# 1AC

#### AUMF aff – Same as Kentucky round 6

# 2AC

## Solvency

**Obama will adhere to the plan - wants to rely on congressional authority**

**WSJ ‘12**

[Julian Barnes and Evan Perez. December 6. <http://online.wsj.com/article/SB10001424127887323316804578163724113421726.html> ETB]

Obama **administration officials, concerned about the legal justifications behind counterterrorism operations, have preferred to rely on congressional authority for the use of force against al Qaeda, seeing such authority** as more defensible and acceptable to allies.

## Terrorism

#### Plan key to flex

**Cronogue ‘12**

[Graham. Duke University School of Law, J.D. expected 2013; University of North Carolina B.A. 2010. 22 Duke J. Comp. & Int'l L. 377 2011-2012. ETB]

Though the President's inherent authority to act in times of emergency¶ and war can arguably make **congressional authorization of force**¶ unnecessary, it **is extremely important for the conflict against al-Qaeda and** **its allies**. First, as seen above, the existence of a state of war or national¶ emergency is not entirely clear and might not authorize offensive war¶ anyway. Next, assuming that a state of war did exist, specific **congressional authorization would** further **legitimate and guide the executive branch** in the prosecution of this conflict **by setting out exactly what Congress authorizes** and what it does not. Finally, **Congress should** specifically **set out what the President can and cannot do to limit his discretionary authority** **and prevent adding to the gloss on executive power**.¶ Even during a state of war, **a congressional authorization** for conflict¶ **that clearly sets out the acceptable targets and means would further** **legitimate the President's actions and help guide his decision making¶ during this new form of warfare.** Under Justice Jackson's framework from¶ Youngstown, presidential authority is at its height when the Executive is acting pursuant to an implicit or explicit congressional authorization. 74 In¶ this zone, the President can act quickly and decisively because he knows¶ the full extent of his power.75 In contrast, the constitutionality of¶ presidential action merely supported by a president's inherent authority¶ exists in the "zone of twilight." 76 **Without a congressional grant of power,** **the President's war actions are often of questionable constitutionality because Congress has not specifically delegated any of its own war powers to the executive.77**¶ **This** problem **forces the President to make complex judgments** **regarding the extent and scope of his inherent authority. The resulting uncertainty creates unwelcome issues of constitutionality that might hinder¶ the President's ability to prosecute this conflict effectively.** **In timesensitive**¶ and dangerous **situations**, where **the President** needs to make splitsecond¶ decisions that could fundamentally impact American lives and¶ safety, he **should not have to guess at the scope of his authority. Instead, Congress should provide a clear, unambiguous grant of power, which would mitigate many questions of authorization. Allowing the President to understand the extent of his authority will enable him to act quickly, decisively but also constitutionally.¶** Finally, a grant or denial of **congressional authorization will allow Congress to control the "gloss" on the executive power.** There is¶ considerable **tension between the President's constitutional powers** as¶ Commander in Chief **and Congress's war making powers**.7 8 This tension is **not readily resolved** simply **by looking at the Constitution**. Instead **courts look to past presidential actions and congressional responses when evaluating the constitutionality of executive actions**.80 Indeed Justice¶ **Frankfurter** **noted** in Youngstown that "**a systematic**, unbroken, **executive¶ practice**, long pursued to the knowledge of the Congress and never before¶ questioned ... **may be treated as a gloss on 'executive Power'** vested in the¶ President by § 1 of Art. II."8 Thus, **congressional inaction can be deemed as implicit delegation of war making power to the executive.**82 Whether the United States is in a state of war or not, **an authorization of force provides legitimacy and clarity to the war effort**. **If the President acts pursuant to such an authorization his authority is at its height**;¶ consequently, **he can operate with greater certainty that his actions are constitutional**.83 **Absent such a declaration, the President's power is much less clear.** **While the President has the authority to frame the conflict and he might still be able to act pursuant to his inherent powers, he is operating in¶ the zone of twilight.84 Congressional authorizations remove this uncertainty by stamping specific acts with congressional approval or disapproval. This process also allows Congress to exert control over what the President can do in the future and prevents the "gloss" that comes from congressional acquiescence.¶**

## 2ac- Restrict

**Plan is a statutory restriction**

**Bellinger III, 2011** [John B. Adjunct Senior Fellow for International and National Security Law, Council on Foreign Relations, “Revisiting a Stale Counterterrorism Law”, <http://www.cfr.org/counterterrorism/revisiting-stale-counterterrorism-law/p25742>, BJM]

**A revised AUMF** can certainly reference the 9/11 attacks. But my view is that it's not intended to be an open-ended legal authority to carry out military operations against terrorists or others all around the world, as some critics suggest. **It is important to bring the statutory authority in line with the reality** of our military operations. Administration lawyers at the Defense Department and the Justice Department have to strain very hard when reviewing the legal authority for our military or intelligence agencies to go after certain individuals or groups to find that affiliation with the original 9/11 planners.¶ The point is not to have a huge unrestricted authority that opens up new wars, but simply to make plain that our military and intelligence services have clear statutory authority to do what it is they are already doing today. It would be possible to rely on constitutional authority; I have absolutely no question about that. But it is useful and important for Congress to be authorizing what government agencies are doing. If they are not already over the line today, as far as eking out every last bit of authority from the ten-year-old AUMF, then it is likely to happen very soon.

**C/I --- Restriction is limitation, NOT prohibition**

**CAC 12**,COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, COUNTY OF LOS ANGELES, Plaintiff and Respondent, v. ALTERNATIVE MEDICINAL CANNABIS COLLECTIVE et al., Defendants and Appellants, DIVISION ONE, 207 Cal. App. 4th 601; 143 Cal. Rptr. 3d 716; 2012 Cal. App. LEXIS 772

**We disagree with County that in using the phrases** “further **restrict** the location or establishment” and “regulate the location or establishment” in [\*615] section 11362.768, subdivisions (f) and (g), **the Legislature intended to authorize local governments to ban all medical marijuana dispensaries** that are otherwise “authorized by law to possess, cultivate, or distribute medical marijuana” (§ 11362.768, subd. (e) [stating scope of section's application]); **the Legislature did not use the words “ban” or “prohibit.” Yet County cites dictionary definitions of** “regulate” (to govern or direct according to rule or law); “regulation” (controlling by rule or restriction; a rule or order that has legal force); “**restriction” (a limitation or qualification, including on the use of property);** “establishment” (the act of establishing or state or condition of being established); “**ban” (to prohibit); and “prohibit” (to forbid by law; to prevent or hinder) to** attempt to **support its interpretation**. **County then concludes that “the ordinary meaning** [\*\*\*23] **of** the terms, ‘**restriction**,’ ‘regulate,’ and ‘regulation’ **are consistent with a ban or prohibition** against the opening or starting up or continued operation of [a medical marijuana dispensary] storefront business.” **We disagree.**¶CA(9)(9) **The ordinary meanings of “restrict” and “regulate” suggest a degree of control or restriction falling short of** “banning,” **“prohibiting,”** “forbidding,” or “preventing.” **Had the Legislature intended to include an outright ban** or prohibition among the local regulatory powers authorized in section 11362.768, subdivisions (f) and (g), **it would have said** so. **Attributing the usual and ordinary meanings to the words used** in section 11362.768, subdivisions (f) and (g), construing the words in context, attempting to harmonize subdivisions (f) and (g) with section 11362.775 and with the purpose of California's medical marijuana [\*\*727] statutory program, and bearing in mind the intent of the electorate and the Legislature in enacting the CUA and the MMP, **we conclude that** HN21Go to this Headnote in the case.**the phrases** “further **restrict** the location or establishment” and “regulate the location or establishment” in section 11362.768, subdivisions (f) and (g) **do not authorize a per se ban** at the local level. The Legislature [\*\*\*24] decided in section 11362.775 to insulate medical marijuana collectives and cooperatives from nuisance prosecution “solely on the basis” that they engage in a dispensary function. To interpret the phrases “further restrict the location or establishment” and “regulate the location or establishment” to mean that local governments may impose a blanket nuisance prohibition against dispensaries would frustrate both the Legislature's intent to “[e]nhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects” and “[p]romote uniform and consistent application of the [CUA] among the counties within the state” and the electorate's intent to “ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes” and “encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana.”

## Politics

#### Won’t pass - election fears and Obama’s approach prolongs Republican backlash

Kaplan 10-3

[Rebecca, serves as City Councilmember At-Large for Oakland, California, CBS News, “Why is it so difficult to end the government shutdown?” <http://www.cbsnews.com/8301-250_162-57605784/why-is-it-so-difficult-to-end-the-government-shutdown/>]

As the government shutdown enters its third day, **Democrats and Republicans seem no closer to bridging their differences than they were when the shutdown began** early Tuesday morning. **It's difficult to say when the standoff will end**. The two **shutdowns** that occurred **in 1995 and 1996 lasted** a total of **27 days. And** back then, the **conditions** for getting to a deal **were much better**.¶ Republicans won the House and Senate in the 1994 midterm elections - the first time the party had a House majority in 40 years. That set up a showdown between House Speaker Newt Gingrich, who had run on a conservative platform, and then-President Bill Clinton. That dispute came in 1995, when Gingrich wanted to balance the budget in a short time frame and Clinton wanted money spent on Democratic priorities. After two separate shutdowns and several weeks, the pressure was too high on Republicans and they cut a deal with Clinton: he would get his priorities, but would have to balance the budget for 10 years.¶ "They were kind of testing each other," said former Rep. Tom Davis, R-Va., who was a freshman in Congress at the time. Afterward, Davis noted, Clinton and Gingrich would go on to work together on a host of issues including welfare reform. The economy boomed, helping to mitigate budget issues.¶ Republicans who were lawmakers or aides in Congress in 1995 cite a variety of reasons that the shutdown ended. For Davis, it was the mounting public pressure on Republicans and their rapidly dropping poll numbers that helped spur a compromise. "There was a revolt, and they simply couldn't hold their members after a while," he said of the Republican leadership. It didn't help that Republicans were afraid of losing the first majority they'd had in decades. Davis recalls going to former Rep. Dick Armey, then the Republican Majority leader from Texas, and saying, "We're getting our butts kicked."¶ But Bob Walker, then a Republican congressman from Pennsylvania, had a different take from the conventional narrative that Republicans had caved. "We stayed focused in 1995 on the fact that what the end result for us was to get a pathway to a balanced budget, and so in the end when we got an agreement to just begin the process of moving toward a balanced budget," he said. "We declared victory on that and we were prepared to then get the government back into action."¶ **This time, it's not so easy for Republicans to achieve even a piece of their chief goal** - to dismantle the Affordable Care Act. The law is President Obama's signature policy achievement, and its constitutional authority was affirmed by the Supreme Court. Democrats in the Senate and Mr. Obama himself have proven with the shutdown fight that they are determined to keep the law intact.¶ "We didn't get an immediate balanced budget obviously but what we got was a seven-year plan toward a balanced budget that then ended up being accomplished in there years," Walker said of the House Republicans in 1995. But nowadays, he said, "I'm not certain I see where the bottom lines are."¶ As shutdown continues, Obama says Wall Street "should be concerned"¶ Government shutdown: Is Congress acting selfishly?¶ Yet another explanation of why the 1995-1996 shutdown ended had to do with presidential politics. Former Senate Majority Leader Bob Dole, R-Kansas, was eyeing a presidential bid against Clinton in 1996.¶ "He just got sick of it. I think he started seeing that this was directly impacting his ability to run for president," said John Feehery, a political strategist who was the communications director for then-House Majority Whip Tom DeLay during the shutdown. Dole was key to engineering an end to the shutdown, a fact that was apparent to everyone - even Democrats.¶ "It was a huge factor," said American University professor Patrick Griffin, who served as Clinton's assistant for legislative affairs from 1994 to 1996. "We could always sense that there was no love lost between him and [Gingrich] - on the [Contract with America], on the shutdown. It was just not Dole's style...he was wasting time, he was not being able to get his campaign."¶ If anything, presidential politics will lengthen the shutdown. Mr. **Obama has no re-election campaign** to worry about - like Clinton did at the time - **and Republican** presidential **campaigns cannot be won without pleasing an active base that hates the healthcare law. It would be difficult for any Republican to help broker a compromise that preserved most of Obamacare and then woo Republican primary voters**.¶ **Not that many Republicans feel as if they can work with** Mr. **Obama**. "Many people in Congress ...believe that the president treats them with contempt and so the atmosphere for negotiating is not very good. That's a big difference," said Walker.¶ House Speaker John Boehner, R-Ohio, and Mr. Obama have tried and failed to negotiate big deals several times**. Since the** government **shut down** on Tuesday, **they've barely talked** aside from a meeting the president held with top congressional leaders Wednesday afternoon. And a recent Politico story that detailed how Boehner and Senate Majority Leader Harry Reid, R-Nev., worked together to preserve congressional subsidies for healthcare coverage will likely have poisoned the well between the leaders of the two chambers.¶ That wasn't the case with Gingrich and Clinton, despite their differences. "Both President Clinton and Speaker Gingrich had a pretty civil and reasonably good personal relationship," said Mack McLarty, Clinton's first chief of staff as president. Both hailed from the south, and had "very inquisitive minds" about the world around them.¶ Perhaps **the biggest roadblock to a deal**, however, **is the** increasingly partisan nature **of Congress caused by congressional redistricting that puts many members into seats where fewer and fewer constituents are from the opposite party**. In 1995, more than 34 percent of Republican representatives in the House were elected in districts that had voted for Clinton as president. Now, only seven percent of House members come from districts that voted for Mr. Obama.¶ There's a larger proportion of hardline conservatives in the House in 2013, and they have so far been more successful at driving the agenda than their more moderate counterparts. "The-rank-and-file members are sick and tired of the rebels running the thing but there's too many of them who vote with the rebels to protect their flank," Feehery said, referring to Republicans who are worried about receiving a primary challenge from the right.¶ **With so many factors working against a deal, it's hard to see a way out of the crisis**. The only thing that's guaranteed to inject some urgency into the debate is the looming deadline to raise the debt ceiling on Oct. 17. While a government shutdown can have minimal effects on the financial markets, the possibility of the U.S. defaulting is much more likely to cause financial panic that could push lawmakers into a deal.¶ Plus, **if the spending and debt ceiling deals** morph into one**, there may be more issues on the table to discuss such as the sequester and the whole federal budget. That**, Walker said, **will** give Republicans more areas where they can look for victory.

