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### Plan

#### The United States Federal Government should require prior Congressional approval for United States Armed Forces deployments authorized by the United Nations.

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#### Contention 1: United Nations

#### Now is a crucial time to engage the UN in the context of foreign policy—provisional agreement on the Syria deal creates a unique window of opportunity to recalibrate foreign policy around international institutions

Hirsh, 9/24/13 [“Why the United Nations Is Suddenly Relevant”, Michael Hirsh is chief correspondent for National Journal. He also contributes to 2012 Decoded. Hirsh previously served as the senior editor and national economics correspondent for Newsweek, based in its Washington bureau. He was also Newsweek’s Washington web editor and authored a weekly column, <http://www.defenseone.com/politics/2013/09/why-united-nations-suddenly-relevant/70738/?oref=d-skybox>]

That's especially the view in Washington, which more often than not sees the big green building on the East River as a giant, musty encumbrance. But suddenly the United Nations has become freshly relevant, more so than it has been in years, certainly for all of Obama's first term. And new U.N. Ambassador Samantha Power, who is largely untested as a diplomat, finds herself in a very hot spotlight, one that might even make her predecessor, new National Security Advisor Susan Rice, a touch regretful that she departed New York so soon. Indeed, in coming months the actions of the U.N. Security Council could determine Obama's major foreign-policy legacy, even more so than his takedown of Osama bin Laden, on the long-festering issues of Iran's nuclear program and Syria's civil war. In both cases a legal dependency on the U.N. Charter and previous Security Council resolutions will be crucial to success. It already seems clear that it was, more than anything, the sharp bite of U.N.-approved sanctions on Iran that led to the surprise election of moderate President Hassan Rouhani, who has practically tripped over himself offering to negotiate and whose much-anticipated speech Tuesday is expected to give clues as to his flexibility. It is also clear that previous U.N. Security Council resolutions dating back to 2006 and demanding that Tehran suspend uranium enrichment will, more than anything else, put Rouhani's sincerity and internationalism to the test. On Syria -- an issue on which Obama has looked consistently weak for two years -- it is also a U.N. Security Council resolution that will enforce the deus-ex-machina deal that Moscow and Washington suddenly already agreed upon to dismantle Bashar al–Assad's chemical weapons. [Read more: Will Obama and Rouhani Meet Face-to-Face at the United Nations?] The Russians are resisting any mention of force in the new resolution, and Obama has pledged to keep open his earlier threat to attack Syria unilaterally if it does not comply. But even here, says John Bellinger, the former legal counsel to the State Department, the president's best argument rests on the U.N. charter's "Chapter 7" guarantee of the right to "collective self-defense." Bellinger, who served under George W. Bush, says the previous president might have won more support in Iraq had he done something similar. "My advice to Obama would be same: Rather than rely on new and untested theories such as preemption or humanitarian intervention, emphasize more a reliance on the U.N. charter itself." American policy-makers have rarely paid much respect to the U.N. General Assembly, an obstreperous talking shop built on the pretense that the vote of Zimbabwe or Liechtenstein is as important as that of the United States. U.S. presidents have also grown impatient with the Security Council, which Franklin Roosevelt set up toward the end of World War II as a global policing body. Presidents, including Obama, tend to see the Security Council as a stagnant pool of lost great-power ambitions, a pretend-place where a Russia can puff itself up into an image of its former self. Under Vladimir Putin, Moscow has often done just that, vetoing every resolution that might have authorized an intervention in Syria over the last two years. But now Russia has publicly committed itself to a U.N.-authorized dismantling of Syria's chemical weapons—and if Moscow follows through, that will achieve the double victory of curtailing Assad's activities and co-opting an increasingly roguish Russia back, to some degree, into the international system. The fact is that, as Obama is discovering anew, the Security Council remains the main repository for international legitimacy—which is another way of saying it's the most effective way of getting other nations to ally with the United States. As we are finding out anew, the growing body of U.N. Security Council resolutions is what gives American foreign-policy goals the heft of international law, rather than the stigma of a diktat from Washington.

#### Explicitly involving Congress in the decisionmaking process is vital to codify the US commitment to the UN—that increases accountability and checks isolationism

McGuinness, 09 [Copyright (c) 2009 Willamette Law Review Willamette Law Review Spring, 2009 Willamette Law Review 45 Willamette L. Rev. 417 LENGTH: 15253 words PRESIDENTIAL POWER IN THE 21ST CENTURY SYMPOSIUM: ARTICLE: THE PRESIDENT, CONGRESS AND THE SECURITY COUNCIL: COUNTERTERRORISM AND THE USE OF FORCE THROUGH THE INTERNATIONALIST LENS NAME: Margaret E. McGuinness\* BIO: \* Associate Professor, University of Missouri Law School, p. lexis]

The Value of More Explicit Ex Ante Congressional Involvement in U.S./U.N. Counterterrorism Measures **A shift** in thinking **toward involving** the United States Congress in a more formal method of ex ante internal consultation on U.S. activities at the U.N. Security Council would have several salutary effects. First, it would reinforce and solidify the acceptance of U.N. Security Council substantive norms within the U.S. legal and political system. Second, it would create opportunities for capacity building within the U.N. Security Council on the question of parliamentary and legislative participation (which itself is an important dimension of the comprehensive counterterrorism policy, as well as important to addressing the democracy gap). This, in turn, has the potential to influence efforts to increase democratic accountability of other member states. Third, increased involvement of the U.S. Congress can also influence accountability and coordination of other transnational actors (in particular NGOs) who can "game" the accountability gap at the international and domestic level. Fourth, it may increase "buy-in" by the U.S. through Congress's power of the purse. The United States provides 25% of the United Nations' peacekeeping budget and already provides important outside accountability for management problems at the U.N. n134 Increased consultation can serve to sharpen those processes by providing early congressional input into the form and financing of particular U.N. measures. Moreover, democratically grounded participation in U.N. counterterrorism policies will enable the United States to demonstrate its commitment to protection of human rights as consistent with counterterrorism policy. The U.N. Charter balances the mandate of maintaining peace and security with the mandate to uphold human rights and human dignity. n135 By recognizing that counterterrorism policy implicates the dual pillars of the U.N. Charter, the United States will go a long way in addressing the concerns of the human rights community regarding particular past national policies (e.g., [\*448] communications monitoring, creation of watch lists, and administrative or preventative detention). n136 Terrorist groups are allied against the universality of human rights espoused by the U.N. Charter and the central human rights instruments of the human rights system. n137 By working within that system to correct its problems and support its infrastructure, the United States will create a more effective bulwark against the nihilist ideologies of those terrorist and jihadist groups. Finally, the strongest argument for more robust and ongoing congressional participation in Council military activities is that failure to secure and sustain strong domestic support for American involvement in U.N. operations would leave U.S. counterterrorism policy especially vulnerable to sudden reversal by Congress - and potentially also by the courts. n138 While building a consensus in support of particular policies is not easy, Congress can serve as an early warning for programs that raise particular domestic constitutional or human rights concerns. Congressional backlash that can occur when consultation does not take place can be costly. n139 Judicial reversal, as with the Kadi case in Europe, is also costly to the effectiveness of Council measures. Adding more voices to the process before detailed enforcement measures are put in place may be one way to avoid these reversals.

#### Without explicit prior involvement, Congressional vacillation will de-legitimize the UN and weaken the US commitment

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[\*449] There is of course, one significant cost to congressional participation in U.S. counterterrorism policies at the U.N.: the risk that Congress may block the President's preferred policy. The cost of obstruction of policies that are central to the security of the American people was cited by the Bush administration as a rationale for working around Congress, applying signing statements that restricted the effect of legislation in the area of national security, and invoking radical theories of presidential power in order to ignore statutory prohibitions against certain measures (including the use of torture). n140 That internally unilateralist approach created **significant international ripples** which were costly to the U.S.. While it is difficult to measure whether those costs outweigh any claimed security benefits gained through the policies (that judgment may belong only to history), it is clear that the United States' reputation for compliance with international human rights and humanitarian legal norms has been significantly harmed. Moreover, congressionalobjection to a particular U.N. policy that is made **prior to U.S. support** or votes at the Council can lead to **ongoing negotiation** over the form and content of the policy. After-the-fact objections, by contrast, may lead to congressionally imposed reversals that may prove more costly to the President. B. The Form of Congressional Involvement The National War Powers Commission, chaired by former Secretaries of State James Baker and Warren Christopher, proposed a War Powers Consultative Act (WPCA). n141 Though its project was not aimed explicitly at the question of U.N. operations, the Commission set aside the question of constitutional war powers of the President and Congress that has bedeviled the War Powers Resolution, and replaced it with a structured consultative mechanism (the WPCA) designed to address domestic political concerns. n142 The framework of the WPCA may be a useful starting point for thinking about incorporating congressional consultation and participation into the President's actions at the Council, not only for domestic legitimacy [\*450] purposes, but also for purposes of international institutional legitimacy. By setting aside the contentious constitutional law questions, the Commission usefully positions its own proposal as a political arrangement aimed at broader political participation and accountability. It is useful to think about congressional participation in use of force decisions as politically desirable, rather than legally mandated, as the Commission recommends. n143 The proposal, however, falls short in that it specifically exempts short-term and limited operations - which would include many of the types of counterterrorism operations we are likely to see more of. n144 The proposed WPCA includes a requirement for congressional consultation for large-scale military commitments, and notes that "in cases of lesser conflicts - e.g., limited actions to defend U.S. embassies abroad, reprisals against terrorist groups, and covert operations - such advance consultation is not required, but is strongly encouraged." n145 Adding to this proposal specific language in support of multilateralism and requiring prior consultation in the case of all U.N. operations - including smaller scale operations - would create the kind of formal statutory mechanism which could achieve the goals of more effective domestic accountability.

