# Explanation/Guide

### File Description and General Tips

This file contains a disadvantage that can be read against both the Surveillance State Repeal Act affirmative and the Secure Data Act affirmative. It contains materials for both the negative and the affirmative.

When reading this disadvantage, the negative should introduce it as an off-case position in the 1NC. The 1NC shell is included in this file. To extend the disadvantage in the negative block, the negative should prepare blocks to each affirmative response. When doing so, the negative can make use of the backline evidence contained in the file. Students should carefully choose which extension evidence to read; it is very unlikely that students will be able to read *all* extension cards in any 2NC or 1NR.

When answering this disadvantage, the affirmative should use the 2AC frontline. It includes five arguments. For each 2AC argument, the affirmative is provided with two or three extension cards that could be useful for the 1AR. Due to the intense time constraints of that speech, students should carefully choose which (if any) extension evidence to read.

### Explanation of the Negative

The Presidential War Powers DA argues that curtailing surveillance undermines the president’s war powers, undermining his ability to effectively wage war and prevent WMD proliferation. The negative argues that strong presidential powers provide needed flexibility for the exercise of commander-in-chief responsibilities and that the authority to collect intelligence on the nation’s enemies (foreign *and* domestic) is an inherent presidential war power.

This disadvantage is largely based on the “unitary executive” theory of John Yoo, a Berkeley law professor whose work as a lawyer in the Office of Legal Counsel during the Bush Administration was instrumental in shaping the country’s post-9/11 foreign policy. Yoo’s work is extremely controversial, so the negative will need to defend the validity of quoting him as a scholarly expert. The negative will also need to defend the validity of Yoo’s arguments about the inherent presidential power to conduct domestic surveillance and the importance of unchecked executive power to countering global proliferation.

### Explanation of the Affirmative

The affirmative takes issue with many parts of John Yoo’s theory of presidential power. Most basically, the affirmative argues that Yoo should not be quoted in debates because his actions during the Bush Administration (especially with regard to torture) make him a war criminal deserving of prosecution. The affirmative contends that by quoting Yoo as an expert, the negative is complicit with the war crimes he has committed. In addition to an indictment of Yoo, the affirmative argues that there is no inherent presidential power to engage in domestic surveillance. To the extent that such authority exists, the affirmative argues that it has already been undermined by the passage of the USA Freedom Act.

The affirmative also introduces two impact turns. First, they argue that unchecked executive flexibility in warmaking *increases* the risk of proliferation and war. Second, they argue that Yoo’s unitary executive theory risks sliding America into a tyranny that crushes civil liberties.

# Negative

## 1NC

### 1NC — Presidential War Powers DA

#### The first/next off-case position is the Presidential War Powers DA.

#### First, presidential war powers are strong — Obama has maintained presidential power.

Goldsmith 14 — Jack Goldsmith, Henry L. Shattuck Professor of Law at Harvard University, formerly served as Assistant Attorney General in the Office of Legal Counsel and as Special Counsel to the General Counsel to the Department of Defense, holds a J.D. from Yale Law School, 2014 (“Obama’s Breathtaking Expansion of a President’s Power To Make War,” *Time*, September 11th, Available Online at <http://time.com/3326689/obama-isis-war-powers-bush/>, Accessed 08-12-2015)

Future historians will ask why George W. Bush sought and received express congressional authorization for his wars (against al Qaeda and Iraq) and his successor did not. They will puzzle over how Barack Obama the prudent war-powers constitutionalist transformed into a matchless war-powers unilateralist. And they will wonder why he claimed to “welcome congressional support” for his new military initiative against the Islamic State but did not insist on it in order to ensure clear political and legal legitimacy for the tough battle that promised to consume his last two years in office and define his presidency.

“History has shown us time and again . . . that military action is most successful when it is authorized and supported by the Legislative branch,” candidate Barack Obama told the Boston Globe in 2007. “It is always preferable to have the informed consent of Congress prior to any military action.” President Obama has discarded these precepts. His announcement that he will expand the use of military force against the Islamic State without the need for new congressional consent marks his latest adventure in unilateralism and cements an astonishing legacy of expanding presidential war powers.

The legacy began in 2011 with the seven-month air war in Libya. President Obama relied only on his Commander in Chief powers when he ordered U.S. forces to join NATO allies in thousands of air strikes that killed thousands of people and effected regime change. His lawyers argued beyond precedent that the large-scale air attacks did not amount to “War” that required congressional approval. They also blew a large hole in the War Powers Resolution based on the unconvincing claim that the Libya strikes were not “hostilities” that would have required compliance with the law.

Although he backed down from his threat to invade Syria last summer, President Obama proclaimed then the power to use unilateral force for purely humanitarian ends without congressional or United Nations or NATO support. This novel theory, which removed all practical limits on presidential humanitarian intervention, became a reality in last month’s military strikes to protect civilians trapped on Mount Sinjar and in the town of Amirli.

Yesterday’s announcement of a ramped-up war against the Islamic State in Iraq and possibly Syria rests on yet another novel war powers theory. The administration has said since August that air strikes in Syria were justified under his constitutional power alone. But yesterday it switched course and maintained that Congress had authorized the 2014 campaign against the Islamic State in the 2001 law that President George W. Bush sought to fight the Taliban and al Qaeda.

The administration’s new approach allows it to claim that it is acting with congressional approval. It also lets it avoid the strictures of the War Powers Resolution because that law does not apply to wars approved by Congress.

The problem with this approach is that its premise is unconvincing. The 2001 law authorized force against al Qaeda and its associates. The Islamic State once had associations with al Qaeda, but earlier this year al Qaeda expelled it and broke off ties. The administration nonetheless insists that the 2001 law applies to its new military action, primarily because the Islamic State claims to be “the true inheritor of Usama bin Laden’s legacy” and is supported by “some individual members and factions of [al-Qaeda]-aligned groups.” But if this remarkably loose affiliation with al Qaeda brings a terrorist organization under the 2001 law, then Congress has authorized the President to use force endlessly against practically any ambitious jihadist terrorist group that fights against the United States. The President’s gambit is, at bottom, presidential unilateralism masquerading as implausible statutory interpretation.

#### Second, the plan is a crushing blow to present *and future* presidential war powers.

Yoo 14 — John Yoo, Emanuel Heller Professor of Law at the University of California-Berkeley, Visiting Scholar at the American Enterprise Institute, former official in the Office of Legal Counsel of the U.S. Department of Justice, holds a J.D. from Yale Law School, 2014 (“NSA spying -- will Obama lead or punt to courts, Congress and harm the presidency?,” *Fox News*, January 7th, Available Online at http://www.foxnews.com/opinion/2014/01/07/nsa-spying-will-obama-lead-or-punt-to-courts-congress-and-harm-presidency.html, Accessed 08-13-2015)

Under Barack Obama, the presidency’s control over national security intelligence has come under a crippling cross-fire.

From the right, in December Bush-appointed Judge Richard Leon found the National Security Agency’s “Orwellian” phone records collection program to violate the Constitution.

From the left, the White House’s own blue-ribbon commission recently urged the president to place an “out of control” NSA under unprecedented judicial, bureaucratic, and even private controls.

Mr. Obama may rise up to defend the NSA from the growing chorus of critics in Congress, the media, and the antiwar wing of his own party.

He might blunt the effort to subject the NSA’s national security mission to the stricter rules that govern domestic law enforcement.

He might even preserve the intelligence agency’s ability to collect phone calls and email data that, by the account of two successive administrations of both parties, has stopped terrorist attacks on the United States and its allies.

But don’t count on it.

Mr. Obama’s first instinct is to shift national security responsibility to other branches of government -- witness his past attempts to try the 9/11 plotters in civilian court in New York City, move the terrorists in Guantanamo Bay, Cuba to a domestic prison, and ask Congress decide on intervening in Syria.

If he makes the same mistake again, Mr. Obama will follow in the footsteps of failed presidents who shrunk before similar challenges, to the long-term harm of their office.

Kicking the intelligence question to Congress or the courts undermines the Oval Office by reversing the polarity of its constitutional powers.

The Framers created the presidency precisely because foreign affairs and national security pose unique challenges to a legislature, which cannot react quickly to sudden, unforeseen events.

“Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man,” Alexander Hamilton explained in "Federalist 70."

Only a single president could marshal the nation’s resources with the energy and vigor to effectively protect its security. “Of all the cares or concerns of government,” he added in "Federalist 74," “the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand.”

Presidents who have defied the Framers’ design have led the nation into some of its greatest disasters, despite their great intellect or political skills.

Take, for example, James Madison, our fourth president. Madison wrote the first draft of the Constitution, co-authored "The Federalist" with Hamilton and John Jay, and led the fight for the Constitution’s ratification.

But when attacking (at Thomas Jefferson’s behest) George Washington’s 1793 proclamation of neutrality, Madison argued that Congress should decide all questions of war and peace.

“Those who are to conduct a war cannot in the nature of things, be proper or safe judges, whether a war ought to be commenced, continued, or concluded,” he argued.

Madison kept true to his beliefs as president. By 1812, the nation was profiting handsomely from trade during the Napoleonic Wars.

Nevertheless, war hawks in Congress -- the term first appears here in American history -- drove the nation into a conflict with the only contending European nation with a powerful navy and a shared border with the United States.

Madison did not exercise his presidential authority to stop the rush for war, but instead left the ultimate decision to Congress.

Of all our nation’s conflicts, the War of 1812 may have been the most strategically dangerous. It led to a crippling naval embargo, a series of desultory assaults on Canada, a British incursion that captured and burned the capital, and a major land invasion at New Orleans that sought to split the nation into two.

Only the end of the Napoleonic war and Andrew Jackson’s heroic defeat of the British invasion force preserved American independence. A more confident and assertive chief executive would have saved the nation from this disaster.

Presidential deference to other branches on national security has not just led the nation into mistaken wars, it has also kept us out of vital ones.

When secession read its ugly head in the wake of Abraham Lincoln’s election, James Buchanan sat in the Oval Office. Like the president-elect, Buchanan believed the Constitution did not permit states to leave the Union.

Unlike Lincoln, however, Buchanan – an accomplished Senator from Pennsylvania and former Secretary of State – concluded that the president did not have the constitutional power “to make war against a State.”

Buchanan called upon “the only human tribunal under Providence possessing the power to meet the existing emergency,” Congress, which promptly appointed a special committee to develop a solution.

By contrast, Lincoln maneuvered the Confederacy into firing the first shot at Fort Sumter in April 1861, raised an army and navy, imposed a blockade on the South, and sent federal troops into action – and then waited until July 4, 1861 to seek Congress’s approval after-the-fact.

Lincoln never gave up the mantle of leadership, including his freeing of the slaves with the Emancipation Proclamation and his control over military strategy, and his control over the terms of the peace.

Scholars today generally rank Lincoln as one of the three greatest presidents in our history (along with Washington and FDR), and Buchanan as the worst.

Mr. Obama need not revisit the 17th or 18th Centuries to see the pitfalls in relying on the other branches for leadership in foreign affairs. He need only turn his gaze to post-Watergate years, when President Nixon’s undeniable abuses of the executive power led Congress and the courts to overreact in expanding their controls over national security.

Over Mr. Nixon’s veto, Congress passed a War Powers Resolution that limits foreign military interventions to less than 60 days without congressional approval.

Presidents ever since have refused to accept the WPR’s constitutionality, but have often foreshortened their wars into the resolution’s artificial deadline.

Congress passed the Foreign Intelligence Surveillance Act and gave the courts a veto over the executive’s surveillance of foreign enemies. FISA also produced the “wall” between our nation’s foreign and domestic intelligence agencies that allowed the 9/11 hijackers to succeed.

Even after U.S. withdrawal from South Vietnam, Congress cut off all funds for any U.S. military operations in Southeast Asia, which led to the shameful American abandonment of Saigon, the death of millions in communist camps, and the consignment of an entire nation to a totalitarian dictatorship.

The Iranian Revolution and hostage crisis and the Soviet invasion of Afghanistan took further advantage of a weakened presidency under the stewardship of Jimmy Carter.

Similar restrictions have re-appeared in Judge Leon’s decision, which orders the end of the NSA’s collection program, and in his blue-ribbon commission, which wants to subject the NSA to new oversight procedures.

Congress is considering unprecedented restrictions on targets, databases, and search methods.

It is not just in President Obama’s interests to avoid this fate.

It is also in the interests of both parties in Congress and of the nation.

There are surely partisan differences to fight out over domestic policy, where the Constitution places Congress in the primary policymaking role and the president second.

But no party benefits in the long run from a weakened executive in foreign affairs, as shown by the War of 1812, the Civil War, and even the isolationism between the World Wars.

Partisans must resist the temptation to strike a blow against a vulnerable president, and instead support his ability to fulfill the Framers’ design: to protect the nation’s security with determination, vigor, speed, and secrecy.

The Constitution expects no less.

