# Round 4 UTD

## 2AC

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Judicial review over targeted killing is an on face restriction of executive authority

McKelvey-JD Candidate Vandy-11 44 Vand. J. Transnat'l L. 1353

NOTE: Due Process Rights and the Targeted Killing of Suspected Terrorists: The Unconstitutional Scope of Executive Killing Power

B. The Aulaqi Case in Federal Court In August 2010, Nasser al-Aulaqi, Anwar's father, filed suit in the District Court for the District of Columbia requesting an injunction against the targeted killing of his son. 36 Represented by the American Civil Liberties Union (ACLU), Nasser al-Aulaqi claimed that outside of the zone of armed conflict, the targeted killing of an American citizen represents an extrajudicial killing without due process of law. 37 The claim stated that under customary international law, the only circumstances allowing an exception to this general rule are those presenting a "concrete, specific, and imminent threat of death or serious physical injury." 38 The targeted killing of an American citizen outside of these circumstances is a violation of the Fourth and Fifth Amendments. 39 The complaint asserted three constitutional challenges to the targeted killing program. 40 By targeting an American for an extrajudicial killing outside of circumstances that present concrete, specific, and imminent threats of harm, the government had violated Aulaqi's Fourth Amendment right to be free from unreasonable seizure and his Fifth Amendment right not to be deprived of life without due process of law. 41 In addition, by refusing to disclose the standards used in determining that Aulaqi should be targeted for extrajudicial killing, the government violated the Fifth Amendment's notice requirement. 42 The complaint further asserted that by claiming this broad and unreviewable power, the Executive Branch permitted itself to conduct at-will extrajudicial killings of Americans, in secret, without any notice. 43 In the suit - filed against President Obama, then-Defense Secretary Robert Gates, and then-Director of the CIA Leon Panetta 44 - Nasser al-Aulaqi requested several forms of relief to [\*1360] prevent the targeted killing of his son. 45 He requested a preliminary injunction against the order to pursue Anwar al-Aulaqi with lethal force, and declaratory relief requiring the government to disclose the standards used for placing people on the targeted killing list. 46 In its brief in response, the DOJ moved for summary judgment on several alternative grounds, with emphasis on standing, the political question doctrine, and the state secrets privilege. 47 The DOJ argued that Nasser al-Aulaqi did not meet the requirements for next-friend standing for two reasons. 48 First, Aulaqi was not denied access to the courts. 49 Rather, Aulaqi seemed to be hiding in Yemen of his own accord. 50 Second, there was no evidence that Aulaqi desired to raise these claims in court to challenge the government's authority to conduct an extrajudicial killing against him. 51 Therefore, Nasser al-Aulaqi did not demonstrate that he was representing his son's interests or purpose. 52 The DOJ also challenged Nasser al-Aulaqi's complaint on grounds of executive authority, arguing that litigating this matter would violate established boundaries in the separation of judicial and executive power. 53 First, the government asserted that the decision to target Anwar al-Aulaqi was a nonjusticiable political question, and that conducting judicial review of this decision would require an infringement on textually committed executive authority. 54 Second, the government invoked the state secrets privilege, a rarely used but mostly successfully employed doctrine claiming that certain issues cannot be litigated because litigating them would require the disclosure of classified intelligence. 55 According to the state secrets doctrine, classified information cannot be disclosed through discovery and public trial because it would threaten national security and disrupt the Executive's ability to discharge its constitutional obligations. 56 The district court granted the defendant's motion to dismiss in December 2010. 57 The court held that Nasser al-Aulaqi did not have [\*1361] standing to raise these constitutional claims on his son's behalf. 58 By ruling on standing grounds the court focused on a narrow legal doctrine and avoided confrontation with the larger, more controversial issues in the suit. 59 However, the court also expressed discomfort with the outcome and its potential implications on due process rights and executive power. 60

#### And, C/I --- Statutory restrictions must be legislative limits

The Law Dictionary 13 “What is Statutory Restriction?, The Law Dictionary: **Featuring Black’s Law Dictionary Free Online Legal Dictionary 2nd Edition**, Accessed 7-22-2013, http://thelawdictionary.org/statutory-restriction/

What is STATUTORY RESTRICTION?