#### War powers authority is key—expressing support isn't enough—only prior legislative involvement makes UN action effective

Berman, et al, 09 [REP. HOWARD L. BERMAN HOLDS A HEARING ON THE RECOMMENDATIONS OF THE NATIONAL WAR POWERS COMMISSION Date: March 05, 2009 Location: WASHINGTON, D.C. Committee: Committee on Foreign Affairs. House Permalink: <HTTP://congressional.proquest.com.proxy.lib.umich.edu/congressional/docview/t65.d40.c3f69998000086dc?accountid=14667> Speaker REP. HOWARD L. BERMAN, CHAIRMAN Terms Subjects: War HOUSE; HRG; POWERS Body HOUSE COMMITTEE ON FOREIGN AFFAIRS HOLDS A HEARING ON THE RECOMMENDATIONS OF THE NATIONAL WAR POWERS COMMISSION MARCH 5, 2009]

And while the war powers resolution specifically directs the president to consult in every possible instance prior to introducing U.S. troops into harm's way, there have been numerous instances of U.S. military action where there has been no prior meaningful consultation with Congress, sometimes with calls coming while planes were in the air. Examples include the invasions of Granada in 1983 and Panama in 1989. Then the president believed he could deploy forces for short periods of time without adhering to the resolution's consultative requirements. Similar cases occurred with Somalia in 1992 and Haiti in 1994. To be fair, presidents have sought at various times the collective judgment and backing of Congress prior to significant armed conflict, in part in response to congressional efforts to return to a more faithful adherence to the Constitution's division of war powers. Major combat operations, including the Gulf War of 1991, the conflict in Afghanistan in 2001 and the 2003 Iraq War were all the subject of congressional debate and a vote by both the House and Senate resulting in an authorization to use U.S. armed forces. The conflict in Kosovo was also subject to congressional votes, albeit conflicting ones and usually negative ones on the opposite sides of the same issue, in fact. And the House voted to limit U.S. military involvement in Central America during the Reagan administration, which led to a scaling back of American intervention in the region. But to the extent presidents have negotiated around the war powers resolution or not consulted Congress at all, the resolution has not fulfilled its original purpose. It essentially remains a well- intentioned yet toothless mechanism to force consultations and if necessary, withdrawal of U.S. armed forces should Congress not approve of their deployment within 60 days. Indeed, presidents, scholars and even some members of this body continue to dismiss the resolution as unconstitutional and unworkable. I became particularly seized with the war powers question during Secretary Baker's term as secretary of the Treasury when President Reagan authorized U.S. war ships to defend reflagged Kuwait tankers in the Gulf during the Iran/Iraq War. We could never quite get the administration to admit that these war ships had been deployed into hostilities and were subject to the war powers resolution. In close cooperation with my respected former colleagues, Dante Fissell (ph) and Lee Hamilton, several of us undertook an effort to rewrite the war powers resolution and invite the president to seek prior authorization for military action. The thrust of that legislation for 1988, H.J. Res. 675, was to require the president to consult with the permative (ph) consultative group consisting of congressional leadership and some members chosen by the Democratic Caucus in the Republican conference of the House and Senate. It effectively preempted claims by the administration that consultation was unnecessary or improvident. I welcome a rekindling of this debate through the commendable work of the National War Powers Commission chaired by Secretaries Baker and Christopher, which believes Congress should repeal the war powers resolution. In its place the commission has recommended a consultative mechanism and a procedure for Congress to take the measure of support for the president's military actions. If such deployment does not command military support, majority support, then any member of Congress may propose a joint resolution of disapproval that would require an end to the military involvement with such resolution being subject to expedited procedures. A resolution, of course, would be subject to a veto, which would have to be overcome by a two-thirds majority. I'm not sure if the proposed legislation would sufficiently balance the authorities between the executive and legislative branches. However, I am certain that the proposed draft is a real and substantial improvement over the existing law. I'm gratified the commission has made this contribution to the war powers debate. And I can think of no better witnesses to address the critical issue of how to make the decision to go to war. I am now happy to yield to the distinguished ranking member for her opening statement. ROS-LEHTINEN: Thank you so much, Mr. Chairman. And I also join you in welcoming our most distinguished witnesses this morning. I'm grateful for the time invested by our great secretaries of State, Mr. Baker and Mr. Christopher as well as our former chairman and dear friend of this committee, Lee Hamilton as well as all of their colleagues on the commission. Their insight and their expertise are highly welcomed. The life and death issue, as you pointed out, Mr. Chairman, of committing our armed forces to combat is one of the most solemn responsibilities of our federal government, a responsibility that has only become even more complex since the deplorable attacks on our nation on 9/11. The Constitution vests the Congress with the power to declare war and to raise and support armies while making the president the commander in chief of the armed forces. The proper exercise in the interrelation of these war-making powers has been a source of historical ambiguity and tension, which some see as healthy and others as dangerous. The war powers resolution, an attempt at congressional corrective, was passed over President Nixon's veto in 1973, but has not produced a settled consensus. In this context, it would be useful to hear from our witnesses -- excuse me -- about the details of their proposed replacement for the war powers resolution, which they have titled the War Powers Consultation Act. I'm interested in learning why they believe it represents an improvement over the current war powers resolution and how we would operate in current circumstances. Congress always possesses the constitutional authority to cut all funding for U.S. participation in any particular conflict. But where no such consensus exists, our servicemen and women deserve our full support, including political support for their mission and their sacrifices. The commission has attempted to address some of these issues by offering a proposal to serve as the starting point for possible legislative action. I ask our witnesses to provide us with additional insight on how they intend their proposal to operate on several issues. First, I would be interested in understanding their decision to shift the statuary (ph) consequences of congressional inaction where the war powers resolution requires congressional approval for the president to continue U.S. troop commitment beyond 60 days. Although it has been -- it has not been enforced in practice. The proposed Constitution Act, Consultation Act would allow such deployment to continue in the absence of congressional disapproval. Second, their definition of significant armed conflict specifically excludes a number of circumstances such as actions to repel or prevent imminent attacks, limited acts of reprisals against terrorists, acts to prevent criminal activity abroad and covert operations, among others. Given the generality of these exceptions and the ingenuity of the executive branch, I would like to understand better how this new definition would improve rather than intensify the conflicting interpretations on authorities that have arisen under the war powers resolution. Third, the commission's proposal would create a standing committee, the Joint Congressional Consultation Committee, JCCC, as the focus for enhanced congressional executive consultation. Aside from the question of whether Congress can constitutionally require the president to consult before exercising his authorities, how do you see this joint congressional committee fundamentally improving preconflict resolution and consultation? And again, I want to thank Secretaries Baker and Christopher and former Chairman Hamilton for their work on this report, the National War Powers Commission Report, which represents a fitting continuation of their distinguished careers in public service. So thank you, gentlemen, for being with us here today. Thank you, Mr. Chairman. BERMAN: Thank you very much, Ms. Ros-Lehtinen. And we have excellent witnesses. Does any member want to overcome the natural barrier to seeking one minute for initial comments? PAYNE: Well, I don't... BERMAN: The gentleman from New Jersey, Mr. Payne, is recognized for one minute. PAYNE: Thank you very much. I just would like to also welcome our two great secretaries, former secretaries of State. I had the privilege to serve under both of them and, of course, our chairman, Lee Hamilton. I think that it is certainly fitting that we try to come up with a resolution to this question. I mean, ever since the Bay of Tonkin resolution, we have gone into December 7th, I guess, or December 8th in 1941 was the last time we really declared war, I suppose. But since then we've been into Granada and Panama. We've been into Haiti and went to Liberia, was in Somalia, been to Bosnia and Sudan, have gone, of course, to Iraq. Some want to go to Iran, North Korea. So I do think that at some point in time we need to have a clarification of the duties. And I commend the committee for the war powers commission, such distinguished persons. I hope that we can come to grips with the resolution. And with that, my time is expired. BERMAN: The time of the gentleman is expired. On behalf of the institution, I would say you served with the two secretaries, not under the two secretaries. The gentleman from New Jersey, Mr. Smith, is recognized for one minute. SMITH: Mr. Chairman, thank you. Let me just say very briefly that our three witnesses are extraordinary, wise and experienced men, all of whom have profoundly and positively shaped foreign policy during some of this nation's most challenging years. The War Powers Act clearly has failed to provide any meaningful framework for the president or for the Congress to deal with the profound issues of war and taking a country to war. I think this commission's report that I have read cover to cover, like, I'm sure, every member of this committee has, provides a very, very meaningful blueprint for action. And I think, you know, having Mr. Hamilton, our former chairman, who I served with as well, as a very eminent member of this commission bodes well. He not only heads the 9/11 commission, which he and Tom Kane so ably chaired, made a difference. Most of the recommendations, almost every one of the recommendations they made, either through administrative action or by congressional action, has been put into policy and into law. I think this is a starting gate for Congress. And hopefully we come out of the blocks and take very seriously your recommendations. And I thank you. BERMAN: The time of the gentleman is expired. We served under Chairman Hamilton. We served with the secretaries. The gentleman from Massachusetts is recognized for one minute. DELAHUNT: Thank you, Mr. Chairman. Thank you, Mr. Chairman. As you're aware, chairing the Committee on Oversight, I conducted a number of hearings on the same issues. And I applaud you for taking it to the full committee. And I want to express my gratitude to all three gentlemen in taking on what is clearly an issue that deserves serious consideration and is not susceptible to easy resolution. I'm particularly pleased that you've taken the concept of consultation and elevated it. I think that is absolutely essential to a thoughtful decision. I'm reminded of the quote by Senator Hagel during the course of the debate on Iraq where he claimed that the Bush administration considered Congress as a constitutional nuisance in terms of that particular conflict. I dare say that has occurred previous to the Bush administration as well, both with Democratic and Republican presidents. However, I -- am I done? BERMAN: You can finish the sentence. DELAHUNT: I'll make it a very -- I won't -- I'll either make it a very long sentence or I'll stop. I'll stop. I thank the gentleman. BERMAN: The time of the gentleman has expired. The gentleman from Texas, Mr. Paul? PAUL: Thank you, Mr. Chairman. And welcome, panel. I do appreciate the chairman bringing this very important issue before us because it's something that I have been talking about for a long time. And I think it's crucial. And I agree that the war powers resolution has not functioned very well. And a lot of people have argued that it is unconstitutional. Of course, the president's have argued it was unconstitutional because they wanted more power and more leeway. And others such as myself have argued that it has given the president too much power, actually legalized war for 90 days. And it's very difficult to get out of a war once it gets started. Since World War II we have had essentially perpetual war with no significant congressional approval in that there's never been a declaration of war. There's a lot of ambiguity. But, quite frankly, I think the ambiguity comes from the fact that we don't follow precisely -- which is very clearly stated in the Constitution. You can't go to war unless the war is declared. And we'd be a lot better off if we just followed that mandate. BERMAN: The time of the gentleman is expired. The gentleman from Georgia, Mr. Scott, is recognized for one minute. SCOTT: Thank you very much, Mr. Chairman. I, too, want to commend you all for coming before us and doing this extraordinary work. There's no more important work than what we do to make decisions before we send our young men and women into harm's way. But just one point -- this legislation calls for a congressional vote approving military action 30 days after its start. If Congress does not approve of the military action, it can submit a resolution expressing its disapproval. My point is submitting a disapproval resolution seems unnecessary when Congress can simply practice the constitutional rights and deny funding. So the question is why is there a need for this additional measure is the point we want to make. Thank you. BERMAN: The time of the gentleman is expired. The gentleman from Missouri, Mr. Carnahan, is recognized for one minute. CARNAHAN: Thank you, Mr. Chairman. A quick thanks to the members of the commission for this work. I think it's long-overdue, also to Subcommittee Chairman Delahunt for the hearings we had in his subcommittee last Congress and to the chairman for bringing this up. It's an issue like me and my colleagues, I believe, needs to be reexamined and revisited in ways that are constitutional and practical. I can't begin this debate without mentioning my friend, the late Missouri Senator Tom Eagleton, who was one of the original champions at preserving the war powers with the popularly elected Congress. While he ultimately voted against the final committee report because he viewed it as too watered down, his work and subsequent attempts to strengthen the war powers resolution left an indelible mark on the debate surrounding Congress' role in war. Senator Eagleton also sought to prevent an end run around congressional authorization by the executive branch by seeking to prevent the president from using treaties and other authorities as bases for going to war. So I'm anxious to hear the panel talk about that today. Thank you, Mr. Chairman. BERMAN: The time of the gentleman has expired. The gentleman from Indiana, Mr. Burton? BURTON: Mr. Chairman, it's nice to have these three great people here, especially Lee Hamilton from Indiana. We have that Hoosier intelligence at the desk, and we really appreciate that. You know, there have been times when presidents have gone beyond their authorities such as Lincoln and Jackson. And what I want to find out today is how we deal with those gray areas because there are gray areas. And so, if you could illuminate those