#### Third, strong war powers provide necessary flexibility to prevent WMD proliferation and attacks.

Yoo 12 — John Yoo, Emanuel Heller Professor of Law at the University of California-Berkeley, Visiting Scholar at the American Enterprise Institute, former official in the Office of Legal Counsel of the U.S. Department of Justice, holds a J.D. from Yale Law School, 2012 (“War Powers Belong to the President,” *ABA Journal*—a publication of the American Bar Association, February 1st, Available Online at http://www.abajournal.com/magazine/article/war\_powers\_belong\_to\_the\_president, Accessed 08-13-2015)

Our Constitution has succeeded because it favors swift presidential action in war, later checked by Congress’ funding power. If a president continues to wage war without congressional authorization, as in Libya, Kosovo or Korea, it is only because Congress has chosen not to exercise its easy check. We should not confuse a desire to escape political responsibility for a defect in the Constitution.

A radical change in the system for making war might appease critics of presidential power. But it could also seriously threaten American national security. In order to forestall another 9/11 attack, or to take advantage of a window of opportunity to strike terrorists or rogue nations, the executive branch needs flexibility. It is not hard to think of situations where congressional consent cannot be obtained in time to act. Time for congressional deliberation, which leads only to passivity and isolation and not smarter decisions, will come at the price of speed and secrecy.

The Constitution creates a presidency that can respond forcefully to prevent serious threats to our national security. Presidents can take the initiative and Congress can use its funding power to check them. Instead of demanding a legalistic process to begin war, the framers left war to politics. As we confront the new challenges of terrorism, rogue nations and WMD proliferation, now is not the time to introduce sweeping, untested changes in the way we make war.

#### Finally, proliferation risks global nuclear war.

Utgoff 2 — Victor A. Utgoff, Deputy Director of the Strategy, Forces, and Resources Division of the Institute for Defense Analyses and senior member of the National Security Council Staff, 2002 (“Proliferation, Missile Defence And American Ambitions,” *Survival*, Volume 44, Number 2, June, Available Online to Subscribing Institutions via EBSCOhost Electronic Journals Service, p. 87-90)

In sum, widespread proliferation is likely to lead to an occasional shoot-out with nuclear weapons, and that such shoot-outs will have a substantial probability of escalating to the maximum destruction possible with the weapons at hand. Unless nuclear proliferation is stopped, we are headed toward a world that will mirror the American Wild West of the late 1800s. With most, if not all, nations wearing nuclear 'six-shooters' on their hips, the world may even be a more polite place than it is today, but every once in a while we will all gather on a hill to bury the bodies of dead cities or even whole nations.

## 2NC/1NR

### They Say: “No Inherent Surveillance Authority”

#### Surveillance authority is intrinsic to the President’s powers as Commander-in-Chief.

Yoo 13 — John Yoo, Emanuel Heller Professor of Law at the University of California-Berkeley, Visiting Scholar at the American Enterprise Institute, former official in the Office of Legal Counsel of the U.S. Department of Justice, holds a J.D. from Yale Law School, 2013 (“The Legality of the National Security Agency’s Bulk Data Surveillance Programs,” UC Berkeley Public Law Research Paper No. 2369192, December 1st, Available Online via SSRN at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2369192>, Accessed 08-13-2015, p. 17-18)

As Commander-in-Chief, the President has the constitutional power and the responsibility to wage war in response to a direct attack against the United States. In the Civil War, President Lincoln undertook several actions—raised an army, withdrew money from the treasury, launched a blockade—on his own authority in response to the Confederate attack on Fort Sumter, moves that Congress and the Supreme Court later approved.85 During World War II, the Supreme Court similarly recognized that once war began, the President’s authority as Commander-in-Chief and Chief Executive gave him the tools necessary to effectively wage war.86 In the wake of the September 11 attacks, Congress agreed that “the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States,” which recognizes the President’s authority to use force to respond to al Qaeda, and any powers necessary and proper to that end.87

Even legal scholars who argue against this historical practice concede that once the United States has been attacked, the President can respond immediately with force. The ability to collect intelligence is intrinsic to the use of military force. It is inconceivable that the Constitution would vest in the President the powers of Commander-in-Chief and Chief Executive, give him the responsibility to protect the nation from attack, but then disable him from gathering intelligence to use the military most effectively to defeat the enemy. Every evidence of the Framers’ understanding of the Constitution is that the government would have every ability to meet a foreign danger. As James Madison wrote in The Federalist, “security against foreign danger is one of the [end page 17] primitive objects of civil society.”88 Therefore, the “powers requisite for attaining it must be effectually confided to the federal councils.” After World War II, the Supreme Court declared, “this grant of war power includes all that is necessary and proper for carrying these powers into execution.”89 Covert operations and electronic surveillance are clearly part of this authority.

During the writing of the Constitution, some Framers believed that the President alone should manage intelligence because only he could keep secrets.90 Several Supreme Court cases have recognized that the President’s role as Commander-in-Chief and the sole organ of the nation in its foreign relations must include the power to collect intelligence.91 These authorities agree that intelligence rests with the President because its structure allows it to act with unity, secrecy, and speed.

#### The President has inherent surveillance authority.

Yoo 13 — John Yoo, Emanuel Heller Professor of Law at the University of California-Berkeley, Visiting Scholar at the American Enterprise Institute, former official in the Office of Legal Counsel of the U.S. Department of Justice, holds a J.D. from Yale Law School, 2013 (“The Legality of the National Security Agency’s Bulk Data Surveillance Programs,” UC Berkeley Public Law Research Paper No. 2369192, December 1st, Available Online via SSRN at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2369192>, Accessed 08-13-2015, p. 18-19)

Presidents have long ordered electronic surveillance without any judicial or congressional participation. More than a year before the Pearl Harbor attacks, but with war clearly looming with the Axis powers, President Franklin Roosevelt authorized the FBI to intercept any communications, whether wholly inside the country or international, of persons “suspected of subversive activities against the Government of the United States, including suspected spies.”92 FDR was concerned that “fifth columns” could wreak havoc with the war effort. “It is too late to do anything about it after sabotage, assassinations and ‘fifth column’ activities are completed,” FDR wrote in his order. FDR ordered the surveillance even though a federal law at the time prohibited electronic surveillance without a warrant.93 Presidents continued to monitor the communications of national security threats on their own authority, even in peacetime.94 If Presidents in times of peace could order surveillance of spies and terrorists, executive authority is only the greater now, as hostilities continue against al Qaeda. This is a view that Justice Departments have not just held under Presidents George W. Bush or Barack Obama. The [end page 18] Clinton Justice Department held a similar view of the executive branch’s authority to conduct surveillance outside the FISA framework.95

Courts have never opposed a President’s authority to engage in warrantless electronic surveillance to protect national security. When the Supreme Court first considered this question in 1972, it held that the Fourth Amendment required a judicial warrant if a President wanted to conduct surveillance of a purely domestic group, but it refused to address surveillance of foreign threats to national security.96 In the years since, every federal appeals court, including the FISA Appeals Court, to address the question has “held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information.”97 The FISA Appeals Court did not even feel that it was worth much discussion. It took the President’s power to do so “for granted,” and observed that “FISA could not encroach on the President’s constitutional power.”98

Congress also implicitly authorized the President to carry out electronic surveillance to prevent further attacks on the United States. Congress’s September 18, 2001 Authorization to Use Military Force (AUMF) is sweeping; it has no limitation on time or place—only that the President pursue al Qaeda.99 Although the President did not need, as a constitutional matter, Congress’s permission to pursue and attack al Qaeda after the attacks on New York City and the Pentagon, its passage shows that the President and Congress fully agreed that military action would be appropriate. Congress’s approval of the killing and capture of al Qaeda must obviously included the tools to locate them in the first place.

#### The plan violates the president’s war powers — surveillance restrictions interfere with commander-in-chief responsibilities.

Paulsen 6 — Michael Stokes Paulsen, McKnight Presidential Professor of Law and Public Policy, Briggs and Morgan Professor of Law, and Associate Dean for Research and Scholarship at the University of Minnesota Law School, holds a J.D. from Yale Law School, 2006 (“A Discourse: Presidential Powers in Time of War,” *Perspectives*, Spring, Available Online at <http://www.law.umn.edu/uploads/wE/aa/wEaa1g7XB6j0QyoOhoFpYw/Presidential_Powers_exchange_Paulsen_Kitrosser_Carpenter.pdf>, Accessed 08-13-2015, p. 35-36)

One of the hottest issues of the day is presidential power in time of war—specifically the president’s power unilaterally to order the interception of overseas communications by persons in the United States who have been in contact with al Qaeda forces and terrorists.

Some of my colleagues may well disagree, but I think the issue is relatively straightforward. The president’s power as military commander in chief, in time of constitutionally authorized war, of course includes the power to intercept enemy communications, including enemy communications with persons here in the United States who may be in league with the enemy, and to follow the chain of such communications where it leads, in order to wage the war against the enemy and, of vital importance, to protect the nation against further attacks.

There is no doubt that we are at war. On Sept. 18, 2001, Congress issued what is arguably the most sweeping declaration of war in our nation’s history, authorizing the president to employ “all necessary and appropriate force” against those nations, “organizations or persons” that “he determines” planned, authorized, committed or aided the 9/11, attacks, or who harbor such persons or organizations. The last clause of the authorization is important: “in order to prevent future acts of international terrorism against the United States” by such organizations. We are at war, [end page 35] Congress has declared the war, and granted the president sweeping authority to wage it as he sees fit, in order to defend against future attacks by al Qaeda and its allies.

Clearly, the commander in chief powers of the president are fully in play. Those powers unquestionably include the power to gather intelligence concerning communications with the enemy forces with whom we are at war. I would go so far as to say that if the president failed to monitor such communications, he would be grossly derelict in his commander in chief responsibilities.

As a straightforward matter of constitutional law, Congress may not by statute purport to take action displacing the president’s constitutional power as commander in chief. If some action falls within the commander in chief’s power, a statute may not limit it. In this sense, the Foreign Intelligence Surveillance Act (FISA) either must be construed as not limiting these powers—this seems the view most consistent with judicial decisions in this area—or else FISA is an unconstitutional restriction on the president’s power as commander in chief in time of authorized warmaking. My own view is that FISA is best understood as a “safe harbor.” Congress has provided a framework for obtaining a warrant (of a certain type) that should permit the introduction of evidence obtained by such surveillance in a criminal prosecution, if prosecution should be the course of action the executive branch chooses to take with respect to an al Qaeda operative or spy who happens also to be a U.S. citizen or resident alien.

### They Say: “Reject John Yoo”

#### Students should engage with Yoo’s arguments, not ignore him — he’s a legitimate expert.

Eastman 8 — John C. Eastman, Dean and Donald P. Kennedy Chair in Law at the Dale E. Fowler School of Law at Chapman University, Senior Fellow at the Claremont Institute for the Study of Statesmanship & Political Philosophy and Director of The Claremont Institute Center for Constitutional Jurisprudence, Adjunct Fellow at the Ashbrook Center for Public Affairs, holds a Ph.D. in Government from Claremont Graduate School and a J.D. from the University of Chicago Law School, 2008 (“Statement of Dean John C. Eastman Regarding the Appointment of Professor John Yoo as the 2009 Fletcher Jones Distinguished Visiting Professor at Chapman University School of Law,” Republished by *Fire John Yoo!*—a blog dedicated to firing John Yoo, February 3rd, Available Online at <http://www.firejohnyoo.net/2009/02/chapman-law-school-dean-defend.html>, Accessed 08-13-2015)

Chapman University officials have received several notes of concern about my decision to offer Professor John Yoo a distinguished visitorship at the Chapman University School of Law. Professor Yoo has been a well-regarded member of the law faculty at the University of California, Berkeley's Boalt Hall School of Law since 1993, one of the top law schools in the nation. He visited at the University of Chicago in 2003 and held the Distinguished Fulbright Chair in Law at the University of Trento (Italy) in 2006. While I acknowledge the controversy surrounding the legal positions Professor Yoo articulated during his tenure as deputy assistant attorney general in the Office of Legal Counsel of the U.S. Department of Justice during the administration of President George W. Bush, we are very much looking forward to Professor Yoo's visit at Chapman University, where our students and, indeed, the entire academic community here at Chapman, can engage him in a serious, yet civil, scholarly discussion of the issues on which he provided legal counsel while serving in the administration.

In this, our position is not unlike that of Christopher Edley, Professor Yoo's Dean at Berkeley, and presently a leading member of President-Elect Barack Obama's transition team. Dean Edley's position in defense of academic freedom is a model for us all. It is available at http://www.law.berkeley.edu/news/2008/edley041008.html. Dean Edley noted that "in Berkeley's classrooms and courtyards our community argues about the legal and moral issues with the intensity and discipline these crucial issues deserve. Those who prefer to avoid these arguments—be they left or right or lazy—will not find Berkeley or any other truly great law school a wholly congenial place to study. For that we make no apology."

