# 1NC

### Off

#### The affirmative does not restrict indefinite detention- merely manages practices associated with it

Schackleford 17 J. is a justice of the Supreme Court of Florida. “Atlantic Coast Line Railroad Company, a corporation, et al., Plaintiff in Error, v. The State of Florida, Defendant in Error,” 73 Fla. 609; 74 So. 595; 1917 Fla., Lexis

There would seem to be no occasion to discuss whether or not the Railroad Commissioners had the power and authority to make the order, requiring the three specified railroads running into the City of Tampa to erect a union passenger station in such city, which is set out in the declaration in the instant case and which we have copied above. [\*\*\*29] It is sufficient to say that under the reasoning and the authorities cited in State v. Atlantic Coast Line R. Co., 67 Fla. 441, 458, 63 South. Rep. 729, 65 South. Rep. 654, and State v. Jacksonville Terminal [\*631] Co., supra, it would seem that HN14the Commissioners had power and authority. The point which we are required to determine is whether or not the Commissioners were given the authority to impose the fine or penalty upon the three railroads for the recovery of which this action is brought. In order to decide this question we must examine Section 2908 of the General Statutes of 1906, which we have copied above, in the light of the authorities which we have cited and from some of which we have quoted. It will be observed that the declaration alleges that the penalty imposed upon the three railroads was for the violation of what is designated as "Order No. 282," which is set out and which required such railroads to erect and complete a union depot at Tampa within a certain specified time. If the Commissioners had the authority to make such order, it necessarily follows that they could enforce a compliance with the same by appropriate proceedings in the courts, but [\*\*\*30] it does not necessarily follow that they had the power and authority to penalize the roads for a failure to comply therewith. That is a different matter. HN15Section 2908 of the General Statutes of 1906, which originally formed Section 12 of Chapter 4700 of the Laws of Florida, (Acts of 1899, p. 86), expressly authorizes the imposition of a penalty by the Commissioners upon "any railroad, railroad company or other common carrier doing business in this State," for "a violation or disregard of any rate, schedule, rule or regulation, provided or prescribed by said commission," or for failure "to make any report required to be made under the provisions of this Chapter," or for the violation of "any provision of this Chapter." It will be observed that the word "Order" is not mentioned in such section. Are the other words used therein sufficiently comprehensive to embrace an order made by the Commissioners, such as the one now under consideration? [\*632] It could not successfully be contended, nor is such contention attempted, that this order is covered by or embraced within the words "rate," "schedule" or "any report,' therefore we may dismiss these terms from our consideration and [\*\*\*31] direct our attention to the words "rule or regulation." As is frankly stated in the brief filed by the defendant in error: "It is admitted that an order for the erection of a depot is not a 'rate' or 'schedule' and if it is not a 'rule' or 'regulation' then there is no power in the Commissioners to enforce it by the imposition of a penalty." It is earnestly insisted that the words "rule or regulation" are sufficiently comprehensive to embrace such an order and to authorize the penalty imposed, and in support of this contention the following authorities are cited: Black's Law Dictionary, defining regulation and order; Rapalje & Lawrence's Law Dictionary, defining rule; Abbott's Law Dictionary, defining rule; Bouvier's Law Dictionary, defining order and rule [\*\*602] of court; Webster's New International Dictionary, defining regulation; Curry v. Marvin, 2 Fla. 411, text 515; In re Leasing of State Lands, 18 Colo. 359, 32 Pac. Rep. 986; Betts v. Commissioners of the Land Office, 27 Okl. 64, 110 Pac. Rep. 766; Carter V. Louisiana Purchase Exposition Co., 124 Mo. App. 530, 102 S.W. Rep. 6, text 9; 34 Cyc. 1031. We have examined all of these authorities, as well as those cited by the [\*\*\*32] plaintiffs in error and a number of others, but shall not undertake an analysis and discussion of all of them. While it is undoubtedly true that the words, rule, regulation and order are frequently used as synonyms, as the dictionaries, both English and law, and the dictionaries of synonyms, such as Soule's show, it does not follow that these words always mean the same thing or are interchangeable at will. It is well known that the same word used in different contexts may mean a different thing by virtue of the coloring which the word [\*633] takes on both from what precedes it in the context and what follows after. Thus in discussing the proper constructions to be placed upon the words "restrictions and regulations" as used in the Constitution of this State, then in force, Chap. 4, Sec. 2, No. 1, of Thompson's Digest, page 50, this court in Curry v. Marvin, 2 Fla. 411, text 415, which case is cited to us and relied upon by both the parties litigant, makes the following statement: "The word restriction is defined by the best lexicographers to mean limitation, confinement within bounds, and would seem, as used in the constitution, to apply to the amount and to the time [\*\*\*33] within which an appeal might to be taken, or a writ of error sued out. The word regulation has a different signification -- it means method, and is defined by Webster in his Dictionary, folio 31, page 929, to be 'a rule or order prescribed by a superior for the management of some business, or for the government of a company or society.' This more properly perhaps applies to the mode and form of proceeding in taking and prosecuting appeals and writs of error. By the use of both of those terms, we think that something more was intended than merely regulating the mode and form of proceedings in such cases." Thus, in Carter v. Louisiana Purchase Exposition Co., 124 Mo. App. 530, text 538, 102 S.W. Rep. 6, text 9, it is said, "The definition of a rule or order, which are synonymous terms, include commands to lower courts or court officials to do ministerial acts." In support of this proposition is cited 24 Amer. & Eng. Ency. of Law 1016, which is evidently an erroneous citation, whether the first or second edition is meant. See the definition of regulate and rule, 24 amer. & Eng. Ency. of Law (2nd Ed.) pages 243 to 246 and 1010, and it will be seen that the two words are not always [\*\*\*34] synonymous, much necessarily depending upon the context and the sense in which the words are used. Also see the discussion [\*634] of the word regulation in 34 Cyc. 1031. We would call especial attention to Morris v. Board of Pilot Commissioners, 7 Del. chan. 136, 30 Atl. Rep. 667, text 669, wherein the following statement is made by the court: "These words 'rule' and the 'order,' when used in a statute, have a definite signification. They are different in their nature and extent. A rule, to be valid, must be general in its scope, and undiscriminating in its application; an order is specific and not limited in its application. The function of an order relates more particularly to the execution or enforcement of a rule previously made." Also see 7 Words & Phrases 6271 and 6272, and 4 Words & Phrases (2nd Ser.) 419, 420. As we held in City of Los Angeles v. Gager, 10 Cal. App. 378, 102 Pac. Rep. 17, "The meaning of the word 'rules' is of wide and varied significance, depending upon the context; in a legal sense it is synonymous with 'laws.'" If Section 2908 had contained the word order, or had authorized the Commissioners to impose a penalty for the violation of any order [\*\*\*35] made by them, there would be no room for construction. The Georgia statute, Acts of 1905, p. 120, generally known as the "Steed Bill," entitled "An act to further extend the powers of the Railroad Commission of this State, and to confer upon the commission the power to regulate the time and manner within which the several railroads in this State shall receive, receipt for, forward and deliver to its destination all freight of every character, which may be tendered or received by them for transportation; to provide a penalty for non-compliance with any and all reasonable rules, regulations and orders prescribed by the said commission in the execution of these powers, and for other purposes," expressly authorized the Railroad Commissioners "to provide a penalty for non-compliance with any and all reasonable rules, regulations and orders prescribed by the said Commision." [\*635] See Pennington v. Douglas, A. & G. Ry. Co., 3 Ga. App. 665, 60 S.E. Rep. 485, which we cited with approval in State v. Atlantic Coast Line R. Co., 56 fla. 617, text 651, 47 South. Rep. 969, 32 L.R.A. (N.S.) 639. Under the reasoning in the cited authorities, especially State v. Atlantic Coast Line R. Co., [\*\*\*36] supra, and Morris v. Board of Pilot Commissioners, we are constrained to hold that the fourth and eighth grounds of the demurrer are well founded and that HN16the Railroad Commissioners were not empowered or authorized to impose a penalty upon the three railroads for failure to comply with the order for the erection of a union depot.

#### Vote negative-

#### Limits- there are infinite ways the Congress could implement oversight policies over the areas of the topic- the permutations of the composition of the drone court etc are enormous and prevent negative preparation

#### Bidirectionality- allowing oversight affs allows actual increases in executive action in topical areas- for example the aff could argue that the drone court actually would increase the number of acceptable targets for targeted killing

#### Precision-Lexicography is key to understanding the resolution

Dash No Date [Nilardi Sekhar Dash Linguistic Research Unit, Indian Statistical Institute, worked in the area of corpus linguistics and language technology for more than 15 years No Date “Linguistics- The Art of Lexicography” Encyclopedia of Life Support Systems http://www.eolss.net/Sample-Chapters/C04/E6-91-16.pdf]

Lexicography also studies lexicon but from a different angle. While lexicology concentrate on the general properties and features that can be viewed as systematic, lexicography typically deals with the individuality of each lexical unit (Zgusta 1973: 14). Lexicography is thus defined as the art of writing a dictionary or the science of compiling a dictionary. While lexicology studies words as elements of a system, lexicography approaches words as individual units with respect to their meaning and usage. We use a dictionary in order to learn about words in the process of language learning, comprehending a text in a better way or checking correct spellings and pronunciations of words, etc.

### Off

#### Class is the driver of all social and existential conditions. Only emancipation from the status quo modes of production can enact any form of human freedom

**Ebert and Zavarzadeh in 2008**(Teresa L., English, State University of New York, Albany, Mas’ud, prolific writer and expert on class ideology, “Class in Culture”, p.ix-xii)

**Class** is everywhere and nowhere. It **is the most decisive condition of social life: it shapes the economic and**, consequently, **the social and cultural resources of people**. It determines their birth, healthcare, clothing, schooling, eating, love, labor, sleep, aging, and death. Yet **it remains invisible in the every day and in practical consciousness because,** for the most part, **it is dispersed through popular culture, absorbed in cultural difference, obscured by formal equality before the law or explained away by philosophical arguments**. Class in Culture attempts to trace class in different cultural situations and practices to make its routes and effects visible. However, the strategies obscuring class are cunning, complex, and subtle, and are at work in unexpected sites of culture. Consequently, this is not a linear book: it surprises class in the segments, folds, vicinities, points, and divides of culture. It moves, for example, from Abu Ghraib to the post-deconstructive proclamations of Antonio Negri, from stem cell research to labor history, from theoretical debates on binaries to diets. It is also written in a variety of registers and lengths: in the vocabularies of theory, the idioms of description and explanation, as well as in the language of polemics, and in long, short, and shorter chapters. Regardless of the language, the plane of argument, the length of the text, and the immediate subject of our critiques, our purpose has been to tease out from these incongruous moments the critical elements of a basic grammar of class-one that might be useful in reading class in other social sites. Our text on eating, for example, unpacks two diets that, we argue, reproduce class binaries in the zone of desire. The point here is not only when one eats, one eats class, but also class works in the most unexpected comers of culture, Eating as a sensuous, even sensual corporeality, is seen as the arena of desire which is represented in the cultural imaginary as autonomous from social relations. **Desire is thought to be exemplary of the singularity of the individual and her freedom from material conditions. One desires what one desires. Desire is the absolute lack: it is the unrepresentable.** We argue, however, that **one desires what one can desire; one's desire is always and ultimately determined before one desires it, and it is determined by one's material (class) conditions.** Our point is not that **individuality and singularity** are myths but that they **are myths in class societies**. **Individuality and singularity become reality**-not stories that culture tells to divert people from their anonymity in a culture of commodities-**only when one is free from necessity beyond which "begins that development of human energy which is an end in itself'** (Marx, Capita/III, 958-59). **Class is the negation of human freedom**. **A theory of class** (such as the one we articulate) **argues that class is the material logic of social life and** therefore it **determines how people live and think**. But this is too austere for many contemporary critics. ("Determinism" is a dirty totalizing word in contemporary social critique.) Most writers who still use the concept of class prefer to talk about it in the more subtle and shaded **languages of overdetermination, lifestyle, taste, prestige, and preferences**, **or** in the **stratification** terms of income, occupation, and even status. These **are all significant** aspects of social life, **but they are effects of class and not class**. This brings us to the "simple" question: What is class? We skip the usual review of theories of class because they never lead to an answer to this question. The genre of review requires, in the name of fairness, "on the one hand, on the other hand" arguments that balance each perspective with its opposite. The purpose of Class in Culture is not review but critique not a pluralism that covers up an uncommitted wandering in texts but an argument in relation to which the reader can take a position leading to change and not simply be more informed. This is not a book of information; it is a book of critique. To answer the question (what is class?), we argue-and here lies the austerity of our theory-**class is essentially a relation of property, of owning**. Class, in short, is **a relation to labor because property is the congealed alienated labor of the other**. By owning we obviously do not mean owning just anything. Owning a home or a car or fine clothes does not by itself put a person in one or another class. What does, is **owning the labor power of others in exchange for wages.** Unlike a home or a car, labor (or to be more precise "**labor power**") **is a commodity that produces value when it is consumed**. Structures like homes or machines like cars or products such as clothes do not produce value. Labor does. **Under capitalism, the producers of value do not own what they produce**. The capitalist who has purchased the labor power of the direct producers owns what they produce. Class is this relation of labor-owning. This means wages are symptoms of estranged labor, of the unfreedom of humans, namely the exploitation of humans by humans-which is another way to begin explaining class. **To know class, one has to learn about the labor relations that construct class differences**, that enable the subjugation of the many by the few. **Under capitalism labor is unfree**, it is forced wage-labor that produces "surplus value"-an objectification of a person's labor as commodities that are appropriated by the capitalist for profit. **The labor of the worker,** therefore, **becomes "an object" that "exits outside him**, independently, as **something alien to him, and it becomes a power on its own confronting him" which**, among other things, **"means that the life which he has conferred on the object confronts him as something hostile and alien**" (Marx, Economic and Philosophic Manuscripts of 1844,272). The direct producers' own labor, in other words, negates their freedom because it is used, in part, to produce commodities not for need but for exchange. **One**, therefore, **is made "to exist, first, as a worker; and, second as a physical subject**. The height of this servitude is that it is only as a worker that he can maintain himself as a physical subject, and that it is only as a physical subject that he is a worker" (273). Under wage labor, **workers**, consequently, **relate to their own activities as "an alien activity not belonging to [**them]" (275). **The estranged relation** of people to the object of their labor **is not a local matter but includes all spheres of social life**. ln other words, it is "at the same time the relation to the sensuous external world, to the objects of nature, as an alien world inimically opposed to [them]" (275). **The scope of estrangement in a class society**, of human unfreedom caused by wage labor, is not limited to the alienation of the worker from her products. It includes the productive activity itself because what is produced is a "summary of the activity, of production," and therefore it is "manifested not only in the result but in the act of production, within the producing activity itself' (274). **The worker, in the act of production, alienates herself from herself because production activity is "active alienation, the alienation of activity, the activity of alienation**" (274)-an activity which does not belong to her. This is another way of saying that the activity of labor-life activity-is turned against the worker and "here we have self-estrangement" (275). In his theory of alienated labor, Marx distinguishes between the "natural life" of eating, drinking, and procreating which humans share with other animals and the "species life" which separates humans from animal. This distinction has significant implications for an emancipatory theory of classless society. "Species life" is the life marked by consciousness, developed senses, and a human understanding himself in history as a historical being because "his own life is an object for him" (276}--humans, as "species beings," are self-reflexive. To be more clear, "conscious life activity distinguishes man immediately from animal life activity" (276). The object of man's labor is the actualization, the "objectification of man's species-life" (277). Alienated labor, however, "in tearing away from man the object of his production, therefore, ... tears from him his species-life" (277). Consequently, "it changes for him the life of the species into a means of individual life ... it makes individual life in its abstract form the purpose of life of the species, likewise in the abstract and estranged form" (276). This is another way of saying that **the larger questions that enable humans to build their world consciously are marginalized, and sheer biological living** ("individual life in the abstract") **becomes the goal of life in class society structured by wage labor. "Life itself appears only as a means to life"** (276). **Class turns "species life" into "natural life."** Since society is an extension of the sensuous activities of humans in nature (labor), **the alienation of humans from the products of their labor, from the very process of labor, which is their life activity, and from their species-being, leads to the estrangement of humans from humans (**277)-**the alienation in class societies that is experienced on the individual level as loneliness**. In confronting oneself, one confronts others; which is another way of saying that one's **alienation from the product of one's labor**, from productive activity, and from "species life" **is** at the same time **alienation from other people, their labor, and the objects of their labor**. In class societies, **work**, therefore, **becomes the negation of the worker:** he "only feels himself outside his work, and in his work feels outside himself" (274). **Ending class structures is a re-obtaining of human freedom.** Freedom here is not simply the freedom of individuals as symbolized, for instance, in bourgeois "freedom of speech" but is a world-historical **"freedom from necessity**" (Marx, Critique of the Gotha Programme). **Class struggle is the struggle for human emancipation by putting an end to alienated labor** (as class relations). Alienated labor is the bondage of humans to production: it is an effect of wage labor (which turns labor into a means of living) and private property (which is congealed labor). **Emancipation from alienated labor is, therefore, the emancipation of humans from this bondage because "all relations of servitude," such as class relations, "are but modifications and consequences" of the relation of labor to production** (Marx, Economic and Philosophic Manuscripts of 1844,280). **Class**, in short, **is the effect of property relations that are themselves manifestations of the alienation of labor as wage labor. Wage labor alienates one from one's own product, from oneself, from other humans, and, as Marx put it, "estranges the species from man**" (276).