areas, I'd really appreciate it. BERMAN: The time of the gentleman has expired. The gentleman from California, Mr. Rohrabacher, is recognized for one minute. ROHRABACHER: Thank you very much, Mr. Chairman. Let me note I have served under two of our witnesses today, not only Chairman Hamilton, but also under Mr. Baker, who was the chief of staff at the White House when I worked at the White House. But I have listened a great deal to Mr. Christopher. I don't usually listen to people who I'm working under. So... BERMAN: We've noticed. ROHRABACHER: All right. No, but let me just note both of them were fine bosses and contributed a lot to my understanding of how the war works. And I appreciate the guidance from both of them in my career and look forward to this testimony. Let me just say very quickly I don't think we need a change in the law. We need to have Congress have courage enough to use the powers that we already have to balance off the authority of the president in this very important area in terms of war fighting and committing of our troops. As far as I'm concerned, Congress has been gutless and unwilling to exercise the power it already has. Why change the law when we aren't even exercising the authority we've got? Thank you. BERMAN: The time (inaudible) for one minute. (UNKNOWN): Thank you, Mr. Chairman. Thank you, Mr. Chairman. And thank you for holding these hearings. Article 1, Section 8 of the Constitution explicitly grants the legislative branch the exclusive power to declare war. Article 2, Section 2 declares the president shall be the commander in chief with respect to carrying out the exercise of such powers declared by the Congress. In no way did the founding fathers envision vesting the power to declare war with the president. In fact, they were fleeing from that very model of government. Yet for the past half-century, this body has abrogated its responsibility and watched an all too willing executive branch to step in to fill the void. To wit, the last formal declaration of war made by this Congress was World War II. But we have repeatedly sent and currently have troops deployed at war. Today we're seven years into the largest kinetic U.S. military engagement since the Revolutionary War predicated on a flimsy congressional authorization and a string of exaggerated intelligence from the executive. Since it was enacted in 1973, no president has ceded the argument that the war powers resolution was necessary, let alone constitutional. And I think they're right. I think Congress needs to step up to its responsibility. And I think we need to have this kind of dialogue about what are the proper roles of the legislative and executive. BERMAN: The time of the gentleman... CONNOLLY: Thank you. And if I may, Mr. Chairman, simply acknowledge the former governor of Virginia, Gerry Baliles, who is here today. BERMAN: Yes. CONNOLLY: We're very pleased to have him. BERMAN: Do any other members of the committee seek recognition? The gentlelady from California, Ambassador Watson? WATSON: Thank you so much, Mr. Chairman, for this hearing. And (inaudible) from the war in Iraq the discourse between Congress and the president must begin at the armed set, a significant armed conflict. Looking back in retrospect, the war powers resolution of 1973 does not provide a needed forum. It is unclear that adopting the proposed war powers resolution of 2009 will encourage the president to begin the necessary discussion and truly consult with Congress and the people. But it's a start to making necessary changes on how our country enters significant armed conflict. So I look forward to the testimony. And I welcome our expert witnesses. Thank you. BERMAN: The time of the gentlelady is expired. The gentlelady from California, Ms. Lee, is recognized for one minute. LEE: Thank you, Mr. Chairman. And I, too, want to thank you and recognize all of you for all of the service that you have provided to our country and so glad that you're here today and we've come to this point. My predecessor, Ron Dellums was very involved in issues around War Powers Act. And I've been deeply involved in them also as a result of being on his staff and now as a member. And there are several issues that I hope the commission was able to address some of these issues. One is, of course, the president has the authority to use force to prevent imminent attacks on the United States. So I want to find out how the commission -- or did the commission address the authorization or an authorization to use force as a preemptive strike to prevent future military attacks, just how that would proceed within your recommendations of the War Powers Act revision. Also I'm one who believes that only Congress can declare war. I still believe that. And I don't believe we have the authority to provide the authority to the president to do whatever. And so, let me just ask you if you could address how the authorization to use force versus a declaration of war fits in. BERMAN: The time of the gentlelady has expired. LEE: Thank you very much. BERMAN: And if there is no one else seeking recognition, I will now turn to our witness panel for whom no introduction is really necessary. But I'll give one anyway. James A. Baker III, served as the 61st secretary of State under President George H.W. Bush from 1989 to 1992 and as President Bush's White House chief of staff from 1992 to 1993. Mr. Baker, a 1991 recipient of the presidential medal of freedom, served during President Ronald Reagan's administration as chief of staff from 1981 to 1985 and as secretary of the Treasury from 1985 1988. Mr. Baker is the honorary chairman of the James A. Baker III Institute for Public Policy at Rice University and senior partner at the law firm Baker Botts. Mr. Baker and former U.S. Congressman Lee Hamilton served as co-chairs of the Iraq study group in 2006. And Mr. Baker and former President Jimmy Carter served as co-chairs of the Commission on Federal Election Reform in 2005. Warren Christopher served as the 63rd secretary of State under President William J. Clinton from 1993 to 1997. He served as the deputy attorney general of the United States from 1967 to 1969 and as the deputy secretary of State of the United States from 1997 (sic) to 1981. A 1981 recipient of the presidential medal of freedom, Mr. Christopher is senior partner at the law firm of O'Melveny & Myers where he was chairman from 1982 to 1992. In order not to look parochial, I will not specifically refer to the number of major contributions he's made to the Los Angeles community in a whole variety of areas and, of course, now lives there. Lee Hamilton is president and director of the Woodrow Wilson International Center for Scholars and a director of the Center on Congress at Indiana University. Lee Hamilton served for 34 years in Congress representing Indiana's 9th District from January 1965 to January 1999. During his tenure, he served as chairman and ranking member of this committee. He also chaired the Subcommittee on Europe and the Middle East from the early 1970s until 1993 along with at least four other committees during his congressional tenure. Since leaving the House, Hamilton has served on every major commission on national security, including a stint as vice-chair of the National Commission on Terrorist Attacks Upon the United States, known as the 9/11 commission, and co-chair of the Iraq study group. Congressman Hamilton, thank you very much for returning to the committee. I understand you will not be giving an opening statement, but you will be available to answer questions. And I want to, as Gerry Connolly did, recognize the director of the Miller Center, which produced, sponsored this commission, the former governor of Virginia Gerald Baliles and performed a valued role as an adviser to the commission. Without objection, the executive summary of the national commission's report and the proposed legislation offered by the commission shall be inserted into the record. And, Mr. Baker, I call upon you to proceed with your opening statement. BAKER: Thank you, sir. Chairman Berman, Ranking Member Ros- Lehtinen... BERMAN: The microphone. BAKER: Thank you, sir, very much. Chairman Berman and Ranking Member Ros-Lehtinen, members of the committee, it is a real honor for us to be with you today. We are here, of course, to discuss the report of the National War Powers Commission, which Secretary Christopher and I co-chaired and on which your esteemed and very distinguished former Chairman Lee Hamilton served as a very valuable member. We're quite fortunate, as you've noted, Mr. Chairman, that Chairman Hamilton is with us here this morning. Let me begin with a bit of background on the commission and the serious problem that it was formed to deal with. And then Secretary Christopher will detail our proposed new legislation. Two years ago, Chris and I were approached by the Miller Center at the University of Virginia. And as you've noted, Mr. Chairman, the director of that very fine center, the distinguished former governor of Virginia, Gerald Baliles, is with us today. And we were asked at that time to co-chair an independent but bipartisan commission to consider an issue that has bedeviled legal experts and government officials since the very day our Constitution was framed. And that is, of course, the question of how our nation makes the decision to go to war. As we know, our Constitution gives the president the powers of commander in chief. The Congress has, of course, the power of the purse and the power to declare war. But history indicates that presidents and Congresses have often disagreed about their respective roles in the decision to go to war. And the Supreme Court has shied away from settling the constitutional issue. So it was evident to us that if we were going to recommend anything meaningful, it had to be some practical or pragmatic solution to this conundrum. As we put together the commission, we thought it was important to have a wide range of perspectives and voices. And so, our commission includes legal experts, former congressional members, former White House staffers and former military leaders. Our 12-member commission is equal part Democrats and Republicans. After 14 months of study, Mr. Chairman, we concluded that the central law governing this critical decision, the war powers resolution of '73, is ineffective. It's unworkable, and it should be repealed and replaced with a better law. The 1973's resolution's greatest fault is that most legal experts consider it unconstitutional. Although I think it's important to note that the Supreme Court has never ruled on it. We believe that the rule of law, which, of course, I'm sure everybody in this room would agree is a centerpiece of American democracy, is undermined and is damaged when the main statute in this vital policy area is regularly questioned or ignored. The war powers resolution of '73 has other problems. It calls for the president to file reports of armed conflicts and then use these filings to trigger the obligation for the president to remove troops within 60 or 90 days if Congress has not affirmatively approved the military action. This, of course, purports to allow Congress to halt military campaigns simply by inaction. Unsurprisingly, not one president, Democrat or Republican, has filed reports in a way that would trigger the obligation to withdraw forces. As a result, the 1973 statute has been honored more in the breach than in the observance. Recognizing this, others have suggested amending or replacing that flawed '73 law. But no such proposal has gotten very far typically because most of them have sided too heavily either with the Congress or with the president. A common theme, however, runs through all of these efforts. And that common theme is the importance of meaningful consultation between the president and the Congress before the nation is committed to war. And our proposed statute would do exactly that. It would promote, in fact, mandate meaningful discussion between the president and Congress when America's sons and daughters are to be sent into harm's way. But, Mr. Chairman, it does so in a way that does not in any way limit or prejudice either the executive branch's right or the Congress' right or ability to assert their respective constitutional war powers. Neither branch is prejudiced by what we are proposing. And, in fact, our statute expressly preserves each branch's constitutional arguments. In fact, we think that both branches -- and we know the American people -- would benefit from an enactment of this statute. Mr. Chairman, our report is unanimous. That is somewhat remarkable, given the different political philosophies on the part of the members of our commission. I would submit to you that there is something good about a solution we suggest when you can get people from differing political perspectives like Judge Abner Mikva and former Attorney General Edwin Meese to agree on the solution. But both of these gentlemen served very ably on our commission, and both of them support this result. Before I turn the microphone over to Secretary Christopher, let me simply say how rewarding it has been for me personally to work with this fine gentleman and this able statesman and this dedicated public servant. A truly great American, Secretary Christopher. BERMAN: Thank you very much, Secretary Baker. Secretary Christopher, we look forward to your testimony. CHRISTOPHER: Chairman and Ranking Member, members of the committee, my testimony will follow briefly on Secretary Baker's testimony. Without going on about it, let me just say it's a lot more fun to be working with Secretary Baker than working against him. He's really an extraordinary American leader. The statement that I have will be brief. Let me just say that the statute that we're putting forward is quite straightforward and almost simple. It establishes a bipartisan joint congressional consultation committee consisting of the leaders of the House and the chair of the key committees. Under the proposed statute, the committee is provided with a permanent professional staff and access to relevant intelligence information. And this is an innovation which we think the Congress ought to pretty much welcome. The statute requires, as the chairman has said, the president to consult with the committee before deploying U.S. troops into any significant armed conflict, which is defined as a combat operation lasting more than a week. Now, if secrecy precludes prior consultation at that time, the president is required to consult with the committee when three days after the conflict begins. Within 30 days after the conflict begins Congress is required to vote up or down on the resolution. If the resolution is defeated, any senator or representative may file a resolution of disapproval. Mr. Chairman, I recognize that many advocates of congressional power argue that Article 1, Section 8 of the Constitution joins -- puts the hands on -- this issue in the hands of Congress by giving the Congress the power to declare war. These proponents say that by this provision the framers of the Constitution stripped (ph) the executive branch of the power to commence war which the king of England enjoyed and which the framers wanted to avoid. On the other hand on the other side of the argument, proponents of presidential authority point to the executive power in the commander in chief clause of the Constitution. They say that the framers wanted to put the authority to make war in the hands of the government official who had the most efficient -- most ability to execute and the most information. And they point to the recent history of the president's predominance as proof of their position. Now, Mr. Chairman, a whole forest of trees has been felled in writings on both sides of the issue, pro and con. And although both sides have very good arguments to make, I would say only three propositions hold true. First, no consensus has emerged in the debate over the 200 years of our constitutional history. No one side or the other has, quote, "won" this argument. Second, only a constitutional amendment or a decisive Supreme Court opinion will dissolve that fundamental debate. And without extending this, neither one of those things is very likely to happen. Courts have turned down war powers cases filed by as many as 100 members of Congress. And third, Mr. Chairman, despite what I and my fellow commissioners might feel about this debate one way or the other, we determined that we simply can't resolve the debate. And the last thing we wanted to do was simply put down another report to paint an opinion as to who was right and wrong. Thus in drafting the statute before you we've deliberately decided not to try to resolve this underlying constitutional right debate and preserve the rights of both the Congress and the executive. Instead of trying to call balls and strikes, we can actually agree that any legislative reform must focus on practical steps to ensure the president and the Congress consult in a meaningful way before we go to war. We believe that among all available alternatives the proposed statute best accomplishes that result. We think it's a significant improvement over the 1973 resolution and that it will be good for the Congress, the president and the American people. We offend (ph) part of the Congress -- and I know I'm here in Congress today. The statute gives the Congress a more significant seat at the table when the Congress is thinking (ph) about whether or not the nation should go to war, provides not only a seat at the table, but a permanent staff and access to all relevant intelligence information. The statute also calls for genuine consultation, not just lip service, not just notification. Now, I strongly believe that the seasoned views of congressional leaders constitute a vital resource for the president in hisdecision making process**.