It would be simple for academic institutions to ignore views from one end or the other of the political spectrum. Indeed, all too many law schools have faculties that are much too homogenous with respect to their views on contested matters. We, on the other hand, pride ourselves on having built a law school that is now one of the most ideologically diverse in the nation. Several members of our faculty have clerked at the Supreme Court, but the Justices for whom they worked run the gamut on the ideological spectrum, from the late Chief Justice Rehnquist and Justice Thomas to Justices Brennan, Stevens, and Souter. This semester we have Richard Falk as our Bette & Wylie Aitken Distinguished Visiting Professor. Professor Falk, the Albert G. Milbank Professor of International Law and Practice, Emeritus at Princeton University, is an internationally recognized human rights scholar, but also extremely controversial. He was recently named the U.N.'s rapporteur on the Palestinian territories, but his views are so hostile to Israel that Israel has denied him a visa. He has in addition authored the preface to a book that argues that the Bush administration was complicit in the attacks on September 11, commending the book for its "single coherent account" of the accusations, and he is listed by David Horowitz as one of "The 101 Most Dangerous Academics in America." I have no doubt that people on the other side of the political aisle from Professor Falk are as troubled by his having a visiting appointment at Chapman as others are by John Yoo's appointment, but students and faculty of every political stripe have found his presence here to be both stimulating and thought-provoking, and we fully expect the same result from Professor Yoo's visit.

Finally, I would encourage those who object to Professor Yoo's appointment here to read his scholarly work on the subject of Executive power, and in particular the memos he authored while serving in the administration. Read, too, the full range of serious commentary on that work. You will find that Yoo's position, while disputed, is far from ignorant or disrespectful of the Constitution. No less a constitutional law scholar than Harvard's Alan Dershowitz had made similar constitutional arguments in favor of executive power in time of war. See, for example, http://www.opinionjournal.com/editorial/feature.html?id=110010832.

In the wake of 9/11, President Bush pledged to use every legal and constitutional tool at his disposal to prevent another attack on our homeland. Some of the task of identifying the line between legal and illegal, constitutional and unconstitutional, fell to Professor Yoo during his time of service in the administration. Many believe his legal analysis was flawed, but others, serious constitutional scholars and historians among them, think he got it right or at least made a fair stab at it. The opportunity to explore some of the most profoundly important legal questions of our age with someone who was actually present and involved in the them, whether it be Professor Falk or Professor Yoo, is a phenomenal opportunity for our students, even (and perhaps especially) those who vehemently disagree with the positions they have taken. As Dean Edley noted, that is the mark of a truly great law school, and I am honored to say that Chapman is increasingly worthy of being considered in such company, in no small measure due to prominent appointments such as Richard Falk and John Yoo.

#### We should grapple with Yoo’s arguments, not refuse to evaluate them.

Edley 8 — Christopher Edley, Dean of the University of California-Berkeley Boalt Hall School of Law, former Professor at Harvard Law School, Co-Founder of the Harvard Civil Rights Project, served in White House policy and budget positions under Presidents Jimmy Carter and Bill Clinton, holds a J.D. from Harvard University, 2008 (“The Torture Memos, Professor Yoo, and Academic Freedom: Statement of Dean Edley,” Republished by *Balkinization*—Jack M. Balkin’s scholarly blog, August 20th, Available Online at <http://balkin.blogspot.com/2009/08/dean-edley-on-professor-yoo.html>, Accessed 08-13-2015)

There are important questions about the content of the Yoo memoranda—about tortured definitions of "torture," about how he and his colleagues conceived their role as lawyers, and about whether and when the Commander in Chief is subject to domestic statutes and international law that he finds bothersome or interfering. We press our students to grapple with these matters, and in the legal literature Professor Yoo and his critics do battle. One can oppose and even condemn a challenging or even abhorrent idea, but I do not believe that in a university we can fearfully refuse to look at it.

That would not be the best way to educate, or a promising way to seek deeper understanding in a world of continual, strange revolutions.

There is more, however. Having worked in the White House under two presidents, I am exceptionally sensitive to the complex, ineffable boundary between policymaking and law-declaring. I know that Professor Yoo continues to believe his legal reasoning was sound, but I do not know whether he believes that the Department of Defense and CIA made political or moral mistakes in the way they exercised the discretion his memoranda declared available to them within the law. As critical as I am of his analyses, no argument about what he did or didn't facilitate, or about his special obligations as an attorney, makes his conduct morally equivalent to that of his nominal clients, Secretary Rumsfeld, et al., or comparable to the conduct of interrogators distant in time, rank and place. The law does not criminalize very immoral act, however, and there is a strong argument that these more direct actors get a "pass" because they relied on the DOJ memoranda. (Even if Rumsfeld thought his actions were legal, that didn't make his choices moral.)

#### Yoo hasn’t committed academic misconduct — his arguments deserve rejoinder.

Leiter 9 — Brian Leiter, Professor of Law and Director of the Center for Law, Philosophy, and Human Values at the University of Chicago, former Hines H. Baker and Thelma Kelley Baker Chair in Law and Professor of Philosophy at the University of Texas-Austin, holds a Ph.D. in Philosophy and a J.D. from the University of Michigan, 2009 (“Freedom To Be Wrong,” *Room for Debate*—a *New York Times* expert blog, August 20th, Available Online at <http://roomfordebate.blogs.nytimes.com/2009/08/20/torture-and-academic-freedom/comment-page-11/>, Accessed 08-14-2015)

As a contractual and perhaps constitutional matter, Professor Yoo cannot be fired or penalized for the content of his scholarship and teaching, unless it involves research misconduct or intellectual dishonesty. A faculty member can also be disciplined by the university if convicted by a court of a serious criminal violation. Berkeley’s regulations on this score are typical.

Professor Yoo has not committed research misconduct. He has defended his views about executive power in scholarly journals, as well as in the memoranda he wrote as an attorney for the government. Other scholars have defended similar views. One may think (as I do) such views implausible, badly argued and morally odious, but they do not involve “research misconduct.”

If “research misconduct” or “intellectual dishonesty” were interpreted to cover what he has done then there would be nothing left of academic freedom, since every disagreement on the merits of a position, especially a minority position in the scholarly community, could be turned into a “research misconduct” charge that would lead to disciplinary proceedings and possible termination. (Something like this happened, in part, in the Ward Churchill case.)

Many of those commenting on the Yoo case have, I suspect, an unrealistic picture of constitutional law, as though there were clearly correct and incorrect positions on these issues. Alas, there is not a lot of “law” in American constitutional law, so that we quickly go from “that’s a bad legal argument” to “that’s a morally odious position.” But having what many would deem morally odious views is well within the protection afforded by academic freedom.

### They Say: “Link Not Unique”

#### The Freedom Act increased surveillance authority — our link is unique.

Raimondo 14 — Justin Raimondo, Editorial Director of Antiwar.com, Contributing Editor at *The American Conservative*, Senior Fellow at the Randolph Bourne Institute, Adjunct Scholar with the Ludwig von Mises Institute, 2014 (“The ‘USA Freedom Act’ Is A Fraud,” Antiwar.com, November 17th, Available Online at <http://original.antiwar.com/justin/2014/11/16/the-usa-freedom-act-is-a-fraud/>, Accessed 08-14-2015)

This is precisely what has occurred with the final bill. Rather than fundamentally changing the way the NSA scoops up data, the bill merely outsources collection to immunized telecoms, compelling them to do the NSA’s dirty work.

The "Freedom Act" is quite free with its Orwellian redefinition of common words to mean the exact opposite of what they have traditionally meant: for example, the bill defines a "selector" in such a way as to permit NSA to report a dragnet order collecting everyone’s VISA bill as a single order targeting specific alleged terrorist outfits – when, in the real world, it would legalize surveillance of over 300 million US citizens. No wonder Deputy NSA Director Richard Ledgett says that under the terms of the bill "the actual universe of potential calls that could be queried against is [potentially] dramatically larger."

#### The Freedom Act *didn’t* end authority — the plan is a much larger blow to war powers.

Eddington 15 — Patrick Eddington, Policy Analyst in Homeland Security and Civil Liberties at the Cato Institute, Assistant Professor in the Security Studies Program at Georgetown University, formerly served as Communications Director and Senior Policy Advisor to Representative Rush Holt (D-NJ), former Military Imagery Analyst at the Central Intelligence Agency’s National Photographic Interpretation Center where he earned letters of commendation from the Joint Special Operations Command, the Joint Warfare Analysis Center, and the CIA’s Office of Military Affairs, holds an M.A. in National Security Studies from Georgetown University, 2015 (“The Minimalist Surveillance Reforms of USA Freedom,” *Just Security*, April 29th, Available Online at <https://www.justsecurity.org/22553/usa-freedom-surveillance-reform-minimalism/>, Accessed 08-14-2015)

The revelations about the abuses of the Patriot Act Sec. 215 metadata program are what ignited this surveillance reform debate. Yet even the current version of the USA Freedom Act would not end the executive branch’s authority to collect metadata; it would (assuming the best case scenario) simply narrow the scope of such metadata collection. It’s a curious course of action given the fact that Obama’s own Review Group on Intelligence and Communications Technology found that the metadata program prevented zero attacks on the United States. And as the New York Times recently reported, multiple government audits of this and other post-9/11 surveillance programs found them essentially useless in the fight against foreign terrorist organizations.

Perhaps the most remarkable thing about this debate — such as it is — is the refusal of the bill’s proponents to actually deal with the fact that these surveillance authorities should never have existed in the first place, that they have been repeatedly renewed despite false claims of their effectiveness and their dubious constitutionality, and that existing oversight mechanisms have failed to correct executive branch surveillance over-reach in multiple areas.

Consider what this bill is not addressing:

The “back door” searches conducted under Sec. 702 of the FISA Amendments Act.

The expansive collection of U.S. Person data under Executive Order 12333.

The targeting of anyone using internet anonymization technology such as Tor.

NSA’s subversion of encryption standards, supply chain interdiction operations, and espionage and spy recruitment efforts against international standards bodies.

#### Obama has maintained the unitary executive model — *especially* in the context of surveillance.

Weismann 13 — Anne Weismann, Chief Counsel at Citizens for Responsibility and Ethics in Washington—a non-profit, nonpartisan organization promoting ethics and accountability in government, former Deputy Chief of the Enforcement Bureau at the Federal Communications Commission, holds a J.D. from George Washington University’s National Law Center, 2013 (“Have We Come Full Circle? Or Unitary Executive Redux,” CREW’s blog, August 20th, Available Online at <http://www.citizensforethics.org/blog/entry/have-we-come-full-circle-or-unitary-executive-redux>, Accessed 08-13-2015)

Many thought President Barack Obama’s election relegated the unitary executive theory to the garbage heap, or at least the dusty annals of history. Recent revelations suggest it is alive and kicking. In the name of protecting our nation from terrorism, our government has brushed aside the niceties of the law and the clear limitations of the Patriot Act, denied congressional overseers full access to documentation of its surveillance programs, including assessments of their lawfulness, and withheld from the Foreign Intelligence Surveillance (or FISA) court information that would cast doubt on the legality of its information gathering actions.

Consider the latest revelation made by Barton Gellman of the Washington Post last week that according to an internal NSA audit, the agency broke privacy rules or exceeded its legal authority thousands of times each year in the manner in which it conducted surveillance of both Americans and foreign intelligence targets. The documents were part of the Snowden cache and their contents would not otherwise have been revealed, given the instructions they contained for removing details and substituting generic language when reporting on the audit results to the Department of Justice and the Office of the Director of National Intelligence.

Not only did the NSA stymie executive branch oversight, but it was equally careful and limited in what it told the FISA court, according to another Washington Post report. FISA Chief Judge Reggie B. Walton, who until now has been quite tight-lipped on the activities of his very secret court, went so far as to issue a written statement explaining the court “is forced to rely upon the accuracy of the information that is provided to the Court.” In other words, don’t blame the judiciary, which can’t catch illegalities and “noncompliance” if the government fails to provide the true facts.

What made these serial reports all the more startling was their timing, just six days after President Obama’s White House news conference in which he acknowledged that the American people need to have confidence in our government’s surveillance programs, and outlined a four-step program to meet that objective. Step one was an as-yet undefined way to put in place “greater oversight, greater transparency and constraints on the use of this authority.” But this supposed commitment to greater transparency rings especially hollow made in the wake of the Snowden revelations; had Mr. Snowden not forced the president’s hand undoubtedly we would still be in the dark, with no promise of future transparency.

Step two, according to President Obama, is working with Congress to improve public confidence in the FISA court’s oversight. But public confidence is the least of the issue if the chief judge of that court is acknowledging publicly its oversight is limited by an executive branch that fails to impart truthful and complete information.

