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## plan

The United States Federal Government should restrict the President’s authority for targeted killing as a first resort outside zones of active hostilities.

## terror

The plan is key to prevent an escalating public backlash against future drone use

Zenko 13 (Micah Zenko is the Douglas Dillon fellow in the Center for Preventive Action (CPA) at the Council on Foreign Relations (CFR). Previously, he worked for five years at the Harvard Kennedy School and in Washington, DC, at the Brookings Institution, Congressional Research Service, and State Department's Office of Policy Planning, Council Special Report No. 65, January 2013, “U.S. Drone Strike Policies”, i.cfr.org/content/publications/attachments/Drones\_CSR65.pdf‎)

In his Nobel Peace Prize acceptance speech, President Obama declared: “Where force is necessary, we have a moral and strategic interest in binding ourselves to certain rules of conduct. Even as we confront a vicious adversary that abides by no rules, I believe the United States of America must remain a standard bearer in the conduct of war.”63 Under President Obama drone strikes have expanded and intensified, and they will remain a central component of U.S. counterterrorism operations for at least another decade, according to U.S. officials.64 But much as the Bush administration was compelled to reform its controversial coun- terterrorism practices, it is likely that the United States will ultimately be forced by domestic and international pressure to scale back its drone strike policies. The Obama administration can preempt this pressure by clearly articulating that the rules that govern its drone strikes, like all uses of military force, are based in the laws of armed conflict and inter- national humanitarian law; by engaging with emerging drone powers; and, most important, by matching practice with its stated policy by limiting drone strikes to those individuals it claims are being targeted (which would reduce the likelihood of civilian casualties since the total number of strikes would significantly decrease). The choice the United States faces is not between unfettered drone use and sacrificing freedom of action, but between drone policy reforms by design or drone policy reforms by default. Recent history demonstrates that domestic political pressure could severely limit drone strikes in ways that the CIA or JSOC have not anticipated. In support of its counterterrorism strategy, the Bush administration engaged in the extraordinary rendition of terrorist suspects to third countries, the use of enhanced interrogation techniques, and warrantless wiretapping. Although the Bush administration defended its policies as critical to protecting the U.S. homeland against terrorist attacks, unprecedented domestic political pressure led to significant reforms or termination. Compared to Bush-era counterterrorism policies, drone strikes are vulnerable to similar—albeit still largely untapped—moral outrage, and they are even more susceptible to political constraints because they occur in plain sight. Indeed, a negative trend in U.S. public opinion on drones is already apparent. Between February and June 2012, U.S. support for drone strikes against suspected terrorists fell from 83 per- cent to 62 percent—which represents less U.S. support than enhanced interrogation techniques maintained in the mid-2000s.65 Finally, U.S. drone strikes are also widely opposed by the citizens of important allies, emerging powers, and the local populations in states where strikes occur.66 States polled reveal overwhelming opposition to U.S. drone strikes: Greece (90 percent), Egypt (89 percent), Turkey (81 percent), Spain (76 percent), Brazil (76 percent), Japan (75 percent), and Pakistan (83 percent).67 This is significant because the United States cannot conduct drone strikes in the most critical corners of the world by itself. Drone strikes require the tacit or overt support of host states or neighbors. If such states decided not to cooperate—or to actively resist—U.S. drone strikes, their effectiveness would be immediately and sharply reduced, and the likelihood of civilian casualties would increase. This danger is not hypothetical. In 2007, the Ethiopian government terminated its U.S. military presence after public revelations that U.S. AC-130 gun- ships were launching attacks from Ethiopia into Somalia. Similarly, in late 2011, Pakistan evicted all U.S. military and intelligence drones, forc- ing the United States to completely rely on Afghanistan to serve as a staging ground for drone strikes in Pakistan. The United States could attempt to lessen the need for tacit host-state support by making signifi- cant investments in armed drones that can be flown off U.S. Navy ships, conducting electronic warfare or missile attacks on air defenses, allow- ing downed drones to not be recovered and potentially transferred to China or Russia, and losing access to the human intelligence networks on the ground that are critical for identifying targets. According to U.S. diplomats and military officials, active resis- tance—such as the Pakistani army shooting down U.S. armed drones— is a legitimate concern. In this case, the United States would need to either end drone sorties or escalate U.S. military involvement by attack- ing Pakistani radar and antiaircraft sites, thus increasing the likelihood of civilian casualties.68 Beyond where drone strikes currently take place, political pressure could severely limit options for new U.S. drone bases. For example, the Obama administration is debating deploying armed drones to attack al-Qaeda in the Islamic Maghreb (AQIM) in North Africa, which would likely require access to a new airbase in the region. To some extent, anger at U.S. sovereignty violations is an inevitable and necessary trade-off when conducting drone strikes. Nevertheless, in each of these cases, domestic anger would partially or fully abate if the United States modified its drone policy in the ways suggested below.

Public backlash culminates in a legal crackdown that hemorrhages the targeted killing program

Jack Goldsmith, Harvard Law School Professor, focus on national security law, presidential power, cybersecurity, and conflict of laws, Former Assistant Attorney General, Office of Legal Counsel, and Special Counsel to the Department of Defense, Hoover Institution Task Force on National Security and Law, March 2012, Power and Constraint, P. 199-201

For the GTMO Bar and its cousin NGOs and activists, however, the al-Aulaqi lawsuit, like other lawsuits on different issues, was merely an early battle in a long war over the legitimacy of U.S. targeting practices—a war that will take place not just in the United States, but in other countries as well. When the CCR failed to achieve what it viewed as adequate accountability for Bush administration officials in the United States in connection with interrogation and detention practices, it started pursuing, and continues to pursue, lawsuits and prosecutions against U.S. officials in Spain, Germany, and other European countries. "You look for every niche you can when you can take on the issues that you think are important," said Michael Ratner, explaining the CCR's strategy for pursuing lawsuits in Europe.

Clive Stafford Smith, a former CCR attorney who was instrumental in its early GTMO victories and who now leads the British advocacy organization Reprieve, is using this strategy in the targeted killing context. "There are endless ways in which the courts in Britain, the courts in America, the international Pakistani courts can get involved" in scrutinizing U.S. targeting killing practices, he argues. "It's going to be the next 'Guantanamo Bay' issue."' Working in a global network of NGO activists, Stafford Smith has begun a process in Pakistan to seek the arrest of former CIA lawyer John Rizzo in connection with drone strikes in Pakistan, and he is planning more lawsuits in the United States and elsewhere against drone operators." "The crucial court here is the court of public opinion," he said, explaining why the lawsuits are important even if he loses. His efforts are backed by a growing web of proclamations in the United Nations, foreign capitals, the press, and the academy that U.S. drone practices are unlawful. What American University law professor Ken Anderson has described as the "international legal-media-academic-NGO-international organization-global opinion complex" is hard at work to stigmatize drones and those who support and operate them."

This strategy is having an impact. The slew of lawsuits in the United States and threatened prosecutions in Europe against Bush administration officials imposes reputational, emotional, and financial costs on them that help to promote the human rights groups' ideological goals, even if courts never actually rule against the officials. By design, these suits also give pause to current officials who are considering controversial actions for fear that the same thing might later happen to them. This effect is starting to be felt with drones. Several Obama administration officials have told me that they worry targeted killings will be seen in the future (as Stafford Smith predicts) as their administration's GTMO. The attempted judicial action against Rizzo, the earlier lawsuits against top CIA officials in Pakistan and elsewhere, and the louder and louder proclamations of illegality around the world all of which have gained momentum after al-Aulaqi's killing—are also having an impact. These actions are rallying cries for protest and political pushback in the countries where the drone strikes take place. And they lead CIA operators to worry about legal exposure before becoming involved in the Agency's drone program." We don't know yet whether these forces have affected actual targeting practices and related tactics. But they induce the officials involved to take more caution. And it is only a matter of time, if it has not happened already, before they lead the U.S. government to forgo lawful targeted killing actions otherwise deemed to be in the interest of U.S. national security.

Only the plan can retain allied cooperation on counter-terrorism

David Kris, Assistant Attorney General for National Security at the U.S. Department of Justice from March 2009 to March 2011, 6/15/2011, Law Enforcement as a Counterterrorism Tool, http://jnslp.com/wp-content/uploads/2011/06/01\_David-Kris.pdf

On the other side of the balance, certainly most of our friends in Europe, and indeed in many countries around the world (as well as many people in this country), accept only a law enforcement response and reject a military response to terrorism, at least outside of theaters of active armed conflict.76 As a result, some of those countries will restrict their cooperation with us unless we are using law enforcement methods. Gaining cooperation from other countries can help us win the war – these countries can share intelligence, provide witnesses and evidence, and transfer terrorists to us. Where a foreign country will not give us a terrorist (or information needed to neutralize a terrorist) for anything but a criminal prosecution, we obviously should pursue the prosecution rather than letting the terrorist go free. This does not subordinate U.S. national interest to some global test of legitimacy; it simply reflects a pragmatic approach to winning the war. If we want the help of our allies, we need to work with them.77

More generally, we need to recognize the practical impact of our treatment of the enemy and the perception of that treatment. This war is not a classic battle over land or resources, but is fundamentally a conflict of values and ways of life.78 Demonstrating that we live up to our values, thus drawing stark contrasts with the adversary, is essential to ensuring victory. When our enemy is seen in its true colors – lawless, ruthless, merciless – it loses support worldwide. For example, in Iraq, al Qaeda’s random and widespread violence against civilians eventually helped mobilize the population against the insurgents.79 On the other hand, when our actions or policies provoke questions about whether we are committed to the rule of law and our other values, we risk losing some of our moral authority. This makes it harder to gain cooperation from our allies and easier for the terrorists to find new recruits.

This is not simply abstract philosophy. It is an important reality in our military’s effort to defeat the enemy in places like Iraq and Afghanistan. As the U.S. military’s counterinsurgency field manual states, “to establish legitimacy, commanders transition security activities from combat operations to law enforcement as quickly as feasible. When insurgents are seen as criminals, they lose public support.”80 Adherence to the rule of law is central to this approach: “The presence of the rule of law is a major factor in assuring voluntary acceptance of a government’s authority and therefore its legitimacy. A government’s respect for preexisting and impersonal legal rules can provide the key to gaining widespread enduring societal support. Such respect for rules – ideally ones recorded in a constitution and in laws adopted through a credible, democratic process – is the essence of the rule of law. As such, it is a powerful potential tool for counterinsurgents.”81 Indeed, the U.S. military has been implementing such a transition to civilian law enforcement in Iraq, where detentions and prosecutions of insurgents are now principally processed through the domestic criminal justice system,82 and we are moving in that direction in Afghanistan, where transfer of detention and prosecution responsibilities to Afghan civilian authorities is our goal.83 I think these are principles that are well worth keeping in mind as we think about the impact of employing different tools in the context of our conflict with al Qaeda. It would not only be ironic, but also operationally counterproductive, if our partners in Iraq and Afghanistan rely increasingly on law enforcement tools to detain terrorists, even in areas of active hostilities, while we abandon those tools here in the United States.84

Allied cooperation’s key to effective drone use

Zenko 13

Micah Zenko is the Douglas Dillon fellow with the Center for Preventive Action at the Council on Foreign Relations, Newsday, January 30, 2013, "Zenko: Why we can't just drone Algeria", http://www.newsday.com/opinion/oped/zenko-why-we-can-t-just-drone-algeria-1.4536641

CNN should not have been surprised. Neither the Bush nor Obama administrations received blanket permission to transit Algerian airspace with surveillance planes or drones; instead, they received authorization only on a case-by-case basis and with advance notice.

According to Washington Post journalist Craig Whitlock, the U.S. military relies on a fleet of civilian-looking unarmed aircraft to spy on suspected Islamist groups in North Africa, because they are less conspicuous - and therefore less politically sensitive for host nations - than drones. Moreover, even if the United States received flyover rights for armed drones, it has been unable to secure a base in southern Europe or northern Africa from which it would be permitted to conduct drone strikes; and presently, U.S. armed drones cannot be launched and recovered from naval platforms.

According to Hollywood movies or television dramas, with its immense intelligence collection and military strike capabilities, the United States can locate, track, and kill anyone in the world.

This misperception is continually reinvigorated by the White House's, the CIA's, and the Pentagon's close cooperation with movie and television studios. For example, several years before the CIA even started conducting non-battlefield drone strikes, it was recommending the tactic as a plotline in the short-lived (2001-2003) drama "The Agency." As the show's writer and producer later revealed: "The Hellfire missile thing, they suggested that. I didn't come up with this stuff. I think they were doing a public opinion poll by virtue of giving me some good ideas."

Similarly, as of November there were at least 10 movies about the Navy SEALs in production or in theaters, which included so much support from the Pentagon that one film even starred active-duty SEALs.

The Obama administration's lack of a military response in Algeria reflects how sovereign states routinely constrain U.S. intelligence and military activities. As the U.S. Air Force Judge Advocate General's Air Force Operations and the Law guidebook states: "The unauthorized or improper entry of foreign aircraft into a state's national airspace is a violation of that state's sovereignty. . . . Except for overflight of international straits and archipelagic sea lanes, all nations have complete discretion in regulating or prohibiting flights within their national airspace."

Though not sexy and little reported, deploying CIA drones or special operations forces requires constant behind-the-scenes diplomacy: with very rare exceptions - like the Bin Laden raid - the U.S. military follows the rules of the world's other 194 sovereign, independent states.

These rules come in many forms. For example, basing rights agreements can limit the number of civilian, military and contractor personnel at an airbase or post; what access they have to the electromagnetic spectrum; what types of aircraft they can fly; how many sorties they can conduct per day; when those sorties can occur and how long they can last; whether the aircraft can drop bombs on another country and what sort of bombs; and whether they can use lethal force in self-defense. When the United States led the enforcement of the northern no-fly zone over Iraq from the Incirlik Air Base in southern Turkey from 1991 to 2003, a Turkish military official at the rank of lieutenant colonel or higher was always on board U.S. Air Force AWACS planes, monitoring the airspace to assure that the United States did not violate its highly restrictive basing agreement.

As Algeria is doing presently, the denial or approval of overflight rights is a powerful tool that states can impose on the United States. These include where U.S. air assets can enter and exit another state, what flight path they may take, how high they must fly, what type of planes can be included in the force package, and what sort of missions they can execute. In addition, these constraints include what is called shutter control, or the limits to when and how a transiting aircraft can collect information. For example, U.S. drones that currently fly out of the civilian airfield in Arba Minch, Ethiopia, to Somalia, are restricted in their collection activities over Ethiopia's Ogaden region, where the government has conducted an intermittent counterinsurgency against the Ogaden National Liberation Front.

Drones have damaged Al-Qaeda’s leadership, but they’re still a threat – most qualified ev

Simpson 8/17—national affairs columnist with The Globe and Mail, a Canadian newspaper (2013, Jeffrey, “The long war against al-Qaeda isn't over,” lexis)

Just how serious is the al-Qaeda threat? Informed people can disagree, but the Canadian Security Intelligence Service did everyone a favour by convening a workshop on "The Future of al-Qaeda" and then publishing the results, including three possible scenarios. They ranged from al-Qaeda in decline, as the State Department suggested, to al-Qaeda growing incrementally, to al-Qaeda gaining rapidly in strength.

The incremental growth scenario emerged as the most likely. If that is correct, the organization will remain a threat for a very long time. Al-Qaeda has morphed or sprung offshoots to Saharan Africa and parts of Southeast Asia. It remains resilient in Pakistan and some countries in the Middle East.

Its fighters are now very much involved in the Syrian war, hoping to assist in the overthrow of Bashar al-Assad's regime and replace it with a militant Sunni alternative. And, of course, it has followers and sleeper cells in Western countries who remain a threat, witness to which were the recent arrests of men alleged to have been plotting to blow up a train between Toronto and New York.

This very loose network of affiliates persists, despite U.S. drone attacks and other actions that have killed at least 34 key al-Qaeda figures in Pakistan, Yemen and elsewhere. These losses have undoubtedly been disruptive, but the movement **grows from the bottom**, with new recruits coming from failing states, areas with weak governmental authority, poor economic conditions and, of course, the heavy influence of radical Islam, such as central Yemen, the borderlands of Pakistan, southern Thailand, northern Nigeria or northern Mali.

CSIS published four papers delivered at the conference, but kept the authors' names confidential.

The longest paper, dealing with al-Qaeda Central and al-Qaeda in Iraq, is the most comprehensive and sobering. It concludes that "the long-established nucleus of the al-Qaeda organization has proven itself to be as resilient as it is formidable."

Al-Qaeda's core leadership, the author wrote, "has withstood arguably the greatest international onslaught against a terrorist organization in history." Despite this, the organization has lasted for a quarter of a century. When U.S. troops withdraw from Afghanistan, life will be even easier for al-Qaeda across the border in Pakistan, where its key leaders live and work. The chaos in Syria has presented an opportunity for al-Qaeda to join the fray against an apostate Alawite-controlled regime backed by the Shia forces of Iran and Hezbollah in Lebanon, both enemies of the Sunni jihadis in al-Qaeda.

Drones solve safe havens – prevents an attack in the US

Johnston 12 (Patrick B. Johnston is an associate political scientist at the RAND Corporation, a nonprofit, nonpartisan research institution. He is the author of "Does Decapitation Work? Assessing the Effectiveness of Leadership Targeting in Counterinsurgency Campaigns," published in International Security (Spring 2012)., 8/22/2012, "Drone Strikes Keep Pressure on al-Qaida", www.rand.org/blog/2012/08/drone-strikes-keep-pressure-on-al-qaida.html)

Should the U.S. continue to strike at al-Qaida's leadership with drone attacks? A recent poll shows that while most Americans approve of drone strikes, in 17 out of 20 countries, more than half of those surveyed disapprove of them.

My study of leadership decapitation in 90 counter-insurgencies since the 1970s shows that when militant leaders are captured or killed militant attacks decrease, terrorist campaigns end sooner, and their outcomes tend to favor the government or third-party country, not the militants.

Those opposed to drone strikes often cite the June 2009 one that targeted Pakistani Taliban leader Baitullah Mehsud at a funeral in the Tribal Areas. That strike reportedly killed 60 civilians attending the funeral, but not Mehsud. He was killed later by another drone strike in August 2009. His successor, Hakimullah Mehsud, developed a relationship with the foiled Times Square bomber Faisal Shahzad, who cited drone strikes as a key motivation for his May 2010 attempted attack.

Compared to manned aircraft, drones have some advantages as counter-insurgency tools, such as lower costs, longer endurance and the lack of a pilot to place in harm's way and risk of capture. These characteristics can enable a more deliberative targeting process that serves to minimize unintentional casualties. But the weapons employed by drones are usually identical to those used via manned aircraft and can still kill civilians—creating enmity that breeds more terrorists.

Yet many insurgents and terrorists have been taken off the battlefield by U.S. drones and special-operations forces. Besides Mehsud, the list includes Anwar al-Awlaki of al-Qaida in the Arabian Peninsula; al-Qaida deputy leader Abu Yahya al-Li-bi; and, of course, al-Qaida leader Osama bin Laden. Given that list, it is possible that the drone program has prevented numerous attacks by their potential followers, like Shazad.

What does the removal of al-Qaida leadership mean for U.S. national security? Though many in al-Qaida's senior leadership cadre remain, the historical record suggests that "decapitation" will likely weaken the organization and could cripple its ability to conduct major attacks on the U.S. homeland.

Killing terrorist leaders is not necessarily a knockout blow, but can make it harder for terrorists to attack the U.S. Members of al-Qaida's central leadership, once safely amassed in northwestern Pakistan while America shifted its focus to Iraq, have been killed, captured, forced underground or scattered to various locations with little ability to communicate or move securely.

Recently declassified correspondence seized in the bin Laden raid shows that the relentless pressure from the drone campaign on al-Qaida in Pakistan led bin Laden to advise al-Qaida operatives to leave Pakistan's Tribal Areas as no longer safe. Bin Laden's letters show that U.S. counterterrorism actions, which had forced him into self-imposed exile, had made running the organization not only more risky, but also more difficult.

As al-Qaida members trickle out of Pakistan and seek sanctuary elsewhere, the U.S. military is ramping up its counterterrorism operations in Somalia and Yemen, while continuing its drone campaign in Pakistan. Despite its controversial nature, the U.S. counter-terrorism strategy has demonstrated a degree of effectiveness.

The Obama administration is committed to reducing the size of the U.S. military's footprint overseas by relying on drones, special operations forces, and other intelligence capabilities. These methods have made it more difficult for al-Qaida remnants to reconstitute a new safe haven, as Osama bin Laden did in Afghanistan in 1996, after his ouster from Sudan.

Nuclear terrorism causes extinction

Hellman 8 (Martin E. Hellman, emeritus prof of engineering @ Stanford, “Risk Analysis of Nuclear Deterrence” SPRING 2008 THE BENT OF TAU BETA PI, <http://www.nuclearrisk.org/paper.pdf>)

The threat of nuclear terrorism looms much larger in the public’s mind than the threat of a full-scale nuclear war, yet this article focuses primarily on the latter. An explanation is therefore in order before proceeding. A terrorist attack involving a nuclear weapon would be a catastrophe of immense proportions: “A 10-kiloton bomb detonated at Grand Central Station on a typical work day would likely kill some half a million people, and inflict over a trillion dollars in direct economic damage. America and its way of life would be changed forever.” [Bunn 2003, pages viii-ix]. The likelihood of such an attack is also significant. Former Secretary of Defense William Perry has estimated the chance of a nuclear terrorist incident within the next decade to be roughly 50 percent [Bunn 2007, page 15]. David Albright, a former weapons inspector in Iraq, estimates those odds at less than one percent, but notes, “We would never accept a situation where the chance of a major nuclear accident like Chernobyl would be anywhere near 1% .... A nuclear terrorism attack is a low-probability event, but we can’t live in a world where it’s anything but extremely low-probability.” [Hegland 2005]. In a survey of 85 national security experts, Senator Richard Lugar found a median estimate of 20 percent for the “probability of an attack involving a nuclear explosion occurring somewhere in the world in the next 10 years,” with 79 percent of the respondents believing “it more likely to be carried out by terrorists” than by a government [Lugar 2005, pp. 14-15]. I support increased efforts to reduce the threat of nuclear terrorism, but that is not inconsistent with the approach of this article. Because terrorism is one of the potential trigger mechanisms for a full-scale nuclear war, the risk analyses proposed herein will include estimating the risk of nuclear terrorism as one component of the overall risk. If that risk, the overall risk, or both are found to be unacceptable, then the proposed remedies would be directed to reduce which- ever risk(s) warrant attention. Similar remarks apply to a number of other threats (e.g., nuclear war between the U.S. and China over Taiwan). his article would be incomplete if it only dealt with the threat of nuclear terrorism and neglected the threat of full- scale nuclear war. If both risks are unacceptable, an effort to reduce only the terrorist component would leave humanity in great peril. In fact, society’s almost total neglect of the threat of full-scale nuclear war makes studying that risk all the more important. The cosT of World War iii The danger associated with nuclear deterrence depends on both the cost of a failure and the failure rate.3 This section explores the cost of a failure of nuclear deterrence, and the next section is concerned with the failure rate. While other definitions are possible, this article defines a failure of deterrence to mean a full-scale exchange of all nuclear weapons available to the U.S. and Russia, an event that will be termed World War III. Approximately 20 million people died as a result of the first World War. World War II’s fatalities were double or triple that number—chaos prevented a more precise deter- mination. In both cases humanity recovered, and the world today bears few scars that attest to the horror of those two wars. Many people therefore implicitly believe that a third World War would be horrible but survivable, an extrapola- tion of the effects of the first two global wars. In that view, World War III, while horrible, is something that humanity may just have to face and from which it will then have to recover. In contrast, some of those most qualified to assess the situation hold a very different view. In a 1961 speech to a joint session of the Philippine Con- gress, General Douglas MacArthur, stated, “Global war has become a Frankenstein to destroy both sides. … If you lose, you are annihilated. If you win, you stand only to lose. No longer does it possess even the chance of the winner of a duel. It contains now only the germs of double suicide.” Former Secretary of Defense Robert McNamara ex- pressed a similar view: “If deterrence fails and conflict develops, the present U.S. and NATO strategy carries with it a high risk that Western civilization will be destroyed” [McNamara 1986, page 6]. More recently, George Shultz, William Perry, Henry Kissinger, and Sam Nunn4 echoed those concerns when they quoted President Reagan’s belief that nuclear weapons were “totally irrational, totally inhu- mane, good for nothing but killing, possibly destructive of life on earth and civilization.” [Shultz 2007] Official studies, while couched in less emotional terms, still convey the horrendous toll that World War III would exact: “The resulting deaths would be far beyond any precedent. Executive branch calculations show a range of U.S. deaths from 35 to 77 percent (i.e., 79-160 million dead) … a change in targeting could kill somewhere between 20 million and 30 million additional people on each side .... These calculations reflect only deaths during the first 30 days. Additional millions would be injured, and many would eventually die from lack of adequate medical care … millions of people might starve or freeze during the follow- ing winter, but it is not possible to estimate how many. … further millions … might eventually die of latent radiation effects.” [OTA 1979, page 8] This OTA report also noted the possibility of serious ecological damage [OTA 1979, page 9], a concern that as- sumed a new potentiality when the TTAPS report [TTAPS 1983] proposed that the ash and dust from so many nearly simultaneous nuclear explosions and their resultant fire- storms could usher in a nuclear winter that might erase homo sapiens from the face of the earth, much as many scientists now believe the K-T Extinction that wiped out the dinosaurs resulted from an impact winter caused by ash and dust from a large asteroid or comet striking Earth. The TTAPS report produced a heated debate, and there is still no scientific consensus on whether a nuclear winter would follow a full-scale nuclear war. Recent work [Robock 2007, Toon 2007] suggests that even a limited nuclear exchange or one between newer nuclear-weapon states, such as India and Pakistan, could have devastating long-lasting climatic consequences due to the large volumes of smoke that would be generated by fires in modern megacities. While it is uncertain how destructive World War III would be, prudence dictates that we apply the same engi- neering conservatism that saved the Golden Gate Bridge from collapsing on its 50th anniversary and assume that preventing World War III is a necessity—not an option.