#### Capitalism’s preoccupation with endless accumulation will result in total ecological destruction and extinction

Foster 11,[John Bellamy ] Dec. 2011, Capitalism and the Accumulation of Catastrophe, Monthly Review, Vol. 63 Issue 07, <http://monthlyreview.org/2011/12/01/capitalism-and-the-accumulation-of-catastrophe> (Aug 2012)

Yet, the continued pursuit of Keynes’s convenient lie over the last eight decades has led to a world far more polarized and beset with contradictions than he could have foreseen. It is a world prey to the enormous unintended consequences of accumulation without limits: namely, global economic stagnation, financial crisis, and planetary ecological destruction. Keynes, though aware of some of the negative economic aspects of capitalist production, had no real understanding of the ecological perils—of which scientists had already long been warning. Today these perils are impossible to overlook. Faced with impending ecological catastrophe, it is more necessary than ever to abandon Keynes’s convenient lie and espouse the truth: that foul is foul and fair is fair. Capitalism, the society of “après moi le déluge!” is a system that fouls its own nest—both the human-social conditions and the wider natural environment on which it depends. The accumulation of capital is at the same time accumulation of catastrophe, not only for a majority of the world’s people, but living species generally. Hence, nothing is *fairer*—more just, more beautiful, and more necessary—today than the struggle to overthrow the regime of capital and to create a system of substantive equality and sustainable human development; a socialism for the twenty-first century.

#### Method is key- our alternative is dialectical materialism which provides the best method for understanding social and political relations-this education is key to achieve class consciousness and stop capitalism

**Lukacs in 67** (George, Hungarian Marxist philosopher and literary critic. He is a founder of the tradition of Western Marxism. He contributed the ideas of reification and class consciousness to Marxist philosophy and theory, and his literary criticism was influential in thinking about realism and about the novel as a literary genre. He served briefly as Hungary's Minister of Culture as part of the government of the short-lived Hungarian Soviet Republic, History and Class Consciousness)

If the question were really to be formulated in terms of such a crude antithesis it would deserve at best a pitying smile. But in fact it is not (and never has been) quite so straightforward. Let us assume for the sake of argument that recent research had disproved once and for all every one of Marx's individual theses. Even if this were to be proved, every serious 'orthodox' Marxist would still be able to accept all such modern findings without reservation and hence dismiss all of Marx's theses in toto—without having to renounce his orthodoxy for a single moment. **Orthodox Marxism**, therefore, **does not imply the uncritical acceptance of the results of Marx's investigations**. It is not the 'belief in this or that thesis, nor the exegesis of a 'sacred' book. **On the contrary, orthodoxy refers exclusively to method. It is the scientific conviction that dialectical materialism is the road to truth and that its methods can be developed, expanded and deepened** only along the lines laid down by its founders. It is the conviction, moreover, that all attempts to surpass or 'improve' it have led and must lead to over-simplification, triviality and eclecticism. Materialist dialectic is a revolutionary dialectic. **This definition is so important** and altogether so crucial for an understanding of its nature **that if the problem is to be approached in the right way this must be fully grasped before we venture upon a discussion of the dialectical method itself**. **The issue turns on the question of theory and practice**. And this not merely in the sense given it by Marx when he says in his first critique of Hegel that "theory becomes a material force when it grips the masses".1 Even **more to the point is the need to discover those features and definitions both of the theory and the ways of gripping the masses which convert the theory, the dialectical method, into a vehicle of revolution**. We must extract the practical essence of the theory from the method and its relation to its object. **If this is not done that 'gripping the masses' could well turn out to be a will o' the wisp**. **It might turn out that the masses were in the grip of quite different forces**, that they were in pursuit of quite different ends. **In that event**, there would be no necessary connection between the theory and their activity, **it would be a form that enables the masses to become conscious of their socially necessary or fortuitous actions, without ensuring a genuine and necessary bond between consciousness and action**. In the same essay\* Marx clearly defined the conditions in which a relation between theory and practice becomes possible. "It is not enough that thought should seek to realise itself; reality must also strive towards thought." Or, as he expresses it in an earlier work:3 "It will then be realised that the world has long since possessed something in the form of a dream which it need only take possession of consciously, in order to possess it in reality." **Only when consciousness stands in such a relation to reality can theory and practice be united. But for this to happen the emergence of consciousness must become the decisive step which the historical process must take** towards its proper end (an end constituted by the wills of men, but neither dependent on human whim, nor the product of human invention). The historical function of theory is to make this step a practical possibility. Only when a historical situation has arisen in which a class must understand society if it is to assert itself; only when the fact that a class understands itself means that it understands society as a whole and when, in consequence, the class becomes both the subject and the object of knowledge; in short, **only when these conditions are all satisfied will the unity of theory and practice, the precondition of the revolutionary function of the theory, become possible**. Such a situation has in fact arisen with the entry of the proletariat into history. "When the proletariat proclaims the dissolution of the existing social order,” Marx declares, "it does no more than disclose the secret of its own existence, for it is the effective dissolution of that order." \* **The links between the theory that affirms this and the revolution are not just arbitrary, nor are they particularly tortuous** or open to misunderstanding. **On the contrary, the theory is essentially the intellectual expression of the revolutionary process itself. In it every stage of the process becomes fixed so that it may be generalised**, communicated, utilised **and developed**. **Because the theory does nothing but arrest and make conscious each necessary step, it becomes at the same time the necessary premise of the following one**. <1-3>

### Off

#### By executive order, the President of the United States should commit the Solicitor General & White House Counsel’s Office to advance consultation with the Office of Legal Counsel and require written publication of Office of Legal Counsel opinions over current law regarding use of the material witness statue to prosecute the War on Terror. The President should publicly pledge to act consistent with these opinions.

#### The Office of Legal Counsel should opine that the best interpretation of current law prohibits indefinite detention of material witnesses for the purposes of prosecuting the War on Terror.

#### CP competes on ‘authority’ but solves – OLC rulings are binding as settled law, but crafting reduces links to net benefits

Trevor W. Morrison, October 2010 Columbia Law Professor

“STARE DECISIS IN THE OFFICE OF LEGAL COUNSEL,” Columbia Law Review, 110 Colum. L. Rev. 1448.

On the other hand, an OLC that says "yes" too often is not in the client's long-run interest. n49 Virtually all of OLC's clients have their own legal staffs, including the White House Counsel's Office in the White House and the general counsel's offices in other departments and agencies. Those offices are capable of answering many of the day-to-day issues that arise in those components. They typically turn to OLC when the issue is sufficiently controversial or complex (especially on constitutional questions) that some external validation holds special value. n50 For example, when a department confronts a difficult or delicate constitutional question in the course of preparing to embark upon a new program or course of action that raises difficult or politically sensitive legal questions, it has an interest in being able to point to a credible source affirming the [\*1462] legality of its actions. n51 The in-house legal advice of the agency's general counsel is unlikely to carry the same weight. n52 Thus, even though those offices might possess the expertise necessary to answer at least many of the questions they currently send to OLC, in some contexts they will not take that course because a "yes" from the in-house legal staff is not as valuable as a "yes" from OLC. But that value depends on OLC maintaining its reputation for serious, evenhanded analysis, not mere advocacy. n53 The risk, however, is that OLC's clients will not internalize the long-run costs of taxing OLC's integrity. This is in part because the full measure of those costs will be spread across all of OLC's clients, not just the client agency now before it. The program whose legality the client wants OLC to review, in contrast, is likely to be something in which the client has an immediate and palpable stake. Moreover, the very fact that the agency has come to OLC for legal advice will often mean it thinks there is [\*1463] at least a plausible argument that the program is lawful. In that circumstance, the agency is unlikely to see any problem in a "yes" from OLC. Still, it would be an overstatement to say that OLC risks losing its client base every time it contemplates saying "no." One reason is custom. In some areas, there is a longstanding tradition - rising to the level of an expectation - that certain executive actions or decisions will not be taken without seeking OLC's advice. One example is OLC's bill comment practice, in which it reviews legislation pending in Congress for potential constitutional concerns. If it finds any serious problems, it writes them up and forwards them to the Office of Management and Budget, which combines OLC's comments with other offices' policy reactions to the legislation and generates a coordinated administration position on the legislation. n54 That position is then typically communicated to Congress, either formally or informally. While no statute or regulation mandates OLC's part in this process, it is a deeply entrenched, broadly accepted practice. Thus, although some within the Executive Branch might find it frustrating when OLC raises constitutional concerns in bills the administration wants to support as a policy matter, and although the precise terms in which OLC's constitutional concerns are passed along to Congress are not entirely in OLC's control, there is no realistic prospect that OLC would ever be cut out of the bill comment process entirely. Entrenched practice, then, provides OLC with some measure of protection from the pressure to please its clients. But there are limits to that protection. Most formal OLC opinions do not arise out of its bill comment practice, which means most are the product of a more truly voluntary choice by the client to seek OLC's advice. And as suggested above, although the Executive Branch at large has an interest in OLC's credibility and integrity, the preservation of those virtues generally falls to OLC itself. OLC's nonlitigating function makes this all the more true. Whereas, for example, the Solicitor General's aim of prevailing before the Supreme Court limits the extent to which she can profitably pursue an extreme agenda inconsistent with current doctrine, OLC faces no such immediate constraint. Whether OLC honors its oft-asserted commitment to legal advice based on its best view of the law depends largely on its own self-restraint. 2. Formal Requests, Binding Answers, and Lawful Alternatives. - Over time, OLC has developed practices and policies that help maintain its independence and credibility. First, before it provides a written opinion, n55 OLC typically requires that the request be in writing from the head or general counsel of the requesting agency, that the request be as specific and concrete as possible, and that the agency provide its own written [\*1464] views on the issue as part of its request. n56 These requirements help constrain the requesting agency. Asking a high-ranking member of the agency to commit the agency's views to writing, and to present legal arguments in favor of those views, makes it more difficult for the agency to press extreme positions. Second, as noted in the Introduction, n57 OLC's legal advice is treated as binding within the Executive Branch until withdrawn or overruled. n58 As a formal matter, the bindingness of the Attorney General's (or, in the modern era, OLC's) legal advice has long been uncertain. n59 The issue has never required formal resolution, however, because by longstanding tradition the advice is treated as binding. n60 OLC protects that tradition today by generally refusing to provide advice if there is any doubt about whether the requesting entity will follow it. n61 This guards against "advice-shopping by entities willing to abide only by advice they like." n62 More broadly, it helps ensure that OLC's answers matter. An agency displeased with OLC's advice cannot simply ignore the advice. The agency might [\*1465] construe any ambiguity in OLC's advice to its liking, and in some cases might even ask OLC to reconsider its advice. n63 But the settled practice of treating OLC's advice as binding ensures it is not simply ignored. In theory, the very bindingness of OLC's opinions creates a risk that agencies will avoid going to OLC in the first place, relying either on their general counsels or even other executive branch offices to the extent they are perceived as more likely to provide welcome answers. This is only a modest risk in practice, however. As noted above, legal advice obtained from an office other than OLC - especially an agency's own general counsel - is unlikely to command the same respect as OLC advice. n64 Indeed, because OLC is widely viewed as "the executive branch's chief legal advisor," n65 an agency's decision not to seek OLC's advice is likely to be viewed by outside observers with skepticism, especially if the in-house advice approves a program or initiative of doubtful legality. OLC has also developed certain practices to soften the blow of legal advice not to a client's liking. Most significantly, after concluding that a client's proposed course of action is unlawful, OLC frequently works with the client to find a lawful way to pursue its desired ends. n66 As the OLC Guidelines put it, "when OLC concludes that an administration proposal is impermissible, it is appropriate for OLC to go on to suggest modifications that would cure the defect, and OLC should stand ready to work with the administration to craft lawful alternatives." n67 This is a critical component of OLC's work, and distinguishes it sharply from the courts. In addition to "providing a means by which the executive branch lawyer can contribute to the ability of the popularly-elected President and his administration to achieve important policy goals," n68 in more instrumental terms the practice can also reduce the risk of gaming by OLC's clients. And that, in turn, helps preserve the bindingness of OLC's opinions. n69 [\*1466] To be sure, OLC's opinions are treated as binding only to the extent they are not displaced by a higher authority. A subsequent judicial decision directly on point will generally be taken to supersede OLC's work, and always if it is from the Supreme Court. OLC's opinions are also subject to "reversal" by the President or the Attorney General. n70 Such reversals are rare, however. As a formal matter, Dawn Johnsen has argued that "the President or attorney general could lawfully override OLC only pursuant to a good faith determination that OLC erred in its legal analysis. The President would violate his constitutional obligation if he were to reject OLC's advice solely on policy grounds." n71 Solely is a key word here, especially for the President. Although his oath of office obliges him to uphold the Constitution, n72 it is not obvious he would violate that oath by pursuing policies that he thinks are plausibly constitutional even if he has not concluded they fit his best view of the law. It is not clear, in other words, that the President's oath commits him to seeking and adhering to a single best view of the law, as opposed to any reasonable or plausible view held in good faith. Yet even assuming the President has some space here, it is hard to see how his oath permits him to reject OLC's advice solely on policy grounds if he concludes that doing so is indefensible as a legal matter. n73 So the President needs at least a plausible legal basis for [\*1467] disagreeing with OLC's advice, which itself would likely require some other source of legal advice for him to rely upon. The White House Counsel's Office might seem like an obvious candidate. But despite recent speculation that the size of that office during the Obama Administration might reflect an intention to use it in this fashion, n74 it continues to be virtually unheard of for the White House to reverse OLC's legal analysis. For one thing, even a deeply staffed White House Counsel's Office typically does not have the time to perform the kind of research and analysis necessary to produce a credible basis for reversing an OLC opinion. n75 For another, as with attempts to rely in the first place on in-house advice in lieu of OLC, any reversal of OLC by the White House Counsel is likely to be viewed with great skepticism by outside observers. If, for example, a congressional committee demands to know why the Executive Branch thinks a particular program is lawful, a response that relies on the conclusions of the White House Counsel is unlikely to suffice if the committee knows that OLC had earlier concluded otherwise. Rightly or wrongly, the White House Counsel's analysis is likely to be treated as an exercise of political will, not dispassionate legal analysis. Put another way, the same reasons that lead the White House to seek OLC's legal advice in the first place - its reputation for [\*1468] providing candid, independent legal advice based on its best view of the law - make an outright reversal highly unlikely. n76 Of course, the White House Counsel's Office may well be in frequent contact with OLC on an issue OLC has been asked to analyze, and in many cases is likely to make it abundantly clear what outcome the White House prefers. n77 But that is a matter of presenting arguments to OLC in support of a particular position, not discarding OLC's conclusion when it comes out the other way. n78The White House is not just any other client, and so the nature of - and risks posed by - communications between it and OLC on issues OLC is analyzing deserve special attention. I take that up in Part III. n79 My point at this stage is simply that the prospect of literal reversal by the White House is remote and does not meaningfully threaten the effective bindingness of OLC's decisions.