#### The plan is a concession – dems would have to vote for the plan which appeases the GOP – causes a deal

Todd 10-3

“A Potential Way out,” <http://firstread.nbcnews.com/_news/2013/10/03/20801495-first-thoughts-a-potential-way-out>

“We have to get something out of this”: This is where Rep. Marlin Stutzman’s (R-IN) amazing and revealing quote comes into play. “We’re not going to be disrespected,” the Tea Party congressman said, per NBC's Frank Thorp. “We have to get something out of this. And I don’t know what that even is.” Let that quote sink: Stutzman is admitting that conservatives don’t even know what they want out of this fight. As we said yesterday, the deeper a hole you did, the harder it is to get out because suddenly you get this war mentality where you can’t fathom “surrendering” to the other side’s terms. And what Boehner seems to be almost BEGGING Democrats for is a fig leaf of something so that Republicans can get “something” out of this. If there is a “something” that Democrats MIGHT offer, keep an eye on the medical-device tax. It’s a way for Senate Democrats to recruit Senate Republicans to make a statement to House Republicans. Reid can say it is NOT connected to the shutdown, but they pass it as a stand-alone, send it to the House, and let Boehner spin it any way he wants to simply get the government open.

#### Their link is non-unique

NPR 9/21

“Have Obama's Troubles Weakened Him For Fall's Fiscal Fights?” http://www.ideastream.org/news/npr/224494760

President Obama has had a tough year. He failed to pass gun legislation. Plans for an immigration overhaul have stalled in the House. He barely escaped what would have been a humiliating rejection by Congress on his plan to strike Syria.¶ Just this week, his own Democrats forced Larry Summers, the president's first choice to head the Federal Reserve, to withdraw.¶ Former Clinton White House aide Bill Galston says all these issues have weakened the unity of the president's coalition.¶ "It's not a breach, but there has been some real tension there," he says, "and that's something that neither the president nor congressional Democrats can afford as the budget battle intensifies."¶ Obama is now facing showdowns with the Republicans over a potential government shutdown and a default on the nation's debt. On Friday, the House voted to fund government operations through mid-December, while also defunding the president's signature health care law — a position that's bound to fail in the Senate.¶ As these fiscal battles proceed, Republicans have been emboldened by the president's recent troubles, says former GOP leadership aide Ron Bonjean.

#### PC isn’t key and Obama isn’t spending it

Allen, 9/27

Politics reporter for Politico (Jonathan, “President Obama’s distance diplomacy” <http://www.politico.com/story/2013/09/government-shutdown-barack-obama-house-gop-97483.html?hp=t3_3>)

The White House’s distance diplomacy with Republicans is an approach that tacitly acknowledges three inescapable realities: There’s no one to negotiate with on the GOP side; Obama’s direct involvement in a pact would poison it for many rank and file Republicans; and Democrats don’t trust him not to cut a lousy deal.¶ Indeed, Democrats are urging Obama to stay at arm’s length from Congress so there’s no confusion over his message that he won’t negotiate on an increase in the debt limit, which the nation is expected to breach as early as Oct. 17 without legislative action.¶ “I believe the president has made it very clear, as we have tried to make it clear: There are no negotiations. We’re through,” Senate Majority Leader Harry Reid (D-Nev.) told POLITICO.¶ In past installments of the fiscal-failure soap opera, overheated rhetoric about government shutdowns and a default on the national debt has been matched by sober and direct deal-making behind the scenes — usually in the form of a virtual handshake between Vice President Joe Biden and Senate Minority Leader Mitch McConnell.¶ In the winter 2010 debate over tax cuts, Biden and McConnell agreed to extend all of the Bush-era tax cuts for two years, infuriating the left. In 2011, Boehner and Obama secretly discussed for weeks a possible grand-bargain deal — but when the details were leaked, Democrats were furious and the negotiations fell apart. And in 2012, Biden and McConnell averted the so-called fiscal cliff — but that greatly upset Reid, who believed the White House gave away too much to Republicans whose backs were against the wall.¶ Indeed, many Democrats had buyer’s remorse on aspects of those agreements, particularly a budget sequestration plan that has squeezed domestic and military spending, and the locking in of much of the Bush tax rates.¶ When Chief of Staff Denis McDonough and other senior White House aides quietly discussed budget issues with a group of Senate Republicans earlier this year, top Democrats believed it made little sense to continue negotiations that appeared to be going nowhere and didn’t seem likely to help their party.¶ So they’ve asked Obama himself to steer clear of this round of the debt fight and try to force Republicans to come to him. The Senate, on a party line 54-44 vote on Friday, sent a bill that would keep the government operating but dropped a House provision defunding Obamacare. Now the House is expected to load up the measure with more provisions that aren’t acceptable to Democrats — though it has been hard for House GOP leaders to herd their troops on a budget bill and a separate plan to raise the debt ceiling.¶ “You first need the Republicans to have a position to negotiate – they don’t yet,” Sen. Chuck Schumer (D-N.Y.), who often advises the White House on strategy, said Friday when asked about Obama’s posture. “Until the House Republican Caucus figures out what it wants to do, nobody can deal with them.”¶ Other than a terse phone call to Speaker John Boehner last Friday to reiterate that he won’t negotiate on the debt limit, Obama hasn’t talked to House Republicans — the key constituency in the fight.¶ The White House has let Reid take the lead in the latest fights, even scrapping a potential meeting at the White House with Obama and the three other congressional leaders to allow the process to play out on Capitol Hill. With Republicans fighting with each other over Obamacare, Democrats believe it makes far more sense to keep the focus on the GOP intraparty warfare, rather than risk putting Obama middle of a politically sensitive negotiation.¶ Republicans sourly note that Obama has been quicker to talk with Russian President Vladimir Putin — and now Iranian President Hassan Rouhani — than with House Speaker John Boehner.¶ “Grandstanding from the president, who refuses to even be a part of the process, won’t bring Congress any closer to a resolution,” said Brendan Buck, a spokesman for House Speaker John Boehner.¶ When McDonough went to the Hill this week for closed-door talks, it was to reassure fellow Democrats that the president wouldn’t fold early, as he’s been accused of doing in past budget battles.¶ Obama isn’t expected to meet with congressional leaders until after the Tuesday deadline to stop a government shutdown.¶ Asked if he believed that Obama would eventually have to engage directly in the fiscal fights, Reid said: “Not on the debt ceiling and not on the CR. Maybe on something else – but not these two. We have to fund the government and pay our bills.”¶ Whether Obama can sustain his no-negotiation position on the debt ceiling remains to be seen. Senate Republicans — even those who have balked at calls to use the threat of a government shutdown to defund Obamacare — say the president won’t get a clean debt ceiling increase.¶ “It’s what’s wrong with the government right now,” said Sen. Roy Blunt (R-Mo.), who voted to break a GOP-led filibuster blocking the continuing resolution. “I suppose the Congress might say we don’t want a negotiation on the debt ceiling either.”¶ If Obama can’t get 60 votes in the Senate for a clean debt ceiling increase, he will very likely to have to engage in direct talks with Republicans, even Democrats privately concede.¶ But for now, Democratic leaders say the president is doing what he has to: Making speeches to attack Republicans, and letting his allies on the Hill deal with the nitty-gritty of legislating and horse-trading.¶ Republican Rep. Mike Rogers (R-Mich.), who has worked with the White House on national security issues, says the president’s always had a “laissez-faire” approach to Congress.

#### No impact – multiple factors check

FXStreet.com, 9/25

An investing website (“4 Reasons Why You Shouldn't Worry Over This Year's Debt Ceiling Deadline” <http://www.fxstreet.com/analysis/piponomics/2013/09/25/>)

The U.S. debt ceiling deadline may be looming like dark clouds over the market horizon, but I've found a few reasons why this issue might not be such a big deal after all.¶ 1. In 2011 the market was also dealing with:¶ Back when the debt ceiling issue popped up in 2011, risk appetite was really low since markets were also troubled by Greece's potential default, Portugal's and Japan's debt downgrades, the prospect of another global recession, plus ongoing riots in the U.K. Clearly, the global economy had more problems than a math book!¶ This time around though, market sentiment is much different as major economies like the euro zone, the U.K., and even Japan and China are all looking at optimistic economic growth prospects. With that, the debt ceiling issue might simply make a tiny dent in risk appetite.¶ 2. The Fed is still stimulating the markets.¶ In the FOMC statement last week, the Fed decided to keep supporting the U.S. economy by refusing to taper its monthly asset purchases. Aside from helping sustain the progress in lending and spending, this could eventually stimulate the global economy as it would also ensure healthy demand and robust trade activity.¶ 3. The Dollar Index is hinting at a repeat of history.¶ If you look at the USDX chart you'll see that the dollar fell 200 pips from mid-July until early August when the debt ceiling deadline was due. It then encountered support at the 74.00 psychological area and even reached the 80.00 area by October.¶ This time around the USDX is consolidating at the 81.00 support on the daily chart. If history is to repeat itself, then the 200-pip fall from early September has already run its course. Does this mean that we're about to see a dollar rally soon?¶ 4. We've seen this before.¶ In 2011 the U.S. government alleviated the markets' fears by raising the debt ceiling and promising to reduce future increases in government spending. Then, in 2013, they got over the fiscal cliff hurdle by passing a last-minute bill that includes a $600 billion tax revenue in a span of ten years. And then there's the budget sequestration issue, which has gone relatively smoothly since early this year despite the onslaught of criticism.

#### XO solves

Weisenyhal 9/30

(Joe Weisenthal 9/30, Executive Editor for Business Insider, “It Increasingly Looks Like Obama Will Have To Raise The Debt Ceiling All By Himself,” <http://www.businessinsider.com/it-increasingly-looks-like-obama-will-have-to-raise-the-debt-ceiling-all-by-himself-2013-9>)

With no movement on either side and the debt ceiling fast approaching, there's increasing talk that the solution will be for Obama to issue an executive order and require the Treasury to continue paying U.S. debt holders even if the debt ceiling isn't raised.¶ Here's Greg Valliere at Potomac Research:¶ HOW DOES THIS END? What worries many clients we talk with is the absence of a clear end-game. We think three key elements will have to be part of the final outcome: First, a nasty signal from the stock market. Second, a daring move from Barack Obama to raise the debt ceiling by executive order if default appears to be imminent. Third, a capitulation by Boehner, ending the shut-down and debt crisis in an arrangement between a third of the House GOP and virtually all of the Democrats. ¶ Valliere isn't the only one seeing this outcome.¶ Here's David Kotok at Cumberland Advisors:¶ We expect this craziness to last into October and run up against the debt limit fight. In the final gasping throes of squabbling, we expect President Obama to use the President Clinton designed executive order strategy so that the US doesn’t default. There will then ensue a protracted court fight leading to a Supreme Court decision. The impasse may go that far. This is our American way. “Man Plans and God Laughs” says the Yiddish Proverb.¶ Indeed, back in 2011, Bill Clinton said he'd raise the debt ceiling by invoking the 14th Amendment rather than negotiate with the House GOP.¶ This time around, again, Clinton is advising Obama to call the GOP's bluff.

#### PC is low and decreasing

Steinhauser, 9/26

CNN Political Editor (Paul, “Obama's support slips; controversies, sluggish economy cited” <http://www.cnn.com/2013/09/26/politics/cnn-poll-of-polls-obama/?hpt=po_c2>)

As he battles with congressional Republicans over the budget and the debt ceiling, and as a key component of his health care law kicks in, new polling suggests that President Barack Obama's standing among Americans continues to deteriorate.¶ The president's approval rating stands at 45%, according to a CNN average of four national polls conducted over the past week and a half. And a CNN Poll of Polls compiled and released Thursday also indicates that Obama's disapproval rating at 49%.¶ In the afterglow of his re-election and second inauguration, the percentage of those approving of Obama's job performance hovered in the low 50s as the year began, according to CNN Poll of Poll averages.¶ But his numbers slipped to the upper 40s by spring and now have edged down to the mid 40s. At the same time, his disapproval numbers have edged up from the low 40s to right around the 50% mark.¶ Anxiety and skepticism over the Affordable Care Act, better known as Obamacare, continuing concerns over the sluggish economy, and a drop in the president's approval on foreign policy -- once his ace in the hole -- all appear to be contributing to the slide of Obama's general approval rating.¶ "Not a precipitous drop, but more like a continued erosion in the president's numbers," says CNN Chief Political Correspondent Candy Crowley. "The Boston Marathon bombings, Edward Snowden's 'big brother' revelations, the 'non-coup' in Egypt, the 'now we bomb, now we don't' policy in Syria, an economic recovery that remains disappointing, the uncertainty of how/what will change under the new health care system, shall I go on?"¶ "It all adds up to an awful lot of uncertainty and unfairly or not, uncertainty tends to breed lower poll numbers for the guy in charge," added Crowley, anchor of CNN's "State of the Union."¶ Besides being the main indicator of a president's standing with the public, a presidential approval rating is a good gauge of his clout in dealing with Congress.¶ The drop in his numbers comes as the president pushes back against attempts by congressional Republicans to use deadlines to keep the federal government funded and to extend the nation's debt ceiling to try and defund the health care law.¶ A slew of national polls conducted this month indicate that a majority doesn't support shutting down the government in order to defund Obamacare.¶ But if the fight shifts to the debt ceiling, public opinion appears to turn against the president, who reiterated on Thursday that he will not negotiate with the GOP in Congress over extending the debt ceiling.