Limits or controls that have been place on activities by its ruling legislation.

### CP

#### 1. Drone Courts key – Congress should establish Judicial Review, it is the best check on the president, all other mechanisms insufficient

Bazzle 12

(Timothy, George Mason University Civil Rights Law Journal, “Shutting the courthouse doors: invoking the state secrets privilege to thwart judicial review in the age of terror,” 2012, Hein Library Online) /wyo-mm

By design, courts serve as a bulwark against the excesses of the political branches. The challenge courts face when confronted with a claim of state secrets is reconciling their Article III duties with the Executive’s potentially competing Article II duties.212 While the temptation for the Executive to concentrate its power is understandable, a robust state secrets privilege insulates an overreaching Executive from meaningful oversight. To the extent courts are able to fashion judicial devices for determining when and how the states privilege applies, they may represent the most important method of controlling Executive Branch activity.213 Given the inability of Congress to enact legislation to constrain the application of the privilege,214 courts are perhaps also the best equipped to block the Executive Branch from self-interestedly invoking the privilege to protect itself from embarrassment and potential civil and criminal liability.215 Academic arguments claiming that courts should automatically defer to the Executive’s expertise in national security and foreign affairs matters216 ignore the potentially more serious—and structural—conflict of interest problem that occurs when an Executive, accused of wrongdoing, can self-servingly invoke the state secretes privilege to conceal its action from public view.217 Reinforcing judicial review of state secrets claim represents an important check on the potential for Executive Branch abuse of the privilege.

#### Judicial review is essential to judicial independence

Gerber, 2007

[Scott D. Gerber is an associate professor at Ohio Northern University College of Law and a senior research scholar in law and politics at the Social Philosophy and Policy Center, The Political Theory of an Independent Judiciary, 116 YALE L.J. POCKET PART 223 (2007), http://thepocketpart.org/2007/01/09/gerber.html] /Wyo-MB

Judicial review fits into the political theory of an independent judiciary in at least two ways. First, judicial review is a core component of the Constitution’s system of checks and balances, a system in which each branch of the federal government is endowed with, in the words of The Federalist No. 48, “a constitutional control over the others.” The President has, among other checks, a veto over congressional bills and the power to nominate federal judges. Congress has, among other checks, the power to override presidential vetoes and to control the size and jurisdiction of the federal courts, as well as the power to impeach all federal officials. Without the power of judicial review, what check—what “constitutional control”—would the federal judiciary have on the President or Congress? The answer is none. As a consequence, judicial review is an inevitable component of the Constitution’s commitment to checks and balances.¶ Judicial review also fits into the political theory of an independent judiciary in another, equally straightforward, fashion: judicial review is the ultimate expression of judicial independence, because without judicial independence no court could safely void an act of a coordinate political branch. Bluntly stated, the risk to a judge who exercises judicial review when he or she is not independent of the executive and the legislature is either removal from the bench or a reduction in salary. John Adams knew this, and so did the Framers who met in Philadelphia during the summer of 1787 when they wrote Adams’s theory of judicial independence into Article III of the Constitution.

#### Judicial independence is critical to democratic consolidation

Herron and Randazzo, 2003

[Erik, University of Kansas and Kirk, University of Kentucky, The Relationship Between Independence and Judicial Review in Post-Communist Courts, THE JOURNAL OF POLITICS, Vol. 65, No. 2, May 2003, Pp. 422–438, http://people.cas.sc.edu/randazzo/herron\_randazzo\_2003\_jop.pdf] /Wyo-MB

Although independent judiciaries are important actors in democratic consolidation, how expressions of judicial independence evolve in transitional societies¶ remains unclear. Ideally, courts review legislation and government decisions¶ under the rubric of constitutionality. That is, the judiciary is able to declare laws¶ and actions unconstitutional and serve as a check against excesses by other¶ branches of government. A strong judiciary in newly independent countries helps¶ the state break with its authoritarian past and develop a constitutional culture that¶ teaches state actors that the legal system cannot be transgressed for political gain¶ (Brewer-Carias 1989; Larkins 1996). However, the development of an independent judiciary can be constrained by a weak institutional legacy, limited training¶ and support for judges, and the strength of other political actors. If the judiciary¶ does not have the authority to make independent decisions, democratic progress may falter, potentially returning the country to “the darkness and chaos of a totalitarian and dictatorial regime” (Mohan 1982, 110).1