Step three in President Obama’s four-step program is bringing more transparency to these programs by making public the Office of Legal Counsel opinion providing the legal rationale for the government’s program and creating a website detailing the mission, authorities, and oversight of the NSA. With the release of the administration’s White Paper explaining its bulk collection of telephone metadata it is unlikely the promised OLC opinion will offer more details, and the promised website is just window dressing, but no substitute for real transparency.

The president’s fourth step is to bring in a group of “outside experts” to review our surveillance capabilities and suggest ways to avoid future abuses. The efficacy of such a move is unclear; the devil is in the details. In any case, do we really believe the intelligence agencies who rarely listen to each other will actually listen to outsiders?

Perhaps most striking is what the president did not say. He did not acknowledge any actual abuses by the government in its surveillance programs, focusing instead on making Americans feel better about these programs. Which brings us back to the unitary executive. President George W. Bush’s administration made no bones about its belief that, especially in wartime – with the war on terror counting as wartime – the president has virtually unchecked powers. President Obama has adopted a much softer tone, speaking of the need to “secure our nation” with “open debate and democratic process.” But a review of the administration’s actual actions and policies indicate a continued belief in a unitary executive, unaccountable to Congress or the courts.

### They Say: “Executive Flexibility Bad”

#### Strong presidential war powers are essential to countering WMD proliferation. Flexibility is vital.

Yoo 7 — John Yoo, Emanuel Heller Professor of Law at the University of California-Berkeley, Visiting Scholar at the American Enterprise Institute, former official in the Office of Legal Counsel of the U.S. Department of Justice, holds a J.D. from Yale Law School, 2007 (“Exercising Wartime Powers,” *Harvard International Review*, April 18th, Available Online at http://hir.harvard.edu/archives/1369, Accessed 08-13-2015)

Congressional participation does not automatically or even consistently produce desirable results in war decision making. Critics of presidential war powers exaggerate the benefits of declarations or authorizations of war. What also often goes unexamined are the potential costs of congressional participation: delay, inflexibility, and lack of secrecy. In the post-Cold War era, the United States is confronting the growth in proliferation of WMDs, the emergence of rogue nations, and the rise of international terrorism. Each of these threats may require pre-emptive action best undertaken by the President and approved by Congress only afterward.

Take the threat posed by the Al Qaeda terrorist organization. Terrorist attacks are more difficult to detect and prevent than conventional ones. Terrorists blend into civilian populations and use the channels of open societies to transport personnel, material, and money. Although terrorists generally have no territory or regular armed forces from which to detect signs of an impending attack, WMDs allow them to inflict devastation that once could have been achievable only by a nation-state. To defend itself from this threat, the United States may have to use force earlier and more often than when nation-states generated the primary threats to US national security. The executive branch needs the flexibility to act quickly, possibly in situations wherein congressional consent cannot be obtained in time to act on the intelligence. By acting earlier, the executive branch might also be able to engage in a more limited, more precisely targeted, use of force. Similarly, the least dangerous way to prevent rogue nations from acquiring WMDs may depend on secret intelligence gathering and covert action rather than open military intervention. Delay for a congressional debate could render useless any time-critical intelligence or windows of opportunity.

The Constitution creates a presidency that is uniquely structured to act forcefully and independently to repel serious threats to the nation. Instead of specifying a legalistic process to begin war, the Framers wisely created a fluid political process in which legislators would use their appropriations power to control war. As the United States confronts terrorism, rogue nations, and WMD proliferation, we should look skeptically at claims that radical changes in the way we make war would solve our problems, even those stemming from poor judgment, unforeseen circumstances, and bad luck.

#### Contemporary threats require extreme presidential powers — flexibility is vital to prevent WMD attacks.

Yoo 5 — John Yoo, Emanuel Heller Professor of Law at the University of California-Berkeley, Visiting Scholar at the American Enterprise Institute, former official in the Office of Legal Counsel of the U.S. Department of Justice, holds a J.D. from Yale Law School, 2005 (“An interview with John Yoo, author of The Powers of War and Peace: The Constitution and Foreign Affairs after 9/11,” University of Chicago Press, Available Online at http://www.press.uchicago.edu/Misc/Chicago/960315in.html, Accessed 08-14-2015)

The world after September 11, 2001, however, is very different. It is no longer clear that the United States must seek to reduce the amount of warfare, and it certainly is no longer clear that the constitutional system ought to be fixed so as to make it difficult to use force. Rather than war disappearing from the world, the threat of war may well be increasing. Threats now come from at least three primary sources: the easy availability of the knowledge and technology to create weapons of mass destruction (WMD), the emergence of rogue nations, and the rise of international terrorism of the kind represented by the al Qaeda terrorist organization. Because of these developments, the optimal level of war for the United States may no longer be zero, but may actually be dramatically higher than before.

The emergence of direct threats to the United States that are more difficult to detect and prevent may demand that the United States undertake preemptive military action to prevent these threats from coming to fruition. The costs of inaction, for example, by allowing the vetoes of multiple decision-makers to block warmaking, could entail much higher costs than scholars in the 1990s envisioned. At the time of the cold war, the costs to American national security of refraining from the use of force in places like Haiti, Somalia, or Kosovo would have appeared negligible. The September 11, 2001, terrorist attacks, however, demonstrate that the costs of inaction in a world of terrorist organizations, rogue nations, and more easily available WMD are extremely high—the possibility of a direct attack on the United States and the deaths of thousands of civilians.

These new threats to American national security, driven by changes in the international environment, should change the way we think about the relationship between the process and substance of the warmaking system. The international system allowed the United States to choose a warmaking system that placed a premium on consensus, time for deliberation, and the approval of multiple institutions. If, however, the nature and the level of threats are increasing, the magnitude of expected harm has risen dramatically, and military force unfortunately remains the most effective means for responding to those threats, then it makes little sense to commit our political system to a single method for making war. Given the threats posed by WMD proliferation, rogue nations, and international terrorism, we should not, at the very least, adopt a warmaking process that contains a built-in presumption against using force abroad. Earlier scholarly approaches assumed that in the absence of government action peace would generally be the default state. September 11 demonstrated that this assumption has become unrealistic in light of the new threats to American national security. These developments in the international system may demand that the United States have the ability to use force earlier and more quickly than in the past.

#### Strong presidential power is the only way to solve global problems. This outweighs the risk of overreach.

Posner 10 — Eric A. Posner, Kirkland and Ellis Distinguished Service Professor of Law and Arthur and Esther Kane Research Chair at the University of Chicago Law School, Legal Columnist for *Slate*, Fellow of the American Academy of Arts and Sciences, Member of the American Law Institute, holds a J.D. from Harvard Law School, 2010 (“POTUS-phobia,” *The New Republic*, Volume 241, Issue 18, November 11th, Available Online to Subscribing Institutions via Academic Search Premiere)

Even if Ackerman is right that there is a greater chance that an extremist will become president today than in the past, he needs to show that the risk is great enough to justify a restructuring of the government that would weaken the executive's power to do good. Surely the executive has become a powerful institution because Americans want an activist government and Congress has usually been passive. Presidents have been on the right side of history more often than Congress has; and they also stand up well against the Supreme Court. With great power to do good comes great power to engage in abuse, of course. But there is no way to reduce the risk of abuse to zero without depriving the executive branch of all effectiveness. Should the president be stripped of important powers so that the "near-zero" risk of a military coup will be reduced to nearer-zero? Ackerman scoffs at this question but does not answer it.

Instead he moves on to proposals for reform. You would think that the "decline and fall" of republican institutions would call for radical reform, but Ackerman rules out what he regards as politically infeasible, regretfully commenting that it would be impossible to abolish the presidency and replace the American system with a parliamentary system. He thus confines himself to mostly small-bore reform proposals, which tumble out like an avalanche. All major White House staffers will be subject to Senate confirmation so as to limit the power of toadies, partisans, and ideologues. A Presidential Commission on Civil-Military Relations will establish new canons of ethics that will discourage military officers from meddling in politics. The chairman of the Joint Chiefs of Staff will no longer be permitted to attend National Security Council meetings, except with the permission of the secretary of defense. A new statute will give the president the power to declare emergencies and act unilaterally to counter a threat, but the emergency will end unless Congress periodically renews it in a system that requires larger majorities as time passes. A Supreme Executive Tribunal, composed of independent judges, will evaluate the president's assertions of executive authority when they are challenged by members of Congress. A National Endowment for Journalism, financed by the government, will transfer funds to news organizations that publish articles on the Internet that readers electronically vote for. On Deliberation Day, which will be held two weeks before presidential elections, groups of citizens will meet and deliberate about the merits of presidential candidates. States will agree to cast their electoral votes for the presidential candidate who wins the national popular vote.

This eccentric jumble of proposals is too ambitious and not ambitious enough. Few if any of them seem politically realistic, yet even if all of them were implemented, they hardly seem adequate to halt the decline and fall of the American Republic. The United States faces many problems today, and the public continues to look to the president for solutions. They do not want to abolish or to restrict the office; they want it occupied by a competent person with access to its full powers. Watergate, Iran-Contra, and Bush's war on terrorism—which are pretty much all that Ackerman offers as evidence of a dysfunctional presidency—just do not add up to a case against a system of executive primacy that is the best hope for addressing the massive economic, environmental, and military problems that beset us. Ackerman's fear that an extremist will seize the presidency has no political resonance—not even in our undeniably inflamed era—because nothing like that has ever happened in the United States. And the fact that the presidency used to be a weaker office is a matter of indifference to a practical-minded public that reveres the Founders but disregards their antique political trepidations.

The executive has evolved to its present state because it is the one political institution that can address modern problems. The clumsy, many-headed Congress is hampered by its over-elaborate structure and its senatorial half, where the threshold for action is so high and senators from small states have excessive power. The courts are too weak, passive, and decentralized. State governments are too small. The military lacks people's trust, at least as far as civilian governance is concerned, because it is not a democratic institution. Precisely because the Founders created an executive office with ill-defined powers, this office could rise to meet modern challenges. James Madison's vision of checks and balances has given way to a system of executive primacy, but rather than leading to tyranny, as he feared, democratic politics has—so far—kept the American president, sometimes for better and sometimes for worse, under control.

### They Say: “Tyranny Turn”

#### No risk of tyranny — demographics and elections.

Posner and Vermeule 10 — Eric A. Posner, Kirkland and Ellis Distinguished Service Professor of Law and Arthur and Esther Kane Research Chair at the University of Chicago Law School, Legal Columnist for *Slate*, Fellow of the American Academy of Arts and Sciences, Member of the American Law Institute, holds a J.D. from Harvard Law School, and Adrian Vermeule, John H. Watson Professor of Law at Harvard Law School, Member of the American Academy of Arts and Sciences, former Bernard D. Meltzer Professor of Law at the University of Chicago, holds a J.D. from Harvard Law School, 2010 (“Tyrannophobia,” *The Executive Unbound: After the Madisonian Republic*, Published by Oxford University Press, ISBN 9780199765331, p. 193)

Dictatorship and Tyrannophobia in America

Against this historical and comparative background, we turn to the relationship between tyrannophobia and dictatorship in the United States. If tyrannophobia were a crucial safeguard against dictatorship, it would have benefits. However, we believe that tyrannophobia is either not a safeguard against dictatorship, or is at best an unnecessary and costly one, akin to placing one’s house underground to guard against the risk of a meteor strike. In the administrative state that flowered in the twentieth century, demographic factors and the basic constraint of elections jointly provide an independent and sufficient buffer against dictatorship. The contemporary United States is too wealthy, with a population that is too highly educated, to slide into authoritarianism. An implication is that even if tyrannophobia reduces the risk of dictatorship, it must also constrain grants of power to the executive that are otherwise desirable. The former effect is a benefit, the latter a cost; but the benefit is minimal, because demography and elections, taken together, independently prevent dictatorship. Accordingly, either tyrannophobia has no effect on the risk of dictatorship, or else it produces social costs for little in the way of offsetting benefits.

#### The benefits of strong presidential powers outweigh a *non-existent risk* of tyranny.

Posner and Vermeule 10 — Eric A. Posner, Kirkland and Ellis Distinguished Service Professor of Law and Arthur and Esther Kane Research Chair at the University of Chicago Law School, Legal Columnist for *Slate*, Fellow of the American Academy of Arts and Sciences, Member of the American Law Institute, holds a J.D. from Harvard Law School, and Adrian Vermeule, John H. Watson Professor of Law at Harvard Law School, Member of the American Academy of Arts and Sciences, former Bernard D. Meltzer Professor of Law at the University of Chicago, holds a J.D. from Harvard Law School, 2010 (“Tyrannophobia,” *The Executive Unbound: After the Madisonian Republic*, Published by Oxford University Press, ISBN 9780199765331, p. 202-203)

The Costs and Benefits of Tyrannophobia

We have suggested that the framers’ tyrannophobia, combined with the lack of dictatorship in later periods, plausibly fuels contemporary tyrannophobia, insofar as contemporary actors infer that the framers’ design choices are what has allowed democracy to endure. However, the inference is invalid, for the key choice of presidentialism may itself have been a risk factor for dictatorship; if it was, then the framers inadvertently put self-government at risk, but were favored by fortune. Likewise, while it is possible that tyrannophobia has an endogenous tyranny-preventing effect, it is equally possible that it perversely increases the risk, and the most plausible conclusion of all is that it has no effect in either direction; to ignore the latter two possibilities is itself a major symptom of tyrannophobia. Tyrannophobia in the United States is real, and it may well be the result of the psychological and informational factors discussed above, but there is no evidence that it contributes to the absence of dictatorship in the United States, and some affirmative evidence that it does not do so.