## 2AC Warfighting DA

#### Obama is weak now - sending global signals of weakness and uncertainty

Forbes 9/1

<http://www.forbes.com/sites/dougschoen/2013/09/01/weak-on-syria-weak-in-the-world/> ETB

Put another way, the President made it clear a year ago that there was a red line that the Syrians should not cross. All evidence suggests that they have surely crossed it and instead of striking, the President lectures the American people, and indeed the world, on American democracy.¶ Indeed, just this morning, a Syrian state state-run newspaper called Obama’s decision to seek Congressional approval before taking military action “the start of the historic American retreat.” It doesn’t get clearer than that.¶ This is not a president who shies away from using his executive power. He has altered ObamaCare, pushed his gun control agenda to strengthen national background checks, delayed the deportation of illegal immigrants when Congress wouldn’t agree amongst many other examples. But he has now suddenly decided that before he takes action, action that is within his purview, he is going to seek Congressional approval that is almost impossible to predict as to whether it will be granted or not.¶ If Obama really wanted to go ahead he would have brought congress back into session immediately and not waited more than 10 days thereby giving the Syrians time to plan for an attack – should one ultimately come. And even then, Obama has made it clear any such attack will be limited in nature and scope and will not involve regime change.¶ It follows that the message Obama’s speech yesterday sends is a muddled one at best.¶ It said to the mullahs in Iran and their Supreme Leader Ali Khamenei that they can continue to pursue their nuclear program by enriching uranium and refining plutonium without having to fear that they will be precipitously attacked by the US.¶ And to Russia’s President Putin, who has been an unbendable ally of Assad, providing him with arms and anti-aircraft weaponry, Obama has shown that the balance of power in the Middle East has almost certainly shifted away from the US. This is all the more alarming as Putin said just yesterday that the idea that the Syrian regime used chemical weapons is “absolute nonsense.”¶ What’s more, with a totally incoherent American policy on Egypt wherein it is unclear who and what we support, the US’s approach to the Syria further paints a bleak picture of American power and potency. Indeed, with our only real achievement in the region being the recent appearance of convincing the Arabs and Israelis to come to the peace table, an image of American uncertainty is radiating across the globe.¶ And although this would be a serious accomplishment if progress is made, our inaction on Syria signals to Israel, one of our strongest allies, that we are not willing to stick our neck out for them, their safety and way of life.¶ To our allies around the world who have said that if we do not stand firm we will send the wrong message to the Syrians, Obama offered not much of a response other than to tell them, in so many words, that they may well have to go it alone.¶ The US has not been sending clear messages. And though it may be apparent to me that the President’s move was calculated to force responsibility on a reluctant Congress and to play to 80% of the American people who have said in polls that they are against intervention in Syria, that does not mean that the US is offering anything but a confused image of our mission in the world to both our allies and foes.¶ Thus, in the short term the President may have managed to escape from the political quandary he faces. But in the longer term, America looks weaker, feckless and more uncertain.¶ President Obama has, if nothing else, compounded the view of a weak leader heading an unsure nation. This is an image we can ill afford to project.

#### Stronger statutory checks on Presidential war powers increase credibility

Waxman 13

Matthew C. Waxman 13, Professor of Law at Columbia Law School; Adjunct Senior Fellow for Law and Foreign Policy, Council on Foreign Relations, “The Constitutional Power to Threaten War”, Forthcoming in Yale Law Journal, vol. 123 (2014), 8/25/2013, PDF

A second argument, this one advanced by some congressionalists, is that stronger legislative checks on presidential uses of force would improve deterrent and coercive strategies by making them more selective and credible. The most credible U.S. threats, this argument holds, are those that carry formal approval by Congress, which reflects strong public support and willingness to bear the costs of war; requiring express legislative backing to make good on threats might therefore be thought to enhance the potency of threats by encouraging the President to seek congressional authorization before acting.181 A frequently cited instance is President Eisenhower’s request (soon granted) for standing congressional authorization to use force in the Taiwan Straits crises of the mid- and late-1950s – an authorization he claimed at the time was important to bolstering the credibility of U.S. threats to protect Formosa from Chinese aggression.182 (Eisenhower did not go so far as to suggest that congressional authorization ought to be legally required, however.) “It was [Eisenhower’s] seasoned judgment … that a commitment the United States would have much greater impact on allies and enemies alike because it would represent the collective judgment of the President and Congress,” concludes Louis Fisher. “Single-handed actions taken by a President, without the support of Congress and the people, can threaten national prestige and undermine the presidency. Eisenhower’s position was sound then. It is sound now.”183 A critical assumption here is that legal requirements of congressional participation in decisions to use force filters out unpopular uses of force, the threats of which are unlikely to be credible and which, if unsuccessful, undermine the credibility of future U.S. threats. A third view is that legal clarity is important to U.S. coercive and deterrent strategies; that ambiguity as to the President’s powers to use force undermines the credibility of threats. Michael Reisman observed, for example, in 1989: “Lack of clarity in the allocation of competence and the uncertain congressional role will sow uncertainty among those who depend on U.S. effectiveness for security and the maintenance of world order. Some reduction in U.S. credibility and diplomatic effectiveness may result.”184 Such stress on legal clarity is common among lawyers, who usually regard it as important to planning, whereas strategists tend to see possible value in “constructive ambiguity”, or deliberate fudging of drawn lines as a negotiating tactic or for domestic political purposes.185 A critical assumption here is that clarity of constitutional or statutory design with respect to decisions about force exerts significant effects on foreign perceptions of U.S. resolve to make good on threats, if not by affecting the substance of U.S. policy commitments with regard to force then by pointing foreign actors to the appropriate institution or process for reading them.

#### Legitimacy key to sustainable counter terrorism policy

Chesney et al. ‘13

[Robert Chesney is a ¶ professor at the University ¶ of Texas School of Law, a ¶ nonresident senior fellow ¶ of the Brookings Institution, ¶ and a distinguished scholar ¶ at the Robert S. Strauss ¶ Center for International ¶ Security and Law. He is a ¶ cofounder and contributor to ¶ the Lawfare Blog and writes ¶ frequently on topics relating ¶ to US counterterrorism ¶ policy and law. Jack Goldsmith is the Henry ¶ L. Shattuck Professor of ¶ Law at Harvard Law School ¶ and a member of the Hoover ¶ Institution’s Jean Perkins ¶ Task Force on National ¶ Security and Law. He served ¶ in the Bush administration as ¶ assistant attorney general, ¶ Office of Legal Counsel, from ¶ 2003 to 2004 and as special ¶ counsel to the general ¶ counsel from 2002 to 2003. Matthew C. Waxman ¶ is a professor of law at ¶ Columbia Law School, ¶ an adjunct senior fellow ¶ at the Council on Foreign ¶ Relations, and a member ¶ of the Hoover Institution’s ¶ Jean Perkins Task Force ¶ on National Security and ¶ Law. He previously served ¶ in senior positions at the ¶ State Department, Defense ¶ Department, and National ¶ Security Council. Benjamin Wittes is a senior ¶ fellow in governance ¶ studies at the Brookings ¶ Institution, a member of ¶ the Hoover Institution’s ¶ Jean Perkins Task Force ¶ on National Security and ¶ Law, and the editor in chief ¶ of the Lawfare Blog. Jean Perkins Task Force on National Security and Law. <http://media.hoover.org/sites/default/files/documents/Statutory-Framework-for-Next-Generation-Terrorist-Threats.pdf> ETB]

While we believe there will be a need for a new AUMF, and while we discuss ¶ options for such a new statute in Parts II and III, we first pause to note the general ¶ downsides of a new AUMF. As the discussion of inherent presidential power ¶ implies, a new statutory framework for presidential uses of force against newly ¶ developing terrorist threats might diminish presidential flexibility and discretion ¶ at the margins. At the same time, of course, it enhances the legitimacy of presidential action in domestic courts and with domestic public opinion. ¶ This constraint-legitimacy tradeoff is commonplace. And to the extent that the ¶ constraint achieves legitimacy it promotes sustainable counterterrorism policy, politically and legally, over the long term. A strong statutory basis makes it less likely that Congress or courts will intervene later with constraints that dangerously hamper the president’s agility to respond to threats.

## CP

**Resolved means by vote**

**Webster’s 1998**

Webster’s Revised Unabridged Dictionary, 1998 (dictionary.com)

Resolved: 5**. To express, as an opinion or determination, by resolution and vote; to declare or decide by a formal vote; -- followed by a clause**; as, the house resolved (or, it was resolved by the house) that no money should be apropriated (or, to appropriate no money).

**Should means ought**

Howard 5

Taylor and Howard, 05 - Resources for the Future, Partnership to Cut Hunger and Poverty in Africa (Michael and Julie, “Investing in Africa's future: U.S. Agricultural development assistance for Sub-Saharan Africa”, 9/12, http://www.sarpn.org.za/documents/d0001784/5-US-agric\_Sept2005\_Chap2.pdf)  
Other legislated DA earmarks in the FY2005 appropriations bill are smaller and more targeted: plant biotechnology research and development ($25 million), the American Schools and Hospitals Abroad program ($20 million), women’s leadership capacity ($15 million), the International Fertilizer Development Center ($2.3 million), and clean water treatment ($2 million). Interestingly, in the wording of the bill, Congress uses the term shall in connection with only two of these eight earmarks; the others say that USAID should make the prescribed amount available. **The difference between shall and should may have legal significance—one is clearly mandatory while the other is a strong admonition**—but it makes little practical difference in USAID’s need to comply with the congressional directive to the best of its ability.

**CP forces prez to rely on article 2 authority, which doesn’t solve terrorism or legitimacy and links to politics**

**Chesney et al. ‘13**

[Robert Chesney, Jack Goldsmith, Matthew C. Waxman, and Benjamin Wittes. Jean Perkins Task Force on National Security and Law. <http://media.hoover.org/sites/default/files/documents/Statutory-Framework-for-Next-Generation-Terrorist-Threats.pdf> ETB]

**Consider** first the option of **Congress doing nothing**. **This is**, at bottom, **a ¶ choice to address extra-AUMF threats through a combination of increasingly ¶ strained executive branch interpretations of the AUMF, law enforcement ¶ and intelligence measures, and whatever supplemental military force the ¶ president can and will assert based on his Article II authorities**. It is our ¶ contention that **at some point even strained interpretations of the AUMF will ¶ not be possible, and that even before we reach that point, the strained ¶ interpretations will call into question the legitimacy of congressional and ¶ democratic backing for the president’s uses of force. That leaves law ¶ enforcement measures and Article II powers, which in combination are ¶ far from ideal.¶** To be very clear, we do not claim that all terrorism-related threats can or ¶ should be dealt with militarily. Law enforcement and intelligence tools can ¶ have tremendous effect, and we strongly endorse the view that the ¶ president’s authority to use them should not be unduly constrained out of a ¶ misguided sense that most or all terrorism scenarios require a military ¶ solution. But law enforcement and intelligence tools are not a panacea. In some ¶ circumstances—such as the late 1990s in Afghanistan and today in certain ¶ areas of Pakistan, Yemen, Somalia, and the Sahel region—these options simply ¶ do not provide sufficient capacity to capture individuals or to otherwise ¶ disrupt their activities. And in some circumstances, these tools are equally ¶ inadequate to the task of long-term incapacitation. Meanwhile, local ¶ governments are sometimes either incapable of addressing or unwilling to ¶ address terrorism threats; in some cases, for various reasons, we would not ¶ want to entrust them with these responsibilities. Whether this is the case ¶ with respect to any given extra-AUMF threat at any given point in time is ¶ exceedingly difficult to say, particularly for those (including us) who are ¶ outside government and lack access to the relevant intelligence. We proceed ¶ on the assumption, however, that some such circumstances do exist or ¶ will arise. Bearing this in mind, the next issue is whether the president’s inherent powers ¶ under Article II are adequate to address any gap that may emerge between ¶ what defense of the nation demands and what law enforcement and intelligence ¶ options can provide in extra-AUMF scenarios. We are skeptical, for three ¶ reasons.¶ **First**, **it is worth bearing in mind that some administrations are more comfortable ¶ resorting to claims of Article II authority than others**. The Obama administration, ¶ for example, has consciously distanced itself from the Bush administration on ¶ this dimension, at least in the counterterrorism setting (as opposed to the ¶ operation in support of the revolution in Libya, which relied on a surprisingly ¶ bold stand-alone Article II argument). **In a situation where a military response is ¶ appropriate but officials are reluctant to act without statutory cover, a serious ¶ problem arises unless there is time to seek and receive legislative support.¶ Second, presidential action based on statutory authority has more political ¶ and legal legitimacy than action based on Article II alone**. **Article II actions leave ¶ the president without overt political support of Congress, which can later ¶ snipe at his decisions, or take actions to undermine them**. We saw this happen, ¶ for example, in response to many of the Bush administration’s unilateral ¶ assertions of authority, and also to some degree in response to President ¶ Obama’s unilateral assertion of authority in Libya. **This is a problem that grows ¶ with reliance on Article II over time. Also,** of course, **any subsequent judicial** ¶ **review** of the president’s use of force is more likely to be upheld if supported ¶ by Congress.¶ **Third, the president faces significant legal hurdles to detaining dangerous ¶ terrorism suspects over the longer term under Article II, and at a minimum ¶ would encounter substantial political and legal opposition if he attempted it.** ¶ The Obama administration has shown no proclivity to detain terrorism ¶ suspects (outside the criminal justice system or in a combat zone like ¶ Afghanistan) other than those captured and detained under the previous ¶ administration. But a **future administration might regard such detention as ¶ necessary in some circumstances, and would have a harder time doing so ¶ beyond short periods without statutory authorization**. Relatedly, **an ¶ exclusive reliance on Article II would make targeted killing politically and ¶ legally safer than detention**, **an outcome that would run contrary** both **to ¶ the security interests of the U**nited **S**tates (by eliminating the possibility of useful intelligence through lawful interrogation) and to the interests of the ¶ individual in question (for obvious reasons).

**CP links to politics but the aff doesn’t**

**Goldsmith ‘13**

[Jack Goldsmith is the Henry L. Shattuck Professor at Harvard Law School, <http://www.lawfareblog.com/2013/03/why-the-administration-needs-to-get-congress-on-board-for-its-stealth-war/> ETB]

Having the intelligence committees publicly on board helps, but what the administration really needs now is to have Congress on board. **The only way to** **legitimate the administration’s** stealth war **tactics**, **and** to **stop the growing bipartisan sniping** at **and distrust** of them (which will only grow and grow if not addressed), **is to make Congress vote on them and get behind them**. The administration should ask for a comprehensive authorization for the tactics it is now deploying in the “war on terrorism.” I know, this approach is risky; secrets can spill out; Congress might give too much or too little authority; and the administration will be tagged with the legacy of making war permanent. There are plenty of excuses for not forging congressional approval, all of them premised on short-term thinking and a remarkable paucity of executive branch leadership. At some point soon the pain of not engaging Congress will be greater than the pain of engaging Congress, and at that point the administration will wish it had gone to Congress sooner.

