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## 1

**Authority is power delegated to an agent**

Kelly3 Judge for the State of Michigan, JOSEPH ELEZOVIC, Plaintiff, and LULA ELEZOVIC, Plaintiff-Appellant/Cross-Appellee, v. FORD MOTOR COMPANY and DANIEL P. BENNETT, Defendants-Appellees/Cross-Appellants., No. 236749, COURT OF APPEALS OF MICHIGAN, 259 Mich. App. 187; 673 N.W.2d 776; 2003 Mich. App. LEXIS 2649; 93 Fair Empl. Prac. Cas. (BNA) 244; 92 Fair Empl. Prac. Cas. (BNA) 1557, lexis

Applying agency principles, a principal is responsible for the acts of its agents done within the scope of the agent's authority, "even though acting contrary to instructions." [Dick Loehr's, Inc v Secretary of State, 180 Mich. App. 165, 168; 446 N.W.2d 624 (1989)](https://www.lexis.com/research/buttonTFLink?_m=6cbcd97524abff5644c0987b135f7517&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b259%20Mich.%20App.%20187%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_origin=TOASHLX&_butNum=115&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b180%20Mich.%20App.%20165%2cat%20168%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=136&_startdoc=101&wchp=dGLbVtb-zSkAk&_md5=708331d40466e4347936b73e103c82fb). This is because, in part, an agency relationship arises where the principal [\*\*\*36]  has the right to control the conduct of the agent. [St Clair Intermediate School Dist v Intermediate Ed Ass'n/Michigan Ed Ass'n, 458 Mich. 540, 558 n 18; 581 N.W.2d 707 (1998)](https://www.lexis.com/research/buttonTFLink?_m=6cbcd97524abff5644c0987b135f7517&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b259%20Mich.%20App.%20187%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_origin=TOASHLX&_butNum=116&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b458%20Mich.%20540%2cat%20558%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=136&_startdoc=101&wchp=dGLbVtb-zSkAk&_md5=c0a63a81a484a6ce53be229bc2290a07) (citations omitted). The employer is also liable for the torts of his employee if "'the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation,'" [McCann v Michigan, 398 Mich. 65, 71; 247 N.W.2d 521 (1976)](https://www.lexis.com/research/buttonTFLink?_m=6cbcd97524abff5644c0987b135f7517&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b259%20Mich.%20App.%20187%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_origin=TOASHLX&_butNum=117&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b398%20Mich.%2065%2cat%2071%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=136&_startdoc=101&wchp=dGLbVtb-zSkAk&_md5=5219d53b6a7119254f8041c911d87fd2), quoting [Restatement of Agency, 2d § 219(2)(d)](https://www.lexis.com/research/buttonTFLink?_m=6cbcd97524abff5644c0987b135f7517&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b259%20Mich.%20App.%20187%5d%5d%3e%3c%2fcite%3e&_butType=4&_butStat=0&_origin=TOASHLX&_butNum=118&_butInline=1&_butinfo=AGENCY%20SECOND%20219&_fmtstr=FULL&docnum=136&_startdoc=101&wchp=dGLbVtb-zSkAk&_md5=71c1bf8c001fe5ae1153be4268b8e9e9), p 481; see also [Champion v Nation Wide Security, Inc, 450 Mich. 702, 704, 712; 545 N.W.2d 596 (1996)](https://www.lexis.com/research/buttonTFLink?_m=6cbcd97524abff5644c0987b135f7517&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b259%20Mich.%20App.%20187%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_origin=TOASHLX&_butNum=119&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b450%20Mich.%20702%2cat%20704%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=136&_startdoc=101&wchp=dGLbVtb-zSkAk&_md5=3d1841dc7f4fb90804d8adb6349a6fae), citing [Restatement of Agency, 2d § 219(2)(d)](https://www.lexis.com/research/buttonTFLink?_m=6cbcd97524abff5644c0987b135f7517&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b259%20Mich.%20App.%20187%5d%5d%3e%3c%2fcite%3e&_butType=4&_butStat=0&_origin=TOASHLX&_butNum=120&_butInline=1&_butinfo=AGENCY%20SECOND%20219&_fmtstr=FULL&docnum=136&_startdoc=101&wchp=dGLbVtb-zSkAk&_md5=c1927abf5bf3954a85d211c044ada141), p 481 ("the master is liable for the tort of his servant if the servant 'was aided in accomplishing the tort by the existence of the agency relation'"). In [Backus v  [\*213]  Kauffman (On Rehearing), 238 Mich. App. 402, 409; 605 N.W.2d 690 (1999)](https://www.lexis.com/research/buttonTFLink?_m=6cbcd97524abff5644c0987b135f7517&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b259%20Mich.%20App.%20187%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_origin=TOASHLX&_butNum=121&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b238%20Mich.%20App.%20402%2cat%20409%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=136&_startdoc=101&wchp=dGLbVtb-zSkAk&_md5=d9947545fee151274d489cbc14123160), this Court stated: The term "authority" is defined by Black's Law Dictionary to include "**the power delegated by a principal to an agent."** Black's Law Dictionary (7th ed), p [\*\*\*37]  127. "Scope of authority" is defined in the following manner: "The reasonable power that an agent has been delegated or might foreseeably be delegated in carrying out the principal's business." Id. at 1348.

Must restrict ability to conduct MILITARY CHAIN OF COMMAND

Bajesky 13 (2013¶ Mississippi College Law Review¶ 32 Miss. C. L. Rev. 9¶ LENGTH: 33871 words ARTICLE: Dubitable Security Threats and Low Intensity Interventions as the Achilles' Heel of War Powers NAME: Robert Bejesky\* BIO: \* 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.)

A numerical comparison indicates that the Framer's intended for Congress to be the dominant branch in war powers. Congressional war powers include the prerogative to "declare war;" "grant Letters of Marque and Reprisal," which were operations that fall short of "war"; "make Rules for Government and Regulation of the land and naval Forces;" "organize, fund, and maintain the nation's armed forces;" "make Rules concerning Captures on Land and Water," "raise and support Armies," and "provide and maintain a Navy." [n25](http://www.lexisnexis.com/lnacui2api/frame.do?tokenKey=rsh-20.771738.1261791409&target=results_DocumentContent&returnToKey=20_T17974748742&parent=docview&rand=1376677997032&reloadEntirePage=true#n25) In contrast, the President is endowed with one war power, named as the Commander-in-Chief of the Army and Navy. [n26](http://www.lexisnexis.com/lnacui2api/frame.do?tokenKey=rsh-20.771738.1261791409&target=results_DocumentContent&returnToKey=20_T17974748742&parent=docview&rand=1376677997032&reloadEntirePage=true#n26)¶ The Commander-in-Chief authority is a core preclusive power, predominantly designating that the President is the head of the military chain of command when Congress activates the power. [n27](http://www.lexisnexis.com/lnacui2api/frame.do?tokenKey=rsh-20.771738.1261791409&target=results_DocumentContent&returnToKey=20_T17974748742&parent=docview&rand=1376677997032&reloadEntirePage=true#n27) Moreover, peripheral Commander-in-Chief powers are bridled by statutory and treaty restrictions [n28](http://www.lexisnexis.com/lnacui2api/frame.do?tokenKey=rsh-20.771738.1261791409&target=results_DocumentContent&returnToKey=20_T17974748742&parent=docview&rand=1376677997032&reloadEntirePage=true#n28) because the President "must respect any constitutionally legitimate restraints on the use of force that Congress has enacted." [n29](http://www.lexisnexis.com/lnacui2api/frame.do?tokenKey=rsh-20.771738.1261791409&target=results_DocumentContent&returnToKey=20_T17974748742&parent=docview&rand=1376677997032&reloadEntirePage=true#n29) However, even if Congress has not activated war powers, the President does possess inherent authority to expeditiously and unilaterally react to defend the nation when confronted with imminent peril. [n30](http://www.lexisnexis.com/lnacui2api/frame.do?tokenKey=rsh-20.771738.1261791409&target=results_DocumentContent&returnToKey=20_T17974748742&parent=docview&rand=1376677997032&reloadEntirePage=true#n30) Explicating the intention behind granting the President this latitude, Alexander Hamilton explained that "it is impossible to foresee or to define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them." [n31](http://www.lexisnexis.com/lnacui2api/frame.do?tokenKey=rsh-20.771738.1261791409&target=results_DocumentContent&returnToKey=20_T17974748742&parent=docview&rand=1376677997032&reloadEntirePage=true#n31) The Framers drew a precise distinction by specifying that the President was empowered "to repel and not to commence war." [n32](http://www.lexisnexis.com/lnacui2api/frame.do?tokenKey=rsh-20.771738.1261791409&target=results_DocumentContent&returnToKey=20_T17974748742&parent=docview&rand=1376677997032&reloadEntirePage=true#n32)

**Violation—the plan doesn’t reduce executive authority, they simply restrict his ability to circumvent.**

**Voting issue for limits and neg ground—they functionally eliminate the word “authority” from the resolution—they can ban an infinite number of programs while avoiding core DA links based off of restrictions on the president**

## 2

**The United States Congress should pass legislation restricting** presidential war powers by nullifying the
presidential signing statement interpreting Title X in Division A of
the \*\*Detainee
Treatment Act of 2005 \*\*attached to the McCain amendment due to its unconstutionality
and limiting future objecting presidential signing statements (OPSS) on war
powers to Congressionally-agreed complex issues. As in all judicial
matters, the Court may draw from legal precedent, previously-used
government guidelines and lower court decisions in formulating grounds for
its decision and the Court may issue opinions and judicial dicta suggesting
clarification by the lower courts and Congress.\*

**The Congress should exercise its authority under Article III to eliminate the jurisdiction of any federal court to hear challenges to the constitutionality of this legislation or to the authority of Congressional interpretation of the above.**

**The Congress should direct that the highest courts of each state, pursuant to Article VI, treat this law as authoritative, and that the United States Supreme Court, pursuant to its holdings in *Testa* *v*. *Katt* (330 U. S. 386), shall ensure that lower courts both follow this directive and accept Congressional interpretation of the Constitution as authoritative.**

**Contention One – Solvency**

**The Court has taken control of Constitutional interpretation---the counterplan creates a “constitutional moment” to restore democratic decision-making by placing it in the hands of congress and the people**

West 1994(Robin, Prof. Law @ Georgetown U, “Progressive Constitutionalism,” p. 218-220)

The concluding section of this chapter argues that even in the short term, and certainly in the long term, there are good reasons for developing an alternative, non- or postliberal, and explicitly progressive paradigm of constitutional interpretation, even if it is clear, as it seems to be, that the present conservative Supreme Court will not embrace it. It also argues, however, that for both strategic and theoretical reasons, **the proper audi­ence for the development of a progressive interpretation of the Constitution is Congress rather than the courts**. The progressive Constitution should be meant for, and therefore must be aimed toward, legislative rather than adjudicative change. The strategic reasons for this proposed reorientation of progressive con­stitutional discourse should be self-evident. Although the progressive Con­stitution is arguably consistent with some aspects of the liberal-legalist paradigm of the middle of this century, it is utterly **incompatible with the conservative paradigm now dominating constitutional adjudication**. It does not follow, however, that the progressive Constitution is incompatible with all constitutional decision making: both legislatures and citizens have constitutional obligations, engage in constitutional discourse, and can be moved, presumably, to **bring electoral politics in line with the progressive mandates of the Constitution**, as those mandates have been understood and interpreted by progressive constitutional lawyers and theorists. I also argue, however, that for theoretical and strategic reasons, the long-range success, the sense, and even more modestly the relevance of the progressive interpretation of the Constitution depend not only on the merits of its interpretive claims but also, and perhaps more fundamentally, on a federal Congress reenlivened to its constitutional obligations. First, of course, it is Congress, not the Supreme Court, that is specifically mandated under the Fourteenth Amendment to take positive action to ensure equal protection and due process rights—the core constitutional tools for attack­ing illegitimate social and private power. If Congress is ever to fulfill this obligation, it will need the guidance of interpretive theories of the mean­ing of equal protection, due process, equality, and liberty that are aimed explicitly toward the context of legislative action and are not constrained by the possibilities and limits of adjudicative law. But more fundamentally, the progressive Constitution, I argue, will never achieve its full meaning—and worse, will remain riddled with paradox and contradiction—**so long as it remains in an adjudicative forum**. This is not only because of the probable political composition of the Court over the next few decades, but also because of the philosophical and political meanings of adjudi­cative law itself: the possibilities of adjudicative law are constrained by precisely the same profoundly conservative attitudes toward social power that underlie conservative constitutionalism. By acquiescing in a definition of the Constitution as a source of adjudicative law, progressives seriously undermine its progressive potential. Only by reconceptualizing the Consti­tution as a source of inspiration and guidance for legislation, rather than a superstructural constraint on adjudication, can we make good on its richly progressive promise. Therefore, the concluding section of this chapter argues that, for struc­tural long-term as well as strategic short-term reasons, the progressive Constitution—the cluster of meanings found or implanted in constitu­tional guarantees by modern progressive scholars—should be addressed to the Congress and to the citizenry rather than to the courts. The goal of progressive constitutionalists, both in the academy and at the bar, over the coming decades should be to create what Bruce Ackerman has called in other contexts **a "constitutional moment**" 20 and what Owen Fiss might call more dramatically an "interpretive crisis.' Progressives need to cre­ate a world **in which it is clear that a progressive Congress has embraced one set of constitutional meanings, and the conservative Court a contrast­ing and incompatible set**. The Supreme Court does, and always has, as Fiss reminds us, read the Constitution so as to avoid crisis.22 The lesson to draw is surely that only when faced with such a constitutional moment will this conservative Court change paths.

