States under the Bush administration seem impractical, but the next U.S. administration needs to take up the issue in time for the 2010 NPT review conference. As with the 1995 conference, the United States should lead a P-5 initiative prior to the 2010 conference to reaffirm political pledges not to use or threaten to use nuclear weapons against non-nuclear-weapon states. To build confidence in its nuclear intentions, it should allow the conference to establish a mechanism to consider ways to provide legally binding NSAs. In this regard, a new administration could consider several options. One option would be approval of another UN Security Council resolution going beyond the one adopted prior to the 1995 conference. Such a resolution of security assurances to NPT non-nuclear-weapon parties in full compliance with their obligations could include two key components. It could recognize that legally binding security assurances to non-nuclear-weapon NPT members in full compliance with their nonproliferation obligations would strengthen the nuclear nonproliferation regime and that the Security Council should consider taking action against any nation threatening to use nuclear weapons against a non-nuclear-weapon NPT member. Although the first of these two parts would go a long way to address the concerns of many states that the United States and the other nuclear-weapon NPT members have weakened their NSA promises, the second statement would address the security of non-nuclear-weapon NPT members not aligned with any of the P-5. In light of the Bush administration’s insistence that the 1995 U.S. assurances, offered essentially to gain support for the indefinite extension of the NPT and recognized by the Security Council, are not legally binding on the United States, and that these assurances do not preclude the United States from preemptory attacks upon underground hiding places for biological or chemical weapons, the solemn declarations made by the United States and other P-5 members are now regarded as of little value by these non-nuclear-weapon NPT members. Unless a post-2008 U.S. administration wins back the confidence of these nonaligned states that U.S nuclear policies are not aimed at them, any approach through the Security Council would be unappealing.

[their card ends]