**CP Links to flex but the aff doesn’t**

**Cronogue ‘12**

[Graham. Duke University School of Law, J.D. expected 2013; University of North Carolina B.A. 2010. 22 Duke J. Comp. & Int'l L. 377 2011-2012. ETB]

Though the President's inherent authority to act in times of emergency¶ and war can arguably make **congressional authorization of force**¶ unnecessary, it **is extremely important for the conflict against al-Qaeda and** **its allies**. First, as seen above, the existence of a state of war or national¶ emergency is not entirely clear and might not authorize offensive war¶ anyway. Next, assuming that a state of war did exist, specific **congressional authorization would** further **legitimate and guide the executive branch** in the prosecution of this conflict **by setting out exactly what Congress authorizes** and what it does not. Finally, **Congress should** specifically **set out what the President can and cannot do to limit his discretionary authority** **and prevent adding to the gloss on executive power**.¶ Even during a state of war, **a congressional authorization** for conflict¶ **that clearly sets out the acceptable targets and means would further** **legitimate the President's actions and help guide his decision making**¶ **during this new form of warfare.** Under Justice Jackson's framework from¶ Youngstown, presidential authority is at its height when the Executive is acting pursuant to an implicit or explicit congressional authorization. 74 In¶ this zone, the President can act quickly and decisively because he knows¶ the full extent of his power.75 In contrast, the constitutionality of¶ presidential action merely supported by a president's inherent authority¶ exists in the "zone of twilight." 76 **Without a congressional grant of power,** **the President's war actions are often of questionable constitutionality because Congress has not specifically delegated any of its own war powers to the executive.77**¶ **This** problem **forces the President to make complex judgments** **regarding the extent and scope of his inherent authority. The resulting uncertainty creates unwelcome issues of constitutionality that might hinder the President's ability to prosecute this conflict effectively.** **In time sensitive**¶ and dangerous **situations**, where **the President** needs to make splitsecond¶ decisions that could fundamentally impact American lives and¶ safety, he **should not have to guess at the scope of his authority. Instead, Congress should provide a clear, unambiguous grant of power, which would mitigate many questions of authorization. Allowing the President to understand the extent of his authority will enable him to act quickly, decisively but also constitutionally.**¶Finally, a grant or denial of **congressional authorization will allow Congress to control the "gloss" on the executive power.** There is¶ considerable **tension between the President's constitutional powers** as¶ Commander in Chief **and Congress's war making powers**.7 8 This tension is **not readily resolved** simply **by looking at the Constitution**. Instead **courts look to past presidential actions and congressional responses when evaluating the constitutionality of executive actions**.80 Indeed Justice¶ **Frankfurter** **noted** in Youngstown that "**a systematic**, unbroken, **executive**¶ **practice**, long pursued to the knowledge of the Congress and never before¶ questioned ... **may be treated as a gloss on 'executive Power'** vested in the¶ President by § 1 of Art. II."8 Thus, **congressional inaction can be deemed as implicit delegation of war making power to the executive.**82 Whether the United States is in a state of war or not, **an authorization of force provides legitimacy and clarity to the war effort**. **If the President acts pursuant to such an authorization his authority is at its height**;¶ consequently, **he can operate with greater certainty that his actions are constitutional**.83 **Absent such a declaration, the President's power is much less clear.** **While the President has the authority to frame the conflict and he might still be able to act pursuant to his inherent powers, he is operating in**¶ **the zone of twilight.84 Congressional authorizations remove this uncertainty by stamping specific acts with congressional approval or disapproval. This process also allows Congress to exert control over what the President can do in the future and prevents the "gloss" that comes from congressional acquiescence.**¶

**CP Fails**

**Scheuerman 12** – William E. Scheuerman, Professor of Political Science and West European Studies at Indiana University, "Review Essay:  Emergencies, Executive Power, and the Uncertain Future of US Presidential Democracy", Law and Social Inquiry, Summer, 37 Law 26 Soc. Inquiry 743, Lexis

Posner and Vermeule rely on two main claims. First, even if the president constitutes the dominant actor in a legally unchecked administrative state, he or she has to gain elite and public support to get things done and stand for election. So how can political actors decide whether or not the executive is performing well? Posner and Vermeule tend to hang their hats on “executive signaling”: presidents can send signals to voters communicating that they are “well-motivated,” and that in fact many voters might make the same (or at least similar) decisions if they possessed the information the president typically has. By communicating in a certain way (e.g., by appointing members of the opposing party to his or her cabinet, promising to accept the recommendations of an independent commission, or by making decisions as transparent as possible), presidents can gain credibility, and voters might thereby come to acknowledge the plausibility—if not necessarily the substantive rightness—of what the executive is doing (2010, 137–53).¶ However, as Schmitt aptly grasped, **even formally free elections potentially become charades when the executive effectively exercises legally unconstrained power** (e.g., in Peronist Argentina, or Putin's Russia). **Posner and Vermeule never really provide enough evidence for us to dismiss this possibility.** **Since the president in our system is only subject on one occasion to reelection, it is unclear how their proposals might meaningfully check the executive,** **particularly during a second term.** **The fact that executive signaling represents a form of self-binding hardly seems reassuring, either** (2010, 135). Nor does the book's highlighting of the possible dangers of different forms of executive signaling (e.g., too much transparency, or an excessive subservience to independent agencies) help very much on this score (2010, 142–46). **Why should we expect to get presidents who know how to engage in executive signaling in just the right way?¶** The familiar reason the executive needs elite and popular support, of course, is that it still relies on a popularly elected Congress and other institutional players to get things done: this is why **describing such dependence as intrinsically political and “nonlegal” seems odd.** For that matter, the relationship between what we traditionally have described as a normative theory of political legitimacy and executive signaling mechanisms—whereby the executive gains popular credibility—remains ambiguous. Is their theory of executive signaling and credibility meant to stand in for a normative theory of legitimacy? If so, one might worry. **We can easily imagine an executive diligently doing many of the things prescribed here yet nonetheless pursuing policies deeply at odds with the common good, or at least with what a democratic community under more ideal conditions might determine to be in its best interests.** Depending on one's normative preferences, some of the examples provided of executive signaling (e.g., FDR and Obama naming Republicans to their cabinets) might legitimately be taken as evidence for presidential Machiavellianism, rather than as solid proof that the presidents in question were well-motivated and thereby somehow politically acceptable. **Presidential “signaling” seems like a pale replacement for liberal legalism and the separation of powers.**

## K

#### Life should be valued as apriori – it precedes the ability to value anything else

Amien Kacou. 2008. WHY EVEN MIND? On The A Priori Value Of “Life”, Cosmos and History: The Journal of Natural and Social Philosophy, Vol 4, No 1-2 (2008) cosmosandhistory.org/index.php/journal/article/view/92/184

Furthermore, that manner of **finding things good** that is in pleasure **can certainly not exist in any world without consciousness (i.e., without “life,”** as we now understand the word)—slight analogies put aside. In fact, we can begin to develop a more sophisticated definition of the concept of “pleasure,” in the broadest possible sense of the word, as follows: it is the common psychological element in all psychological experience of goodness (be it in joy, admiration, or whatever else). In this sense, pleasure can always be pictured to “mediate” all awareness or perception or judgment of goodness: there is pleasure in all consciousness of things good; pleasure is the common element of all conscious satisfaction. In short, it is simply the very experience of liking things, or the liking of experience, in general. In this sense, **pleasure is, not only uniquely characteristic of life but also, the core expression of goodness in life—the most general sign or phenomenon for favorable conscious valuation**, in other words. This does not mean that “good” is absolutely synonymous with “pleasant”—what we value may well go beyond pleasure. (The fact that we value things needs not be reduced to the experience of liking things.) However, what we value beyond pleasure remains a matter of speculation or theory. Moreover, we note that a variety of things that may seem otherwise unrelated are correlated with pleasure—some more strongly than others. In other words, there are many things the experience of which we like. For example: the admiration of others; sex; or rock-paper-scissors. But, again, what they are is irrelevant in an inquiry on a priori value—what gives us pleasure is a matter for empirical investigation. Thus, we can see now that, in general, **something primitively valuable is attainable in living—that is, pleasure itself.** And it seems equally clear that we have a priori logical reason to pay attention to the world in any world where pleasure exists. Moreover, **we can now also articulate a foundation for a security interest in our life: since the good of pleasure can be found in living** (to the extent pleasure remains attainable),[17] **and only in living, therefore, a priori, life ought to be continuously (and indefinitely) pursued at least for the sake of preserving the possibility of finding that good.** However, this platitude about the value that can be found in life turns out to be, at this point, insufficient for our purposes. It seems to amount to very little more than recognizing that our subjective desire for life in and of itself shows that life has some objective value. For what difference is there between saying, “living is unique in benefiting something I value (namely, my pleasure); therefore, I should desire to go on living,” and saying, “I have a unique desire to go on living; therefore I should have a desire to go on living,” whereas the latter proposition immediately seems senseless? In other words, “life gives me pleasure,” says little more than, “I like life.” Thus, we seem to have arrived at the conclusion that **the fact that we already have some (subjective) desire for life shows life to have some (objective) value.** But, if that is the most we can say, then it seems our enterprise of justification was quite superficial, and the subjective/objective distinction was useless—for all we have really done is highlight the correspondence between value and desire. Perhaps, our inquiry should be a bit more complex.

#### Risk framing empowers agency and is key to solve the alt

Borraz, ‘7 [OLIVIER BORRAZ Centre de Sociologie des Organisations, Sciences Po-CNRS, Paris, “Risk and Public Problems,” Journal of Risk Research, 10, 7, Oct 2007, 941-957]

First, risk is the result of a dynamic, haphazard, controversial and unstable process of construction. In a sense, risk is never entirely stabilized, it is associated with many uncertainties, its status like its boundaries change, following the dynamics of contention which contributed to its emergence. More than a frame, risk is thus closer to a state in the life of a public problem (Gilbert, 2003b), a state characterized by fluidity in its boundaries, struggles over the definition of the risk, debates as to who is accountable, etc. Labelling a problem as a risk exerts pressure on political authorities, in a way which tests their capacity to act. It is also an opportunity for rules and power relations to be redefined. Generally, the boundary between risk and crisis is unclear (Besanc ̧on et al., 2004). Second, risk is inseparable from wider political controversies and conflicting values, ideas and interests. Whatever the issue, be it limited in scale (sewage sludge or mobile phone masts) or on the contrary high profile (nuclear waste, global warming, asbestos, GMO), the move into the state of risk allows for links to be made with broader political, economic, social, moral, ethical or environmental issues. The risk of an activity is always more than just a health or environmental safety issue: it also questions the multiple dimensions surrounding that activity (its benefits, use, effects, etc.).

#### Fear is inevitable and productive – denying fear worse than danger control

Sandman and Lanard 2003

Peter M. PhD in Communications and Professor at Rutgers specialzing in crisis communication; Jody, Psychiatrist, Sept 7, “Fear of fear”

Let’s start with the obvious. Any normal person is going to be more anxious than usual while awaiting a biopsy result, a turbulent airplane landing, or a layoff notice. Human **emotions tend to match the situation. The same is true of a more widespread threat**. Of course the public at large will be commensurately alarmed when told that a terrorism attack, an epidemic, or a hurricane may be approaching. Moreover, **fear** isn’t just normal in frightening situations; it **is functional**. Both the human body and the body politic ultimately benefit from the changes (physiological and sociological ... and inevitably emotional) that accompany preparedness for crisis. Take terrorism as a case in point. Nearly everyone agrees that we need people to be vigilant for indications of terrorist attacks; to prepare themselves and their families to cope with possible attacks; to be supportive of preparedness expenses and tolerant of preparedness inconveniences. And nearly everyone agrees that we need all this to ramp up in an actual attack, so that people put other agendas on hold, follow instructions willingly, and help care for their neighbors. The question is what emotional state, what state of mind, is conducive to this sort of public readiness. We believe the right answer is fear. We won’t get there if terrorism is merely one of many issues people are “concerned” about, along with West Nile Virus and inflation and rap lyrics. Either terrorism is different from most other concerns, or it isn’t. If it is, we need to get used to the idea that people are going to be appropriately frightened, and we need to help them get used to it too. Not all fear is functional. **Fear that is paralyzing**, fear that verges on panic, **is** obviously **not functional**. Terror is the goal of terrorism, not the goal of preparedness. But fear is not necessarily terror. This is a conceptual mistake officials routinely make, a mistake they seem terribly attracted to — **the** embedded, preconscious, **erroneous assumption that all fear is one short step removed from panic**. Some fear is. Most fear is not. When officials express their reluctance about “unduly frightening people,” they are literally right. The key word here is “unduly.” Unduly frightening people is wrong. Duly frightening people is right, and important. The problem is telling the two apart. The distinction is partly a matter of degree — “enough” fear versus “excessive” fear. Perhaps in addition there are kinds of fear like the kinds of cholesterol — “good” fear versus “bad” fear. But we suspect the key difference is neither the amount of fear nor the kind of fear, but rather people’s ability to bear the fear. Much is known about how to enhance that ability. Among the things that help: Give people things to do — action binds anxiety. Give people things to decide — decision-making provides more individual control, which makes fear more tolerable. Encourage appropriate anger — the desire to get even often trumps the desire to cower. Encourage love (and camaraderie) — soldiers, for example, fight for their friends and for their country. **Provide candid leadership — we get more frightened when our leaders seem to be misleading us. Show your own fear and show you can bear it** — apparently fearless leaders are little help to a fearful public. Most importantly, treat other people’s fear as legitimate. **Fear is likeliest to escalate into** terror or **panic** (or to flip into denial) **when it is treated as shameful and wrong**. “It’s natural to be afraid, I’m afraid too” is a much more empathic response to public fear than “there’s nothing to be afraid of.” If we want people to bear their fear, we must assure them that their fear is appropriate. Even fear that is statistically inappropriate can and should be legitimized as normal, understandable, and widespread. Leaders who are contemptuous of people’s fear have a much tougher time explaining the reasons why they needn’t be afraid.