#### Solves global wars,

Epstien et al, 2007

[Susan B. Epstein, Nina M. Serafino, and Francis T. Miko Specialists in Foreign Policy Foreign Affairs, Defense, and Trade Division Congressional research service, Democracy Promotion: Cornerstone of U.S. Foreign Policy?, 12-26-7, http://www.au.af.mil/au/awc/awcgate/crs/rl34296.pdf] /Wyo-MB

A common rationale offered by proponents of democracy promotion, including¶ former Secretary of State Madeleine Albright and current Secretary of State¶ Condoleezza Rice, is that democracies do not go to war with one another. This is¶ sometimes referred to as the democratic peace theory. Experts point to European¶ countries, the United States, Canada, and Mexico as present-day examples.¶ According to President Clinton’s National Security Strategy of Engagement and¶ Enlargement: “Democracies create free markets that offer economic opportunity,¶ make for more reliable trading partners, and are far less likely to wage war on one¶ another.”22¶ Some have refined this democracy peace theory by distinguishing between¶ mature democracies and those in transition, suggesting that mature democracies do¶ not fight wars with each other, but that countries transitioning toward democracy are¶ more prone to being attacked (because of weak governmental institutions) or being¶ aggressive toward others. States that made transitions from an autocracy toward¶ early stages of democracy and were involved in hostilities soon after include France¶ in the mid-1800s under Napoleon III, Prussia/Germany under Bismarck (1870-1890),¶ Chile shortly before the War of the Pacific in 1879, Serbia’s multiparty constitutional¶ monarchy before the Balkan Wars of the late 20th Century, and Pakistan’s military guided pseudo-democracy before its wars with India in 1965 and 1971.23¶ The George W. Bush Administration asserts that democracy promotion is a¶ long-term antidote to terrorism. The Administration’s Strategy for Winning the War¶ on Terror asserts that inequality in political participation and access to wealth¶ resources in a country, lack of freedom of speech, and poor education all breed¶ volatility. By promoting basic human rights, freedoms of speech, religion, assembly,¶ association and press, and by maintaining order within their borders and providing¶ an independent justice system, effective democracies can defeat terrorism in the long¶ run, according to the Bush White House.24¶ Another reason given to encourage democracies (although debated by some¶ experts) is the belief that democracies promote economic prosperity. From this¶ perspective, as the rule of law leads to a more stable society and as equal economic¶ opportunity for all helps to spur economic activity, economic growth, particularly of¶ per capita income, is likely to follow. In addition, a democracy under this scenario¶ may be more likely to be viewed by other countries as a good trading partner and by¶ outside investors as a more stable environment for investment, according to some¶ experts. Moreover, countries that have developed as stable democracies are viewed¶ as being more likely to honor treaties, according to some experts.25

### PIC

#### Piracy impact is exaggerated

Pein 2006

(Corey, award-winning investigative reporter and long-form narrative journalist who writes about the military industrial complex, money, politics and violence from London, UK, “Hijacking the Pirate Menace,” 9-12-06, <http://www.slate.com/id/2149370/>)