#### OLC can resolve WPA questions quickly and effectively

Cornelia Pillard Feb 2005 Supreme Court Inst, G-town U Law, former DOJ Deputy Asst Att Gen

<http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1190&context=facpub>

Michigan Law Review, 103.4, “The Unfulfilled Promise of the Constitution in Executive Hands”, 103 Mich. L. Rev. 676-758

Just as the SG is the federal government's chief litigator, the head of the Office of Legal Counsel is the executive branch's chief legal advisor. The Attorney General has formally delegated the legal-advice-giving part of his statutory responsibility to OLC.104 OLC has no enforcement or litigation responsibilities, and is devoted exclusively to giving legal advice. OLC's role within the executive branch has evolved over the years, with tasks calling for legal and, especially, constitutional judgment migrating to OLC, while more politicized tasks, like OLC's short involvement in vetting potential judicial nominees, being reassigned elsewhere.105 OLC's core work is to provide written and oral legal opinions to others within the executive branch, including the president, the Attorney General, and heads of other departments. In practice, the White House and the Attorney General are by far the most frequent requesters, often asking complex, momentous questions, frequently on short notice. OLC clients may seek opinions on matters such as the sustainability of a claim of executive privilege, or the lawfulness in a particular circumstance of a quarantine, detention, or use of military force. OLC has been consulted when troops have been sent abroad and when international criminals were arrested overseas.106 Much of OLC's work is more quotidian, including topics such as the constitutionality under the Appointments Clause of various boards and commissions, or the scope of an agency's statutory authority to alter a regulation or settle a case in a particular way. Its opinions "involve domestic problems, international issues, pet plans of bureaucrats, the application of the Constitution and the laws to administrative policies and procedures, the powers and jurisdictions of departments and agencies, the advisability of contemplated actions, [and various mundane and] momentous matters." 107 OLC traditionally requires that requests for advice come from the head or general counsel of the requesting agency, that advice-seekers submit their own view of the question to OLC, and that independent agencies (not already presumptively bound) agree in advance to abide by the advice - even oral advice - that OLC delivers.108 The agreement to be bound forestalls opportunistic advice-shopping by entities willing to abide only by advice they like, and it preserves the resources and authority of OLC against being treated merely as an extra source of legal research on issues that other lawyers or officials will ultimately resolve for themselves.109

### Off

#### 4GW is the most accurate description of modern war- escalation is likely if uncontained- executive authority is key to counter these threats

Li 2009 [Zheyoa Li Winter, 2009 The Georgetown Journal of Law Public Policy 7 Geo. J.L. & Pub. Pol'y 373 “War Powers for the Fourth Generation: Constitutional Interpretation in the Age of Asymmetric Warfare” lexis]

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 modern trend toward a new phase of warfighting, the authors argued that:¶ [\*395] 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 III, 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.

#### Most likely nuclear escalation

Richards 2005 (Dr. Chet Richards, J. Addams & Partners July 12, 2005, “Dear Mr. & Ms. 1RP: Welcome to the 21st Century” http://www.zmetro.com/pdf/2005/07/welcome\_21st\_century\_v4.pdf)

Beginning with Mao Tse-Tung, and continuing to the present day, insurgency and other forms of non-state warfare have become more potent and much more dangerous in at least two ways: Groups other than states – that is, multinational organizations ranging from alQa’ida to the narcotrafficking cartels – are beginning to acquire high levels of sophistication in organization and in the information technologies that allow them to plan and conduct operations while widely dispersed.4 These same groups increasingly have the financial wherewithal to acquire virtually any type of weapon, from small arms to chemical and biological to nuclear, that they need to carry out operations. The only exceptions are conventional weapons such as tanks, combat aircraft, and fighting ships that require large facilities to support them, but are primarily of use only against other military forces armed with the same types of weapons. They are using their new capabilities not only to fight local governments, as was the case with traditional insurgencies, but to attack distant superpowers as well. Because they can’t field sizable amounts of conventional military hardware, fourth generation (4GW) forces will never try to achieve victory by defeating the military forces of a state in stand-up battles. Instead, they will try to convince their state opponent that it is simply not worth it to continue the fight. Successful 4GWcampaigns in modern times would include those against the French in Algeria, the US in Vietnam and the Soviet Union in Afghanistan, where the insurgents never defeated the foreign armies in any major battle, but eventually persuaded the governments back home to withdraw them. In a well run 4GW campaign, everything the 4GW forces do – including fighting and usually losing the occasional major battle – will support this goal. Persuading governments to withdraw forces, rather than defeating them on the battlefield, is an “information age” goal.6 To achieve the necessary level of persuasion, practitioners of 4GWwill use every information tool they can find to spread their messages to the enemy population and decision makers: Our cause is just and no threat to you There’s nothing here worth your effort and sacrifice Your troops are becoming brutal and your tactics ineffective If you keep it up, you’re going to bleed for a very long time So why not just leave now? As we enter the 21st Century, 4GWorganizations are becoming adept at spreading such messages through new channels, such as global news services (CNN, Al Jazeerah) and of course, web sites, blogs, and mass e-mailings. What you may not be aware of is that 4GWorganizations are also using the latest information tools to communicate with each other and to share information, particularly about what is and is not working (what the military calls “lessons learned.”)7Messages may be encrypted, or sent using code phrases, or even hidden in web site images, a practice called steganography. As with so many information age techniques, instructions for encryption and steganography are floating all over the Internet. Information age techniques are ideal for loose networks of highly motivated individuals, which is a typical form of organization for 4GW groups. Modern information warfare places a higher premium on creativity and innovation than it does on things 4GW organizations typically don’t have, like massive forces, volumes of regulations, and expensive hardware.8 By emphasizing speed and innovation, 4GWgroups can often invent new techniques faster than more structured and bureaucratic organizations such as the Pentagon.9 First responder organizations themselves may be targets of information warfare operations. The information systems of 1RP organizations, including operational systems as well as payroll and administrative, might make attractive targets in coordination with a physical attack. This is a real threat: Many members of al-Qa’ida and affiliated groups are from the educated classes in their countries, were technically trained (Osama bin Laden is a civil engineer), studied and lived in the West, and are capable of conceiving and managing such attacks. There are other advantages to the non-state player from operating in a loose social network. Obviously a social network is harder to find than an organization that requires a fixed infrastructure and wears uniforms. But perhaps most significant in wars of the weak against the strong, networks are highly resilient, so killing their leaders and destroying portions of the network can leave the rest to regenerate under new leadership in different locations.1112 So long as enough of the network survives to pass along the ideology and culture, along with lessons learned, the new network will likely be more dangerous and more resilient than its predecessor, much like the more resistant forms of bacteria that can emerge as a result of mis-use of antibiotics. In fact, the European resistance movements during World War II exhibited just this kind of toughness and survivability. In addition to its networked structure, there are other attributes of 4GW that should concern the 1RP (editor’s note: First Responder) community. The first is its transnational nature. An operation can be approved in Afghanistan, planned in Germany, funded in the Middle East, and carried out in the United States, as was the 9/11 attack. There is no one state we can retaliate against, nor one nationality we can profile against. Further, because it is transnational, it can involve networks of networks, such as alQa’ida attempting to cooperate with narco-trafficking organizations in Latin America to trade access to potential base areas and help in infiltrating the US for assistance in distributing narcotics.13 The upshot is that the lack of identifiable 4GW activity may not be an indication that an attack is not in the works, if the su4rveillance is being conducted by someone else. One of the more unpleasant aspects of insurgencies that will likely carry over to 4GWis their use of disguise, camouflage, and the other tools of deception. Because they are militarily weak, 4GW groups survive not by confronting superior firepower but by staying out of its sights. Those that have survived have become masters of concealment and deception, making it even more difficult to pick up early warning signals. This is why simple ethnic or national profiling will not work – 4GWteams will go to great lengths not to be identified as members of the groups in question. Skin color, eye color, and hair color are trivially easy to change, and the criminal infrastructure that already exists in most developed countries makes it simple to get drivers licenses or other means of identification (as any victim of identity theft can attest.) In a pinch, one can always recruit a member of a non-targeted group, such as the “shoe bomber,” Richard Reid, and it would be a mistake to assume the next batch will be as poorly trained. If we’re going to let Icelanders (or grandmothers or parents with toddlers, or whoever) through with less security screening than Saudis or Pakistanis or Jordanians, see if you can guess what the next aircraft hijacker will look like. Another unpleasant fact of 4GW is that like insurgency from whence it sprang, 4GW will be a protracted struggle.14 As Henry Kissinger once noted, if the guerillas don’t lose, they win, so they have all the motivation they need to keep going for as long as they think it will take.15 First responders should not draw comfort from what seems like a pause in attacks – operational cycles can stretch over several years, and a fourth generation war can span decades.16 But the most unpleasant fact of 4GW is that in it, we have finally reached the level of total war.17 In the eyes of the 4GW attacker, there are no civilians and no noncombatants. A concern for public relations offers the only reason for limiting the scope or violence of the attacks. What seems like “terrorism” to us, or senseless, random violence, may appear to the 4GW network as a legitimate way to persuade the foreign state government to withdraw, that is to stop the war. Such a strategy is nothing new. It was what Sherman had in mind during his marches through the South after the fall of Vicksburg (July 1863).18 In its local areas, the 4GW organization will spread the message that the foreign state has killed many civilians, which in a war of an advanced state versus a Third World country will often be true and will always be believed. What this means is that when a 4GW group decides to directly attack the United States or another state involved in “their” struggle, no level of violence, even nuclear, is ruled out. They may calculate that the message they are sending to the state government, to the state’s population, to undecided elements in other parts of the world, and to their own members is worth any backlash from the scenes of horror and brutality that ensue.

### Off

#### Judicial deference is high – there’s strict adherence to the political question doctrine

Bradley 9-2 (Curtis A., William Van Alstyne Professor of Law – Duke Law School, “War Powers, Syria, and Non-Judicial Precedent,” Lawfare Blog, 2013, http://www.lawfareblog.com/2013/09/war-powers-syria-and-non-judicial-precedent/)

As an initial matter, we need to bracket the issue of whether Obama’s action will weaken his own power as a political matter. This is a complicated issue: on the one hand, it may signal weakness both to Congress and to other nations; on the other hand, if he obtains congressional authorization, he may be in an ultimately stronger political position, as Jack Goldsmith has pointed out. As I understand it, the claim being made by Spiro, Rothkopf, and others is that the power of the presidency more generally is being weakened. How might this happen? Not through an influence on judicial doctrine: Although courts sometimes take account of historic governmental practices when assessing the scope of presidential authority, they have consistently invoked limitations on standing and ripeness, as well as the political question doctrine, to avoid addressing constitutional issues relating to war powers. In the absence of judicial review, what is the causal mechanism by which the “precedent” of Obama seeking congressional authorization for the action in Syria could constrain future presidential action? When judicial review is unavailable, the most obvious way in which the President is constrained is through the political process—pressure from Congress, the public, his party, etc. In an extreme case, this pressure could take the form of impeachment proceedings, but it does not take such an extreme case for the pressure to have a significant effect on presidential decisionmaking. Indeed, it is easy to think of political considerations that might have motivated Obama to go to Congress with respect to Syria.

#### The plan reverses this

Lederman 11 (Martin, Professor of Law – Georgetown University Law Center, “War, Terror, and the Federal Courts, Ten Years After 9/11: Conference\*: Association of American Law Schools' Section on Federal Courts Program at the 2012 AALS Annual Meeting in Washington, D.C.,” American University Law Review, June, 61 Am. U.L. Rev. 1253, Lexis)

Number two: Numerous very important, contested, hotly debated topics have arisen in the last ten years, many of them in the Bush Administration, involving for example interrogation techniques, the scope of detention authority, habeas review, military commissions, targeted killings, and the use of force more broadly. On some of these questions, the federal courts - and the Supreme Court in particular - have had quite a lot to say; and on others, not so much, at least in part because of several different federal courts doctrines that prevent the courts from speaking too much about those. You're all familiar with standing limits, political questions, state secrets, etc. We're going to focus particularly on a couple of them, which are immunity doctrines and the weakening of the Bivens n2 and state court sorts of causes of action.

We will also discuss the fact that there are many people who think the federal courts have become too involved at supervising and resolving substantive questions involving the political branches, including some of Judge Kavanaugh's colleagues, who have been particularly vocal about that, engaging in what appears to be a form of resistance to the Supreme Court's Boumediene n3 decision. By contrast, many other people think the courts have not been nearly involved enough at resolving some of the unresolved questions about the scope of interrogation and detention and military commissions and the like, that might be lingering from the last administration, or occurring now in the new administration, such as with respect to use of force. So that's the second broad topic - whether the federal courts have been too timid or too aggressive in this area.

#### This makes war powers a justiciable issue – this case-specific exception causes a slippery slope that breaks the entire doctrine

Miller 10 (Mathew Edwin, JD – University of Michigan Law School, Associate – Latham & Watkins LLP, “The Right Issue, the Wrong Branch: Arguments against Adjudicating Climate Change Nuisance Claims,” Michigan Law Review, November, 109 Mich. L. Rev. 257, Lexis)

However, to say that cases like American Electric Power are justiciable just because plaintiffs allege a public nuisance begs the question: Why should such claims automatically be justiciable? It contravenes the purpose and articulation of the political question doctrine to suggest that nuisances are categorically justiciable because political questions have historically excluded torts between private parties and have focused instead on governmental issues like gerrymandering, foreign policy, and federal employment. n70 Again, Baker demanded "discriminating" case-by-case inquiries, rejecting "resolution by any semantic cataloguing." n71 Similarly, the fact that other public nuisance claims have not presented political questions in the past should not preclude such a finding in the climate context. n72 Indeed, the argument for nonjusticiability rests on the notion that climate suits are unique and therefore defy classification among tort precedent. n73

 [\*271] Extending the political question doctrine to a public nuisance allegation would surpass precedent in terms of claim-category application. Yet with respect to the theory behind the doctrine, such an extension is proper because cases like American Electric Power would push existing nuisance law to embrace a complex, qualitatively unique phenomenon that cannot be prudentially adjudicated. n74 The Supreme Court has never held that torts cannot present political questions, so prudential constitutional principles should similarly apply to them. This Note simply argues that the facts, claims, parties, and relief demanded in this particular mode of litigation should fall under the nonjusticiability umbrella, wherever its limits may lie. n75 The following analysis of Baker invokes the American Electric Power situation specifically for the sake of convenience, but the arguments therein should be read to apply to injunctive climate nuisance claims generally.

[Continues to Footnore]

n75. This Note does not purport to suggest exactly where the line ought to be drawn in applying the political question doctrine to tort claims. A consideration of the potential doctrinal "slippery slope" - where courts might improperly refuse to adjudicate claims solely on the basis of complexity - is beyond the scope of the present discussion.

#### Independently—violating PQD on war powers causes a wave of litigation—the impact is DOD contracting

Isenberg 10 (David, Research Fellow – Independent Institute, “Contractor Legal Immunity and the ‘Political Questions’ Doctrine,” CATO Institute, 1-19, <http://www.cato.org/publications/commentary/contractor-legal-immunity-political-questions-doctrine>)

One can easily see why most defense contractors, including private military and security firms working under U.S. government contract, would like to prevent such suits from proceeding. The sheer number of injuries alone gives them reason to want to avoid possible suits. According to ProPublica as of last September 30 the number of private contractors injured in Iraq and Afghanistan totaled 37,652. Of course, not all those injuries are the result of something done wrong. But even a small fraction of them would entail considerable legal costs for a contractor so it is easy to understand why they would want to preventing such suits from being filed in the first place.

As I am not a lawyer the following is derived from Maj. Carter’s article.

Traditionally, the reason given for this is that such cases may involve “political questions” that the Judicial Branch is ill-equipped to decide. Thus defense contractor advocates claim these actions must be dismissed, else there be grim consequences for Government contingency contracting.

But according to Maj. Carter, “the recent developments in political question doctrine case law are significant to the future of Government contingency contracting. However, they are not catastrophic — although portrayed as such by some defense contractor advocates. There will not be an explosion of contracting costs passed on to the Government. There will not be a mass refusal of defense contractors to accept contingency contracts. There will not be chaos on the battlefield. Such predictions are nothing more than “bellowing bungle.”

Carter wrote:

What is the political question doctrine? According to Chief Justice John Marshall, “[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in [the U.S. Supreme Court].” In 2004, the Court held “[s]ometimes .. . the law is that the judicial department has no business entertaining [a] claim of unlawfulness — because the question is entrusted to one of the political branches or involves no judicially enforceable rights. Such questions are said to be ‘nonjusticiable,’ or ‘political questions.’”

What this means is that traditionally courts have deferred to the political branches in matters of foreign policy and military affairs. Policy decisions regarding the employment of U.S. military forces in combat belong to the political branches, not the courts. The Supreme Court has held that, due to their “complex, subtle, and professional” nature, decisions as to the “composition, training, equipping, and control of a military force” are “subject always” to the control of the political branches.