#### The alt results in more securitization and intervention

Tara McCormack, 2010, is Lecturer in International Politics at the University of Leicester and has a PhD in International Relations from the University of Westminster. 2010, (Critique, Security and Power: The political limits to emancipatory approaches, page 127-129)

The following section will briefly raise some questions about the rejection of the old security framework as it has been taken up by the most powerful institutions and states. Here we can begin to see the political limits to critical and emancipatory frameworks. In an international system which is marked by great power inequalities between states, the **rejection of the** old narrow national interest-based **security framework** by major international institutions, and the adoption of ostensibly emancipatory policies and policy rhetoric, **has the consequence of problematising weak or unstable states and allowing international institutions or major states a more interventionary role, yet without establishing mechanisms by which the citizens of states being intervened in might have any control over the agents or agencies of their emancipation**. Whatever the problems associated with the pluralist security framework **there were at least formal and clear demarcations. This has the consequence of entrenching international power inequalities and allowing for a shift towards a hierarchical international order in which the citizens in weak or unstable states may arguably have even less freedom or power than before**. Radical critics of contemporary security policies, such as human security and humanitarian intervention, argue that we see an assertion of Western power and the creation of liberal subjectivities in the developing world. For example, see Mark Duffield’s important and insightful contribution to the ongoing debates about contemporary international security and development. Duffield attempts to provide a coherent empirical engagement with, and theoretical explanation of, these shifts. Whilst these shifts, away from a focus on state security, and the so-called merging of security and development are often portrayed as positive and progressive shifts that have come about because of the end of the Cold War, Duffield argues convincingly that these shifts are highly problematic and unprogressive. For example, the rejection of sovereignty as formal international equality and a presumption of nonintervention has eroded the division between the international and domestic spheres and led to an international environment in which Western NGOs and powerful states have a major role in the governance of third world states. Whilst for supporters of humanitarian intervention this is a good development, Duffield points out the depoliticising implications, drawing on examples in Mozambique and Afghanistan. Duffield also draws out the problems of the retreat from modernisation that is represented by sustainable development. The Western world has moved away from the development policies of the Cold War, which aimed to develop third world states industrially. Duffield describes this in terms of a new division of human life into uninsured and insured life. Whilst we in the West are ‘insured’ – that is we no longer have to be entirely self-reliant, we have welfare systems, a modern division of labour and so on – sustainable development aims to teach populations in poor states how to survive in the absence of any of this. **Third world populations must be taught to be self-reliant, they will remain uninsured. Self-reliance of course means the condemnation of millions to a barbarous life of inhuman bare survival.** Ironically, although sustainable development is celebrated by many on the left today, by leaving people to fend for themselves rather than developing a society wide system which can support people, sustainable development actually leads to a less human and humane system than that developed in modern capitalist states. Duffield also describes how many of these problematic shifts are embodied in the contemporary concept of human security. For Duffield, we can understand these shifts in terms of Foucauldian biopolitical framework, which can be understood as a regulatory power that seeks to support life through intervening in the biological, social and economic processes that constitute a human population (2007: 16). Sustainable development and human security are for Duffield technologies of security which aim to *create* self-managing and self-reliant subjectivities in the third world, which can then survive in a situation of serious underdevelopment (or being uninsured as Duffield terms it) without causing security problems for the developed world. For Duffield this is all driven by a neoliberal project which seeks to control and manage uninsured populations globally. Radical critic Costas Douzinas (2007) also criticises new forms of cosmopolitanism such as human rights and interventions for human rights as a triumph of American hegemony. Whilst we are in agreement with critics such as Douzinas and Duffield that **these new security frameworks cannot be empowering, and ultimately lead to more power for powerful states,** we need to understand why these frameworks have the effect that they do. We can understand that these frameworks have political limitations without having to look for a specific plan on the part of current powerful states. **In new security frameworks such as human security we can see the political limits of the framework proposed by critical and emancipatory theoretical approaches**.

**Prefer specific scenarios – even if we invoke some security logic, the fact that others will securitize means that we have to make worst-case assessments to avoid escalation**

Ole **Waever**, Senior Research Fellow – Copenhagen Peace Research Inst., **2K**

(I. R. Theory & the Politics of European Integration, ed Kelstrup/Williams p. 282-285)

The other main possibility is to stress responsibility. Particularly **in a field like security one has to make choices and deal with the challenges and risks that one confronts** – and not shy away into long-range or principled transformations. The meta-political line risks (despite the theoretical commitment to the concrete other) implying that politics can be contained within large ‘systemic’ questions. In line with the classical revolutionary tradition, after the change (now no longer the revolution but the meta-physical transformation), there will be no more problems whereas in our situation (until the change) we should not deal with the ‘small questions’ of politics, only with the large one (cf. Rorty 1996). However, the ethical demand in post-structuralism (e.g. Derrida’s ‘justice’) is of a kind that can never be instantiated in any concrete political order – it is an experience of the undecidable that exceeds any concrete solution and re-inserts politics. Therefore, politics can never be reduced to meta-questions; there is no way to erase the small, particular, banal conflicts and controversies. In contrast to the quasi-institutionalist formula of radical democracy which one finds in the ‘opening’ oriented version of deconstruction, we could with Derrida stress the singularity of the event. To take a position, take part, and ‘produce events’ (Derrida 1994: 89) means to get involved in specific struggles. Politics takes place ‘in the singular event of engagement’ (Derrida 1996: 83). Derrida’s politics is focused on the calls that demand response/responsibility in words like justice, Europe and emancipation. Should we treat security in this manner? No, security is not that kind of call. ‘Security’ is not a way to open (or keep open) an ethical horizon. **Security** is a much more situational concept oriented to the handling of specifics. It **belongs to the sphere of how to handle challenges – and avoid ‘the worst’** (Derrida 1991). Here enters again the possible pessimism hich for the security analyst might be occupational or structural. The infinitude of responsibility (Derrida 1996: 86) or the tragic nature of politics (Morgenthau 1946, Chapter 7) means that one can never feel reassured that by some ‘good deed’, ‘I have assumed my responsibilities’ (Derrida 1996: 86). If I conduct myself particularly well with regard to someone, I know that it is to the detriment of an other; of one nation to the detriment of another nation, of one family to the detriment of another family, of my friends to the detriment of other friends or non-friends, etc. This is the infinitude that inscribes itself within responsibility; otherwise there would be no ethical problems or decisions. (ibid.; and parallel argumentation in Morgenthau 1946; Chapters 6 and 7) Because of this there will remain conflicts and risks – and the question of how to handle them. Should developments be securitized (and if so, in what terms)? Often our reply will be to aim for de-securitization and then politics meet meta-politics; but **occasionally** the underlying **pessimism** regarding the prospects for orderliness and compatibility among human aspirations **will point to** **scenarios sufficiently worrisome that** **responsibility will entail securitization in order to block the worst. As a security/securitization analyst, this means accepting the task of trying to manage and avoid spirals and accelerating security concerns, to try to assist in shaping the continent in a way that creates the least insecurity and violence – even if this occasionally means invoking/producing ‘structures’ or even using the dubious instrument of securitization**. In the case of current European configuration, the above analysis suggests the use of securitization at the level of European scenarios with the aim of preempting and avoiding numerous instances of local securitization that could lead to security dilemmas and escalations, violence and mutual vilification.

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#### Plan is a limit on statutory authority

Goldsmith ‘13

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Begin with whether there is problem that needs to be addressed. A recent Washington Post story suggests that the administration believes there is a serious problem, that it is more pressing than we originally stated, and that the solution the administration is groping toward is far from ideal. The story says that the AUMF is “being stretched to its legal breaking point, just as new threats are emerging in countries including Syria, Libya and Mali.” It quotes a senior Obama administration official for the proposition that “[t]he farther we get away from 9/11 and what this legislation was initially focused upon . . . we can see from both a theoretical but also a practical standpoint that groups that have arisen or morphed become more difficult to fit in.” The official added that the waning relevance of the AUMF is “requiring a whole policy and legal look.” The story notes that “legal advisers at the White House, the State Department, the Pentagon and intelligence agencies are now weighing whether the law can be stretched to cover what one former official called ‘associates of associates.’” This comes on top of the creation of a new base in Niger for drones which, it is widely believed, will one day be armed and deployed in North Africa.¶ Extra-AUMF threats directed at the United States are a problem today, and are will only grow worse over time. No administration will ignore these threats. The only issues are how the threats will be addressed, and on what legal basis. Jennifer and Steve agree with us that such problems should be addressed through some combination of law enforcement authorities and military authorities. And we all agree on the legal basis for law enforcement authorities. That leaves only the question of the legal foundation for the exercise of military authorities against extra-AUMF threats.¶ Jennifer and Steve prefer a combination of the current AUMF and Article II. They think that such an approach will be more limited or cabined than the one we propose. I am skeptical. As the administration’s “associates of associates” gambit suggests, and as the history of the past dozen years shows, and as the unilateral opening of the Niger base implies, Executive branch lawyers have many tricks up their sleeves for secret expansion of the AUMF. Especially if these AUMF authorities are deployed only for targeting, they will likely never be reviewed by a court. Jennifer’s and Steve’s limitation of statutory authorities to the current AUMF is thus not a recipe for ending armed conflict – it is, in light of the realities of ever-present threats, a recipe for continued armed conflict via secret and ever-more-tenuous expansions of the AUMF. (I am a bit surprised about the ease with which Steve and Jennifer conclude that AQAP is covered by the current AUMF, so perhaps they, like the administration, embrace a relatively open-ended interpretation of the AUMF; but I note, for reasons stated in our piece, that such interpretive expansions of the AUMF are not a stable solution and are increasingly illegitimate.) Moreover, I agree with Steve and Jennifer that Article II is a possible solution to terrorist threats; but I also believe, as we said in our piece, that “presidential action based on statutory authority has more political and legal legitimacy than action based on Article II alone.” In addition, Steve’s and Jennifer’s proposal would include none of the clarifying (or potentially narrowing) interventions by Congress that our proposal contains. Nor would their proposal contain the accountability mechanisms that we propose, including the relatively robust and public and deliberate administrative process for adding threatening new groups (as opposed to the secret and ad hoc way they are added now), and much “more thorough ex post reporting and auditing” than is currently the case.¶ Steve and Jennifer say that “a key—and possibly principal—objective of the CGWW proposal is to provide authority to this and future presidents to detain terrorism suspects without charge.” That is simply untrue. Our essay discusses detention and targeting under a new AUMF, it notes that statutory authority is probably needed for any medium-to-long-term detention of persons who pose extra-AUMF threats, and it acknowledges that statutory authority is an advantage for a “future administration [that] might regard such detention as necessary in some circumstances.” But we did not wade in to the thorny issue of whether new detentions are necessary, or when detention as opposed to targeting is preferred, or the possible relationship between the unavailability of detention and enhanced rates of targeting, and how that tradeoff should be managed. These are all hard issues on which Ben, Bobby, Matt and I probably disagree. But there are many legitimacy and democracy-enhancing benefits to our proposal over the current one even if Congress authorizes only targeting (as opposed to detention) authority, or even if Congress gives the President detention authority and he (like President Obama) declines to use it. Detention is not the only thing, and is not the most important thing, at stake in this debate.¶ Other points on which we think Steve and Jennifer misinterpret or mischaracterize or misunderstand our argument: (1) they say that we propose, “in effect, a paradigm shift: from defensive uses of force in response to an imminent terrorist threat to offensive uses of force to preempt such threats from even arising” – but actually, quite the opposite, our proposed definitions of targetable groups are expressly limited to those who have committed a belligerent act against the United States or who present an “imminent threat”; (2) they describe our proposal as “an expansion of statutory authorities to use military force” – but given the possibility of extending the AUMF to “associates of associates,” and the likelihood that such expansion, if limited to targeting, would never be subject to judicial review, and that it would lack any of the limiting or accountability mechanisms we propose, we think that our proposal is more cabined, and certainly more legitimate, than the trajectory of current law that Jennifer and Steve embrace; (3) they say that we advocate “open-ended and permanent declaration of armed conflict,” but in fact we argued for authorities that contain express and stricter substantive and temporal limits than the the unilateral executive branch expansions of the AUMF combined with unilateral Article II authorities that they prefer; and (4) they criticize our accountability proposals (sunsets, limiting targeting categories, enhanced reporting and review, etc.) as ineffective, but they do not explain why they think the current methods for expanding the AUMF via interpretation, and of unilateral executive decisions deciding who can be targeted, are better.