Causes US-Russia miscalc – extinction

Barrett et al. 13—PhD in Engineering and Public Policy from Carnegie Mellon University, Fellow in the RAND Stanton Nuclear Security Fellows Program, and Director of Research at Global Catastrophic Risk Institute—AND Seth Baum, PhD in Geography from Pennsylvania State University, Research Scientist at the Blue Marble Space Institute of Science, and Executive Director of Global Catastrophic Risk Institute—AND Kelly Hostetler, BS in Political Science from Columbia and Research Assistant at Global Catastrophic Risk Institute (Anthony, 24 June 2013, “Analyzing and Reducing the Risks of Inadvertent Nuclear War Between the United States and Russia,” Science & Global Security: The Technical Basis for Arms Control, Disarmament, and Nonproliferation Initiatives, Volume 21, Issue 2, Taylor & Francis)

War involving significant fractions of the U.S. and Russian nuclear arsenals, which are by far the largest of any nations, could have globally catastrophic effects such as severely reducing food production for years, 1 potentially leading to collapse of modern civilization worldwide, and even the extinction of humanity. 2 Nuclear war between the United States and Russia could occur by various routes, including accidental or unauthorized launch; deliberate first attack by one nation; and inadvertent attack. In an accidental or unauthorized launch or detonation, system safeguards or procedures to maintain control over nuclear weapons fail in such a way that a nuclear weapon or missile launches or explodes without direction from leaders. In a deliberate first attack, the attacking nation decides to attack based on accurate information about the state of affairs. In an inadvertent attack, the attacking nation mistakenly concludes that it is under attack and launches nuclear weapons in what it believes is a counterattack. 3 (Brinkmanship strategies incorporate elements of all of the above, in that they involve intentional manipulation of risks from otherwise accidental or inadvertent launches. 4 ) Over the years, nuclear strategy was aimed primarily at minimizing risks of intentional attack through development of deterrence capabilities, and numerous measures also were taken to reduce probabilities of accidents, unauthorized attack, and inadvertent war. For purposes of deterrence, both U.S. and Soviet/Russian forces have maintained significant capabilities to have some forces survive a first attack by the other side and to launch a subsequent counter-attack. However, concerns about the extreme disruptions that a first attack would cause in the other side's forces and command-and-control capabilities led to both sides’ development of capabilities to detect a first attack and launch a counter-attack before suffering damage from the first attack. 5 Many people believe that with the end of the Cold War and with improved relations between the United States and Russia, the risk of East-West nuclear war was significantly reduced. 6 However, it also has been argued that inadvertent nuclear war between the United States and Russia has continued to present a substantial risk. 7 While the United States and Russia are not actively threatening each other with war, they have remained ready to launch nuclear missiles in response to indications of attack. 8 False indicators of nuclear attack could be caused in several ways. First, a wide range of events have already been mistakenly interpreted as indicators of attack, including weather phenomena, a faulty computer chip, wild animal activity, and control-room training tapes loaded at the wrong time. 9 Second, terrorist groups or other actors might cause attacks on either the United States or Russia that resemble some kind of nuclear attack by the other nation by actions such as exploding a stolen or improvised nuclear bomb, 10 especially if such an event occurs during a crisis between the United States and Russia. 11 A variety of nuclear terrorism scenarios are possible. 12 Al Qaeda has sought to obtain or construct nuclear weapons and to use them against the United States. 13 Other methods could involve attempts to circumvent nuclear weapon launch control safeguards or exploit holes in their security. 14 It has long been argued that the probability of inadvertent nuclear war is significantly higher during U.S.–Russian crisis conditions, 15 with the Cuban Missile Crisis being a prime historical example. It is possible that U.S.–Russian relations will significantly deteriorate in the future, increasing nuclear tensions. There are a variety of ways for a third party to raise tensions between the United States and Russia, making one or both nations more likely to misinterpret events as attacks. 16

Most qualified evidence says an attack’s feasible

Us Russia Joint Threat Assessment May 11

http://belfercenter.ksg.harvard.edu/files/Joint-Threat-Assessment%20ENG%2027%20May%202011.pdf

ABOUT THE U.S.-RUSSIA JOINT THREAT ASSESSMENT ON NUCLEAR TERRORISM The U.S.-Russia Joint Threat Assessment on Nuclear Terrorism is a collaborative project of Harvard University’s Belfer Center for Science and International Affairs and the U.S.A. and Canada Studies Institute of the Russian Academy of Sciences led by Rolf Mowatt-Larssen and Pavel Zolotarev. Authors: • Matthew Bunn. Associate Professor of Public Policy at Harvard Kennedy School and Co-Principal Investigator of Project on Managing the Atom at Harvard University’s Belfer Center for Science and International Affairs. • Colonel Yuri Morozov (retired Russian Armed Forces). Professor of the Russian Academy of Military Sciences and senior fellow at the U.S.A and Canada Studies Institute of the Russian Academy of Sciences, chief of department at the General Staff of the Russian Armed Forces, 1995–2000. • Rolf Mowatt-Larssen. Senior fellow at Harvard University’s Belfer Center for Science and International Affairs, director of Intelligence and Counterintelligence at the U.S. Department of Energy, 2005–2008. • Simon Saradzhyan. Fellow at Harvard University’s Belfer Center for Science and International Affairs, Moscow-based defense and security expert and writer, 1993–2008. • William Tobey. Senior fellow at Harvard University’s Belfer Center for Science and International Affairs and director of the U.S.-Russia Initiative to Prevent Nuclear Terrorism, deputy administrator for Defense Nuclear Nonproliferation at the U.S. National Nuclear Security Administration, 2006–2009. • Colonel General Viktor I. Yesin (retired Russian Armed Forces). Senior fellow at the U.S.A and Canada Studies Institute of the Russian Academy of Sciences and advisor to commander of the Strategic Missile Forces of Russia, chief of staff of the Strategic Missile Forces, 1994–1996. • Major General Pavel S. Zolotarev (retired Russian Armed Forces). Deputy director of the U.S.A and Canada Studies Institute of the Russian Academy of Sciences and head of the Information and Analysis Center of the Russian Ministry of Defense, 1993–1997, deputy chief of staff of the Defense Council of Russia, 1997–1998. Contributor: • Vladimir Lukov, director general of autonomous non-profit organization “Counter-Terrorism Center.”

The expert community distinguishes pathways terrorists might take to the bomb (discussed in detail in the next section of the report). One is the use of a nuclear weapon that has been either stolen or bought on the black market. The probability of such a development is very low, given the high levels of physical security (guards, barriers, and the like) and technical security (electronic locks and related measures) of modern nuclear warheads. But we cannot entirely rule out such a scenario, especially if we recall the political instability in Pakistan, where the situation could conceivably develop in a way that would increase the chance that terrorist groups might gain access to a Pakistani nuclear weapon A second pathway is the use of an improvised nuclear device built either by terrorists or by nuclear specialists that the terrorists have secretly recruited, with use of weapons-usable fissile material either stolen or bought on the black market.1 The probability of such an attack is higher than using stolen nuclear warheads, because the acceleration of technological progress and globalization of information space make nuclear weapons technologies more accessible while the existence of the nuclear black market eases access of terrorists to weapons-usable fissile materials. A third pathway is the use of an explosive nuclear device built by terrorists or their accomplices with fissile material that they produced themselves—either highly enriched uranium (HEU) they managed to enrich, or plutonium they managed to produce and reprocess. Al-Qaeda and associated groups appear to have decided that enriching uranium lies well beyond the capabilities that they would realistically be able to develop. A fourth pathway is that terrorists might receive a nuclear bomb or the materials needed to make one from a state. North Korea, for example, has been willing to sell its missile technology to many countries, and transferred its plutonium production reactor technology to Syria, suffering few consequences as a result. Transferring the means to make a nuclear bomb to a terrorist group, however, would be a dramatically different act, for the terrorists might use that capability in a way that could provoke retaliation that would result in the destruction of the regime. A far more worrisome transfer of capability from state to group could occur without the witting cooperation of the regime. A future A.Q. Khan-type rogue nuclear supplier network operating out of North Korea or out of a future nuclear-armed Iran could potentially transfer such a capability to a surrogate group and/or sell it for profit to the highest bidder. Global trends make nuclear terrorism a real threat. Although the international community has recognized the dangers of nuclear terrorism, it has yet to develop a comprehensive strategy to lower the risks of nuclear terrorism. Major barriers include complacency about the threat and the adequacy of existing nuclear security measures; secrecy that makes it difficult for states to share information and to cooperate; political disputes; competing priorities; lack of funds and technical expertise in some countries; bureaucratic obstacles; and the sheer difficulty of preventing a potentially small, hard-to-detect team of terrorists from acquiring a small, hard-to-detect chunk of nuclear material with which to manufacture a crude bomb. These barriers must not be allowed to stand in the way of the panhuman universal priority of preventing this grave threat from materializing. If current approaches toward eliminating the threat are not replaced with a sense of urgency and resolve, the question will become not if, but when, where, and on what scale the first act of nuclear terrorism occurs.

## norms

Unrestrained drone use outside zones of active hostilities collapses legal norms governing targeted killing – only the plan solves

Rosa Brooks, Professor of Law, Georgetown University Law Center, Bernard L. Schwartz Senior Fellow, New America Foundation, 4/23/13, The Constitutional and Counterterrorism Implications of Targeted Killing, http://www.judiciary.senate.gov/pdf/04-23-13BrooksTestimony.pdf

Mr. Chairman, I would like to turn now to the legal framework applicable to US drone strikes. Both the United States and the international community have long had rules governing armed conflicts and the use of force in national self-defense. These rules apply whether the lethal force at issue involves knives, handguns, grenades or weaponized drones. When drone technologies are used in traditional armed conflicts—on “hot battlefields” such as those in Afghanistan, Iraq or Libya, for instance – they pose no new legal issues. As Administration officials have stated, their use is subject to the same requirements as the use of other lawful means and methods of warfare.28

But if drones used in traditional armed conflicts or traditional self-defense situations present no “new” legal issues, some of the activities and policies enabled and facilitated by drone technologies pose significant challenges to existing legal frameworks.

As I have discussed above, the availability of perceived low cost of drone technologies makes it far easier for the US to “expand the battlefield,” striking targets in places where it would be too dangerous or too politically controversial to send troops. Specifically, drone technologies enable the United States to strike targets deep inside foreign states, and do so quickly, efficiently and deniably. As a result, drones have become the tool of choice for so-called “targeted killing” – the deliberate targeting of an individual or group of individuals, whether known by name or targeted based on patterns of activity, inside the borders of a foreign country. **It is when drones are used in targeted killings outside of traditional or “hot” battlefields that their use challenges existing legal frameworks**.

Law is almost always out of date: we make legal rules based on existing conditions and technologies, perhaps with a small nod in the direction of predicted future changes. As societies and technologies change, law increasingly becomes an exercise in jamming square pegs into round holes. Eventually, that process begins to do damage to existing law: it gets stretched out of shape, or broken. Right now, I would argue, US drone policy is on the verge of doing significant damage to the rule of law.

A. The Rule of Law

At root, the idea of “rule of law” is fairly simple, and well understood by Americans familiar with the foundational documents that established our nation, such as the Declaration of Independence, the Constitution and the Bill of Rights. The rule of law requires that governments follow transparent, clearly defined and universally applicable laws and procedures. The goal of the rule of law is to ensure predictability and stability, and to prevent the arbitrary exercise of power. In a society committed to the rule of law, the government cannot fine you, lock you up, or kill you on a whim -- it can restrict your liberty or take your property or life only in accordance with pre-established processes and rules that reflect basic notions of justice, humanity and fairness.

Precisely what constitutes a fair process is debatable, but most would agree that at a minimum, fairness requires that individuals have reasonable notice of what constitutes the applicable law, reasonable notice that they are suspected of violating the law, a reasonable opportunity to rebut any allegations against them, and a reasonable opportunity to have the outcome of any procedures or actions against them reviewed by some objective person or body. These core values are enshrined both in the US Constitution and in international human rights law instruments such as the International Covenant on Civil and Political Rights, to which the United States is a party.

In ordinary circumstances, this bundle of universally acknowledged rights (together with international law principles of sovereignty) means it is clearly unlawful for one state to target and kill an individual inside the borders of another state. Recall, for instance, the 1976 killing of Chilean dissident Orlando Letelier in Washington DC. When Chilean government intelligence operatives planted a car bomb in the car used by Letelier, killing him and a US citizen accompanying him, the United States government called this an act of murder—an unlawful political assassination.

B. Targeted Killing and the Law of Armed Conflict

Of course, sometimes the “ordinary” legal rules do not apply. In war, the willful killing of human beings is permitted, whether the means of killing is a gun, a bomb, or a long-distance drone strike. The law of armed conflict permits a wide range of behaviors that would be unlawful in the absence of an armed conflict. Generally speaking, the intentional destruction of private property and severe restrictions on individual liberties are impermissible in peacetime, but acceptable in wartime, for instance. Even actions that a combatant knows will cause civilian deaths are lawful when consistent with the principles of necessity, humanity, proportionality,29 and distinction.30

It is worth briefly explaining these principles. The principle of necessity requires parties to a conflict to limit their actions to those that are indispensible for securing the complete submission of the enemy as soon as possible (and that are otherwise permitted by international law). The principle of humanity forbids parties to a conflict to inflict gratuitous violence or employ methods calculated to cause unnecessary suffering. The principle of proportionality requires parties to ensure that the anticipated loss of life or property incidental to an attack is not excessive in relation to the concrete and direct military advantage expected to be gained.

Finally, the principle of discrimination or distinction requires that parties to a conflict direct their actions only against combatants and military objectives, and take appropriate steps to distinguish between combatants and non-combatants.31

This is a radical oversimplification of a very complex body of law.32 But as with the rule of law, the basic idea is pretty simple. When there is no war -- when ordinary, peacetime law applies -- agents of the state aren't supposed to lock people up, take their property or kill them, unless they have jumped through a whole lot of legal hoops first. When there is an armed conflict, however, everything changes. War is not a legal free-for-all33 -- torture, rape are always crimes under the law of war, as is killing that is willful, wanton and not justified by military necessity34 -- but there are far fewer constraints on state behavior.

Technically, the law of war is referred to using the Latin term “lex specialis” – special law. It is applicable in—and only in -- special circumstances (in this case, armed conflict), and in those special circumstances, it supersedes “ordinary law,” or “lex generalis,” the “general law” that prevails in peacetime. We have one set of laws for “normal” situations, and another, more flexible set of laws for “extraordinary” situations, such as armed conflicts.

None of this poses any inherent problem for the rule of law. Having one body of rules that tightly restricts the use of force and another body of rules that is far more permissive does not fundamentally undermine the rule of law, as long as we have a reasonable degree of consensus on what circumstances trigger the “special” law, and as long as the “special law” doesn’t end up undermining the general law.

To put it a little differently, war, with its very different rules, does not challenge ordinary law as long as war is the exception, not the norm -- as long as we can all agree on what constitutes a war -- as long as we can tell when the war begins and ends -- and as long as we all know how to tell the difference between a combatant and a civilian, and between places where there's war and places where there's no war.

Let me return now to the question of drones and targeted killings. When all these distinctions I just mentioned are clear, the use of drones in targeted killings does not necessarily present any great or novel problem. In Libya, for instance, a state of armed conflict clearly existed inside the borders of Libya between Libyan government forces and NATO states. In that context, the use of drones to strike Libyan military targets is no more controversial than the use of manned aircraft.

That is because our core rule of law concerns have mostly been satisfied: we know there is an armed conflict, in part because all parties to it agree that there is an armed conflict, in part because observers (such as international journalists) can easily verify the presence of uniformed military personnel engaged in using force, and in part because the violence is, from an objective perspective, widespread and sustained: it is not a mere skirmish or riot or criminal law enforcement situation that got out of control. We know who the “enemy” is: Libyan government forces. We know where the conflict is and is not: the conflict was in Libya, but not in neighboring Algeria or Egypt. We know when the conflict began, we know who authorized the use of force (the UN Security Council) and, just as crucially, we know whom to hold accountable in the event of error or abuse (the various governments involved).35

Once you take targeted killings outside hot battlefields, it’s a different story. The Obama Administration is currently using drones to strike terror suspects in Pakistan, Somalia, Yemen, and –perhaps—Mali and the Philippines as well. Defenders of the administration's increasing reliance on drone strikes in such places assert that the US is in an armed conflict with “al Qaeda and its associates,” and on that basis, they assert that the law of war is applicable -- in any place and at any time -- with regard to any person the administration deems a combatant.

The trouble is, no one outside a very small group within the US executive branch has any ability to evaluate who is and who isn’t a combatant. The war against al Qaeda and its associates is not like World War II, or Libya, or even Afghanistan: it is an open-ended conflict with an inchoate, undefined adversary (who exactly are al Qaeda’s “associates”?). What is more, targeting decisions in this nebulous “war” are based largely on classified intelligence reporting. **As a result, Administration assertions** about who is a combatant and what constitutes a threat **are entirely non-falsifiable, because they're based wholly on undisclosed evidence**. Add to this still another problem: most of these strikes are considered covert action, so although the US sometimes takes public credit for the deaths of alleged terrorist leaders, most of the time, the US will not even officially acknowledge targeted killings.

This leaves all the key rule-of-law questions related to the ongoing war against al Qaeda and its "associates" unanswered.36 Based on what criteria might someone be considered a combatant or directly participating in hostilities? What constitutes “hostilities” in the context of an armed conflict against a non-state actor, and what does it mean to participate in them? And just where is the war? Does the war (and thus the law of war) somehow "travel" with combatants? Does the US have a “right” to target enemy combatants anywhere on earth, or does it depend on the consent of the state at issue? Who in the United States government is authorized to make such determinations, and what is the precise chain of command for such decisions?

I think the rule of law problem here is obvious: when “armed conflict” becomes a term flexible enough to be applied both to World War II and to the relations between the United States and “associates” of al Qaeda such as Somalia’s al Shabaab, the concept of armed conflict is not very useful anymore. And **when we lack clarity and consensus on how to recognize “armed conflict,” we no longer have a clear or principled basis for deciding how to categorize US targeted killings**. Are they, as the US government argues, legal under the laws of war? Or are they, as some human rights groups have argued, unlawful murder?

C. Targeted Killing and the International Law of Self-Defense

When faced with criticisms of the law of war framework as a justification for targeted killing, Obama Administration representatives often shift tack, arguing that international law rules on national self-defense provide an alternative or additional legal justification for US targeted killings. Here, the argument is that if a person located in a foreign state poses an "imminent threat of violent attack" against the United States, the US can lawfully use force in self-defense, provided that the defensive force used is otherwise consistent with law of war principles.

Like law of war-based arguments, this general principle is superficially uncontroversial: if someone overseas is about to launch a nuclear weapon at New York City, no one can doubt that the United States has a perfect right (and the president has a constitutional duty) to use force if needed to prevent that attack, regardless of the attacker's nationality.

But once again, the devil is in the details. To start with, what constitutes an "imminent" threat? Traditionally, both international law and domestic criminal law understand that term narrowly: 37 to be "imminent," a threat cannot be distant or speculative.38 But much like the Bush Administration before it, the Obama Administration has put forward an interpretation of the word “imminent” that bears little relation to traditional legal concepts.

According to a leaked 2011 Justice Department white paper39—the most detailed legal justification that has yet become public-- the requirement of imminence "does not require the United States to have clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future." This seems, in itself, like a substantial departure from accepted international law definitions of imminence.

But the White Paper goes even further, stating that "certain members of al Qaeda are continually plotting attacks...and would engage in such attacks regularly [if] they were able to do so, [and] the US government may not be aware of all... plots as they are developing and thus cannot be confident that none is about to occur." For this reason, it concludes, anyone deemed to be an operational leader of al Qaeda or its "associated forces" presents, by definition, an imminent threat even in the absence of any evidence whatsoever relating to immediate or future attack plans. In effect, the concept of "imminent threat" (part of the international law relating to self-defense) becomes conflated with identity or status (a familiar part of the law of armed conflict).

That concept of imminence has been called Orwellian, and although that is an overused epithet, in this context it seems fairly appropriate. According to the Obama Administration, “imminent” no longer means “immediate,” and in fact the very absence of clear evidence indicating specific present or future attack plans becomes, paradoxically, the basis for assuming that attack may perpetually be “imminent.”

The 2011 Justice Department White Paper notes that the use of force in self-defense must comply with general law of war principles of necessity, proportionality, humanity, and distinction. The White Paper offers no guidance on the specific criteria for determining when an individual is a combatant (or a civilian participating directly in hostilities), however. It also offers no guidance on how to determine if a use of force is necessary or proportionate.

From a traditional international law perspective, this necessity and proportionality inquiry relates both to imminence and to the gravity of the threat itself, but so far there has been no public Administration statement as to how the administration interprets these requirements. Is any threat of "violent attack" sufficient to justify killing someone in a foreign country, including a U.S. citizen? Is every potential suicide bomber targetable, or does it depend on the gravity of the threat? Are we justified in drone strikes against targets who might, if they get a chance at some unspecified future point, place an IED that might, if successful, kill one person? Ten people? Twenty? 2,000? How grave a threat must there be to justify the use of lethal force against an American citizen abroad -- or against non-citizens, for that matter?

As I have noted, it is impossible for outsiders to fully evaluate US drone strikes, since so much vital information remains classified. In most cases, we know little about the identities; activities or future plans of those targeted. Nevertheless, given the increased frequency of US targeted killings in recent years, it seems reasonable to wonder whether the Administration conducts a rigorous necessity or proportionality analysis in all cases.

So far, the leaked 2011 Justice Department White Paper represents the most detailed legal analysis of targeted killings available to the public. It is worth noting, incidentally, that this White Paper addresses only the question of whether and when it is lawful for the US government to target US citizens abroad. We do not know what legal standards the Administration believes apply to the targeting of non-citizens. It seems reasonable to assume, however, that the standards applicable to non-citizens are less exacting than those the Administration views as applicable to citizens.

Defenders of administration targeted killing policy acknowledge that the criteria for determining how to answer these many questions have not been made public, but insist that this should not be cause for concern. The Administration has reportedly developed a detailed “playbook” outlining the targeting criteria and procedures,40, and insiders insist that executive branch officials go through an elaborate process in which they carefully consider every possible issue before determining that a drone strike is lawful.41

No doubt they do, but this is somewhat cold comfort. Formal processes tend to further normalize once-exceptional activities -- and "trust us" is a rather shaky foundation for the rule of law. Indeed, the whole point of the rule of law is that individual lives and freedom should not depend solely on the good faith and benevolence of government officials.

As with law of war arguments, stating that US targeted killings are clearly legal under traditional self-defense principles requires some significant cognitive dissonance. Law exists to restrain untrammeled power. It is no doubt possible to make a plausible legal argument justifying each and every U.S. drone strike -- but this merely suggests that we are working with a legal framework that has begun to outlive its usefulness.

The real question isn't whether U.S. drone strikes are "legal." The real question is this: Do we really want to live in a world in which the U.S. government's justification for killing is so malleable?

5. Setting Troubling International Precedents

**Here is an a**dditional **reason to worry** about the U.S. overreliance on drone strikes: Other states will follow America's example, and the results are not likely to be pretty. Consider once again the Letelier murder, which was an international scandal in 1976: If the Letelier assassination took place today, the Chilean authorities would presumably insist on their national right to engage in “targeted killings” of individuals deemed to pose imminent threats to Chilean national security -- and they would justify such killings using precisely the same legal theories the US currently uses to justify targeted killings in Yemen or Somalia. We should assume that governments around the world—including those with less than stellar human rights records, such as Russia and China—are taking notice.

Right now, the United States has a decided technological advantage when it comes to armed drones, but that will not last long. **We should use this window to advance a robust legal** and normative **framework that will help protect against abuses by those states whose leaders can rarely be trusted**. Unfortunately, we are doing the exact opposite: Instead of articulating norms about transparency and accountability, the United States is effectively handing China, Russia, and every other repressive state a playbook for how to foment instability and –literally -- get away with murder.

Take the issue of sovereignty. Sovereignty has long been a core concept of the Westphalian international legal order.42 In the international arena, all sovereign states are formally considered equal and possessed of the right to control their own internal affairs free of interference from other states. That's what we call the principle of non-intervention -- and it means, among other things, that it is generally prohibited for one state to use force inside the borders of another sovereign state. There are some well-established exceptions, but they are few in number. A state can lawfully use force inside another sovereign state with that state's invitation or consent, or when force is authorized by the U.N. Security Council, pursuant to the U.N. Charter,43 or in self-defense "in the event of an armed attack."

The 2011 Justice Department White Paper asserts that targeted killings carried out by the United States don't violate another state's sovereignty as long as that state either consents or is "unwilling or unable to suppress the threat posed by the individual being targeted." That sounds superficially plausible, but since the United States views itself as the sole arbiter of whether a state is "unwilling or unable" to suppress that threat, the logic is in fact circular.

It goes like this: The United States -- using its own malleable definition of "imminent" -- decides that Person X, residing in sovereign State Y, poses a threat to the United States and requires killing. Once the United States decides that Person X can be targeted, the principle of sovereignty presents no barriers, because either 1) State Y will consent to the U.S. use of force inside its borders, in which case the use of force presents no sovereignty problems or 2) State Y will not consent to the U.S. use of force inside its borders, in which case, by definition, the United States will deem State Y to be "unwilling or unable to suppress the threat" posed by Person X and the use of force again presents no problem.

This is a legal theory that more or less eviscerates traditional notions of sovereignty, and has the potential to significantly destabilize the already shaky collective security regime created by the U.N. Charter.44 If the US is the sole arbiter of whether and when it can use force inside the borders of another state, any other state strong enough to get away with it is likely to claim similar prerogatives. And, of course, if the US executive branch is the sole arbiter of what constitutes an imminent threat and who constitutes a targetable enemy combatant in an ill- defined war, why shouldn’t other states make identical arguments—and use them to justify the killing of dissidents, rivals, or unwanted minorities?

That solves global war – US precedent is key

Kristen Roberts 13, news editor for the National Journal, master in security studies from Georgetown, “When the Whole World Has Drones”, March 22, <http://www.nationaljournal.com/magazine/when-the-whole-world-has-drones-20130321>

The proliferation of drone technology has moved well beyond the control of the United States government and its closest allies. The aircraft are too easy to obtain, with barriers to entry on the production side crumbling too quickly to place limits on the spread of a technology that promises to transform warfare on a global scale. Already, more than 75 countries have remote piloted aircraft. More than 50 nations are building a total of nearly a thousand types. At its last display at a trade show in Beijing, China showed off 25 different unmanned aerial vehicles. Not toys or models, but real flying machines.

It’s a classic and common phase in the life cycle of a military innovation: An advanced country and its weapons developers create a tool, and then others learn how to make their own. But what makes this case rare, and dangerous, is the powerful combination of efficiency and lethality spreading in an environment lacking internationally accepted guidelines on legitimate use. This technology is snowballing through a global arena where the main precedent for its application is the one set by the United States; it’s a precedent Washington does not want anyone following.

America, the world’s leading democracy and a country built on a legal and moral framework unlike any other, has adopted a war-making process that too often bypasses its traditional, regimented, and rigorously overseen military in favor of a secret program never publicly discussed, based on legal advice never properly vetted. The Obama administration has used its executive power to refuse or outright ignore requests by congressional overseers, and it has resisted monitoring by federal courts.

To implement this covert program, the administration has adopted a tool that lowers the threshold for lethal force by reducing the cost and risk of combat. This still-expanding counterterrorism use of drones to kill people, including its own citizens, outside of traditionally defined battlefields and established protocols for warfare, has given friends and foes a green light to employ these aircraft in extraterritorial operations that could not only affect relations between the nation-states involved but also destabilize entire regions and potentially upset geopolitical order.

Hyperbole? Consider this: Iran, with the approval of Damascus, carries out a lethal strike on anti-Syrian forces inside Syria; Russia picks off militants tampering with oil and gas lines in Ukraine or Georgia; Turkey arms a U.S.-provided Predator to kill Kurdish militants in northern Iraq who it believes are planning attacks along the border. Label the targets as terrorists, and in each case, Tehran, Moscow, and Ankara may point toward Washington and say, we learned it by watching you. In Pakistan, Yemen, and Afghanistan.

This is the unintended consequence of American drone warfare. For all of the attention paid to the drone program in recent weeks—about Americans on the target list (there are none at this writing) and the executive branch’s legal authority to kill by drone outside war zones (thin, by officials’ own private admission)—what goes undiscussed is Washington’s deliberate failure to establish clear and demonstrable rules for itself that would at minimum create a globally relevant standard for delineating between legitimate and rogue uses of one of the most awesome military robotics capabilities of this generation.