** Having heard a number of these debates over the years, I can say I think it's very healthy for the president to hear independent views from people who don't work for him. The president, I think, is advantaged by this because this proposal would eliminate a law that every president since 1973 has regarded as unconstitutional but nevertheless has to worry about and is an overhang. This provides a mechanism so he knows who to consult with on Congress. He just doesn't have to guess. Mr. Chairman, working with former chairman of the committee, Lee Hamilton, here on my left, we've sought to set out a careful balance between the Congress and the president on matters like this of enormous importance. I'm sure that neither the strongest advocates of congressional power nor those of presidential power will be happy completely with our proposal. But we think that what we've done is a fair reflection of the right balance to strike. We think it's a practical and pragmatic reform. Thank you very much, Mr. Chairman. BERMAN: Thank you very much. Am I correct, Lee, that you have no opening statement? OK. Then I will yield myself five minutes to begin the questioning. And this is to any of you who would care to respond. And I have two questions. I'll throw them out both (ph) and remind my colleagues that the five minutes includes what I say and their answers. So pace yourself. Question number one, I mentioned this earlier. One thing that worries me about this is the extent to which this more formalized, institutionalized consultative process, which I find appealing -- does that become the basis for, at least on the occasions where the White House has asked the Congress for the authorization to use force -- sometimes we're thought of as the functional equivalent of a declaration of war. But others disagree. But will that reduce the incentive for the White House to do what at least on three occasions they have done, which is come, before hostilities started, to seek a direct vote by both Houses? The second question is as to the exceptions in terms of the time limits and the bases for not applying this process. And I raise the hypothetical question about a decision to hit nuclear installations in another country in order to prevent them from developing a nuclear weapon. The timeframe might be thought of in less than a week. But the consequences of that decision could lead to a conflict that go much longer than a week. To what extent do -- in a more general sense, to what extent do these exceptions threaten to swallow the general rule that your proposal makes? BAKER: Mr. Chairman, with respect to your first question, I don't believe that this would reduce the White House's inclination to come to the Congress for approval. In fact, I think it would increase it. As I think you pointed out in your opening statement, that has been the case over the last 50 years with the exceptions, I think, of Granada, Panama and Bosnia. The White House has actually come to the Congress for approval and gotten a vote of approval. But I think the reason presidents come to the Congress is because they need the political support that is gained by getting the approval of the representatives of the people. And by requiring extended and more intensive consultation in the first instance we think it would move that practice forward positively and not negatively. I don't think the fact that the president consulted would mean that he would be satisfied to go forward without trying to get Congress' approval. The presidents normally want Congress' approval for the political benefit that that brings, not because they think they need it because no president believes he or -- so far he -- absolutely needs it. So they come to the Congress for the political benefit that that brings. And I think they would continue to do so. I might take a quick shot at your second question. Then maybe Chris wants to add or... BERMAN: Only because of the time, maybe we ought to, on the second one... BAKER: Yes, get one person -- yes. Why don't you... BERMAN: Yes, because we only have another minute before I have to gavel myself down. CHRISTOPHER: Mr. Chairman, any hypothetical such as you put forward would have to be measured against the statute. And to be brief about it, any conflict that goes on longer than seven days requires the president to move forward and the Congress to vote up or down on that particular action. You can guess as well as others whether such a conflict to take out nuclear facilities might take longer than seven days. It probably will. But with respect to any such hypothetical, always suggest is it be laid down against the statute and see how the statute affects it. HAMILTON: Mr. Chairman, may I simply observe that every president confronts a really difficult judgment how to consult with the Congress. The Congress is a very large, very diffuse institution. One of the great advantages of the proposed statute is that it gives the president a mechanism, a focal point by which to consult. And I think any president would use that extensively. There is also a provision in this bill that encourages -- does not require -- that a president consult regularly with this consultative committee. I think that -- you can't impose consultation on anybody if they don't want to consult, I guess. But we try to encourage it here. And the result of these two things, in my view, would be you would develop an ongoing relationship between the president and the Congress on many questions of foreign policy, and particularly the one of going to war. BERMAN: My time is expired. The gentlelady from Florida? ROS-LEHTINEN: Thank you so much, Mr. Chairman. And thank you for the excellent testimony this morning. Following up on my opening remarks, your legislative proposal on page nine, section nine definition talks about the term significant armed conflicts, says it shall not include any commitment of the United States armed forces by the president for the following reasons, a, b, c, d and e, covert operations, training exercises, acts to prevent criminal activity, limited reprisals against terrorists. Couldn't a creative executive construe these exemptions very broadly to avoid the reporting and legislative requirements of the statute? And why do you expect that those ambiguities would be less problematic than the interpretive disputes that have arisen under the war powers resolution now? Thanks, gentlemen. BAKER: Not in my opinion, Congresswoman. I don't think -- I think that what we're calling for here is a certain amount of exercise of good faith on both sides. We're not going to resolve the constitutional question here, as we point out in our testimony. You can only do that by Supreme Court decision or a constitutional amendment. We're not going to get either one of those. But we do need to try to move toward greater cooperation and consultation. The exclusions that we have listed here all disappear if a conflict has extended for more than seven days. Nothing in here would be exempt after the conflict. Let's suppose a president took action to prevent an imminent attack on the United States. And if that extended for more than seven days, there would -- the obligation to consult would be triggered. And the obligation to periodically consult as the conflict went on would be triggered. And the obligation to file a report once a year listing all significant armed conflicts and other operations would be triggered. ROS-LEHTINEN: Thank you. Mr. Christopher or Mr. Hamilton? HAMILTON: Ms. Lehtinen, let me just observe that the exceptions to the significant armed conflict are really quite precise. And they are very limited in scope. And I do not think they create loopholes, if you would. Now, we'd have to acknowledge here that we spent as a commission an awful lot of time on the definition of significant armed conflict. Obviously, that's very hard to do. And we resolved it by defining it in terms of length of time, conflict lasting more than a week. But the exceptions that are made there are precise. They are ones clearly where you want the president to act on his executive authority. And they're quite limited. ROS-LEHTINEN: Mr. Christopher, if you wanted to comment? CHRISTOPHER: I just would point to Section 4-B, which... BERMAN: Push your microphone. CHRISTOPHER: Congresswoman, I just point to Section 4-B, which specifically provides that if any action goes on longer than seven days then it's subject to the provisions of the statute. And as Congressman Hamilton had just said, we worked a long time on that particular provision. And we think that this does give the president authority to act in emergency situations but constrains that authority by the seven-day rule. ROS-LEHTINEN: I still have a minute. So on this seven-day rule, the term significant armed conflict shall not include any commitment of the U.S. armed forces by the president for the following purposes. And that's not subject to the seven days. CHRISTOPHER: Yes, I think if you look at Section 4-B, Congresswoman, you'll see if any one of the actions described in Section 3-B, that's the -- of this act becomes a significant armed conflict as defined in Section 5-A, then the president shall initiate the consultation with the joint consultation committee. So that seven-day provision is an override on each of the exception provisions. ROS-LEHTINEN: Thanks. I think in my 20 seconds that are left -- we have different versions, obviously. But it's the definitions of the exemptions that I believe are just as open to controversy, to interpretation as the original act itself. Thank you very much, gentlemen. CHRISTOPHER: I'm very sorry, Congresswoman. I didn't realize you had a different numbering than we have here. BERMAN: Just to verify the substantive issue, you're saying number one, nine, one. The other sections are subject to nine, one. So if there is a combat operation lasting more than a week, it doesn't matter what kind of -- I think it was -- the consultation process triggers in. CHRISTOPHER (?): Chairman, that's correct. BERMAN: The gentleman from New Jersey, Mr. Payne, is recognized for five minutes. PAYNE: Thank you very much. I have a question. And it's been indicated in the testimony that the courts have failed to involve itself, the judiciary, in the question of who has the authority, whether it's the executive branch totally or whether it's the Congress. And I guess my question is that I said in the past courts have declined jurisdiction for deciding whether the president violated the war powers resolution by entering into hostilities without congressional authorization. If a member of Congress, in your opinion, were to file suit against the president for violating the War Powers Consultation Act of 2009, the one that we have before us, would, in your opinion, a court be more likely to accept jurisdiction for deciding the merit of the case? I'll start with you, Mr. Baker. BAKER: That's a great question. That's a great question. And you may get differences of opinion among the lawyers here at this witness table. I don't know what Secretary Christopher's view is. My view is no, they wouldn't be any more likely to. I think they would still consider it to be a political issue that they might try to decline to take jurisdiction of. But you would have, you would have a much more clearer situation, I think, than in the case of a statute the constitutionality of which is generally widely questioned. CHRISTOPHER: Congressman, never predict what the Supreme Court is going to do for sure. But there are dozens of instances, and more than 100 members of Congress have sought to invoke the jurisdiction of the Supreme Court of the United States. And for one reason or another, usually because they called it a political question, often because they say the plaintiff does not have standing to sue, the court has declined to get into that. I think it wants to stay away from that issue on political grounds. PAYNE: Yes. HAMILTON: Mr. Payne, we had a battery of lawyers advise us on this question. And I think it is total unanimity among the lawyers. And as the two secretaries have stated, the courts have just stayed away from this and do not think it's an appropriate role for the courts to get into this most political of all questions, do you go to war. PAYNE: Well, thank you very much. As you said (ph) there, two lawyers in the room at least have two opinions. But... BAKER: Well, at least we all agreed on this, Congressman. PAYNE: Yes. Thank you. I yield back, Mr. Chairman. BERMAN: Of course, there was a -- that used to be the rule about redistricting. Then Baker vs. Carr came along, and all of a sudden, the political question wasn't a political question. You weren't the Baker, though, I don't think. BAKER: No. BERMAN: The gentleman from New Jersey, Mr. Smith, is recognized for five minutes. SMITH: Thank you very much, Mr. Chairman. Let me just say the draft that we have, I think, underscores some of the concerns the ranking member made. I would hope that if we talked about significant armed conflict, it would stop and not have exclusions except in the most egregious manners because the legislation we have suggests that to prevent imminent attacks, limited acts of reprisal against terrorism, terrorists and states -- I mean, that's exactly, in a way, without a doubt, what got us into the Iraqi war, and then covert operations. So it seems as if the exclusions page on our draft just makes it so that just about anything from an elasticity point of view could be included in that. So we've got to be very careful how we draft it. Let me ask -- because I was going to ask about that, but I thank the ranking member for making that very important point. Let me just ask about the joint committee, the makeup. I served as chairman of the Veterans Affairs Committee. And I often thought of that committee as the consequences committee having spent so many years working with service cadets and disabled veterans. Was there any discussion -- I know you drew your ideas from prior proposals. But would it be advisable to include the Veterans Committee chairman and ranking member? No one knows the burden of war than a veteran, especially a disabled veteran. And certainly their representatives on that committee would have a very unique perspective. The talk of consultation with the joint congressional committee and the conveyance of a classified report setting forth the circumstances necessitating the significant armed conflict, the objectives and the estimated scope and duration of the conflict before ordering the deployment of U.S. armed forces into significant armed conflict is, in my opinion, necessary, prudent and will make potentially reckless deployments less likely. It may also enhance the sustainability, especially over the long run, of a deployment. But the concern is that the secrecy part, which can be exercised by the president, and you recognize that in Section 5-A, could render the consultation and reporting provisions before an action moot. Every president thinks -- and I say this with respect -- they know best. And Congress might be left out. And that language then becomes almost sent (ph) to the Congress. What's your thought on that? BAKER: Do you want to take that, Chris? CHRISTOPHER: I'll respond to the first part of your question. I think we wanted to keep the consultation committee relatively simply, relatively narrow. But that would certainly be an issue that Congress could decide if it wanted to add the chairman and co-chairman of another -- chairman and ranking member of another committee, that could certainly be done. That would simply be something that would be up to Congress. On the other question, I think we considered very carefully the provisions. And we've gone about as far as, I think, we can properly go in limiting the scope of the consultation. SMITH: Secretary Baker? BAKER: Are you concerned that -- is your concern... SMITH: I'm concerned that everything -- the chief executive or commander in chief might construe everything to be secret and then after the fact, we get the information, and then if these exclusions on the definitions page were to be enacted in the way our draft has it, just about everything -- you could fit everything into that exclusion. And we will then have had a very well-meaning but ineffective legislation. BAKER: I think there's still some difference of view on that last question. First of all on the secrecy issue... SMITH: Yes. BAKER: Yes, any president, particularly one that wanted to act in bad faith, could keep everything secret from you for three days, well, for three days, but no more than that. OK? But I think we have to assume here since we're talking about trying to encourage cooperation and consultation that there'll be a modicum of good faith on both sides with dealing with this difficult issue. With respect to the exclusions, I think we tried to make clear -- and I believe this is correct -- that after seven days you've got to consult, that covert action is exempted completely because there are other processes, procedures and statutes that govern that. But I believe that it's correct to say that after an engagement has gone on for seven days, even if it's one of these -- if they were undertaken as one of the exclusion items, then the obligation to consult would take place and the statute would be triggered. Now, that's my view. HAMILTON: Mr. Smith, obviously there are limitations to language here. And it's very, very difficult to try to foresee the kind of events the president and the Congress would be confronted with. I don't know that we've got this language exactly right, but it does seem to me that there are going to be a number of instances -- and we've identified, I think, most of them where presidents must act quickly in emergency situations. And you don't want to invoke the process that we have here in this statute. So we were trying to balance here the role of the Congress on conflict, on the one hand, and the role of the commander in chief to act quickly in defense of the nation. And I think we've done a reasonably good job of it, but obviously it's not the easiest thing to write into statute. SMITH: Secretary Baker, did you want to... BERMAN: Actually... SMITH: Am I out of time? BAKER: No, you're a minute done. I got so interested in your question that I -- the time of the gentleman has expired. The gentleman from Massachusetts, Mr. Delahunt? DELAHUNT: Thank you, Mr. Chairman. And again, let me repeat. I think encouraging consultation is profoundly important and very well might obviate much of the tension and the conflict between the executive and the legislative branches. But I would put forth that meaningful consultation, even if it is genuine and done in good faith -- and presumably it does -- in the end does not give the president the power to engage in military action and without the approval or authorization of Congress. I take that view. And myself and my colleague from North Carolina, Mr. Jones -- we'll be introducing legislation before the end of the month that embraces consultation but obviously takes a different course in terms of Congress' role. And I agree with the gentleman who spoke earlier, my ranking member, Mr. Rohrabacher, is that the avoidance of the congressional burden of authorization of military action in a large degree is responsible for this debate and for this tension, for this conflict. And I believe that the course that we're on now is dangerous in the sense that Congress, not the executive, continues to allow the erosion of what is our obligation. I don't know if -- and let me just also note that you refer to the funding mechanism as a way for Congress to assert itself. I don't accept that because I don't think it's always post facto. It's after the initiation of military action. And again, going back and reading, at least my reading of the Constitution is that some sort of authorization is required. And we can't just simply look for rationales to avoid our burden. And again, I think the consultative mechanism will help. And I think it's important. And I think it should be enthusiastically embraced by this committee. But I don't know if any of you had the opportunity to note this morning's -- I think it was in the Washington Post -- opinion piece by George Will relative to the Iraq War. And it's entitled, I think, "Congress Shares the Burden." And with the expiration of the U.N. mandate, I would submit that there is no authority, no authorization for American military to conduct offensive combat action. And again, that was the position that was articulated by both the president, by the secretary of State and by the vice president prior to the election. And unless we accept or confer or embrace the so-called -- it's called a status of forces agreement, which I believe it's not -- and take some action, we will continue to allow the erosion of the congressional responsibility to occur. And I just wonder if any of you have any comment on that observation, on the Will, George Will opinion piece. CHRISTOPHER: Mr. Delahunt, I did see Mr. Will's piece. But the point that you make -- it has struck me in the preliminary comments of several members of the committee. You made the point that Congress has been timid, that it's not been aggressive enough in asserting its constitutional powers and the like. And I think that view is widely shared among many members of Congress. I don't know if a majority, but widely shared. I think we believe what we have put forward is a very practical approach. And it certainly does not resolve the question that you're raising. You want to increase the power of the Congress with regard to this critical question of when you go to war. There have been many over a period of many years who have taken that position. And to be very candid about it, that viewpoint has not been able to get a law enacted. The reverse is also true. There have been many members of Congress who take the opposite view you do, and they want to increase executive power. And the argument has gone on, and it has not been resolved. And the proposal before you does not try to resolve that question. We punt on it, if you would. Our proposal avoids the constitutional debate. And it respects, I think, the constitutional powers of both branches. BERMAN: The time... CHRISTOPHER: We are dealing with a very practical problem. The president thinks we've got a national security threat out there. He thinks that armed service action is needed. And we're trying to make assure that you enhance the opinion available to the president before he makes that decision by going outside his official family and consulting members of Congress. BERMAN: The time... CHRISTOPHER: We think people can agree upon that and still take the position that you take, Mr. Delahunt. In other words, you could vote for this bill and still advocate your position. You would not be prejudicing your position at all. BERMAN: The time of the gentleman has definitely expired. And the gentleman from California, Mr. Rohrabacher, is recognized for five minutes. ROHRABACHER: Thank you very much, Mr. Chairman. Let me note that in 1999 when President Bill Clinton sent our military forces to battle Bosnia Serbs, the House of Representatives rejected authorization by a vote of 213 to 213. Then the House defeated a measure declaring a state of war between the United States and the Federal Republic of Yugoslavia. And then we defeated a measure directing the president to remove the U.S. armed forces from operations against the Federal Republic of Yugoslavia. And then both Houses of Congress agreed to an emergency supplemental appropriation to pay for it. I don't necessarily think that increasing the influence of people who now have demonstrated an inability to make a decision on this end of the government just improving consultation between us and the executive branch are going to make things better. I don't think it will necessarily create an harm. And I appreciate -- I will be reading your work. I have not done my homework, but I will be reading it thoroughly. And I thank you for spending the time and effort to focus on this relationship. Clearly, the Constitution gave the preponderance of power in terms of foreign policy and at least the carrying out of military operations to the executive branch. Do you believe that we need to in some way nudge that back? And believe me, I happen to believe that those people who are opposed to the Iraq War -- and we heard a lot of rhetoric about it -- never were willing to act on that. And that's, you know, -- so that's one of their pieces we're here today discussing this issue. But let me just get to the heart of the matter. Do you as wise men who are advising us -- would you suggest that we need to grant more authority in this way to give a little bit more, how to say, emphasis on the legislative branch's role in conducting military operations? Is that what we need to do? Is that what this is all about? BAKER: No, not at all, Congressman. And that's not what this act seeks to do. And that's not what this act does. There are benefits in this act, we think, for the executive branch and for the legislative branch. And what this act calls for is, frankly, what most presidents have done in most of the conflicts that we've been engaged in over the past 50 years. And we don't see this as granting more authority to one branch or the other. We see this as beneficial to both branches. There are benefits in here for each branch. And we think it would be beneficial as far as the general public is concerned because the testimony of 40 experts that came before us and the polling that -- if you look a the polling over the past 70 years, the American people when the question comes to war, they would like to think that the congressional and executive branches are on the same page. So they'd like to see this. All this does is enhance consultation. ROHRABACHER: Is that because there is a lack of -- there is an imbalance now and (inaudible)? BAKER: It's because it's not structured, number one. It's because this would tend, as Chairman Hamilton said, to build trust between the branches as that consultation took place. This specifies how presidents should consult. Right now you say consult with the Congress, presidents don't know -- you know, some presidents do it one way, and some do it another. This would tell you how to do it. And it would do it, by the way -- and I want to volunteer this for the chairman and the ranking member's benefit. It would do it in a way that locks in the jurisdiction of this committee, that does not take away any aspects of the jurisdiction of this committee. The resolution of approval called for in this legislation -- it specifically says -- would originate here in this committee and in Senate Foreign Relations. And so, it doesn't -- by setting up a consultative committee we are reflecting what presidents have done recently, most all the time in these cases of going to war with the leadership of the relevant committees and the leadership of the Congress. ROHRABACHER: Lee? HAMILTON: Well, if this bill... ROHRABACHER: In seconds. HAMILTON: Mr. Rohrabacher, if this bill becomes -- is perceived as tilting power, constitutional power to the Congress... ROHRABACHER: Yes. HAMILTON: Or if it is perceived the other way as tilting power to the executive branch, the bill is dead. It'll never pass because the other branch would resist so strongly. BAKER (?): It might pass, but it wouldn't become law. HAMILTON: What? BAKER (?): It might pass, but it wouldn't become law. HAMILTON: It would never become law is the better way to put it. ROHRABACHER: All of us need to exercise the authority that we've been given. We've been given... BERMAN: The time of the gentleman has expired. ROHRABACHER: Thank you. BERMAN: The gentleman from Missouri, Mr. Carnahan, is recognized for five minutes. CARNAHAN: Thank you, Mr. Chairman. I have two questions I'd like to present to the panel. First, presidents have used treaties and institutional authority such as the U.N. and NATO to avoid congressional authorization for going to war. Do the recommendations in the commission's report address this issue? And if so, how? And my second question -- what are the consequences if the president does not consult with the joint committee within three days after an emergency situation? And, frankly, what teeth are in this proposal that are absent from the current law? BAKER: Well, the... CHRISTOPHER: Mr. Chairman... BAKER: Go ahead, Chris. CHRISTOPHER: Congressman, on your first question, we dealt with that specifically in what in your discussion draft is called Section 7 on page eight saying the provision of this act shall not be affected by any treaty obligations of the United States. That means the president could not rely on a treaty in order to avoid the consultation provisions of this act. CARNAHAN: Thank you. BAKER: Now, with respect to what is the penalty, what is the sanction, it's diminished political support for a foreign engagement that the president might think is important to the national security of this country. Because if he doesn't comply with the law that's as plain and as clear as this and on the books, then he would suffer the political consequences of not doing so. We've already answered the question about whether we think the federal courts would grant jurisdiction of a dispute between a member of Congress and the president for his refusal to abide by the provision. But he would suffer, I think, substantial political damage. CHRISTOPHER: We believe, Congressman Carnahan, that you've got a win, win, win situation in this bill. We think the president will look favorably upon the bill because it frees his hand to address minor armed conflicts. It frees his hand to respond to emergencies. It provides him with specific people in Congress to consult with. Always a big question of who do I consult with in the executive branch. This answers the question for him and for the Congress. We think it's a win situation for the Congress because we empower the Congress to have a joint consultative committee fully staffed, bipartisan, fully resourced, available to classified information. It has a very clear mechanism for the Congress to vote up or down. And above everything else, it assures the Congress of the United States that it has a seat at the table when the decisions are being discussed. You don't always have that. You will be assured of it with this bill. It's a win for the American people. We went back 70 years, I believe, to look at poll results. And they show over and over and over again that the American people want this most serious of all questions to be a shared decision by members of Congress and, of course the executive branch. They do not want the decision of going to war to be made by one person, even if that person is the president. So we analyzed this statute, proposed statute as a win, win, win situation. BERMAN: Secretary Christopher? CHRISTOPHER: Mr. Chairman, I wonder if I could take a minute, not on anyone's time, to clarify the record. There has been quite a lot of confusion because the discussion draft that you have before you misstates the section. And the ranking member, I think, was on to this. If you look at page five where it refers in the middle of the page to Section 3-B, that should read Section A-2 -- sorry, Section 9 of Section 2. And the Section 3-A later in that should read Section 9, sub-paragraph 2. So that means that if there is a military action described in Section 