**The net benefit is democratic transitions---illiberal democratic transitions are widespread---they lack an accessible constitutional structure**

Diamond 2008 (Larry, Democracy Superstar and Senior Fellow at the Hoover Institution and the Freeman Spogli Institute for Int’l Studies @ Stanford U, November 28, <http://www.cipe.org/publications/fs/pdf/112808.pdf>)

Many new democracies around the world are performing very poorly and are in fact quite “illiberal,” if they can be called democracies at all. Yes, they had competitive elections, even real uncertainty about which party would win power, and even alternation in power, but for much of the population, democracy is a shallow or even invisible phenomenon. What many (or most) citizens actually experience is a mix of distressed governance: abusive police forces, domineering local oligarchies, incompetent and indifferent state bureaucracies, corrupt and inaccessible judiciaries, and venal, ruling elites contemptuous of the rule of law and accountable to no one but themselves.2 As a result, people – especially in the bottom strata of society, which in many new democracies comprise the majority – are citizens only in name. There are few meaningful channels of participation and voice open to them. There are elections, but they are contests between corrupt, clientelistic parties that serve popular interests only in name. There are parliaments and local governments, but they do not represent or respond to broad constituents. There is a constitution, but not constitutionalism – a commitment to the principles and restraints in that hallowed charter. There is democracy in a formal sense, but people are still not politically free. As a result, there is widespread public skepticism, even cynicism and disillusionment, toward “democracy.” How, then, can young democracies move beyond fleeting hope toward making their political systems more mature, durable, and effective? It is useful at this point to consider a bit more closely what is necessary for a country to be termed a democracy. To many who live or believe they live in a democracy, the term is so intuitive it seems straightforward. But a more careful analysis reveals that democracy varies in depth and may exist above two distinct thresholds: “thin” electoral and “thick” liberal democracy. Electoral Democracy vs. Liberal Democracy At the minimal level, if a people can choose and replace their leaders in regular, free, and fair elections, there is an electoral democracy. Calling a political system a democracy doesn’t mean it is a good or admirable system, or that we needn’t worry much about improving it further. It simply means that if a majority of the people want a change in leaders and policies and are able to organize effectively within the rules, they can get change. But electoral democracies vary enormously in their quality. Competitive and uncertain elections, even frequent alternation of parties in power, can coexist with serious abuses of human rights, significant constraints on freedom in many areas of life, discrimination against minorities, a weak rule of law, a compromised or ineffectual judiciary, rampant corruption, gerrymandered electoral districts, unresponsive government, state domination of the mass media, and widespread crime and violence. Genuine competition to determine who rules does not ensure high levels of freedom, equality, transparency, social justice, or other liberal values. Electoral democracy helps to make these other values more achievable, but it does not by any means ensure them. When we speak of democracy, then, we should aspire to its realization at a higher plane, to the achievement of the ten “thick” dimensions (see box on next page). When these exist in substantial measure, we can call a system a liberal democracy.3 To the extent that these are greatly diminished, democracy – if it existsPage 1 ECONOMICREFORM Feature Service Center for International Private Enterprise The Spirit of Democracy: How to Make Democracies Work Article at a glance Despite the recent democratic recession, democracy remains a • universal value that inspires people around the world. Large authoritarian countries are unlikely to turn into full- • fledged democracies in the near future. Global democratic renewal must come from deepening reforms • in young, fragile democracies. In order to become liberal democracies, countries must move • beyond just holding elections and implement institutional reforms. November 28, 2008 published by the Center for International Private Enterprise an affiliate of the U.S. Chamber of Commerce 1155 Fifteenth Street NW • Suite 700 • Washington, DC 20005 • USA ph: (202) 721-9200 • www.cipe.org • e-mail: cipe@cipe.org Larry Diamond Hoover Institution and the Freeman Spogli Institute for International Studies, Stanford University ® To comment on this article, visit CIPE’s Development Blog: www.cipe.org/blog. Page 2 Center for International Private Enterprise The Spirit of Democracy: How to Make Democracies Work – 2 – Introduction Over the past three decades the world has been transformed. In 1974, nearly three-quarters of all countries were dictatorships; today, more than half are democracies. But the 1999 coup in Pakistan was the harbinger of something different. It took place when the third wave of democratization was seemingly at its peak. And it reflected deep-seated problems of governance with which many other new and fragile democracies were also struggling. Since then, “democratic recession” has affected many crucial parts of the world, including Russia, Venezuela, or Nigeria. Despite these setbacks, the desire for democracy runs deep around the world. There are no global rivals to democracy as a broad model of government. Communism is dead. Military rule lacks appeal everywhere, and is tolerated only as a temporary expedient to restoring order or purging corrupt rulers. One-party states have largely disappeared. Only the vague model of an Islamic state has any moral and ideological appeal – and only for a small portion of the world’s societies. The single example of an Islamic state is the increasingly corrupt, discredited, and illegitimate “Islamic Republic” in Iran, whose own people overwhelmingly desire to see it replaced by a truly democratic form of government. But how and why exactly does democracy progress? Is it really possible to build free and democratic societies throughout the world? Doing so must involve more than the creation of new political structures; it requires the generation of new norms, as Gandhi put it, “change of the heart.” Democratic structures will be mere facades unless people come to value the essential principles of democracy. The fate of democracy is not simply driven by abstract historical and structural forces. It is a consequence of struggle, strategy, ingenuity, vision, courage, conviction, compromise, and choices by human actors. In order to spur a renewed democratic boom, new emphasis must be placed on good governance, the rule of law, security, protection of individual rights, vibrant civil society, and shared economic prosperity. Only then will the spirit of democracy be secured.

**Commitment to judicial supremacy sends a global signal – it influences transitional models**

Hiebert 2004 (Janet L., Assoc. Prof. of Poli. Sci. @ Queen’s U of Canada, 82 Tex. L. Rev. 1963)

The reason for caution does not arise out of any inherent conceptual shortcomings with this model, but from the strong influence of American constitutional ideas. Despite the innovative approach these models take, it remains to be seen to what extent these political communities can resist the emphasis on judicial hegemony when interpreting rights and resolving legislative conflicts where rights claims arise. It seems remarkable that the idea of judicial hegemony remains so influential, particularly in light of the cumulative force of challenges posed first by Legal Realists [95](https://www.lexis.com/research/retrieve?_m=da6b68717a4dcefdc7e0ff7e0605712c&csvc=le&cform=byCitation&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzb-zSkAb&_md5=dabf2713bbd696ec04dcb00d5c610e39#n95) and reinforced by a diverse range of critical perspectives from Critical Legal Studies, [96](https://www.lexis.com/research/retrieve?_m=da6b68717a4dcefdc7e0ff7e0605712c&csvc=le&cform=byCitation&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzb-zSkAb&_md5=dabf2713bbd696ec04dcb00d5c610e39#n96) feminist, [97](https://www.lexis.com/research/retrieve?_m=da6b68717a4dcefdc7e0ff7e0605712c&csvc=le&cform=byCitation&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzb-zSkAb&_md5=dabf2713bbd696ec04dcb00d5c610e39#n97) critical race, [98](https://www.lexis.com/research/retrieve?_m=da6b68717a4dcefdc7e0ff7e0605712c&csvc=le&cform=byCitation&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzb-zSkAb&_md5=dabf2713bbd696ec04dcb00d5c610e39#n98) and lesbian and gay [99](https://www.lexis.com/research/retrieve?_m=da6b68717a4dcefdc7e0ff7e0605712c&csvc=le&cform=byCitation&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzb-zSkAb&_md5=dabf2713bbd696ec04dcb00d5c610e39" \l "n99" \t "_self) scholarship, all of which have  [\*1987]  challenged the idea that legal reasoning and methodology embody objective principles that negate the political ideology of the judge or the influence of dominant social norms. It is equally remarkable that this judicial hegemony would be accepted in a contemporary environment where bills of rights are overlaid against a modern welfare state that presumes and requires substantial state involvement. Answers to questions of whether a right has been infringed can rarely be assessed by reference to abstract associations of the limited state in classical liberal theory, which assumes that the state is the enemy of freedom. Rather, these resolutions must address numerous questions: How does the activity associated with a claim to a right relate to the normative reasons for protecting certain human activities from the coercive powers of the modern state? How important are the values or objectives that the impugned legislation seeks to advance? Are these values consistent with a free and democratic society? But since these questions may give rise to a range of reasonable answers, it makes little sense to pretend that judges have superior or exclusive insights. [100](https://www.lexis.com/research/retrieve?_m=da6b68717a4dcefdc7e0ff7e0605712c&csvc=le&cform=byCitation&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzb-zSkAb&_md5=dabf2713bbd696ec04dcb00d5c610e39" \l "n100" \t "_self) Nevertheless, the power of this assumption transcends American constitutional ideas. It influences the assumptions about appropriate political behavior even within polities that have constructed an alternative model recognizing the legitimacy of legislative judgments, and even where these are different from judicial judgments. Only time will tell whether it is possible to establish a bill of rights that will evolve in a manner that can resist the notion that judicial hegemony is required for responsible judgments about rights.

**Judicial hegemony entrenches elite power – ensures democratic transitions fail.**

Hirschl 2004(Ran, Prof. Poli. Sci. and Law @ U of Toronto, “Towards Juristocracy,” p. 1-2)

While the benefits of constitutionalization for economic libertarians and judicial elites appear obvious, its appeal for hegemonic sociopolitical forces and their political representatives may at first glance look questionable. However, when their policy preferences have been, or are likely to be, in­creasingly challenged in majoritarian decision-making arenas, elites that possess disproportionate access to, and influence over, the legal arena may initiate a constitutional entrenchment of rights and judicial review in order to transfer power to supreme courts. Based on the courts' relatively high public reputation for professionalism and political impartiality, their record of adjudication, and the justices' ideological preferences, these elites may safely assume that their policy preferences will be less effectively contested under the new arrangement. Judicial empowerment through constitution­alization may provide an efficient institutional solution for influential groups who seek to preserve their hegemony and who, given an erosion in their popular support, may find strategic drawbacks in adhering to majoritarian policy-making processes. More "demographically representa­tive" political processes are, in other words, a catalyst, not an outcome, of constitutionalization. The constitutionalization of rights is therefore often not a reflection of a genuinely progressive revolution in a polity; rather, it is evidence that the rhetoric of rights and judicial review has been appropri­ated by threatened elites to bolster their own position in the polity. By keep­ing popular decision-making mechanisms at the forefront of the formal democratic political process while shifting the power to formulate and pro­mulgate certain policies to semiautonomous professional policy-making bodies, those who possess disproportionate access to, and have a decisive in­fluence upon, such bodies minimize the potential threat to their hegemony. '

**Illiberal majoritarian transitions cause genocide and war**

Zakaria 1997(Fareed, PhD Poli Sci @ Harvard U, Managing Editor of *Foreign Affairs*, 1997, <http://www.fareedzakaria.com/ARTICLES/other/democracy.html>)