THE WRONG QUESTION

The United States is the indisputable leader in drone technology and long-range strike. Remote-piloted aircraft have given Washington an extraordinary ability to wage war with far greater precision, improved effect, and fewer unintended casualties than conventional warfare. The drones allow U.S. forces to establish ever greater control over combat areas, and the Pentagon sees the technology as an efficient and judicious force of the future. And it should, given the billions of dollars that have gone into establishing and maintaining such a capability.

That level of superiority leads some national security officials to downplay concerns about other nations’ unmanned systems and to too narrowly define potential threats to the homeland. As proof, they argue that American dominance in drone warfare is due only in part to the aircraft itself, which offers the ability to travel great distances and loiter for long periods, not to mention carry and launch Hellfire missiles. The drone itself, they argue, is just a tool and, yes, one that is being copied aggressively by allies and adversaries alike. The real edge, they say, is in the unparalleled intelligence-collection and data-analysis underpinning the aircraft’s mission.

“There is what I think is just an unconstrained focus on a tool as opposed to the subject of the issue, the tool of remotely piloted aircraft that in fact provide for greater degrees of surety before you employ force than anything else we use,” said retired Lt. Gen. David Deptula, the Air Force’s first deputy chief of staff for intelligence, surveillance, and reconnaissance. “I think people don’t realize that for the medium altitude aircraft—the MQ-1 [Predator] and MQ-9 [Reaper] that are generally written about in the press—there are over 200 people involved in just one orbit of those aircraft.… The majority of those people are analysts who are interpreting the information that’s coming off the sensors on the aircraft.”

The analysts are part of the global architecture that makes precision strikes, and targeted killing, possible. At the front end, obviously, intelligence—military, CIA, and local—inform target decisions. But in as near-real time as technologically possible, intel analysts in Nevada, Texas, Virginia, and other locations watch the data flood in from the aircraft and make calls on what’s happening on target. They monitor the footage, listen to audio, and analyze signals, giving decision-makers time to adjust an operation if the risks (often counted in potential civilian deaths) outweigh the reward (judged by the value of the threat eliminated).

“Is that a shovel or a rifle? Is that a Taliban member or is this a farmer? The way that warfare has advanced is that we are much more exquisite in our ability to discern,” Maj. Gen. Robert Otto, commander of the Air Force Intelligence, Surveillance, and Reconnaissance Agency, told National Journal at Nellis Air Force Base in Nevada. “We’re not overhead for 15 minutes with a fighter that’s about to run out of gas, and we have to make a decision. We can orbit long enough to be pretty sure about our target.”

Other countries, groups, and even individuals can and do fly drones. But no state or group has nearly the sophisticated network of intelligence and data analysis that gives the United States its strategic advantage. Although it would be foolish to dismiss the notion that potential U.S. adversaries aspire to attain that type of war-from-afar, pinpoint-strike capability, they have neither the income nor the perceived need to do so.

That’s true, at least today. It’s also irrelevant. Others who employ drones are likely to carry a different agenda, one more concerned with employing a relatively inexpensive and ruthlessly efficient tool to dispatch an enemy close at hand.

“It would be very difficult for them to create the global-strike architecture we have, to have a control cell in Nevada flying a plane over Afghanistan. The reality is that most nations don’t want or need that,” said Peter Singer, director of the Brookings Institution’s Center for 21st Century Security and Intelligence and one of the foremost experts in advanced military technology. “Turkey’s not looking to conduct strikes into the Philippines.... But Turkey is looking to be able to carry out long-duration surveillance and potentially strike inside and right on its border.”

And that’s a NATO ally seeking the capability to conduct missions that would run afoul of U.S. interests in Iraq and the broader Middle East. Already, Beijing says it considered a strike in Myanmar to kill a drug lord wanted in the deaths of Chinese sailors. What happens if China arms one of its remote-piloted planes and strikes Philippine or Indian trawlers in the South China Sea? Or if India uses the aircraft to strike Lashkar-e-Taiba militants near Kashmir?

“We don’t like other states using lethal force outside their borders. It’s destabilizing. It can lead to a sort of wider escalation of violence between two states,” said Micah Zenko, a security policy and drone expert at the Council on Foreign Relations. “So the proliferation of drones is not just about the protection of the United States. It’s primarily about the likelihood that other states will increasingly use lethal force outside of their borders.”

LOWERING THE BAR

Governments have covertly killed for ages, whether they maintained an official hit list or not. Before the Obama administration’s “disposition matrix,” Israel was among the best-known examples of a state that engaged, and continues to engage, in strikes to eliminate people identified by its intelligence as plotting attacks against it. But Israel certainly is not alone. Turkey has killed Kurds in Northern Iraq. Some American security experts point to Russia as well, although Moscow disputes this.

In the 1960s, the U.S. government was involved to differing levels in plots to assassinate leaders in Congo and the Dominican Republic, and, famously, Fidel Castro in Cuba. The Church Committee’s investigation and subsequent 1975 report on those and other suspected plots led to the standing U.S. ban on assassination. So, from 1976 until the start of President George W. Bush’s “war on terror,” the United States did not conduct targeted killings, because it was considered anathema to American foreign policy. (In fact, until as late as 2001, Washington’s stated policy was to oppose Israel’s targeted killings.)

When America adopted targeted killing again—first under the Bush administration after the September 11 attacks and then expanded by President Obama—the tools of the trade had changed. No longer was the CIA sending poison, pistols, and toxic cigars to assets overseas to kill enemy leaders. Now it could target people throughout al-Qaida’s hierarchy with accuracy, deliver lethal ordnance literally around the world, and watch the mission’s completion in real time.

The United States is smartly using technology to improve combat efficacy, and to make war-fighting more efficient, both in money and manpower. It has been able to conduct more than 400 lethal strikes, killing more than 3,500 people, in Afghanistan, Pakistan, Yemen, Somalia, and North Africa using drones; reducing risk to U.S. personnel; and giving the Pentagon flexibility to use special-forces units elsewhere. And, no matter what human-rights groups say, it’s clear that drone use has reduced the number of civilians killed in combat relative to earlier conflicts. Washington would be foolish not to exploit unmanned aircraft in its long fight against terrorism. In fact, defense hawks and spendthrifts alike would criticize it if it did not.

“If you believe that these folks are legitimate terrorists who are committing acts of aggressive, potential violent acts against the United States or our allies or our citizens overseas, should it matter how we choose to engage in the self-defense of the United States?” asked Rep. Mike Rogers, R-Mich., chairman of the House Intelligence Committee. “Do we have that debate when a special-forces team goes in? Do we have that debate if a tank round does it? Do we have the debate if an aircraft pilot drops a particular bomb?”

But defense analysts argue—and military officials concede—there is a qualitative difference between dropping a team of men into Yemen and green-lighting a Predator flight from Nevada. Drones lower the threshold for military action. That’s why, according to the Council on Foreign Relations, unmanned aircraft have conducted 95 percent of all U.S. targeted killings. Almost certainly, if drones were unavailable, the United States would not have pursued an equivalent number of manned strikes in Pakistan.

And what’s true for the United States will be true as well for other countries that own and arm remote piloted aircraft.

“The drones—the responsiveness, the persistence, and without putting your personnel at risk—is what makes it a different technology,” Zenko said. “When other states have this technology, if they follow U.S. practice, it will lower the threshold for their uses of lethal force outside their borders. So they will be more likely to conduct targeted killings than they have in the past.”

The Obama administration appears to be aware of and concerned about setting precedents through its targeted-strike program. When the development of a disposition matrix to catalog both targets and resources marshaled against the United States was first reported in 2012, officials spoke about it in part as an effort to create a standardized process that would live beyond the current administration, underscoring the long duration of the counterterrorism challenge.

Indeed, the president’s legal and security advisers have put considerable effort into establishing rules to govern the program. Most members of the House and Senate Intelligence committees say they are confident the defense and intelligence communities have set an adequate evidentiary bar for determining when a member of al-Qaida or an affiliated group may be added to the target list, for example, and say that the rigor of the process gives them comfort in the level of program oversight within the executive branch. “They’re not drawing names out of a hat here,” Rogers said. “It is very specific intel-gathering and other things that would lead somebody to be subject for an engagement by the United States government.”

BEHIND CLOSED DOORS

The argument against public debate is easy enough to understand: Operational secrecy is necessary, and total opacity is easier. “I don’t think there is enough transparency and justification so that we remove not the secrecy, but the mystery of these things,” said Dennis Blair, Obama’s former director of national intelligence. “The reason it’s not been undertaken by the administration is that they just make a cold-blooded calculation that it’s better to hunker down and take the criticism than it is to get into the public debate, which is going to be a hard one to win.”

But by keeping legal and policy positions secret, only partially sharing information even with congressional oversight committees, and declining to open a public discussion about drone use, the president and his team are asking the world to just trust that America is getting this right. While some will, many people, especially outside the United States, will see that approach as hypocritical, coming from a government that calls for transparency and the rule of law elsewhere.

“I know these people, and I know how much they really, really attend to the most important details of the job,” said Barry Pavel, a former defense and security official in the Bush and Obama administrations who is director of the Brent Scowcroft Center on International Security at the Atlantic Council. “If I didn’t have that personal knowledge and because there isn’t that much really in the press, then I would be giving you a different rendering, and much more uncertain rendering.”

That’s only part of the problem with the White House’s trust-us approach. The other resides in the vast distance between the criteria and authorization the administration says it uses in the combat drone program and the reality on the ground. For example, according to administration officials, before a person is added to the targeted strike list, specific criteria should be met. The target should be a 1) senior, 2) operational 3) leader of al-Qaida or an affiliated group who presents 4) an imminent threat of violent attack 5) against the United States.

But that’s not who is being targeted.

Setting aside the administration’s redefining of “imminence” beyond all recognition, the majority of the 3,500-plus people killed by U.S. drones worldwide were not leaders of al-Qaida or the Taliban; they were low- or mid-level foot soldiers. Most were not plotting attacks against the United States. In Yemen and North Africa, the Obama administration is deploying weaponized drones to take out targets who are more of a threat to local governments than to Washington, according to defense and regional security experts who closely track unrest in those areas. In some cases, Washington appears to be in the business of using its drone capabilities mostly to assist other countries, not to deter strikes against the United States (another precedent that might be eagerly seized upon in the future).

U.S. defense and intelligence officials reject any suggestion that the targets are not legitimate. One thing they do not contest, however, is that the administration’s reliance on the post-9/11 Authorization for Use of Military Force as legal cover for a drone-strike program that has extended well beyond al-Qaida in Afghanistan or Pakistan is dodgy. The threat that the United States is trying to deal with today has an ever more tenuous connection to Sept. 11. (None of the intelligence officials reached for this article would speak on the record.) But instead of asking Congress to consider extending its authorization, as some officials have mulled, the administration’s legal counsel has chosen instead to rely on Nixon administration adviser John Stevenson’s 1970 justification of the bombing of Cambodia during the Vietnam War, an action new Secretary of State John Kerry criticized during his confirmation hearing this year.

Human-rights groups might be loudest in their criticism of both the program and the opaque policy surrounding it, but even the few lawmakers who have access to the intelligence the administration shares have a hard time coping with the dearth of information. “We can’t always assume we’re going to have responsible people with whom we agree and trust in these positions,” said Sen. Angus King, I-Maine, who sits on the Senate Intelligence Committee. “The essence of the Constitution is, it shouldn’t matter who is in charge; they’re still constrained by principles and rules of the Constitution and of the Bill of Rights.”

PEER PRESSURE

Obama promised in his 2013 State of the Union to increase the drone program’s transparency. “In the months ahead, I will continue to engage Congress to ensure not only that our targeting, detention, and prosecution of terrorists remains consistent with our laws and system of checks and balances, but that our efforts are even more transparent to the American people and to the world,” the president said on Feb. 12. Since then, the administration, under pressure from allies on Senate Intelligence, agreed to release all of the legal memos the Justice Department drafted in support of targeted killing.

But, beyond that, it’s not certain Obama will do anything more to shine light on this program. Except in situations where leaks help it tell a politically expedient story of its skill at killing bad guys, the administration has done little to make a case to the public and the world at large for its use of armed drones.

Already, what’s become apparent is that the White House is not interested in changing much about the way it communicates strike policy. (It took Sen. Rand Paul’s 13-hour filibuster of CIA Director John Brennan’s nomination to force the administration to concede that it doesn’t have the right to use drones to kill noncombatant Americans on U.S. soil.) And government officials, as well as their surrogates on security issues, are actively trying to squash expectations that the administration would agree to bring the judicial branch into the oversight mix. Indeed, judicial review of any piece of the program is largely off the table now, according to intelligence officials and committee members.

Under discussion within the administration and on Capitol Hill is a potential program takeover by the Pentagon, removing the CIA from its post-9/11 role of executing military-like strikes. Ostensibly, that shift could help lift the secret-by-association-with-CIA attribute of the program that some officials say has kept them from more freely talking about the legitimate military use of drones for counterterrorism operations. But such a fix would provide no guarantee of greater transparency for the public, or even Congress.

And if the administration is not willing to share with lawmakers who are security-cleared to know, it certainly is not prepared to engage in a sensitive discussion, even among allies, that might begin to set the rules on use for a technology that could upend stability in already fragile and strategically significant places around the globe. Time is running out to do so.

“The history of technology development like this is, you never maintain your lead very long. Somebody always gets it,” said David Berteau, director of the International Security Program at the Center for Strategic and International Studies. “They’re going to become cheaper. They’re going to become easier. They’re going to become interoperable,” he said. “The destabilizing effects are very, very serious.”

Berteau is not alone. Zenko, of the Council on Foreign Relations, has urged officials to quickly establish norms. Singer, at Brookings, argues that the window of opportunity for the United States to create stability-supporting precedent is quickly closing. The problem is, the administration is not thinking far enough down the line, according to a Senate Intelligence aide. Administration officials “are thinking about the next four years, and we’re thinking about the next 40 years. And those two different angles on this question are why you see them in conflict right now.”

That’s in part a symptom of the “technological optimism” that often plagues the U.S. security community when it establishes a lead over its competitors, noted Georgetown University’s Kai-Henrik Barth. After the 1945 bombing of Hiroshima and Nagasaki, the United States was sure it would be decades before the Soviets developed a nuclear-weapon capability. It took four years.

With drones, the question is how long before the dozens of states with the aircraft can arm and then operate a weaponized version. “Pretty much every nation has gone down the pathway of, ‘This is science fiction; we don’t want this stuff,’ to, ‘OK, we want them, but we’ll just use them for surveillance,’ to, ‘Hmm, they’re really useful when you see the bad guy and can do something about it, so we’ll arm them,’ ” Singer said. He listed the countries that have gone that route: the United States, Britain, Italy, Germany, China. “Consistently, nations have gone down the pathway of first only surveillance and then arming.”

The opportunity to write rules that might at least guide, if not restrain, the world’s view of acceptable drone use remains, not least because this is in essence a conventional arms-control issue. The international Missile Technology Control Regime attempts to restrict exports of unmanned vehicles capable of carrying weapons of mass destruction, but it is voluntary and nonbinding, and it’s under attack by the drone industry as a drag on business. Further, the technology itself, especially when coupled with data and real-time analytics, offers the luxury of time and distance that could allow officials to raise the evidentiary bar for strikes—to be closer to certain that their target is the right one.

But even without raising standards, tightening up drone-specific restrictions in the standing control regime, or creating a new control agreement (which is never easy to pull off absent a bad-state actor threatening attack), just the process of lining up U.S. policy with U.S. practice would go a long way toward establishing the kind of precedent on use of this technology that America—in five, 10, or 15 years—might find helpful in arguing against another’s actions.

A not-insignificant faction of U.S. defense and intelligence experts, Dennis Blair among them, thinks norms play little to no role in global security. And they have evidence in support. The missile-technology regime, for example, might be credited with slowing some program development, but it certainly has not stopped non-signatories—North Korea and Iran—from buying, building, and selling missile systems. But norms established by technology-leading countries, even when not written into legal agreements among nations, have shown success in containing the use and spread of some weapons, including land mines, blinding lasers, and nuclear bombs.

Arguably more significant than spotty legal regimes, however, is the behavior of the United States. “History shows that how states adopt and use new military capabilities is often influenced by how other states have—or have not—used them in the past,” Zenko argued. Despite the legal and policy complexity of this issue, it is something the American people have, if slowly, come to care about. Given the attention that Rand Paul’s filibuster garnered, it is not inconceivable that public pressure on drone operations could force the kind of unforeseen change to U.S. policy that it did most recently on “enhanced interrogation” of terrorists.

The case against open, transparent rule-making is that it might only hamstring American options while doing little good elsewhere—as if other countries aren’t closely watching this debate and taking notes for their own future policymaking. But the White House’s refusal to answer questions about its drone use with anything but “no comment” ensures that the rest of the world is free to fill in the blanks where and when it chooses. And the United States will have already surrendered the moment in which it could have provided not just a technical operations manual for other nations but a legal and moral one as well.

Turkey follows US precedent to strike the PKK – collapses negotiations and Erdogans presidency

Stein 13 (Aaron, Ph.D candidate at King’s College, London and the Nonproliferation Program Director at the Center for Economics and Foreign Policy Studies an independent think tank in Istanbul, “Turkey’s Negotiations with the Kurdistan Workers’ Party and Armed Drones” February 26, 2013, Turkey Wonk Blog)

Prime Minister Recep Tayyip Erdogan has recently re-intiated peace talks with Abdullah Ocalan and the Kurdistan Worker’s Party (PKK). Erdogan’s AKP, like Turgut Ozal’s Motherland Party, has sought to address Turkey’s Kurdish Issue – or the Kurds’ Turkey Problem – by focusing on the two groups’ shared muslim identity, rather than the previous policy of forced ethnic assimilation. Erdogan has previously engaged the PKK in peace talks, however, these efforts were unsuccessful. During the previous round of negotiations, Erdogan opted to hold the talks in secret, rather than subject himself to the inevitable backlash from Turkish nationalists (An important AKP voting bloc by the way).

The talks, despite having made some progress, broke down after President Abdullah Gul went public with the negotiations and the subsequent celebration at the Habur border gate in 2009 when Kurdish fighters returned from the PKK camps in Iraqi Kurdistan to Turkish territory. The AKP appeared to have been caught off guard and ill-prepared to deal with the imagery of thousands of Kurds welcoming home the PKK fighters as national heroes. The Turkish nationalist backlash, combined with the AKP’s political ambitions, led to the end of the talks and the re-militarization of the Kurdish issue.

This time around, Erdogan has opted to publicize the talks, which has, in my opinion, placed the responsibility for success squarely on the shoulders of Abdullah Ocalan. Erdogan’s public statements, as well as the policies that his party is now pursuing are politically dangerous, though the powerful Prime Minister has a number of reasons to solve the Kurdish issue. Most importantly, the AKP has shown an off and on commitment to ending the Turkish – Kurdish conflict, which has claimed an estimated 40,000 lives since the current conflict began in 1984. Moreover, **Erdogan**, who **has made no secret of his desire to move to an executive Presidency, has an incentive to** engage and **secure** the **support** of the Kurdish BDP **for his proposed constitution**. In addition, Erdogan’s 2009 – 2012 alliance with Turkey’s ultra-nationalist MHP has alienated Turkish liberals, which, despite being less religious than the AKP, are keen on implementing European Union reforms **and deepening the country’s democratic system** **(Both AKP campaign themes).**

Erdogan, I am assuming, is betting that if he solves the PKK problem, the majority of Turks, who continue to be wary of negotiating with what they consider to be a terrorist group akin to Al Qaeda, will eventually support his decision. This of course hinges on his kicking out the fighters from Turkish territory, so as to ensure a drop in violence, which would in turn give him the **credibility to go before the wary Turkish electorate** and claim that he has brought peace. This political path is fraught with potential pitfalls, as illustrated by the recent attack of BDP MPs in the nationalist strongholds of Sinop and Samsun (For an excellent overview of the recent attack, see this blog post by the excellent Frederike Geerdink).

The AKP, however, receives a tremendous amount of political support from nationalists. The AKP, which faces little resistance from the main opposition Republican People’s Party (CHP), is far more concerned about the potential for its base to splinter, which would in turn lead to it loosing some votes to the MHP, the BDP, and the Islamist Saadet Party. **The AKP**, therefore, **is seeking to balance** the current **PKK negotiations with its need to** continue to engage and **appeal to Turkish nationalists**. It is an incredibly difficult policy to pursue and is likely the reason why Erdogan’s messaging has vacillated wildly between themes like re-instituting the death penalty and the need to open chapters for Turkey’s stalled European Union bid.

However, because **the AKP has shown an incredible ability to set Turkey’s political agenda** – using coordinated leaks, trial balloons, and speeches, which are framed by overarching themes like justice and development (The translation of the AKP’s name) – I believe that the AKP is capable of keeping its coalition together and ending the conflict with the PKK. (The PKK also has a lot to with this, but that is the subject for another blog post.)

However, as I explain in my current piece on Foreign Policy, Ankara has opted to follow Washington’s example of using drones for counter-terrorism missions. Turkey, as I explain in the piece, has developed a surveillance drone and is seeking to use the current platform to develop an armed version. While Ankara has been characteristically opaque about the drones’ development, it does not take a genius to figure out that the Turkish military hopes to use armed drones to shorten to “kill-chain” for targeted strikes against PKK operatives. However, Turkey has not publicized who makes the decisions about when to use deadly force, nor has it publicly explained the legal rationale for using armed drones to assassinate Turkish citizens without due process. (As an EU candidate country, one would assume Turkey would try and figure this out).

Moreover, if the drone is used in the southeast to attack PKK militants, it is likely that some of those killed will be Turkish citizens. Given the trajectory of the cease fire talks, I see a disconnect between Erdogan’s intentions, the likely use of armed drones in the future, and the military establishment’s opaque drone policy. To be clear, I am not advocating that Ankara disarm or cease in its efforts to further develop its anti-terror capabilities. However, I do think it would be prudent for the Turkish government to publicize its drone policies, in order to build trust with the Kurdish minority. Moreover, Turkey should also seek to clarify the current legal structure that has been put in place for the killing of Turkish citizens. (If one does not exist, Ankara should start writing.) It would also be prudent for the Turkish government to explain whether or not it conducts signature strikes (I think it does, one need not look any further than the Uludere tragedy for confirmation).

If Ankara presses ahead with its armed drone program (and it will), the government should seek to be more forthcoming with information about the program’s goals and its intended use. **Otherwise, it risks undermining trust with the Kurdish minority and, should the two sides agree to a cease fire,** could risk re-igniting the conflict. Moreover, the program, which is still in the design phase, provides Ankara with a political opportunity. On the one hand, **Erodgan can tout the program as a symbol of** Turkey’s strength **– which would win him support from the nationalists**. However, **he could pair the rhetoric with a clear articulation of Turkey’s drone policy, which should include a clear legal framework for the strikes, in order to assuage Turkish liberals and Turkey’s Kurds. This would allow for him to continue to balance the two sides’ political demands and, from the perspective of AKP political operatives, help them grow their voter base.**

Key to Turkish model --- solves Middle East instability

Kirişci 8/15/13 (Kemal Kirişci is the TÜSİAD senior fellow and director of the Center on the United States and Europe's Turkey Project at Brookings, with an expertise in Turkish foreign policy and migration studies, “ The Rise and Fall of Turkey as a Model for the Arab World “ August 15, 2013, Brookings Institution)

As the Arab Spring spread from Tunisia to the rest of the Middle East early in 2011, the longtime opposition figure Rashid al-Gannouchi, also the co-founder and leader of Tunisia’s an-Nahda party, was among the many leaders who pointed to Justice and Development Party (AKP)-led Turkey as a model for guiding the transformation of the Middle East. Gannouchi maintained close relations with AKP and its leadership, which later became closely involved in Tunisia’s transformation efforts. Yet, after a May 2013 talk on “Tunisia’s Democratic Future” at The Brookings Institution, Gannouchi’s response to a question asking him which countries he thought constituted a model for Tunisia was striking because he did not mention Turkey. It is probably not a coincidence that he responded the way he did because the news about the harsh police response to the initial stages of the anti-government protests in Turkey was just breaking out. Subsequently, in an interview he gave to Jackson Diehl of The Washington Post early in June, he also took a critical view of both Mohammed Morsi and Recep Tayyip Erdoğan for their majoritarian understanding of democracy, a view that he said an-Nahda renounces. So what happened to Turkey’s model credentials? What might have led Gannouchi to change his views so dramatically? Are there any prospects for Turkey to reclaim these credentials?

For a long time, Turkish schoolchildren were taught how the 1923 establishment of the Turkish Republic on the ashes of the Ottoman Empire and the reforms introduced by the founder of the republic Kemal Atatürk constituted an example for nearly all the national liberation struggles against colonial powers during the first half of the 20th century. As the Soviet Union collapsed and the question of reform and democratization emerged in its former republics, The Economist announced Turkey to be the “Star of Islam” and a model particularly for the newly independent Central Asian republics. Roughly a decade later, the idea of Turkey as a “model” was raised once again, this time by U.S. President George W. Bush, when he launched the Broader Middle East and North Africa Initiative after intervening against Saddam Hussein in Iraq. In both cases, Turkey’s “model” credentials were promoted by the West because Turkey was both a secular Muslim country and a democracy with a liberal market and close ties to the West. But many Turkish leaders were somewhat reluctant to take up the mantle of a role model and some even feared that this could undermine Turkey’s national identity and secularism.

The Arab Spring brought about a different context. This time it seemed that it was the Arab world that was keen to take Turkey as a model. Public opinion surveys run by the Turkish Economic and Social Studies Foundation (TESEV) between 2010 and 2012 repeatedly showed that approximately 60 percent of the Arab public saw Turkey as a model and believed that Turkey could contribute positively to the transformation of the Arab world. A number of factors made Turkey attractive to the post-Spring Arab public. The most visible one was Turkey’s economic performance. The impressive growth rates that the Turkish economy achieved at a time when Western economies were suffering caught attention. This was accompanied by the growing visibility of Turkish manufactured goods and investments in the region. Furthermore, the Turkish government’s efforts to encourage regional economic integration and the signing of free trade agreements with a string of countries including Syria and Lebanon was welcomed as development that would help the region’s economic development. The AKP government’s policy to liberalize visa requirements also made it possible for an ever-growing number of Arab tourists, professionals and students to come and see this economic performance with their own eyes. The fact that a political party with Islamist roots was in power in Turkey since 2002 and that it had introduced a long list of reforms to improve the quality of Turkey’s democracy was another factor that strengthened Turkey’s model credentials. In the early stages of the AKP’s government, Turkey’s close relations with the EU and its prospects of membership also attracted considerable positive attention and appreciation.

Turkey’s popularity was also strengthened by the “zero problems with neighbors” policy of Turkish Minister of Foreign Affairs Ahmet Davutoğlu. In the Middle East, the cornerstone of this policy was Turkey’s ability to improve its relations with neighboring countries and to talk to all parties involved in the region’s disputes. In Lebanon, Turkey was able to engage with Hezbollah as well as with the Christian and Sunni leaderships. The same was true of Iraq, where Turkey maintained close contacts with Sunni, Shi’a, Kurdish and Turkmen parties during much of the 2000s. Longstanding tensions with Syria over territorial disputes, water rights and the Kurdish issue were replaced by much closer and warmer relations. Additionally, Erdoğan’s critical stance toward Israel and his support for the Palestinian cause galvanized the Arab street even if it did raise some eyebrows in diplomatic circles.