3-B, that's the exception section, it becomes longer -- becomes a significant armed conflict that is longer than seven days, then the consultation provision provides (ph). And that will, I think, clarify the record and perhaps clarify some of the questions that have been raised. The exceptions in Section 9-2 are really subject to the consultation requirement if the conflict goes on longer than seven days. And thank you, Mr. Chairman, for the chance to clarify that. BAKER (?): If it morphs into a significant armed conflict, then the requirement to consultation (inaudible). BERMAN (?): Consultation trumps exceptions after seven days. CHRISTOPHER (?): Precisely. BAKER: OK. And there's a specific provision in the report that was misprinted in the committee print. BERMAN: The time of the gentleman has expired. We appreciate the clarification. The gentleman from Texas, Mr. Paul, is recognized for five minutes. PAUL: Thank you, Mr. Chairman. I hear three points that the panel has made that the war powers resolution has been ineffective. I agree with that. Should be repealed. I agree with that. The conclusion, though, I don't agree with that we need a new law. And I think that's where the real important part comes. When we, the Congress, passed the war powers resolution in the 1970s, it was motivated by the anti-war people thinking it would help. But the unintended consequence was disastrous. And not only the chaos that you described, but the fact that it legalized war for 90 days. That's what it did. It gave the power, greater power to the president, not less power to the president. And it took away this assumption that Congress has this responsibility to declare war. The panel says that they do not portend to resolve the constitutional issue, which is fine. That's not your job. And you reassure us that the courts seem to want to stay away, so we don't have to worry about the courts. But what we should worry about is our oath of office and our responsibilities here as congresspeople. And that to me is the ominous responsibility we have. But I am reassured by Mr. Baker's comment that if it tilts toward one branch of government maybe this thing won't get passed. And the way I interpret it it obviously does. And I will challenge the panel on this. And then they can answer my comments. And the reason I challenge this is first, the consultation isn't with the Congress. You pick out a few people, select people. And they're supposed to represent us. No, the responsibility for war is the Congress, not a select group. So the president starts a war. It lasts a week. He comes to this select committee, and they say, OK, it sounds like we'd better do it. Then after 30 days, we have this opportunity to vote. And then we vote that we disapprove of the war, and then we have to have another vote, a vote of disapproval. And so, we pass that. And then the president vetoes it. So what we're establishing here is the power of the president to pursue war with a select committee and then endorsed by the Congress with one- third of the Congress because he can veto this. I think this is going absolutely in the wrong direction. And I think Mr. Rohrabacher pointed out earlier it's mostly because we don't live up to our commitment. Once again, I think the panel makes the point that we do have the fallback. And the fallback is that we can deny funds. But then we're politically trapped. We never could do that in Korea or Vietnam. It goes on and on because then we get painted as un-American, we don't care about the troops. So once they get the upper hand, they can start the war, run the war, and a third of the Congress endorsed the war, get the people in harm's way. And then you said, you're un-American if you vote against this process. So I ask the panel show me why this is not tilting power to the executive branch and to a small group of congressmen rather than reestablishing the principle that in this country very precisely it was stated that the Congress declares war. This has no interference whatsoever for the president to act in emergencies. That is clear- cut. We know that, even before the war powers resolution. This doesn't change it. So why is it that -- why am I wrong in thinking that this is not tilting, that this is tilting toward the president and against the Congress? BAKER: I think you're wrong, Congressman, because if you don't do anything, you have the situation you're talking about. You're not going to, you're not going to have anything, and the presidents are going to do what they consider necessary to protect the national security of the country. And they have the power, they claim, under the Constitution to do that. And you're not going to be able to do anything about it. So you're better off, I think, we think, if you consult, if the two branches consult with each other rather than continuing to knock heads over who has the power, the ultimate power. Because we're not going to get an answer to that. PAUL: Of course, the Congress -- I put most of the blame on the Congress for being derelict in their responsibility. But if presidents just go out and start wars, sure the Congress has something to do with it. They shouldn't fund him. If it's necessary, they need to impeach the president. But this whole thing -- answer my question about one-third of the Congress. Actually, a third of the Congress and the president can pursue war. Is that not correct? BAKER: Well, you say that because the president has the right to veto bills presented to him under the presentment clause. That happens to be in the Constitution. If you don't like that, you can get a constitutional amendment passed that would delete that. PAUL: I don't... BAKER: I don't think you'll have any success. PAUL: I'm not arguing that point. I'm arguing whether or not I'm right that one-third of the Congress and the president can pursue war. That's the point. BAKER: No, you're not right because you have, under our legislation specifically, not only a right to vote, but a duty to vote with respect to it. And if it's voted down here in the Congress, you're just on the losing side. That's what that is. HAMILTON: Congressman Paul, may I... BERMAN: I'm really concerned that votes are going to come, and I want to get as many members as possible. So the five minutes has expired. And I apologize. It's a very interesting discussion. The gentleman from Georgia, Mr. Scott? SCOTT: Thank you very much, Mr. Chairman. And again, welcome to the committee. I wanted to kind of get to a point. I think we could get a better understanding if we try to get an applicable example here, especially within the area of what is a significant armed conflict. And I think that most immediate to us would be a decision coming affecting a terrorist attack, a reprisal to a terrorist attack or an attack from a nation that sponsors terrorists. Within your proposal, you are exempting limited acts of reprisal against terrorists or states that sponsor terrorism and not considering that as a significant armed conflict. So let's suppose if we said where would this fall. If, for example, we were to retaliate and had evidence that terrorists within the border on Pakistan and would involve the president making the decision to send armed forces into Pakistan. Where would that fall within your proposal as far as consultation? CHRISTOPHER: Congressman, if that response lasted longer than seven days, the consultation provisions would be required. If it would have simply lasted a day or two, that would be within the exemption. But the theory of our bill is that almost any action that was significant would be seven days or longer. And that would bring on the consultation provisions and thus invoke the whole series of things that follows on the consultations provisions. That is the vote up or down by the Congress. SCOTT: And so, that would trigger the president coming and meeting with the select committee. And now would you share with me, under your proposal, how are the members of this joint committee for consultation selected? CHRISTOPHER: They're selected in the statute by the leader of both the House and the Senate and the chairman and ranking member of the key committees, a group of about 20, the chairman and ranking member of this committee, chairman and ranking member of the Senate Foreign Relations Committee, the Armed Services Committee, the Intelligence Committee and so forth. So you get a group of congressional leaders previously designated so the president will know who he should consult with. SCOTT: Does the president have any input into before the selection is made as who is being considered? CHRISTOPHER: No, the selection is made deliberately by the legislation itself because in the past there's been a tendency of presidents, naturally enough, to consult with people who they think will agree with them. And this sets up a body that provides people from both parties and the key members of Congress on this particular issue. SCOTT: Now, in Section 5 of the legislation it calls for a congressional vote approving military action 30 days after its start. BERMAN: Mr. Scott, let me just interject one second. I am advised there was a timekeeper mistake. So you have about a minute or a minute and a quarter left, notwithstanding what the clock shows. SCOTT: OK. But thank you very much -- 30 days after its start. And if Congress does not approve of the military action, it could submit a resolution expressing its disapproval. My point is submitting a disapproval resolution seems unnecessary when Congress can simply practice its constitutional right and deny funding. So why is there a need for this additional measure? CHRISTOPHER: Well, Congress could certainly do that. SCOTT: I can't hear you, sir. I'm sorry. CHRISTOPHER: Mr. Scott, Congress could certainly do that. But we thought it was perhaps more propitious to require first a resolution of disapproval and then Congress can act within its internal rules to deny funding. Congress can deny funding at any point. But we thought from the standpoint of public impression that it's a better theory to have the Congress go ahead and exercise their power of disapproval. Hence the American people would know that Congress had not only failed to approve, but they had disapproved. Then you could move to deny the funding if that was the will of Congress. HAMILTON: Appropriation bills often take a little time to come before the Congress. This would require the Congress to act rather quickly. BERMAN: The time of the gentleman has expired. The gentleman from Indiana, Mr. Burton? We're going to try and take Mr. Burton and Ms. Lee. But I understand the witnesses have to leave by 12:15. Am I correct in that? You don't want to come back and spend the afternoon with us? OK. (UNKNOWN): (OFF-MIKE) BERMAN: Well, if that's the case, then they will be -- unfortunately, the hearing will -- we will have to adjourn after our next two questioners. Mr. Burton? BURTON: Mr. Chairman, I'm going to just ask one question because I don't want to -- I know you want to get as many people involved as possible. This all boils down to there's going to be consultation. But as far as teeth is concerned, the only real teeth in this is public opinion. BAKER (?): Right. BURTON: If the president is hell-bent to go ahead with a conflict, even though he has a strong disagreement with the Congress, he's going to be able to do it. And so, the constitutional authority he has is in no way impaired. BAKER: That's correct, Congressman. That's right. BURTON: OK, that's all I want to know. I wanted to make sure. Thank you. BERMAN: The gentlelady from California? LEE: Thank you very much, Mr. Chairman. Let me reiterate again my belief and understanding that based on Section 8, Article 1, the Congress has the authority to declare war. I've been listening to what you have said with regard to the constitutional issues. And that's not what this is about. It's unfortunate that the Supreme Court hasn't ruled because it almost makes this Constitution moot. But I still believe in it. And so, let me ask you how this would work if, in fact -- and I'm going to go dead to the resolution of September 14th that I could not vote for. The Congress authorized the president to use force. It was a blank check. All it said was resolution that said against any organization, individuals or country connected to 9/11 or that harbored those connected with 9/11. It was a total blank check, three days after the horrific events of 9/11. How would this kick in? Because at this point, at this point, would this body, this consultative process sit down and say, "Mr. President, what countries are you talking about? Mr. President, how long would this resolution, this authority to use force be in effect?" Would this body say, "Mr. President, would this be in this region only? Mr. President, would this allow for terror? Mr. President, would this body be able to define these blank checks that we've been given to the administration to use force?" Because I'm concerned about this resolution still being in play, quite frankly. BAKER: No, Congresswoman, it wouldn't. But the Congress, of course, could come forward any time it wants to and limit the scope of that prior resolution. Our proposed statute is forward-looking. It doesn't have application to anything that's happened before, except to the extent that something happens that is a -- that meets the definition of significant armed conflict. Then there would be an obligation on the president for the ongoing consultations that we call for. LEE: But not retroactive at all? BAKER: No, it's forward-looking. LEE: OK. But had this resolution been -- had your bill been the law on 9/14, how would that have worked with the consultation process? BAKER: Well, assuming if it had been, if it had been, if it had been in law then, assuming that -- I assume there would have been consultation, as we call for here, between the president and the Congress. And if you'd still passed that same resolution, that resolution would be effective, but the president would have to have continuing consultations with you as it was implemented. LEE: So if the president wanted to use that resolution to go into another country, any country, would the president have to say, "OK, Congress, this is where we're going now," in terms of the use of force and military action? HAMILTON: The president has to spell out the scope and what he thinks the duration of the conflict may be. LEE: And where? HAMILTON: I don't think we say where. I think we say scope and duration. It could be covered under scope, I suppose. I do want to comment, Ms. Lee, on one of your -- we've had cited to us several times today as if it's definitive that the power to declare war resolves the constitutional question. It does in the mind of a lot of people. But the other side of the argument is that the commander in chief phrase resolves the question for people on the other side of the issue. And they both take their positions with equal intensity. And that is an argument that has proceeded for over 200 years in this country. Now, as the secretaries testified, we've said we just couldn't solve this problem on the commission. We wanted to find a way to improve consultation when you're confronted with this grave question. LEE: I understand that. And I can... HAMILTON: It's a very limited bill. And it does not deal with this constitutional question. LEE: No, I understand that. HAMILTON: Yes. LEE: And I'm just saying, though, I'm trying to see how this would work. HAMILTON: Yes, I understand. LEE: Because as a member of Congress, I'm of the... HAMILTON: Right. I was responding to your early comment about declaration, which others have made here. Quite frankly, I have a good bit of personal sympathy for that having served in a legislative branch. But to suggest that that sentence in the Constitution resolves the question is short of the mark. LEE: Thank you. BAKER: Mr. Chairman, may I just add that this bill, Congresswoman, will not satisfy the absolutists on either side of this issue. The congressionalists who think only that Congress has the power or has the preeminent power nor the executive branch people who think the president should have totally unlimited scope. But the fact of the matter is that over quite a number of years troops have been sent abroad 264 times. War has been declared five times. So we're trying to deal with a situation that we face and to increase the cooperation and consultation between the two branches.