Another step would be to offer guarantees to countries in nuclear-weapon-free zones outside of Latin America. Other existing zones include Africa, Central Asia, the South Pacific, and Southeast Asia. The United States has not yet committed itself legally not to attack or threaten to attack with nuclear weapons members of these zones. This leaves many to believe that the United States is keeping the nuclear option open even for states that have, in addition to their NPT non-nuclear-weapon state obligations, declared that their own and their neighbors’ territories must be free of nuclear weapons. A main driving force behind declaring these zones free of nuclear weapons is not to be threatened by states that have them. Nuclear-weapon-free zones play an important role in strengthening the security of states that belong to such zones, but these zones remain complementary instruments to the global nuclear nonproliferation norm: the NPT. Pending the total elimination of nuclear weapons, only the NPT provides the framework for global assurances against the threat or use of nuclear weapons. Because amendment of the NPT is almost impossible, legally binding assurances could be more effectively addressed in a separate treaty or, better yet, a protocol to the existing NPT. Honoring only those assurances given to members of existing nuclear-weapon-free zones would exclude countries not covered by these zones or by other nuclear security arrangements. A nuclear-weapon state could also provide unilateral security assurances to a non-nuclear-weapon state. This may be feasible in a few cases, but it could also send the wrong signal. North Korea has sought such a promise from the United States. If U.S.-North Korean negotiations produce such a promise, it should of course be conditioned on North Korea’s observance of its commitment not to acquire nuclear weapons and to give up any that it now has. Such a promise, however, could send a dangerous message: the only way to extract assurances from the United States against the threat or use of nuclear weapons is to seek such weapons first. If other states, such as Iran, use similar nuclear brinkmanship, the nonproliferation regime could be blown apart. Two other broader options could also be considered. One would be a new treaty containing promises by the P-5 not to use nuclear weapons against NPT-compliant non-nuclear-weapon members. Such a treaty has been proposed for negotiation at the Geneva-based Conference on Disarmament (CD). NPT outsiders India, Israel, and Pakistan, however, are active participants at this conference and would probably not agree to be excluded from the negotiations. At the same time, many non-nuclear-weapon states would be in principle opposed to accepting NSAs from these three nuclear-armed countries. In the eyes of NPT non-nuclear-weapon members, why should nonmember states with nuclear weapons gain the benefits of a nuclear nonuse promise? In addition, negotiating such a treaty in the CD would create yet another proliferation conundrum. Would Israel, which is a CD member, acknowledge its nuclear status and, as a result, be required to offer legally binding assurances to its Arab neighbors? Will its Arab neighbors accept Israel’s status and its offer? The answer to both questions is likely to be no. At the moment, the CD remains deadlocked over several issues, including whether to take up a Sri Lankan proposal that includes discussion of NSAs and possibly negotiation of such a treaty. The best option would probably be to negotiate a protocol to the NPT containing NSAs for all non-nuclear-weapon NPT members. The NAC submitted such a draft based on an earlier South African draft for consideration during the preparatory phase for the 2005 conference. The United States, however, categorically opposed it, and no serious negotiations on it resulted. A protocol to the NPT has the advantage of limiting the recipients of the promise to non-nuclear-weapon NPT members and thereby providing a reward for joining and staying within the NPT. Surely, security assurances should only be available to states that have forgone the nuclear weapons option. Non-NPT states-parties and NPT states-parties aspiring to acquire or develop nuclear weapons in contravention of the treaty should not enjoy such security luxury. Security assurances granted only to non-nuclear-weapon states in full compliance with their NPT nonproliferation obligations will emphasize the basic principle that security is guaranteed by the NPT regime and not by nuclear weapons. This would strengthen the regime and confirm the validity of the NPT and its indefinite extension. Legally binding security assurances linked to the NPT would also build confidence among NPT state-parties, addressing concerns over possible scenarios in which some nuclear-weapon states may consider using these arms. Conclusion Although it is too early to predict how the 2010 review conference will approach this thorny issue and what the outcome of the negotiations will be, a significant number of NPT delegations at the first PrepCom meeting for the 2010 conference, including the NAM,[12] the NAC, and close U.S. allies made specific proposals on security assurances. The European Union, for instance, emphasized that both “positive and negative assurances can play an important role in the NPT regime and can serve as an incentive to forgo the acquisition” of weapons of mass destruction. The EU also committed itself to promote further consideration of security assurances. Italy called for additional efforts “to explore the possibility that existing security assurances may be complemented by a multilateral legally binding instrument.” Canada argued that discussions of legally binding NSAs “would most logically take place in the context of the [NPT].” Canada also asked a number of pertinent questions, including whether the unilateral assurances made by the nuclear-weapon states in 1995 are still valid, given “new doctrines announced by some of them. If not, what if any assurances remain from these states?” As a consequence of the emphasis placed on security assurances during the 2007 meeting of the PrepCom, the chairman stated in his summary of the deliberations that: [s]tates parties noted that pending the elimination of nuclear weapons, the nuclear-weapon states should provide security assurances to the non-nuclear-weapon states that they would not use nuclear weapons against them. It was expressed that security assurances can play an important role in the NPT regime and can serve as an incentive to forgo the acquisition of weapons of mass destruction. It was emphasized that the need for NSAs, a key basis for the 1995 extension decision, remained essential and should be reaffirmed. Reaffirmations were expressed of commitments under Security Council Resolution 984 (1995).[13] Although a number of delegations reacted to other parts of the chairman’s summary complaining that it incorrectly reflected the discussions at the meeting, especially in the case of Iran, no specific reference was made to these security assurances. It seems that the U.S. delegation either decided that there were bigger fish to fry (e.g., Iran’s nuclear program) or chose simply to ignore the issue. If the United States and other nuclear-weapon states, perhaps with the exception of China, continue to ignore the long quest by responsible states not to be threatened by P-5 nuclear arsenals, then the outcome of the 2010 conference may be in jeopardy. **Another failed conference would hold very negative consequences for the future of the NPT regime, especially if such failure is once again the result in part of the insistence by the United States to retain the right to use or threaten to use nuclear weapons against states not having them. We urge the next U.S. administration to modify the adamant rejection of effective NSAs by the current administration.** We believe that negotiating legally binding NSAs in the context of the NPT is the way to go.

[article ends]