Lang's embarrassment highlights two common, and often mistaken, assumptions -- that the forces of democracy are the forces of ethnic harmony and of peace. Neither is necessarily true. Mature liberal democracies can usually accommodate ethnic divisions without violence or terror and live in peace with other liberal democracies. But without a background in constitutional liberalism, the introduction of democracy in divided societies has actually fomented nationalism, ethnic conflict, and even war. The spate of elections held immediately after the collapse of communism were won in the Soviet Union and Yugoslavia by nationalist separatists and resulted in the breakup of those countries. This was not in and of itself bad, since those countries had been bound together by force. But the rapid secessions, without guarantees, institutions, or political power for the many minorities living within the new countries, have caused spirals of rebellion, repression, and, in places like Bosnia, Azerbaijan, and Georgia, war. Elections require that politicians compete for peoples' votes. In societies without strong traditions of multiethnic groups or assimilation, it is easiest to organize support along racial, ethnic, or religious lines. Once an ethnic group is in power, it tends to exclude other ethnic groups. Compromise seems impossible; one can bargain on material issues like housing, hospitals, and handouts, but how does one split the difference on a national religion? Political competition that is so divisive can rapidly degenerate into violence. Opposition movements, armed rebellions, and coups in Africa have often been directed against ethnically based regimes, many of which came to power through elections. Surveying the breakdown of African and Asian democracies in the 1960s, two scholars concluded that democracy "is simply not viable in an environment of intense ethnic preferences." Recent studies, particularly of Africa and Central Asia, have confirmed this pessimism. A distinguished expert on ethnic conflict, Donald Horowitz, concluded, "In the face of this rather dismal account . . . of the concrete failures of democracy in divided societies . . . one is tempted to throw up one's hands. What is the point of holding elections if all they do in the end is to substitute a Bemba-dominated regime for a Nyanja regime in Zambia, the two equally narrow, or a southern regime for a northern one in Benin, neither incorporating the other half of the state?" Over the past decade, one of the most spirited debates among scholars of international relations concerns the "democratic peace" -- the assertion that no two modern democracies have gone to war with each other. The debate raises interesting substantive questions (does the American Civil War count? do nuclear weapons better explain the peace?) and even the statistical findings have raised interesting dissents. (As the scholar David Spiro points out, given the small number of both democracies and wars over the last two hundred years, sheer chance might explain the absence of war between democracies. No member of his family has ever won the lottery, yet few offer explanations for this impressive correlation.) But even if the statistics are correct, what explains them? Kant, the original proponent of the democratic peace, contended that in democracies, those who pay for wars -- that is, the public -- make the decisions, so they are understandably cautious. But that claim suggests that democracies are more pacific than other states. Actually they are more warlike, going to war more often and with greater intensity than most states. It is only with other democracies that the peace holds. When divining the cause behind this correlation, one thing becomes clear: the democratic peace is actually the liberal peace. Writing in the eighteenth century, Kant believed that democracies were tyrannical, and he specifically excluded them from his conception of "republican" governments, which lived in a zone of peace. Republicanism, for Kant, meant a separation of powers, checks and balances, the rule of law, protection of individual rights, and some level of representation in government (though nothing close to universal suffrage). Kant's other explanations for the "perpetual peace" between republics are all closely linked to their constitutional and liberal character: a mutual respect for the rights of each other's citizens, a system of checks and balances assuring that no single leader can drag his country into war, and classical liberal economic policies -- most importantly, free trade -- which create an interdependence that makes war costly and cooperation useful. Michael Doyle, th leading scholar on the subject, confirms in his 1997 book Ways of War and Peace that without constitutional liberalism, democracy itself has no peace-inducing qualities: Kant distrusted unfettered, democratic majoritarianism, and his argument offers no support for a claim that all participatory polities -- democracies -- should be peaceful, either in general or between fellow democracies. Many participatory polities have been non-liberal. For two thousand years before the modern age, popular rule was widely associated with aggressiveness (by Thucydides) or imperial success (by Machiavelli) . . . The decisive preference of [the] median voter might well include "ethnic cleansing" against other democratic polities. The distinction between liberal and illiberal democracies sheds light on another striking statistical correlation. Political scientists Jack Snyder and Edward Mansfield contend, using an impressive data set, that over the last 200 years democratizing states went to war significantly more often than either stable autocracies or liberal democracies. In countries not grounded in constitutional liberalism, the rise of democracy often brings with it hyper-nationalism and war-mongering. When the political system is opened up, diverse groups with incompatible interests gain access to power and press their demands. Political and military leaders, who are often embattled remnants of the old authoritarian order, realize that to succeed that they must rally the masses behind a national cause. The result is invariably aggressive rhetoric and policies, which often drag countries into confrontation and war. Noteworthy examples range from Napoleon III's France, Wilhelmine Germany, and Taisho Japan to those in today's newspapers, like Armenia and Azerbaijan and Milosevic's Serbia. The democratic peace, it turns out, has little to do with democracy.

**These conflicts escalate globally.**

Jentleson 1996 (Bruce W., director, Terry Sanford Inst. of Public Policy, Prof. Public Policy and Poli. Sci @ Duke U, Policy Paper #27, UC Davis, [www.igcc.ucsd.edu](http://www.igcc.ucsd.edu))

There are three bases for this claim. The first goes back to the questions raised earlier about the validity of the common assumption by major outside powers like the United States that their interests are better served by waiting to see if the conflict will subside, not spread, or otherwise self-contain. If it were the case that the fires of ethnic conflicts, however intense, would just burn upon themselves, and not have significant potential to spread regionally or destabilize more systematically, then in strict realist terms one could argue that major powers could afford to just let them be. The Bosnia experience, though, particularly belies the realism of this assumption. Moreover, as Lake and Rothchild and other authors in their volume delineate in their articles, there is substantial analytic and theoretical basis for concluding that Bosnia is not an exception, and that the risks of both diffusion and escalation of ethnic conflicts are quite substantial. There may be direct contagion through the actual physical movement of people and weapons, and/or demonstration effects (Kuran), and/or other modes of diffusion. There also may be the horizontal escalation of drawing in outside powers, even if not as direct combatants, which can have damaging effects on their overall relations and thus reverberate through the international system. This is why the UN and regional multilateral organizations have been increasing emphasis on regional security both in an absolute sense and also relative to the humanitarian rationale as the basis for sovereignty-abridging intermediations and interventions.

## Thinkability

#### They solve 0% of this advantage.

#### Critiques of terrorism tie the hands of the US–this appeasement prevents action to stop genocide, terrorism, sexism, and other atrocities

**HANSON 2004**

(Victor Davis, Professor of Classical Studies at CSU Fresno, City Journal, Spring, <http://www.city-journal.org/html/14_2_the_fruits.html>)

 Rather than springing from realpolitik, sloth, or fear of oil cutoffs, much of our appeasement of Middle Eastern terrorists derived from a new sort of anti-Americanism that thrived in the growing therapeutic society of the 1980s and 1990s. Though the abrupt collapse of communism was a dilemma for the Left, it opened as many doors as it shut. To be sure, after the fall of the Berlin Wall, few Marxists could argue for a state-controlled economy or mouth the old romance about a workers’ paradise—not with scenes of East German families crammed into smoking clunkers lumbering over potholed roads, like American pioneers of old on their way west. But if the creed of the socialist republics was impossible to take seriously in either economic or political terms, such a collapse of doctrinaire statism did not discredit the gospel of forced egalitarianism and resentment against prosperous capitalists. Far from it. If Marx receded from economics departments, his spirit reemerged among our intelligentsia in the novel guises of post-structuralism, new historicism, multiculturalism, and all the other dogmas whose fundamental tenet was that white male capitalists had systematically oppressed women, minorities, and Third World people in countless insidious ways. The font of that collective oppression, both at home and abroad, was the rich, corporate, Republican, and white United States. The fall of the Soviet Union enhanced these newer post-colonial and liberation fields of study by immunizing their promulgators from charges of fellow-traveling or being dupes of Russian expansionism. Communism’s demise likewise freed these trendy ideologies from having to offer some wooden, unworkable Marxist alternative to the West; thus they could happily remain entirely critical, sarcastic, and cynical without any obligation to suggest something better, as witness the nihilist signs at recent protest marches proclaiming: “I Love Iraq, Bomb Texas.” From writers like Arundhati Roy and Michel Foucault (who anointed Khomeini “a kind of mystic saint” who would usher in a new “political spirituality” that would “transfigure” the world) and from old standbys like Frantz Fanon and Jean-Paul Sartre (“to shoot down a European is to kill two birds with one stone, to destroy an oppressor and the man he oppresses at the same time”), there filtered down a vague notion that the United States and the West in general were responsible for Third World misery in ways that transcended the dull old class struggle. Endemic racism and the legacy of colonialism, the oppressive multinational corporation and the humiliation and erosion of indigenous culture brought on by globalization and a smug, self-important cultural condescension—all this and more explained poverty and despair, whether in Damascus, Teheran, or Beirut. There was victim status for everybody, from gender, race, and class at home to colonialism, imperialism, and hegemony abroad. Anyone could play in these “area studies” that cobbled together the barrio, the West Bank, and the “freedom fighter” into some sloppy global union of the oppressed—a far hipper enterprise than rehashing Das Kapital or listening to a six-hour harangue from Fidel. Of course, pampered Western intellectuals since Diderot have always dreamed up a “noble savage,” who lived in harmony with nature precisely because of his distance from the corruption of Western civilization. But now this fuzzy romanticism had an updated, political edge: the bearded killer and wild-eyed savage were not merely better than we because they lived apart in a pre-modern landscape. No: they had a right to strike back and kill modernizing Westerners who had intruded into and disrupted their better world—whether Jews on Temple Mount, women in Westernized dress in Teheran, Christian missionaries in Kabul, capitalist profiteers in Islamabad, whiskey-drinking oilmen in Riyadh, or miniskirted tourists in Cairo. An Ayatollah Khomeini who turned back the clock on female emancipation in Iran, who murdered non-Muslims, and who refashioned Iranian state policy to hunt down, torture, and kill liberals nevertheless seemed to liberal Western eyes as preferable to the Shah—a Western-supported anti-communist, after all, who was engaged in the messy, often corrupt task of bringing Iran from the tenth to the twentieth century, down the arduous, dangerous path that, as in Taiwan or South Korea, might eventually lead to a consensual, capitalist society like our own. Yet in the new world of utopian multiculturalism and knee-jerk anti-Americanism, in which a Noam Chomsky could proclaim Khomeini’s gulag to be “independent nationalism,” reasoned argument was futile. Indeed, how could critical debate arise for those “committed to social change,” when no universal standards were to be applied to those outside the West? Thanks to the doctrine of cultural relativism, “oppressed” peoples either could not be judged by our biased and “constructed” values (“false universals,” in Edward Said’s infamous term) or were seen as more pristine than ourselves, uncorrupted by the evils of Western capitalism. Who were we to gainsay Khomeini’s butchery and oppression? We had no way of understanding the nuances of his new liberationist and “nationalist” Islam. Now back in the hands of indigenous peoples, Iran might offer the world an alternate path, a different “discourse” about how to organize a society that emphasized native values (of some sort) over mere profit. So at precisely the time of these increasingly frequent terrorist attacks, the silly gospel of multiculturalism insisted that Westerners have neither earned the right to censure others, nor do they possess the intellectual tools to make judgments about the relative value of different cultures. And if the initial wave of multiculturalist relativism among the elites—coupled with the age-old romantic forbearance for Third World roguery—explained tolerance for early unpunished attacks on Americans, its spread to our popular culture only encouraged more. This nonjudgmentalism—essentially a form of nihilism—deemed everything from Sudanese female circumcision to honor killings on the West Bank merely “different” rather than odious. Anyone who has taught freshmen at a state university can sense the fuzzy thinking of our undergraduates: most come to us prepped in high schools not to make “value judgments” about “other” peoples who are often “victims” of American “oppression.” Thus, before female-hating psychopath Mohamed Atta piloted a jet into the World Trade Center, neither Western intellectuals nor their students would have taken him to task for what he said or condemned him as hypocritical for his parasitical existence on Western society. Instead, without logic but with plenty of romance, they would more likely have excused him as a victim of globalization or of the biases of American foreign policy. They would have deconstructed Atta’s promotion of anti-Semitic, misogynist, Western-hating thought, as well as his conspiracies with Third World criminals, as anything but a danger and a pathology to be remedied by deportation or incarceration.

**Deterrence empirically solves war**

**Moore 4**John Norton Moore is the Director at the Center for Security Law and Professor of Law @ University of Virginia, Editor of the American Journal of International Law “Solving the War Puzzle: Beyond the Democratic Peace,” pg. 30-31

As so broadly conceived, **there is strong evidence that deterrence**, that is, the effect of external factors on the decision to go to war, **is the missing link in the war/peace equation**. In my War & Peace Seminar, I have undertaken to examine the level of deterrence before the principal wars of the twentieth century. This examination has led me to believe that in every case the potential aggressor made a rational calculation that the war would be won, and won promptly…Indeed, **virtually all** **principals wars in the twentieth century**, at least those involving conventional invasion, were preceded by what I refer to as a “double **deterrence absence**.” That is, the potential aggressor believed that they had the military force in place to prevail promptly and that nations that might have the military or diplomatic power to prevent this were not inclined to intervene…This well-known correlation between war and territorial contiguity seems also to underscore the importance of deterrence and is likely principally a proxy for levels of perceived profit and military achievability of aggression in many such settings.