Even if tyrannophobia has a weak effect of that sort, it seems clear that wealth and other demographic factors in all likelihood prevent dictatorship in the United States, quite apart from its tyrannophobic political culture. So [end page 202] even if tyrannophobia once checked dictatorship, that check is unnecessary today, in light of the exceptional stability of advanced democratic polities like the United States. The main possible benefit of tyrannophobia is therefore illusory. On the other hand, if tyrannophobia hampers useful grants of power to the executive, it creates social costs, namely an entrenched reluctance to transfer necessary powers to the executive. Elsewhere, we have described a range of institutions and policy initiatives that would increase welfare by increasing executive power, especially in the domain of counterterrorism, but that are blocked by “libertarian panics” and tyrannophobia.93 Overall, then, the cost-benefit ledger of tyrannophobia shows real costs and illusory benefits.

#### The benefits of a strong president massively outweigh the costs.

Posner 14 — Eric A. Posner, Kirkland and Ellis Distinguished Service Professor of Law and Arthur and Esther Kane Research Chair at the University of Chicago Law School, Legal Columnist for *Slate*, Fellow of the American Academy of Arts and Sciences, Member of the American Law Institute, holds a J.D. from Harvard Law School, 2014 (“The Presidency Comes With Executive Power. Deal With It.,” *The New Republic*, February 3rd, Available Online at <http://www.newrepublic.com/article/116450/obama-use-executive-power-unexceptional>, Accessed 08-14-2015)

Meanwhile, the founders’ anxieties about executive tyranny have proven erroneous. The president is kept in check by elections, the party system, the press, popular opinion, courts, a political culture that is deeply suspicious of his motives, term limits, and the sheer vastness of the bureaucracy which he can only barely control. He does not always do the right thing, of course, but presidents generally govern from the middle of the political spectrum.

Obama’s assertion of unilateral executive authority is just routine stuff. He follows in the footsteps of his predecessors on a path set out by Congress. And well should he. If you want a functioning government—one that protects citizens from criminals, terrorists, the climatic effects of greenhouse gas emissions, poor health, financial manias, and the like—then you want a government led by the president.

# Affirmative

## 2AC

### 2AC — Presidential War Powers DA

#### 1. No Inherent Surveillance Power — Congress has the constitutional authority to limit *domestic* surveillance powers.

Carpenter 6 — Dale Carpenter, Julius E. Davis Professor of Law at the University of Minnesota Law School, holds a J.D. from the University of Chicago Law School, 2006 (“A Discourse: Presidential Powers in Time of War,” *Perspectives*, Spring, Available Online at <http://www.law.umn.edu/uploads/wE/aa/wEaa1g7XB6j0QyoOhoFpYw/Presidential_Powers_exchange_Paulsen_Kitrosser_Carpenter.pdf>, Accessed 08-13-2015, p. 38)

(2) The president’s top priority must be to defend the country against attack, but he does not have limitless constitutional power to do so. Notably, there is no “necessity clause” in the Constitution giving the president authority to do whatever he thinks necessary to protect us. The security of the United States is no more the sole constitutional fiefdom of the president than legislation is the sole fief of Congress, or the Constitution itself is the sole fief of the Supreme Court. The president’s powers over security are shared and blended with the other branches. The president is commander in chief of the army and navy, which most obviously means that he has operational control over the military when force is authorized. This general presidential power, however, is subject to specific constraints elsewhere in the Constitution. One constraint on the president’s general command authority is Congress’s specific power “to make Rules for the Government and Regulation of the land and naval Forces.” Art. I, Sec. 8, cl. 14. FISA is one such regulation.

The Constitution further gives to Congress, not to the president, the power to make laws “necessary and proper” to carry into execution its own powers and “all other Powers” enjoyed by any part of the federal government, including the executive. (Art. I, Sec. 8., cl. 18.) This leaves to Congress the judgment about what legal authority is needed to make effective the president’s own powers, including the commander in chief power. If gathering intelligence about the enemy is an incident of the president’s commander in chief power over the military, then limiting the use of that power within the United States is an incident of Congress’s Article I authority to legislate its execution.

Once Congress has regulated the president’s use of his war powers inside the United States, he can no more violate the law for reasons he believes are good than he could collect more taxes than Congress has authorized because he thinks the government needs more money for the war or appoint more justices to the Supreme Court without the advice and consent of the Senate because he thinks the Court is deciding war-related cases incorrectly.

The president has expansive powers under the Constitution and under the AUMF to fight the country’s foreign enemies. But when he directs that considerable power inward, toward the United States itself, special concerns arise from the history of the abuse of executive power and from the nation’s commitment to civil liberties. When the president fights a war inside the United States, the balance between the needs of national security and the liberties of the people, between the danger of catastrophic attack and the danger of repression, is better struck by involving all three branches of the federal government than by acquiescing to the diktat of one.

If the president believes that FISA is inadequate to deal with the war on terror, he should make that case before the body that has the constitutional responsibility to make law in this republic—the Congress. He may believe with all his heart that he needs the authority to conduct warrantless spying on people in the United States in order to protect the country from another devastating attack. He may be right about that. But more than two centuries ago this nation rejected the principle that one person could run the country, even for very good reasons, in favor of a more cooperative and democratic approach that better serves both liberty and security.

#### 2. Reject John Yoo — he’s a war criminal, not an “expert.” Exclude him *completely* from public discourse.

Hussein 14 — Murtaza Hussain, Journalist and Political Commentator at *The Intercept* focusing on human rights, foreign policy, and cultural affairs, has covered foreign policy and civil liberties for the *New York Times*, The *Guardian*, *Al Jazeera*, The *Globe and Mail*, *Salon*, and *Prism Magazine*, 2014 (“John Yoo’s despicable return: We must stop giving war criminals a platform,” *Salon*, April 16th, Available Online at <http://www.salon.com/2014/04/16/john_yoos_despicable_return_we_must_stop_giving_war_criminals_a_platform/>, Accessed 07-14-2015)

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

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

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

But a more important question to ask here is, why are people asking John Yoo’s opinion about things? In what universe does it seem appropriate to seek out a man whose actions resulted in the grievous torture and deaths of innumerable people and ask him to weigh in on the news of the day? John Yoo almost single-handedly shredded the U.S. Constitution – to say nothing of what he helped do to America’s moral standing in the world – and yet major news outlets and even universities continue to regularly seek out his advice as though he isn’t an incompetent reprobate of biblical proportions. Worse than that, he’s the monstrous figure who knowingly enabled the most unconscionable war crimes of the global war on terror. In any sane or just society, Yoo would be rotting in a prison cell instead of wearing tailored suits and sharing his opinions in polite company.

But, alas, America as it stands today is somewhat wanting in the departments of both sanity and justice. While powerful ghouls such as Yoo completely escape legal consequences for their actions – no matter how morally despicable and disastrous for the country they were – ordinary Americans somehow continue to regularly land in jail for the slightest transgressions. In fact, Yoo is not only not in jail, he’s still somehow a media figure regularly weighing in on the issues of the day. Legal accountability for his moral failures aside, he hasn’t even really paid a career price for the monumental incompetence he displayed in his work.

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

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

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

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

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

#### 3. Link Not Unique — the USA Freedom Act reduced the President’s authority to conduct domestic surveillance.

#### 4. Executive Flexibility Bad — unchecked presidential powers risk nuclear war.

Adler 11 — David Gray Adler, Director of the Andrus Center for Public Policy and Cecil Andrus Professor of Public Affairs at Boise State University, former James A. McClure Professor and Director of the James A. and Louise McClure Center for Public Policy Research at the University of Idaho, former Professor of Political Science and Director of the Center for Constitutional Studies at Idaho State University, holds a Ph.D. from the University of Utah, 2011 (“Presidential Ascendancy in Foreign Affairs and the Subversion of the Constitution,” Paper Presented to the German-American Conference on “Comparisons of Parliamentary and Coordinated Power (Presidential) Systems,” March, Available Online at <http://www.civiced.org/pdfs/GermanAmericanConf2011/Adler.pdf>, Accessed 08-13-2015, p. 19-21)

Conclusions

The ascendancy of the president in the area of war and peace finds no foundation in the Constitution. It reflects, rather, the tendency among presidents—Republicans and Democrats, conservatives and liberals alike—to aggrandize and abuse power. Usurpation of the war power, particularly in an era that exalts the concept of a personal or Imperial Presidency at the expense of a constitutionally confined presidency, lays bare the paramountcy of a president’s personal characteristics. Indeed, it is precisely in the realm of a personal presidency that a decidedly executive perspective, subject to the full measure of the president’s talents, strengths and temperament, as well as his judgment, knowledge and self-restraint, will be brought to the policy anvil. The historical portrait may not be pretty. Consider, for example, the arrogance and self-righteousness of Woodrow Wilson, the inclination toward dramatic posturing by Theodore Roosevelt, the inattentiveness of Ronald Reagan, as well as the indiscipline of Bill Clinton and the stunning, yet naïve certainties of George W. Bush. Then, [end page 19] too, there is the question of the president’s ambition, political agenda, personal distractions and desire for fame and glory.

A considerable literature urges executive supremacy, and extols the supposed virtues of presidential assertion, domination and control; yet this body of work often ignores the dimensions of executive flaws, foibles, and frailties. The electoral process is not infallible; an elected president may lack the wisdom, temperament and judgment, not to mention perception, expertise and emotional intelligence to produce success in matters of war and peace. Those qualities which, to be sure, are attributes of the occupant and not of the office, cannot be conferred by election. 104 Champions of a unilateral executive war power have ignored and, perhaps, forgotten the institutional safeguards of separation of powers, checks and balances and collective decision making urged by the Framers as protection from the flaws of unilateral judgment and the temptations of power. Among those who have lost their memory of the virtues and values of those institutional safeguards, apparently, are those many members of Congress and dozens of judges over the years, who have acquiesced in the face of presidential usurpation in the realm of national security. Perhaps seduced by the allure of swift, bold military action under the banner of nationalism, patriotism and ideological and political certainty, these representatives, some elected and others appointed, have forgotten their institutional duties and responsibilities. It is not probable, but certain, that the Imperial Presidency would be brought to heel if the other branches duly exercised their powers and responsibilities, but they have lost their way. No less a personage than the late Senator Sam Ervin questioned, in the course of hearings in 1973 on the unchecked executive practice of impoundment, whether the Congress of the United States will remain a viable institution or whether the current trend toward the executive use of legislative power is to continue unabated until we have arrived at a presidential form of government.” Senator Ervin justly criticized executive aggrandizement of legislative authority, but he also found Congress culpable for the rise of presidential dominance: “The executive branch has been able to seize power so brazenly only because the Congress has lacked the courage and foresight to maintain its constitutional position.” 105 What was true of impoundment, is true of the war power. Only “Congress itself,” to borrow from Justice Robert H. Jackson, “can prevent power from slipping through its fingers.”106

The siren song of unilateral presidential war making ignores the tragedies of Korea, Vietnam and Iraq, and the cost to America of its precious blood and treasure as well as denied and stolen. The American constitutional system is grounded in the conviction, as James Iredell explained it, that there is “nothing more fallible than human judgment.” 107 It is sometimes observed that the intentions of the Framers are outdated and irrelevant. But before we too readily acquiesce in that verdict, we might do well to recall the policy considerations that underlay the decision to vest the war power in Congress and not the president. Painfully aware of the horror and destructive consequences of warfare, the Framers wisely determined that before the very fate of the nation were put to risk that there ought to be some discussion, some deliberation by Congress, the people’s representatives. The Founders did not, as James Wilson explained it, want “one man to hurry us into war.”108 As things stand in the United States today, however, the president has been exercising that power. The “accretion of dangerous power,” Justice Frankfurter has reminded us, occurs when power is freed from institutional restraints, checks and safeguards. The eminently sound rationales that convinced the Framers to vest the war power [end page 20] exclusively in Congress, however, have been ignored and abandoned in recent decades. There is a cost in that, too. It was the artist, Goya, who in one of his etchings, graphically portrayed the consequences of ignoring reason with the inscription: “The sleep of reason brings forth monsters.”109 There is no comfort to be found in a practice which permits unilateral executive war making, particularly in the age of nuclear weapons, when war might lead to the incineration of the planet. When it comes to the constitutional design for war making, it is clear that the Framers’ policy concerns are even more compelling today than they were two centuries ago.