However, this positive climate did not last very long and, as a result of at least two important developments, Turkey’s credentials began to weaken. Firstly, as the excitement over the region’s prospects of transformation from authoritarian to more democratic regimes waned and peaceful revolutions were replaced by civil war, sectarian strife and instability, Turkey increasingly became embroiled in the regional conflicts rather than an arbiter of them. The worst of this turnabout occurred in the case of Turkey’s relationship with Syria, once presented as a resounding success of Turkey’s “zero problems” policy at its best, which has deteriorated into virtual undeclared warfare. Practically all the gains achieved with respect to visa liberalization and economic integration has collapsed. The free trade agreement with Syria was suspended in December 2011, the one in Lebanon could not be activated and relations with the Nouri al-Maliki government in Iraq entered an impasse. Most recently the new Egyptian regime appears inclined to reassess Egypt’s relations with Turkey in reaction to Erdoğan’s bitter criticisms of the military intervention and pro-Morsi stand. As a result, many commentators have come to characterize this dramatic transformation in Turkish foreign policy as “zero neighbors without problems.”

Secondly, the brutal police repression used against the anti-government protests in Istanbul and across Turkey coupled with Erdoğan’s choice of denigrating language toward the protestors raised doubts about the quality of Turkey’s democracy. Even before the protests broke out, these doubts had already started to be expressed, particularly with respect to press freedoms and the freedom of expression. Turkey had increasingly been cited as a country that had a greater number of journalists in jail than did China, Iran and Russia. Furthermore, **Turkey’s inability to resolve its Kurdish problem — ironically at a time when the prime minister was launching an effort to address the problem —** began to be seen as yet another weakness that engendered views critical of Turkey’s model credentials. The coup de grace came as Erdoğan in his third term of office, after a resounding electoral victory in 2011, began to adopt an increasingly authoritarian style of leadership in his third term of office, grew unwilling to accept criticisms and displayed a majoritarian understanding of democracy. His discourse and policies became more and more at odds with a country characterized by diversity in all senses of the word: culturally, ethnically, religiously, socially and politically. It is then not surprising that Gannouchi should have reconsidered his views about Turkey’s model credentials for Tunisia’s transformation and taken a critical view of Erdoğan’s own democratic credentials.

**Is this then the end of the road for Turkey as a model for the transformation of the Middle East?** The answer will clearly depend a lot on the lessons that Erdoğan and his government will draw from the protests in Turkey as well as the loss that Turkey’s role-model status has suffered recently. It is difficult to see how Turkey could revitalize these credentials if Erdoğan maintains his current domestic and regional courses of action. It is also difficult to see how, under these circumstances, Turkey would be able to finally resolve the thorny Kurdish issue, continue to keep the economy growing, maintain Turkey as a major attraction for tourism, raise new generations of youth capable of keeping up with the challenges of globalization and, perhaps most importantly, manage the Syrian crisis in a manner that does not draw Turkey into it. The alternative course of action would revisit the pragmatism and inclusiveness that characterized the first two AKP governments. Such a course of action would revitalize Turkey’s democratic transition and credentials as a model capable of reconciling Western liberal values with a religiously conservative society. Indeed, such a Turkey would regain its constructive role in its neighborhood and also energize its relationship with the EU. Yet, if the current course of action is maintained, it may well drag Turkey into turmoil and the kind of instability and polarization that could cause Turkey to look more like the post-Arab Spring Middle East rather than an inspiration for pluralist democracy, consensus building and tolerance.

And, Turkish intervention goes nuclear

Snyder 11 (Michael T. Snyder is a graduate of the McIntire School of Commerce at the University of Virginia and has two law degrees from the University of Florida. He is an attorney that has worked for some of the largest and most prominent law firms in Washington D.C. and who now resides outside of Seattle, Washington. He is a very active blogger and is also a respected researcher, writer, speaker and activist, “Could We Actually See A War Between Syria And Turkey?” 6/28/11, endoftheamericandream.com/archives/could-we-actually-see-a-war-between-syria-and-turkey)

In recent days, there have been persistent rumors that we could potentially be on the verge of a military conflict between Syria and Turkey. As impossible as such a thing may have seemed just a few months ago, it is now a very real possibility. Over the past several months, we have seen the same kind of "pro-democracy" protests erupt in Syria that we have seen in many of the other countries in the Middle East. The Syrian government has no intention of being toppled by a bunch of protesters and has cracked down on these gatherings harshly. There are reports in the mainstream media that say that over 1,300 people have been killed and more than 10,000 people have been arrested since the protests began. Just like with Libya, the United States and the EU are strongly condemning the actions that the Syrian government has taken to break up these protests. The violence in Syria has been particularly heavy in the northern sections of the country, and thousands upon thousands of refugees have poured across the border into neighboring Turkey. Syria has sent large numbers of troops to the border area to keep more citizens from escaping. Turkey has responded by reinforcing its own troops along the border. Tension between Turkey and Syria is now at an all-time high. So could we actually see a war between Syria and Turkey? A few months ago anyone who would have suggested such a thing would have been considered crazy. But the world is changing and the Middle East is a powder keg that is just waiting to explode. Since the Syrian government began cracking down on the protests, approximately 12,000 Syrians have flooded into Turkey. The Turkish government is deeply concerned that Syria may try to strike these refugees while they are inside Turkish territory. Troop levels are increasing on both sides of the border and tension is rising. One wrong move could set off a firestorm. The government of Turkey is demanding that Syrian military forces retreat from the border area. The government of Syria says that Turkey is just being used to promote the goals of the U.S. and the EU. Syria also seems to be concerned that Turkey may attempt to take control of a bit of territory over the border in order to provide a "buffer zone" for refugees coming from Syria. What makes things even more controversial is that the area where many of the Syrian refugees are encamped actually used to belong to Syria. In fact, many of the maps currently in use inside Syria still show that the area belongs to Syria. War between Syria and Turkey has almost happened before. Back in the 1990s, the fact that the government of Syria was strongly supporting the Kurds pushed the two nations dangerously close to a military conflict. Today, the border between Syria and Turkey is approximately 850 kilometers long. The military forces of both nations are massing along that border. One wrong move could set off a war. Right now, it almost sounds as though the U.S. government is preparing for a war to erupt in the region. U.S. Secretary of State Hillary Clinton recently stated that the situation along the border with Turkey is "very worrisome" and that we could see "an escalation of conflict in the area". Not only that, but when you study what Clinton and Obama have been saying about Syria it sounds very, very similar to what they were saying about Libya before the airstrikes began. In a recent editorial entitled "There Is No Going Back in Syria", Clinton wrote the following.... Finally, the answer to the most important question of all -- what does this mean for Syria's future? -- is increasingly clear: There is no going back. Syrians have recognized the violence as a sign of weakness from a regime that rules by coercion, not consent. They have overcome their fears and have shaken the foundations of this authoritarian system. Syria is headed toward a new political order -- and the Syrian people should be the ones to shape it. They should insist on accountability, but resist any temptation to exact revenge or reprisals that might split the country, and instead join together to build a democratic, peaceful and tolerant Syria. Considering the answers to all these questions, the United States chooses to stand with the Syrian people and their universal rights. We condemn the Assad regime's disregard for the will of its citizens and Iran's insidious interference. "There is no going back"? "Syria is headed toward a new political order"? It almost sounds like they are already planning the transitional government. The EU has been using some tough language as well. A recent EU summit in Brussels issued a statement that declared that the EU "condemns in the strongest possible terms the ongoing repression and unacceptable and shocking violence the Syrian regime continues to apply against its own citizens. By choosing a path of repression instead of fulfilling its own promises on broad reforms, the regime is calling its legitimacy into question. Those responsible for crimes and violence against civilians shall be held accountable." If you take the word "Syrian" out of that statement and replace it with the word "Libyan" it would sound exactly like what they were saying about Gadhafi just a few months ago. The EU has hit Syria with new economic sanctions and it is also calling on the UN Security Council to pass a resolution condemning the crackdown by the Syrian government. It seems clear that the U.S. and the EU want to see "regime change" happen in Syria. The important thing to keep in mind in all of this is that Turkey is a member of NATO. If anyone attacks Turkey, NATO has a duty to protect them. If Syria attacked Turkey or if it was made to appear that Syria had attacked Turkey, then NATO would have the justification it needs to go to war with Syria. If NATO goes to war with Syria, it is very doubtful that Iran would just sit by and watch it happen. Syria is a very close ally to Iran and the Iranian government would likely consider an attack on their neighbor to be a fundamental threat to their nation. In fact, there are already reports in the international media that Iran has warned Turkey that they better not allow NATO to use their airbases to attack Syria. So if it was NATO taking on Syria and Iran, who else in the Middle East would jump in? Would Russia and China sit by and do nothing while all of this was going on? Could a conflict in the Middle East be the thing that sets off World War III? Let's certainly hope not. More war in the Middle East would not be good for anyone. Unfortunately, tensions are rising to frightening levels throughout the region. Even if things between Syria and Turkey cool off, that doesn't mean that war won't break out some place else. Riots and protests continue to sweep across the Middle East and the entire region has been arming for war for decades. Eventually something or someone is going to snap. When it does, let us just hope that World War III does not erupt as a result.

ME instability goes nuclear

James A. **Russell,** Senior Lecturer, National Security Affairs, Naval Postgraduate School, ‘9 (Spring) “Strategic Stability Reconsidered: Prospects for Escalation and Nuclear War in the Middle East” IFRI, Proliferation Papers, #26, http://www.ifri.org/downloads/PP26\_Russell\_2009.pdf

Strategic stability in the region is thus undermined by various factors: (1) asymmetric interests in the bargaining framework that can introduce unpredictable behavior from actors; (2) the presence of non-state actors that introduce unpredictability into relationships between the antagonists; (3) incompatible assumptions about the structure of the deterrent relationship that makes the bargaining framework strategically unstable; (4) perceptions by Israel and the United States that its window of opportunity for military action is closing, which could prompt a preventive attack; (5) the prospect that Iran’s response to pre-emptive attacks could involve unconventional weapons, which could prompt escalation by Israel and/or the United States; (6) the lack of a communications framework to build trust and cooperation among framework participants. These systemic weaknesses in the coercive bargaining framework all suggest that escalation by any the parties could happen either on purpose or as a result of miscalculation or the pressures of wartime circumstance. Given these factors, it is disturbingly easy to imagine scenarios under which a conflict could quickly escalate in which the regional antagonists would consider the use of chemical, biological, or nuclear weapons. It would be a mistake to believe the nuclear taboo can somehow magically keep nuclear weapons from being used in the context of an unstable strategic framework. Systemic asymmetries between actors in fact suggest a certain increase in the probability of war – a war in which escalation could happen quickly and from a variety of participants. Once such a war starts, events would likely develop a momentum all their own and decision-making would consequently be shaped in unpredictable ways. The international community must take this possibility seriously, and muster every tool at its disposal to prevent such an outcome, which would be an unprecedented disaster for the peoples of the region, with substantial risk for the entire world.

The best scholarship validates our theory of arms races – unless norms precede formal agreements, they’ll be ineffective

Robert Farley 11, assistant professor at the Patterson School of Diplomacy and International Commerce at the University of Kentucky, Over the Horizon: U.S. Drone Use Sets Global Precedent, October 12, http://www.worldpoliticsreview.com/articles/10311/over-the-horizon-u-s-drone-use-sets-global-precedent

Is the world about to see a "drone race" among the United States, China and several other major powers? Writing in the New York Times, Scott Shane argued that just such an arms race is already happening and that it is largely a result of the widespread use of drones in a counterterror role by the United States. Shane suggests that an international norm of drone usage is developing around how the United States has decided to employ drones. In the future, we may expect that China, Russia and India will employ advanced drone technologies against similar enemies, perhaps in Xinjiang or Chechnya. Kenneth Anderson agrees that the drone race is on, but disagrees about its cause, arguing that improvements in the various drone component technologies made such an arms race inevitable. Had the United States not pursued advanced drone technology or launched an aggressive drone campaign, some other country would have taken the lead in drone capabilities.

So which is it? Has the United States sparked a drone race, or was a race with the Chinese and Russians inevitable? While there's truth on both sides, on balance Shane is correct. Arms races don't just "happen" because of outside technological developments. Rather, they are embedded in political dynamics associated with public perception, international prestige and bureaucratic conflict. China and Russia pursued the development of drones before the United States showed the world what the Predator could do, but they are pursuing capabilities more vigorously because of the U.S. example. Understanding this is necessary to developing expectations of what lies ahead as well as a strategy for regulating drone warfare.

States run arms races for a variety of reasons. The best-known reason is a sense of fear: The developing capabilities of an opponent leave a state feeling vulnerable. The Germany's build-up of battleships in the years prior to World War I made Britain feel vulnerable, necessitating the expansion of the Royal Navy, and vice versa. Similarly, the threat posed by Soviet missiles during the Cold War required an increase in U.S. nuclear capabilities, and so forth. However, states also "race" in response to public pressure, bureaucratic politics and the desire for prestige. Sometimes, for instance, states feel the need to procure the same type of weapon another state has developed in order to maintain their relative position, even if they do not feel directly threatened by the weapon. Alternatively, bureaucrats and generals might use the existence of foreign weapons to argue for their own pet systems. All of these reasons share common characteristics, however: They are both social and strategic, and they depend on the behavior of other countries.

Improvements in technology do not make the procurement of any given weapon necessary; rather, geostrategic interest creates the need for a system. So while there's a degree of truth to Anderson's argument about the availability of drone technology, he ignores the degree to which dramatic precedent can affect state policy. The technologies that made HMS Dreadnought such a revolutionary warship in 1906 were available before it was built; its dramatic appearance nevertheless transformed the major naval powers' procurement plans. Similarly, the Soviet Union and the United States accelerated nuclear arms procurement following the Cuban Missile Crisis, with the USSR in particular increasing its missile forces by nearly 20 times, partially in response to perceptions of vulnerability. So while a drone "race" may have taken place even without the large-scale Predator and Reaper campaign in Pakistan, Yemen and Somalia, the extent and character of the race now on display has been driven by U.S. behavior. Other states, observing the effectiveness -- or at least the capabilities -- of U.S. drones will work to create their own counterparts with an enthusiasm that they would not have had in absence of the U.S. example.

What is undeniable, however, is that we face a drone race, which inevitably evokes the question of arms control. Because they vary widely in technical characteristics, appearance and even definition, drones are poor candidates for "traditional" arms control of the variety that places strict limits on number of vehicles constructed, fielded and so forth. Rather, to the extent that any regulation of drone warfare is likely, it will come through treaties limiting how drones are used.

Such a treaty would require either deep concern on the part of the major powers that advances in drone capabilities threatened their interests and survival, or widespread revulsion among the global public against the practice of drone warfare. The latter is somewhat more likely than the former, as drone construction at this point seems unlikely to dominate state defense budgets to the same degree as battleships in the 1920s or nuclear weapons in the 1970s. However, for now, drones are used mainly to kill unpleasant people in places distant from media attention. So creating the public outrage necessary to force global elites to limit drone usage may also prove difficult, although the specter of "out of control robots" killing humans with impunity might change that. P.W. Singer, author of "Wired for War," argues that new robot technologies will require a new approach to the legal regulation of war. Robots, both in the sky and on the ground, not to mention in the sea, already have killing capabilities that rival those of humans. Any approach to legally managing drone warfare will likely come as part of a more general effort to regulate the operation of robots in war.

However, even in the unlikely event of global public outrage, any serious effort at regulating the use of drones will require U.S. acquiescence. Landmines are a remarkably unpopular form of weapon, but the United States continues to resist the Anti-Personnel Mine Ban Convention. If the United States sees unrestricted drone warfare as being to its advantage -- and it is likely to do so even if China, Russia and India develop similar drone capabilities -- then even global outrage may not be sufficient to make the U.S. budge on its position. This simply reaffirms the original point: Arms races don't just "happen," but rather are a direct, if unexpected outcome of state policy. Like it or not, the behavior of the United States right now is structuring how the world will think about, build and use drones for the foreseeable future. Given this, U.S. policymakers should perhaps devote a touch more attention to the precedent they're setting.

## solvency

Only congressional action on the scope of hostilities sends a clear signal that the US abides by the laws of armed conflict

Kenneth Anderson, Professor of Law, Washington College of Law, American University, and Research Fellow, The Hoover Institution, Stanford University and Member of its Task Force on National Security and the Law, 3/18/10, Rise of the Drones: Unmanned Systems and the Future of War, digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1002&context=pub\_disc\_cong

• First, the United States government urgently needs publicly to declare the legal rationale behind its use of drones, and defend that legal rationale in the international community, which is increasingly convinced that parts, if not all, of its use is a violation of international law.

• Second, the legal rationale offered by the United States government needs to take account, not only of the use of drones on traditional battlefields by the US military, but also of the Obama administration’s signature use of drones by the CIA in operations outside of traditionally conceived zones of armed conflict, whether in Pakistan, or further afield, in Somalia or Yemen or beyond. This legal rationale must be certain to protect, in plain and unmistakable language, the lawfulness of the CIA’s participation in drone-related uses of force as it takes place today, and to protect officials and personnel from moves, in the United States or abroad, to treat them as engaged in unlawful activity. It must also be broad enough to encompass the use of drones (under the statutory arrangements long set forth in United States domestic law) by covert civilian agents of the CIA, in operations in the future, involving future presidents, future conflicts, and future reasons for using force that have no relationship to the current situation.

• Third, the proper legal rationale for the use of force in drone operations in special, sometimes covert, operations outside of traditional zones of armed conflict is the customary international law doctrine of self-defense, rather than the narrower law of armed conflict.

• Fourth, Congress has vital roles to play here, mostly in asserting the legality of the use of drones. These include: (i) Plain assertion of the legality of the programs as currently used by the Obama administration, as a signal to courts in the US as well as the international community and other interested actors, that the two political branches are united on an issue of vital national security and foreign policy. (ii) Congressional oversight mechanisms should also be strengthened in ensuring Congress’s meaningful knowledge and ability to make its views known. (iii) Congress also should consider legislation to clarify once and for all that that covert use of force is lawful under US law and international law of self-defense, and undertake legislation to make clear the legal protection of individual officers. (iv) Congress should also strongly encourage the administration to put a public position on the record. In my view, that public justification ought to be something (self-defense, in my view) that will ensure the availability of targeted killing for future administrations outside the context of conflict with Al Qaeda – and protect against its legal erosion by acquiescing or agreeing to interpretations of international law that would accept, even by implication, that targeted killing by the civilian CIA using drones is per se an unlawful act of extrajudicial execution.

The Multiple Strategic Uses of Drones and Their Legal Rationales

4. Seen through the lens of legal policy, drones as a mechanism for using force are evolving in several different strategic and technological directions, with different legal implications for their regulation and lawful use. From my conversations and research with various actors involved in drone warfare, the situation is a little bit like the blind men and the elephant – each sees only the part, including the legal regulation, that pertains to a particular kind of use, and assumes that it covers the whole. The whole, however, is more complicated and heterogeneous. They range from traditional tactical battlefield uses in overt war to covert strikes against non-state terrorist actors hidden in failed states, ungoverned, or hostile states in the world providing safe haven to terrorist groups. They include use by uniformed military in ordinary battle but also use by the covert civilian service.

5. Although well-known, perhaps it bears re-stating the when this discussion refers to drones and unmanned vehicle systems, the system is not “unmanned” in the sense that human beings are not in the decision or control loop. Rather, “unmanned” here refers solely to “remote-piloted,” in which the pilot and weapons controllers are not physically on board the aircraft. (“Autonomous” firing systems, in which machines might make decisions about the firing of weapons, raise entirely separate issues not covered by this discussion because they are not at issue in current debates over UA Vs.)

6. Drones on traditional battlefields. The least legally complicated or controversial use of drones is on traditional battlefields, by the uniformed military, in ordinary and traditional roles of air power and air support. From the standpoint of military officers involved in such traditional operations in Afghanistan, for example, the use of drones is functionally identical to the use of missile fired from a standoff fighter plane that is many miles from the target and frequently over-the-horizon. Controllers of UAVs often have a much better idea of targeting than a pilot with limited input in the cockpit. From a legal standpoint, the use of a missile fired from a drone aircraft versus one fired from some remote platform with a human pilot makes no difference in battle as ordinarily understood. The legal rules for assessing the lawfulness of the target and anticipated collateral damage are identical.

7. Drones used in Pakistan’s border region. Drones used as part of the on-going armed conflict in Afghanistan, in which the fighting has spilled over – by Taliban and Al Qaeda flight to safe havens, particularly – into neighboring areas of Pakistan likewise raise relatively few questions about their use, on the assumption that the armed conflict has spilled, as is often the case of armed conflict, across an international boundary. There are no doubt important international and diplomatic questions raised about the use of force across the border – and that is presumably one of the major reasons why the US and Pakistan have both preferred the use of drones by the CIA with a rather shredded fig leaf, as it were, of deniability, rather than US military presence on the ground in Pakistan. The **legal questions are important**, but (unless one takes the view that the use of force by the CIA is always and per se illegal under international law, even when treated as part of the armed forces of a state in what is unquestionably an armed conflict) there is nothing legally special about UAVs that would distinguish them from other standoff weapons platforms.

8. Drones used in Pakistan outside of the border region. The use of drones to target Al Qaeda and Taliban leadership outside of places in which it is factually plain that hostilities are underway begins to invoke the current legal debates over drone warfare. From a strategic standpoint, of course, the essence of much fighting against a raiding enemy is to deny it safe haven; as safe havens in the border regions are denied, then the enemy moves to deeper cover. The strategic rationale for targeting these leaders (certainly in the view of the Obama administration) is overwhelming. Within the United States, and even more without, arguments are underway as to whether Pakistan beyond the border regions into which overt fighting has spilled can justify reach to the law of armed conflict as a basis and justification for drone strikes.

9. Drones used against Al Qaeda affiliates outside of AfPak – Somalia, Yemen or beyond. The President, in several major addresses, has stressed that the United States will take the fight to the enemy, and pointedly included places that are outside of any traditionally conceived zone of hostilities in Iraq or AfPak – Somalia and Yemen have each been specifically mentioned. And indeed, the US has undertaken uses of force in those places, either by means of drones or else by human agents. The Obama administration has made clear – entirely correctly, in my view – that it will deny safe haven to terrorists. As the president said in an address at West Point in fall 2009, we “cannot tolerate a safe-haven for terrorists whose location is known, and whose intentions are clear.”1 In this, the President follows the long-standing, traditional view of the US government endorsing, as then-State Department Legal Advisor Abraham Sofaer put it in a speech in 1989, the “right of a State to strike terrorists within the territory of another State where terrorists are using that territory as a location from which to launch terrorist attacks and where the State involved has failed to respond effectively to a demand that the attacks be stopped.”2

10. The United States might assert in these cases that the armed conflict goes where the combatants go, in the case particularly of an armed conflict (with non-state actors) that is already acknowledged to be underway. In that case, those that it targets are, in its view, combats that can lawfully be targeted, subject to the usual armed conflict rules of collateral damage. One says this without knowing for certain whether this is, in fact, the US view – although the Obama administration is under pressure for failing to articulate a public legal view, this was equally the case for the preceding two administrations. In any case, however, that view is sharply contested as a legal matter. The three main contending legal views at this point are as follows:

• One legal view (the traditional view and that presumably taken by the Obama administration, except that we do not know for certain, given its reticence) is that we are in an armed conflict. Wherever the enemy goes, we are entitled to follow and attack him as a combatant. Geography and location – important for diplomatic reasons and raising questions about the territorial integrity of states, true – are irrelevant to the question of whether it is lawful to target under the laws of war; the war goes where the combatant goes. We must do so consistent with the laws of war and attention to collateral damage, and other legal and diplomatic concerns would of course constrain us if, for example, the targets fled to London or Istanbul. But the fundamental right to attack a combatant, other things being equal, surely cannot be at issue.

• A second legal view directly contradicts the first, and says that the legal rights of armed conflict are limited to a particular theatre of hostilities, not to wherever combatants might flee throughout the world. This creates a peculiar question as to how, lawfully, hostilities against a non-state actor might ever get underway. But the general legal policy response is that if there is no geographic constraint consisting of a “theatre” of hostilities, then the very special legal regime of the laws of armed conflict might suddenly, and without any warning, apply – and overturn – ordinary laws of human rights that prohibit extrajudicial execution, and certainly do not allow attacks subject merely to collateral damage rules, with complete surprise and no order to it. Armed conflict is defined by its theatres of hostilities, on this view, as a mechanism for limiting the scope of war and, importantly, the reach of the laws of armed conflict insofar as the displace (with a lower standard of protection) ordinary human rights law. Again, this leaves a deep concern that this view, in effect, empowers the fleeing side, which can flee to some place where, to some extent, it is protected against attack.

• A third legal view (to which I subscribe) says that armed conflict under the laws of war, both treaty law of the Geneva Conventions and customary law, indeed accepts that non-international armed conflict is defined, and therefore limited by, the presence of persistent, sustained, intense hostilities. In that sense, then, an armed conflict to which the laws of war apply exists only in particular places where those conditions are met. **That is not the end of the legal story, however**. Armed conflict as defined under the Geneva Conventions (common articles 2 and 3) is not the only international law basis for governing the use of force. The international law of self-defense is a broader basis for the use of force in, paradoxically, more limited ways that do not rise to the sustained levels of fighting that legally define hostilities.

• Why is self-defense the appropriate legal doctrine for attacks taking place away from active hostilities? From a strategic perspective, a large reason for ordering a limited, pinprick, covert strike is in order to avoid, if possible, an escalation of the fighting to the level of overt intensity that would invoke the laws of war – the intent of the use of force is to avoid a wider war. Given that application of the laws of war, in other words, requires a certain level of sustained and intense hostilities, that is not always a good thing. It is often bad and precisely what covert action seeks to avoid. The legal basis for such an attack is not armed conflict as a formal legal matter – the fighting with a non-state actor does not rise to the sustained levels required under the law’s threshold definition – but instead the law of self-defense.

• Is self-defense law simply a standardless license wantonly to kill? This invocation of self-defense law should not be construed as meaning that it is without limits or constraining standards. On the contrary, it is not standardless, even though it does not take on all the detailed provisions of the laws of war governing “overt” warfare, including the details of prison camp life and so on. It must conform to the customary law standards of necessity and proportionality – necessity in determining whom to target, and proportionality in considering collateral damage. The standards in those cases should essentially conform to military standards under the law of war, and in some cases the standards should be still higher.

11. The United States government seems, to judge by its lack of public statements, remarkably indifferent to the increasingly vehement and pronounced rejection of the first view, in particular, that the US can simply follow combatants anywhere and attack them. The issue is not simply collateral damage in places where no one had any reason to think there was a war underway; prominent voices in the international legal community question, at a minimum, the lawfulness of even attacking what they regard as merely alleged terrorists. In the view of important voices in international law, the practice outside of a traditional battlefield is a violation of international human rights law guarantees against extrajudicial execution and, at bottom, is just simple murder. On this view, the US has a human rights obligation to seek to arrest and then charge under some law; it cannot simply launch missiles at those it says are its terrorist enemies. It shows increasing impatience with US government silence on this issue, and with the apparent – but quite undeclared – presumption that the armed conflict goes wherever the combatants go.