Tort suits that challenge the internal operations of these areas of the military are likely to be dismissed as political questions. Yet, notwithstanding the foregoing prohibitions on judicial conduct, the Supreme Court has cautioned, “it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.” As mentioned earlier, vast precedent exists for judicial involvement in foreign and military affairs. Case law establishes that military decisions are reviewable by federal courts. An assertion of military necessity, standing alone, is not a bar to judicial action. Merely because a dispute can be tied in some way to combat activities does not prevent a court from reviewing it. Although an action arises in a contingency environment, if a case is essentially “an ordinary tort suit” it is well within the competence of the courts to entertain. Courts have underscored the point: no litmus test exists that prohibits judicial action merely because an issue involves the military in some fashion.

Where plaintiffs seek only damages and not injunctive relief, such cases are “particularly judicially manageable.” When such a damages-only lawsuit concerns only a defense contractor (as opposed to the Federal Government), courts have held that such actions do not involve “overseeing the conduct of foreign policy or the use and disposition of military power.” Thus, those actions are less likely to raise political questions than suits against the Government, suits seeking injunctive relief, or both.

Given the enormous amount of money involved in Government contingency contracting and the correspondingly large number of contractors and contractor employees performing GWOT (Global War on Terror) contingency contracts, the number of plaintiffs seeking redress for tortious conduct was certain to rise — and it did. Universally, defendant defense contractors invoked the political question doctrine in order to shield themselves from liability in their performance of GWOT contracts, some with more success than others. The first significant case centered around the tragic events at the Abu Ghraib prison in Iraq.

In Ibrahim v. Titan Corp., Iraqi plaintiffs alleged they were tortured, raped, humiliated, beaten, and starved while in U.S. custody. Apparently fearing a dismissal on sovereign immunity grounds if they sued the U.S. Government, the plaintiffs instead chose to name as defendants the contractors who provided interpreters and interrogators for the prison. The defendants filed a motion to dismiss, alleging the matter involved political questions. The court held the case should not be dismissed at such an early stage on political question grounds, especially because the United States was not a party to the case. Ibrahim is significant because it was the first GWOT case to underscore the need for full factual development of a case prior to an assessment of justiciability.

One particularly interesting point in Carter’s article is this:

Judges and scholars openly speculate about the possible consequences of defense contractor tort liability on the federal procurement process. In Boyle, the Supreme Court warned that “[t]he financial burden of judgments against [] contractors would ultimately be passed through, substantially if not totally, to the United States itself, since defense contractors will predictably raise their prices to cover, or to insure against, contingent liability … .”

Since private military contracting advocates claim that their firms are more cost effective than the government one might reasonably believe that they can be so only by preventing tort suits against them. If the cost of such suits were factored in, the presumed cost effectiveness could conceivably be significantly less, or perhaps not exist at all.

Carter asks “is the situation really this dire? Are contractors at a point where, because of increased litigation risks, they will be forced to charge the Government more for their services or elect to not provide services altogether?”

The answers may not be far away. In November 2008, Joshua Eller filed suit in the U.S. District Court for the Southern District of Texas, as a result of injuries he suffered at Balad Air Base, Iraq, while deployed as a contractor employee of KBR from February to November of 2006. The complaint alleges defendants KBR and Halliburton “intentionally and negligently exposed thousands of soldiers, contract employees and other persons to unsafe water, unsafe food, and contamination due to faulty waste disposal systems … .” The complaint also includes allegations of injury from toxic smoke which emanated from an open air burn pit at Balad. The complaint alleges approximately 1,000 other individuals suffered similar injuries and it seeks to combine all of those actions into a single class action lawsuit. More significantly, this action is only one of several suits currently pending that relate to similar KBR activities in Iraq.

The political question doctrine will be a major factor in this coming storm of litigation. With the large number of potential plaintiffs compounded by the seriousness of the conduct and injuries alleged, these suits have the potential to dwarf the damages awards previously sought in earlier GWOT cases. Undoubtedly, KBR will seek to raise the political question doctrine as an absolute bar to these and any similar suits.

Defense contractor advocates warn of “deleterious effects” to the mission and the contractor-military relationship if tort suits against war zone defense contractors are allowed to proceed. They argue such tort claims “frustrate” and “conflict with” the Government’s ability to control contingency operations and would result in compromised logistical support and mission jeopardy. Furthermore, many companies, especially smaller ones, could be deterred from seeking contingency contracts. For those contractors who do elect to proceed, they will seek to insulate themselves from liability by either self-insuring or obtaining insurance coverage, if it is available. The argument continues that such costs will then be passed onto the Government in the form of higher contract prices. But, most alarmingly, some defense contractor advocates claim the impact of such suits “would be far more profound than financial” and defense contractors may, out of a fear of being sued, refuse to follow the military’s instructions altogether.

#### Key to contain Afghan instability

Schwartz 9 (Moshe, Specialist in Defense Acquisition – Congressional Research Service, “Department of Defense Contractors in Iraq and Afghanistan: Background and Analysis,” Congressional Research Service, 8-23, http://fpc.state.gov/documents/organization/128824.pdf)

The Department of Defense (DOD) increasingly relies upon contractors to support operations in Iraq and Afghanistan, which has resulted in a DOD workforce in those countries comprising approximately an equal number of contractors (200,000) as uniformed personnel (194,000). The critical role contractors play in supporting such military operations and the billions of dollars spent by DOD on these services requires operational forces to effectively manage contractors during contingency operations. Lack of sufficient contract management can delay or even prevent troops from receiving needed support and can also result in wasteful spending. Some analysts believe that poor contract management has also played a role in abuses and crimes committed by certain contractors against local nationals, which likely has undermined U.S. counterinsurgency efforts in Iraq and Afghanistan.

DOD officials have stated that the military’s experience in Iraq and Afghanistan, coupled with Congressional attention and legislation, has focused DOD’s attention on the importance of contractors to operational success. DOD has taken steps to improve how it manages and oversees contractors in Iraq and Afghanistan. These steps include tracking contracting data, implementing contracting training for uniformed personnel, increasing the size of the acquisition workforce in Iraq and Afghanistan, and updating DOD doctrine to incorporate the role of contractors. However, these efforts are still in progress and could take three years or more to effectively implement.

#### Afghanistan failure causes WWIII great power war

Fox 2011 (Robert Fox, international reporter and associate at the Corriere della Sera in Milan, July 12, 2011, “Afghanistan: If we’re not careful, WW3 is imminent,” The Week, http://goo.gl/PlUTV)

There are growing fears that a speedy withdrawal of western troops from Afghanistan, accompanied by a fudged deal to bring the Taliban back into power in some sort of coalition, could trigger another dreadful round of civil war. And, given the meddling already undertaken by neighbours such as Pakistan and Iran, this civil war could quickly become a regional war. This in turn could morph into a contest of global significance between India and China and their proxies and allies. In short, welcome to the Third World War in the 21st century. There is a list of concerns which suggest this might happen. First there is the endemic corruption in Kabul under President Karzai. This is about to be highlighted by the IMF's attempt to sort out the crash of the Kabul Bank, with a loss of some $700 million. The problem is not just the Kabul bank, but banks in general across Afghanistan, which the kleptocrats of Kabul seem to regard as their personal piggy banks. Then there is Karzai himself, who seems to be trying to bend or break the constitution so he can run for a third term in two years' time – banned under the present rules. The armed services and police are also a concern. Though recruiting and training have made huge strides, with more than 250,000 under arms now, there are worries about the continuing imbalance between the different ethnic groups, with the Tajiks and Hazara over-represented, and the recruiting of southern Pashtuns still limping. The danger is that the Afghan army will split on ethnic lines when Afghanistan gains full control of its security in 2015. In a civil war, the southern Pashtuns would turn to the Pakistan army and ISI intelligence service, who are more deeply involved in backing Islamist militants than previously thought, according to some devastating reports for the New York Times by Carlotta Gall.

### Case

#### Democratic checks prevent their impact from escalating

O’Kane 1997 (“Modernity, the Holocaust, and politics”, Economy and Society, February, ebsco)

Chosen policies cannot be relegated to the position of immediate condition (Nazis in power) in the explanation of the Holocaust. Modern bureaucracy is not ‘intrinsically capable of genocidal action’ (Bauman 1989: 106). Centralized state coercion has no natural move to terror. In the explanation of modern genocides it is chosen policies which play the greatest part, whether in effecting bureaucratic secrecy, organizing forced labour, implementing a system of terror, harnessing science and technology or introducing extermination policies, as means and as ends. As Nazi Germany and Stalin’s USSR have shown, furthermore, those chosen policies of genocidal government turned away from and not towards modernity. The choosing of policies, however, is not independent of circumstances. An analysis of the history of each case plays an important part in explaining where and how genocidal governments come to power and analysis of political institutions and structures also helps towards an understanding of the factors which act as obstacles to modern genocide. But it is not just political factors which stand in the way of another Holocaust in modern society. Modern societies have not only pluralist democratic political systems but also economic pluralism where workers are free to change jobs and bargain wages and where independent firms, each with their own independent bureaucracies, exist in competition with state-controlled enterprises. In modern societies this economic pluralism both promotes and is served by the open scientific method. By ignoring competition and the capacity for people to move between organizations whether economic, political, scientific or social, Bauman overlooks crucial but also very ‘ordinary and common’ attributes of truly modern societies. It is these very ordinary and common attributes of modernity which stand in the way of modern genocides.

#### Not the root cause of conflict – other factors overwhelm

Volf 2002 Miroslav Volf (Henry B. Wright Professor of Theology at Yale Divinity School since 1998) Journal of Ecumenical Studies 1-1-02

Though “otherness”–cultural, ethnic, religious, racial difference–is an important factor in our relations with others, we should not overestimate it as a cause of conflict. During the war in the former Yugoslavia in the early 1990′s, I was often asked, “What is this war about? Is it about religious and cultural differences? Is it about economic advantage? Is it about political power? Is it about land?” The correct response was, of course, that the war was about all of these things. Monocausal explanations of major eruptions of violence are rarely right. Moreover, various causes are intimately intertwined, and each contributes to others. That holds true also for otherness, which I am highlighting here. However, neither should we underestimate otherness as a factor. The contest for political power, for economic advantage, and for a share of the land took place between people who belonged to discrete cultural and ethnic groups. Part of the goal of the war in the former Yugoslavia was the creation of ethnically clean territories with economic and political autonomy. The importance of “otherness” is only slightly diminished if we grant that the sense of ethnic and religious belonging was manipulated by unscrupulous, corrupt, and greedy politicians for their own political and economic gain. The fact that conjured fears for one’s identity could serve to legitimize a war whose major driving force lay elsewhere is itself a testimony to how much “otherness” matters.

#### Violence is objectively decreasing due to western reason and liberal democracy- spreading those ideals is key to solve conflict

Pinker 2011 Steven Pinker is Professor of psychology at Harvard University "Violence Vanquished" Sept 24 online.wsj.com/article/SB10001424053111904106704576583203589408180.html

 With all its wars, murder and genocide, history might suggest that the taste for blood is human nature. Not so, argues Harvard Prof. Steven Pinker. He talks to WSJ's Gary Rosen about the decline in violence in recent decades and his new book, "The Better Angels of Our Nature." But a better question may be, "How bad was the world in the past?" Believe it or not, the world of the past was much worse. Violence has been in decline for thousands of years, and today we may be living in the most peaceable era in the existence of our species. The decline, to be sure, has not been smooth. It has not brought violence down to zero, and it is not guaranteed to continue. But it is a persistent historical development, visible on scales from millennia to years, from the waging of wars to the spanking of children. This claim, I know, invites skepticism, incredulity, and sometimes anger. We tend to estimate the probability of an event from the ease with which we can recall examples, and scenes of carnage are more likely to be beamed into our homes and burned into our memories than footage of people dying of old age. There will always be enough violent deaths to fill the evening news, so people's impressions of violence will be disconnected from its actual likelihood. Evidence of our bloody history is not hard to find. Consider the genocides in the Old Testament and the crucifixions in the New, the gory mutilations in Shakespeare's tragedies and Grimm's fairy tales, the British monarchs who beheaded their relatives and the American founders who dueled with their rivals. Today the decline in these brutal practices can be quantified. A look at the numbers shows that over the course of our history, humankind has been blessed with six major declines of violence. The first was a process of pacification: the transition from the anarchy of the hunting, gathering and horticultural societies in which our species spent most of its evolutionary history to the first agricultural civilizations, with cities and governments, starting about 5,000 years ago. For centuries, social theorists like Hobbes and Rousseau speculated from their armchairs about what life was like in a "state of nature." Nowadays we can do better. Forensic archeology—a kind of "CSI: Paleolithic"—can estimate rates of violence from the proportion of skeletons in ancient sites with bashed-in skulls, decapitations or arrowheads embedded in bones. And ethnographers can tally the causes of death in tribal peoples that have recently lived outside of state control. These investigations show that, on average, about 15% of people in prestate eras died violently, compared to about 3% of the citizens of the earliest states. Tribal violence commonly subsides when a state or empire imposes control over a territory, leading to the various "paxes" (Romana, Islamica, Brittanica and so on) that are familiar to readers of history. It's not that the first kings had a benevolent interest in the welfare of their citizens. Just as a farmer tries to prevent his livestock from killing one another, so a ruler will try to keep his subjects from cycles of raiding and feuding. From his point of view, such squabbling is a dead loss—forgone opportunities to extract taxes, tributes, soldiers and slaves. The second decline of violence was a civilizing process that is best documented in Europe. Historical records show that between the late Middle Ages and the 20th century, European countries saw a 10- to 50-fold decline in their rates of homicide. The numbers are consistent with narrative histories of the brutality of life in the Middle Ages, when highwaymen made travel a risk to life and limb and dinners were commonly enlivened by dagger attacks. So many people had their noses cut off that medieval medical textbooks speculated about techniques for growing them back. Historians attribute this decline to the consolidation of a patchwork of feudal territories into large kingdoms with centralized authority and an infrastructure of commerce. Criminal justice was nationalized, and zero-sum plunder gave way to positive-sum trade. People increasingly controlled their impulses and sought to cooperate with their neighbors. The third transition, sometimes called the Humanitarian Revolution, took off with the Enlightenment. Governments and churches had long maintained order by punishing nonconformists with mutilation, torture and gruesome forms of execution, such as burning, breaking, disembowelment, impalement and sawing in half. The 18th century saw the widespread abolition of judicial torture, including the famous prohibition of "cruel and unusual punishment" in the eighth amendment of the U.S. Constitution. At the same time, many nations began to whittle down their list of capital crimes from the hundreds (including poaching, sodomy, witchcraft and counterfeiting) to just murder and treason. And a growing wave of countries abolished blood sports, dueling, witchhunts, religious persecution, absolute despotism and slavery. The fourth major transition is the respite from major interstate war that we have seen since the end of World War II. Historians sometimes refer to it as the Long Peace. Today we take it for granted that Italy and Austria will not come to blows, nor will Britain and Russia. But centuries ago, the great powers were almost always at war, and until quite recently, Western European countries tended to initiate two or three new wars every year. The cliché that the 20th century was "the most violent in history" ignores the second half of the century (and may not even be true of the first half, if one calculates violent deaths as a proportion of the world's population). Though it's tempting to attribute the Long Peace to nuclear deterrence, non-nuclear developed states have stopped fighting each other as well. Political scientists point instead to the growth of democracy, trade and international organizations—all of which, the statistical evidence shows, reduce the likelihood of conflict. They also credit the rising valuation of human life over national grandeur—a hard-won lesson of two world wars. The fifth trend, which I call the New Peace, involves war in the world as a whole, including developing nations. Since 1946, several organizations have tracked the number of armed conflicts and their human toll world-wide. The bad news is that for several decades, the decline of interstate wars was accompanied by a bulge of civil wars, as newly independent countries were led by inept governments, challenged by insurgencies and armed by the cold war superpowers. The less bad news is that civil wars tend to kill far fewer people than wars between states. And the best news is that, since the peak of the cold war in the 1970s and '80s, organized conflicts of all kinds—civil wars, genocides, repression by autocratic governments, terrorist attacks—have declined throughout the world, and their death tolls have declined even more precipitously. The rate of documented direct deaths from political violence (war, terrorism, genocide and warlord militias) in the past decade is an unprecedented few hundredths of a percentage point. Even if we multiplied that rate to account for unrecorded deaths and the victims of war-caused disease and famine, it would not exceed 1%. The most immediate cause of this New Peace was the demise of communism, which ended the proxy wars in the developing world stoked by the superpowers and also discredited genocidal ideologies that had justified the sacrifice of vast numbers of eggs to make a utopian omelet. Another contributor was the expansion of international peacekeeping forces, which really do keep the peace—not always, but far more often than when adversaries are left to fight to the bitter end. Finally, the postwar era has seen a cascade of "rights revolutions"—a growing revulsion against aggression on smaller scales. In the developed world, the civil rights movement obliterated lynchings and lethal pogroms, and the women's-rights movement has helped to shrink the incidence of rape and the beating and killing of wives and girlfriends. In recent decades, the movement for children's rights has significantly reduced rates of spanking, bullying, paddling in schools, and physical and sexual abuse. And the campaign for gay rights has forced governments in the developed world to repeal laws criminalizing homosexuality and has had some success in reducing hate crimes against gay people. \* \* \* \* Why has violence declined so dramatically for so long? Is it because violence has literally been bred out of us, leaving us more peaceful by nature? This seems unlikely. Evolution has a speed limit measured in generations, and many of these declines have unfolded over decades or even years. Toddlers continue to kick, bite and hit; little boys continue to play-fight; people of all ages continue to snipe and bicker, and most of them continue to harbor violent fantasies and to enjoy violent entertainment. It's more likely that human nature has always comprised inclinations toward violence and inclinations that counteract them—such as self-control, empathy, fairness and reason—what Abraham Lincoln called "the better angels of our nature." Violence has declined because historical circumstances have increasingly favored our better angels. The most obvious of these pacifying forces has been the state, with its monopoly on the legitimate use of force. A disinterested judiciary and police can defuse the temptation of exploitative attack, inhibit the impulse for revenge and circumvent the self-serving biases that make all parties to a dispute believe that they are on the side of the angels. We see evidence of the pacifying effects of government in the way that rates of killing declined following the expansion and consolidation of states in tribal societies and in medieval Europe. And we can watch the movie in reverse when violence erupts in zones of anarchy, such as the Wild West, failed states and neighborhoods controlled by mafias and street gangs, who can't call 911 or file a lawsuit to resolve their disputes but have to administer their own rough justice. Another pacifying force has been commerce, a game in which everybody can win. As technological progress allows the exchange of goods and ideas over longer distances and among larger groups of trading partners, other people become more valuable alive than dead. They switch from being targets of demonization and dehumanization to potential partners in reciprocal altruism. For example, though the relationship today between America and China is far from warm, we are unlikely to declare war on them or vice versa. Morality aside, they make too much of our stuff, and we owe them too much money. A third peacemaker has been cosmopolitanism—the expansion of people's parochial little worlds through literacy, mobility, education, science, history, journalism and mass media. These forms of virtual reality can prompt people to take the perspective of people unlike themselves and to expand their circle of sympathy to embrace them. These technologies have also powered an expansion of rationality and objectivity in human affairs. People are now less likely to privilege their own interests over those of others. They reflect more on the way they live and consider how they could be better off. Violence is often reframed as a problem to be solved rather than as a contest to be won. We devote ever more of our brainpower to guiding our better angels. It is probably no coincidence that the Humanitarian Revolution came on the heels of the Age of Reason and the Enlightenment, that the Long Peace and rights revolutions coincided with the electronic global village.