#### Killing terrorists solves terrorism–all of their recruitment arguments are backwards

PETERS 2004

(Ralph, Fmr Military Officer and Author, Parameters, Summer)

And we shall hear that killing terrorists only creates more terrorists. This is sophomoric nonsense. The surest way to swell the ranks of terror is to follow the approach we did in the decade before 9/11 and do nothing of substance. Success breeds success. Everybody loves a winner. The clichés exist because they’re true. Al Qaeda and related terrorist groups metastasized because they were viewed in the Muslim world as standing up to the West successfully and handing the Great Satan America embarrassing defeats with impunity. Some fanatics will flock to the standard of terror, no matter what we do. But it’s far easier for Islamic societies to purge themselves of terrorists if the terrorists are on the losing end of the global struggle than if they’re allowed to become triumphant heroes to every jobless, unstable teenager in the Middle East and beyond. Far worse than fighting such a war of attrition aggressively is to pretend you’re not in one while your enemy keeps on killing you. Even the occupation of Iraq is a war of attrition. We’re doing remarkably well, given the restrictions under which our forces operate. But no grand maneuvers, no gestures of humanity, no offers of conciliation, and no compromises will persuade the terrorists to halt their efforts to disrupt the development of a democratic, rule-of-law Iraq. On the contrary, anything less than relentless pursuit, with both preemptive and retaliatory action, only encourages the terrorists and remaining Baathist gangsters.

**Terror is a real threat driven by forces the aff can’t resolve---we should reform the war on terror, not surrender---any terror attack turns the entire case**

Peter **Beinart 8**, associate professor of journalism and political science at CUNY, The Good Fight; Why Liberals – and only Liberals – Can Win the War on Terror and Make America Great Again, vii-viii

APPLYING THAT TRADITION today is not easy. Cold war liberals devel- oped their narrative of national greatness in the shadow of a totalitarian ¶ superpower. Today, the United States faces no such unified threat. Rather, it faces a web of dangers—from disease to environmental degradation to weapons of mass destruction—all fueled by globalization, which leaves America increasingly vulnerable to pathologies bred in distant corners of the world. And at the center of this nexis sits jihadist terrorism, a new totalitarian movement that lacks state power but harnesses the power of globalization instead. ¶ Recognizing that the United States again faces a totalitarian foe does not provide simple policy prescriptions, because today’s totalitarianism takes such radically different form. But it reminds us of something more basic, **that liberalism does not find its enemies only on the right**—a lesson sometimes forgotten in the age of George W. Bush. ¶ Indeed, it is because liberals so despise this president that they increasingly reject his trademark phrase, the “war on terror.” Were this just a semantic dispute, it would hardly matter; better alternatives to war on terror abound. But the rejection signifies something deeper: a turn away from the very idea that anti-totalitarianism should sit at the heart of the liberal project. For too many liberals today, George W. Bush’s war on terror is the only one they can imagine. This alienation may be understand- able, but that does not make it any less disastrous, for it is liberalism’s principles—even more than George W. Bush’s—that jihadism threatens. If today’s liberals cannot rouse as much passion for fighting a movement that flings acid at unveiled women as they do for taking back the Senate in 2006, they have strayed far from liberalism’s best traditions. And if they believe it is only George W. Bush who threatens America’s freedoms, they should ponder what will happen if the United States is hit with a nuclear or contagious biological attack. **No matter who is president**, Republican or Democrat, **the reaction will make John Ashcroft look like the head of the ACLU**.

Intelligence experts agree that torture is necessary to prevent terrorism

Thiessen, 2009, visiting fellow at the Hoover Institution and served in senior positions in the Pentagon and the White House from 2001 to 2009 (Marc, “The CIA's Questioning Worked”, April 21, <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/20/AR2009042002818_pf.html>)

Consider the Justice Department memo of May 30, 2005. It notes that "the CIA believes 'the intelligence acquired from these interrogations has been a key reason why al Qaeda has failed to launch a spectacular attack in the West since 11 September 2001.' . . . In particular, the CIA believes that it would have been unable to obtain critical information from numerous detainees, including [Khalid Sheik Mohammed] and Abu Zubaydah, without these enhanced techniques." The memo continues: "Before the CIA used enhanced techniques . . . KSM resisted giving any answers to questions about future attacks, simply noting, 'Soon you will find out.' " Once the techniques were applied, "interrogations have led to specific, actionable intelligence, as well as a general increase in the amount of intelligence regarding al Qaeda and its affiliates."

Specifically, interrogation with enhanced techniques "led to the discovery of a KSM plot, the 'Second Wave,' 'to use East Asian operatives to crash a hijacked airliner into' a building in Los Angeles." KSM later acknowledged before a military commission at Guantanamo Bay that the target was the Library Tower, the tallest building on the West Coast. The memo explains that "information obtained from KSM also led to the capture of Riduan bin Isomuddin, better known as Hambali, and the discovery of the Guraba Cell, a 17-member Jemmah Islamiyah cell tasked with executing the 'Second Wave.' " In other words, without enhanced interrogations, there could be a hole in the ground in Los Angeles to match the one in New York.

The memo notes that "[i]nterrogations of [Abu] Zubaydah -- again, once enhanced techniques were employed -- furnished detailed information regarding al Qaeda's 'organizational structure, key operatives, and modus operandi' and identified KSM as the mastermind of the September 11 attacks." This information helped the intelligence community plan the operation that captured KSM. It went on: "Zubaydah and KSM also supplied important information about al-Zarqawi and his network" in Iraq, which helped our operations against al-Qaeda in that country.

All this confirms information that I and others have described publicly. But just as the memo begins to describe previously undisclosed details of what enhanced interrogations achieved, the page is almost entirely blacked out. The Obama administration released pages of unredacted classified information on the techniques used to question captured terrorist leaders but pulled out its black marker when it came to the details of what those interrogations achieved.

Yet there is more information confirming the program's effectiveness. The Office of Legal Counsel memo states "we discuss only a small fraction of the important intelligence CIA interrogators have obtained from KSM" and notes that "intelligence derived from CIA detainees has resulted in more than 6,000 intelligence reports and, in 2004, accounted for approximately half of the [Counterterrorism Center's] reporting on al Qaeda." The memos refer to other classified documents -- including an "Effectiveness Memo" and an "IG Report," which explain how "the use of enhanced techniques in the interrogations of KSM, Zubaydah and others . . . has yielded critical information." Why didn't Obama officials release this information as well? Because they know that if the public could see the details of the techniques side by side with evidence that the program saved American lives, the vast majority would support continuing it.

## SOP

**Information disparity between the president and congress inevitably decreases SOP**

Marshall ‘8

[William P. Marshall, Kenan Professor of Law, University of North Carolina. Boston Law Review 88:505. http://www.bu.edu/law/central/jd/organizations/journals/bulr/documents/MARSHALL.pdf ETB]

6. Presidential Access to and Control of Information

If, “[i]n the information age, information is power”62 then most of that ¶ power rests with the executive. Because of its vast resources, the executive ¶ branch has far greater access to information than do the co-branches of ¶ government.63 In addition, the executive branch has far greater ability and ¶ expertise to gather, examine, and cull that information than do the transitory ¶ legislative staffs in the Congress. Congress, for example, does not have at its ¶ disposal the information gathering capabilities of the intelligence agencies or ¶ the technical expertise of the military in determining when there is a threat to ¶ national security.64 Instead, it must rely on the executive for that appraisal and ¶ therefore must continually negotiate with the executive from a position of ¶ weakness and dependence.65 Moreover, this disparity in access and control of ¶ information is only likely to worsen as the world becomes more complex, because complexity necessarily requires increasingly sophisticated methods of ¶ information collection, analysis, distillation, and dissemination. And because ¶ only the executive branch is likely to have the expertise and the resources to ¶ perform these functions, its relative powers will again increase.

**SOP will never collapse- 4 reasons**

Shane ‘9

[Peter M. Shane is the Jacob E. Davis and Jacob E. Davis II Chair in Law at the Ohio State University's Moritz College of Law, where he regularly teaches administrative law, constitutional law, law and the presidency, and courses at the intersection of law, democracy, and new media. Madison’s Nightmare: How Executive Power Threatens American Democracy. <http://press.uchicago.edu/Misc/Chicago/749396.html> ETB]

Ordinarily, at least four factors in the American system coincide to produce the culture of self-restraint that averts any serious breakdown of government. One is the internalization within each institution of norms of deference for the core capacities of the other two branches. The history of federal court jurisdiction provides a powerful case in point. The past two centuries are replete with examples of the federal judiciary rendering decisions antagonistic to the views and interests of the elected branches of government. The judicial invalidation of President Truman’s seizure of the steel mills and the overturning of anti-flag-burning laws are two well-known historical illustrations. Yet, the elected branches have rarely retaliated in any significant way. The President has rarely—and never in modern history—refused to enforce or recognize judicial orders. Congress, despite numerous proposals to do so, has never ousted the courts from all jurisdiction to decide a category of cases in which Congress, for a political standpoint, would probably prefer judicial silence. It seems impossible to explain the forbearance of the elected branches from substantially curtailing federal jurisdiction in such controversial areas as abortion, school prayer, or desegregation unless we regard that self-restraint as a sign of our elected officials’ allegiance to the near inviolability of the judicial function as conveyed by Article III of the Constitution. This is what I mean by a habit or a norm of deference.¶ A second factor is a common belief in the legitimacy and necessity of active, problem-solving government. Frequently, even amid deep policy disagreement between the executive and legislative branches, public policy compromises emerge in the solution of public problems because both elected branches are committed to demonstrating their capacity to respond in some constructive way to public challenges. Powerful examples from the 1990s include tax and budget reform under President George H. W. Bush and welfare reform under President Clinton. In each case, an ideologically reluctant President went along with congressional initiative out of a felt imperative to respond to a widely perceived public problem and to share in the credit for its solution.¶ Third, each branch—but each of the elected branches especially—has historically been motivated to represent a broad range of public opinion on critical issues. Even when the elected branches disagree significantly on public policy, each has usually been motivated to seek the approval of a wide spectrum of American voters. This impulse was significantly evident in President Clinton’s judicial nominating strategy, in which he worked with a Republican-controlled Senate to confirm potential judges who were notably centrist in their views, and in the Republican Congress’s 1996 enactment of line-item veto authority, which threatened to empower a Democratic President, but which was perceived to be widely popular among the national electorate.¶ Finally, each branch of the government is structured internally so as to promote deliberation, thus increasing the likelihood that multiple points of view will be heard and given time to help shape long-term policy outcomes. Congress, for example, is divided into two houses, which must concur in a legislative proposal in order that it be enacted. The length of terms and the geographical basis of representation is different in the two houses, which, originally, were also selected by different methods. The judiciary consists of a Supreme Court and lower courts through which legal interpretation evolves in a highly formal, multivocal way. Article III of the Constitution gives those judges who officiate over the courts authorized by that article lifetime tenure, insuring that, at any given moment, the judiciary is populated by judges whose prejudicial careers exhibit a variety of ideological and political predispositions. Even the constitutional text describing the executive branch, the most unitary of the three branches, contemplates that the President may seek advice from the heads of “departments.” Deliberation was an intended feature of the new government through and through.¶ Government lawyers, if they perform their jobs well, play a central role in maintaining the ethos of deliberation that was the Framers’ hope. Decision making is most effectively deliberative if it involves a wide variety of perspectives, each shedding light on whatever issue is under discussion. In formal deliberative settings, such as an argument before the Supreme Court or debates on the floor of Congress, contending perspectives are literally embodied in different human beings, all physically present and asserting their various points of view. Decisions within the executive branch, however, are most frequently made in a potentially more insulated environment. The only voices literally present in a particular policy conversation may be those of a high-level presidential appointee, some lower-level presidential appointees, and civil servants who are most directly accountable to these presidential appointees. In such settings, it would require some form of special self-discipline for those immediately involved in the decision to actually concern themselves with perspectives and interests other than the partisan agenda they likely all share. This is especially so for the vast majority of decisions that will never be reviewed in Congress because they are too low-visibility and that will never be reviewed in court because they do not affect the specific interests of identifiable individuals in a way that would ordinarily entitle them to call those decisions into question through litigation.¶ Seen in this light, a critical function of the law in operation—the law as embodied for the executive branch in judicial opinions rendered by the courts and statutes enacted by Congress—is to make manifest the range of interests and concerns that would not otherwise be vigorously articulated when key decisions are made. It is precisely in this way that the rule of law is a fundamental day-to-day check on the spirit of faction in government affairs. Executive branch lawyers, residing in every agency of government, make this check real because they advise on virtually every important administrative decision and focus decision makers’ attention on whatever law is relevant. When the executive branch in 2009 attends, for example, to the Voting Rights Act of 1965 or the 1969 National Environmental Policy Act or the Supreme Court’s 1974 decision in United States v. Nixon, the Administration can, in a sense, hear the multiple voices of earlier times that themselves had to reach consensus in order to create binding public policy. These voices are virtually, even if not physically present, and their recognition can serve as a buffer against the more immediate passions of partisanship or the undisciplined pursuit of self-interest. Conscientious lawyering insures that contending perspectives are brought to bear whenever current decision makers act, and is thus a critical element in preserving the democratic legitimacy of American government.