12. Thus, for example, the UN special rapporteur on extrajudicial execution, NYU law professor Philip Alston, has asked in increasingly strong terms that, at a minimum, the US government explain its legal rationales for targeted killing using drones. The American Civil Liberties Union in February 2010 filed an extensive FOIA request (since re-filed as a lawsuit), seeking information on the legal rationales (but including requests for many operational facts) for all parts of the drones programs, carefully delineating military battlefield programs and CIA programs outside of the ordinary theatres of hostilities. Others have gone much further than simply requests that the US declare its legal views and have condemned them as extrajudicial execution – as Amnesty International did with respect to one of the earliest uses of force by drones, the 2002 Yemen attack on Al Qaeda members. The addition of US citizens to the kill-or-capture list, under the authorization of the President, has raised the stakes still further. The stakes, in this case, are highly unlikely to involve President Obama or Vice-President Biden or senior Obama officials. They are far more likely to involve lower level agency counsel, at the CIA or NSC, who create the target lists and make determinations of lawful engagement in any particular circumstance. It is they who would most likely be investigated, indicted, or prosecuted in a foreign court as, the US should take careful note, has already happened to Israeli officials in connection with operations against Hamas. **The reticence of the US government on this matter is frankly hard to justify**, at this point; this is not a criticism per se of the Obama administration, because the George W. Bush and Clinton administrations were equally unforthcoming. But this is the Obama administration, and **public silence on the legal legitimacy of targeted killings especially in places** and ways **that are not obviously** by the military in obvious **battlespaces is increasingly problematic**.

13. Drones used in future circumstances by future presidents against new non-state terrorists. A government official with whom I once spoke about drones as used by the CIA to launch pinpoint attacks on targets in far-away places described them, in strategic terms, as the “lightest of the light cavalry.” He noted that if terrorism, understood strategically, is a “raiding strategy” launched largely against “logistical” rather than “combat” targets – treating civilian and political will as a “logistical target” in this strategic sense – then how should we see drone attacks conducted in places like Somalia or Yemen or beyond? We should understand them, he said, as a “counter-raiding” strategy, aimed not at logistical targets, but instead at combat targets, the terrorists themselves. Although I do not regard this use of “combat” as a legal term – because, as suggested above, the proper legal frame for these strikes is self-defense rather than “armed conflict” full-on – as a strategic description, this is apt.

14. This blunt description suggests, however, that it is a profound mistake to think that the importance of drones lies principally on the traditional battlefield, as a tactical support weapon, or even in the “spillover” areas of hostilities. In those situations, it is perhaps cheaper than the alternatives of manned systems, but is mostly a substitute for accepted and existing military capabilities. Drone attacks become genuinely special as a form of strategic, yet paradoxically discrete, air power outside of overt, ordinary, traditional hostilities – the farthest project of discrete force by the lightest of the light cavalry. As these capabilities develop in several different technological direction – on the one hand, smaller vehicles, more contained and limited kinetic weaponry, and improved sensors and, on the other hand, large-scale drone aircraft capable of going after infrastructure targets as the Israelis have done with their Heron UAVs – it is highly likely that they will become a weapon of choice for future presidents, future administrations, in future conflicts and circumstances of self- defense and vital national security of the United States. Not all the enemies of the United States, including transnational terrorists and non-state actors, will be Al Qaeda or the authors of 9/11. Future presidents will need these technologies and strategies – and will need to know that they have sound, publicly and firmly asserted legal defenses of their use, including both their use and their limits in law.

Status quo administration policy delineates between geographic zones, but our legal justification for war everywhere remains in place

Anthony Dworkin 13, senior policy fellow at the European Council on Foreign Relations, “Drones And Targeted Killing: Defining A European Position”, July, <http://ecfr.eu/page/-/ECFR84_DRONES_BRIEF.pdf>

Two further points are worth noting. First, the administration has acknowledged that in the case of American citizens, even when they are involved in the armed conflict, the US Constitution imposes additional requirements of due process that bring the threshold for targeted killing close to that involved in a self-defence analysis. These requirements were listed in a Department of Justice white paper that became public earlier this year.26 Second, **the administration has** at times **suggested** that even in the case of non-Americans **its policy is to concentrate its efforts against individuals who pose a significant and imminent threat to the US**. For example, John Brennan said in his Harvard speech in September 2011 that the administration’s counterterrorism efforts outside Afghanistan and Iraq were “focused on those individuals who are a threat to the United States, whose removal would cause a significant – even if only temporary – disruption of the plans and capabilities of al-Qaeda and its associated forces”.27

However, the **details** that have emerged about US targeting practices in the past few years **raise questions about how closely this approach has been followed in practice**. An analysis published by McClatchy Newspapers in April, based on classified intelligence reports, claimed that 265 out of 482 individuals killed in Pakistan in a 12-month period up to September 2011 were not senior al-Qaeda operatives but instead were assessed as Afghan, Pakistani, and unknown extremists.28 It has been widely reported that in both Pakistan and Yemen the US has at times carried out “signature strikes” or “Terrorist Attack Disruption Strikes” in which groups are targeted based not on knowledge of their identity but on a pattern of behaviour that complies with a set of indicators for militant activity. It is widely thought that these attacks have accounted for many of the civilian casualties caused by drone strikes. In both Pakistan and Yemen, there may have been times when some drone strikes – including signature strikes – could perhaps best be understood as counterinsurgency actions in support of government forces in an internal armed conflict or civil war, and in this way lawful under the laws of armed conflict. Some attacks in Pakistan may also have been directly aimed at preventing attacks across the border on US forces in Afghanistan. However, **by presenting its drone programme overall as part of** a global armed conflict. the **Obama** administration **continues to set** an expansive precedent **that is damaging to the international rule of law**.

Obama’s new policy on drones

It is against this background that Obama’s recent counterterrorism speech and the policy directive he announced at the same time should be understood. On the subject of remotely piloted aircraft and targeted killing, there were two key aspects to his intervention. First, he suggested that the military element in US counterterrorism may be scaled back further in the coming months, and that he envisages a time in the not-too-distant future when the fight against the al-Qaeda network will no longer qualify as an armed conflict. He said that “the core of al Qaeda in Afghanistan and Pakistan is on the path to defeat” and that while al-Qaeda franchises and other terrorists continued to plot against the US, “the scale of this threat closely resembles the types of attacks we faced before 9/11”.29 Obama promised that he would not sign legislation that expanded the mandate of the AUMF, and proclaimed that the United States’ “systematic effort to dismantle terrorist organizations must continue […] but this war, like all wars, must end”. The tone of Obama’s speech contrasted strongly with that of US **military officials** who testified before the Senate Committee on Armed Services the week before; Michael Sheehan, the Assistant Secretary of Defence for Special Operations and Low-Intensity Conflict, **said** then that **the end of the armed conflict was “a long way off**” and appeared to say that **it might continue for 10 to 20 years**.30

Second, the day before his speech, **Obama set out regulations** for drone strikes that appeared to restrict them beyond previous commitments (the guidance remains classified but a summary has been released). The guidance set out standards and procedures for drone strikes “that are either already in place or will be transitioned into place over time”.31 **Outside areas of active hostilities, lethal force will only be used “when capture is not feasible and no other reasonable alternatives exist to address the threat effectively”. It will only be used against a target “that poses a continuing, imminent threat to US persons”. And there must be “near certainty that non-combatants will not be injured or killed**”.

In some respects, these standards remain unclear: the president did not specify how quickly they would be implemented, or how “areas of active hostilities” should be understood. Nevertheless, **taken at face value,** they **seem to** represent a meaningful change**, at least on a conceptual level**. Effectively, they bring the criteria for all targeted strikes into line with the standards that the administration had previously determined to apply to US citizens. **Where the administration had previously said on occasions that it focused in practice on those people who pose the greatest threat,** this is **now formalised as** official policy. In this way, the standards are **significantly** more restrictive than the limits that the laws of armed conflict set for killing in wartime, and represent a shift towards a threat-based rather than status-based approach. **In effect, the new policy endorses a self-defence standard as the de facto basis for US drone strikes**, even if the continuing level of attacks would strike most Europeans as far above what a genuine self-defence analysis would permit.32 The new standards would seem to prohibit signature strikes in countries such as Yemen and Somalia and confine them to Pakistan, where militant activity could be seen as posing a cross-border threat to US troops in Afghanistan. According to news reports, signature strikes will continue in the Pakistani tribal areas for the time being.33

However, the impact of the new policy will depend very much on how the concept of a continuing, imminent threat is interpreted. The administration has not given any definition of this phrase, and the leaked Department of Justice white paper contained a strikingly broad interpretation of imminence; among other points, the white paper said that it “does not require the United States to have clear evidence that a specific attack on US persons or interests will take place in the immediate future” and that it “must incorporate considerations of the relevant window of opportunity, the possibility of reducing collateral damage to civilians, and the likelihood of heading off future disastrous attacks on Americans”.34 The presidential policy guidance captures the apparent concerns behind the administration’s policy more honestly by including the criterion of continuing threat, but this begs the question of how the notions of a “continuing” and “imminent” threat relate to each other. Even since Obama’s speech, the US is reported to have carried out four drone strikes (two in Pakistan and two in Yemen) killing between 18 and 21 people – suggesting that the level of attacks is hardly diminishing **under the new guidelines**.35

It is also notable that the new standards **announced by Obama** represent a policy decision **by the US** rather than **a** revised **interpretation of its** legal obligations. In his speech, **Obama drew a distinction between legality and morality**, pointing out that “to say a military tactic is legal, or even effective, is not to say it is wise or moral in every instance”. The suggestion was that the US was scaling back its use of drones out of practical or normative considerations, not because of any new conviction that the its previous legal claims went too far. The **background** assertion that the US **is engaged in an armed conflict with al-Qaeda and associated forces, and** might **therefore** lawfully kill any member **of the opposing forces** wherever they were found, remains in place **to serve** as a precedent **for other states that wish to claim it**.

Limiting the use of force as a first resort is critical to sustainable consensus-building on targeted killing standards

Jennifer Daskal, Fellow and Adjunct Professor, Georgetown Center on National Security and the Law, Georgetown University Law Center, April 2013, ARTICLE: THE GEOGRAPHY OF THE BATTLEFIELD: A FRAMEWORK FOR DETENTION AND TARGETING OUTSIDE THE "HOT" CONFLICT ZONE, 161 U. Pa. L. Rev. 1165

Legal scholars, policymakers, and state actors are embroiled in a heated debate about whether the conflict with al Qaeda is concentrated within specific geographic boundaries or extends to wherever al Qaeda members and associated forces may go. The United States' expansive view of the conflict, coupled with its broad definition of the enemy, has led to a legitimate concern about the creep of war. Conversely, the European and human rights view, which confines the conflict to a limited geographic region, ignores the potentially global nature of the threat and unduly constrains the state's ability to respond. Neither the law of international armed conflict (governing conflicts between states) nor the law of noninternational armed conflict (traditionally understood to govern intrastate conflicts) provides the answers that are so desperately needed.

The zone approach proposed by this Article fills the international law gap, effectively mediating the multifaceted liberty and security interests at stake. It recognizes the broad sweep of the conflict, but distinguishes between zones of active hostilities and other areas in determining which rules apply. **Specifically, it offers a set of standards that would both limit and legitimize the use of out-of-battlefield targeted killings** and law of war-based detentions, subjecting their use to an individualized threat assessment, a least-harmful-means test, and significant procedural safeguards. **This approach confines the use of out-of-battlefield targeted killings** and detention without charge to extraordinary situations in which the security of the state so demands. It thus limits the use of force as a first resort, protects against the unnecessary erosion of peacetime norms and institutions, and safeguards individual liberty. At the same time, the zone approach ensures that the state can effectively respond to grave threats to its security, wherever those threats are based.

The United States has already adopted a number of policies that distinguish between zones of active hostilities and elsewhere, implicitly recognizing the importance of this distinction. **By adopting the** proposed **framework as a matter of law, the U**nited **S**tates **can begin to set the standards and build an international consensus as to the rules that ought to apply, not only to this conflict, but to future conflicts**. The likely reputational, security, and foreign policy gains make acceptance of this framework a worthy endeavor.

This is current administration policy, it just needs to be formalized

Jennifer Daskal, Fellow and Adjunct Professor, Georgetown Center on National Security and the Law, Georgetown University Law Center, April 2013, ARTICLE: THE GEOGRAPHY OF THE BATTLEFIELD: A FRAMEWORK FOR DETENTION AND TARGETING OUTSIDE THE "HOT" CONFLICT ZONE, 161 U. Pa. L. Rev. 1165

One might be skeptical that a nation like the United States would ever accept such constraints on the exercise of its authority. There are, however, several reasons why doing so would be in the United States' best interest.

First, as described in Section II.B, **the** general **framework is** largely **consistent with current U.S. practice since 2006**. The United States has, as a matter of policy, adopted important limits on its use of out-of-battlefield targeting and law-of-war detention suggesting an implicit recognition of the value and benefits of restraint.

Second, while the proposed substantive and procedural safeguards are more stringent than those that are currently being employed, their implementation will lead to increased restraint and enhanced legitimacy, which in turn inure to the state. As the U.S. Counterinsurgency Manual explains, it is impossible and self-defeating to attempt to capture or kill every potential insurgent: "Dynamic insurgencies can replace losses quickly. Skillful counterinsurgents must thus cut off the sources of that recuperative power" by increasing their own legitimacy at the expense of the insurgent's legitimacy. n215 The Counterinsurgency Manual further notes, "Excessive use of force, unlawful detention ... and punishment without trial" comprise "illegitimate actions" that are ultimately "self-defeating." n216 In this vein, the Manual advocates moving "from combat operations to law enforcement as [\*1232] quickly as feasible." n217 **In other words, the high profile and controversial nature of killings outside conflict zones** and detention without charge **can work to the advantage of terrorist groups** and to the detriment of the state. **Self-imposed limits on** the use of detention without charge and **targeted killing** can **yield legitimacy and security benefits**. n218

Third, limiting the exercise of these authorities outside zones of active hostilities better accommodates the demands of European allies, upon whose support the United States relies. As Brennan has emphasized: "**The convergence of our** legal views **with those of our international partners matters**. The effectiveness of our counterterrorism activities depends on the assistance and cooperation of our allies who, in ways public and private, take great risks to aid us in this fight." n219 By placing self-imposed limits on its actions outside the "hot" battlefield, the United States will be in a better position to participate in the development of an international consensus as to the rules that ought to apply.

Fourth, such self-imposed restrictions are more consistent with the United States' long-standing role as a champion of human rights and the rule of law a role that becomes difficult for the United States to play when viewed as supporting broad-based law-of-war authority that gives it wide latitude to employ force as a first resort and bypass otherwise applicable human rights and domestic law enforcement norms.

Fifth, **and critically, while the U**nited **S**tates **might be confident that it will exercise its authorities responsibly, it cannot assure that other states will follow suit**. What is to prevent Russia, for example, from asserting that [\*1233] it is engaged in an armed conflict with Chechen rebels, and can, consistent with the law of war, kill or detain any person anywhere in the world which it deems to be a "functional member" of that rebel group? Or Turkey from doing so with respect to alleged "functional members" of Kurdish rebel groups? If such a theory ultimately resulted in the targeted killing or detaining without charge of an American citizen, the United States would have few principled grounds for objecting.

## \*\*\*2AC\*\*\*

## threat con

**Their impact is wrong – debate over even the most technical issues improves decision-making and advocacy**

Orna **Ben-Naftali**, Head of the International Law Division and of the Law and Culture Division, The Law School, The College of Management Academic Studies, Spring 200**3**, ARTICLE: 'We Must Not Make a Scarecrow of the Law': A Legal Analysis of the Israeli Policy of Targeted Killings, 36 Cornell Int'l L.J. 233

Our analysis concludes that while a specific act of preemptive killing may be legal if it meets the above-specified requirements, the policy of state targeted preemptive killings is not. Furthermore, some specific acts of targeted killings may generate state responsibility, while others may constitute a war crime entailing criminal accountability. These conclusions, emanating from the reading of the three legal texts applicable to the context, and informed by a sensibility that coheres them, do not rest on a negation of the importance of the national interest in security. On the contrary, these conclusions incorporate and express the way it should be balanced with a minimum standard of humanity and against the relevant context.

This delicate, ever precarious balance is at the heart of the democratic discourse. A democratic state is not a meek state. True, it is fighting with "one hand tied behind its back,"n342 as soberly observed by Chief Justice Barak of the Israeli Supreme Court, but democratic sensibilities internalize this limitation on State power, not as a source of weakness but as a sign of strength. Democracies require a public discourse forever alert to the importance of human rights, suspicious of the way power is used, and committed to the rule of law. The legal culture, in turn, while not a substitute for this public discourse, is never absent from it and indeed serves as a catalyst for its development.

We therefore reject the notion that the policy of targeted killings, designed by Israel as a way to combat terrorist attacks, is beyond the purview of the rule of law.n343 We also deny the purist position suggesting that the legalistic nitty-gritty preoccupation with details entailed in the above discussion is likely to obscure and legitimize a harrowing policy; n344 one that, on principle, should be condemned. n345 This position in fact maintains that the legality or illegality of targeted state killings is not a legitimate issue of discussion; that while an emergency situation may exceptionally necessitate the deed, it should never be elevated to the sphere of the Word. n346 We appreciate the sensibility of this position, but, alas, do not find it sensible. Indeed, nor would the people who consider themselves victims of the policy of targeted killings, and appeal to the courts to intervene. n347 Purity belongs to the Platonic world of ideas; it is a necessary ideal to strive for, even if forever unachievable in this all too fallible City of Man. n348 In the best of all possible worlds law would be superfluous; in this world, it is a necessary, albeit insufficient means to achieve some possible betterment. This article hopes to contribute to this modest goal.

**No impact to threat con – prefer topic specific ev**

Eric A. **Posner and** Adrian **Vermeule 3**, law profs at Chicago and Harvard, Accommodating Emergencies, September, <http://www.law.uchicago.edu/files/files/48.eap-av.emergency.pdf>

Against the view that panicked government officials overreact to an emergency, and unnecessarily curtail civil liberties, we suggest a more constructive theory of the role of fear. Before the emergency, government officials are complacent. They do not think clearly or vigorously about the potential threats faced by the nation. After the terrorist attack or military intervention, their complacency is replaced by fear. Fear stimulates them to action. Action may be based on good decisions or bad: fear might cause officials to exaggerate future threats, but it also might arouse them to threats that they would otherwise not perceive. **It is impossible to say in the abstract whether decisions and actions provoked by fear are likely to be better than decisions and actions made in a state of calm**. But our limited point is that there is no reason to think that the fear-inspired decisions are likely to be worse. For that reason, the existence of fear during emergencies does not support the antiaccommodation theory that the Constitution should be enforced as strictly during emergencies as during non-emergencies.

C. The Influence of Fear during Emergencies

Suppose now that the simple view of fear is correct, and that it is an unambiguously negative influence on government decisionmaking. Critics of accommodation argue that this negative influence of fear justifies skepticism about emergency policies and strict enforcement of the Constitution. However, this argument is implausible. It is doubtful that fear, so understood, has more influence on decisionmaking during emergencies than decisionmaking during non-emergencies.

The panic thesis, implicit in much scholarship though rarely discussed in detail, holds that citizens and officials respond to terrorism and war in the same way that an individual in the jungle responds to a tiger or snake. The national response to emergency, because it is a standard fear response, is characterized by the same circumvention of ordinary deliberative processes: thus, (i) the response is instinctive rather than reasoned, and thus subject to error; and (ii) the error will be biased in the direction of overreaction. While the flight reaction was a good evolutionary strategy on the savannah, in a complex modern society the flight response is not suitable and can only interfere with judgment. Its advantage—speed—has minimal value for social decisionmaking. No national emergency requires an immediate reaction—except by trained professionals who execute policies established earlier—but instead over days, months, or years people make complex judgments about the appropriate institutional response. And the asymmetrical nature of fear guarantees that people will, during a national emergency, overweight the threat and underweight other things that people value, such as civil liberties.

But if decisionmakers rarely act immediately, then the tiger story cannot bear the metaphoric weight that is placed on it. Indeed, the flight response has nothing to do with the political response to the bombing of Pearl Harbor or the attack on September 11. The people who were there—the citizens and soldiers beneath the bombs, the office workers in the World Trade Center—no doubt felt fear, and most of them probably responded in the classic way. They experienced the standard physiological effects, and (with the exception of trained soldiers and security officials) fled without stopping to think. It is also true that in the days and weeks after the attacks, many people felt fear, although not the sort that produces a irresistible urge to flee. **But this kind of fear is not the kind in which cognition shuts down**. (Some people did have more severe mental reactions and, for example, shut themselves in their houses, but these reactions were rare.) The fear is probably better described as a general anxiety or jumpiness, an anxiety that was probably shared by government officials as well as ordinary citizens.53

While, as we have noted, there is psychological research suggesting that normal cognition partly shuts down in response to an immediate threat, we are aware of no research suggesting that people who feel anxious about a non-immediate threat are incapable of thinking, or thinking properly, or systematically overweight the threat relative to other values. Indeed, it would be surprising to find research that clearly distinguished “anxious thinking” and “calm thinking,” given that anxiety is a pervasive aspect of life. People are anxious about their children; about their health; about their job prospects; about their vacation arrangements; about walking home at night. No one argues that people’s anxiety about their health causes them to take too many precautions—to get too much exercise, to diet too aggressively, to go to the doctor too frequently—and to undervalue other things like leisure. So it is hard to see why anxiety about more remote threats, from terrorists or unfriendly countries with nuclear weapons, should cause the public, or elected officials, to place more emphasis on security than is justified, and to sacrifice civil liberties.

Fear generated by immediate threats, then, causes instinctive responses that are not rational in the cognitive sense, not always desirable, and not a good basis for public policy, but it is not this kind of fear that leads to restrictions of civil liberties during wartime. The internment of Japanese Americans during World War II may have been due to racial animus, or to a mistaken assessment of the risks; it was not the direct result of panic; indeed there was a delay of weeks before the policy was seriously considered.54 Post-9/11 curtailments of civil liberties, aside from immediate detentions, came after a significant delay and much deliberation. The civil libertarians’ argument that fear produces bad policy trades on the ambiguity of the word “panic,” which refers both to real fear that undermines rationality, and to collectively harmful outcomes that are driven by rational decisions, such as a bank run, where it is rational for all depositors to withdraw funds if they believe that enough other depositors are withdrawing funds. Once we eliminate the false concern about fear, it becomes clear that the panic thesis is indistinguishable from the argument that during an emergency people are likely to make mistakes. But if the only concern is that during emergencies people make mistakes, there would be no reason for demanding that the constitution be enforced normally during emergencies. Political errors occur during emergencies and nonemergencies, but the stakes are higher during emergencies, and that is the conventional reason why constitutional constraints should be relaxed.

**One speech act doesn’t cause securitization – it’s an ongoing process**

**Ghughunishvili 10**

Securitization of Migration in the United States after 9/11: Constructing Muslims and Arabs as Enemies Submitted to Central European University Department of International Relations European Studies In partial fulfillment of the requirements for the degree of Master of Arts Supervisor: Professor Paul Roe <http://www.etd.ceu.hu/2010/ghughunishvili_irina.pdf>

As provided by the Copenhagen School securitization theory is comprised by speech act, acceptance of the audience and facilitating conditions or other non-securitizing actors contribute to a successful securitization. The causality or a one-way relationship between the speech act, the audience and securitizing actor, where politicians use the speech act first to justify exceptional measures, has been criticized by scholars, such as Balzacq. According to him, the one-directional relationship between the three factors, or some of them, is not the best approach. To fully grasp the dynamics, it will be more beneficial to “rather than looking for a one-directional relationship between some or all of the three factors highlighted, it could be profitable to focus on the degree of congruence between them. 26 Among other aspects of the Copenhagen School’s theoretical framework, which he criticizes, the thesis will rely on the criticism of the lack of context and the rejection of a ‘one-way causal’ relationship between the audience and the actor. The process of threat construction, according to him, can be clearer if external context, which stands independently from use of language, can be considered. 27 Balzacq opts for more context-oriented approach when it comes down to securitization through the speech act, where a single speech does not create the discourse, but it is created through a long process, where context is vital. 28 He indicates: In reality, the speech act itself, i.e. literally a single security articulation at a particular point in time, will at best only very rarely explain the entire social process that follows from it. In most cases a security scholar will rather be confronted with a process of articulations creating sequentially a threat text which turns sequentially into a securitization. 29 This type of approach seems more plausible in an empirical study, as it is more likely that a single speech will not be able to securitize an issue, but it is a lengthy process, where a the audience speaks the same language as the securitizing actors and can relate to their speeches.

**Quality of life is skyrocketing worldwide by all measures**

**Ridley**, visiting professor at Cold Spring Harbor Laboratory, former science editor of *The Economist*, and award-winning science writer, **2010**

(Matt, *The Rational Optimist*, pg. 13-15)

If my fictional family is not to your taste, perhaps you prefer statistics. Since 1800, the population of the world has multiplied six times, yet **average life expectancy has more than doubled and real income has risen more than nine times**. Taking a shorter perspective, in 2005, compared with 1955, the average human being on Planet Earth earned nearly three times as much money (corrected for inflation), ate one-third more calories of food, buried one-third as many of her children and could expect to live one-third longer. She was less likely to die as a result of war, murder, childbirth, accidents, tornadoes, flooding, famine, whooping cough, tuberculosis, malaria, diphtheria, typhus, typhoid, measles, smallpox, scurvy or polio. She was less likely, at any given age, to get cancer, heart disease or stroke. She was more likely to be literate and to have finished school. She was more likely to own a telephone, a flush toilet, a refrigerator and a bicycle. All this during a half-century when the world population has more than doubled, so that far from being rationed by population pressure, the goods and services available to the people of the world have expanded. It is, by any standard, an astonishing human achievement. Averages conceal a lot. **But even if you break down the world into bits**, **it is hard to find any region that was worse off in 2005 than it was in 1955**. Over that half-century, real income per head ended a little lower in only six countries (Afghanistan, Haiti, Congo, Liberia, Sierra Leone and Somalia), life expectancy in three (Russia, Swaziland and Zimbabwe), and infant survival in none. In the rest they have rocketed upward. Africa’s rate of improvement has been distressingly slow and patchy compared with the rest of the world, and many southern African countries saw life expectancy plunge in the 1990s as the AIDS epidemic took hold (before recovering in recent years). There were also moments in the half-century when you could have caught countries in episodes of dreadful deterioration of living standards or life chances – China in the 1960s, Cambodia in the 1970s, Ethiopia in the 1980s, Rwanda in the 1990s, Congo in the 2000s, North Korea throughout. Argentina had a disappointingly stagnant twentieth century. But overall, after fifty years, **the outcome for the world is** remarkably, astonishingly, **dramatically positive**. The average South Korean lives twenty-six more years and earns fifteen times as much income each year as he did in 1955 (and earns fifteen times as much as his North Korean counter part). The average Mexican lives longer now than the average Briton did in 1955. The average Botswanan earns more than the average Finn did in 1955. **Infant mortality is lower today in Nepal than it was in Italy in 1951**. The proportion of Vietnamese living on less than $2 a day has dropped from 90 per cent to 30 per cent in twenty years. The rich have got richer, but the poor have done even better. **The poor in the developing world grew their consumption twice as fast as the world as a whole between 1980 and 2000**. The Chinese are ten times as rich, one-third as fecund and twenty-eight years longer-lived than they were fifty years ago. Even Nigerians are twice as rich, 25 per cent less fecund and nine years longer-lived than they were in 1955. **Despite a doubling of the world population**, even **the raw number of people living in absolute poverty** (defined as less than a 1985 dollar a day) **has fallen since the 1950s**. The percentage living in such absolute poverty has dropped by more than half – to less than 18 per cent. That number is, of course, still all too horribly high, but the trend is hardly a cause for despair: at the current rate of decline, it would hit zero around 2035 – though it probably won’t. The United Nations estimates that poverty was reduced more in the last fifty years than in the previous 500.