**NDAA expanded the aumf**

**Chesney ‘12**

[Robert Chesney ¶ University of Texas School of Law¶ August 29, 2012¶ Beyond the Battlefield, Beyond Al Qaeda: The Destabilizing Legal Architecture of Counterterrorism¶ Michigan Law Review, Forthcoming ¶ U of Texas Law, Public Law Research Paper No. 227. ETB]

This perception of institutional settlement is an illusion. It depends on the existence of set of stabilizing factors that have been present since 2001, but are rapidly decaying today. For years these factors have drawn our attention away from a pair of critical and wholly-unresolved legal issues that might best be described as “boundary questions.” These boundary questions, alas, are quickly becoming central to the government’s authority to detain and to kill in the name of counterterrorism. ¶ ¶ A. What Are the Boundary Questions? ¶ ¶ It is hard to talk sensibly about the legality of using detention or lethal force in a particular case without taking a position, explicitly or otherwise, on the relevance of LOAC to the analysis. And it is equally difficult to do so without some coherent conception of the identity of the “enemy,” at both the individual and organizational levels. Both sets of issues are critical in defining the legal boundaries of the government’s powers. Given the apparent stability of the legal architecture in recent years, one might suppose that both had been largely resolved. Far from it, however. ¶ ¶ 1. The Boundaries of the LOAC Model ¶ ¶ Consider first the LOAC problem. LOAC—also known today as International Humanitarian Law (IHL) and formerly known simply as the law of war—provides an array of rules governing the permissible means and methods of armed conflict (including who may be killed and under what circumstances) and the proper treatment and disposition of persons who fall into the hands of the enemy in such circumstances (including who may be detained for the duration of hostilities without criminal charge). But once we move beyond the paradigm case of two states using their regular armed forces against one another, pinning down the precise circumstances governed by LOAC—LOAC’s “field of application”—proves to be a rather difficult task. ¶ It is not that people disagree about the test for LOAC’s field of application, at least not when stated in abstract terms. When dealing with a situation involving a state party on one side and a non-state actor on the other, there is widespread agreement that the non-state party must possess (at least) some sufficient degree of organizational coherence, and that the violence at issue must rise to some sufficient level of intensity (taking into account factors such as the nature, scale, methods, impact, and duration of the violence). So far so good. But once we move to apply this test to a particular fact pattern, we quickly discover that the room for disagreements is substantial. ¶ First, it is entirely unclear just where the line lies between the level of intensity at which violence remains a matter of civil disorder or criminality and the level beyond which it earns the title “armed conflict.” That is to say, there is no clear consensus as to the metrics to be used in calibrating the elements of the intensity inquiry, no number of deaths or types of weaponry that decisively and objectively tip the scales in one direction or the other. It is a holistic inquiry, with inevitable room for disagreement among reasonable persons in marginal cases. Second, even if the metrics for the test were clearer, disagreement also can arise because of uncertainty regarding which fact patterns are properly made the objects of that inquiry. Consider, from this viewpoint, the circumstances of AQAP in Yemen. The United States has repeatedly used lethal force against AQAP targets—at least forty times between 2010 and August 4, 2012, according to one source, —and AQAP has on a few occasions attempted to set off bombs on US-bound planes. AQAP and the Yemeni government have engaged in much more numerous exchanges of fire, and of course the United States, other governments, and other elements of the al Qaeda network have had their violent interactions as well. Does all of it count in assessing the intensity factor? If only part of it counts, which parts? And over what time period does the inquiry properly extend? It is not clear that these questions only admit of a single correct answer. Third, there may also be disagreement as to the underlying facts themselves: i.e., who actually carried out which actions, with what intentions or knowledge, and toward what ends and with what consequences. ¶ Assuming that one overcomes these obstacles, a separate boundary issue involving LOAC then arises: are there geographic constraints with respect to where LOAC may apply? That is, if we assume the conditions for recognition of an armed conflict are satisfied in, say, Afghanistan, does it follow that LOAC applies not only in Afghanistan but also in other locations around the world, no matter how remote from Afghanistan, so long as the parties to the conflict in Afghanistan encounter one another there? The U.S. government takes the position that LOAC travels with the parties wherever they might roam. Others disagree. One viewpoint, for example, holds that LOAC has no application outside the geographic boundaries of the specific state in which events satisfy the threshold-of-intensity criterion; another accepts that LOAC can apply as to persons outside the borders of such a state, but only as to persons whose activities in  ¶ some meaningful sense tie back to the original zone of hostilities (such as by exercising remote command of operations). ¶ Boundary questions also emerge along the temporal dimension. That is, even if we assume that a state of armed conflict existed in connection with some particular situation of violence in some relevant location, difficult questions can arise as to precisely when that situation achieved this status and for how long thereafter that status remains in play. There is little doubt that the problem of temporal boundaries is particularly vexing in a circumstance in which the precise identity of the opponent is in question. Which leads directly to a separate set of boundary questions. ¶ ¶ 2. The Organizational Boundaries of the Enemy ¶ ¶ Separate from the LOAC boundary issue (though not unrelated) is the question of how precisely to identify the enemy or opponent in whatever conflict (or other paradigm of interactions) is in issue. One would hardly think twice about this in a conventional state-againststate armed conflict, both because of the centrality of visible and discrete armed forces and because the domestic law instruments associated with such conflicts—declarations of war, authorizations for use of military force—typically would provide an express answer to the question. But it is a step that can prove quite complicated in the context of non-international armed conflict, particularly where the operative domestic law instruments do not actually name the enemy. More to the point, with non-state actors it may be exceedingly difficult to say which groups should be understood as jointly comprising a single entity, which are distinct yet mutually engaged in the conflict, and which might be sympathetic with or supportive of a party to the conflict without actually being a party to the conflict. Where the groups involved seek to obscure their location, membership, organizational structure, and activities, of course, all of these inquiries become more difficult. ¶ ¶ B. Stabilizing Factors that Obscure the Boundary Questions ¶ ¶ How can it be, in light of all these two sets of boundary issues, that in recent years the legal architecture for the U.S. government’s use of detention and lethal force has acquired a venire of stability? It is not because these boundary questions have been resolved, nor that they are novel. It is because certain stabilizing factors have spared us the need to focus on them. ¶ ¶ 1. Undisputed Armed Conflict in Afghanistan ¶ ¶ Throughout the post-9/11 era—well, at least since November 2001—there has always been at least one circumstance in which it is essentially undisputed that the United States was engaged in armed conflict. Specifically, the United States has been engaged in large-scale, overt combat operations in Afghanistan at all relevant times (and for a number of years in the midst of this period was similarly engaged in Iraq). There is no serious dispute that circumstances in Afghanistan constitute armed conflict, nor that LOAC applies there as a result. This has long ensured that the U.S. government can argue with great force that it is fighting under color of LOAC at least somewhere against someone. ¶ That would not matter to the larger debate if the use of detention and lethal force in Afghanistan had been largely a sideshow over the years, relative to activities elsewhere. But the opposite has been the case. Afghanistan has dominated perceptions of how and where the United States uses military force in relation to terrorism (though Iraq had its moment as well, of course). And this is especially true when it comes to the handful of occasions on which the government’s legal theories have been put to the test in a serious and high-profile way. ¶ One such occasion was the 2004 Supreme Court decision involving the detention of Yaser Hamdi, a man who was captured in Afghanistan and taken to Guantanamo but then brought to America after officials learned he had a plausible claim to U.S. citizenship.65 The Supreme Court’s decision in his case played a central role in legitimating the use of military detention and confirming the relevance of LOAC as part of the governing legal architecture. To be sure, the plurality opinion was at pains to specify that it was solely addressing the facts of his case (an alleged Taliban fighter caught bearing arms with his unit on an Afghan battlefield, and held while the conflict in Afghanistan continues).66 Indeed, the opinion specifically anticipated the possibility that detention in other circumstances may not warrant application of the traditional legal framework for detention associated with LOAC: ¶ ¶ If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel. But that is not the situation we face as of this date. Active combat operations against Taliban fighters apparently are ongoing in Afghanistan.67 ¶ ¶ Nonetheless, the decision contributed to a larger perception that there is little need to engage with the LOAC boundary question, assisted no doubt by the fact that the Supreme Court has not taken a similar case since then—let alone one presenting a fact pattern lacking ties to Afghanistan. ¶ The work of the lower courts in more recent years has been to similar effect. As noted above in Part I, the decisions emerging from the Guantanamo habeas process have roundly endorsed the government’s viewpoint (i.e., that the detention-facilitating rules of LOAC are applicable and are consistent with U.S. government practices). Just like Hamdi, however, these cases are very much rooted in the comparatively-easy context of Afghanistan. The overwhelming majority of Guantanamo habeas cases concern persons who were captured in Afghanistan, captured fleeing from Afghanistan, or captured in more remote locations where they allegedly were engaged in activities linked to the hostilities in Afghanistan (such as recruiting fighters to go there). And so long as U.S. forces continue to be engaged in overt combat operations in Afghanistan—so long as the condition specified by the Supreme Court in Hamdi continues to obtain—these cases are largely incapable of providing the occasion for testing the outer boundaries of the LOAC model. Even the quite distinct habeas proceedings involving American citizen Jose Padilla—an alleged al Qaeda “sleeper” agent arrested on a jet way in Chicago upon his return to the country from Pakistan—eventually turned on claims about his prior activities in relation to Afghanistan. The sole case that appeared to lack any particular ties to Afghanistan—that involving Ali Salah Kahleh al-Marri, a Qatari citizen arrested in the U.S. and then held in military detention as a suspected al Qaeda agent—made little headway one way or another with respect to the LOAC model, as the various judicial opinions it produced before he was transferred back into civilian criminal custody were badly splintered and the issues in any event were clouded by the peculiar considerations raised by the invocation of military detention authority within the United States proper. ¶ Collectively, this multi-year run of judicial decisions has played an influential role in forming perceptions about the legality of U.S. detention policy, owing to their nearly-unique status as an adversarial and highly-public forum for contesting the government’s legal claims regarding its counterterrorism powers. Again and again, these cases have accepted the applicability of LOAC, and the subsidiary notion that detention authority exists under that rubric. ¶ This has played a central role in molding the public’s understanding of the legitimacy of those claims, not to mention impacting Congressional perceptions. Yet it has gone largely unremarked that almost all of these decisions concern the one location in which there has been no disagreement that an armed conflict exists, the one location where the LOAC boundary issues have little significance. ¶ ¶ 2. Relative Clarity as to the Identity of the Enemy ¶ ¶ The perception of legal stability at the close of the first post-9/11 decade also benefitted mightily from a second stabilizing factor: relative clarity with respect to the identity of the enemy. ¶ At the outset in 2001, there was no serious dispute that there existed an entity known as al Qaeda, that al Qaeda was responsible for the 9/11 attacks, and that al Qaeda was to be the central object of the use of force that was to follow. It was equally clear that the Afghan Taliban movement existed, that it controlled the bulk of Afghanistan’s territory, that its leadership tolerated the presence in Afghanistan of a substantial part of al Qaeda (including al Qaeda’s own senior leadership), and that, as a result, the deployment of sustained military force against al Qaeda would likely require the use of force against the Afghan Taliban as well. What followed was a massive, overt military intervention in Afghanistan, squarely focused on al Qaeda and the Afghan Taliban. This focus closely tracked the broad outlines of the AUMF Congress enacted in September of 2001 (which spoke of using force only against the entity responsible for the 9/11 attacks and anyone harboring that entity). And though President Bush at the time argued publicly for a far more ambitious and expansive counterterrorism agenda—giving rise to the much-criticized formulation the “global war on terrorism,” entailing the possibility of using force against other terrorist groups of international reach even if unrelated to the 9/11 attacks —the pushback sparked by this broadening rhetoric if anything underscored the notion that the fight properly encompassed just al Qaeda and the Afghan Taliban. ¶ Subsequent legal challenges to the use of military detention repeatedly reinforced this framing. The Supreme Court’s 2004 Hamdi decision, as noted above, dealt with a man said to be a fighter for the Afghan Taliban.78 The government asserted that Jose Padilla was an al Qaeda agent, dispatched to the United States by the al Qaeda senior leadership.79 And in a seeminglyendless parade of post-2008 Guantanamo habeas cases, the government almost invariably alleged that the men were Afghan Taliban members, al Qaeda members, or in many instances both. Very few of the Guantanamo cases involved any other organizational affiliation. The few that did, moreover, not only drew little attention but could in any event be understood as involving only minor and logical extensions of the hostilities in order to encompass manifestly distinct groups that had nonetheless openly joined in the fighting against American and allied forces on the ground in Afghanistan, such as Gulbuddin Hekmatyar’s Hezb-e Islami Gulbuddin and the Islamic Movement of Uzbekistan. ¶ These cases almost never presented serious questions as to the organizational boundaries of al Qaeda itself or the AUMF more broadly, as opposed to endless difficulties surrounding the alleged ties of specific persons to specific groups. The sole exception was Parhat v. Gates, a 2008 D.C. Circuit Court of Appeals decision concluding that the government lacked sufficient proof to show that the Chinese Uighur group known as ETIM—the East Turkestan Islamic Movement—was part-and-parcel of the al Qaeda network.83 This was the exception that proved the rule, however. Far from portending a rash of cases presenting more difficult variations on the organizational boundaries theme, Parhat was followed by years’ worth of Guantanamo habeas cases that presented no such issues. ¶ The relative uniformity and simplicity of the Guantanamo cases when it comes to the question of organizational boundaries is not surprising for another reason: The bulk of detainees there were captured relatively early in the post-9/11 era. They hail from a period in the life cycle of al Qaeda and the Afghan Taliban that predates most of the complexities that I will go on to describe below. The caselaw they are capable of producing is bound for the most part to reflect the simpler circumstances that prevailed early in the first post-9/11 decade. Insofar as that caselaw in turn has played an important role in constructing perceptions of legal stability, those perceptions are more than a little artificial. ¶ ¶ III. DISRUPTIVE STRATEGIC CHANGE ¶ ¶ These stabilizing factors will not last. A set of long-term trends involving changes to the strategic posture of both al Qaeda and the United States will profoundly disrupt them. Indeed, that process already is well-underway. Bit by bit, this erosion is unsettling the legal foundation for the U.S. government’s use of both military detention and lethal force. ¶ ¶ A. Strategic Change and the Evolution of al Qaeda ¶ ¶ Who is the enemy against which the United States is fighting in the second post-9/11 decade? That fundamental question has grown ever more difficult to answer in recent years, and the problem is accelerating. ¶ There may have been a time when it would suffice to refer simply to “al Qaeda” and the Afghan Taliban in answer to this question. But this is no longer an adequate response, for two reasons. First, in Afghanistan, the reality is that U.S. forces have for years been engaged in combat with a large number of armed groups that cannot properly be considered part of either al Qaeda or the Afghan Taliban. Second, al Qaeda itself has undergone an extraordinary process of diffusion and fragmentation. One upshot is that, in a number of regions around the world, there are armed groups claiming some degree of association with what remains of al Qaeda’s senior leadership. Sometimes this is a matter of an al Qaeda cell growing independent, and sometimes it is a matter of an originally-distinct entity drawing close to al Qaeda’s orbit. The important point, at any rate, is that it is difficult to say which if any of these groups are best understood as part-and-parcel of al Qaeda, which are not part-and-parcel of al Qaeda yet nonetheless constitute enemies of the United States, and which are neither. Ahmed Warsame’s fact pattern is a case in point. Unfortunately, such scenarios do not fit comfortably within the existing domestic legal architecture embodied in the AUMF, the NDAA FY’12, and the caselaw generated by military detainees. ¶ ¶ 1. Proliferation and Fragmentation ¶ ¶ The proliferation of enemies is most apparent in Afghanistan and Pakistan (though it is not limited to that region, as I will explain below). The point as to proliferation in the Afghanistan Pakistan region is not simply that it can be hard to describe the organizational boundaries of the Afghan Taliban. Even if we treat the Afghan Taliban as a unified whole (even if, that is, we lump together all commanders loyal to some degree to Mullah Mohamed Omar’s Quetta Shura), the fact remains that there are many other armed groups in the field in Afghanistan that cannot fairly be described as a formal part of either the Afghan Taliban or al Qaeda, including the Haqqani Network and Gulbuddin Hekmatyar’s Hezb-e Islami. Each routinely uses force against ¶ U.S. and allied forces in Afghanistan (and some but not all direct force against Pakistani forces as well), and U.S. forces routinely target and detain their leaders and members in turn.85 Because these groups engage in extensive cooperation, it can be exceedingly difficult to parse the organizational boundaries among these groups. As an anonymous American military officer put the point in late 2010: ¶ ¶ This is actually a syndicate of related and associated militant groups and networks . . . [t]rying to parse them, as if they have firewalls in between them, is really kind of silly. They cooperate with each other. They franchise work with each other.86 ¶ ¶ Other officials added that ¶ ¶ the loose federation was not managed by a traditional military command-and-control system, but was more akin to a social network of relationships that rose and faded as the groups decided on ways to attack Afghan, Pakistani, American and NATO interests.87 ¶ ¶ Organizational ambiguity, from this perspective, is not so much a problem of inadequate intelligence (though that certainly could be an issue) as it is simply an organic and irreducible feature of the socio-political landscape within which these groups and networks operate. ¶ Having said all that, the blurred organizational boundaries in the Afghanistan-Pakistan theater are not the biggest reason why the two-party, al Qaeda-Taliban conception of the enemy is problematic. The bigger problem is the fragmentation and diffusion of al Qaeda itself: it has evolved over the past decade in a manner that makes it far more difficult to speak coherently about its organizational boundaries, and the trend appears to be accelerating.88 ¶ Al Qaeda has been evolving throughout its existence.89 Born in the waning days of the anti-Soviet jihad in Afghanistan, it began as a rather underspecified collaborative project agreed to by the leaders of several existing groups and networks, including Osama bin Laden.90 A number of members were soon sworn into the new group,91 and by the time of its days based in the Sudan al Qaeda had become quite institutionalized, possessing bureaucratic structures, job descriptions, payrolls, and other accoutrements of a hierarchical organization with centralized leadership.92 ¶ Fast forward a few years to Afghanistan, and the situation was more complex. Al Qaeda now had a center of operations from which its senior leadership could act with relative impunity to recruit and train personnel in large numbers.93 Not all those trainees necessarily were best understood as part of al Qaeda; the bulk of these simply went on to fight, or assist the fighting, in places like Afghanistan, Chechnya, or Bosnia, or else simply returned to live a more peaceful life elsewhere.94 The more promising ones were offered the chance for more advanced training, however, along with more explicit ties to al Qaeda as such.95 This process gradually generated a cadre of personnel more-directly responsive to the direction and control of al Qaeda’s senior leadership.96 This in turn enabled al Qaeda to mount its own operations, as illustrated by the attack on the US embassies in Kenya and Tanzania in 1998, the bombing of the USS Cole in Yemen in 2000, and the 9/11 attacks themselves.97 ¶ Even in these years, it would be difficult to map the precise organizational boundaries of al Qaeda. Some key leaders were involved in other organizations as well,98 raising questions as to whether those organizations should be understood as independent or not. And al Qaeda had always been open to the possibility of assisting other groups in conducting operations suiting the interests of al Qaeda’s senior leadership, which further muddied the water.99 Those complications were relatively manageable circa 2001, however. At that time, it was perfectly plausible to speak of al Qaeda writ large as a discrete and identifiable organization, however much factual uncertainty there might be regarding the associational status of particular persons in relation to the group.100 ¶ Things are different today thanks to the complex ways in which al Qaeda has evolved in response to internal and external pressures. The general thrust of these changes has been to weaken the central organization relative to an emerging set of regional