## Deference

**Turn—Deference. Judicial involvement in war power authority debates turns and escalates every impact**

POSNER & VERMEULE 7—\*Eric A. Posner, Professor of Law at the University of Chicago Law School AND \*\*Adrian Vermeule, Professor of Law at Harvard [*Terror in the Balance: Security, Liberty, and the Courts*, Oxford University Press, pg. 17-18]

Whatever the doctrinal formulation, the basic distinction between the two views is that our view counsels courts to provide high deference during emergencies, as courts have actually done, whereas the civil libertarian view does not. During normal times, the deferential view and the civil libertarian view permit the same kinds of executive action, and during war or other emergencies, the deferential view permits more kinds of executive action than the civil libertarian view does. We assume that courts have historically provided extra deference during an emergency or war because they believe that deference enables the government, especially the executive, to act quickly and decisively. Although deference also permits the government to violate rights, violations that are intolerable during normal times become tolerable when the stakes are higher. Civil libertarians, on the other hand, claim either that government action is likely to be worse during emergencies than during normal times, or at least that no extra deference should be afforded to government decisionmaking in times of emergency-and that therefore the deferential position that judges have historically taken in emergencies is a mistake.

The deferential view does not rest on a conceptual claim; it rests on a claim about relative institutional competence and about the comparative statics of governmental and judicial performance across emergencies and normal times. In emergencies, the ordinary life of the nation, and the bureaucratic and legal routines that have been developed in ordinary times, are disrupted. In the case of wars, including the "war on terror," the government and the public are not aware of a threat to national security at time 0. At time 1, an invasion or declaration of war by a foreign power reveals the existence of the threat and may at the same time cause substantial losses. At time 2, an emergency response is undertaken.

Several characteristics of the emergency are worthy of note. First, the threat reduces the social pie-both immediately, to the extent that it is manifested in an attack, and prospectively, to the extent that it reveals that the threatened nation will incur further damage unless it takes costly defensive measures. Second, the defensive measures can be more or less effective. Ideally, the government chooses the least costly means of defusing the threat; typically, this will be some combination of military engagement overseas, increased intelligence gathering, and enhanced policing at home. Third, the defensive measures must be taken quickly, and-because every national threat is unique, unlike ordinary crime-the defensive measures will be extremely hard to evaluate. There are standard ways of preventing and investigating street crime, spouse abuse, child pornography, and the like; and within a range, these ways are constant across jurisdictions and even nation-states. Thus, there is always a template that one can use to evaluate ordinary policing. By contrast, emergency threats vary in their type and magnitude and across jurisdictions, depending heavily on the geopolitical position of the state in question. Thus, there is no general template that can be used for evaluating the government's response.

In emergencies, then, judges are at sea, even more so than are executive officials. The novelty of the threats and of the necessary responses makes judicial routines and evolved legal rules seem inapposite, even obstructive. There is a premium on the executive's capacities for swift, vigorous, and secretive action. Of course, the judges know that executive action may rest on irrational assumptions, or bad motivations, or may otherwise be misguided. But this knowledge is largely useless to the judges, because they cannot sort good executive action from bad, and they know that the delay produced by judicial review is costly in itself. In emergencies, the judges have no sensible alternative but to defer heavily to executive action, and the judges know this.

**Effective fast response and mission planning is key to deterring every conflict globally**

KAGAN & O’HANLON 7—\*Frederick Kagan, resident scholar at AEI & \*\*Michael O’Hanlon, senior fellow in foreign policy at Brookings [“The Case for Larger Ground Forces”, April 2007, <http://www.aei.org/files/2007/04/24/20070424_Kagan20070424.pdf>]

We live at a time when wars not only rage in nearly every region but threaten to erupt in many places where the current relative calm is tenuous. To view this as a strategic military challenge for the United States is not to espouse a specific theory of America’s role in the world or a certain political philosophy. Such an assessment flows directly from the basic bipartisan view of American foreign policy makers since World War II that overseas threats must be countered before they can directly threaten this country’s shores, that the basic stability of the international system is essential to American peace and prosperity, and that no country besides the United States is in a position to lead the way in countering major challenges to the global order. Let us highlight the threats and their consequences with a few concrete examples, emphasizing those that involve key strategic regions of the world such as the Persian Gulf and East Asia, or key potential threats to American security, such as the spread of nuclear weapons and the strengthening of the global Al Qaeda/jihadist movement. The Iranian government has rejected a series of international demands to halt its efforts at enriching uranium and submit to international inspections. What will happen if the US—or Israeli—government becomes convinced that Tehran is on the verge of fielding a nuclear weapon? North Korea, of course, has already done so, and the ripple effects are beginning to spread. Japan’s recent election to supreme power of a leader who has promised to rewrite that country’s constitution to support increased armed forces—and, possibly, even nuclear weapons— may well alter the delicate balance of fear in Northeast Asia fundamentally and rapidly. Also, in the background, at least for now, Sino Taiwanese tensions continue to flare, as do tensions between India and Pakistan, Pakistan and Afghanistan, Venezuela and the United States, and so on. Meanwhile, the world’s nonintervention in Darfur troubles consciences from Europe to America’s Bible Belt to its bastions of liberalism, yet with no serious international forces on offer, the bloodletting will probably, tragically, continue unabated. And as bad as things are in Iraq today, they could get worse. What would happen if the key Shiite figure, Ali al Sistani, were to die? If another major attack on the scale of the Golden Mosque bombing hit either side (or, perhaps, both sides at the same time)? Such deterioration might convince many Americans that the war there truly was lost—but the costs of reaching such a conclusion would be enormous. Afghanistan is somewhat more stable for the moment, although a major Taliban offensive appears to be in the offing.

Sound US grand strategy must proceed from the recognition that, over the next few years and decades, the world is going to be a very unsettled and quite dangerous place, with Al Qaeda and its associated groups as a subset of a much larger set of worries. The only serious response to this international environment is to develop armed forces capable of protecting America’s vital interests throughout this dangerous time. Doing so requires a military capable of a wide range of missions—including not only deterrence of great power conflict in dealing with potential hotspots in Korea, the Taiwan Strait, and the Persian Gulf but also associated with a variety of Special Forces activities and stabilization operations. For today’s US military, which already excels at high technology and is increasingly focused on re-learning the lost art of counterinsurgency, this is first and foremost a question of finding the resources to field a large-enough standing Army and Marine Corps to handle personnel intensive missions such as the ones now under way in Iraq and Afghanistan. Let us hope there will be no such large-scale missions for a while. But preparing for the possibility, while doing whatever we can at this late hour to relieve the pressure on our soldiers and Marines in ongoing operations, is prudent. At worst, the only potential downside to a major program to strengthen the military is the possibility of spending a bit too much money. Recent history shows no link between having a larger military and its overuse; indeed, Ronald Reagan’s time in office was characterized by higher defense budgets and yet much less use of the military, an outcome for which we can hope in the coming years, but hardly guarantee. While the authors disagree between ourselves about proper increases in the size and cost of the military (with O’Hanlon preferring to hold defense to roughly 4 percent of GDP and seeing ground forces increase by a total of perhaps 100,000, and Kagan willing to devote at least 5 percent of GDP to defense as in the Reagan years and increase the Army by at least 250,000), we agree on the need to start expanding ground force capabilities by at least 25,000 a year immediately. Such a measure is not only prudent, it is also badly overdue.

**Lambakis 01** Steven: Senior Analyst, National Institute for Public Policy, Hoover Institution, Managing editor of Comparative Strategy, “Space Weapons: Refuting the Critics” http://www.hoover.org/publications/policyreview/3479337.html

Likewise, World War I may have symbolically begun with the assassination of Archduke Ferdinand in Sarajevo. Yet a serious student of history would note that the alliances, the national goals and military plans, and the political, diplomatic, and military decisions of the major European powers during the preceding years and months were the true causes of the erosion in global strategic stability. By extension, if decisions to go to war are set on a hair-trigger, the reasons for the precarious circumstances extend far beyond whether a communications or imaging platform is destroyed in space rather than on earth. Those who believe we run extraordinary risks stemming from clouded perceptions and misunderstandings in an age of computerized space warfare might want to take a look at some real-world situations of high volatility in which potentially provocative actions took place. Take, for example, the tragedies involving the USS Stark and USS Vincennes. In May 1987, an Iraqi F-1 Mirage jet fighter attacked the Stark on patrol to protect neutral shipping in the Persian Gulf, killing 37 sailors. Iraq, a "near-ally" of the United States at the time, had never before attacked a U.S. ship. Analysts concluded that misperception and faulty assumptions led to Iraq’s errant attack. The memory of the USS Stark no doubt preoccupied the crew of the USS Vincennes, which little over a year later, in July 1988, was also on patrol in hostile Persian Gulf waters. The Vincennes crew was involved in a "half war" against Iran, and at the time was fending off surface attacks from small Iranian gunboats. Operating sophisticated technical systems under high stress and rules of engagement that allowed for anticipatory self-defense, the advanced Aegis cruiser fired anti-aircraft missiles at what it believed to be an Iranian military aircraft set on an attack course. The aircraft turned out to be a commercial Iran Air flight, and 290 people perished owing to mistakes in identification and communications. To these examples we may add a long list of tactical blunders growing out of ambiguous circumstances and faulty intelligence, including the U.S. bombing in 1999 of the Chinese Embassy in Belgrade during Kosovo operations. Yet though these tragic actions occurred in near-war or tinderbox situations, they did not escalate or exacerbate local instability. The world also survived U.S.-Soviet "near encounters" during the 1948 Berlin crisis, the 1961 Cuban missile crisis, and the 1967 and 1973 Arab-Israeli wars. Guarded diplomacy won the day in all cases. Why would disputes affecting space be any different? In other words, it is not at all self-evident that a sudden loss of a communications satellite, for example, would precipitate a wider-scale war or make warfare termination impossible. In the context of U.S.-Russian relations, communications systems to command authorities and forces are redundant. Urgent communications may be routed through land lines or the airwaves. Other means are also available to perform special reconnaissance missions for monitoring a crisis or compliance with an armistice. While improvements are needed, our ability to know what transpires in space is growing — so we are not always in the dark. The burden is on the critics, therefore, to present convincing analogical evidence to support the notion that, in wartime or peacetime, attempts by the United States to control space or exploit orbits for defensive or offensive purposes would increase significantly the chances for crisis instability or nuclear war. In Washington and other capitals, the historical pattern is to use every available means to clarify perceptions and to consider decisions that might lead to war or escalation with care, not dispatch.