Despite their impressive exploits of late—seizing oil platforms off the coast of Nigeria and, memorably, firing rockets at a cruise ship off Somalia—modern maritime pirates have been robbed of the mystique that once made them stars of the criminal underworld. A steady increase over the last decade in the number of thefts, hijackings, and killings at sea, along with a disingenuous PR campaign led by the United States, have put pirates in company with al-Qaida. It's a bum rap. Most pirates today are not wannabe Bin Ladens itching to re-enact the USS Cole bombing. The forces of law, order, and commercial insurance are kicking pirates when they're down. First there was the 2004 tsunami, which literally wiped out many of them. Then, at the urging of the United States, came stepped-up sea and air patrols by the countries around the Malacca Strait (known as littoral states). ß Marked 19:03 ß In the first quarter of 2006, the International Maritime Bureau reported zero attacks in this traditional pirate's haunt. But in early July, pirates off Indonesia's Aceh coast hit three ships in three days. One was a Japanese carrier, and the other two were United Nations ships loaded with food aid. As targets go, these were unusually high-profile, but the pirates made off only with equipment from the U.N. ships; they were repelled by the Japanese crew before they could board. After every such incident, scare headlines and reports relay fears of an as-yet-unproved connection between pirates and international terrorist groups. The horror scenarios range from nautical terrorists hijacking and wrecking a tanker in a shallow, high-traffic sea lane—thus disrupting trade and spurring a global recession—to exploding a dirty-bomb-laden vessel in a major harbor. Terrible stuff—and as with any such threat, you can't say it won't happen, because it could. But big-time maritime terrorism is perhaps less likely to occur than, for instance, a run-of-the-mill airplane hijacking, because the sea-terror scenarios rest on a mistaken assumption: that pirates and terrorists share a common objective. In reality, today's pirates don't pose a DEFCON 1-level threat. Southeast Asia's pirates are far more likely to sneak aboard a merchant or fishing ship and plunder the captain's chest than to attempt suicide terrorism via oil tanker. Their modus operandi is opportunistic robbery. In most reported attacks, the perps are lightly armed with pistols and knives. Commercial mariners and maritime-security experts say that pirates, if spotted on approach, can often be scared away by bringing the crew on deck and taking pictures. Frankly, you'd expect more determination from bloodthirsty Islamofascists. Indeed, a recent piracy crackdown by Somalia's Islamists shows that the interests of the sea bandits and the religious fanatics can, and do, diverge. The supposed tide of piracy hasn't risen much more than ankle-deep. Each year, more than 50,000 ships pass through the Malacca Strait. In 2005, no more than 12 of them reported piracy attacks to the IMB—down from 38 the previous year. The seas have calmed so much that the IMB asked Lloyd's of London to take Malacca off its high-risk, high-premium "war and terrorism" list (the insurer obliged in August), and Malaysia's maritime police have turned their attention from piracy to illegal fishing methods.

### State Secret DA

**Nuclear deterrence does not prevent the use of weapons, but rather increases the likelihood of war**

**Scott D. Sagan, 13**

Professor of Political Science, Stanford University and Co-Director, Center for International Security and Cooperation “The Spread of Nuclear Weapons; An Enduring Debate,” Book. Chapter 2: More Will be Worse. Accessed 6/5/13,WYO/JF

**Waltz places great emphasis on the benefits of uncertainty regarding nuclear deterrence**. **Given the horrendous costs** of an all-out war, **states should be exceedingly cautious if there is any chance of nuclear weapons** being involved. **Yet nuclear uncertainty is a two-edged sword: it cuts against any absolute assurance that nuclear weapons will not be used** (this helps deterrence) **and also cuts against any absolute assurance that nuclear weapons will be used** (this hurts deterrence). How far does the nuclear writ run? **History suggests that while many states facing nuclear adversaries may well be cau­tious, some states have nevertheless launched attacks in the face of such uncertainty**. In 1973, Egypt and Syria attacked Israel despite the fact that Israel had a small nuclear arsenal at the time. In 1982, Argentina invaded the British-owned Falk­land Islands, despite the fact that Great Britain had hundreds of nuclear weapons. In January 1991, during the Persian Gulf war, Iraq launched barrage after barrage of SCUD missiles into the cities of Israel, despite Israel having an estimated one hun­dred nuclear weapons and long-range Jericho missiles in its possession.39 After the invasion of Kuwait, Prime Minister Yitzhak Shamir declared that "anyone attempting an attack on Israel will be bringing upon himself a great disaster."40 How could Saddam Hussein have been absolutely certain that Israel would not retaliate with nuclear weapons? **Governments take gambles, especially when they are in desperate straits. Nuclear weapons may well produce prudence, but it is a prudence that still leaves room for war**.