organizations that may share al Qaeda’s brand but are not necessarily responsive to its direction and control. The combination is a recipe for uncertainty regarding just what one might mean in referring today to ¶ “al Qaeda.” ¶ Several factors drive this process of fragmentation. Most obviously, decentralization to some extent is a matter of survival in the face of intensive and sustained efforts by the United States and its allies to capture or kill the leaders and members of the core al Qaeda organization. Such efforts were underway prior to 9/11, with mixed success.102 The scope and impact of those efforts accelerated dramatically in late 2001, however. A host of new policies—including the invasion of Afghanistan, the use of lethal force in other locations (as demonstrated in Yemen, for example, in 2002), the expanded use of rendition (that is, capturing an individual and transferring them to the custody of another country), pressure on allies both to provide intelligence cooperation and to use their own authorities to capture and either transfer or detain suspects, and the use of both criminal prosecution and non-criminal detention—combined to incapacitate a large number of al Qaeda figures and to drive the remainder much deeper into hiding. The bulk of the leadership apparently sought haven in Pakistan, but the eventual expansion of U.S. kinetic operations to the FATA combined with an array of other efforts to locate them ultimately made it extraordinarily difficult for remaining personnel to communicate, let alone engage in training and operational planning, as illustrated by the extent to which bin Laden was isolated and the frequency with which subordinate leadership figures have been killed. The oppressive operational environment—particularly the constraints on communications that followed from the extraordinary security measures undertaken to hide the location of key leadership figures— ensured that there would be limits to the ability of al Qaeda’s leaders in central Asia to stay in touch with, let alone manage the operations of, operatives and cells located elsewhere (or even in the Afghanistan-Pakistan area). ¶ It is perhaps inevitable that in such circumstances cells located abroad might develop their own independent agendas, especially as they draw new members from indigenous sources. AQAP provides a case study in this aspect of fragmentation (as distinct from a separate model, discussed below, in which a regional “franchise” originates not as an al Qaeda cell but as an independent, indigenous organization). ¶ AQAP’s story is best understood against the backdrop of operations that the core al Qaeda organization conducted in Yemen in the late 1990s. Al Qaeda by that time had developed a substantial operational capacity in its own right, and had turned its eyes to Yemen with the hope of striking an American military target in an unexpected location; the periodic visits of U.S. warships to the port of Aden provided a golden opportunity. And though an attack on the USS The Sullivans in 1999 failed, the subsequent attack on the USS Cole in 2000 did not. These attacks demonstrated al Qaeda’s capacity to operate in Yemen on an ad hoc basis. But aside from a Yemeni native named Qa’id Salim Talib Sinyan al-Harithi (who would later be killed in a U.S. drone strike), al Qaeda did not appear to maintain a sustained presence in the country in that era. As one observer put the point, the Cole attack “appears to have been more an example of opportunism than a sign of an enduring al-Qa’ida presence in Yemen.”110 ¶ This began to change after the 9/11 attacks. By 2002, a group of Yemeni men who had been in Afghanistan training with al Qaeda had made it out of the region, returning to Yemen with instructions from al Qaeda to carry out additional attacks when possible. Under the leadership of a Saudi operative named Fawaz Yahya Hasan al-Rabay’i, this newly-implanted al Qaeda cell ultimately carried out a Cole-style bombing on the French vessel M/V Limburg, and then followed with a failed attempt to shoot down a helicopter with an RPG. At this point, however, the cell was crippled by a long string of arrests, resulting in the imprisonment of alRabay’i and dozens of others. ¶ There things stood for a number of years, until a dramatic prison break—involving a tunnel dug between the prison and a nearby mosque—resulted in the escape of some two-dozen extremists, including not only al-Rabay’i but also future AQAP leaders Nasir al-Wahayshi and ¶ Qasim al-Raymi. Within a year’s time, the escapees proclaimed the formation of a new organization known as “al Qaeda in the Land of Yemen,” which soon carried out a doublesuicide bombing targeting an oil facility. Many more attacks followed, some directed at Western targets in Yemen but many focused on local government officials and Yemen’s security services and military. Over time, it became apparent that the new group was developing substantial indigenous roots, and growing ties with tribal leaders in provincial areas already resistant to central government control. Name changes followed as well, with al Qaeda in the Land of Yemen giving way first to “al Qaeda in the Southern Arabian Peninsula” and then finally—after the addition to its leadership of two Saudis who had formerly been held at Guantanamo—it became “al Qaeda in the Arabian Peninsula,” or simply AQAP.118 ¶ Today, AQAP appears committed to a two-pronged strategy. Most obviously, it is committed to fighting a relatively conventional insurgency against the central government in Yemen, and of late has had considerable success in taking and holding territory toward that end. At the same time, however, AQAP has repeatedly demonstrated its interest in attacking American and other Western targets, both within Yemen and externally. The failed attempt by the so-called “underwear bomber” to take down a flight to Detroit on Christmas Day 2009 and the failed attempt to set off bombs on two international parcel delivery flights in 2010 both testify to this interest in external operations.121 ¶ Bearing all of this in mind, is AQAP best understood to be part-and-parcel of the original al Qaeda organization, or instead a wholly-distinct organization that simply shares historic ties, branding, goals, and enemies? AQAP is widely cited as the franchise of al Qaeda that remains most closely tied to the core leadership, and we do know that AQAP’s current emir—al Wahayshi—has publicly pledged bayat to Ayman al Zawahiri, the post-bin Laden leader of al Qaeda, promising “obedience in good and hard times, in ease and difficulty.” We know, too, that Osama bin Laden at one point rejected a request by al Wahayshi to elevate the Americanborn cleric Anwar al-Awlaki to a more senior leadership position within AQAP. On the other hand, there is little evidence of the al Qaeda senior leadership exercising detailed control over AQAP’s operational activities. Absent agreement with respect to just what conditions suffice to establish that a regional group such as AQAP is part-and-parcel of the core organization, it is hard to say much more than this. ¶ Complicating matters, there is a distinct model whereby regional groups are linked to al ¶ Qaeda. Whereas AQAP illustrates the break-away model of al Qaeda’s fragmentation, al Shabaab in Somalia is a case study of a model in which an indigenous, independent group is gradually brought into the al Qaeda orbit. ¶ It is not that al Qaeda was a stranger to east Africa in the pre-9/11 period. On the contrary, its formative years were spent in the Sudan, and even after bin Laden shifted headquarters to Afghanistan the group maintained an operational presence robust enough to carry out the simultaneous bombing of U.S. embassies in both Kenya and Tanzania in 1998.126 A substantial number of al Qaeda operatives remained in the region thereafter, moreover, and during the first post-9/11 decade other members have moved to the area, fleeing the pressure in Pakistan. Eventually, al Qaeda attempted to invest this regional concentration of operatives with a sense of unity, applying to them the label “al Qaeda in East Africa” (“AQEA”). Yet AQEA has never acquired much in the way of organizational coherence, let alone a substantially-distinct identity a la AQAP. The interesting question in East Africa is not whether AQEA is breaking away from al Qaeda’s senior leadership, but instead whether the indigenous Somali insurgent group known as Harakat al-Shabaab al-Mujahideen (that is, the Mujahideen Youth Movement), or simply “alShabaab,” will merge into the al Qaeda network to a meaningful degree. ¶ Al Shabaab originated as the youth wing of a coalition of Somali political factions and extremist groups collected under the label the Islamic Courts Union (“ICU”), which in 2006 seized control across a wide swath of southern Somalia. The ICU’s power was broken that same year by an Ethiopian invasion, one result of which was al Shabaab’s emergence as a fullyindependent organization. In relatively short order, al Shabaab managed to retake much of southern Somalia, mounting a persistent campaign of attacks—including suicide bombings— against Somalia’s transitional government in Mogadishu and the African Union peacekeepers supporting it. Remarkably, the organization even succeeded in recruiting a number of young Somali-American men from the Minneapolis-St. Paul area—including at least one person who went on to carry out a suicide bombing. Whether its aspirations would remain wholly local became much less clear over time, however. ¶ Attention began to focus on the question whether the group had evolved into an al Qaeda regional franchise, especially after al Shabaab pulled off a spectacular double-suicide bombing in Uganda in 2010, killing approximately 74 people including one American. The al Shabaab-al Qaeda tie proved difficult to pin down, however, for a few reasons. First, there has long been some amount of “dual-hatting” pursuant to which AQEA members have, on an individual basis, taken on important roles within al Shabaab’s leadership structure. Saleh Ali Saleh Nabhan, for example, was both an al Qaeda member associated with AQEA and a senior al Shabaab official. Second, quite apart from ad hoc integration of specific al Qaeda members into its leadership, al Shabaab has also long had a substantial number of foreign fighters within its ranks, and at least since 2008 leaders associated with these foreign fighters appear to have distinguished themselves from indigenously-focused al Shabaab leaders by publicly advocating the formal integration of al Shabaab into al Qaeda. Third, al Qaeda’s senior leaders themselves seem to  ¶ have been divided on the question of ties to al Shabaab. All that said, there were certainly at least a substantial amount of friendly communication underway, with AQAP leaders apparently playing an important role both as a go-between and as an advocate encouraging al Shabaab to turn its sights outward beyond its own borders. ¶ The prospect of merger gained considerable ground in February 2012, when a key al Shabaab leader appeared in a video to announce al Shabaab’s formal accession to the al Qaeda network—a video that included a clip of Ayman al Zawahiri himself welcoming al Shabaab aboard. Whether the video truly spoke for al Shabaab as a whole—and whether the linkage in any event will involve actual subordination of al Shabaab to al Qaeda, or even the sort of cooperative relationship that may exist between AQAP and al Qaeda—remains to be see, however. The pronouncement was made by an al Shabaab figure long associated with al Shabaab’s foreign forces, and similar statements of allegiance to al Qaeda had been made in the past by that wing. Other al Shabaab leaders in the past have expressed reluctance to become drawn into al Qaeda’s larger global orientation, however, lest they lose focus on their ambitions for Somalia (and lest they draw unwanted attention from western security services). At the time of this writing, then, the most that can be said is that AQAP appears to be more closely connected to al Qaeda than is al Shabaab, but that the gap may be shrinking. ¶ There are many other examples of al Qaeda’s fragmentation, most of them more akin to the al Shabaab model of an independent group moving into al Qaeda’s orbit to some indeterminate and unstable degree. Al Qaeda has been linked in relatively unspecified ways to a group of Islamist extremists in northern Nigeria known as Boko Haram. The Algerian extremist group formerly known as the Salafist Group for Call and Combat has embraced the al Qaeda brand more formally, becoming “al Qaeda in the Islamic Maghreb” or “AQIM,” and has recently seized territory in Northern Mali working in close concert with a local armed group of extremists known as Ansar Dine (“Defenders of the Faith”). Multiple al Qaeda-linked groups have emerged in the area of the Sinai Peninsula in Egypt, including a group calling itself the Mujahideen Shura Council and another called Ansar al Jihad. Iraq famously became the home of al Qaeda in Iraq in the years following the U.S. invasion, and was famously (and foolishly) reluctant to conform its operations to the dictates of al Qaeda’s senior leadership in Pakistan in its first iteration; after nearly being eliminated a few years ago, it is now enjoying a substantial resurgence. And as the civil war in Syria unfolds, there are claims in the media regarding the presence of “al Qaeda” fighters appearing, though whether this represents an influx of al Qaeda in Iraq members, of homegrown extremists appropriating al Qaeda’s brand, something else, or mere propaganda is far from clear at this time. The point being, each of these groups may differ markedly from one another in terms of their actual degree of connection to al Qaeda itself, their interest in conducting operations targeting American or other western targets outside the confines of the state in which they usually operate, and in terms of their own organizational coherence. ¶ Extreme decentralization receives a further nudge from certain influential theorists of jihad—most notably Abu Musab al-Suri—who advocate pushing this trend toward a radically decentralized model in which there is little or no hierarchy or connectivity amongst participants, but rather simply an inspirational vision that would lead to large numbers of individuals or small groups to form and take action on their own initiative. They would be members of a movement, one might say, but not of any particular organization. This model—familiar in the  ¶ United States as the “leaderless resistance” approach, and popularized in particular by Mark Sageman as the “leaderless jihad” concept—maximizes operational security, as one cannot unravel a network after identifying one or more key nodes when there is no network. ¶ Notwithstanding these pressures and theories, the drive to decentralize might have amounted to relatively little if not for the fact that there were havens to which at least some al Qaeda personnel could disperse (or remain in place, for those situations where an al Qaeda member already was present), and regions with indigenous, like-minded organizations to which ties might be established. In fact, both were available. Ungoverned areas—or, at least, areas beyond the writ of central governments—turned out to exist not only in the FATA of Pakistan, but also in a number of provinces in Yemen, in wide swaths of Somalia, and in northern Mali. Each of these areas has indigenous populations hostile to some degree to their respective central governments, inclined both theologically and politically to sympathize actively with al Qaeda, or at least to tolerate the presence of groups espousing al Qaeda’s viewpoint. And in each of these areas there is no shortage of existing armed groups. The emergence of civil war in Syria, moreover, may well be producing a similar opportunity. ¶ In summary, al Qaeda has fragmented along several dimensions. Its core personnel have dispersed geographically to some extent, thus making it more difficult to determine whether a particular individual is in fact best understood to be part of al Qaeda in the first instance. At the same time, it has embraced (willfully or not) a model in which its own regional cells are increasingly independent while at the same time it seeks nominal or loose ties to already-existing independent regional actors. These groups vary widely in terms of the nature of their relationship to al Qaeda’s senior leadership, making it exceedingly difficult (particularly without access to the best intelligence) to say which of these groups are best understood to be part-andparcel of al Qaeda itself, which are independent yet allied in some meaningful fashion to al Qaeda, and which merely are in sympathetic communication with al Qaeda but are not in any real sense subject to its direction and control. ¶ Making matters more complicated still, the original al Qaeda organization may be on the brink of complete collapse in light of the extraordinary success that the United States and its allies have had in killing or capturing its key leadership figures, combined with the body blow to its popularity al Qaeda has suffered as a result of growing public appreciation for the volume of Muslims killed by its operations and operations conducted by its co-branded affiliates and the alternative pathway to political change in the Sunni Arab world made manifest in the Arab Spring movement and its various component revolutions. At some point, the core may well be gone altogether, in other words, leaving no “al Qaeda” to which the regional groups could be connected. Even if the core survives, however, its decline relative to the operational significance and independence of the “franchises” makes it ever less sensible—ever more dated—to view the overall situation through a core-centric lens. ¶ ¶ 2. The Legal Consequences of Proliferation and Fragmentation ¶ ¶ The proliferation and fragmentation trends described above create a growing disconnect between the conception of the enemy embedded in the existing domestic legal architecture and the facts on the ground. ¶ The 2001 AUMF, though framed in general terms, was relatively straightforward in terms of identifying an enemy. It encompassed al Qaeda in its reference to the organization responsible for the 9/11 attacks, and it encompassed the Afghan Taliban in its reference to those who might harbor the organization responsible for the 9/11 attacks. It said no more and no less, and thus set the stage for a two-party conception of the enemy. ¶ President Bush himself challenged that conception early on in a speech to Congress, proclaiming that the war on terrorism would not be limited to al Qaeda but would extend to all terrorist organizations of global reach threatening America. Such a capacious understanding of the enemy was beyond what Congress had provided in the AUMF, obviously, and thus the speech raised the question whether military force against additional groups might instead by justified domestically (i.e., in terms of the separation of powers) on grounds of inherent presidential power to use force under Article II of the Constitution (either as a matter of national self-defense or on some broader theory of executive discretion to use force to further the national interest). But though subsequent rhetoric often referred to a “global war on terror” rather than a conflict with al Qaeda as such, the matter eventually began to seem rather academic, as it did not appear that the United States actually was detaining or targeting persons outside of the al Qaeda/Afghan Taliban framework. The emerging detention caselaw powerfully reinforced this perception, moreover, as the vast bulk of the cases involved persons said by the government to be members of al Qaeda or the Afghan Taliban.158 The fact that the Obama administration expressly invoked authority only under the AUMF further reinforced the apparent primacy of the two-party conception. ¶ All of which would be fine from the domestic separation of powers perspective, except that in reaction to the proliferation and fragmentation trends described above the United States eventually did begin using force against members of other groups after all—or at least it began using force in situations which could not be reconciled with the two-party conception without encountering difficult factual questions about the precise nature of the link between a given group and al Qaeda or the Afghan Taliban. This has occurred on a widespread and sustained scale in Afghanistan itself and in Pakistan; it has occurred on a narrower and more-episodic scale in Yemen in relation to AQAP; and it may or may not have occurred from time to time in Somalia, depending on whether one thinks that episodic uses of force there have targeted al Shabaab as such or, instead, individuals linked as much or more to the core al Qaeda organization. ¶ The executive branch has long argued that any such extensions remain justified from a domestic law perspective on the theory that the AUMF implicitly includes authority to use force also against any entities that emerge as co-belligerents of al Qaeda or the Afghan Taliban—a status the executive branch refers to as becoming an “associated force.”163 This approach began in the Bush administration, which built the associated forces model into its description of the boundaries of its detention authority in the course of the Guantanamo habeas litigation. The Obama administration has continued this approach, both in litigation and in its National Strategy for Counterterrorism. ¶ There are two problems with the associated-forces solution. The first is that some critics deny that the cobelligerency concept has application in this setting, reasoning that cobelligerency is a creature of international law applicable solely in the context of international armed conflict—a circumstance not present here. Whatever the merits of that criticism in the abstract, however, it became irrelevant to the domestic law separation-of-powers dispute (i.e., the fight as to whether Congress had implicitly authorized the use of force against “associated forces” or if the President might have such power through Article II in the alternative) **when Congress** in 2011 **enacted the NDAA** FY’12, **and included** within it **language expressly** **embracing** the **executive** branch’s detention-**authority** definition—**encompassing** not just al Qaeda and the Taliban, but also “**associated forces**.” **It thus is no longer necessary to argue that such a concept should be read into the AUMF via cobelligerency**; Congress has expressly embraced the general idea. ¶ **But what exactly counts as an associated force? This is the second problem, and not only does it remain untouched by the NDAA, it is a problem that is growing increasingly serious as the trends described above continue to unfold. Simply put, it is not clear what criteria apply to identify a group as an associated force. ¶** International law is little help, even if we accept the relevance of the co-belligerency concept, given the distance between the organizations and networks currently at issue and the state-centric situations that gave rise to that concept in the past. **Congress**, for its part**, missed the chance to address this issue in the NDAA, choosing to simply codify the “associated forces” concept without defining it.** The habeas-derived caselaw from the past decade also has little to offer. As noted above, those cases almost invariably involve persons linked either to the Afghan Taliban or to the core al Qaeda organization (or more specifically, to the training camps and recruiting pipelines operated in the pre-9/11 period by al Qaeda). Such fact patterns spare the courts any need to grapple with the nuances presented in situations like that of Ahmed Warsame (i.e., those that are replete with uncertainty regarding various groups and their ties to al Qaeda). Here we might add, too, a note on the impact of the sheer passage of time. In some quarters, **a tipping point has been reached**. Nothing captures this sense better—or more relevantly—than the blunt denunciation issued by Christopher Heyns—designated by a U.N. body to be a “special rapporteur” monitoring the practice of “extrajudicial killing”—at an ACLU-sponsored event in the summer of 2012. According to the account provided by the Guardian, ¶ ¶ Heyns ridiculed the US suggestion that targeted UAV strikes on al-Qaida or allied groups were a legitimate response to the 9/11 attacks. "It's difficult to see how any killings carried out in 2012 can be justified as in response to [events] in 2001," he said. "Some states seem to want to invent new laws to justify new practices.”