#### We control uniqueness – wars are declining now – your theoretical impacts don’t match reality

Marshall and Cole 2009 Monty G. Marshall (Research Professor in the George Mason University School of Public Policy and Director of Research at the Center for Global Policy) and Benjamin R Cole (Hood House Lecturer in International Affairs at the University of New Hampshire, He holds B.A. and M.A. degrees in Political Science from the University of New Hampshire and is completing his doctoral studies in the School of Public Policy at George Mason University) 2009 “Global Report 2009 Conflict, Governance, and State Fragility” pg 7-8, http://www.systemicpeace.org/Global%20Report%202009.pdf

The most encompassing observation that can be made regarding global system performance in regard to the conflict dimension concerns the status of major episodes of political violence (armed conflict). These include societal (civil, ethnic, and communal) and interstate (including independence) warfare.3 The global trend in major armed conflict has continued its dramatic decline during the globalization era both in numbers of states affected by major armed conflicts and in total magnitude (figure 3). According to our calculations, the global magnitude of warfare has decreased by over sixty percent since peaking in the mid-1980s, falling by the end of 2009 to its lowest level since 1960. Societal warfare has been the predominant mode of warfare since the mid-1950s; increasing steeply and steadily through the Cold War period. This steep, linear increase in societal warfare is largely explained by a general tendency toward longer, more protracted, wars during that period; internal wars often receiving crucial military and/or material support from foreign states, in many cases linked to the competing superpowers. In contrast, the rate of onset of new societal wars has remained constant since 1946 to the present with an average of about four new societal wars per year. In contrast, the global trend in interstate warfare has remained at a relatively low level since the end of the Second World War and the establishment of the United Nations Organization (UN). The UN was specially designed to “maintain international peace and security” without “interven[ing] in matters which are essentially within the domestic jurisdiction of any state.” Although there was a moderate increase in interstate wars during the latter years of the Cold War, from 1977 to 1987, like civil warfare, interstate warfare has also declined substantially since the end of the Cold War. Of the interstate wars that took place during the Cold War period, many of the most serious were wars of independence fought during the decolonization phase that occurred during the first half of the Cold War period. Of the conventional interstate wars, onsets occurred at the rate of about one event per year, although onsets occurred at about double that rate during the late 1970s and early 1980s. Of sixty seven such wars, three-quarters remained at fairly low levels of violence.

#### No mindless intervention

Mandelbaum 2011 (Michael Mandelbaum, A. Herter Professor of American Foreign Policy, the Paul H. Nitze School of Advanced International Studies, Johns Hopkins University, Washington DC; and Director, Project on East-West Relations, Council on Foreign Relations, “CFR 90th Anniversary Series on Renewing America: American Power and Profligacy,” Jan 2011)

I think it is, Richard. And I think that this period really goes back two decades. I think the wars or the interventions in Somalia, in Bosnia, in Kosovo, in Haiti belong with the interventions in Afghanistan and Iraq, although they were undertaken by different administrations for different reasons, and had different costs. But all of them ended up in the protracted, unexpected, unwanted and expensive task of nation building. Nation building has never been popular. The country has never liked it. It likes it even less now. And I think we're not going to do it again. We're not going to do it because there won't be enough money. We're not going to do it because there will be other demands on the public purse. We won't do it because we'll be busy enough doing the things that I think ought to be done in foreign policy. And we won't do it because it will be clear to politicians that the range of legitimate choices that they have in foreign policy will have narrowed and will exclude interventions of that kind. So I believe and I say in the book that the last -- the first two post-Cold War decades can be seen as a single unit. And that unit has come to an end.

# 2NC

## Counterplan

### Executive Constitutionalism

#### CP alone is key to executive constitutionalism

Cornelia Pillard Feb 2005 Supreme Court Inst, G-town U Law, former DOJ Deputy Asst Att Gen

<http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1190&context=facpub>

Michigan Law Review, 103.4, “The Unfulfilled Promise of the Constitution in Executive Hands”, 103 Mich. L. Rev. 676-758

V. ENABLING EXECUTIVE CONSTITUTIONALISM The courts indisputably do not and cannot fully assure our enjoyment of our constitutional rights, and it is equally clear that the federal executive has an independent constitutional duty to fulfill the Constitution's promise. Executive constitutionalism seems ripe with promise. Yet, it is striking how limited and court-centered the executive's normative and institutional approaches to constitutional questions remain. One conceivable way to avoid the pitfalls of court-centric executive lawyering on one hand and constitutional decisions warped by political expedience on the other would be to make the Solicitor General and Office of Legal Counsel - or perhaps the entire Department of Justice - as structurally independent as an independent counsel or independent agency.207 Making the SG and OLC independent in order to insulate them from politics presumably would alleviate the "majoritarian difficulty" resulting from their service to elected clients. Promoting fuller independence in that sense does not, however, appear to be clearly normatively attractive, constitutionally permissible, nor particularly feasible. In all the criticism of our current constitutionalism, there is little call for an SG or OLC that would act, in effect, as a fully insulated and jurisprudentially autonomous constitutional court within the executive branch, operating with even less transparency and accountability than the Supreme Court. Moreover, as a practical matter it would be complex and problematic to increase the independence of the SG and OLC. The federal government faces Article II obstacles to formally insulating executive lawyers from politics and institutional pressures, and the president and his administration likely would be less amenable to guidance from such unaccountable lawyers.208 The challenge, rather, is to draw forth from the executive a constitutional consciousness and practice that helps the government actively to seek to fulfill the commitments of the Constitution and its Bill of Rights, interpreted by the executive as guiding principles for government. Adjustments to executive branch constitutional process and culture should be favored if they encourage the executive to use its experience and capacities to fulfill its distinctive role in effectuating constitutional guarantees. There is transformative potential in measures that break ingrained executive branch habits of looking to the Constitution only as it is mediated through the courts, and of reflexively seeking, where there is no clear doctrinal answer, to minimize constitutional constraint. It is difficult fully to imagine what kinds of changes would best prompt executive lawyers and officials to pick up constitutional analysis where the courts leave off, and to rely on the Constitution as an affirmative, guiding mandate for government action; what follows are not worked-out proposals, but are meant to be merely suggestive. A. Correcting the Bias Against Constitutional Constraint As we have seen, the SG's and OLC's default interpretive approach to individual rights and other forms of constitutional constraints on government is to follow what clear judicial precedents there are and, where precedents are not squarely to the contrary, to favor interpretations that minimize constitutional rights or other constitutional obligations on federal actors. Those court-centered and narrowly self-serving executive traditions produce a systematic skew against individual rights. 1. Encourage Express Presidential Articulation of Commitment to Constitutional Rights To the extent that a president articulates his own rights-protective constitutional vision with any specificity, he ameliorates the tension his constitutional lawyers otherwise face between advancing individual rights and serving their boss's presumed interest in maximum governing flexibility. Case or controversy requirements and restrictions against courts issuing advisory opinions do not, of course, apply to the executive's internal constitutional decisionmaking, and presidents can better serve individual rights to the extent that they expressly stake out their constitutional commitments in general and in advance of any concrete controversy."° When the president takes a stand for advancing abortion rights, property rights, disability rights, "charitable choice," a right to bear arms, or full remediation of race and sex discrimination, he signals to his lawyers that they should, in those areas, set aside their default bias in favor of preserving executive prerogative, even if it requires extra executive effort or restraint to do so. If presented in a concrete setting with a choice between interpreting and applying the Constitution in fully rights-protective ways or sparing themselves the effort where Supreme Court precedent can be read not to require it, government officials typically default to the latter course without considering whether they might thereby be giving short shrift to a constitutional duty. A president's stated commitment to protection of particular rights, however, flips the default position with respect to those rights, acting as a spur to executive-branch lawyers and other personnel to work to give effect to constitutional rights even where, for a range of institutional reasons, the courts would not. A president is thus uniquely situated to facilitate full executive-branch constitutional compliance by precommitting himself to a rights-protective constitutional vision, and thereby making clear that respect for constitutional rights is part of the executive's interest, not counter to it.

#### Executive constitutionalism solves the aff, key to robust democracy

Pillard 2005 – JD from Harvard, Faculty Director of Supreme Court Institute at Georgetown University Law Center, former Deputy Assistant Attorney General in the DOJ (February, Cornelia T., Michigan Law Review, 103.4, “The Unfulfilled Promise of the Constitution in Executive Hands”, 103 Mich. L. Rev. 676-758, http://scholarship.law.georgetown.edu/facpub/189/)

\*NOTE: SG = Solicitor General; OLC = Office of Legal Counsel

The executive, in my view, has failed fully to meet the challenges of interpreting and applying the Constitution on its own. My focus here is on questions of individual rights that evade judicial review. As the Office of Legal Counsel's "torture memos" illustrate, there are substantial risks associated with executive decisionmaking on fundamental questions of executive power and individual rights.' My basic analysis is also relevant to the executive's approach to federalism and separation of powers, but the principal focus here is on how the executive understands and fulfills its constitutional obligations with respect to individuals.2 This Article builds on two bodies of literature that, thus far, have not significantly engaged one another: writings about executive-branch legal processes, and about the Department of Justice's Solicitor General ("SG") and Office of Legal Counsel ("OLC") in particular (the institutional literature), and a recent round of theoretical scholarship about extrajudicial constitutionalism (the theoretical literature). The institutional literature typically projects confidence that the SG and OLC provide the highest quality legal advice and representation to the executive, and that they scrupulously protect the Constitution against executive officials distorting the law to advance personal, partisan, or institutionally parochial agendas. These writings routinely point to the special character and traditions of those offices in representing not only the president and the executive branch, but also the United States and its people. The descriptions seem at first blush to support the enthusiasm of the extrajudicial constitutionalists, inasmuch as they highlight offices within the executive branch dedicated to high-quality constitutional analysis. Meanwhile, the theoretical literature on extrajudicial constitutionalism suggests that the political branches have the capacity to effectuate the Constitution in ways quite distinct from the familiar, judicial version, and that, in part because of that distinctiveness, extrajudicial constitutionalism provides a normatively attractive supplement to or substitute for judicial doctrines. Scholars have pinned on the political branches hopes for a more democratic, less crabbed and formalistic constitutionalism, and one that reflects the political branches' distinctive capacities. Larry Sager, for example, sees the gap between the Constitution's normative commands and their judicial enforcement as enabling "robust participation by popular political institutions in the constitutional project of identifying and implementing the elements of political justice."3 Robin West identifies congressional constitutionalism as potentially enabling the "the democratization - long overdue - of the Constitution itself," and as promising a less legalistic approach Robert Post and Reva Siegel contend that "[q]uestions of constitutional law involve profound issues of national identity that cannot be resolved merely by judicial decree," and that, therefore, "a legitimate and vibrant system of constitutional law requires institutional structures that will ground it in the constitutional culture of the nation."5 Larry Kramer unearths an American historical tradition of popular constitutionalism that embraces "the democratic pedigree and superior evaluative capacities of the political branches" and that is resistant to the notion that the Constitution is mere ordinary law, formalistic and legalized to such an extent that only courts can be trusted with it.6 Bruce Peabody believes "a deeper consensus" could result from greater engagement by nonjudicial actors in constitutional interpretation Mark Tushnet champions a "populist constitutional law," wrested from the courts' unduly formalistic reliance on text, structure and history, and interpreted instead in light of "all-things-considered, more practical judgment."' As Christopher Eisgruber has explained, "[e]xperience and responsibility are invaluable teachers in the art of governance, and there may be times when Congress or the Executive, by virtue of their connection to the people or their knowledge of what government can do, have the best insight into how the Constitution balances competing principles."9 Certain features stand out as normatively attractive to proponents of political-branch constitutionalism. As applied to the executive, the theoretical literature highlights the importance of democratic responsiveness and distinctive institutional capacities (e.g., the executive's ability to investigate facts and take positive action) in shaping a constitutionalism that differs substantially from what the courts devise. Also central for those theorists, although often implicit, is a commitment to constitutional - as distinct from merely political - guidance for decisions left to political actors. The Constitution in the executive's hands could be a counterweight both to a monopoly over constitutional meaning in the hands of judicial elites that is stunted by the courts' limited practical capacities, and to a politics of raw competition among self-promoting interests divorced from the public-regarding underpinning our fundamental law provides. Viewed in this way, executive constitutionalism holds untapped potential as a more democratically engaged and institutionally versatile way of keeping the American polity true to its best self.