**The alt doesn’t spillover**

**Mearsheimer 1**, Poli. Sci. Prof. @ U. Chicago, (John J., *The Tragedy of Great Power Politics*)

Great powers cannot commit themselves to the pursuit of a peaceful world order for two reasons. First, states are unlikely to agree on a general formula for bolstering peace. Certainly, international relations scholars have never reached a consensus on what the blueprint should look like. In fact, it seems there are about as many theories on the causes of war and peace as there are scholars studying the subject. But more important, poli­cymakers are unable to agree on how to create a stable world. For exam­ple, at the Paris Peace Conference after World War I, important differences over how to create stability in Europe divided Georges Clemenceau, David Lloyd George, and Woodrow Wilson.49 In particular, Clemenceau was determined to impose harsher terms on Germany over the Rhineland than was either Lloyd George or Wilson, while Lloyd George stood out as the hard-liner on German reparations. The Treaty of Versailles, not sur­prisingly, did little to promote European stability.

Furthermore, consider American thinking on how to achieve stability in Europe in the early days of the Cold War.50 The key elements for a sta­ble and durable system were in place by the early 1950s. They included the division of Germany, the positioning of American ground forces in Western Europe to deter a Soviet attack, and ensuring that West Germany would not seek to develop nuclear weapons. Officials in the Truman administration, however, disagreed about whether a divided Germany would be a source of peace or war. For example, George Kennan and Paul Nitze, who held important positions in the State Department, believed that a divided Germany would be a source of instability, whereas Secretary of State Dean Acheson disagreed with them. In the 1950s, President Eisenhower sought to end the American commitment to defend Western Europe and to provide West Germany with its own nuclear deterrent. This policy, which was never fully adopted, nevertheless caused significant instability in Europe, as it led directly to the Berlin crises of 1958-59 and 1961."

Second, great powers cannot put aside power considerations and work to promote international peace because they cannot be sure that their efforts will succeed. If their attempt fails, they are likely to pay a steep price for having neglected the balance of power, because if an aggressor appears at the door there will be no answer when they dial 911. That is a risk few states are willing to run. Therefore, prudence dictates that they behave according to realist logic. This line of reasoning accounts for why collective security schemes, which call for states to put aside narrow con­cerns about the balance of power and instead act in accordance with the broader interests of the international community, invariably die at birth.

**The alt fails and destroys minority rights – sectarian violence causes re-securitization**

**Roe**, Assistant Professor, International Relations and European Studies – Central European University, **‘4**

(Paul, “Securitization and Minority Rights: Conditions of Desecuritization,” *Security Dialogue*, Vol. 35, No. 3, September)

Aradau’s (valuable) contentions aside, what I want to emphasize here is the particular understanding of securitization in terms of deconstructing identities – where the label ‘migrant’ is subordinated to other, individual identity markers. In this next section, however, what I want to show is how the deconstructivist strategy might be considered a ‘logical impossibility’ when set against the different context of protecting minority rights – that is, where, as an identity marker, the collective (the ethnic and/or the national) is necessarily considered primary. Minority Rights, Societal Security and (the Impossibility of) Desecuritization Taking a lead from Wæver, Kymlicka has also expressed a preference for desecuritization. Speaking of **minority rights**, Kymlicka notes that while in the West the claims of minorities are assessed in terms of justice, in much of Central and Eastern Europe (CEE) they **are assessed in terms of security.** Moreover, the discourses of justice and security ‘pull in different directions’: security discourse effectively closes the space for minority rights to be framed in terms of justice (Kymlicka, 2001a: 1–2). Kymlicka’s claim with regard to the distinction between justice (in Western Europe) and security (in Eastern Europe) may, in itself, be contentious,4 but this is not necessarily my concern. Rather, what I would like to concentrate on is more the point that minority rights are often subject to the language of security and – this being the case – Kymlicka’s argument that the most effective strategy for enhancing minority rights in this situation is ‘to desecuritize the discourse . . . to get people to think of minority claims in terms of justice/fairness rather than loyalty/security’ (2001a: 2). I will come back to Kymlicka’s own suggested strategy for descuritization at the end of this section. But, first of all, I want to set a Huysmans-like deconstructivist approach in this very context. My starting point in thinking about this lies in Gaetano Pentassuglia’s (2003: 29) assertion that although the notion of minority rights has often been less than clearly defined, ‘the “right to identity”, going beyond the “minimalist”, physical discrimination and antidiscrimination entitlements, stands out as the overarching guarantee informing the whole notion of minority rights’. In other words, over and above all other principles, it is **the maintenance of group identity** that **underpins the provision of minority rights.** The same is also made clear in the interpretation of minority rights promoted by the OSCE’s High Commissioner for National Minorities: ‘First of all, a minority is a group with linguistic, ethnic or cultural characteristics which distinguish it from the majority. Secondly, a minority is a group which usually not only seeks to maintain its identity but also tries to give a stronger expression to that identity’ (Kemp, 2001: 30). Or, in the language of the Copenhagen School, being a minority, and thus pursuing minority rights, is a matter of ‘societal security’. In the 1993 book Identity, Migration and the New Security Agenda in Europe (Wæver et al., 1993), Barry Buzan’s (1991) previous five-dimensional approach to international security is reconceptualized. In addition to the five sectors of state security (military, political, economic, societal and environmental), a duality of state and societal security is also conceived: societal security is retained as a sector of state security, but it is also a referent object of security in its own right (Wæver, 1993: 25). In this new formulation, whereas, according to Wæver, state security is concerned with threats to the state’s sovereignty – if a state loses its sovereignty it will not survive as a state – societal security is all about threats to collective identity – if a society loses its identity it will not survive as a society (Wæver, 1993: 25–26). In simple terms, the Copenhagen School defines societies as politically significant ethnic, national or religious groups – collectivities that can act alongside, indeed even challenge, states in the international system. Thus, societal security concerns whatever threats bring the identity of such units into question. For Buzan, threats to societal identity can occur through the ‘sustained application of repressive measures against the expression of identity’, which can include ‘forbidding the use of language, names and dress, through closure of places of worship, to the deportation or killing of members of the community’ (Buzan, 1993: 43). In terms of defending societal identity, the Copenhagen School recognizes that ‘for threatened societies, one obvious response is to strengthen societal identity. This can be done by using cultural means to reinforce social cohesion and distinctiveness and to ensure that society reproduces itself effectively’ (Wæver et al., 1993: 191). Wæver captures the dynamic neatly, commenting that culture can be defended ‘with culture’, adding that ‘if one’s identity seems threatened . . . the answer is a strengthening of existing identities. In this sense, consequently, culture becomes security policy’ (Wæver, 1995: 68; my emphasis). Therefore, the likely response to such threats is either to safeguard the maintenance of, or to seek the restoration of, the means and practices that ensure the expression and continuity of group identity. When societal security concerns are considered within the subsequent securitization concept, the defence (maintenance/restoration) of societal identity is conceived as a discourse that is potentially available to a securitizing actor. Societal security speech acts will thus display the language of **existential threat** presented in identity terms on behalf of a collectivity (society). Securitizing actors may speak of ‘security’ itself, or instead describe threats to the identity of the group through synonyms – for example, ‘die’, ‘perish’, ‘wither’, ‘weaken’, ‘waste’, ‘decline’, and so forth. Williams notes how ‘within the specific terms of security as a speech act . . . it is precisely under the condition of attempted securitizations that a reified, monolithic form of identity is declared’ and, if this is successful, ‘[the identity’s] negotiability and flexibility are challenged, denied, or suppressed’ (Williams, 2003: 519). He continues: ‘A successful securitization of identity involves precisely the capacity to decide on the limits of a given identity, to oppose it to what it is not, to cast this as a relationship of threat or even enmity, and to have this decision or declaration accepted by the relevant group’ (Williams, 2003: 520). Securitizing within the societal sector is therefore concerned with the defining of us and them, maintaining our identity as opposed to theirs. Thus, **the language of societal security is the language of minority rights.** As such, to desecuritize in the societal sector entails that the language of maintaining collective identity be effectively **taken out of the discourse.** In Huysmans’s deconstructivist strategy, the language of the collectivity, ‘migrants’, is replaced with the language of the individual, ‘migrant’. Thus, the potential fluidity of the individual migrant’s identity provides a possible escape route from the constraints of the us–them dichotomy. In the context of minority rights, however, the necessity on the part of the minority (and indeed also the majority) for group distinctiveness necessarily **blocks this** same **way out:** the language of the individual is subordinated to the language of the collective. In other words, how is it possible to desecuritize through identity deconstruction when both minorities and majorities often strive for the reification of distinct collectivities? **To remove the language of security from the issue of minority rights**, to shift from a position of societal security to one of societal asecurity, is in essence to stop talking about group distinctiveness. In this way, it **signals the death of the** collectivity, of the **distinct minority.** This point is similar to that made by so-called post-structural security studies (e.g., Campbell, 1992; Klein, 1994; Shapiro, 1997), where, in terms of the state, security is not so much a function of the unit as an assertion of itself: it is ‘discourses of danger’ (Campbell, 1992) on the part of the state that are constitutive of the latter’s own identity. Commenting on David Campbell’s work, Steve Smith notes how, in this way, this identity is never fixed, and never final; it is always in the process of becoming and ‘should the state project of security be successful in terms in which it is articulated, the state would cease to exist.. . . Ironically, then, the inability of the state project of security to succeed is the guarantor of the state’s continued success’ (Smith, 2000: 95). Equally, minority rights is ‘the process of becoming’; it is an ongoing project that enables the minority to reproduce its group distinctiveness. Should its project of societal security be successful, in the sense that collective identity is no longer something that needs to be maintained, then, again, the minority will cease to exist. To restate: the **desecuritization of minority rights may** thus **be logically impossible.** This, I acknowledge, is a very strong claim to make. And although it is a claim that I wish to stick to, I do so in the knowledge of a number of important contentions. A first is that I have chosen a particular understanding of minority rights, one that ignores a more complex rendering of the situation in which political and economic insecurities are also of importance. This I accept, together with its corollary that there may be no logical impossibility at all of desecuritizing in other such situations. My approach is clearly very much contextual, and although thus relatively limited in empirical terms (to Central and Eastern Europe perhaps?), it nonetheless serves a more than useful purpose in terms of thinking conceptually about the desecuritization process. A second is that I have utilized a particular understanding of desecuritization – a Huysmans-type strategy predicated on the deconstruction of identity. Again, this is true, which is why I now want to return to Kymlicka and to what may be described as a more objectivist desecuritizing approach. Although Kymlicka is relatively unsure as to how to proceed in terms of desecuritization, he does suggest that a first step must be to grapple with the issue of territorial (political) autonomy and (possible) secession. He notes how political autonomy for minority groups might be decoupled from secession: ‘to persuade [CEE] states to put [political autonomy] on the agenda, while agreeing . . . that secession cannot be a legitimate topic of public debate or political mobilization’ (Kymlicka, 2001b: 46). But, as Kymlicka also points out, even with certain guarantees in place, CEE states have nonetheless been more than reluctant to consider claims for political autonomy, this stemming from the fear that political autonomy will naturally lead to stronger calls for secession. Kymlicka’s suggestion, though, is ‘just the opposite. I believe that democratic federalism reduces the likelihood of secession’ (Kymlicka, 2001b: 49). And here it is worthwhile quoting Kymlicka at length: We need to challenge the assumption that eliminating secession from the political agenda should be the first goal of the state. We should try to show that secession is not necessarily a crime against humanity, and that the goal of the democratic political system shouldn’t be to make it unthinkable. States and state borders are not sacred. The first goal of a state should be to promote democracy, human rights, justice and the wellbeing of citizens, not to somehow insist that every citizen views herself as bound to the existing state in ‘perpetuity’ – a goal that can only be achieved through undemocratic and unjust means in a multinational state. A state can only enjoy the benefits of democracy and federalism if it is willing to live with the risks of secession (Kymlicka, 2001b: 50). To desecuritize minority rights, then, is to accept the previously unacceptable: to open up, through democratic federalism, the **possibility of** political autonomy and **secession**; to make minority rights part of normal politics. Kymlicka’s approach here in some way seems to resemble an objectivist strategy of desecuritization. In the West, the acceptance of secession, he notes, is ‘tied to the fact that secession would not threaten the survival of the minority nation. Secession may involve the painful loss of territory, but it is not seen as a threat to the very survival of the majority nation or state’ (Kymlicka, 2001b: 50). In the East (or Central and Eastern Europe), however, the tendency is to believe that secession ‘forebodes national death’ (Bibo, in Kymlicka, 2001b: 50). The question, therefore, is how to make the case that the minority does not really represent a threat. From a Huysmans-type point of view, **this** kind of **strategy** clearly **reproduces the us–them dichotomy**: ‘we’ should accept, as part of being normal, that ‘they’ might not want to live with ‘us’ anymore! And this runs the risk that the minority, as with the migrant, will remain as the ‘unified cultural alien’ (Huysmans, 1995: 66). However, in order for group distinctiveness to be successfully reproduced, such a dichotomy must arguably be maintained. But, this being the case, the further risk perhaps is that the very possibility of political autonomy and secession will not only serve to reproduce the dichotomy between us and them, but will also potentially **transform this dichotomy into** one of **friend–enemy**. In other words, **it threatens to (re)securitize the situation**, not ‘normalize’ it. Conclusion: Towards the ‘Managing’ of Minority Rights? The assumption that more security is not always better has found a great deal of its expression in the context of migration. To frame the issue of migration in security terms is, as Huysmans describes, to see it as a ‘drama’, one ‘in which selves and others are constituted in a dialectic of inclusion and exclusion and in which this dialectic appears as a struggle for survival’ (Huysmans, 1995: 63). As a security drama, there is always the risk of violence between the natives and the aliens, and ‘there are good arguments for saying that in the present western European context that risk is relatively high’ (Huysmans, 1995: 63). The concept of desecuritization, where migration is moved from emergency politics to normal politics, where the migrant is taken out of the security drama, has thus far centred very much on the deconstruction of collective identities, where the label ‘migrant’ is subordinated to a plurality of other, more ‘everyday’ identity markers. In Central and Eastern Europe, the security drama has often been played out more in terms of minorities than in terms of migrants. But taking the minority out of the drama cannot always follow the same escape route as the migrant. Where minority rights are predicated on the maintenance of a distinct collectivity, other, everyday identity markers will remain subordinate to the ethnic/national. In these cases, therefore, a Huysmans-type deconstructivist strategy may well, as I have argued, be a logical impossibility. My conclusion in this respect thus points to the consideration of alternative ways of dealing with securitized issues: if minority rights cannot always be ‘transformed’, then perhaps they can be sometimes ‘managed’ instead. Thinking in these terms certainly reflects Wæver’s concerns with the strong self-reinforcing character of securitization in the societal sector, but does not necessarily lead to a Wæver-type conclusion that strategies should thereby be designed to ‘forestall’ emergency politics. **Management** in this sense **is about ‘moderate’** (**not excessive**) **securitization**, about ‘sensible’ (not irrational) securitization. Where societal security dilemmas occur, management is about ‘mitigating’ or ‘ameliorating’ them, not transcending them. As I alluded earlier in the article, managing the securitization of minority rights will not return the issue to normal politics in the Copenhagen School sense of it – that is to say, the situation will still be marked by the language of (societal) security. What **management can** do, however, is to ‘**normalize’ minority rights** in terms of seeking to regulate minority–majority relations **through** more **liberal democratic forms.** For such a strategy, there is the clear acceptance that both sides have genuine security concerns. As such, the strategy is to move the situation from a condition of insecurity (insufficient defence) to one of security (sufficient defence), and not from a condition of security to asecurity. The minority can feel secure when certain provisions/ legislations/mechanisms are put in place that will guarantee its existence (in identity terms), while similarly the majority can also feel secure in the knowledge that the minority will thus work (politically, economically and also societally) within the existing framework of the state. Thus, and returning to Kymlicka, the institutionalizing of a federal state structure is desirable not because it makes the possibility of political autonomy and secession something normal, but because it provides the mechanisms through which **the justification for emergency politics on both sides is reduced.**

**Legal restraints work – the theory of the exception is self-serving and wrong**

William E. **Scheuerman 6**, Professor of Political Science at Indiana University, Carl Schmitt and the Road to Abu Ghraib, Constellations, Volume 13, Issue 1

Yet this argument relies on Schmitt’s controversial model of politics, as outlined eloquently but unconvincingly in his famous Concept of the Political. To be sure, there are intense conflicts in which it is naïve to expect an easy resolution by legal or juridical means. But the argument suffers from a troubling circularity: **Schmitt** occasionally **wants to define “political” conflicts as those irresolvable by legal** or juridical **devices in order** then **to argue against** **legal** or juridical **solutions** to them. **The claim** also **suffers from** a certain **vagueness** and lack of conceptual precision. At times, it seems to be directed against trying to resolve conflicts in the courts or juridical system narrowly understood; at other times it is directed against any legal regulation of intense conflict. The former argument is surely stronger than the latter. After all, **legal devices have undoubtedly played a positive role** **in taming** or at least minimizing the potential dangers of harsh **political antagonisms**. In the Cold War, for example, international law contributed to the peaceful resolution of conflicts which otherwise might have exploded into horrific violence, even if attempts to bring such conflicts before an international court or tribunal probably would have failed.22

Second, Schmitt dwells on the legal inconsistencies that result from modifying the traditional state-centered system of international law by expanding protections to non-state fighters. His view is that irregular combatants logically enjoyed no protections in the state-centered Westphalian model. By broadening protections to include them, international law helps undermine the traditional state system and its accompanying legal framework. Why is this troubling? The most obvious answer is that Schmitt believes that the traditional state system is normatively superior to recent attempts to modify it by, for example, extending international human rights protections to individuals against states. 23 But what if we refuse to endorse his nostalgic preference for the traditional state system? Then a sympathetic reading of the argument would take the form of suggesting that the project of regulating irregular combatants by ordinary law must fail for another reason: it rests on a misguided quest to integrate incongruent models of interstate relations and international law. We cannot, in short, maintain core features of the (state-centered) Westphalian system while extending ambitious new protections to non-state actors.

This is a powerful argument, but it remains flawed. Every modern legal order rests on diverse and even conflicting normative elements and ideals, in part because human existence itself is always “in transition.” When one examines the so-called classical liberal legal systems of nineteenth-century England or the United States, for example, one quickly identifies liberal elements coexisting uneasily alongside paternalistic and authoritarian (e.g., the law of slavery in the United States), monarchist, as well as republican and communitarian moments. The same may be said of the legal moorings of the modern welfare state, which arguably rest on a hodgepodge of socialist, liberal, and Christian and even Catholic (for example, in some European maternity policies) programmatic sources. In short, **it is by no means self-evident that trying to give coherent legal form to a transitional** political and social **moment is always doomed to fail**. Moreover, there may be sound reasons for claiming that the contemporary transitional juncture in the rules of war is by no means as incongruent as Schmitt asserts. In some recent accounts, **the general trend** towards extending basic protections to non-state actors **is** plausibly interpreted in a more **positive** – **and by no means incoherent** – light.24

Third, Schmitt identifies a deep tension between the classical quest for codified and stable law and the empirical reality of a social world subject to permanent change: “The tendency to modify or even dissolve classical [legal] concepts…is general, and in view of the rapid change of the world it is entirely understandable” (12). Schmitt’s postwar writings include many provocative comments about what contemporary legal scholars describe as the dilemma of legal obsolescence. 25 In The Partisan, he suggests that the “great transformations and modifications” in the technological apparatus of modern warfare place strains on the aspiration for cogent legal norms capable of regulating human affairs (17; see also 48–50). Given the ever-changing character of warfare and the fast pace of change in military technology, it inevitably proves difficult to codify a set of cogent and stable rules of war. The Geneva Convention proviso that legal combatants must bear their weapons openly, for example, seems poorly attuned to a world where military might ultimately depends on nuclear silos buried deep beneath the surface of the earth, and not the success of traditional standing armies massed in battle on the open field. “Or what does the requirement mean of an insignia visible from afar in night battle, or in battle with the long-range weapons of modern technology of war?” (17).

As I have tried to show elsewhere, these are powerful considerations deserving of close scrutiny; Schmitt is probably right to argue that the enigma of legal obsolescence takes on special significance in the context of rapid-fire social change.26 Unfortunately, he seems uninterested in the slightest possibility that we might successfully adapt the process of lawmaking to our dynamic social universe. To be sure, he discusses the “motorization of lawmaking” in a fascinating 1950 publication, but only in order to underscore its pathological core.27 Yet **one** possible **resolution** of the dilemma he describes **would be** to figure how **to reform the process** whereby rules of war are adapted to novel changes in military affairs in order **to minimize the danger of** anachronistic or **out-of-date law. Instead, Schmitt** simply **employs the dilemma of legal obsolescence as a battering ram** against the rule of law and the quest to develop a legal apparatus suited to the special problem of irregular combatants.

## olc cp

Congressional restriction key to credibility and signal

Kenneth Anderson, Professor of Law, Washington College of Law, American University, and Research Fellow, The Hoover Institution, Stanford University and Member of its Task Force on National Security and the Law, 5/11/2009, Targeted Killing in U.S. Counterterrorism Strategy and Law, http://www.brookings.edu/~/media/research/files/papers/2009/5/11%20counterterrorism%20anderson/0511\_counterterrorism\_anderson.pdf

What Should Congress Do?

Does this analysis offer any practical policy prescriptions for Congress and the administration? The problem is not so much a need for new legislation to create new structures or new policies. The legislative category in which many instances of targeted killing might take place in the future already exists. The task for Congress and the administration, rather, is instead to preserve a category that is likely to be put under pressure in the future and, indeed, is already seen by many as a legal non-starter under international law.

Before addressing what Congress should do in this regard, we might ask from a strictly strategic political standpoint whether, given that the Obama Administration is committed to this policy anyway, whether it is politically prudent to draw public attention to the issue at all. Israeli officials might be threatened with legal action in Spain; but so far no important actor has shown an appetite for taking on the Obama Administration. Perhaps it is better to let sleeping political dogs lie.

These questions require difficult political calculations. However, the sources cited above suggest that even if no one is quite prepared at this moment to take on the Obama Administration on targeted killing, the intellectual and legal pieces of the challenge are already set up and on the table. Having asserted certain positions concerning human rights law and its application and the United States having unthinkingly abandoned its self-defense rationale for its policy, the play can be made at any time—at some later time in the Obama Administration or in the next Republican administration, prying apart the “American” position to create a de facto alliance among Democrats **and Europeans and thereby undermining the ability of the United States to craft a unified American security strateg**y.101 **The U**nited **S**tates **would be best served if the Obama Administration did that exceedingly rare thing in international law and diplomacy: Getting the U**nited **S**tates **out in front of the issue by making plain the American position**, **rather than merely reacting** in surprise when its sovereign prerogatives are challenged by the international soft-law community.

The deeper issue here is not merely a strategic and political one about targeted killing and drones but goes to the very grave policy question of whether it is time to move beyond the careful ambiguity of the CIA’s authorizing statute in referring to covert uses of force under the doctrines of vital national interest and self-defense. Is it time to abandon strategic ambiguity with regards to the Fifth Function and assert the right to use force in self-defense and yet in “peacetime”—that is, outside of the specific context of an armed conflict within the meaning of international humanitarian law? Quite possibly, the strategic ambiguity, in a world in which secrecy is more and more difficult, and in the general fragmentation of voice and ownership of international law, has lost its raison d’etre. This is a larger question than the one undertaken here, but on a range of issues including covert action, interrogation techniques, detention policy, and others, **a general approach of overt legislation that removes ambiguity is to be preferred**.

**The single most important role for Congress to play** in addressing targeted killings, **therefore, is the open, unapologetic, plain insistence that the American understanding of international law on this issue of self-defense is legitimate**. The assertion, that is, that the United States sees its conduct as permissible for itself and for others. **And it is the** putting of congressional strength behind the official statements of the executive branch as the opinio juris of the United States, **its authoritative view of what international law is on this subject**. If this statement seems peculiar, that is because the task—as fundamental as it is—remains unfortunately poorly understood.

Yet if it is really a matter of political consensus between Left and Right that targeted killing is a tool of choice for the United States in confronting its non-state enemies, then this **is an essential task for Congress to play in support of** the **Obama** Administration **as it seeks to** speak with a single voice **for the United States** to the rest of the world. The Congress needs to backstop the administration in asserting to the rest of the world— including to its own judiciary—how the United States understands international law regarding targeted killing. And it needs to make an unapologetic assertion that its views, while not dispositive or binding on others, carry international authority to an extent that relatively few others do—even in our emerging multi-polar world. International law traditionally, after all, accepts that states with particular interests, power, and impact in the world, carry more weight in particular matters than other states. The American view of maritime law matters more than does landlocked Bolivia’s. American views on international security law, as the core global provider of security, matter more than do those of Argentina, Germany or, for that matter, NGOs or academic commentators. But it has to speak—and speak loudly—if it wishes to be heard. It is an enormously important instance of the need for the United States to re-take “ownership” of international law— not as its arbiter, nor as the superpower alone, but as a very powerful, very important, and very legitimate sovereign state.

Intellectually, **continuing to squeeze** all forms and instances of targeted killing **by standoff platform** under the law of IHL armed conflict **is** probably **not** the most analytically **compelling** way to proceed. **It is certainly not a practical long-term approach.** Not everyone who is an intuitively legitimate target from the standpoint of self-defense or vital national security, after all, will be already part of an armed conflict or combatant in the strict IHL sense. Requiring that we use such IHL concepts for a quite different category is likely to have the deleterious effect of deforming the laws of war, over the long term—**starting**, for example, **with the idea of a “global war**,” which **is** itself **a** certain **deformation of** the IHL **concept of hostilities** and armed conflict.