## Politics

#### Boehner’s all talk.

Costa 10/3 [Robert, National Review, Re: Grand Bargain http://www.nationalreview.com/corner/360254/re-grand-bargain-robert-costa]

Boehner raised the prospect of a grand bargain-type deal at the White House meeting and was laughed at because everyone feels like they’ve heard this song and dance before. The general feeling is, if he’s really ready to make some tough choices – read, revenue – then great. But the history of this from where we sit is Boehner talking a big game, then bailing as soon as he runs into the inevitable resistance from a certain faction in his caucus. So we will believe it when we see it, but are proceeding under the assumption that this is just more of the same big talk, no walk.

#### Their pressure arguments are irrelevant – conservatives are deaf to the public’s concerns.

Sargent 10/2 [Greg, Washington Post, The Morning Plum: Governing crisis set to escalate dramatically <http://www.washingtonpost.com/blogs/plum-line/wp/2013/10/02/the-morning-plum-governing-crisis-set-to-escalate-dramatically/>]

But here’s the problem: Conservative Republicans remain convinced the public is on their side in this battle. Despite multiple polls showing disapproval of the law does not translate into public support for GOP sabotage of it, multiple Republicans are quoted today claiming the public will side with them over time. The real danger here is that many Republicans — who are in an anti-Obamacare bubble where no good news about the law ever penetrates; where the most minor glitch confirms the law is collapsing under its own weight; and where huge majorities will support any tactic, no matter how destructive, designed to hasten that supposedly inevitable collapse — will remain convinced the public is with them as this showdown drags into a debt ceiling crisis. This makes miscalculation about the Dem resolve not to cave on the debt limit more likely, which in turn makes default more likely. And with it, unpredictable levels of economic havoc and destruction

#### GOP would view as a concession

Munoz 6/3

Carlos Munoz, The Hill, House rolling back 9/11-era counter terrorism rules of war http://thehill.com/blogs/defcon-hill/policy-and-strategy/303153-house-rolling-back-911-era-counter-terrorism-rules-of-war-#ixzz2eGIF5zaI

**The other proposal will force the Pentagon and White House to review all groups or individuals now characterized as “associated forces” under the** 9/11 counter terrorism rules, known on Capitol Hill as the Authorization of the Use of Military Force (**AUMF**). Both measures were included in the House defense panel's version of the fiscal year 2014 Defense Authorization bill. The Hill first reported details of the House panel's efforts to reel in mandates in the AUMF last Friday. Individuals or groups with cursory ties to al Qaeda are now considered “associated forces,” and can be targeted in drone strikes just like members of terrorist cells or people with direct links to the terror group. The House-mandated review requires the Pentagon to specifically lay out whether those groups or individuals are directly tied to al Qaeda operations, and if they are engaged with ongoing or future terror plots against the United States or its allies. Those pushing to change the rules argue the current definition of associated forces gives U.S. military and intelligence agencies far too much leeway in determining who can and cannot be targeted by U.S. forces in counter terrorism “kill/capture” missions. The rules of war under the AUMF provide a "frightening amount of power and it is counter to the rights enshrined in the United States Constitution," House Armed Services Committee Ranking Member Rep. Adam Smith said in a statement Monday. "We have an opportunity, through this year’s bill, to protect constitutional rights and roll back this authority," he added. The kill/capture notification called for in the Pentagon spending bill will "ensure that every [counter terrorism] action is consistent with our civil liberties and freedoms," **Rep Mac Thornberry (R-Texas), head of the House defense committee's subpabel on emerging threats and intelligence, said** in a statement last month. Thornberry, who introduced the proposal as a stand-alone bill in May, **said the legislation has garnered widespread support on Capitol Hill. "There has been bipartisan support in the House and Senate for more ... oversight of such operations to ensure they are carried out in ways that are consistent with the United States Constitution,"** Thornberry said at the time.

#### No fight back

Bannon 13

(Brad Bannon runs Bannon Communications Research, a political polling and consulting firm which helps labor unions, progressive issue groups, and Democratic candidates win public affairs and political campaigns, May 28, 2013, <http://www.usnews.com/opinion/blogs/brad-bannon/2013/05/28/obama-wants-us-to-take-away-his-war-powers--we-should>, “An Offer We Can’t Refuse”, AB)

President Obama kicked off the long Memorial Day weekend with a speech which had a request that you hardly get from a president or anybody else in Washington. The president asked Congress to take away some of his power. This is not the kind of offer that comes along very often, so Congress should snap it up while it's still on the table. President Obama asked Congress to replace or refine the Authorization for the Use of Military Force that Congress passed after the al-Qaida attack on the World Trade Center on 9/11. President George W. Bush used the authorization as a blank check to justify illegal renditions, drone attacks, indefinite detention and just about anything else he and Vice President Dick Cheney wanted to do. Reduction in presidential authority with the repeal of authorization would mean more power for the federal legislative branch to review and restrain the president's actions.