### Solves their “branch key” warrants

#### The CP garners the benefits of Congressional & Judicial involvement while avoiding the DA’s – keeping authority with the president is the key

James Baker, 2007 - Former Special Assistant to the President & Legal Advisor to NSC

Chief Judge, United States Court of Appeals for the Armed Forces IN THE COMMON DEFENSE: NATIONAL SECURITY LAW FOR PERILOUS TIMES, p. 25-27

Understanding process also entails an appreciation as to how to effectively engage the constitutional process between branches. Unilateral executive action has advantages in surprise, speed, and secrecy. In context, it is also functionally imperative. As discussed in Chapter 8, for example, military command could hardly function if it were subject to interagency, let alone, interbranch application. Unilateral decision and action have other advantages. Advantage comes in part from the absence of objection or dissent and in the avoidance of partisan political obstruction. In the view of some experts, during the past fifteen years, “party and ideology routinely trump institutional interests and responsibilities” in the Congress.6 These years coincide with the emergence of the jihadist threat. However, there are also security benefits that derive from the operation of external constitutional appraisal. These include the foreknowledge of objection and the improvements in policy or execution that dissent might influence. Chances are, if the executive cannot sell a policy to members of Congress, or persuade the courts that executive actions are lawful, the executive will not be able to convince the American public or the international community. A sustained and indefinite conflict will involve difficult public policy trade-offs that will require sustained public support; that means support from a majority of the population, not just a president’s political base or party. Such support is found in the effective operation of all the constitutional branches operating with transparency. Where members of Congress of both parties review and validate a policy, it is more likely to win public support. Likewise, where the government’s legal arguments and facts are validated through independent judicial review, they are more likely to garner sustained public support. Thus, where there is more than one legal and effective way to accomplish the mission, as a matter of legal policy, the president and his national security lawyers should espouse the inclusive argument that is more likely to persuade more people for a longer period of time. The extreme and divisive argument should be reserved for the extraordinary circumstance. In short, congressional and judicial review, not necessarily decision, offers a source of independent policy and legal validation that is not found in the executive branch alone. Further, while the president alone has the authority to wield the tools of national security and the bureaucratic efficiencies to do so effectively, that is not to say the president does not benefit from maximizing his authority through the involvement and validation of the other branches of government. Whatever can be said of the president’s independent authority to act, as the Jacksonian paradigm recognizes, when the president acts with the express or implied authorization of the Congress in addition to his own inherent authority, he acts at the zenith of his powers. Therefore, those who believe in the necessity of executive action to preempt and respond to the terrorist threat, as I do, should favor legal arguments that maximize presidential authority. In context, this means the meaningful and transparent participation of the Congress and the courts.

### A2 PDB

#### Perm links to circumvention CP does not

Harvard Law Review 2012 (Unsigned)

Presidential Power and the Office of Legal Counsel, 125 Harv. L. Rev. 2090

The President relies on OLC to issue written opinions that explain the bounds of his constitutional authority and help him to fulfill his duty to faithfully execute the laws. The threat to national security posed by the war on terror in the past decade has led to increased pressure on OLC to give the President the tools that he needs in order to protect the country. Each of the examples discussed in this Part reveals the need for OLC not only to adhere to its own internal guidelines but also to strengthen them in order to protect its independence and legitimacy. This approach would ensure that the White House receives the best possible legal advice on controversial subjects and would give the President the option to use its opinions as a form of executive self-binding. Given the apparent atrophy of external constraints from the other branches, an internal constraint of this kind may offer the best chance of meaningfully containing executive power. Such a constraint, however, requires the influence of public opinion, as in the case of signing statements, and only time will tell whether public opinion will have a similar impact in the context of OLC.

### 2NC Compliance

#### Presidential pledge assures compliance

Harvard Law Review 2012 (Unsigned)

Presidential Power and the Office of Legal Counsel, 125 Harv. L. Rev. 2090

As Professor Richard Pildes points out in his critique of their book, though, "willingness to follow OLC interpretations would seem to be the quintessential kind of executive self-binding constraint that Posner and Vermeule otherwise advocate as critical to presidential credibility." n61 Indeed, the President could self-interestedly announce that, because an independent OLC would provide him with a relatively unbiased view of the law, he is pledging to follow its advice in the vast majority of cases. Legally, the President would remain free to weigh OLC's opinion against the advice provided by the White House Counsel or cabinet officials, and he would retain the power to reject any OLC opinion with which he disagreed or which he believed would [\*2100] harm national security or other vital interests if followed. Informally, however, he would face political and reputational costs if he decided to go back on his pledge and substitute his own judgment for that of OLC, n62 costs made even more substantial as a result of the White House's reliance on OLC's reputation to legitimate some of its key legal positions. The stigma attached to disregarding OLC's advice n63 would thus constitute a meaningful limit on the President, particularly if public opinion plays a role in constraining the President, n64 because he would be discouraged from deviating from OLC's view unless he were willing to spend a significant amount of political capital. Thus, if OLC's internal safeguards work correctly, the President will have a strong incentive to follow a (relatively) impartial view of the law while nevertheless retaining the flexibility, in times of need, to determine the meaning of the law for himself.

#### Disclosure checks the advantages

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<http://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1370&context=plr> Pepperdine Law Review, Volume 39, Issue 4, Article 1, “Reforming Lawyers into Irrelevance?: Reconciling Crisis and Constraint at the Office of Legal Counsel”,)

1. Disclosure Disclosure is an important deliberative safeguard. From an ex ante perspective, disclosure protects against fringe views, since the author of an opinion knows that outside audiences will “kick the tires” and quickly discover and critique views that distort the relevant law.242 Disclosure also helps ex post, by allowing Congress, professional peers, and the public to see distortions as they emerge and campaign to correct them.243 Disclosure also works hand in hand with efforts by the President to secure ratification of an unorthodox view that responds to exigent circumstances; disclosure, at least to Congress, is a necessary incident of ratification.244 Certain opinions may contain sensitive information that makes immediate disclosure inappropriate.245 However, Congress could well require as part of its oversight that OLC engage in a deliberative process, including making express findings that become part of an opinion, when such circumstances prevail.

#### The CP includes the SG – united fronts solve

Cornelia Pillard Feb 2005 Supreme Court Inst, G-town U Law, former DOJ Deputy Asst Att Gen

<http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1190&context=facpub>

Michigan Law Review, 103.4, “The Unfulfilled Promise of the Constitution in Executive Hands”, 103 Mich. L. Rev. 676-758

One such difference is that all of the OLC deputies are politically appointed, whereas in the SG's Office, three out of the four deputies are career employees. A more politically led office seems less likely to make impartial, arms-length constitutional decisions, but the political pedigree of OLC's leadership may give it credibility with the political leadership of client entities by helping them to trust that OLC will not use constitutional objections as a back-door way to stop or limit policies with which it simply disagrees. Only when clients are willing to abide by its advice can OLC play a client-checking role. Another difference between the two offices is that, whereas only one deputy reviews each matter in the SG's office, OLC customarily follows a "two-deputy rule," permitting advice on behalf of the office only after review and approval by two deputies. Without the immediate threat of an adverse court judgment against an agency that fails to follow its advice, OLC's clout depends more on support from other sources. Presenting a "united front," rather than lone authors more readily questioned as idiosyncratic, may enhance OLC's authority with its clients.125

#### WHCO assures compliance – best actual check on the president

Maryanne Borrelli 2k - Connecticut College IR Professor (International Relations)

Also Karen Hult, Nancy Kassop, “The White House Counsel’s Office”, http://whitehousetransitionproject.org/files/counsel/Counsel-OD.PDF

The White House Counsel’s Office is at the hub of all presidential activity. Its mandate is to be watchful for and attentive to legal issues that may arise in policy and political contexts in which the president plays a role. To fulfill this responsibility, it monitors and coordinates the presidency’s interactions with other players in and out of government. Often called “the president’s lawyer,” the Counsel’s Office serves, more accurately, as the “presidency’s lawyer,” with tasks that extend well beyond exclusively legal ones. These have developed over time, depending on the needs of different presidents, on the relationship between a president and a Counsel, and on contemporary political conditions. The Office carries out many routine tasks, such as vetting all presidential appointments and advising on the application of ethics regulations to White House staff and executive branch officials, but it also operates as a “command center” when crises or scandals erupt. Thus, the more sharply polarized political atmosphere in recent years has led to greater responsibility and demands, as well as heightened political pressure and visibility, on the traditionally low-profile Counsel’s Office. The high-stakes quality of its work has led to a common sentiment among Counsels and their staff that there is “zero tolerance” for error in this office. In sum, the Counsel’s Office might be characterized as a monitor, a coordinator, a negotiator, a recommender, and a translator: it monitors ethics matters, it coordinates the president’s message and agenda with other executive branch units, it negotiates with a whole host of actors on the president’s behalf (not the least of which is Congress), it recommends myriad actions to the president, and it translates or interprets the law (whether it is the Constitution, federal rules and regulations, treaties or legislation) for all executive branch officials. Past Counsels have lamented that there is no job description for this office, while the opening quote from Peter Wallison makes clear that even if there was, it would be all-consuming and all-inclusive of everything that goes in and out of the president’s office. In simple terms, the Counsel’s Office performs five basic categories of functions: (1) advising on the exercise of presidential powers and defending the president’s constitutional prerogatives; (2) overseeing presidential nominations and appointments to the executive and judicial branches; (3) advising on presidential actions relating to the legislative process; (4) educating White House staffers about ethics rules and records management and monitoring adherence; and (5) handling department, agency and White House staff contacts with the Department of Justice (see Functions section). In undertaking these responsibilities, the Counsel’s Office interacts regularly with, among others, the president, the Chief of Staff, the White House Office of Personnel, the Press Secretary, the White House Office of Legislative Affairs, the Attorney General, the Office of Management and Budget (on the legislative process), the General Counsels of the departments and agencies, and most especially, the Office of Legal Counsel in the Department of Justice (see Relationships section). In addition to the Counsel, the Office usually consists of one or two Deputy Counsels, a varying number of Associate and Assistant Counsels, a Special Counsel when scandals arise, a Senior Counsel in some administrations, and support staff. Tasks are apportioned to these positions in various ways, depending on the Counsel’s choices, though most Counsels expect all Office members to share the ongoing vetting for presidential appointments (see Organization and Operations section). Certain responsibilities within the Office are central at the very start of an administration (e.g., vetting for initial nominations and shepherding the appointment process through the Senate), while others have a cyclical nature to them (e.g., the annual budget, the State of the Union message), and still others follow an electoral cycle (e.g., determining whether presidential travel and other activities are partisan/electoral/campaign or governmental ones) (see Organization and Operations). There is, of course, the always unpredictable (but almost inevitable) flurry of scandals and crises, in which all eyes turn to the Counsel’s Office for guidance and answers. Watergate, Iran-contra, Whitewater, the Clinton impeachment, and the FBI files and White House Travel Office matters were all managed from the Counsel’s Office, in settings that usually separated scandal management from the routine work of the Office, so as to permit ongoing operations to continue with minimal distraction. Among the more regular tasks that occur throughout an administration are such jobs as directing the judicial nomination process, reviewing legislative proposals (the president’s, those from departments and agencies, and bills Congress has passed that need the Counsel’s recommendation for presidential signature or veto), editing and clearing presidential statements and speeches, writing executive orders, and determining the application of executive privilege (see both Relationships and Organization and Operations sections). Perhaps, the most challenging task for the Counsel is being the one who has the duty to tell the president “no,” especially when it comes to defending the constitutional powers and prerogatives of the presidency. Lloyd Cutler, Counsel for both Presidents Carter and Clinton, noted that, in return for being “on the cutting edge of problems,” the Counsel needs to be someone who has his own established reputation…someone who is willing to stand up to the President, to say, “No, Mr. President, you shouldn’t do that for these reasons.” There is a great tendency among all presidential staffs to be very sycophantic, very sycophantic. It’s almost impossible to avoid, “This man is the President of the United States and you want to stay in his good graces,” even when he is about to do something dumb; you don’t tell him that. You find some way to put it in a very diplomatic manner. (Cutler interview, pp. 3-4) LAW, POLITICS AND POLICY A helpful way to understand the Counsel’s Office is to see it as sitting at the intersection of law, politics and policy. Consequently, it confronts the difficult and delicate task of trying to reconcile all three of these without sacrificing too much of any one. It is the distinctive challenge of the Counsel’s Office to advise the president to take actions that are both legally sound and politically astute. A 1994 article in Legal Times warned of the pitfalls: Because a sound legal decision can be a political disaster, the presidential counsel constantly sacrifices legal ground for political advantage. (Bendavid, 1994, p. 13) For example, A.B. Culvahouse recalled his experience upon arriving at the White House as counsel and having to implement President Reagan’s earlier decision to turn over his personal diaries to investigators during the Iran-contra scandal. Ronald Reagan’s decision to turn over his diary - that sits at the core of the presidency. …You’re setting up precedents and ceding a little power. But politically, President Reagan wanted to get it behind him. (Bendavid, 1994, p. 13) Nonetheless, Culvahouse added, the Counsel is “the last and in some cases the only protector of the President’s constitutional privileges. Almost everyone else is willing to give those away in part inch by inch and bit by bit in order to win the issue of the day, to achieve compromise on today’s thorny issue. So a lot of what I did was stand in the way of that process...” (Culvahouse interview, p. 28) Because of this blend of legal, political and policy elements, the most essential function a Counsel can perform for a president is to act as an “early warning system” for potential legal trouble spots before (and, ultimately, after) they erupt. For this role, a Counsel must keep his or her “antennae” constantly attuned. Being at the right meetings at the right time and knowing which people have information and/or the necessary technical knowledge and expertise in specific policy or legal areas are the keys to insuring the best service in this part of the position. C. Boyden Gray, Counsel for President Bush, commented: “As Culvahouse said -- I used to say that the meetings I was invited to, I shouldn’t go to. …It’s the meetings I wasn’t invited to that I’d go to.” (Gray interview, p. 26) Lloyd Cutler noted that ….the White House Counsel will learn by going to the staff meetings, et cetera, that something is about to be done that has buried within it a legal issue which the people who are advocating it either haven’t recognized or push under the rug. He says, “Wait a minute. We’ve got to check this out,” and goes to the Office of Legal Counsel and alerts them and gets their opinion. But for the existence of the White House Counsel, the Office of Legal Counsel would never have learned about the problem until it was too late. (Cutler interview, p. 4) One other crucial part of the job where the legal overlaps with the policy and the political -- and which can spell disaster for Counsels who disregard this -- is knowing when to go to the Office of Legal Counsel for guidance on prevailing legal interpretations and opinions on the scope of presidential authority. It is then up to the White House Counsel to sift through these legal opinions, and to bring into play the operative policy and political considerations in order to offer the president his or her best recommendation on a course of presidential action. Lloyd Cutler described how this process works:

## Warfighting

### Executive Key Links

#### \*\*\*Speed of decisionmaking is key to 4GW- executive power is essential

Li 2009 [Zheyoa Li Winter, 2009 The Georgetown Journal of Law Public Policy 7 Geo. J.L. & Pub. Pol'y 373 “War Powers for the Fourth Generation: Constitutional Interpretation in the Age of Asymmetric Warfare” lexis]

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 [\*399] consider the implications of the OODA Loop: Observe, Orient, Decide, and Act. 144 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." 146 Unfortunately, the existing constitutional understanding, which diffuses war power between two branches of government, necessarily (by the Framers' design) slows down decision-making. [\*400] 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 fourth-generational opponents.