#### 5. Turn: Tyranny —

#### A. Yoo’s theory of unchecked presidential war powers causes tyranny.

Schneier 5 — Bruce Schneier, Chief Technology Officer for Counterpane Internet Security, Fellow at the Berkman Center for Internet and Society at Harvard Law School, Program Fellow at the New America Foundation's Open Technology Institute, Board Member of the Electronic Frontier Foundation, Advisory Board Member of the Electronic Privacy Information Center, 2005 (“The Security Threat of Unchecked Presidential Power,” *Minneapolis Star-Tribune*, December 21st, Available Online at <https://www.schneier.com/blog/archives/2005/12/the_security_th_1.html>, Accessed 08-13-2015)

In defending this secret spying on Americans, Bush said that he relied on his constitutional powers (Article 2) and the joint resolution passed by Congress after 9/11 that led to the war in Iraq. This rationale was spelled out in a memo written by John Yoo, a White House attorney, less than two weeks after the attacks of 9/11. It's a dense read and a terrifying piece of legal contortionism, but it basically says that the president has unlimited powers to fight terrorism. He can spy on anyone, arrest anyone, and kidnap anyone and ship him to another country ... merely on the suspicion that he might be a terrorist. And according to the memo, this power lasts until there is no more terrorism in the world.

Yoo starts by arguing that the Constitution gives the president total power during wartime. He also notes that Congress has recently been quiescent when the president takes some military action on his own, citing President Clinton's 1998 strike against Sudan and Afghanistan.

Yoo then says: "The terrorist incidents of September 11, 2001, were surely far graver a threat to the national security of the United States than the 1998 attacks. ... The President's power to respond militarily to the later attacks must be correspondingly broader."

This is novel reasoning. It's as if the police would have greater powers when investigating a murder than a burglary.

More to the point, the congressional resolution of Sept. 14, 2001, specifically refused the White House's initial attempt to seek authority to preempt any future acts of terrorism, and narrowly gave Bush permission to go after those responsible for the attacks on the Pentagon and World Trade Center.

Yoo's memo ignored this. Written 11 days after Congress refused to grant the president wide-ranging powers, it admitted that "the Joint Resolution is somewhat narrower than the President's constitutional authority," but argued "the President's broad constitutional power to use military force ... would allow the President to ... [take] whatever actions he deems appropriate ... to pre-empt or respond to terrorist threats from new quarters."

Even if Congress specifically says no.

The result is that the president's wartime powers, with its armies, battles, victories, and congressional declarations, now extend to the rhetorical "War on Terror": a war with no fronts, no boundaries, no opposing army, and – most ominously – no knowable "victory." Investigations, arrests, and trials are not tools of war. But according to the Yoo memo, the president can define war however he chooses, and remain "at war" for as long as he chooses.

This is indefinite dictatorial power. And I don't use that term lightly; the very definition of a dictatorship is a system that puts a ruler above the law. In the weeks after 9/11, while America and the world were grieving, Bush built a legal rationale for a dictatorship. Then he immediately started using it to avoid the law.

This is, fundamentally, why this issue crossed political lines in Congress. If the president can ignore laws regulating surveillance and wiretapping, why is Congress bothering to debate reauthorizing certain provisions of the Patriot Act? Any debate over laws is predicated on the belief that the executive branch will follow the law.

This is not a partisan issue between Democrats and Republicans; it's a president unilaterally overriding the Fourth Amendment, Congress and the Supreme Court. Unchecked presidential power has nothing to do with how much you either love or hate George W. Bush. You have to imagine this power in the hands of the person you most don't want to see as president, whether it be Dick Cheney or Hillary Rodham Clinton, Michael Moore or Ann Coulter.

Laws are what give us security against the actions of the majority and the powerful. If we discard our constitutional protections against tyranny in an attempt to protect us from terrorism, we're all less safe as a result.

#### B. Tyranny is an existential risk — unchecked mass surveillance crushes freedom.

Dvorsky 8 — George Dvorsky, Chair of the Board for the Institute for Ethics and Emerging Technologies, co-founder and president of the Toronto Transhumanist Association, 2008 (“Future risks and the challenge to democracy,” Institute for Ethics & Emerging Technologies, December 24th, Available Online at http://ieet.org/index.php/IEET/more/2773, Accessed 04-11-2012)

Despite the claims of Fukuyama and Bush, and despite our own collective sensibilities, we cannot take our democracies and civil liberties for granted. When appraising the condition of democracies we must realize that past successes and apparent trajectories are no guarantees of future gain. Indeed, democracy is still the exception around the world and not the rule.

Historically speaking, democracies are an abnormality. As early as 1972 only 38% of the world’s population lived in countries that could be classified as free. Today, despite the end of the Cold War, this figure has only crept up to 46%. We may be the victims of an ideological bias in which we’ve assumed far too much about democracy’s potential, including its correlation with progress and its ability to thrive in drastically different social environments.

Catastrophic and existential risks will put democratic institutions in danger given an unprecedented need for social control, surveillance and compliance. Liberal democracies will likely regress to de facto authoritarianism under the intense strain; tools that will allow democratic governments to do so include invoking emergency measures, eliminating dissent and protest, censorship, suspending elections and constitutions, and trampling on civil liberties (illegal arrests, surveillance, limiting mobility, etc).

Looking further ahead, extreme threats may even rekindle the totalitarian urge; this option will appeal to those leaders looking to exert absolute control over their citizens. What’s particularly frightening is that future technologies will allow for a more intensive and invasive totalitarianism than was ever thought possible in the 20th Century – including ubiquitous surveillance (and the monitoring of so-called ‘thought crimes’), absolute control over information, and the redesign of humanity itself, namely using genetics and cybernetics to create a more traceable and controllable citizenry. Consequently, as a political mode that utterly undermines humanistic values and the preservation of the autonomous individual, totalitarianism represents an existential risk unto itself.

Democracy an historical convenience?

It is possible, of course, that democracies will rise to the challenge and work to create a more resilient civilization while keeping it free. Potential solutions have already been proposed, such as strengthening transnational governance, invoking an accountable participatory panopticon, and the relinquishment of nuclear weapons. It is through this type of foresight that we can begin to plan and restructure our systems in such a way that our civil liberties and freedoms will remain intact. Democracies (and human civilization) have, after all, survived the first test of our apocalyptic potential.

That said, existential and catastrophic risks may reveal a dark path that will be all too easy for reactionary and fearful leaders to venture upon. Politicians may distrust seemingly radical and risky solutions to such serious risks. Instead, tried-and-true measures, where the state exerts an iron fist and wages war against its own citizens, may appear more reasonable to panicked politicians.

We may be entering into a period of sociopolitical disequilibrium that will instigate the diminishment of democratic institutions and values. Sadly, we may look back some day and reflect on how democracy was an historical convenience.

## 1AR

### Extend: “No Inherent Surveillance Authority”

#### Domestic surveillance is a congressional power, not a presidential war power.

Carpenter 6 — Dale Carpenter, Julius E. Davis Professor of Law at the University of Minnesota Law School, holds a J.D. from the University of Chicago Law School, 2006 (“A Discourse: Presidential Powers in Time of War,” *Perspectives*, Spring, Available Online at <http://www.law.umn.edu/uploads/wE/aa/wEaa1g7XB6j0QyoOhoFpYw/Presidential_Powers_exchange_Paulsen_Kitrosser_Carpenter.pdf>, Accessed 08-13-2015, p. 41)

Second, while the commander in chief authority surely gives the president the power to control the operational details of military action, it does not obviously give him the power to do whatever he pleases to facilitate the use of military force, even where war has been declared, and especially where he turns that might inward toward the United States itself.

In the war on terror, even more than other wars, there is no clear line between domestic and foreign war-fighting. Thus, to accept Professor’s Paulsen’s concept of unlimited executive war power is to cede to the president practically dictatorial control over the whole country.

The Constitution’s blending of war powers among the branches does not reasonably admit the stark either-or, categorical approach Professor Paulsen advocates. It is helpful to think of the question of the president’s and Congress’s war-related authority as involving a continuum. On one end we have clear exercises of operational control of military forces against a foreign enemy abroad. The president’s power to act on behalf of the whole country is at its height when he acts on matters of foreign affairs and/or matters of core operational control of the military directed outward, away from the United States itself. Shall we invade at the Pas de Calais or at Normandy? Shall we do so on June 5 or June 6? These are decisions it would indeed be “unsound” and “dangerous” to confide to Congress. These “military and defensive efforts” would be clearly within presidential command authority.

On the other end of the continuum are all the ways in which events at home may affect the war effort. Money is necessary for war; but the president could not raise taxes on his own, even if he believed it was absolutely vital to do so. Guns are essential; but he could not seize the steel industry against a contrary legislative command. Conscripts are critical; but he could not unilaterally institute a draft. Public support is vital; but he could not jail dissenters on the ground that they were sapping morale. The Constitution itself limits the president’s command authority in each of these areas. All of them are for Congress to deal with in the first instance, if they can be dealt with at all.

One way to think of this continuum is that it ranges from actions clearly foreign and command-operational (and thus clearly within the president’s commander in chief power) to actions purely domestic and non-operational (and thus clearly within Congress’s legislative powers). The Constitution tells us the president is commander in chief “of the Army and Navy,” not “of the United States.”

There will be hard cases between these two poles. The president’s authorization of warrantless surveillance within the United States is somewhere between the two ends of the continuum. The NSA program implicates military needs because it is gathering information about enemy plans. But it is not just a “military effort,” cut off from any domestic concerns. It occurs domestically and intrudes on the legitimate privacy interests of people inside the United States. As I’ll explain, I believe the NSA program falls much closer to the congressional-power end of the continuum and is thus subject to congressional regulation, where Congress has chosen to regulate (as it has here through FISA).

So the question comes down to this: May the president order the warrantless surveillance of communications in the United States under his commander in chief power despite a congressional command that he may not? Or, may the Congress prohibit such warrantless surveillance under its Rules-and-Regulations power and its All-Other-Powers authority despite the president’s strong desire to conduct warrantless surveillance?

Which war-related power controls the matter of warrantless domestic surveillance, the president’s or the Congress’s? Professor Paulsen does not even begin to grapple with this difficult question; he simply asserts the conclusion that the president’s power controls no matter what.

Yet I can think of several reasons why the president’s action turning force inward means that Congress’s will, expressed in FISA, should prevail here. Briefly: (1) Congress enjoys the power to make laws relating to the president’s own powers, including his commander in chief power, while the reverse is not true; (2) Congress, not the president, is given the power to regulate the armed forces; (3) domestic warrantless surveillance implicates, as the Justice Department acknowledges, not just military necessity but significant domestic civil liberties interests; (4) the history of abuse of domestic spying by presidents under the guise of protecting national security makes giving any president unchecked authority in this area very dangerous; and (5) the president has not shown how the legal alternatives he has under FISA are unworkable or, if they are unworkable, why he could not seek amendment of the law from a Congress that is responsible for making laws to protect national security.

#### The plan is not a violation of the president’s war powers — their authors overstate the President’s authority.

Carpenter 6 — Dale Carpenter, Julius E. Davis Professor of Law at the University of Minnesota Law School, holds a J.D. from the University of Chicago Law School, 2006 (“A Discourse: Presidential Powers in Time of War,” *Perspectives*, Spring, Available Online at <http://www.law.umn.edu/uploads/wE/aa/wEaa1g7XB6j0QyoOhoFpYw/Presidential_Powers_exchange_Paulsen_Kitrosser_Carpenter.pdf>, Accessed 08-13-2015, p. 38)

Professor Paulsen makes several provocative policy assertions about the president’s wartime powers. Remarkably absent from his discussion is any sustained attention to the constitutional text or any consideration of the types of concerns that caused the founding generation to break from colonial and monarchical control. Nothing in the Federalist papers, including Hamilton’s writings, suggests that the president’s wartime power is illimitable. An energetic president, yes; wartime king, no.

*“If (as I believe), the AUMF is, in legal effect, a Declaration of War, then [standard arguments about statutory interpretation] are almost entirely irrelevant.”*

Having practically conceded the statutory arguments, Professor Paulsen now says they don’t matter because the president has unlimited war-making authority. Yet the Constitution does not provide that in time of war all bets are off—that all powers of government are put at the president’s disposal to use as he pleases. There are special provisions that deal with wartime emergencies (e.g., allowing Congress to suspend habeas corpus in cases of invasion or rebellion, Art. I, Sec. 9, cl. 2), but notably none of them are in Article II. There is no general “emergency clause” or “necessity clause” holding the usual rules automatically in abeyance, and certainly none that give the president such power.

*“If war has been authorized, then the commander in chief power to wage war against enemy forces has been unleashed in its entirety.”*

This is a restatement of the problem, not an argument. The very question here is what the “entirety” of the commander in chief power is and whether and to what extent it may be limited by the co-equal branches of the government. Those who resist the president’s claim of power to engage in domestic warrantless spying argue that his war power does not extend in this way to the domestic sphere where Congress has acted to the contrary, as it has in FISA.