OLC can’t solve and links to politics

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These two events neatly encapsulate the dilemma for OLC, and indeed all the president’s legal advisers. If OLC tries to block the president from acting in the way he sees fit, it takes the risk that he will disregard its advice and marginalize the institution. If OLC gives the president the advice that he wants to hear, it takes the risk that it will mislead him and fail to prepare him for adverse reactions from the courts, Congress, and the public. Can OLC constrain the executive? That is the position taken by many scholars, most notably Jack Goldsmith. 18 The underlying idea here is that even if Congress and the courts cannot constrain the executive, perhaps offices within the executive can. The opposite view, advanced by Bruce Ackerman, is that OLC is a rubber stamp. 19 I advocate a third view: OLC does not constrain the executive but enables him to accomplish goals that he would not otherwise be able to accomplish. It is more accurate to say that OLC enables than constrains. B. OLC as a Constraint on the Executive A number of scholars have argued that OLC can serve as an important constraint on executive power. I will argue that OLC cannot act as a constraint on executive power. Indeed, its only function is the opposite—as an “enabler” (as I will put it) or extender of executive power. A president must choose a course of action. He goes to OLC for advice. Ideally, OLC will provide him good advice as to the legality of the course of action. It will not provide him political advice and other relevant types of advice. The president wants to maximize his political advantage, 21 and so he will follow OLC’s advice only if the legal costs that OLC identifies are greater than the political benefits. On this theory, OLC will properly always give the president neutral advice, and the president will gratefully accept it although not necessarily follow it. If the story ended here, then it would be hard to see what the controversy over OLC could be about. As an adviser, it possesses no ability to constrain the executive. It merely provides doctrinal analysis, in this way, if it does its job properly, merely supplying predictions as to how other legal actors will react to the president’s proposed action. The executive can choose to ignore OLC’s advice, and so OLC cannot serve as a “constraint” on executive power in any meaningful sense. Instead, it merely conveys to the president information about the constraints on executive power that are imposed from outside the executive branch. However, there is an important twist that complicates the analysis. The president may choose to publicize OLC’s opinions. Naturally, the president will be tempted to publicize only favorable opinions. When Congress 22 claims that a policy is illegal, the president can respond that his lawyers advised him that the policy is legal. This response at least partially deflects blame from the president. There are two reasons for this. First, the Senate consented to the appointment of these lawyers; thus, if the lawyers gave bad advice, the Senate is partly to blame, and so the blame must be shared. Second, OLC lawyers likely care about their future prospects in the legal profession, which will turn in part on their ability to avoid scandals and to render plausible legal advice; they may also seek to maintain the office’s reputation. When OLC’s opinions are not merely private advice, but are used to justify actions, then OLC takes on a quasi-judicial function. Presidents are not obliged to publicize OLC’s opinions, but clearly they see an advantage to doing so, and they have in this way given OLC quasi-judicial status. But if the president publicizes OLC opinions, he takes a risk. The risk is that OLC will publicly advise him that an action is illegal. If OLC approval helps deflect blame from the president, then OLC disapproval will tend to concentrate blame on the president who ignores its advice. Congress and the public will note that after all the president is ignoring the advice of lawyers that he appointed and thus presumably he trusts, and this can only make the president look bad. To avoid such blame, the president may refrain from engaging in a politically advantageous action. In this way, OLC may be able to prevent the president from taking an action that he would otherwise prefer. At a minimum, OLC raises the political cost of the action. I have simplified greatly, but I believe that this basic logic has led some scholars to believe that OLC serves as a constraint on the president. But this is a mistake. OLC strengthens the president’s hand in some cases and weakens them in others; but overall it extends his power—it serves as enabler, not constraint. To see why, consider an example in which a president must choose an action that lies on a continuum. One might consider electronic surveillance. At one extreme, the president can engage in actions that are clearly lawful—for example, spying on criminal suspects after obtaining warrants from judges. At the other extreme, the president can engage in actions that are clearly unlawful—for example, spying on political opponents. OLC opinions will not affect Congress’s or the public’s reaction to either the obviously lawful or the obviously unlawful actions. But then there are middle cases. Consider a policy L, which is just barely legal, and a policy I, which is just barely illegal. The president would like to pursue policy L but fears that Congress and others will mistakenly believe that L is illegal. As a result, political opposition to L will be greater than it would be otherwise. In such a case, a favorable advisory opinion from a neutral legal body that has credibility with Congress will help the president. OLC’s approval of L would cause political opposition (to the extent that it is based on the mistaken belief that L is unlawful) to melt away. Thus, OLC enables the president to engage in policy L, when without OLC’s participation that might be impossible. True, OLC will not enable the president to engage in I, assuming OLC is neutral. And, indeed, OLC’s negative reaction to I may stiffen Congress’ resistance. However, the president will use OLC only because he believes that OLC will strengthen his hand on net. It might be useful to make this point using a little jargon. In order for OLC to serve its ex ante function of enabling the president to avoid confrontations with Congress in difficult cases, it must be able to say “no” to him ex post for barely illegal actions as well as “yes” to him for barely legal actions. It is wrong to consider an ex post no as a form of constraint because, ex ante, it enables the president to act in half of the difficult cases. OLC does not impose any independent constraint on the president, that is, any constraint that is separate from the constraint imposed by Congress. An analogy to contract law might be useful. People enter contracts because they enable them to do things ex ante by imposing constraints on them ex post. For example, a debtor can borrow money from a creditor only because a court will force the debtor to repay the money ex post. It would be strange to say that contract law imposes “constraints” on people because of ex post enforcement. In fact, contract law enables people to do things that they could not otherwise do—it extends their power. If it did not,people would not enter contracts. A question naturally arises about OLC’s incentives. I have assumed that OLC provides neutral advice—in the sense of trying to make accurate predictions as to how other agents like Congress and the courts would reaction to proposed actions. It is possible that OLC could be biased—either in favor of the president or against him. However, if OLC were biased against the president, he would stop asking it for advice (or would **ask for its advice in private and then** ignore it). This danger surely accounts for the fact that OLC jurisprudence is pro-executive. 23 But it would be just as dangerous for OLC to be excessively biased in favor of the president. If it were, it would mislead the president and lose its credibility with Congress, with the result that it could not help the president engage in L policies. So OLC must be neither excessively pro-president nor anti-president. If it can avoid these extremes, it will be an “enabler”; if it cannot, it will be ignored. In no circumstance could it be a “constraint.” If the OLC cannot constrain the president on net, why have people claimed that OLC can constrain the president? What is the source of this mistake? One possibility, which I have already noted, is that commentators might look only at one side of the problem. Scholars note that OLC may “prevent” the president from engaging in barely illegal actions without also acknowledging that it can do so only if at the same time it enables the president to engage in barely legal actions. This is simply a failure to look at the full picture. For example, in The Terror Presidency, Goldsmith argues that President Bush abandoned a scheme of warrantless wiretapping without authorization from the FISA court because OLC declared the scheme illegal, and top Justice Department officials threatened to resign unless Bush heeded OLC’s advice. 25 This seems like a clear example of constraint. But it is important to look at the whole picture. If OLC had approved the scheme, and subsequently executive branch agents in the NSA had been prosecuted and punished by the courts, then OLC’s credibility as a supplier of legal advice would have been destroyed. For the president, this would have been a bad outcome. As I have argued, a credible OLC helps the president accomplish his agenda in “barely legal” cases. Without taking into account those cases where OLC advice helps the president’s agenda ex post as well as the cases where OLC advice hurts the president’s agenda ex post, one cannot make an overall judgment about OLC’s ex ante effect on executive power. Another possible **source of error** is that scholars imagine that “neutral” advice will almost always prevent the president from engaging in preferred actions, while rarely enabling the president to engage in preferred actions. The implicit picture here is that a president will normally want to break the law, that under the proper interpretation of the Constitution and relevant standards the president can accomplish very little. So if OLC is infact neutral and the president does obey its advice, then it must constrain the president. But this theory cannot be right, either. If OLC constantly told the president that he cannot do what he wants to do, when infact Congress and other agents would not object to the preferred actions, then the president would stop asking OLC for advice. As noted above, for OLC to maintain its relevance, it cannot offer an abstract interpretation of the Constitution that is divorced from political realities; it has to be able to make realistic predictions as to how other legal agents will react to the president’s actions. This has led OLC to develop a pro-executive jurisprudence in line with the long-term evolution of executive power. If OLC tried to impose constraints other than those imposed by Congress and other institutions with political power, then the president would ignore it.

## war powers da

Drones key to Afghan stability post withdrawal

Bengali & Cloud 13 (Shashank Bengali and David S. Cloud – LA Times writers, “U.S. drone strikes up sharply in Afghanistan” February 21, 2013, Los Angeles Times)

The U.S. military launched 506 strikes from unmanned aircraft in Afghanistan last year, according to Pentagon data, a 72% increase from 2011 and a sign that **American commanders may begin to rely more heavily on remote-controlled air power to kill Taliban insurgents as they reduce the number of troops on the ground.**

Though drone strikes represented a fraction of all U.S. air attacks in Afghanistan last year, their use is on the rise even as American troops have pulled back from ground and air operations and pushed Afghan soldiers and police into the lead. In 2011, drone strikes accounted for 5% of U.S. air attacks in Afghanistan; in 2012, the figure rose to 12%.

Military spokesmen in Kabul and at the Pentagon declined to explain the increase. But officers familiar with the operation said it was due in part to the growing number of armed Reaper and Predator drones in Afghanistan and better availability of live video feeds beamed directly to troops on the ground.

The increase has coincided with a shift by the Obama administration toward a new strategy in Afghanistan that relies on a smaller military footprint to go after the Taliban and remaining Al Qaeda fighters.

The use of armed drones is likely to accelerate as most of the 66,000 U.S. troops in the country are due to withdraw by the end of 2014. The remotely piloted long-range aircraft, which kill targets with virtually no risk to American lives, carry an unmistakable attraction for military commanders.

"With fewer troops, and even with fewer manned aircraft flying overhead, it's harder to get traditional support in combat missions," said Joshua Foust, a Washington-based analyst who has advised the U.S. military in Afghanistan. "**Drones provide a good way to do that without importing a bunch of pilots and the support infrastructure they'd need to remain based there."**

The strategy isn't without risk: Drone strikes can kill civilians, as underscored by the Sept. 23 incident that claimed Bacha Zarina's life.

After Marine Gen. John R. Allen, the former coalition commander, issued an order limiting airstrikes in populated areas last year, U.S. and NATO forces reduced civilian casualties in air attacks by 42% in 2012, according to United Nations figures.

But after an airstrike this month that reportedly killed 10 civilians in addition to four Taliban leaders, Afghan President Hamid Karzai banned his forces from requesting coalition airstrikes in residential areas, a decree that also would apply to drones.

Defenders of **drones** say they **are more accurate and less prone to causing civilian casualties** than manned aircraft, because they can watch a potential target longer and often use smaller munitions.

When civilians are inadvertently killed, it is sometimes because they are close to a location where an airstrike is carried out, one U.S. officer said. But there also are instances when troops on the ground mistakenly call for an airstrike against a target where only civilians are present.

The U.S. military has acknowledged multiple times that it has accidentally killed civilians in drone strikes, including in 2010 when 24 Afghans were killed in Oruzgan province after being mistaken for insurgents, based on drone camera images. They were later determined to be noncombatants.

Last year, five coalition drone strikes killed 16 civilians and injured three, according to the U.N. mission in Afghanistan, which documented just one such incident in 2011. It wasn't immediately clear whether those were strikes from U.S. drones; Britain's Royal Air Force also flies armed Reaper drones in Afghanistan, although the vast majority of the coalition's unmanned aircraft belong to the U.S.

Many of the recent strikes have hit eastern Afghanistan, **where Taliban insurgents retain control of many villages.** In Marawara district of Kunar province, where Bacha Zarina lived, the two Taliban commanders killed in the Sept. 23 strike led a group of hard-line fighters who had banned cigarettes and shaving for men, littered the area with roadside bombs, and threatened to kill Afghans who worked for the U.S. military at an outpost an hour's drive away, villagers said.

Bacha Zarina's older brother Saidaa, who, like many Afghans, has just one name, said in a telephone interview that the U.S. military at first denied that the airstrike had killed a civilian, citing the accuracy of drones. After Afghan officials vouched for the family's story, the Americans paid Bacha Zarina's father about $2,000 in compensation.

"Do mistakes happen? Yes," said the U.S. officer, who spoke on the condition of anonymity because he was not authorized to discuss drone operations. "But they also happen with an F-16, maybe more so."

Cmdr. Bill Speaks, a Pentagon spokesman, said, "We have always made safeguarding civilians a top priority in all operations. These strict guidelines apply to all of our weapons platforms."

The Obama administration has come under increasing pressure this month from Congress to disclose details and legal underpinnings for drone strikes, especially a 2011 attack that killed Anwar Awlaki, an American citizen and a leader of the group Al Qaeda in the Arabian Peninsula.

On Tuesday, Sen. Lindsey Graham (R-S.C.) said U.S. drone strikes worldwide had killed 4,700 people, the first public estimate of the death toll by a U.S. official since the attacks began early in the George W. Bush administration.

"Sometimes you hit innocent people, and I hate that, but we're at war, and we've taken out some very senior members of Al Qaeda," Graham told the Easley Rotary Club in South Carolina, according to news reports.

The increase in Afghan drone strikes also has coincided with a greater U.S. military focus in the region on deterring Iran, which has put more demands on the Navy fighters flying off two U.S. aircraft carriers in the Persian Gulf and Arabian Sea. In the past, one of the carriers had focused on air operations over Afghanistan.

The U.S. military drone strikes in Afghanistan are separate from the CIA drone campaigns against suspected Taliban and Al Qaeda targets in Pakistan and Yemen. In Afghanistan, analysts say, drones often are used to back up ground forces or for killing insurgents who are spotted trying to plant roadside bombs.

But another strike last year demonstrated that U.S. forces are also using drones for targeted killings, much as the CIA is in Pakistan and Yemen.

In late July, according to officials in the eastern province of Nuristan, a teacher and another Afghan civilian were traveling in a sport utility vehicle along a rocky road toward the Taliban-held village of Waygal. Three senior Taliban leaders and a junior operative stopped the car and demanded a ride, said Shamsuddin Aselzai, the head of the provincial council, who is from that village.

Minutes later, Aselzai said, a drone strike destroyed the SUV, killing the three Taliban leaders and the teacher, Abdul Qayum, a 48-year-old father of four. The other civilian and the junior Talib were injured but survived.

Since then, Taliban leaders in Waygal have gone almost into hiding, Aselzai said, fearful of the next drone attack**.**

"**They are afraid,** otherwise they wouldn't hide even for a second," Aselzai said by phone. He called Qayum's death a tragedy and a mistake, but said the drone strikes were "very useful."

"The Taliban are destroying our country," he said, "and we need to take some serious steps."

No impact to prez powers

**Healy 11**

Gene Healy is a vice president at the Cato Institute and the author of The Cult of the Presidency, The CATO Institute, June 2011, "Book Review: Hail to the Tyrant", http://www.cato.org/publications/commentary/book-review-hail-tyrant

Legal checks “have been relaxed largely because of the need for centralized, relatively efficient government under the complex conditions of a modern dynamic economy and a highly interrelated international order.” What’s more, the authors insist, America needs the legally unconstrained presidency both at home (given an increasingly complex economy) and abroad (given the shrinking of global distances).

These are disputed points, to say the least. If Friedrich Hayek was at all correct about the knowledge problem, then if anything increasing economic complexity argues for less central direction. Nor does the fact that we face “a highly interrelated international order” suggest that we’re more vulnerable than we were in 1789, as a tiny frontier republic surrounded by hostile tribes and great powers. Economic interdependence — and the rise of other modern industrial democracies — means that other players have a stake in protecting the global trading system.

Posner and Vermuele coin the term “tyrannophobia,” which stands for unjustified fear of executive abuse. That fear is written into the American genetic code: the authors call the Declaration of Independence “the ur-text of tyrannophobia in the United States.” As they see it, that’s a problem because “the risk that the public will fail to trust a well-motivated president is just as serious as the risk that it will trust an ill-motivated one.” They contend that our inherited skepticism toward power exacerbates biases that lead us to overestimate the dangers of unchecked presidential power. Our primate brains exaggerate highly visible risks that fill us with a sense of dread and loss of control, so we may decline to cede more power to the president even when more power is needed.

Fair enough in the abstract — but Posner and Vermuele fail to provide a single compelling example that might lead you to lament our allegedly atavistic “tyrannophobia.” And they seem oblivious to the fact that those same irrational biases drive the perceived need for emergency government at least as much as they do hostility towards it. Highly visible public events like the 9/11 attacks also instill dread and a perceived loss of control, even if all the available evidence shows that such incidents are vanishingly rare. The most recent year for which the U.S. State Department has data, 2009, saw just 25 U.S. noncombatants worldwide die from terrorist strikes. I know of no evidence suggesting that unchecked executive power is what stood between us and a much larger death toll.

Posner and Vermuele argue that only the executive unbound can address modernity’s myriad crises. But they spend little time exploring whether unconstrained power generates the very emergencies that the executive branch uses to justify its lack of constraint. Discussing George H.W. Bush’s difficulties convincing Congress and the public that the 1991 Gulf War’s risks were worth it, they comment, “in retrospect it might seem that he was clearly right.” Had that war been avoided, though, there would have been no mass presence of U.S. troops on Saudi soil — “Osama bin Laden’s principal recruiting device,” according to Paul Wolfowitz — and perhaps no 9/11.

Posner and Vermuele are slightly more perceptive when it comes to the home front, letting drop as an aside the observation that because of the easy-money policy that helped inflate the housing bubble, “the Fed is at least partly responsible for both the financial crisis of 2008-2009 and for its resolution.” Oh, well — I guess we’re even, then.

Sometimes, the authors are so enamored with the elegant economic models they construct that they can’t be bothered to check their work against observable reality. At one point, attempting to show that separation of powers is inefficient, they analogize the Madisonian scheme to “a market in which two firms must act in order to supply a good,” concluding that “the extra transaction costs of cooperation” make “the consumer (taxpayer) no better off and probably worse off than she would be under the unitary system.”

But the government-as-firm metaphor is daffy. In the Madisonian vision, inefficiency isn’t a bug, it’s a feature — a check on “the facility and excess of law-making … the diseases to which our governments are most liable,” per Federalist No. 62. If the “firm” in question also generates public “bads” like unnecessary federal programs and destructive foreign wars — and if the “consumer (taxpayer)” has no choice about whether to “consume” them — he might well favor constraints on production.

From Franklin Roosevelt onward, we’ve had something close to vertical integration under presidential command. Whatever benefits that system has brought, it’s imposed considerable costs — not least over 100,000 U.S. combat deaths in the resulting presidential wars. That system has also encouraged hubristic occupants of the Oval Office to burnish their legacies by engaging in “humanitarian war” — an “oxymoron,” according to Posner. In a sharply argued 2006 Washington Post op-ed, he noted that the Iraq War had killed tens of thousands of innocents and observed archly, “polls do not reveal the opinions of dead Iraqis.”

## debt ceiling

Even a small attack collapses the global economy

Belfer Center 7, Washington Post summary of a Belfer Center Report, The Nuclear Threat Initiative and Project on Managing the Atom, “Nuclear Terrorism FAQ”, September 26, http://belfercenter.ksg.harvard.edu/publication/17529/nuclear\_terrorism\_faq.html

What would happen if terrorists set off a nuclear bomb in a major city?

Terrorist use of a nuclear bomb would be an historic catastrophe. If a crude nuclear bomb with an explosive equivalent of 10,000 tons of TNT (10 "kilotons" in the language of nuclear weapons) were set off at Grand Central Station on a typical work-day, some 500,000 people might be killed, and hundreds of thousands more would be injured, burned, and irradiated. The direct economic damage would likely be in the range of $1 trillion, and the reverberating economic effects throughout the United States and the world would come to several times that figure. In 2005, then-UN Secretary General Kofi Annan warned that such an attack "would stagger the world economy and thrust tens of millions of people into dire poverty," causing "a second death toll throughout the developing world." The terrorists would surely claim they had more bombs already hidden in U.S. cities, potentially provoking widespread panic and economic disruption. In short, America and the world would be changed forever.

No default

Daniel J. Mitchell 9-18, senior fellow at CATO, The Economic Costs of Debt-Ceiling Brinkmanship, <http://www.cato.org/publications/testimony/economic-costs-debt-ceiling-brinkmanship>

Let’s now deal directly with the debt ceiling. My fourth point is that an increase in the debt ceiling is not needed to avert a default. Simply stated, the federal government is collecting far more in revenue than what’s needed to pay interest on that debt.

To put some numbers on the table, interest payments are about $230 billion per year while federal tax revenues are approaching $3 trillion per year. There’s no need to fret about a default.

But don’t believe me. Let’s look at the views of some folks that disagree with me on many fiscal issues, but nonetheless are not prone to false demagoguery.

Donald Marron, head of the Urban-Brookings Tax Policy Center and former Director of the Congressional Budget Office, explained what actually would happen in an article for CNN Money.

If we hit the debt limit… that does not mean that we will default on the public debt. …[The Treasury Secretary] would undoubtedly keep making payments on the public debt, rolling over the outstanding principal and paying interest. Interest payments are relatively small, averaging about $20 billion per month.

And here is the analysis of Stan Collender, one of Washington’s best-known commentators on budget issues.

There is so much misinformation and grossly misleading talk about what will happen if the federal debt ceiling isn’t increased…it’s worth taking a few steps back from the edge. …if a standoff on raising the debt ceiling lasts for a significant amount of time… a default wouldn’t be automatic because payments to existing bondholders could be made the priority while payments to others could be delayed for months.

Or what about the Economist magazine, which made this sage observation.

Even with no increase in the ceiling, the Treasury can easily service its existing debt; it is free to roll over maturing issues, and tax revenue covers monthly interest payments by a large multiple.

Let me add one caveat to all this analysis. I suppose it’s possible that a default might occur, but only if the Secretary of the Treasury deliberately chose not to pay interest in the debt. But that won’t happen. Not only because the Obama Administration wouldn’t want to needlessly roil financial markets, but also since research by Administration lawyers in the 1960s concluded that the Secretary of the Treasury might be personally liable in the event of a default. Mr. Lew has more than one reason to make sure the government pays interest on the debt.

**That boosts Obama’s capital without triggering a fight over authority**

Douglas Kriner, Assistant Profess of Political Science at Boston University, 2010, After the Rubicon: Congress, Presidents, and the Politics of Waging War, p. 59-60

Presidents and politicos alike have long recognized Congress's ability to reduce the political costs that the White House risks incurring by pursuing a major military initiative. While declarations of war are all but extinct in the contemporary period, Congress has repeatedly moved to authorize presidential military deployments and consequently to tie its own institutional prestige to the conduct and ultimate success of a military campaign. **Such authorizing legislation**, even if it fails to pass both chambers, **creates a sense of** shared legislative-executive responsibility for a military action's success **and provides the president with** considerable political support **for** **his chosen policy** course.34 Indeed, the desire for this political cover—and not for the constitutional sanction a congressional authorization affords—has historically motivated presidents to seek Congress's blessing for military endeavors. For example, both the elder and younger Bush requested legislative approval for their wars against Iraq, while assiduously maintaining that they possessed sufficient independent authority as commander in chief to order the invasions unilaterally.35 This fundamental tension is readily apparent in the elder Bush's signing statement to HJ Res 77, which authorized military action against Saddam Hussein in January of 1991. While the president expressed his gratitude for the statement of congressional support, he insisted that the resolution was not needed to authorize military action in Iraq. "As I made clear to congressional leaders at the outset, my request for congressional support did not, and my signing this resolution does not, constitute any change in the long-standing positions of the executive branch on either the President's constitutional authority to use the Armed Forces to defend vital U.S. interests or the constitutionality of the War Powers Resolution."36

#### No compromise

Stan Collendar, Journalist, 9/16/13, This Year's Budget Fight Isn't About The Budget, http://ourfuture.org/20130916/this-years-budget-fight-isnt-about-the-budget

There are many reasons why the budget fight that will take pace over the next few weeks and months will be more difficult than any of the close-to-debacles that have occurred in recent years.

The reasons include John Boehner (R-OH), who was already the weakest and least effective House speaker in modern times, being even weaker; a president with what at best is tepid support from his own party in Congress; an increasingly frustrated tea party wing of the GOP that no longer sees procedural compromises as satisfying; increasingly defiant House Democrats, who see less and less value in supplying votes to enact must-pass legislation when the Republican majority is unable to do it; and a seemingly hopeless split in the House GOP that makes further spending reductions, standing pat at current levels or spending increases impossible.

Add to this "crisis fatigue." So many actual or man-made economic and financial disasters have occurred in recent years that the kinds of things that used to scare Congress and the White House into compromising -- like possible federal defaults and government shutdowns -- no longer motivate them to act.

But none of these admittedly depressing factors are what makes this year's budget cliffhanger so difficult. This year the biggest complication is that the budget fight isn't really about the budget: It's about ObamaCare, and that makes it hard to see what kind of arrangement will garner enough votes to avoid the kind of shutdown and debt ceiling disasters that have been only narrowly averted the past few years.

It's one thing if the debate is just about coming up with a spending cap or deficit limit. If, for example, one side wants spending at $20 and the other wants $10, there should be some number between those two that eventually will make a deal possible.

But what happens when, like now, the budget is the legislative vehicle but the real debate is over something else entirely? What that happens, **there is no number that will satisfy everyone** in the debate and the budget process -- which is designed to compromise numbers rather than policy -- becomes an incredibly in effective way to negotiate.

That's when all of the other factors I noted above kick in. If the budget process can't be used to settle the debate, an ad hoc negotiation between the leaders is needed. But in the current political environment it's not at all clear who has the authority to negotiate let alone who has the ability to convince his or her colleagues that a deal deserves to be supported. And that's if a deal of some kind is even possible.

#### PC’s not key – not enough time

Chris Cillizza, 9/18/13, 5 reasons why a government shutdown is (likely) coming, www.washingtonpost.com/blogs/the-fix/wp/2013/09/18/5-reasons-why-a-government-shutdown-is-likely-coming/?wprss=rss\_politics&clsrd

1. Speaker John Boehner had a choice going into today’s meeting: Go forward with a plan similar to the one that House Majority Leader Eric Cantor (Va.) rolled out last week — which would allow the Senate to strip out the measure defunding Obamacare and then send it to President Obama — or take a hard line, making it so that Senate Majority Leader Harry Reid can still strip the defunding out the legislation but the measure has to then return to the House for passage. Boehner took the hard line, which tells you that he isn’t willing to cross the cast-iron conservatives in his conference on this — **and that he** likely **won’t change his tune by Sept. 30**. (For further explanation on “cast iron conservatives”, read this.)

2. Senate Minority Leader Mitch McConnell has no incentive to work with Reid (or any Democrat) to find a path to consensus before Sept. 30. In fact, McConnell has a huge disincentive to do so in the form of a conservative primary challenger named Matt Bevin. Bevin is already attacking McConnell as too much of an accommodationist and insufficiently conservative. And conservative groups like the Senate Conservatives Fund are essentially looking for a reason to throw their lot in with Bevin or, more accurately, against McConnell. McConnell working with Reid (and/or Obama) would be treated as a provocation by these groups. McConnell’s reluctance to be involved is all the more important when you consider he was the critical Republican in cutting a fiscal cliff deal.

3. **The calendar doesn’t add up**. Yes, Congress is like a college student — staying up late to finish a paper (or a bill) the night before it’s due. We govern from crisis to crisis these days and, so far, Congress and the President have managed to turn in their paper just before they got an “F”. But, Boehner’s move today makes it almost impossible, in the most most literal, logistical terms possible — to get something on President Obama’s desk before Sept. 30. Under the most likely scenario in the Senate, the earliest that the House will get back a continuing resolution is Sept. 27 — and that will be one that, unless something dramatic changes in the Senate, doesn’t make mention of defunding Obamacare.

4. Democrats — from the White House to the Congressional leadership — won’t blink. President Obama, Reid and House Minority Leader Nancy Pelosi (Calif.) are well aware of the public polling that shows Congressional Republicans would bear the brunt of the blame if the government shuts down. And, they are even more aware of the deep split between establishment Republicans and the cast-iron conservatives in the House. Add it up and there’s no incentive for Democrats to throw Boehner a political lifeline on the government shutdown — particularly given his decision to push forward with the defunding Obamacare effort. This is a you-made-your-bed-now-sleep-in-it moment for Boehner in the minds of Democratic leaders.

5. The cast-iron conservatives won’t blink. If there is one single organizational principle that unites all of the cast-iron conservatives in the House and Senate, it’s their vehement belief that the health care law is a massive mistake in public policy and has to be repealed for the good of the country. **It’s literally unfathomable that they will capitulate on Sept. 29** to pass a Senate-approved bill without the defund provision in it. That means that if Boehner and Cantor want to pass the CR, they will have to do so with a significant number of Democratic votes to make up for the losses they will suffer in their own ranks. And, if Boehner does that, it could be very detrimental to his chances of being Speaker again in 2015.