**EVEN IF WEAPONS INDUCE CAUTION BY THE ACQUIRING STATE, THEIR PRESENCE INFLAMES REGIONAL TENSIONS BECAUSE IT CHANGES PERCEPTIONS OF THAT STATE, RISKING ESCALATION**

**Knopf in ‘2**

[Jeffrey, Department of National Security Affairs at Naval Postgraduate School, Security Studies, “Recasting the Proliferation Optimism-Pessimism Debate”, Oct. 2002]

Two **other reasons why nuclear war is possible under standard rationality assumptions involve the intrinsic nature of nuclear weapons themselves**. Because nuclear weapons are so destructive, proliferation optimists expect states to behave extremely carefully**. Fear of nuclear devastation**, however, **can cut two ways. It can make national leaders shrink away from the brink**, as optimists expect. In addition, though, **the danger of nuclear attack can also be provocative, triggering action intended to forestall the danger. In short, both “flight” and “fight” responses are possible**. Their awesome destructive power means nuclear weapons are dualistic in their effects: **they are likely both to dampen and to inflame tensions in regions where they are introduced**. Nuclear weapons can exacerbate tensions in two ways: by creating an increased perception of threat and by prompting efforts to limit damage in the event of nuclear war. On the first point, **proliferation optimists write as if potential adversaries exist at a given, fixed level of hostility. This is unlikely to be the case. Rather, a state that acquires nuclear weapons is likely to be perceived as more threatening than it was before**. This will be partly because of the new, more destructive capabilities at its disposal. In some cases, however, **a state’s pursuit of nuclear weapons may also change how other states view its intentions. This is especially likely because new and aspiring nuclear states are not always circumspect in their pronouncements**. In March 1994, in the midst of a crisis over North Korea’s suspected nuclear weapons program, the North’s chief negotiator threatened his South Korean counterpart that a war could break out in which the South would be turned into “a sea of fire.”47 After the May 1998 nuclear tests in India, Prime Minister Vajpayee wrote President Clinton and explicitly cited a threat from China as a motivation for the tests. Statements by Defense Minister Fernandes shortly before and again shortly after the tests also described China as “potential threat number one” to India.48 Other Indian officials publicly warned Pakistan to end its support for separatist insurgents in Kashmir. Home Minister Advani called on Islamabad to “realize the change in the geostrategic situation” and said that in the new circumstances even the option of “hot pursuit” would not be ruled out.49 Such statements are bound to be provocative to the states against which they are directed. **States on the receiving end of new, public nuclear threats will likely feel a need to display their toughness as a way to show they will not be intimidated. While nuclear weapons do encourage caution, they can also create pressures to demonstrate resolve, and any such demonstration carries with it some risk of escalation**.

**NO DETERRENCE EFFECT OF PROLIF: [2 REASONS] (1) NUCLEAR STATES EMPIRICALLY FIGHT (2) HUMAN NATURE ENSURES DETERRENCE BREAKDOWN**

**Utgoff in 2**

[Victor A., Deputy Director of Strategy, Forces, and Resources Division, Institute for Defense Analyses, “Proliferation, Missile Defence and American Ambitions,” Survival, v. 44 n. 2, Summer 2002].