*“Where the commander in chief power is brought into play, it is the president’s power alone. No statute of Congress may limit it.”*

What is the basis for this extraordinary claim? Congress has two explicit and specific powers that seem to limit, when exercised, the president’s commander in chief power: the power to make rules and regulations for the armed forces and the power to make laws effectuating the president’s own powers. Nothing in the text declares the president’s powers immune to these provisions, even in wartime. Indeed, the Constitution itself makes no general demarcation between wartime and peacetime powers.

### Extend: “Reject John Yoo”

#### Treating Yoo as an “expert” sanctions his war crimes.

Greenwald 8 — Glenn Greenwald, lawyer and journalist who published reports based on classified documents disclosed by Edward Snowden, Contributor to *Salon* and *The Guardian*, Recipient of the 2014 Pulitzer Prize for Public Service, holds a J.D. from New York University School of Law and a B.A. in Philosophy from George Washington University, 2008 (“John Yoo’s war crimes,” *Salon*, April 2nd, Available Online at http://www.salon.com/2008/04/02/yoo\_2/, Accessed 04-20-2015)

(1) The fact that John Yoo is a Professor of Law at Berkeley and is treated as a respectable, serious expert by our media institutions, reflects the complete destruction over the last eight years of whatever moral authority the United States possessed. Comporting with long-held stereotypes of two-bit tyrannies, we’re now a country that literally exempts our highest political officials from the rule of law, and have decided that there should be no consequences when they commit serious felonies.

John Yoo’s Memorandum, as intended, directly led to — caused — a whole series of war crimes at both Guantanamo and in Iraq. The reason such a relatively low-level DOJ official was able to issue such influential and extraordinary opinions was because he was working directly with, and at the behest of, the two most important legal officials in the administration: George Bush’s White House counsel, Alberto Gonzales, and Dick Cheney’s counsel (and current Chief of Staff) David Addington. Together, they deliberately created and authorized a regime of torture and other brutal interrogation methods that are, by all measures, very serious war crimes.

If writing memoranda authorizing torture — actions which then directly lead to the systematic commission of torture — doesn’t make one a war criminal in the U.S., what does? Here is what John Yoo is and what he did:

“It depends on why the President thinks he needs to do that.” Yoo wasn’t just a law professor theorizing about the legalization of torture. He was a government official who, in concert with other government officials, set out to enable a brutal and systematic torture regime, and did so. If this level of depraved criminality doesn’t remove one from the realm of respectability and mainstream seriousness — if not result in war crimes prosecution — then nothing does.

That John Yoo is a full professor at one of the country’s most prestigious law schools, and a welcomed expert on our newspaper’s Op-Ed pages and television news programs, speaks volumes about what our country has become. We sure did take care of that despicable Pvt. Lyndie England, though, because we don’t tolerate barbaric conduct of the type in which she engaged completely on her own.

#### Yoo’s arguments about surveillance are grasping at straws — he’s wrong *in this context*, too.

Masnick 13 — Mike Masnick, Founder and Chief Executive Officer of Floor64—a software company, Founder and Editor of *Techdirt*, 2013 (“Author Of Torture Memo Says Judges Are Too Out Of Touch To Determine If NSA Violated The 4th Amendment,” *Techdirt*, December 24th, Available Online at https://www.techdirt.com/articles/20131218/17550825612/author-torture-memo-says-judges-are-too-out-touch-to-determine-if-nsa-violated-4th-amendment.shtml, Accessed 07-14-2015)

John Yoo, who famously wrote the legal rationale for allowing the US government to torture people, has already defended the NSA's activities, arguing that it takes too long for the NSA to obey the Constitution, so it shouldn't have to. Given that, it was hardly a surprise to see his reaction to the recent ruling saying that the NSA's bulk metadata collection program was likely unconstitutional and should be stopped. Yoo is... not a fan of this ruling. In fact, he uses it to rail against judges daring to make any determination about whether or not something violates the 4th Amendment. According to him (and only him) that's the job of Congress, not the courts.

In fact, I do not think that this is fundamentally the job of judges. It may be time to reconceive the rules of search and seizure in light of new Internet technologies — but that is the responsibility of our elected representatives. Only they can determine what society’s “reasonable expectation of privacy” is in Internet and telephone communications. Judges are the last people to fairly claim they have their fingers on the pulse of the American people. Only our elected representatives can properly balance existing privacy rights (if any), against the need for information to protect the nation from terrorist attack. Judges are far too insulated and lack the expertise to make effective judgments on national-security and foreign affairs. The president and Congress must take up their duty and work out the rules to govern surveillance to protect the nation’s security, and when they don’t, it is left up to the branch least capable of doing so, the judiciary.

There seems to be no basis for this other than that Yoo believes it to be the case. Courts have always had the role of determining whether or not the actions were unconstitutional. The idea that only "national security" and "foreign affairs" insiders can determine the rules is a recipe for massive regulatory capture by surveillance extremists like Yoo.

Yoo is also embarrassingly misstating Judge Leon's ruling. He insists that, despite pages of detailed reasoning, Leon cannot claim that the outdated ruling in Maryland v. Smith doesn't apply here:

Judge Leon cannot claim that the reasoning of Smith does not cover the telephone metadata at issue here, because the data collected are exactly the same as the kind held unprotected in Smith. Leon’s decision instead argues that technology has changed so much that Smith is no longer good law.

That's clearly not what Judge Leon ruled, and Yoo is being blatantly intellectually dishonest here. Leon noted that Smith covered a very specific legal question, and the legal question here is different. And part of the difference in the question involves collecting a single piece of information on a single person, as opposed to collecting all information on everyone and continuing to collect that information forever. As Judge Leon rightly noted, that's an entirely different issue than was tackled in Smith. That's not saying Smith itself is no longer good law (though it isn't), but rather that the situations are vastly different. I can't see how anyone can reasonably argue otherwise. Collecting a single piece of information on a single person is incredibly different than hoovering up all information on everyone.

It's no surprise to see the NSA's loudest apologists grasping at straws over all of this, but, really they might want to give it a rest for a bit, because their arguments are looking more and more desperate and less and less intelligent.

### Extend: “Link Not Unique”

#### Even if imperfect, the Freedom Act restricted presidential authority.

Cohn and Reitman 15 — Cindy Cohn, Executive Director and former Legal Director and General Counsel of the Electronic Frontier Foundation, holds a J.D. from the University of Michigan Law School, and Rainey Reitman, Activism Director at the Electronic Frontier Foundation, Chief Operating Officer and Co-Founder of the Freedom of the Press Foundation, former Director of Communications for the Privacy Rights Clearinghouse—a nonprofit advocacy and education organization promoting consumer privacy, 2015 (“USA Freedom Act Passes: What We Celebrate, What We Mourn, and Where We Go From Here,” Electronic Frontier Foundation, June 2nd, Available Online at https://www.eff.org/deeplinks/2015/05/usa-freedom-act-passes-what-we-celebrate-what-we-mourn-and-where-we-go-here, Accessed 08-14-2015)

The Senate passed the USA Freedom Act today by 67-32, marking the first time in over thirty years that both houses of Congress have approved a bill placing real restrictions and oversight on the National Security Agency’s surveillance powers. The weakening amendments to the legislation proposed by NSA defender Senate Majority Mitch McConnell were defeated, and we have every reason to believe that President Obama will sign USA Freedom into law. Technology users everywhere should celebrate, knowing that the NSA will be a little more hampered in its surveillance overreach, and both the NSA and the FISA court will be more transparent and accountable than it was before the USA Freedom Act.

It’s no secret that we wanted more. In the wake of the damning evidence of surveillance abuses disclosed by Edward Snowden, Congress had an opportunity to champion comprehensive surveillance reform and undertake a thorough investigation, like it did with the Church Committee. Congress could have tried to completely end mass surveillance and taken numerous other steps to rein in the NSA and FBI. This bill was the result of compromise and strong leadership by Sens. Patrick Leahy and Mike Lee and Reps. Robert Goodlatte, Jim Sensenbrenner, and John Conyers. It’s not the bill EFF would have written, and in light of the Second Circuit's thoughtful opinion, we withdrew our support from the bill in an effort to spur Congress to strengthen some of its privacy protections and out of concern about language added to the bill at the behest of the intelligence community.

Even so, we’re celebrating. We’re celebrating because, however small, this bill marks a day that some said could never happen—a day when the NSA saw its surveillance power reduced by Congress. And we’re hoping that this could be a turning point in the fight to rein in the NSA.

#### Even Yoo concedes that the Freedom Act was a blow to presidential power.

Yoo 15 — John Yoo, Emanuel Heller Professor of Law at the University of California-Berkeley, Visiting Scholar at the American Enterprise Institute, former official in the Office of Legal Counsel of the U.S. Department of Justice, holds a J.D. from Yale Law School, 2015 (“The USA Freedom Act Would Take Us Back to the Pre-9/11 Security Status Quo,” *The Corner*—the *National Review* blog, May 15th, Available Online at http://www.nationalreview.com/corner/418462/usa-freedom-act-would-take-us-back-pre-911-security-status-quo-john-yoo, Accessed 08-13-2015)

I worry that the representatives who voted to pass the USA Freedom Act in the House do not understand its full import in terms of our national security. The bill practically repeals Section 215 of the Patriot Act, but makes it appear as if those who voted for the bill advanced security in some way. The result of the legislation’s enactment, however, would not be significantly different than if Section 215 were simply allowed to expire. Even before the Patriot Act, the government could get a warrant from a judge to get call metadata from a phone company. The Freedom Act requires phone companies to keep the calling records, but of course they do that already in order to bill customers. So the Freedom Act eliminates the advantages of Section 215 and practically restores the system that existed before. It is politically superficial but also substantively destructive.

### Extend: “Executive Flexibility Turn”

#### Unchecked executive power undermines global stability.

Knowles 9 — Robert Knowles, Acting Assistant Professor at New York University School of Law, holds a J.D. from the Northwestern University School of Law, 2009 (“American Hegemony and the Foreign Affairs Constitution,” *Arizona State Law Journal* (41 Ariz. St. L.J. 87), Spring, Available Online to Subscribing Institutions via Lexis-Nexis)

The hegemonic model also reduces the need for executive branch flexibility, and the institutional competence terrain shifts toward the courts. The stability of the current U.S.-led international system depends on the ability of the U.S. to govern effectively. Effective governance depends on, among other things, predictability. n422 G. John Ikenberry analogizes America's hegemonic position to that of a "giant corporation" seeking foreign investors: "The rule of law and the institutions of policy making in a democracy are the political equivalent of corporate transparency and [\*155] accountability." n423 Stable interpretation of the law bolsters the stability of the system because other nations will know that they can rely on those interpretations and that there will be at least some degree of enforcement by the United States. At the same time, the separation of powers serves the global-governance function by reducing the ability of the executive branch to make "abrupt or aggressive moves toward other states." n424

The Bush Administration's detainee policy, for all of its virtues and faults, was an exceedingly aggressive departure from existing norms, and was therefore bound to generate intense controversy. It was formulated quickly, by a small group of policy-makers and legal advisors without consulting Congress and over the objections of even some within the executive branch. n425 Although the Administration invoked the law of armed conflict to justify its detention of enemy combatants, it did not seem to recognize limits imposed by that law. n426 Most significantly, it designed the detention scheme around interrogation rather than incapacitation and excluded the detainees from all legal protections of the Geneva Conventions. n427 It declared all detainees at Guantanamo to be "enemy combatants" without establishing a regularized process for making an individual determination for each detainee. n428 And when it established the military commissions, also without consulting Congress, the Administration denied defendants important procedural protections. n429

In an anarchic world characterized by great power conflict, one could make the argument that the executive branch requires maximum flexibility to defeat the enemy, who may not adhere to international law. Indeed, the precedents relied on most heavily by the Administration in the enemy combatant cases date from the 1930s and 1940s - a period when the international system was radically unstable, and the United States was one of several great powers vying for advantage. n430 But during that time, the executive branch faced much more exogenous pressure from other great powers to comply with international law in the treatment of captured enemies. If the United States strayed too far from established norms, it would risk retaliation upon its own soldiers or other consequences from [\*156] powerful rivals. Today, there are no such constraints: enemies such as al Qaeda are not great powers and are not likely to obey international law anyway. Instead, the danger is that American rule-breaking will set a pattern of rule-breaking for the world, leading to instability. n431 America's military predominance enables it to set the rules of the game. When the U.S. breaks its own rules, it loses legitimacy.