#### The impacts are environmental destruction, pandemic disease spread, global conflict, development, WMD proliferation, clean water access—every transnational threat requires robust UN engagement

Tharooor, 03 [Shashi Tharoor, is the [Indian](http://en.wikipedia.org/wiki/India) [Minister of State](http://en.wikipedia.org/wiki/Minister_of_State#Minor_government_ranks) for Human Resource Development, [Member of Parliament](http://en.wikipedia.org/wiki/Member_of_Parliament) (MP) from the [Thiruvananthapuram](http://en.wikipedia.org/wiki/Thiruvananthapuram_%28Lok_Sabha_constituency%29) of [Kerala](http://en.wikipedia.org/wiki/Kerala), an [author](http://en.wikipedia.org/wiki/Author) and a [columnist](http://en.wikipedia.org/wiki/Columnist), Tharoor subsequently obtained a [Bachelor of Arts](http://en.wikipedia.org/wiki/Bachelor_of_Arts) degree in history from [St. Stephen's College](http://en.wikipedia.org/wiki/St._Stephen%27s_College,_Delhi) in [Delhi](http://en.wikipedia.org/wiki/Delhi).[[5]](http://en.wikipedia.org/wiki/Shashi_Tharoor#cite_note-5) and went on to pursue graduate studies at [The Fletcher School of Law and Diplomacy](http://en.wikipedia.org/wiki/The_Fletcher_School_of_Law_and_Diplomacy) at [Tufts University](http://en.wikipedia.org/wiki/Tufts_University), from where he obtained an M.A in 1976, an M.A.L.D in 1977 and a Ph.D. in 1979 at age 23.[[6]](http://en.wikipedia.org/wiki/Shashi_Tharoor#cite_note-Tufts-6), <http://www.cfr.org/world/why-america-still-needs-united-nations/p7567>]