**Courts can’t restrict presidential war powers**

**Wheeler 9** Darren A. Wheeler, associate professor of political science at Ball State University, “Checking Presidential Detention Power in the War on Terror: What Should We Expect from the Judiciary?” Presidential Studies Quarterly 39.4 (Dec 2009): 677-700

This article argues that there are four specific reasons why those expecting the Supreme Court to be a significant check on presidential detention power in the war on terror are likely to be disappointed. The first reason is that the judiciary makes decisions in what can be referred to as "judicial time." In short, the courts are slow. The judicial decision-making process **is often one that takes years to complete** (Rehnquist 1998). Few political actors conceptualize the decision-making process in such an extended manner. If the president can respond more quickly to matters of policy than the courts, **it might be difficult for the judiciary to act as a check on the president**. The second factor that limits the judiciary's ability to check presidential detention power is the fact that courts usually answer specific narrow legal questions as opposed to larger, "big picture" policy questions (Baum 2007; Rehnquist 1998; Rosenberg 1991). As a result, even when the Court makes a decision on a matter, it is often a narrow one that addresses only a small part of the overall policy picture**. This can limit the impact that the courts have on the policymaking process**, as other policy makers often find different means to accomplish their desired goals **regardless of the** roadblocks presented by the **courts** on particular details. The third factor that potentially limits judicial impact on the president's desired detention policies is the fact that the judicial implementation process is fraught with uncertainty (Baum 2007; Canon and Johnson 1999; Carp, Stidham, and Manning 2004; Stumpf 1998). **Even when the courts make a decision, it is possible for** other political actors (including **the president) to shape the implementation process** in such a way as **to minimize the impact that the** particular **decision might have** on the president's preferred policies. Finally, the judiciary, especially since the second half of the twentieth century, has adopted a general posture of deference to the executive in matters of war powers and foreign affairs (Fisher 2005; Howell 2003; Rossiter and Longaker 1976). This deference might lead the Court to refuse to even hear challenges to presidential detention power. Even when the Court does hear cases, it may dispose of them in ways that illustrate this historical pattern of deference. Any combination of these factors **may limit the ability of the judiciary to check presidential initiatives**, **especially in** a policy area - **the war on terror** - in which the Bush administration clearly demonstrated an intense willingness and desire to exert unilateral control over matters (Fisher 2004; Goldsmith 2007; Kassop 2007; Savage 2007; Wheeler 2008).

# 2NC

## CP

Model NB – 2NC Impact – Appointments

**Adopting the American model makes higher court appointment battles inevitable – checking the judiciary is key to avoid politicization.**

Schor 2007 (Miguel, Assoc. Prof. Law, Suffolk U Law School, Winter, 16 Minn. J. Int’l L. 61)

The American Supreme Court is exceptional among the world's supreme or constitutional courts because the mechanisms by which citizens can hold it accountable are weak. Changing the constitution's meaning by replacing members of the court is not an attractive political strategy in nations that follow either the European [87](https://www.lexis.com/research/retrieve?_m=a1f127399af8ad064a3d6901600b3375&csvc=le&cform=byCitation&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzb-zSkAb&_md5=42695cdf5484ceaa30e4687d7338efeb" \l "n87" \t "_self) or Canadian models [88](https://www.lexis.com/research/retrieve?_m=a1f127399af8ad064a3d6901600b3375&csvc=le&cform=byCitation&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzb-zSkAb&_md5=42695cdf5484ceaa30e4687d7338efeb" \l "n88" \t "_self) of judicial review. A core argument of this Article is that although supreme or constitutional courts throughout the world generate political controversy, it is unlikely that factions will form to transform the constitution by influencing appointments in other polities because these polities have stronger and more democratic rules of political accountability. By democratizing judicial review, polities can avoid the faction strewn shoals of American judicial appointments. The politicization of the appointments process in the United States, moreover, has eroded the legitimacy of the Supreme Court. Courts can ameliorate political conflict only if they are perceived as neutral [\*76] arbiters. If the justices of the Supreme Court are identified with a political faction, however, the Court undermines, rather than facilitates, the trust needed for democracy to work. In short, the appointments wars have negative, long-term consequences for American democracy.

**That destroys institutional legitimacy—leads to conflict.**

Schor 2007 (Miguel, Assoc. Prof. Law, Suffolk U Law School, Winter, 16 Minn. J. Int’l L. 61)

The appointments wars have long-term, negative consequences for American democracy. Public support for the Court may be undergoing erosion. [157](https://www.lexis.com/research/retrieve?_m=a1f127399af8ad064a3d6901600b3375&csvc=le&cform=byCitation&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzb-zSkAb&_md5=42695cdf5484ceaa30e4687d7338efeb" \l "n157" \t "_self) Courts can play a role in ameliorating political conflict only if they are perceived to be independent of ideological and social forces. In his classic, Whigs and Hunters, E.P. Thompson notes: "If the law is evidently partial and unjust, then it will mask nothing, legitimize nothing ... . The essential precondition for the effectiveness of law ... is that it shall display an independence from gross manipulation and shall seem to be just." [158](https://www.lexis.com/research/retrieve?_m=a1f127399af8ad064a3d6901600b3375&csvc=le&cform=byCitation&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzb-zSkAb&_md5=42695cdf5484ceaa30e4687d7338efeb" \l "n158" \t "_self) Democracies require the alternation in power by opposing factions. Constitutions play an important role in facilitating regular turnover in power because electoral losers know that there are limits to what electoral winners can do. If one faction can entrench its partisans in the judicial system, however, politics becomes polarized as the Constitution no longer [\*87] moderates but exacerbates conflict. [159](https://www.lexis.com/research/retrieve?_m=a1f127399af8ad064a3d6901600b3375&csvc=le&cform=byCitation&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzb-zSkAb&_md5=42695cdf5484ceaa30e4687d7338efeb#n159) American exceptionalism, when it comes to the formal rules governing appointments, has fueled distrust. Although a vigorous debate is currently underway among scholars over reforming judicial appointments, [160](https://www.lexis.com/research/retrieve?_m=a1f127399af8ad064a3d6901600b3375&csvc=le&cform=byCitation&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzb-zSkAb&_md5=42695cdf5484ceaa30e4687d7338efeb#n160) the debate is unlikely to bear fruit given the roadblocks to reform. [161](https://www.lexis.com/research/retrieve?_m=a1f127399af8ad064a3d6901600b3375&csvc=le&cform=byCitation&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzb-zSkAb&_md5=42695cdf5484ceaa30e4687d7338efeb#n161) Other polities have powerful constitutional courts yet have managed to avoid the appointments battles that plague the United States. The nations of continental Europe, for example, largely require a supermajority for appointment to national high courts. [162](https://www.lexis.com/research/retrieve?_m=a1f127399af8ad064a3d6901600b3375&csvc=le&cform=byCitation&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzb-zSkAb&_md5=42695cdf5484ceaa30e4687d7338efeb#n162) Canada allows for temporary legislative overrides of Supreme Court decisions. [163](https://www.lexis.com/research/retrieve?_m=a1f127399af8ad064a3d6901600b3375&csvc=le&cform=byCitation&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzb-zSkAb&_md5=42695cdf5484ceaa30e4687d7338efeb#n163) The comparative experience shows the importance of democratizing judicial review by creating institutional mechanisms that make it impossible or unlikely that factions will seek to transform the constitution by influencing appointments. American constitutional theory, on the other hand, has turned not to institutional mechanisms in seeking to curb the Court, but to popular constitutionalism.

Model NB – 2NC Impact – Corruption

**Judicial supremacy without accountability leads to rampant corruption.**

Dakolias 2k (Maria, counsel to World Bank Legal Dept., and Kim Thachuk, judicial reform advisor, Spring, “The Problem of Eradicating Corruption from the Judiciary,” 18 Wis. Int'l L.J. 353, Lexis)

Despite the fact that each branch scrutinizes the others' activities, often there is little real understanding of what the judiciary actually does in terms of specific actions. This misunderstanding occurs because the concept of judicial independence has often gone so far as to be an impediment to open communication, even if it is only for the purpose of constructive criticism. Indeed, it is often the 'other-worldly' nature of judiciaries that shrouds them in mystery and sets the stage not only for much misunderstanding, but for lack of understanding about what is actually transpiring. Judicial independence, while an important guarantee of impartiality and nonpartisanship, can also be the cloak behind which judges may conceal illegal or corrupt acts. Indeed, this problem leaves the door open for corrupt activity to go unnoticed or unchallenged. Thus, while there is the need to guarantee judicial independence, branches of government should cooperate and communicate more effectively in order to ensure that the business of government is being done within the guidelines of the constitution. Independence, therefore, requires safeguards against corruption. If there is no judicial accountability, the cloak of independence may feed corrupt behavior. This, of course, requires a delicate balance between independence and accountability.

**Leads to cycles of violence—uniquely bad in the judiciary.**

Dakolias 2k (Maria, counsel to World Bank Legal Dept., and Kim Thachuk, judicial reform advisor, Spring, “The Problem of Eradicating Corruption from the Judiciary,” 18 Wis. Int'l L.J. 353, Lexis)

Corruption in the justice system thus spawns further corruption which leads to a loss of legitimacy and often violence **.** A vicious circleof corruption and lawlessness ensues from which it is difficult to extricate society. Indeed, corruption in the judiciary is somewhat distinct from corruption in other sectors of government because the judiciary is most often [\*364] viewed as the failsafe between constitutionalism and a free-for-all or a Hobbesian state of nature. Corruption undermines political legitimacy and makes citizens become distrusting of government . If corruption is to be addressed it needs, among other things, independent prosecutors and judiciary. 44 However, if the judiciary cannot perform this function, the corruption will never be punished because individuals and other branches of government are confident that they are free to do as they please. 45 The judiciary, then, can be the cause of corruption especially if it is slow and does not accuse the guilty. 46 This will lead to impunity of corrupt activities and if nothing is done to address it, unaccountability of the government. 47

CP – 2NC AT: Permutation

**2. Doesn’t solve –**

**A. It’s a weak congressional challenge—Congress is seen as interpreting independently and gets overwhelmed by judicial authority.**

Lipkin 2006 (Robert J., Prof. Law @ Widener U School of Law, 28 Cardozo L. Rev. 1055)

A congressional override provides a safety net while at the same time permitting the benefits of judicial review to continue. Two conceptions of a congressional override exist: a weak version and a strong version. The weak version permits Congress to override a Supreme Court decision by passing the appropriate legislation, which the Court may then strike down. The strong version makes Congress the final arbiter. The weak version provides a cooperative inter-branch relationship within a modified form of judicial supremacy. In essence, the weak override requires the Court to defer to Congress whenever possible, and strike down an override only as a last resort. There is some value to a weak congressional override. Such an override is at [\*1113] least an improvement over our current form of judicial supremacy for two reasons. First, it makes Congress a partner - albeit a junior partner - in determining constitutional meaning. In short, it explicitly rejects the notion that courts have an exclusive role in constitutional interpretation. Second, this partnership may be enhanced by Congress publicly explaining its reasons for overriding the Court's decision. Then, if the Court strikes down that override, it in turn must explicitly reply to Congress's rationale and analysis. Accordingly, an explicit, dynamic constitutional dialogue between Congress and the Court is formally created. A Court acknowledging Congress' authority to weakly override its decisions might decline reviewing a challenge to an override by publicly requesting the electorate to chasten the legislators who enacted the override. If this fails, the Court has a choice to defer to the electorate or to strike down the override in an appropriate case. Though this is an improvement over our present system, in all probability it would be insufficient. The Court remains the final arbiter of constitutional meaning. The benefit, however, would be requiring the Court to respond analytically to serious objections from a co-equal branch of government. [172](https://www.lexis.com/research/retrieve?_m=b00d8e40303bbd2f1abee242874ec95d&csvc=le&cform=byCitation&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzb-zSkAb&_md5=7a15214eaa1deb8f698148329bfaa541" \l "n172" \t "_self) In the end, however, congressional overrides should be made of sterner stuff. [173](https://www.lexis.com/research/retrieve?_m=b00d8e40303bbd2f1abee242874ec95d&csvc=le&cform=byCitation&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzb-zSkAb&_md5=7a15214eaa1deb8f698148329bfaa541" \l "n173" \t "_self)

**3. Links to the net benefit –**

**A. Modeling – weak review eventually recovers and restores judicial review**

Tushnet 2003 (Mark, 53 Univ. of Toronto L.J. 89)

Professor Roach's important examination of the extensive experience Canada has had in operating the world's leading weak-form system of judicial review shows that we should be cautious about endorsing weak-form judicial review as an alternative to strong-form judicial review. The materials he presents suggest that Canada's weak-form review has become strong-form judicial review, in part because of a lack of political will and in part because of structural obstacles to the legislature's actual ability to respond to Court decisions. The fact that in-your-face statutes are enacted will continue to place on the Canadian constitutional agenda the question of judicial restraint, as such statutes force us to consider whether weak-form systems require that courts exercise restraint when faced with constitutional interpretations with which the judges disagree but which they cannot fairly describe as unreasonable. In the end, then, the invention of weak-form judicial review may not displace the long-standing controversy in strong-form systems over judicial activism and restraint.