#### Bad foreign policy decision-making outweighs and turns “*flexibility good.*”

Holmes 6 — Stephen Holmes, Walter E. Meyer Professor of Law at New York University School of Law, former Professor of Politics at Princeton University and Associate Professor of Government at Harvard University, holds a Ph.D. from Yale University, 2006 (“John Yoo’s Tortured Logic,” *The Nation*, April 13th, Available Online at <http://www.thenation.com/article/john-yoos-tortured-logic/>, Accessed 08-13-2015)

If the executive is not compelled by Congress and the courts to give plausible reasons for its actions, it may soon have no plausible reasons for its actions. It will lash out violently in the “war on terror,” but its choices will feel distressingly arbitrary. It will not establish an intelligent list of priorities, keep its powder dry or allocate scarce resources in a prudent and effective manner. Administration spokesmen have repeatedly explained that since 9/11 the risks of inaction have become greater than the risks of action. And Yoo agrees: “The costs of inaction can be extremely high–the possibility of a direct attack on the United States and the deaths of thousands of civilians.” But the inadequacy of this reasoning should be obvious.

The leap from inaction to action cannot possibly, on its own, guarantee a reduction of risk. Precipitous action may well produce deep commitments from which it will prove impossible or immensely costly to extricate ourselves. In a world of scarce resources and opportunity costs, moreover, every decision to act is a decision not to act. To commit Arabic speakers to the Iraqi theater, for example, is to withdraw them from other tasks, such as the manhunt for Osama bin Laden. To act more forcefully in one arena is to act less forcefully in another. Such trade-offs are seldom desirable, but they are often inevitable.

By dismantling checks and balances, along the lines idealized and celebrated by Yoo, the Administration has certainly gained flexibility in the “war in terror.” It has gained the flexibility, in particular, to shoot first and aim afterward. It has acted on disinformation and crackpot theories and utopian expectations that could perhaps have been corrected or moderated if traditional decision-making protocols had been respected and key policy-makers had not silenced dissident voices and sequestered themselves in an echo chamber. Yoo sees no danger in allowing a poorly educated and sketchily briefed President, perhaps surrounded by yes men and fed picked-over intelligence, to define unilaterally the principal threats facing the country. He does not worry about irreversible decisions taken impetuously and without eliciting a second opinion. But if the misbegotten Iraq War proves anything, it is the foolhardiness of allowing an autistic clique that reads its own newspapers and watches its own TV shows to decide, without outsider input, where to expend American blood and treasure–that is, to decide which looming threats to stress and which to downplay or ignore.

Yoo begins with the premise that the Constitution gives the President virtually unchecked power over foreign affairs. This is an alarming thesis, for all the reasons addressed. But it becomes even more ominous in the post-9/11 context. In the “war on terror,” as Yoo is the first to admit, the foreign front and the home front have become harder to distinguish. Infiltrators and saboteurs are no longer minor and peripheral to the war effort. They are the main enemy, and the battlefield on which we meet them emphatically includes US soil. As a result, the President’s war powers, if grotesquely distended and freed from oversight as Yoo would like, threaten to overwhelm and submerge the Constitution, not just abroad but also domestically. Only if our rulers were infallibly clairvoyant would it be safe to gamble in this reckless way not merely with our personal liberties but also, and perhaps more important, with our country’s national security in an age of multiple, unfamiliar and—we have every reason to fear—still metastasizing threats.

#### Presidents can’t effectively manage concentrated war powers — benefits are overstated.

Karabell 13 — Zachary Karabell, Head of Global Strategy at Envestnet—a financial services firm, Senior Advisor for Business for Social Responsibility, holds a Ph.D. in History and International Relations from Harvard University, 2013 (“Obama and the End of the Imperial Presidency,” *The Atlantic*, September 6th, Available Online at <http://www.theatlantic.com/politics/archive/2013/09/obama-and-the-end-of-the-imperial-presidency/279405/>, Accessed 08-13-2015)

There is, in fact, a direct line between the issues raised by Edward Snowden’s revelations of government spying on domestic emails and communications and the near-decision to launch missiles against Syria. This isn’t about whether such policies are the right ones. They were not decided in the right way. That is, the way they were decided assumes not just competence and integrity on the part of the executive but that in most cases, the president is better able to make better decisions than a deliberative body such as Congress. You may think our current Congress is pitiful, but that is always a risk. The Constitution doesn’t say that “Congress shall have the power to declare war … but only if it’s a good Congress.”

The point of the American system, at least in theory, is that too many factors play into key societal decisions to make it easy for individuals and institutions invested with great power to exercise that power lightly. That is more true than ever for the United States today.

In pure military terms, the United States can do whatever it wants to whomever it wants, and precious few other countries can do a thing about it. As Iraq and Afghanistan demonstrate, of course, overwhelming military power only gets you so far, unless you are willing to indiscriminately kill civilians and then govern the country you’ve destroyed. And even then, the risks of blowback and failure are large.

But in terms of firing missiles or deploying commandos or using drones or any number of military measures, the president can literally say go and it is done. Yes, he needs the consensus of his team, but the power is there. And once the missiles are flying, there is no turning back.

That type of power is almost impossible to manage well. The temptation to use it is great. We know that because we use it frequently. China, also powerful in its way, does not. Russia, still well-armed, does not. France did dispatch troops to Mali recently, but even with its nuclear arsenal and not inconsiderable military, force is not a primary option. Those domestic systems are not ones most of us would trade for, yet it bears remembering that they are much less tempted to use force to resolve intractable international issues, including dire human rights abuses.

### Extend: “Tyranny Turn”

#### “Tyrannophobia” is a straw person. An unbounded executive *does* destroy vital liberties even if it doesn’t result in worst-case tyranny.

Crocker 12 — Thomas P. Crocker, Associate Professor of Law at the University of South Carolina School of Law, holds a Ph.D. in Philosophy from Vanderbilt University and a J.D. from Yale Law School, 2012 (“Who Decides on Liberty?,” Connecticut Law Review (44 Conn. L. Rev. 1511), July, Available Online to Subscribing Institutions via Lexis-Nexis)

The tyrannophobia argument also conflates concern over deprivations of liberty with irrational fears of tyranny. That persons and institutions might be concerned to constrain executive officials from policies that impinge on fundamental liberties does not in any obvious way reflect "irrational beliefs" n145 about the prospects of tyranny. n146 Fear of dictatorship is not the same thing as concern that constitutional design and practice constrain governing officials from interfering with fundamental liberty. Nor are such fears the same as the belief that a president unconstrained by law is more likely to violate the People's liberties. Only by making this further identification—that concern over liberty is also "tyrannophobia"—can we make sense of their further claim that with some frequency welfare-increasing policies "are blocked by 'libertarian panics' and tyrannophobia." n147 With this identification, tyrannophobia becomes [\*1542] the view that constitutional culture—the inter-generational conversation that structures available understandings of the presidential office, and its powers and responsibilities, through constitutional forms that constrain the possibilities for executive discretion—would itself have to be a manifestation of tyrannophobia. Contrary to such a conclusion, it seems clear that American constitutional practice is not under the grips of irrational fear, even as it seeks to channel constraints on executive power through Madisonian constitutional forms.

In sum, the tyrannophobia argument attributes irrational phobia to those who adhere to constitutional principles and practices that assign responsibility for liberty to governing institutions other than the executive. On this view, expertise over security is no different from expertise over liberty, constrained not by reference to law or constitutional culture and traditions, but by the political stability of wealth. At root, however, tyrannophobia is a straw-man argument. It substitutes an emotional state—fear—for constitutional principles and practices that value commitment to legal constraint as a constitutive feature of the polity. If tyranny is the limit case for how things might go badly for a democratic republic, there are many lesser forms of executive overreach helpfully constrained by constitutional commitments shared by citizen and governing official alike. One need not posit irrational fear to believe that governing form matters to function, that law is a constitutive feature of our political practices and expectations, and that liberty is not a matter best left to the discretion of the unbounded executive.

#### Executive power *does* risk tyranny — Japanese internment proves.

Giraldi 12 — Philip Giraldi, Executive Director of the Council for the National Interest, Columnist for *The American Conservative*, former Central Intelligence Agency Case Officer and Army Intelligence Officer, holds a Ph.D. in Modern History from the University of London, 2012 (“Defending the Indefensible,” *The American Conservative*, September 13th, Available Online at <http://www.theamericanconservative.com/articles/defending-the-indefensible/>, Accessed 08-13-2015)

I suppose Posner would respond with a version of “it can’t happen here.” But the truth is that it can happen anywhere and does happen even if a genocidal dictatorship is unlikely to spring up in the United States. Guantanamo happened and continues to happen and Jose Padilla is testimony to the fact that government believes it can ignore the constitutional rights of any citizen. The list of states that have constitutions but that have nevertheless evolved into something like dictatorships is a long one. Those seizing control consistently cite a need for security and efficiency as their principal motives, not unlike the justifications offered by both Republicans and Democrats during the post 9/11 years. The restraints imposed by the US Constitution offer a legal recourse against a President Barack Obama or a Mitt Romney declaring a state of emergency and deciding that whole categories of citizens would benefit from being shipped off to reeducation camps. The White House would cry “terrorism!,” the media and congress would fall in line, and the poorly informed public would believe the fiction being dispensed. That is pretty much what Franklin D. Roosevelt did in 1942 with Japanese-Americans. There was no mob storming the Bastille at that time to protest the threatened fellow citizens and there would be little outcry now if selected minority groups were to be on the receiving end.

Executive primacy is by its very nature a dangerous zero sum game, with political power accruing to the president taken away from the American people, the judiciary, from congress, and from the states. The Posner formula enables bad decisions by the White House to become the unchallengeable norm while Posner himself personally provides intellectual legitimacy to a set of bad ideas not to mention criminal behavior. Consider the government fabrications that led to the rush to war with Iraq as an example of how fraud by government can work. Posner’s granting of de facto carte blanche to someone who, quite possibly by a set of curious chances, winds up in the Oval Office and is restrained only by the limits of his own popularity should be seen as a threat to every American, not as a necessary or inevitable advance in governance.

#### Even if full-scale tyranny is unlikely, an unchecked executive risks a soft dictatorship that destroys freedom.

Prakash and Ramsey 12 — Saikrishna B. Prakash, David Lurton Massee, Jr. Professor of Law and Sullivan and Cromwell Professor of Law at the University of Virginia School of Law, holds a J.D. from Yale Law School, and Michael D. Ramsey, Professor of Law at the University of San Diego School of Law, holds a J.D. from Stanford University, 2012 (“Book Review: The Goldilocks Executive,” *Texas Law Review* (90 Tex. L. Rev. 973), March, Available Online to Subscribing Institutions via Lexis-Nexis)

We agree that the chances of slipping into tyranny are low, but that does not prove Posner and Vermeule's point because (despite their efforts to argue otherwise) the United States retains the core of a Madisonian system that imposes legal limits on the President. We have less confidence that, were those legal limits to be lifted, the chances would not appreciably increase. It is true that Posner and Vermeule offer various plausible and specific ways that public opinion constrains the President, but while the particular methods of checking the Executive through public opinion seem important when linked with a Madisonian system (as Part II says), they do not seem all that persuasive without it. At minimum, what would happen if the constraints were lifted seems open to speculation.

Perhaps most importantly, we do not think the separated-powers constraints on the President are solely (or even mainly) designed to avoid full-scale executive tyranny. There can be executive abuses and material losses of freedom without all-encompassing abuses and total loss of freedom. A "soft" dictatorship is also to be feared. By putting the focus on "tyranny," the book's Chapter 6 sets up a bit of a straw man. Of course, a bloodthirsty dictator of the Hitler model is to be feared. But perhaps of more practical concern is a Hugo Chavez-type figure who operates to some extent within the constitutional framework but also abuses his authority and frequently overreaches to punish opponents and achieve his ends.

Posner and Vermeule admit that the soft dictatorship is a more plausible fear, n130 but they do little to assuage it. They believe that "an educated and leisured population, and the regular cycle of elections, will themselves check executive abuses." n131 Yet elsewhere they say only that "politics and public opinion at least block the most lurid forms of executive abuse." n132 In particular, one may doubt the effectiveness of majority opinion to check abuses against political minorities and unpopular views, and a legally unconstrained executive may be able to reward supporters and punish dissent in ways that make organizing popular opposition (even by a majority) difficult. Of course, the Madisonian system is not a sure check on such abuses either. But legal constraints that offer some hope of protection to dissenting views, and at least force a potentially abusive or self-dealing executive to work in conjunction with independent branches, seem to offer materially better assurance than the purely unconstrained Executive.

Of course, it is impossible to prove that the core Madisonian constraints have protected against executive tyranny (of the soft or hard kind) in the past. Perhaps, as Posner and Vermeule suggest, n133 the United States has merely been lucky, or its great wealth and other advantages have allowed it to [\*1007] overcome structural disadvantages in its political system. And it is equally speculative to say what might happen if the Madisonian constraints were removed. But, to harness a different cliche, we suggest that "if it's not broken, don't fix it." We do not see evidence that legal constraint renders the U.S. Executive fatally ineffective. Without opining about incremental changes to executive power, we doubt that a substantial case can be made for the legally unbound Executive that Posner and Vermeule appear to favor.