#### Syria drained capital

Jake Tapper, CNN, 9/12/13, Has Obama paid political price for Syria?, thelead.blogs.cnn.com/2013/09/12/has-obama-paid-political-price-for-syria/

Has Obama paid political price for Syria?

Political capital does not come cheap in Washington, D.C. After weeks of trying to rally Congress to support him on a fast-changing policy in Syria, President Barack Obama may have broken the bank on what political capital he has left in his second term.

Congressman Steve Israel, chairman of the Democratic Congressional Campaign Committee, said he was surprised by how politicized the vote for military authorization in Syria has become.

Several Democratic representatives, including former veterans Rep. Tammy Duckworth and Rep. Tulsi Gabbard, oppose authorization.

"It's military families like mine that are the first to bleed when our nation makes this kind of commitment," Duckworth said in a statement.

But Israel said Obama is not hurting his credibility with Democratic members of the House, adding that after a Democratic caucus briefing, the party is now focused on Russia's diplomatic proposal to disarm Syria of its stockpile of nuclear weapons.

"Our focus on both sides of the aisle right now, quite honestly, is on ensuring that this is a legitimate, transparent, verifiable proposal," said Israel.

But much of the Democratic caucus, people Israel helped get elected in the last cycle, are against the president.

Asked if that lack of support stems from a distant relationship with the president, Israel said no, saying it is the shadow of Iraq that is driving Democrats' doubts on authorizing a strike against Syria.

"It has more to do with the concern that many of my colleagues had with intelligence in the prior administration," said Israel. There "is a sense that we've been down this road. We're dubious when the intelligence community tells us that there are weapons of mass destruction. Been there done that."

Moreover, Israel adds, a relationship with the president should not play a role in evaluating a vote of this nature.

"The relationship actually should be put aside when you're making decisions on whether to commit force," said Israel. "You've got to make a judgment not based on do I like this president, but do I believe the intelligence, and do I believe that his recommendation is the most appropriate course for the national security interests of this country?"

Obama's lack of support on Syria could cast a shadow on other legislative agendas, **such as the upcoming debt ceiling debate**.

"The issue is not whether the President of the United States has expended his political capital. The issue is whether House Republicans are willing to spend any of theirs," said Israel.

Climate fight

Steve Benen, MSNBC, 9/18/13, Congress targets Obama's climate agenda, maddowblog.msnbc.com/\_news/2013/09/18/20559938-congress-targets-obamas-climate-agenda

It's been about three months since President Obama unveiled a fairly ambitious agenda to combat the climate crisis, and in the immediate aftermath, Republicans had very little to say about it. Indeed, Politico reported in June that GOP leaders came up with a game plan: ignore the speech, ignore global warming, and generally ignore science altogether. That approach will change today. President Barack Obama's plans to curb the gases blamed for global warming are heading to their first test, a House hearing in which administration officials make their case before skeptical lawmakers. The energy panel meeting Wednesday comes just days before a deadline for the Environmental Protection Agency to release a revised proposal setting the first-ever limits on carbon dioxide from newly built power plants. You might be thinking, "Wait, why would Congress matter in this?" and at a certain level, it doesn't. The Obama administration is using **its regulatory** authority to combat the climate crisis, taking advantage of powers the U.S. Supreme Court has already endorsed. As was reported in June, "The president outlined a series of climate proposals he intended to advance through executive action, sidestepping a Congress mired in gridlock in its handling of most matters, let alone politically touchy energy and climate issues." But while Congress struggles mightily to create, it finds it easier to destroy. Rep. Ed Whitfield, the chairman of the Energy and Commerce panel on energy and power, is a conservative Kentucky Republican who already intends to push legislation to place new limits on what the EPA can do to regulate carbon pollution from power plants. For that matter, as the AP added, "Congress could also hinder the EPA by slashing its budget." Indeed, **it's difficult to know just how far congressional Republicans are prepared to go to stop the White House** from addressing the climate crisis, which makes today's hearing that much more interesting -- we're about to get a big hint.

Squo drone debate triggers the link – also applies to the CP

Bennett 13 (John T, Senior Congressional Reporter at Defense News, 5/6/2013, "Drones, Sequester Flexibility to Drive 2014 NDAA Debates", www.defensenews.com/article/20130506/DEFREG02/305060006/Drones-Sequester-Flexibility-Drive-2014-NDAA-Debates)

WASHINGTON — US **Lawmakers are expected to battle over armed drones**, softening the blow of military budget cuts and a controversial missile defense shield as they craft Pentagon policy legislation for fiscal 2014.

Mirroring the political climate in Washington, work on the past several national defense authorization acts (NDAAs) has, at times, turned **bitterly partisan**. Longtime defense insiders say the new tone likely is here to stay for some time.

Indeed, the issues **expected to dominate** the NDAA build this spring and summer in the House and Senate Armed Services committees — **and then will** spill onto the chamber floors — sharply divide **most Democrats and Republicans**.

From whether to leave President Barack Obama’s drone-strike program under the CIA’s control or shift to the Pentagon, to closing the Guantanamo Bay, Cuba, facility that houses terrorism suspects, to a proposal to build an East Coast missile shield, **the 2014 NDAA process is shaping up to be a** partisan kerfuffle.

“I see a couple of bigger policy issues this year,” House Armed Services Committee (HASC) member Rep. Rick Larsen, D-Wash., told Defense News. “And one of those will be the proper use of drones.”

Lawrence Korb, a former Pentagon official now at the Center for American Progress, added to that list of problems with the F-35 Joint Strike Fighter program, the Pentagon’s likely DOA plan to close military bases in the US and whether to keep building Army tanks in Michigan, home state of Democratic Senate Armed Services Committee (SASC) Chairman Sen. Carl Levin.

Drones

The simmering debate about the White House’s consideration of moving the drone program from the CIA to the military is **shaping up to be a turf war among congressional panels**. But not political parties.

On one side are powerful pro-military lawmakers such as Sen. John McCain, R-Ariz., a senior Senate Armed Services Committee member. On the other are influential pro-CIA members such as Sen. Dianne Feinstein, D-Calif., who chairs the Senate Intelligence Committee.

Many pro-military House Democrats, such as HASC member Rep. Hank Johnson, D-Ga., and Larsen favor giving the Pentagon full ownership.

## \*\*\*1AR\*\*\*

## posner

Doesn’t solve legal clarity OR president ignores

Posner 11 Eric Posner is the Kirkland & Ellis Professor, University of Chicago Law School. “DEFERENCE TO THE EXECUTIVE IN THE UNITED STATES AFTER 9/11 CONGRESS, THE COURTS AND THE OFFICE OF LEGAL COUNSEL” available at http://www.law.uchicago.edu/academics/publiclaw/index.html.

C. Evidence

1. Testing the Three Hypotheses

We have three hypotheses about OLC on the table. The first is that OLC is an ex ante constraint on presidential power, serving a role similar to thatof Congress and the courts. The second is that OLC is an ex ante enabler of presidential power. The third hypothesis is Ackerman’s rubber-stamp theory that OLC serves neither as a constraint nor as an enabler because it cannot say no ex post. In this section, I will briefly discuss the evidence. It is easy enough to distinguish Ackerman’s hypothesis from the other two: if OLC never or rarely says no, then Ackerman is right. In addition, Ackerman is right even if OLC sometimes says no but the president ignores OLC in those cases. Distinguishing the constraint and enabler hypotheses is more difficult. Both hypotheses predict some ex post no’s. To distinguish the hypotheses, one would need to look at the other side of the ledger: the cases where OLC has enabled the president to act where otherwise Congress would have opposed him. Unfortunately, it would be hard to identify such cases. 2. Statistical Evidence In a study of the written opinions of OLC, Trevor Morrison found that 79 percent approved the president’s position, 8 percent provided a mixed answer, and 13 percent disapproved the president’s position. 26 In several cases, OLC rejected the White House position on issues of significance. In addition, Morrison notes that since OLC usually provides negative advice orally, the written record reflects a selection bias in favor of approvals. 27 But there is less here than meets the eye. First, one must keep in mind that the executive is a “they,” not an “it.” When the president cannot resolve policy differences among his major advisers, he may well be indifferent about OLC’s reaction and indeed welcome a legal resolution (“sorry, my hands are tied”). Second, the relevant focus, for the purpose of my argument, is OLC advice on national security issues. On this topic, the consensus appears to be that OLC has said no to the executive in only four cases in its entire history aside from matters that remain classified: the rejection of the Bush administration’s argument that the Geneva Conventions do not apply to terrorists in Iraq in 2002; 28 the rejection of certain forms of coercive interrogation in 2003; rejection of electronic surveillance that circumvented the FISA court in 2003; and rejection of the Libya intervention in 2011. 2 Even these cases turn out to be ambiguous. It must be recalled that OLC first said “yes” on coercive interrogation and electronic surveillance, and then changed its mind a few years later. In addition, OLC’s “no” on coercive interrogation turned out to be less than absolute: it continued to authorize waterboarding even after the earlier memorandum was withdrawn. Unfortunately, evaluating the empirical evidence is even harder than Morrison indicates. The problem is not just that negative advice is confidential; the problem is that we do not know how the executive responded to this negative advice. Did it desist from its conduct? Modify it along the margins? Or ignore OLC? Maybe, maybe not. A further methodological problem concerns whether a “no” blocks an important policy or simply requires certain i’s to bedotted or t’s to be crossed. OLC officials often emphasize that their job is to help the White House find a legally acceptable method of accomplishing their aims. Even the early Bush administration OLC drew the line on certain forms of torture (such as mock executions, the use of insects to exploit fears, etc.) and established guidelines to ensure the safety of detainees. The problem with treating this advice as a “no” is that it is not clear that the executive cared about these details, as opposedto the broad agenda of using coercive interrogation practices. It no doubt wanted legal advice so as to minimize the risk of legal liability. Finally, as we have seen, President Obama ignored OLC’s position on the Libya intervention. So in that case, OLC took a brave stand and then discovered that it had been pushed to the sidelines. This major event offered unusuallyrapid confirmation of Ackerman’s claim that the executive can avoid negative advice from OLC by soliciting advice from the White House Counsel’s Office. (Obama also received favorable advice from the State Department legal counsel.) Morrison argued prior to this event that the president faces strong disincentives to end-running OLC. 30 Afterwards, he could only criticize the president, claim he suffered from negative political fallout, and hope that this sort of thing does not happen too often. 31 However, while the president was criticized, there is simply no evidence that his evasion of OLC has hurt him politically. As is so often case, the (apparent) success of the operation provides its own justification. The upshot is that there is some evidence that OLC serves as an ex post constraint, but it is fairly weak. Ackerman’s hypothesis seems too extreme, but it is hard to distinguish between the constraint and enabler hypothesis. It is possible that OLC serves as a weak constraint or a weak enabler. Why has it been so weak? First,it may turn out that the constellation of factors that drive decisionmaking in the executive branch prevents the president from solving a time-inconsistency problem by using OLC. The president benefits fromneutral advice, and frombeing able to cite OLC’s approval, but when OLC blocks the president, short-term political considerations trump the medium-term advantages of maintaining a neutral OLC. Meanwhile, OLC’s lawyers yield to political pressure either for careerist reasons or in order to prevent the president from cutting OLC out of the process. Private lawyers face similar pressures, but the market in legal services might provide some additional discipline. Second, the problem might lie in the nature offoreign relations and national security, an area of action that has been notoriously difficult to bring under legal control. Courts have frequently been asked to adjudicate disputes between Congress and the president inthe area of national security. Generally speaking, they have resisted these requests, treating these issues as political questions or nonjusticiable for other reasons. The usual explanation for this resistance is that courts are not experts on these issues; that the highly fluid, frequently changing nature of foreign relations and national security makes themunsuitable for judicial resolution, which is rule-bound, public, decentralized, and slow; and that, accordingly, courts fear that if they intervene, their rulings will be ignored by the executive branch, provoking a constitutional crisis. The supposed solution to this problem is to ask an advisory office in the executive branch to take over a function that the courts have repudiated. It is true that a small office in the executive branch can overcome certain problems that courts face relating to secrecy and speed. But the fundamental problem is that foreign relations are not susceptible to regulation by rules. 32

Libya proves OLC doesn’t check

Posner 11 Eric Posner is the Kirkland & Ellis Professor, University of Chicago Law School. “DEFERENCE TO THE EXECUTIVE IN THE UNITED STATES AFTER 9/11 CONGRESS, THE COURTS AND THE OFFICE OF LEGAL COUNSEL” available at <http://www.law.uchicago.edu/academics/publiclaw/index.html>.

3. A Case Study: Military Intervention without Congressional Authorization Given the inconclusive nature of the statistical evidence, one might also consider the evidence in a qualitative fashion. In this section, I undertake such an analysis, focusing on military intervention. The executive has on a number of occasions sought to send military forces into foreign countries without congressional consent. A lively controversy exists over whether the president has such authority. The U.S. Constitution gives Congress the power to declare war. Yet founding era sources suggest that opinion at that time was that the president could unilaterally use force in certain circumstances—for example, to repel invasions. In the following centuries, the executive has used force on foreign territory (rather thanto repel invasions) on numerous occasions without congressional authorization,which gave rise to the view within the executive branch that tradition sanctioned the unilateral use of force even in foreign countries, albeit subject to ill-defined limits. After the Vietnam War, which was widely blamed on the executive despite congressional acquiescence, Congress passed the War Powers Act over the president’s veto, which required the president to withdraw troops from hostilities within 60 days unless it received congressional authorization. OLC fought off these twin constraints on executive power. In 1991, President George H.W. Bush order American troops into Somalia where they engaged in combat with local militias. OLC resolved the constitutional question by arguing that the executive has constitutional authority to send troops onto foreign soil in order to protect Americans and American property. 33 In 1994, President Clinton prepared tolaunch a military invasion of Haiti after a coup overthrew the government, but the new government of Haiti backed down, and American troops entered Haitian territory to conduct peacekeeping operations. President Clinton did not have congressional authorization for the transfer of American troops onto potentially hostile soil. However, OLC argued that the deployment of troops accorded with an appropriations bill that barred the use of appropriated funds for military operations in Haiti unless justified by U.S. national security interests. 34 The appropriations bill did not by its terms authorize anything. OLC further explained thatthe president did notneed congressional authorization under the Declaration of War clause when “the deployment [takes place] with the full consent of the legitimate government of the country involved.” 35 Such an event is not a “war” even if it could quickly turn into war. In addition, the War Powers Resolution does not apply “where the risk of sustained military conflict [is] negligible.” 36 In 1995, President Clinton decided that U.S. forces should enter Bosnia and Herzegovina to enforce a fragile peace agreement. OLC found itself unable to rely on an appropriations bill. Instead of citing a statute, OLC noted that the president has the “power to deploy troops abroad without the initiation of hostilities,” citing historical practice and the president’s Commander in Chief power, the much criticized constitutional basis for many Bush-era OLC opinions. 37 In this case the risk of sustained military conflict was not“negligible.” But that no longer mattered. Because the parties had consented to the deployment of troops, there is still no “war” and neither the Declaration of War clause nor the War Powers Resolution applied. In 1999, President Clinton ordered a massive air bombardment of Serbia. Congress again refused authorization; indeed, the bill to authorize military operations was voted on but failed to pass on a tie vote. It was impossible to argue that the risk of sustained military conflict was negligible and that the Serbs consented to the bombardment of their own country. OLC rested its case on an appropriations statute enacted after the commencement of hostilities. 38 President Clinton sent American troops into action and then dared Congress to deny them funding. Trapped, Congress reluctantly authorized funds. For OLC, the War Powers Resolution did not stand in the way of the war because of the appropriations statute eventhough the War Powers Resolution said that appropriations statutes do not count ascongressional authorization. During the George W. Bush administration, OLC took aggressive positions on a range of issues, including the use of coercive interrogation (despite a statute that banned torture) and warrantless surveillance (despite a statute that restricted surveillance). 39 OLC opinions relied heavily on the constitutional authority of the executive, using it to justify narrow interpretations of the statutes. Subsequently, OLC withdrew these memos. Let us now turn to the Libya intervention. In 2011, President Obama ordered U.S. forces to participate in a NATO bombardment of Libya. Again, Congress refused to authorize the action. OLC advised the president that he could intervene without congressional authorization, citing its earlier opinions on military intervention. 40 Two months later, in response to questions as to whether the intervention complied with the War Powers Act’s 60-day limit, the White House released a document to Congress with a one-page legal analysis. Consistent with previous OLC doctrine, the president argued that “thePresident had constitutional authority, as Commander in Chief and Chief Executive and pursuant to his foreign affairs powers, to direct such limited military operations abroad.” 41 In addition, the president argued that the War Powers Resolution did not require congressional authorization because the action in Libya was not really a “war”: U.S. military operations are distinct from the kind of “hostilities” contemplated by the Resolution’s 60 day termination provision. U.S. forces are playing a constrained and supporting role in a multinational coalition, whose operations are both legitimated by and limited to the terms of a United Nations Security Council Resolution that authorizes the use of force solely to protect civilians and civilian populated areas under attack or threat of attack and to enforce a no-fly zone and an arms embargo. U.S. operations do not involve sustained fighting or active exchanges of fire with hostile forces, nor do they involve the presence of U.S. ground troops, U.S. casualties or a serious threat thereof, or any significant chance of escalation intoa conflict characterized by those factors. 42 The narrow definition of “hostilities” echoed the narrow definition of “torture” used by the Bush-era OLC. The reliance on UN Security Council authorization echoed Truman’s reliance on Security Council authorization for the U.S. militaryintervention in Korea (also not authorized by Congress). 43 Press reports later revealed that OLC had refused to issue an opinion advising the president that the use of military force in Libya was consistent with the War Powers Act, and that the president instead relied on the advice of the State Department legal adviser and the White House Counsel. 44 What are we to make of this history? One view is that it confirms the rubber-stamp hypothesis. OLC has always rubber stamped legal interventions up until 2011; when it declined to do so, the White House ignored it. However, the rubber-stamp hypothesis raises some questions. One is why OLC would go to such elaborate lengths to provide narrow justifications for military interventions in the early years; and why it would finally draw the line on Libya. It seems likely that OLC sought to prevent its credibility from eroding completely. An OLC which is truly a rubber stamp would be of no value to the president and might as well be dispensed of completely. At the same time, OLC could not in the end constrain the executive from maintaining the military intervention in Libya. So if it preserved its credibility by rendering a “no,” it could not provide the checking function of Congress and the judiciary. The president’s decision to disregard OLC’s advice is more in the spirit of the enabler hypothesis than the constraint hypothesis: the president made what one hopes was a rational decision to weaken his hand with Congress in future confrontations because he believed that the stakes were too high in the Libya intervention to withdraw the troops. The gamble may well have paid off. The president’s success in Libya in the face of congressional opposition may have the long-term effect of eroding the War Powers Act rather than weaken the executive; in that case, the Obama acted wisely by overruling OL*C.*

## link

**He’ll avoid the fight**

William Howell and Jon Pevehouse, Associate Professors at the Harris School of Public Policy at the University of Chicago, 2007, When Congress Stops Wars, Foreign Affairs, EBSCO

After all, when presidents anticipate congressional resistance they will not be able to overcome, they often abandon the sword as their primary tool of diplomacy. More generally, when the White House knows that Congress will strike down key provisions of a policy initiative, it usually backs off. President Bush himself has relented, to varying degrees, during the struggle to create the Department of Homeland Security and during conflicts over the design of military tribunals and the prosecution of U.S. citizens as enemy combatants. Indeed, by most accounts, the administration recently forced the resignation of the chairman of the Joint Chiefs of Staff, General Peter Pace, so as to avoid a clash with Congress over his reappointment.

## Uq

#### All the incentives line up against a deal

Chris Cillizza, 9/18/13, 5 reasons why a government shutdown is (likely) coming, www.washingtonpost.com/blogs/the-fix/wp/2013/09/18/5-reasons-why-a-government-shutdown-is-likely-coming/?wprss=rss\_politics&clsrd

1. Speaker John Boehner had a choice going into today’s meeting: Go forward with a plan similar to the one that House Majority Leader Eric Cantor (Va.) rolled out last week — which would allow the Senate to strip out the measure defunding Obamacare and then send it to President Obama — or take a hard line, making it so that Senate Majority Leader Harry Reid can still strip the defunding out the legislation but the measure has to then return to the House for passage. Boehner took the hard line, which tells you that he isn’t willing to cross the cast-iron conservatives in his conference on this — **and that he** likely **won’t change his tune by Sept. 30**. (For further explanation on “cast iron conservatives”, read this.)

2. Senate Minority Leader Mitch McConnell has no incentive to work with Reid (or any Democrat) to find a path to consensus before Sept. 30. In fact, McConnell has a huge disincentive to do so in the form of a conservative primary challenger named Matt Bevin. Bevin is already attacking McConnell as too much of an accommodationist and insufficiently conservative. And conservative groups like the Senate Conservatives Fund are essentially looking for a reason to throw their lot in with Bevin or, more accurately, against McConnell. McConnell working with Reid (and/or Obama) would be treated as a provocation by these groups. McConnell’s reluctance to be involved is all the more important when you consider he was the critical Republican in cutting a fiscal cliff deal.

3. **The calendar doesn’t add up**. Yes, Congress is like a college student — staying up late to finish a paper (or a bill) the night before it’s due. We govern from crisis to crisis these days and, so far, Congress and the President have managed to turn in their paper just before they got an “F”. But, Boehner’s move today makes it almost impossible, in the most most literal, logistical terms possible — to get something on President Obama’s desk before Sept. 30. Under the most likely scenario in the Senate, the earliest that the House will get back a continuing resolution is Sept. 27 — and that will be one that, unless something dramatic changes in the Senate, doesn’t make mention of defunding Obamacare.

4. Democrats — from the White House to the Congressional leadership — won’t blink. President Obama, Reid and House Minority Leader Nancy Pelosi (Calif.) are well aware of the public polling that shows Congressional Republicans would bear the brunt of the blame if the government shuts down. And, they are even more aware of the deep split between establishment Republicans and the cast-iron conservatives in the House. Add it up and there’s no incentive for Democrats to throw Boehner a political lifeline on the government shutdown — particularly given his decision to push forward with the defunding Obamacare effort. This is a you-made-your-bed-now-sleep-in-it moment for Boehner in the minds of Democratic leaders.

5. The cast-iron conservatives won’t blink. If there is one single organizational principle that unites all of the cast-iron conservatives in the House and Senate, it’s their vehement belief that the health care law is a massive mistake in public policy and has to be repealed for the good of the country. **It’s literally unfathomable that they will capitulate on Sept. 29** to pass a Senate-approved bill without the defund provision in it. That means that if Boehner and Cantor want to pass the CR, they will have to do so with a significant number of Democratic votes to make up for the losses they will suffer in their own ranks. And, if Boehner does that, it could be very detrimental to his chances of being Speaker again in 2015.

#### Dems kill the deal

Nancy Cook, National Journal, 9/17/13, How Dangerous Is the Rift Among Democrats?, www.nationaljournal.com/congress/how-dangerous-is-the-rift-among-democrats-20130917

Remember that split among congressional Republicans on fiscal strategy? Well, now it seems the Democrats have the makings of a similar problem.

In recent weeks, congressional Ds have been uncharacteristically independent, breaking with their leadership and the Obama administration. First they opposed military action in Syria, warning the president they would deny his request to strike. And then came Larry Summers, who was brought down by a handful of Senate Democrats who let the White House know they would not confirm him as Fed chief.

All **this bodes quite poorly for Obama** (and Harry Reid and Nancy Pelosi) as the spending and debt fights approach.

If Obama's advisors take anything away from the Syria and Summers episodes, Hill aides and lawmakers suggest it should be the message that Democrats are not going to get in line with a budget deal that compromises their liberal positions. No longer should the White House feel free, as it has in the past, to consider tweaks to programs like Medicare or Social Security, for instance (unless, of course, Republicans agree to extract more money from taxpayers).

#### No deal

Noam Scheiber, The New Republic, 9/15/13, This Time There Really Will Be a Government Shutdown, www.newrepublic.com/article/114728/boehner-and-obama-cant-avoid-government-shutdown

Suffice it to say, it’s hard to do a deal when the only thing the other guy wants is the one thing you can’t give him. This null set scenario is, unfortunately, precisely where we find ourselves in the debate over funding the government beyond September 30th. House Republicans are insisting that any funding measure simultaneously de-fund Obamacare, while Democrats have rightly proclaimed this idea preposterous. And there appears to be no wiggle room in the GOP position. According to The Wall Street Journal, when Senate Majority Leader Harry Reid asked House Speaker John Boehner what else on the entire planet the GOP could accept—a lifetime supply of Slim Jims, say, or maybe a warehouse full of Kiefer Sutherland-autographed “24” box sets—Boehner told him there was nothing.

Even so, if this were the only obstacle to an agreement, we might still avoid a government shutdown. After all, we’ve been in situations before where the null-set logic looked ironclad, only to have one side or the other back down at the last minute. Back in 2011, Republicans agreed to a debt-ceiling increase in exchange for Obama’s embrace of the sequester, which averted a debt default that looked imminent. At the end of last year, Republicans allowed taxes to rise on the highest income earners to avoid going over the dreaded fiscal cliff.

What makes this time is different is that, in addition to having carved out hardline positions, neither side has an incentive to back down. In 2011, Obama was willing to give on his demand that revenue increases accompany spending cuts because he understood the apocalyptic consequences of failing to raise the debt ceiling. In late 2012, Republicans knew that the alternative to a small tax increase was for taxes to rise automatically by a much larger amount. This time, on the other hand, every party to the negotiation has reason to welcome the government shutdown that would result if they can’t reach a deal.

Start with the White House, which has been annoyingly open to concessions even when it has all the leverage. In my own conversations with White House officials (and people close to them) over the past few months, I’ve picked up a clear willingness to allow a shutdown if Republicans refuse to budge. This is unlike 2011, the last time the White House faced a shutdown situation. Back then, a well-connected former administration official told me recently, “the political strategists wanted a deal. [Senior adviser David] Plouffe wanted a deal . . . to increase our numbers with independents.” This time, according to this source, “**There’s no constituency for caving**.”

That jibes with the change of heart I’ve detected when speaking directly to White House officials. In 2011, they were queasy about the risks a shutdown posed to the rickety economy, which could ultimately hurt the president. This year, they believe a shutdown would strengthen their hand politically, which is almost certainly true given the public outrage that would rain down on Republicans. One official pointed out that the pressure for spending cuts has subsided with the deficit falling so rapidly on its own.

Of course, the president himself isn’t the toughest negotiator in the world. You can’t rule out the possibility that the White House will blink when the deadline gets close. At the very least, one can imagine Obama signing a short-term government funding measure (known as a continuing resolution) that leaves the automatic sequester cuts in place so long as it doesn’t touch Obamacare. But even if he were inclined to do this, Congressional Democrats seem less willing to support him than in the past. They believe they can demand much more in exchange for saving the GOP from a shutdown. “Our leadership thinks the time has come to draw a line in the sand, not do a short-term extension,” a senior Democratic Hill aide told Politico last week. “They’re ready for a flash and a pop.” Bottom line: Democrats across the board are more willing to broach a shutdown than at any other time during the past three years.