### Judiciary Links

#### Now is a key time to determine future role of the judiciary in regulating 4GW- increased restrictions open the floodgates

Wittes 2008 [Benjamin Wittes is a senior fellow in Governance Studies at The Brookings Institution. He co-founded and is the editor-in-chief of the Lawfare blog, which is devoted to sober and serious discussion of "Hard National Security Choices," and is a member of the Hoover Institution's Task Force on National Security and Law 2008 “LAW AND THE ¶ LONG WAR ¶ THE FUTURE OF JUSTICE ¶ IN THE AGE OF TERROR” Chapter 4 “The Necessity and ¶ Impossibility of Judicial ¶ Review” Penguin Press https://webspace.utexas.edu/rmc2289/National%20Security%20and%20the%20Courts/Law%20and%20the%20Long%20War%20%20Chapter%204.pdf]

Before turning to competing visions of what judicial review in this area ¶ ought to look like, let us step back for a moment and contemplate its reality to ¶ date - a reality that, more than six years after the September 11 attacks, has ¶ answered virtually none of the fundamental questions this conflict poses ¶ yet, in the very act of not answering those questions, has made the justices ¶ central players in counterterrorism policy. There is a yawning, though little understood, chasm between the practical impact of the Supreme Court's decisions in this area so far and the potential implications of those decisions in the ¶ future -perhaps the near future - to justify more extensive judicial supervision of war making. Taken on their own, the Court's pronouncements to date ¶ have been something less than dramatic. At the same time, they contain doctrinal seeds of a far more aggressive judicial posture -one that several of the ¶ justices clearly regard as desirable. The Court, in other words, has loaded and ¶ cocked its gun, positioning itself for a veritable sea change in the relationship ¶ between the federal branches in wartime. Yet it has skillfully done so without ¶ closing of f any policy options for either the executive branch or the legislature ¶ in the short term. It has not actually pulled the trigger. ¶

#### Assertion of judicial power over the executive collapses warfighting against nonstate actors

Wittes 2008 [Benjamin Wittes is a senior fellow in Governance Studies at The Brookings Institution. He co-founded and is the editor-in-chief of the Lawfare blog, which is devoted to sober and serious discussion of "Hard National Security Choices," and is a member of the Hoover Institution's Task Force on National Security and Law 2008 “LAW AND THE ¶ LONG WAR ¶ THE FUTURE OF JUSTICE ¶ IN THE AGE OF TERROR” Chapter 4 “The Necessity and ¶ Impossibility of Judicial ¶ Review” Penguin Press https://webspace.utexas.edu/rmc2289/National%20Security%20and%20the%20Courts/Law%20and%20the%20Long%20War%20%20Chapter%204.pdf]

But then there's the tectonic level, where the impact of the decisions is akin ¶ to the persistent grinding of plates deep within the San Andreas fault; the ¶ plates haven't slipped yet" but they're threatening to. Indeed, the Court's ¶ deepest impact to date has not lain in the substance of anything it has done ¶ but in its insistence on its own predominant role - the insistence tha t it has ¶ the final say. The decisions seem to threaten a completely different judicial ¶ posture in the war on terrorism, one tha t is a kind of mi r ror image of the executive power model the administration has adopted. Call it the judicial power ¶ model. Under this vision, which clearly attracts the Court's more liberal justices, the Court asserts the inherent authority to review executive military actions. I t sets its own jurisdiction for such review without regard to the wishes ¶ of the two political branches or to the historical limits of judicial power. In the \_ ¶ absence of clear substantive law to apply using tha t jurisdiction, the justices ¶ mold substantive rights for detainees out of international humanitarian-law ¶ principles the Uni t ed States has either never embraced at all or never clearly ¶ implemented in its domestic statutes. And they claim tha t this power of review follows the American military wherever it goes a round the world. This ¶ specter is not a pa r anoid conservative fantasy. I t is one very plausible endpoint of the road on which the justices set off in Rasul. I t would represent a ¶ tremendous shift in the balance of power among the branches of government ¶ during wa r t ime - and a disaster for the institution of the presidency against ¶ which any reasonable executive-branch lawyer would t ry to protect his client. ¶ At this most speculative level of analysis, Rasul and Hamdan por t end a rebuke ¶ even more extreme than the top-level beating the press understood.

### Security K

**Threats real and not constructed—rational risk assessment goes aff**

Knudsen 2001 (Olav Knudsen, Political Science Professor at Sodertorn, Post-Copenhagen Security Studies, Security Dialogue)

Moreover, I have a problem with the underlying implication that it is unimportant whether states 'really' face dangers from other states or groups. In the Copenhagen school, threats are seen as coming mainly from the actors' own fears, or from what happens when the fears of individuals turn into paranoid political action. In my view, this emphasis on the subjective is a **misleading conception of threat**, in that it discounts an independent existence for what- ever is perceived as a threat. Granted, political life is often marked by misperceptions, mistakes, pure imaginations, ghosts, or mirages, but such phenomena **do not occur simultaneously** to large numbers of politicians, and **hardly most of the time**. During the Cold War, threats - in the sense of plausible possibilities of danger - referred to 'real' phenomena, and they **refer to 'real' phenomena** now. The objects referred to are often not the same, but that is a different matter. Threats have to be dealt with both ín terms of perceptions and in terms of the phenomena which are perceived to be threatening. The point of Waever’s concept of security is not the potential existence of danger somewhere but the use of the word itself by political elites. In his 1997 PhD dissertation, he writes, ’One can View “security” as that which is in language theory called a speech act: it is not interesting as a sign referring to something more real - it is the utterance itself that is the act.’24 The deliberate disregard of objective factors is even more explicitly stated in Buzan & WaeVer’s joint article of the same year.” As a consequence, the phenomenon of threat is reduced to a matter of pure domestic politics.” It seems to me that the security dilemma, as a central notion in security studies, then loses its foundation. Yet I see that Waever himself has no compunction about referring to the security dilemma in a recent article." This discounting of the objective aspect of threats shifts security studies to insignificant concerns. What has long made 'threats' and ’threat perceptions’ important phenomena in the study of IR is the implication that **urgent action may be required**. Urgency, of course, is where Waever first began his argument in favor of an alternative security conception, because a convincing sense of urgency has been the chief culprit behind the abuse of 'security' and the consequent ’politics of panic', as Waever aptly calls it.” Now, here - in the case of urgency - another baby is thrown out with the Waeverian bathwater. When real situations of urgency arise, those situations are challenges to democracy; they are actually at the core of the problematic arising with the process of making security policy in parliamentary democracy. But in Waever’s world, threats are merely more or less persuasive, and the claim of urgency is just another argument. I hold that instead of 'abolishing' threatening phenomena ’out there’ by reconceptualizing them, as Waever does, we should continue paying attention to them, because **situations with a credible claim to urgency will keep coming back** and then we need to know more about how they work in the interrelations of groups and states (such as civil wars, for instance), not least to find adequate democratic procedures for dealing with them.

#### No spiral of security – states underestimate threats

Schweller 2004 (Randall L. Schweller, Associate Professor in the Department of Political Science at The Ohio State University, 2004 “Unanswered Threats A Neoclassical Realist Theory of Underbalancing,” International Security 29.2 (2004) 159-201, Muse)

Despite the historical frequency of underbalancing, little has been written on the subject. Indeed, Geoffrey Blainey's memorable observation that for "every thousand pages published on the causes of wars there is less than one page directly on the causes of peace" could have been made with equal veracity about overreactions to threats as opposed to underreactions to them.92 Library shelves are filled with books on the causes and dangers of exaggerating threats, ranging from studies of domestic politics to bureaucratic politics, to political psychology, to organization theory. By comparison, there have been few studies at any level of analysis or from any theoretical perspective that directly explain why states have with some, if not equal, regularity underestimated dangers to their survival. There may be some cognitive or normative bias at work here. Consider, for instance, that there is a commonly used word, paranoia, for the unwarranted fear that people are, in some way, "out to get you" or are planning to do one harm. I suspect that just as many people are afflicted with the opposite psychosis: the delusion that everyone loves you when, in fact, they do not even like you. Yet, we do not have a familiar word for this phenomenon. Indeed, I am unaware of any word that describes this pathology (hubris and overconfidence come close, but they plainly define something other than what I have described). That noted, international relations theory does have a frequently used phrase for the pathology of states' underestimation of threats to their survival, the so-called Munich analogy. The term is used, however, in a disparaging way by theorists to ridicule those who employ it. The central claim is that the naïveté associated with Munich and the outbreak of World War II has become an overused and inappropriate analogy because few leaders are as evil and unappeasable as Adolf Hitler. Thus, the analogy either mistakenly causes leaders [End Page 198] to adopt hawkish and overly competitive policies or is deliberately used by leaders to justify such policies and mislead the public. A more compelling explanation for the paucity of studies on underreactions to threats, however, is the tendency of theories to reflect contemporary issues as well as the desire of theorists and journals to provide society with policy- relevant theories that may help resolve or manage urgent security problems. Thus, born in the atomic age with its new balance of terror and an ongoing Cold War, the field of security studies has naturally produced theories of and prescriptions for national security that have had little to say about—and are, in fact, heavily biased against warnings of—the dangers of underreacting to or underestimating threats. After all, the nuclear revolution was not about overkill but, as Thomas Schelling pointed out, speed of kill and mutual kill.93 Given the apocalyptic consequences of miscalculation, accidents, or inadvertent nuclear war, small wonder that theorists were more concerned about overreacting to threats than underresponding to them. At a time when all of humankind could be wiped out in less than twenty-five minutes, theorists may be excused for stressing the benefits of caution under conditions of uncertainty and erring on the side of inferring from ambiguous actions overly benign assessments of the opponent's intentions. The overwhelming fear was that a crisis "might unleash forces of an essentially military nature that overwhelm the political process and bring on a war thatnobody wants. Many important conclusions about the risk of nuclear war, and thus about the political meaning of nuclear forces, rest on this fundamental idea."94 Now that the Cold War is over, we can begin to redress these biases in the literature. In that spirit, I have offered a domestic politics model to explain why threatened states often fail to adjust in a prudent and coherent way to dangerous changes in their strategic environment. The model fits nicely with recent realist studies on imperial under- and overstretch. Specifically, it is consistent with Fareed Zakaria's analysis of U.S. foreign policy from 1865 to 1889, when, he claims, the United States had the national power and opportunity to expand but failed to do so because it lacked sufficient state power (i.e., the state was weak relative to society).95 Zakaria claims that the United States did [End Page 199] not take advantage of opportunities in its environment to expand because it lacked the institutional state strength to harness resources from society that were needed to do so. I am making a similar argument with respect to balancing rather than expansion: incoherent, fragmented states are unwilling and unable to balance against potentially dangerous threats because elites view the domestic risks as too high, and they are unable to mobilize the required resources from a divided society. The arguments presented here also suggest that elite fragmentation and disagreement within a competitive political process, which Jack Snyder cites as an explanation for overexpansionist policies, are more likely to produce underbalancing than overbalancing behavior among threatened incoherent states.96 This is because a balancing strategy carries certain political costs and risks with few, if any, compensating short-term political gains, and because the strategic environment is always somewhat uncertain. Consequently, logrolling among fragmented elites within threatened states is more likely to generate overly cautious responses to threats than overreactions to them. This dynamic captures the underreaction of democratic states to the rise of Nazi Germany during the interwar period.97 In addition to elite fragmentation, I have suggested some basic domestic-level variables that regularly intervene to thwart balance of power predictions.

## Case

#### Social death is wrong and a bad

Brown 2009 (Vincent Brown, Professor of History and of African and African-American¶ Studies at Harvard University. December 2009, ¶ AMERICAN HISTORICAL REVIEW, http://history.fas.harvard.edu/people/faculty/documents/brown-socialdeath.pdf)

Like scholars of resistance before him, Rucker effectively refutes any contention that the enslaved were socially dead. At the same time, his focus on the making of African American culture obscures a crucial dimension of the politics of slavery. In The River Flows On, resistance is the expression of culture, and peoplehood is the outcome of resistance, but Rucker places much less emphasis on the kinds of existential problems highlighted by Hartman and Smallwood. He does not ignore the violence of slavery, but he invokes bondage and its depredations as the antithesis of black self-making, rather than as a constitutive part of it. If for Hartman dispossession “had made us an us,” Rucker believes that resistance was the crucible in which black people forged identity from a vital inheritance. 41 How might his approach account for the dislocations, physical violations, and cosmic crises that preoccupy Hartman and Smallwood? Here is where scholars of retention and resistance may yet have something to learn from the concept of social death, viewed properly as a compelling metaphysical threat. African American history has grown from the kinds of people’s histories that emphasize a progressive struggle toward an ultimate victory over the tyranny of the powerful. Consequently, studies that privilege the perspectives of the enslaved depend in some measure on the chronicling of heroic achievement, and historians of slave culture and resistance have recently been accused of romanticizing their subject of study. 42 Because these scholars have done so much to enhance our understanding of slave life beyond what was imaginable a scant few generations ago, the allegation may seem unfair. Nevertheless, some of the criticisms are helpful. As the historian Walter Johnson has argued, studies of slavery conducted within the terms of social history have often taken “agency,” or the self-willed activity of choice-making subjects, to be their starting point. 43 Perhaps it was inevitable, then, that many historians would ﬁnd themselves charged with depicting slave communities and cultures that were so resistant and so vibrant that the social relations of slavery must not have done much damage at all. Even if this particular accusation is a form of caricature, it contains an important insight, that the agency of the weak and the power of the strong have too often been viewed as simple opposites. The anthropologist David Scott is probably correct to suggest that for most scholars, the power of slaveholders and the damage wrought by slavery have been “pictured principally as a negative or limiting force” that “restricted, blocked, paralyzed, or deformed the transformative agency of the slave.”44 In this sense, scholars who have emphasized slavery’s corrosive power and those who stress resistance and resilience share the same assumption. However, the violent domination of slavery generated political action; it was not antithetical to it. If one sees power as productive and the fear of social death not as incapacity but as a generative force—a peril that motivated enslaved activity—a different image of slavery slides into view, one in which the object of slave politics is not simply the power of slaveholders, but the very terms and conditions of social existence.

# 1NR

### OV

#### Our interpretation is that the affirmative has to restrict the president’s WAR POWERS AUTHORITY to indefinitely detain--- If the authority is not grounded in a WAR AUTHORIZATION like the NDAA or AUMF then it is NOT a WPA--- they restrict an extraneous CRIMINAL authority that is being used to SUPPLEMENT war powers authority, not INCREASE it--- this limits the indefinite detention part of the topic to enemy combatant cases--- allows a breadth of cases like habeus rights, different legal options, release, etc.--- yes it limits it to gitmo because that is the CORE of this part of the topic--- err on the side of overlimiting--- you only need a couple T affs per part of the list bc if you don’t like it you have 4 other sub-topics to explore

#### They unlimit the topic--- any kind of authority can be used “for” the war on terror--- the government “indefinitely detains” terrorist funds under anti-fraud laws, terrorist property under forfeiture rules, etc.

#### These are all related to a war but they are not a war power any more than WWII rationing was based in the text of the declaration of war on the axis

#### Similarly you can be “indefinitely detained” for immigration law violations, being a material witness to drug trafficking or any other crime--- this is a distinction explicitly conceded in the 2AC CX

### Limits

#### Restricting indefinite detention in any context allows affs that release children that are wards of the state, people that are immigrant visa violators, drug traffickers, etc. that was above

#### They allow immigration deportation affs

Levenson 2002 (Loyola of Los Angeles Law Review Law Reviews¶ 6-1-2002¶ Detention, Material Witnesses & (and) the War on¶ Terrorism¶ Laurie L. Levenson, pdf online)

The War on Terrorism has capitalized on this new attitude.¶ Following the events of September 11, 2001, the Justice Department¶ and the courts had little hesitancy in detaining individuals who have¶ been prejudged as dangerous. In the rush to shore up national¶ security, the government detained thousands of people. Some were¶ alleged to be in violation of the immigration laws; others were¶ designated as "material witnesses."