## 2NC Adv 3

**Court deference in the context of war fighting is at an all-time high --- most recent cases prove**

George D. Brown 11, Interim Dean and Robert F. Drinan, S.l., Professor of Law, Boston College Law School, 1/7/11, “Accountability, Liability, and the War on Terror -- Constitutional Tort Suits as Truth and Reconciliation Vehicles,” Florida Law Review, <http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1337&context=lsfp>

Still, the notion of national security deference is **deeply ingrained** in our constitutional tradition. Its institutional foundations make sense, as ably demonstrated by Professor Pushaw.415 The question that arises is whether things have changed with the Court's decisions in a series of "enemy combatant" cases since the onset ofthe war on terror.416 These cases have arisen in the context of petitions for habeas corpus. The Court, as Professor Pushaw puts it, "interpreted the habeas corpus statute generously,'.417 even to the point of distortion.418 On the other hand, the substantive results represented a mixed bag of defects and victories for the President. "[T]hese three cases **did not** necessarily **signal a major shift** in the Court's jurisprudence in which individual liberties will be upheld vigorously against executive claims of national security.'.419 Professor Pushaw wrote these words before Boumediene v. Bush,420 in which the Court took on both political branches. Boumediene, far more than its immediate predecessors, might be seen as the case that broke the back of national security deference.421 The majority opinion emphasized the judiciary's Marburybased role as the branch that says "what the law is,' 22 echoing its earlier statement in Hamdi v. Rumsfeld that the Constitution "most assuredly envisions a role for all three branches when individual liberties are at stake. ,.424 ¶ On the other hand, it is possible to see Boumediene as resting primarily on the key role of habeas corpus. The Court proclaimed the writ's "centrality," noting that "protection for the privilege of habeas corpus was one of the few safeguards of liberty specified in a Constitution that, at the outset, had no Bill of Rights. ,.425 I have raised elsewhere the argument that one should not extrapolate too far from the habeas cases, even if they are viewed as an assertion of the judicial role.426 Habeas raises the fundamental question of the lawfulness of executive detention and often presents the judiciary with familiar issues of the validity of procedures. Reverse war on terror suits would take the courts much further. ¶ Certainly, the Court's two most recent war on terror decisions show a reluctance to go further and may even constitute a **retrenchment**. The importance of Ashcroft v. I{lbar27 has already been noted. Holder v. Humanitarian Law Project's points in the same direction. Holder upheld a criminal statute that is a **crucial component** of the war on terror.429 It did so in the face of a **vigorous First Amendment challenge**, supported by three Justices.43o Both cases show deference toward the government and appreciation of the difficulties of waging the war on terror. Iqbal noted that "the Nation's top law enforcement officers [were acting] in the aftermath of a devastating terrorist attack .... ,.431 Holder's language is even **stronger**. The Court stated **explicitly that deference was appropriate** because "[t]his litigation implicates sensitive and weighty interests of national security and foreign affairs.'.432 Indeed, the opinion went further endorsing the preventive approach to counterterrorism and recognizing the government's need to often act "based on **informed judgment rather than concrete evidence**.'.433 In perhaps the ultimate demonstration of the importance of rhetoric, the Court's opinion closed with a citation of the Preamble to the Constitution and its recognition of the need to provide '''for the common defence [sic].".434 Iqbal and Holder stand in stark contrast to the habeas decisions of a few years earlier.

**Court interference decks the Executive flexibility necessary to solve prolif, terror, and the rise of hostile powers---link threshold is low**

Robert Blomquist 10, Professor of Law, Valparaiso University School of Law, THE JURISPRUDENCE OF AMERICAN NATIONAL SECURITY PRESIPRUDENCE, 44 Val. U.L. Rev. 881

Supreme Court Justices--along with legal advocates--need to conceptualize and prioritize big theoretical matters of institutional design and form and function in the American national security tripartite constitutional system. By way of an excellent introduction to these vital issues of legal theory, the Justices should pull down from the library shelf of the sumptuous Supreme Court Library in Washington, D.C. (or more likely have a clerk do this chore) the old chestnut, The Legal Process: Basic Problems in the Making and Application of Law by the late Harvard University law professors Henry M. Hart and Albert M. Sacks. n7 Among the rich insights on institutional design coupled with form and function in the American legal system that are germane to the Court's interpretation of national security law-making and decision-making by the President are several pertinent points. First, "Hart and Sacks' intellectual starting point was the interconnectedness of human beings, and the usefulness of law in helping us coexist peacefully together." n8 By implication, therefore, the Court should be mindful of the **unique** [\*883] constitutional **role played by the POTUS in preserving peace** **and should prevent imprudent judicial actions that would undermine** American national **security**. Second, Hart and Sacks, continuing their broad insights of social theory, noted that legal communities establish "institutionalized[] procedures for the settlement of questions of group concern" n9 and regularize "different procedures and personnel of different qualifications . . . appropriate for deciding different kinds of questions" n10 because "every modern society differentiates among social questions, accepting one mode of decision for one kind and other modes for others-e.g., courts for 'judicial' decisions and legislatures for 'legislative' decisions" n11 and, extending their conceptualization, an executive for "executive" decisions. n12 Third, Professors Hart and Sacks made seminal theoretical distinctions between rules, standards, principles, and policies. n13 While all four are part of "legal arrangements [\*884] in an organized society," n14 and all four of these arrangements are potentially relevant in judicial review of presidential national security decisions, principles and policies n15 are of special concern because of **the sprawling, inchoate, and rapidly changing nature of** national security **threats and the imperative of hyper-energy in the Executive branch in responding to these threats.** n16 The Justices should also consult Professor Robert S. Summers's masterful elaboration and amplification of the Hart and Sacks project on enhancing a flourishing legal system: the 2006 opus, Form and Function in a Legal System: A General Study. n17 The most important points that [\*885] Summers makes that are relevant to judicial review of American national security presiprudence are three key considerations. First, a "conception of the overall form of the whole of a functional [legal] unit is needed to serve the founding purpose of defining, specifying, and organizing the makeup of such a unit so that it can be brought into being and can fulfill its own distinctive role" n18 in synergy with other legal units to serve overarching sovereign purposes for a polity. The American constitutional system of national security law and policy should be appreciated for its genius in making the POTUS the national security sentinel with vast, but not unlimited, powers to protect the Nation from hostile, potentially catastrophic, threats. Second, "a conception of the overall form of the whole is needed for the purpose of organizing the internal unity of relations between various formal features of a functional [legal] unit and between each formal feature and the complementary components of the whole unit." n19 Thus, Supreme Court Justices should have a thick understanding of the form of national security decision-making conceived by the Founders to center in the POTUS; the ways the POTUS and Congress historically organized the processing of national security through institutions like the National Security Council and the House and Senate intelligence committees; and the ways the POTUS has structured national security process through such specific legal forms as Presidential Directives, National Security Decision Directives, National Security Presidential Decision Directives, Presidential Decision Directives, and National Security Policy Directives in classified, secret documents along with typically public Executive Orders. n20 Third, according to Summers, "a conception of the overall form of the whole functional [legal] unit is needed to organize further the mode of operation and the instrumental capacity of the [legal] unit." n21 So, the Supreme Court should be aware that tinkering with national security decisions of the POTUS--unless clearly necessary to counterbalance an indubitable violation of the text of the Constitution--may lead to **unforeseen negative second-order consequences** in the ability of the POTUS (with or without the help of Congress) to preserve, protect, and defend the Nation. n22 [\*886] B. Geopolitical Strategic Considerations Bearing on Judicial Interpretation Before the United States Supreme Court Justices form an opinion on the legality of national security decisions by the POTUS, they should immerse themselves in judicially-noticeable facts concerning what national security expert, Bruce Berkowitz, in the subtitle of his recent book, calls the "challengers, competitors, and threats to America's future." n23 Not that the Justices need to become experts in national security affairs, n24 but every Supreme Court Justice should be aware of the following five basic national security facts and conceptions before sitting in judgment on presiprudential national security determinations. (1) "National security policy . . . is harder today because the issues that are involved are more numerous and varied. The problem of the day can change at a moment's notice." n25 While "[y]esterday, it might have been **proliferation**; today, **terrorism**; tomorrow, **hostile regional powers**" n26, the twenty-first century reality is that "[t]hreats are also more likely to be intertwined--proliferators use the same networks as narco-traffickers, narco-traffickers support terrorists, and terrorists align themselves with regional powers." n27 (2) "Yet, as worrisome as these immediate concerns may be, the long-term challenges are even harder to deal with, and the stakes are higher. Whereas the main Cold War threat--the Soviet Union--was brittle, most of the potential adversaries and challengers America now faces are resilient." n28 (3) "The most important task for U.S. national security today is simply to retain the strategic advantage. This term, from the world of military doctrine, refers to the overall ability of a nation to control, or at least influence, the course of events." n29 Importantly, "[w]hen you hold [\*887] the strategic advantage, situations unfold in your favor, and each round ends so that you are in an advantageous position for the next. When you do not hold the strategic advantage, they do not." n30 (4) While "keeping the strategic advantage may not have the idealistic ring of making the world safe for democracy and does not sound as decisively macho as maintaining American hegemony," n31 maintaining the American "strategic advantage is critical, because it is essential for just about everything else America hopes to achieve--promoting freedom, protecting the homeland, defending its values, preserving peace, and so on." n32 (5) The **U**nited **S**tates requires national security "**agility**." n33 It not only needs "to refocus its resources repeatedly; it needs to do this faster than an adversary can focus its own resources." n34 [\*888] As further serious preparation for engaging in the jurisprudence of American national security presiprudence in hotly contested cases and controversies that may end up on their docket, our Supreme Court Justices should understand that, as Walter Russell Mead pointed out in an important essay a few years ago, n35 the average American can be understood as a Jacksonian pragmatist on national security issues. n36 "Americans are determined to keep the world at a distance, while not isolating ourselves from it completely. If we need to take action abroad, we want to do it on our terms." n37 Thus, recent social science survey data paints "a picture of a country whose practical people take a practical approach to knowledge about national security. Americans do not bother with the details most of the time because, for most Americans, the details do not matter most the time." n38 Indeed, since the American people "do know the outlines of the big picture and what we need to worry about [in national security affairs] so we know when we need to pay greater attention and what is at stake. This is the kind of knowledge suited to a Jacksonian." n39 Turning to how the Supreme Court should view and interpret American presidential measures to oversee national security law and policy, our Justices should consider a number of important points. First, given the robust text, tradition, intellectual history, and evolution of the institution of the POTUS as the American national security sentinel, n40 and the unprecedented dangers to the United States national security after 9/11, n41 national security presiprudence should be accorded **wide latitude** by the Court in the adjustment (and tradeoffs) of trading liberty and security. n42 Second, Justices should be aware that different presidents [\*889] institute changes in national security presiprudence given their unique perspective and knowledge of threats to the Nation. n43 Third, **Justices should be restrained in second-guessing the POTUS** and his subordinate national security experts concerning both the existence and duration of national security emergencies and necessary measures to rectify them. "During emergencies, the institutional advantages of the executive are enhanced", n44 moreover, "[b]ecause of the **importance of secrecy, speed, and flex**ibility, courts, which are slow, open, and rigid, have less to contribute to the formulation of national policy than they do during normal times." n45 Fourth, Supreme Court Justices, of course, should not give the POTUS a blank check--even during times of claimed national emergency; but, how much deference to be accorded by the Court is "always a hard question" and should be a function of "the scale and type of the emergency." n46 Fifth, the Court should be **extraordinarily deferential** to the POTUS and his executive subordinates regarding questions of executive determinations of the international laws of war and military tactics. As cogently explained by Professors Eric Posner and Adrian Vermeule, n47 "the United States should comply with the laws of war in its battle against Al Qaeda"--and I would argue, other lawless terrorist groups like the Taliban--"only to the extent these laws are beneficial to the United States, taking into account the likely response of [\*890] other states and of al Qaeda and other terrorist organizations," n48 as determined by the POTUS and his national security executive subordinates.