Worse still, in a highly proliferated world there would be more frequent opportunities for the use of nuclear weapons. And more frequent opportunities means shorter expected times between conflicts in which nuclear weapons get used, unless the probability of use at any opportunity is actually zero. To be sure, some theorists on nuclear deterrence appear to think that in any confrontation between two states known to have reliable nuclear capabilities, the probability of nuclear weapons being used is zero. These theorists think that such states will be so fearful of escalation to nuclear war that they would always avoid or terminate confrontations between them, short of even conventional war. They believe this to be true even if the two states have different cultures or leaders with very eccentric personalities. History and human nature, however, suggest that they are almost surely wrong. History includes instances in which states known to possess nuclear weapons did engage in direct conventional conflict. China and Russia fought battles along their common border even after both had nuclear weapons. Moreover, logic suggests that if states with nuclear weapons always avoided conflict with one another, surely states without nuclear weapons would avoid conflict with states that had them. Again, history provides counter-examples. Egypt attacked Israel in 1973 even though it saw Israel as a nuclear power at the time. Argentina invaded the Falkland Islands and fought Britain’s efforts to take them back, even though Britain had nuclear weapons. Those who claim that two states with reliable nuclear capabilities to devastate each other will not engage in conventional conflict risking nuclear war also assume that any leader from any culture would not choose suicide for his nation. But history provides unhappy examples of states whose leaders were ready to choose suicide for themselves and their fellow citizens. Hitler tried to impose a ‘victory or destruction’ policy on his people as Nazi Germany was going down to defeat.4 And Japan’s war minister, during debates on how to respond to the American atomic bombing, suggested ‘Would it not be wondrous for the whole nation to be destroyed like a beautiful flower?’ If leaders are willing to engage in conflict with nuclear-armed nations, use of nuclear weapons in any particular instance may not be likely, but its probability would still be dangerously significant. In particular, human nature suggests that the threat of retaliation with nuclear weapons is not a reliable guarantee against a disastrous first use of these weapons. While national leaders and their advisors everywhere are usually talented and experienced people, even their most important decisions cannot be counted on to be the product of well-informed and thorough assessments of all options from all relevant points of view. This is especially so when the stakes are so large as to defy assessment and there are substantial pressures to act quickly, as could be expected in intense and fast-moving crises between nuclear-armed states. Instead, like other human beings, national leaders can be seduced by wishful thinking. They can misinterpret the words or actions of opposing leaders. Their advisors may produce answers that they think the leader wants to hear, or coalesce around what they know is an inferior decision because the group urgently needs the confidence or the sharing of responsibility that results from settling on something. Moreover, leaders may not recognise clearly where their personal or party interests diverge from those of their citizens. Under great stress, human beings can lose their ability to think carefully. They can refuse to believe that the worst could really happen, oversimplify the problem at hand, think in terms of simplistic analogies and play hunches. The intuitive rules for how individuals should respond to insults or signs of weakness in an opponent may too readily suggest a rash course of action. Anger, fear, greed, ambition and pride can all lead to bad decisions. The desire for a decisive solution to the problem at hand may lead to an unnecessarily extreme course of action.

### Air Power DA

#### Unrestrained drones will be used to undermine US air power and defense systems

Gaub, 2011

[Martin, School of Advanced Military Studies United States Army Command and General Staff College Fort Leavenworth, Kansas, The Children of Aphrodite The Proliferation and Threat of Unmanned Aerial Vehicles in the Twenty-First Century, http://www.dtic.mil/dtic/tr/fulltext/u2/a546414.pdf] /Wyo-MB

Another use for UAVs is to exploit existing U.S. air-defense system weaknesses. The ¶ first method is to take advantage of an increasingly confusing and dense air defense “picture.” ¶ During Desert Storm, the U.S. lost no aircraft to friendly fire incidents, and Patriot missile ¶ batteries successfully intercepted multiple ballistic missiles. However, Operation Iraqi Freedom ¶ showed some cracks in the system when Patriot batteries were unable to intercept low-flying ¶ threats, including two ultra-lights that flew over U.S troops while they moved north through ¶ Iraq.76¶ Another method is to “swarm” the system and causing multiple radar tracks that confuse ¶ operators and system software to the point of either inaction, or wrong action.¶ A similar case is the successful shoot-down of an Iranian UAV in February of 2009. ¶ Although U.S. forces eventually shot the UAV down, the fact that a UAV flew out of Iran for as ¶ long as it did, created some challenges for existing airpower and air defense doctrine. ¶ Some state ¶ actors appear to have the ability to create stealth platforms designed to operate with impunity in ¶ virtually any radar environment, however smaller UAVs could challenge air-defense systems as ¶ effectively as stealth UAVs due to their size and relative speed as well. The U.S. appears to be¶ developing a stealth UAV, however, Iran also claims to have a stealth drone called a Sofeh Mahi ¶ (Manta Ray), ¶ 78 and China displayed a UAV with stealth characteristics at a recent air show.79¶ These cases demonstrate how an adversary could avoid much of the air defense network and ¶ attack its vulnerabilities.