#### Tons of ways for Congress to oversee the executive

Triebwasser No Date [Dr. Marc A Triebwasser, a Political Science Professor at Central Connecticut University No Date “Congressional Oversight” http://www.polisci.ccsu.edu/trieb/Cong-8.html]

In order to gain some control over the operations of the various agencies which had been established within the Executive Branch, Congress in 1946 began to develop a series of structures and procedures designed to oversee the Bureaucracy. This process generally came to be known as congressional oversight. Although no pun was probably intended in the coining of this phrase, its secondary meaning certainly comes to mind when one examines how this process has actually tended to operate. There are several methods through which congressional oversight operations take place: the committee process, congressional administrative offices, casework, as well as a number of administrative techniques. ¶ Oversight Through Committees¶ There are three types of committees through which congressional oversight functions take place: authorizations committees, appropriations committees, and governmental operations committees. ¶ Authorization Committees. The first type of committee is the substantive committee which originally establishes or authorizes the program or agency. In the case of a military program, this would be the Armed Services Committees in both chambers. In the case of an urban program, this would be the Banking, Finance and Urban Affairs Committee in the House and the Banking, Housing and Urban Affairs Committee in the Senate. Similarly, each program area within the Federal Bureaucracy is related to at least one specific substantive standing committee in each chamber of Congress.¶ In attempting to pursue oversight activities through these authorization committees, a number of problems are often encountered. One of these results from the fact that a particular governmental agency may fall within the jurisdiction of several different substantive committees or subcommittees. As a result, the agency may play one committee or subcommittee against the other in order to achieve those results in Congress which tend to benefit the agency the most. Another problem is that a committee which establishes a program is often too involved with the outcome of its own efforts to be willing to investigate adequately the operations of the program it has initiated. ¶ Appropriations Committees. One of the most significant places where a measure of oversight activity takes place is in the appropriations process. The budget for an agency must be approved anew each year. One might assume that this yearly appropriations process would lead to a careful annual inspection of the budgets of all the various governmental agencies. This, however, is not the case. The federal budget is so large and complex that it is impossible to consider carefully the budget of each agency and program on a year-to-year basis. What happens instead is that budgets are often routinely approved from year to year with general reviews only occurring periodically. In addition, many agencies develop quite close relationships with the subcommittees of the Appropriations Committees which specifically deal with their agency. These agencies are therefore often able to extract some special favors from these particular appropriations subcommittees. ¶ Government Operations Committees. The Senate Committee on Governmental Affairs and the House Committee on Governmental Reform were originally established to coordinate congressional concern over governmental operations. Thus, many see these committees as an ideal place for maintaining congressional surveillance over the activities of the vast Bureaucracy located within the Executive Branch. However, because of jurisdictional disputes and because of the reluctance of most representatives and senators to provide for adequate independent oversight activities, the efforts of these governmental operations committees have been quite limited. ¶ Oversight Through Congressional Offices¶ The three administrative offices within Congress are used to some extent in the congressional oversight process. ¶ The General Accounting Office. The GAO has the responsibility, not simply for performing accounting audits, but also for judging how various programs are being administered. In other words, the GAO often performs the task of program evaluation. In this respect, the GAO plays a significant role in congressional oversight. ¶ The Congressional Research Service. While preparing reports and studies to assist members of Congress, the CRS sometimes includes some information on the activities and performance of various governmental agencies. This is another important source of oversight information for members of Congress. ¶ The Congressional Budget Office. As we have seen, it is the job of the Congressional Budget Office to gather information on the budgets of the various governmental agencies and to report on new budgetary requests and suggestions made through the Executive Branch's Office of Management and Budget. Obviously, such budgetary information is an extremely important source of data upon which the various congressional committees can judge the effectiveness of specific governmental programs.¶ Although this information gathered by the CBO may seem to allow for significant congressional oversight, the fact is that it is the agencies that often use this informational link for their own purposes in pursuing their requests for additional funding directly to the congressional committee, instead of channeling all their communications through the OMB. This short circuits the use of the OMB as one of the President's management tools.. ¶ Effectiveness. From an overall perspective, we can see that these three congressional offices--The General Accounting Office, the Congressional Research Services, and the Congressional Budget Office--combined with the staffs of individual congresspersons and senators and the staffs of congressional committees--are able to supply our national legislators with vast amounts of information and evaluations of governmental activities. In fact, the United States Congress has available to it one of the most extensive research staffs of any national legislature in the world. However, the availability of information and analysis alone is not sufficient for effective congressional oversight. The desire to follow through on this available information is another necessary ingredient--and it is this ingredient which is often lacking.¶ Many times congressional oversight is limited by the concerns of various congressional committees and subcommittees over their respective jurisdictions. And in a significant number of instances, the pressures of organized special interests also interfere with the ability or desires of members of Congress to significantly oversee governmental operations. Aside from these problems, there are also the limitations of time. Congresspersons are burdened with extremely heavy schedules. They have a large number of often conflicting responsibilities to perform. Representatives and senators must therefor place priorities on the use of their time. Often oversight activities lose in this shuffle of priorities to legislative activities, to the creation of new programs to deal with current problems, and to casework concerns. ¶ Oversight Through Casework¶ Representatives and senators, themselves, do not usually become directly involved in much casework or constituent services. It is their staff that deals with these matters. However representatives and senators are usually informed by their staffs of many of these problems, and it is through these specific interactions that these legislators often get the most vivid impression as to the effectiveness of many governmental programs. Casework thus provides an important source of direct, specific information which proves very useful in congressional oversight activities. ¶ Some Other Approaches to Oversight¶ Congress has also passed some major reforms and explored a number of major legislative techniques, many of which have had the effect of improving congressional oversight. ¶ Sunshine Laws. During the 1970s, Congress attempted to open up many aspect of governmental operations to the general public. This was done through the Freedom of Information Act and the "Government in Sunshine" Act. By making information more widely available to the public, these acts also increase the amount of information available to Congress. ¶ The Congressional Veto. Very often Congress passes rather broad pieces of legislation. It is then up to specific agencies to fill in the details of these laws, both with regard to the structure of governmental agencies and the procedures which they follow. One might note for example that while Congress passes general tax laws, the details of the regulations regarding the payment of federal taxes is to be found not in the tax law itself but rather in the Internal Revenue Code which is developed by the Internal Revenue Service, an executive agency.

### Violation

#### The violation is clear--- to be T two things have to be true

#### They have to be indefinitely detained

#### It has to be an exercise of war powers authority

#### They may meet #1 but not #2---- this means that they functionally REGULATE but do not RESTRICT actual indefinite detention of enemy combatants

#### The case of Jose Padilla illustrates the distinction--- FIRST he was arrested as a material witness, THEN he was indefinitely detained under WPA

Vladeck 2012 (THE DUE PROCESS GUARANTEE ACT: BANNING INDEFINITE DETENTION OF AMERICANS¶ Hearing Before the Senate Committee on the Judiciary¶ Wednesday, February 29, 2012¶ Prepared Statement of Stephen I. Vladeck¶ Professor of Law, American University Washington College of Law http://www.judiciary.senate.gov/pdf/12-2-29VladeckTestimony.pdf)

I. THE NDAA AND THE UNCLEAR STATUS QUO

As popular media reports suggest, there continues to be widespread public

confusion as to whether the National Defense Authorization Act for Fiscal Year 2012

(“NDAA”)1 authorizes the government to subject to military detention individuals initially ¶ apprehended inside the territorial United States, including U.S. citizens.2 The formal ¶ answer, of course, is that it does not.3 Thanks to an amendment introduced by Senator ¶ Feinstein, the NDAA merely preserves the status quo with regard to such authority, a ¶ status quo defined entirely by the September 2001 Authorization for Use of Military Force ¶ (“AUMF”),4 and the only two cases raising whether it authorizes domestic detention.5 ¶ Neither of these cases, however, clearly resolves the question. ¶ The first of these two cases involved Jose Padilla, a U.S. citizen initially arrested on a material witness warrant at Chicago’s O’Hare Airport in May 2002. Padilla was transferred to military custody one month later and detained as an “enemy combatant” until early 2006,6 when he was indicted on criminal charges and tried (and ultimately convicted) in an Article III court.7 Although the Supreme Court never ruled on the legality of Padilla’s detention as an “enemy combatant,”8 both the Second and Fourth Circuits did, reaching diametrically opposite conclusions. The Second Circuit initially ruled in December 2003 that Padilla’s military detention was not authorized because of the Non-Detention Act,9 which provides that “[n]o citizen shall be imprisoned or otherwise detained except pursuant to an Act of Congress.”10 Although the government argued that the AUMF provided such authority, the Court of Appeals disagreed—concluding that, at least for citizens arrested within the territorial United States, § 4001 requires a “clear statement,” which the AUMF did not provide.11

### 2NC Precision Impact

#### Precision Impacts Outweigh

Stanley Fish, dean of the College of Liberal Arts and Sciences at the University of Illinois at Chicago, June 21, 2002. “Say It Ain't So,” THE CHRONICLE, http://chronicle.com/article/Say-It-Ain-t-So/46137

Well, actually everyone knows what's going on. The art of speaking and writing precisely and with attention to grammatical form is more and more a lost one. Just listen to National Public Radio for 15 minutes or read a section of The New York Times and you will be able to start your own collection of howlers, from the (now ubiquitous) confusion of "disinterested" and "uninterested" (which sometimes takes the form of a parallel confusion of "disinvite" and "uninvite," the latter not an English verb form); to the disastrous and often comical substitution of "enervate" for "energize"; to the attribution of reticence to persons who are merely reluctant; to participles with no subjects or too many; to errors of pomposity ("between you and I," dubbed by a former colleague the "Cornell nominative"); to pronouns without referents or as many referents as there are nouns in the previous five sentences; to singular subjects with plural verbs (and the reverse); to dependent clauses attached to nothing; to mismatched tenses attached to the same action; to logical redundancies like, "The reason is because ..." ( I'm afraid I've been guilty of that one myself); not to mention inelegant repetitions and errors of diction made by persons who seem to be writing a language they first encountered yesterday. What has brought us to this sorry pass? Basically, two things. First the belief, devoutly held and endlessly rehearsed, that the purpose of writing is self-expression. The convenience of this belief, for those who profess it, is that they need never accept correction; for if it is their precious little selves they are expressing, the language of expression is answerable only to the internal judgment of those same selves, and any challenge from the outside can be met simply by saying, (as students often do) "I know what I mean," or, more precisely, "I know what I mean." Students who say and believe this will never confront an important truth: Language has its own structure (not unchanging, to be sure, but fixed enough at any one moment to serve as both a constraint and a resource). If you do not submit yourself to the conventional meanings of words and to the grammatical forms that specify the relationships between the objects words refer to, the prose you produce will say something -- language, not you or I, means -- but it will not say what you wanted to say. That's only because your readers will not be inside your head where they might ask the self-seeking expression what it had in mind, but will instead be on the outside processing the formal patterns of your written language and reaching the conclusions dictated and generated by those patterns.

### A2 Their MW Card

#### Their author concludes it’s CRIMINAL law--- that’s distinct

Malhorta ND [Anjana Malhotra: Aryeh Neier Fellow with the ACLU and Human Rights Watch. “OVERLOOKING INNOCENCE: REFASHIONING THE MATERIAL WITNESS LAW TO INDEFINITELY DETAIN MUSLIMS WITHOUT CHARGES” *International Civil Liberties Report*]

The Justice Department has succeeded¶ in using the material witnesses law to¶ preventatively detain Muslim men since¶ September 11 because it held witnesses to¶ testify in terrorism-related grand jury¶ proceedings, where the executive branch is¶ given broad authority to investigate a crime. ¶ Also, relying on grand jury secrecy rules, the¶ government has held witnesses pursuant to¶ closed detention proceedings without any public¶ accountability. Even on requests from¶ Congress, the Justice Department has refused to¶ disclose the names or number of witnesses it has¶ held, where or for how long witnesses were¶ detained, or the details surrounding material¶ witness arrests. The Justice Department¶ released general statistical information,¶ including that half of the witnesses it has¶ arrested in the September 11 investigation were¶ held for more than 30 days.3

###  WPA

#### NDAA and AUMF only give authority to DETAIN--- material witness is extraneous

Kelley 2012 [Michael Kelley October 24, 2012 “Why Losing Indefinite Detention Powers Would Be A Disaster For Obama” Business Insider http://www.businessinsider.com/why-losing-indefinite-detention-powers-would-be-a-disaster-for-obama-2012-10]

There's a big story by Greg Miller in the Washington Post on how the Obama administration has expanded its powers in the War on Terror.¶ Miller notes that the legal foundation for U.S. counterterrorism strategy is partially based on "the Congressional authorization to use military force" (AUMF) that was passed after 9/11.¶ Specifically it seems to be based on an interpretation of the AUMF that was "reaffirmed" by the indefinite detention clause of the National Defense Authorization Act (NDAA). ¶ This explains why Obama is fighting so hard to keep the indefinite detention clause in effect.¶ In court the government argued that the indefinite detention clause is simply a "reaffirmation" of the Authorization Use Of Military Force (AUMF), which gives the president authority "to use all necessary and appropriate force against those ... [who] aided the terrorist attacks that occurred on September 11, 2001 or harbored such organizations or persons." In the NDAA lawsuit, the government argued that the NDAA §1021 is simply an "affirmation" or "reaffirmation" of the AUMF. But the NDAA adds language to the AUMF when it says "The President also has the authority to detain persons who were part of or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in the aid of such enemy forces."

#### If it hasn’t been specifically delegated by Congress then it isn’t WPA

Bejesky 2013 [Robert Bejesky M.A. Political Science (Michigan), M.A. Applied Economics (Michigan), LL.M. International Law ¶ (Georgetown). The author has taught international law courses for Cooley Law School and the ¶ Department of Political Science at the University of Michigan, American government and ¶ constitutional law courses for Alma College, and business law courses at Central Michigan University ¶ and the University of Miami. 1/23/2013 “WAR POWERS PURSUANT TO FALSE PERCEPTIONS AND ASYMMETRIC INFORMATION IN THE “ZONE OF TWILIGHT”” St Mary’s Law Journal http://www.stmaryslawjournal.org/pdfs/Bejesky\_Step12.pdf]

Congressional war powers include the prerogatives to “declare War;” ¶ “grant Letters of Marque and Reprisal,” which were operations that fell ¶ short of “war”; “make Rules for the Government and Regulation of the ¶ land and naval Forces;” “to provide for organizing, arming, and ¶ disciplining, the Militia;” “make Rules concerning Captures on Land and ¶ Water;” “raise and support Armies;” and “provide and maintain a ¶ Navy.”¶ 46¶ Alternatively, the President is endowed with one war power, ¶ that of “Commander in Chief of the Army and Navy.”¶ 47¶ Numerical ¶ comparison indicates that the intended dominant branch in war powers ¶ decisions is Congress. The Commander in Chief authority is a core preclusive power that ¶ designates the President as the head of the military command chain once ¶ Congress activates the power.¶ 48¶ Moreover, peripheral Commander in ¶ Chief powers are bridled by both statutory and treaty restrictions.¶ 49¶ The ¶ media lore of using “Commander in Chief” coterminous with “President” ¶ might occasionally be a misnomer outside of war, perhaps abetting ¶ presidential expansionism when combined with commentators employing ¶ terms such as “inherent authority.” Clearly, if Congress has not activated ¶ war powers, the President still possesses inherent authority to react ¶ expeditiously and unilaterally to defend the nation when confronted with ¶ imminent peril.¶ 50¶ However, the Framers drew a precise distinction when ¶ they specifically empowered the President “to repel and not to commence ¶ war.”¶ 51¶ Alexander Hamilton explained that latitude was required “because ¶ it is impossible to foresee or to define the extent and variety of national ¶ exigencies, and the correspondent extent and variety of the means which ¶ may be necessary to satisfy them.”¶ 52

#### The material witness statute is a 200 yr old CRIMINAL law and the detention is NOT INDEFINITE

Cook 2006 (Joseph Cook, Williford Gragg Professor of Law, University of Tennessee College of Law, “THE DETENTION OF MATERIAL¶ WITNESSES AND THE FOURTH¶ AMENDMENT,” Mississippi Law Journal, http://www.olemiss.edu/depts/ncjrl/pdf/2006.Cook.pdf)

The law referred to is the federal material witness statute,3¶ which authorizes the arrest and detention of an individual whose testimony is material in a criminal proceeding.4 The statute is¶ not a part of the U.S. Patriot Act, and that fact has probably prevented¶ it from garnering too much attention. Quite to the¶ contrary, it has been around, with but minor changes, for over¶ two hundred years, first appearing in the Judiciary Act of 1789.5¶ Its ostensible purpose is to assure the availability of testimony of¶ witnesses who might otherwise elude a subpoena.¶ The unique feature of this statute is that it authorizes the arrest¶ and detention of individuals who have not and are not even¶ suspected of committing any crime. And yet, the statute provides¶ that once arrested, they are to be treated in accordance with the¶ provisions of section 3142.@6 Section 3142 is entitled, ARelease or¶ detention of a defendant pending trial.@7 If we incorporate the¶ standards for the release of defendants pending trial into the¶ material witness statute, then it would seem to follow that a¶ material witness should be detained only so long as may be¶ necessary to set bail or other conditions. If the witness is unable¶ to satisfy the conditions set for release, then a deposition should¶ be taken forthwith, followed by the release.

#### Hamdi decision limited INDEFINITE DETENTION under WAR POWERS to ONLY ENEMY COMBATANTS

Wald 2005 (Patricia Wald and Joe Onek, ABA legal scholars, “Patriot Debates,” http://apps.americanbar.org/natsecurity/patriotdebates/detainees-2)

Words matter. The only kinds of "enemy combatant" for whom the Supreme Court has upheld detention outside the normal criminal processes are prisoners of war and those, like Hamdi, who were (allegedly) captured on or near the battlefield while engaged in armed conflict against the United States or its allies, and then only after the opportunity in a due process hearing to rebut the definitional status. (Justices Scalia and Stevens went further and said that a full blown treason trial would be necessary for a U.S. citizen captured on the battlefield). The Quirin case involved German soldiers, including a U.S. citizen, who were given a trial before a military commission. Neither case remotely resembles the situation of Padilla, whose provocative history as recounted by Jacob and Yoo is based entirely on the government’s untied charges. Moreover, according to administration lawyers in open court, the government’s unilateral power to detain people in military custody would extend far beyond Padilla to a person who simply donates money to a terrorist organization. Nothing in the Court’s decisions supports such an expansive definition of "enemy combatant." It is also mistaken to say, as Jacob and Yoo do, that the Court in Hamdi "adopted"as adequate procedures for a citizen detainee a presumption in favor of the government’s evidence or a military hearing: those options were suggestive only and not concurred in by a majority of Justices. Indeed, two Jutsices who went with the plurality to permit a hearing for Hamdi on remand specifically rejected them.