**Global nuclear war**

Li 9 Zheyao, J.D. candidate, Georgetown University Law Center, 2009; B.A., political science and history, Yale University, 2006. This paper is the culmination of work begun in the "Constitutional Interpretation in the Legislative and Executive Branches" seminar, led by Judge Brett Kavanaugh, “War Powers for the Fourth Generation: Constitutional Interpretation in the Age of Asymmetric Warfare,” 7 Geo. J.L. & Pub. Pol'y 373 2009 WAR POWERS IN THE FOURTH GENERATION OF WARFARE

A. The Emergence of Non-State Actors

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

**Restrictions on detention kill exec flex—key to prevent terrorism**

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Reading the tea leaves of judicial dicta may be fraught with difficulty, but one certainly discerns from these pragmatic guidelines a view that the Executive should be accorded **reasonable deference** in matters of preventive detention. This deference is strongest during the early phases of detention, when facts are unclear, when the risks of release are acute, and the dangers of substituting a judicial judgment for that of the military or the Commander-in-Chief is greatest. If the Government learns that al-Qaeda operatives have invaded the U.S. bent on detonating explosives near chemical-laden rail cars, the overwhelming national effort must be directed toward destroying or detaining those forces intent on harming the country. This is not the time for Miranda and presentment but for concerted, **decisive action** bounded by the law of war. Every instrument of national power must be brought to bear, both military and civilian. If it makes the most sense for the FBI to detain someone, they should do so. If the military has the most information and can most quickly and effectively detain and interrogate, then consistent with military regulations, they should do so.¶ The process of understanding the depth and breadth of the danger, connecting the web of those involved, determining the possibility of future attacks takes time. It remains essential to afford the Commander-in-Chief adequate time and decision space to maximize the opportunity to defeat the threat and prevent future attacks.That is why the NDAA imposes **no temporal limits**, why it **avoids geographic restrictions** and why it **grants no special protections to citizens** who take up arms with the enemy. As Hamdan and Boumerdiene make clear, there are limits to the Court's deference. The more time that passes, the greater the consequences of an erroneous deprivation of liberty and the greater the risk of not affording someone a reasonable opportunity to challenge the basis for their detention. If there is consensus on the matter of process in preventive detention, it appears to mean **reasonable deference** followed by increased scrutiny with the passage of time. It means judicial review bounded by pragmatism, and it means **balancing very real security concerns** against the need to protect individuals from arbitrary deprivation of liberty.

**Nuke terror causes extinction---equivalent to full-scale nuclear war**

Owen B. Toon 7, chair of the Department of Atmospheric and Oceanic Sciences at CU-Boulder, et al., April 19, 2007, “Atmospheric effects and societal consequences of regional scale nuclear conflicts and acts of individual nuclear terrorism,” online: http://climate.envsci.rutgers.edu/pdf/acp-7-1973-2007.pdf

To an increasing extent, people are congregating in the world’s great urban centers, creating megacities with populations exceeding 10 million individuals. At the same time, advanced technology has designed nuclear explosives of such small size they can be easily transported in a car, small plane or boat to the heart of a city. We demonstrate here that a single detonation in the 15 kiloton range can produce urban fatalities approaching one million in some cases, and casualties exceeding one million. Thousands of small weapons still exist in the arsenals of the U.S. and Russia, and there are at least six other countries with substantial nuclear weapons inventories. In all, thirty-three countries control sufficient amounts of highly enriched uranium or plutonium to assemble nuclear explosives. A conflict between any of these countries involving 50-100 weapons with yields of 15 kt has the potential to create fatalities rivaling those of the Second World War. Moreover, even a single surface nuclear explosion, or an air burst in rainy conditions, in a city center is likely to cause the entire metropolitan area to be abandoned at least for decades owing to infrastructure damage and radioactive contamination. As the aftermath of hurricane Katrina in Louisiana suggests, the economic consequences of even a localized nuclear catastrophe would most likely have severe national and international economic consequences. Striking effects result even from relatively small nuclear attacks because low yield detonations are most effective against city centers where business and social activity as well as population are concentrated. Rogue nations and terrorists would be most likely to strike there. Accordingly, an organized attack on the U.S. by a small nuclear state, or terrorists supported by such a state, could generate casualties comparable to those once predicted for a full-scale nuclear “counterforce” exchange in a superpower conflict. Remarkably, the estimated quantities of smoke generated by attacks totaling about one megaton of nuclear explosives could lead to significant global climate perturbations (Robock et al., 2007). While we did not extend our casualty and damage predictions to include potential medical, social or economic impacts following the initial explosions, such analyses have been performed in the past for large-scale nuclear war scenarios (Harwell and Hutchinson, 1985). Such a study should be carried out as well for the present scenarios and physical outcomes.

## 2NC No Impact

**2. Accidental launches will not escalate.**

Alexander K. **Kislov**, Professor and director of Peace and Research Institute (Moscow). 19**93**. Inadvertent Nuclear War. Pg. 239-240.

A deliberate nuclear war between East and West is out of the question; but what about a war caused by chance factors? An accidental or unauthorized launching of a missile or even of several missiles (in itself highly improbable) is unlikely to bring about a full-scale nuclear war when neither side has any incentive for it. We assume a very small probability of a very limited (“automatic” or unauthorized) reaction and a close-to-zero probability of a very limited authorized ‘retaliation’; this is the maximal assumption that is possible if we want to remain realistic.

**3. No risk of miscalculations – Countries are upgrading their detection systems.**

**West et al**. September **08**, Jessica: Managing Editor, Project Ploughshares [Dr. Wade Huntley: Simons Centre for Disarmament and Non-proliferation Research, University of British Columbial; Dr. Ram Jakhu: Institute of Air and Space Law, McGill University; Dr. William Marshall: NASA-Ames Research Center/Space Generation Foundation; Andrew Shore: Department of Foreign Affairs and International Trade Canada; John Siebert: Project Ploughshares; Dr. Ray Williamson: Secure World Foundation; Amb. Thomas Graham Jr.: (Chairman of the Board), Special Assistant to the President for Arms Control, Nonproliferation and Disarmament (ret.); Hon. Philip E. Coyle III: Center for Defense Information; Richard DalBello: Intelsat General Corporation; Theresa Hitchens: Center for Defense Information; Dr. John Logsdon: Charles A. Lindbergh Chair in Aerospace History, National Air and Space Museum; Dr. Lucy Stojak: M.L. Stojak Consultants/International Space University; Dr. S. Pete Worden: Brigadier General USAF (ret.), “Space Security 2008,” http://www.spacesecurity.org/SSI2008.pdf]

Trend 6.1: US and Russia lead in general capability to detect rocket launches, while US leads in the development of advanced technologies to detect direct attacks on satellites —The ability to distinguish space negation attacks from technical failures or environmental disruptions is critical to maintaining international stability in space. Early warning also enables defensive responses, but the type of protection available may be limited. Only the US and Russia can reliably detect rocket launches. US Defense Support Program satellites provide early warning of conventional and nuclear ballistic missile attacks; Russia began rebuilding its aging system in 2001 by upgrading its Oko series satellites. France is developing two missile-launch early-warning satellites—Spirale-1 and -2. Most actors have a basic capability to detect a ground-based electronic attack, such as jamming, by sensing an interference signal or by noticing a loss of communications. It is very difficult to obtain advance warning of directed energy attacks that move at the speed of light

# 1NR

## Ev

## Thinkability

Torture is not immoral – it prevents the murder of many more innocent people

Bagaric, Head of Deakin Law School and Clarke, Lecturer at Deakin Law School, 2005 [Mirko and Julie, ARTICLE: Not Enough Official Torture in the World? The Circumstances in Which Torture Is Morally Justifiable, University of San Francisco of Law Review, 39 U.S.F. L. Rev. 581, Lexis]

While a "civilized" community does not typically condone such conduct, this Article contends that torture is morally defensible in certain circumstances, mainly when more grave harm can be avoided by using torture as an interrogation device. The pejorative connotation associated with torture should be abolished. A dispassionate analysis of the propriety of torture indicates that it is morally justifiable. At the outset of this analytical discussion, this Article requires readers to move from the question of whether torture is ever defensible to the issue of the circumstances in which it is morally permissible.

Consider the following example: A terrorist network has activated a large bomb on one of hundreds of commercial planes carrying over three hundred passengers that is flying somewhere in the world at any point in time. The bomb is set to explode in thirty minutes. The leader of the terrorist organization announces this intent via a statement on the Internet. He states that the bomb was planted by one of his colleagues at one of the major airports in the world in the past few hours. No details are provided regarding the location of the plane where the bomb is located. Unbeknown to him, he was under police surveillance and is immediately apprehended by police. The terrorist leader refuses to answer any questions of the police, declaring that the passengers must die and will do so shortly.

Who in the world would deny that all possible means should be used to extract the details of the plane and the location of the bomb? n7 The answer is not many. n8 The passengers, their relatives and friends, and many in society would expect that all means should be used to [\*584] extract the information, even if the pain and suffering imposed on the terrorist resulted in his death.

Although the above example is hypothetical and is not one that has occurred in the real world, the force of the argument cannot be dismissed on that basis. As C.L. Ten notes, "fantastic examples" that raise fundamental issues for consideration, such as whether it is proper to torture wrongdoers, play an important role in the evaluation of moral principles and theories. n9 These examples sharpen contrasts and illuminate the logical conclusions of the respective principles to test the true strength of our commitment to the principles. n10 Thus, fantastic examples cannot be dismissed summarily merely because they are "simply" hypothetical.

Real life is, of course, rarely this clear cut, but there are certainly scenarios approaching this degree of desperation, n11 which raise for discussion whether it is justifiable to inflict harm on one person to reduce a greater level of harm occurring to a large number of blameless people. Ultimately, torture is simply the sharp end of conduct whereby the interests of one agent are sacrificed for the greater good. As a community, we are willing to accept this principle. Thus, although differing in degree, torture is no different in nature from conduct that we sanction in other circumstances. It should be viewed in this light.

Terrorism causes extinction---hard-line responses are key

Nathan Myhrvold '13, Phd in theoretical and mathematical physics from Princeton, and founded Intellectual Ventures after retiring as chief strategist and chief technology officer of Microsoft Corporation , July 2013, "Stratgic Terrorism: A Call to Action," The Lawfare Research Paper Series No.2, <http://www.lawfareblog.com/wp-content/uploads/2013/07/Strategic-Terrorism-Myhrvold-7-3-2013.pdf>

Several powerful trends have aligned to profoundly change the way that the world works. Technology ¶ now allows stateless groups to organize, recruit, and fund ¶ themselves in an unprecedented fashion. That, coupled ¶ with the extreme difficulty of finding and punishing a stateless group, means that stateless groups are positioned to be ¶ lead players on the world stage. They may act on their own, ¶ or they may act as proxies for nation-states that wish to ¶ duck responsibility. Either way, stateless groups are forces ¶ to be reckoned with.¶ At the same time, a different set of technology trends ¶ means that small numbers of people can obtain incredibly ¶ lethal power. Now, for the first time in human history, a ¶ small group can be as lethal as the largest superpower. Such ¶ a group could execute an attack that could kill millions of ¶ people. It is technically feasible for such a group to kill billions of people, to end modern civilization—perhaps even ¶ to drive the human race to extinction. Our defense establishment was shaped over decades to ¶ address what was, for a long time, the only strategic threat ¶ our nation faced: Soviet or Chinese missiles. More recently, ¶ it has started retooling to address tactical terror attacks like ¶ those launched on the morning of 9/11, but the reform ¶ process is incomplete and inconsistent. A real defense will ¶ require rebuilding our **military and intelligence capabilities** from the ground up. Yet, so far, strategic terrorism has ¶ received relatively little attention in defense agencies, and ¶ the efforts that have been launched to combat this existential threat seem fragmented.¶ History suggests what will happen. The only thing that shakes America out of complacency is a direct threat from a determined adversary that confronts us with our shortcomings by **repeatedly attacking** us or hectoring **us for decades**.

US Torture programs have empirically worked at getting needed intelligence against terrorists

Martinez, ABC News Staff Writer, 2009 [Luis, “CIA Director's Strong Defense of Interrogation Techniques”, January 15 <http://blogs.abcnews.com/politicalradar/2009/01/cia-directors-s.html>]

ABC News' Luis Martinez reports: CIA Director Michael Hayden offered a spirited defense of the agency's controversial detention and interrogation techniques, such as waterboarding, which Attorney General nominee Eric Holder characterized today as "torture." Hayden said the techniques provided extremely useful information about al Qaeda and have led to repeated successes against the terror network. "You can't say it didn't work. It worked," Hayden said in a wide-ranging farewell interview with reporters at the CIA's headquarters in Langley, Va. Hayden said the legality of waterboarding and other enhanced interrogation techniques is an "uninteresting question to the CIA" right now because the agency has not engaged in the practices since March 2003. "We don't do that. We haven't done in it since March 2003. We have no intent to do it," said Hayden. He added that given the new legal climate since the passage of the Military Commission Act and the Detainee Treatment Act, "I wouldn't know what kind of answer I'd get from the Justice Department, were I to ask. But we haven't asked." Hayden was not CIA Director at the time that the enhanced techniques were legally authorized for use at secret CIA prisons, but he offered a strong defense nonetheless. "I am convinced that the program got the maximum amount of information. Particularly out of that first generation of detainees." Referring to 9-11plotter Khalid Sheikh Mohammed and al Qaeda financier Abu Zubaydah, Hayden said he couldn't conceive of another way for them to have provided useful intelligence, "given their character and given their commitment to what it is they do