Summary: Multilateralism is a means, not an end, and there is no more multilateral body than the UN. That may make it unwieldy at times, but the UN's inclusiveness is the key to the legitimacy only it can confer. The organization thus remains an essential force in international politics, and one the United States benefits from greatly. THE POWER OF LEGITIMACY In September 2002, a radical new document declared that "no nation can build a safer, better world alone." These words came not from some utopian internationalist or ivory-tower academic, but from the new National Security Strategy of the United States. For all its underpinnings in realpolitik, the strategy committed the United States to multilateralism. This statement should not have been surprising, for multilateralism, of course, is not only a means but an end. And for good reason: in international affairs, the choice of method can serve to advertise a country's good faith or disinterestedness. Most states act both unilaterally and multilaterally at times: the former in defense of their national security or in their immediate backyard, the latter in pursuit of global causes. The larger a country's backyard, however, the greater the temptation to act unilaterally across it -- a problem most acute in the case of the United States. But the more far-reaching the issue and the greater the number of countries affected, the less sufficient unilateralism proves, and the less viable it becomes. Hence the ongoing need for multilateralism -- which the U.S. National Security Strategy seemed to recognize. The United Nations is the preeminent institution of multilateralism. It provides a forum where sovereign states can come together to share burdens, address common problems, and seize common opportunities. The UN helps establish the norms that many countries -- including the United States -- would like everyone to live by. Throughout its history, the United States has seen the advantages of living in a world organized according to laws, values, and principles; in fact, the republic was not yet 30 years old when it first went to war in defense of international law (attacking the Barbary pirates in 1804), and it has done so multiple times since, including in the first Gulf War. The UN, for all its imperfections -- real and perceived -- reflects this American preference for an ordered world. That Washington has often used force on behalf of such principles makes good political sense. After all, acting in the name of international law is always preferable to acting in the name of national security. Everyone has a stake in the former, and so couching U.S. action in terms of international law universalizes American interests and comforts potential allies. When American actions seem driven by U.S. national security imperatives alone, partners can prove hard to find -- as became clear when, in marked contrast to the first Gulf War, only a small "coalition of the willing" joined Washington the second time around in Iraq. Working within the UN allows the United States to maximize what Joseph Nye calls its "soft power" -- the ability to attract and persuade others to adopt the American agenda -- rather than relying purely on the dissuasive or coercive "hard power" of military force. Global challenges also require global solutions, and few indeed are the situations in which the United States or any other country can act completely alone. This truism is currently being confirmed in Iraq, where Washington is discovering that it is better at winning wars than constructing peace. The limitations of military strength in nation building are readily apparent; as Talleyrand pointed out, the one thing you cannot do with a bayonet is to sit on it. Equally important, however, is the need for legitimacy, and here again the UN has proven invaluable. The organization's role in legitimizing state action has been both its most cherished function and, in the United States, its most controversial. As the world's preeminent international organization, the UN embodies world opinion, or at least the opinion of the world's legally constituted states. When the UN Security Council passes a resolution, it is seen as speaking for (and in the interests of) humanity as a whole, and in so doing it confers a legitimacy that is respected by the world's governments, and usually by their publics. When the resolution in question is passed under Chapter VII of the charter -- that document's enforcement provisions -- it becomes legally binding on all member states. The composition of the council that passes a particular resolution is no more relevant to its legitimacy than that of a national parliament that passes a law; congressional legislation, by the same logic, is not less binding on Americans if the majority that votes for it comes overwhelmingly from small states. The legitimacy of the UN inheres in its universality and not in its structural details, which have long been subject to the clamor for reform. Some Americans have scorned the status and conduct of many of the Security Council members that failed to support the United States on Iraq. But this unseemly sneering over the right of Angola, Cameroon, or Guinea to pass judgment in the council overlooks the valuable contribution their presence makes. The election of small countries to the council bolsters its legitimacy by enhancing its role as a repository of world opinion. Universality of membership also allows the world to view the UN as something more than the sum of its parts, as an entity that transcends the interests of any one member state. The UN guards the vital principles entrenched in its charter, notably the sovereign equality of states and the inadmissibility of interference in their internal affairs. It is precisely because the UN is the chief guardian of both these sacrosanct principles that it alone is allowed to approve derogations from them. Thus when the UN, in particular the Security Council, legislates an intervention in a sovereign state, it is still seen as upholding the basic principles even while approving a departure from them. When an individual state acts in defiance of the UN, on the other hand, it merely violates these principles. This is why so many countries, including the most powerful ones, take care to embed their actions within the framework of the principles and purposes of the UN Charter. For examples of this, one need only peruse a random selection of speeches by countries explaining their votes on the Security Council, especially those concerning military action. The value of internationally recognized principles resonates across the globe and has been reified through 58 years of repetition -- including last March, when the council debated Iraq. SHOWDOWN IN NEW YORK To suggest -- as did some critics of the UN during the Iraq crisis -- that the organization has become irrelevant overlooks the message President George W. Bush himself sent when he appeared before the General Assembly in September 2002. In calling on the Security Council to take action, Bush framed the problem of Iraq as a question not of what the United States (unilaterally) wanted, but of how to implement Security Council resolutions. Indeed, these resolutions were at the heart of the U.S. case. Had the Security Council been able to agree that force was warranted, it would have provided unique (and incontestable) legitimacy for U.S. military action. The fact that the council did not ultimately agree, however, strengthens, rather than dilutes, the rationale for approaching it in such situations. The council's refusal to serve as a rubber stamp for Washington will give any future support it lends to the United States greater credibility. Council resolutions do not serve only to codify the acceptable in the eyes of the world; they also, quite directly, lay down the law. In fact, several countries, from Norway to India, do not or cannot (as a matter of politics, policy, or constitutional law) commit forces overseas without the council's explicit authorization. Such a practice ensures that these countries will not be drawn into military adventures at the behest of one or a handful of powerful states. They send troops only when the Security Council, speaking in the name of the world as a whole, blesses an enterprise. Nonetheless, since the Iraq crisis, some critics have suggested that "coalitions of the willing" will eventually eliminate the need for formal structures such as the UN. "Multilateralism á la carte," the thinking goes, will replace "multilateralism á la charte." But even ad hoc coalitions require structure: many states, when asked by Washington to contribute troops for Iraq, have hesitated to do so without the sanction of a UN resolution or a UN-authorized command structure. International institutions give the United States' potential partners a framework within which they can feel empowered on (at least notionally) equal terms -- and without which they are not willing to participate. Put another way, the difference between a UN operation, in which everyone wears a blue helmet, and a "coalition of the willing" led by one big power is similar to that between a police squad and a posse. Posses are more difficult to find and to fund than are police. Similarly, developing countries in any coalition need financing in order to play their part, and such financing is more easily provided through the UN's agreed cost-sharing formula. Unilateralism is always more expensive than its alternative, and in today's tight world economy, the costs of international unilateralism may no longer be sustainable. Even when a Security Council resolution is not legally required for an action, the UN's imprimatur can still prove extremely useful for the United States. A council decision does not just spread expense and political risk, by diluting Washington's responsibility for a course of action that might provoke resentment or hostility. It is also easier for many governments to sell a policy to their publics if they can describe it as a response to a UN resolution, instead of to an American request. The United States has already learned this lesson: for example, when it has tried to prompt countries to revise and update their domestic security procedures or laws on terrorism, it has discovered that governments are often happier to receive the same American expert as a UN adviser than as a U.S. one. In fact, part of the value of the UN (including for Washington) is the respect in which its members hold the body. Such respect has permitted the United States, on numerous occasions, to advance its specific interests under the cover of international law. For example, UN sanctions on Libya helped the United States achieve a settlement over the Lockerbie bombing. And after the attacks of September 11, 2001, the Security Council's two subsequent resolutions provided an international framework for the global battle against terrorism. Resolution 1373 required nations to interdict arms flows and financial transfers to suspected terrorist groups, report on terrorists' movements, and update national legislation to fight them. Without the legal authority of a binding Security Council resolution, Washington would have been hard-pressed to obtain such cooperation "retail" from 191 individual states, and it would have taken decades to negotiate and ratify separate treaties and conventions imposing the same standards on all countries. As such examples demonstrate, it is clearly not in the U.S. interest to discredit the UN or the Security Council. For every rare occasion when the council thwarts Washington, there are a dozen more when it acts in accordance with U.S. wishes and compels other countries to do the same. To marginalize the council, then, would be to blunt a vital arrow in the U.S. diplomaticquiver**.**  BEYOND LIMITS What about the Security Council's structural deficiencies? For all the carping about its outdated composition -- which, by common consensus, reflects the geopolitical realities of 1945 rather than 2003 -- no other body has acquired the kind of legitimacy it brings to bear on world affairs. The council may need reform, therefore, but until member states agree on how to go about making changes, it remains the only global body with responsibility for maintaining international peace and security. Suggestions that the UN should be replaced -- by a coalition of democracies, for example -- overlook the fact that during the Iraq debate, the most vigorous resistance to the United States in the council came from other democracies. Nor is NATO a feasible alternative to the council, because its legitimacy is geographically limited, as is that of other regional organizations. NATO authorization might have been deemed sufficient for the Kosovo campaign. But in that war, the target was another European state, Yugoslavia. NATO's imprimatur would not have been enough to justify military action in Iraq, which is why the United States and the United Kingdom tried so hard to get the Security Council's benediction for that action. In any case, the council's final vote (or lack thereof) on Iraq was not the only gauge of its relevance to that situation. Just four years ago, when NATO bombed Yugoslavia without even referring to the council (let alone securing its approval), many critics similarly argued that the UN had become irrelevant. But the Kosovo question soon came up again at the Security Council, first when an unsuccessful attempt was made to condemn the bombing, and then when arrangements had to be made to administer the province after the war. Only the Security Council could have approved the arrangements so as to confer on them international legitimacy and encourage all nations to extend their support and resources. And only one body was trusted enough to run the civilian administration of Kosovo: the United Nations. The same pattern was not followed precisely in the case of Iraq, but the events were similar. Resolution 1483, adopted unanimously on May 22, granted the UN a significant role in postwar Iraq. That the United States chose to give the UN such a prominent position reflects not just British pressure but also Washington's own recognition that it needs the world body. Indeed, the very fact that the United States submitted the resolution to the Security Council was an acknowledgment by Washington that there is, in Secretary-General Kofi Annan's words, no substitute for the unique legitimacy provided by the UN. The body might have been written off during the war. But as with Kosovo, it was quickly found to be essential to the ensuing peace. Of course, peace can be kept in many ways, and Kosovo, East Timor, Afghanistan, and now Iraq offer four different models for how the UN can engage in postconflict situations. But peacekeeping (which includes mediation, monitoring, and disarmament) remains exactly the kind of mission where using the UN has advantages for Washington that greatly outweigh the negatives. First, there is the obvious attraction of burden-sharing: UN peacekeeping allows other countries to help shoulder the United States' responsibility for maintaining peace around the world. Second, despite some well-publicized failures, UN peacekeeping works. The UN's "blue helmets" won the Nobel Peace Prize in 1988; since then, they have brought peace and democracy to Namibia, Cambodia, El Salvador, Mozambique, and East Timor; helped ease the U.S. burden after regime changes in Haiti and Afghanistan; and policed largely bloodless stalemates from Cyprus to the Golan Heights to Western Sahara. Third, UN peacekeeping is highly cost-effective. The UN is used to running operations on a shoestring, and it spends less per year on peacekeeping worldwide than is spent on the budgets of the New York City Fire and Police Departments. UN peacekeeping is also far cheaper than the alternative, which is war. Two days of Operation Desert Storm in 1991 cost more than the entire UN peacekeeping budget that year, and one week of Operation Iraqi Freedom would amply pay for all UN peacekeeping for 2003. The UN operation that ended the Iran-Iraq War cost less annually than the crude oil carried in two supertankers. Considering how many supertankers were placed at risk during that ruinous conflict, this makes peacekeeping an extraordinary bargain. None of this is to deny that the Security Council's record has been mixed. The body has acted unwisely at times and failed to act altogether at others: one need only think of the fate of the "safe areas" in Bosnia and the genocide in Rwanda for instances of each. The council has also sometimes been too divided to succeed, as was the case in early 2003 over Iraq. And all too often, member states have passed resolutions they had no intention of implementing. But the UN, at its best, is only a mirror of the world: it reflects divisions and disagreements as well as hopes and convictions. Sometimes it only muddles through. As Dag Hammarskjöld, the UN's second secretary-general, put it, the UN was not created to take humanity to heaven but to save it from hell. And this it has done innumerable times, especially during the Cold War, when it prevented regional or local conflicts from igniting a superpower conflagration. To suggest, on the basis of the disagreement over Iraq, that the Security Council has become dysfunctional or irrelevant is to greatly distort the record by viewing it through the prism of just one issue. Even while disagreeing on Iraq, the members of the Security Council unanimously agreed on a host of other vital issues, from Congo to Côte d'Ivoire, from Cyprus to Afghanistan. Indeed, the Security Council remains on the whole a remarkably harmonious body. Authorizing wars has never been among its principal responsibilities -- only twice in its 58 years of existence has the council explicitly done so -- and it seems unduly harsh to condemn it solely over its handling of so rare a challenge. In any case, it would be folly to discredit an entire institution for a disagreement among its members. One would not close down the Senate (or even the Texas legislature) because its members failed to agree on one bill. The UN's record of success and failure is no worse than that of most representative national institutions, yet its detractors seem to expect the UN to succeed (or at least to agree with the United States) all the time. Too often, the UN's critics seem to miss another fundamental characteristic of the world body: the way it functions both as a stage and as an actor. On the one hand, the UN is a stage on which its member states declaim their differences and their convergences. Yet the UN is also an actor (particularly in the person of the secretary-general, his staff, agencies, and operations) that executes the policies made on its stage. The general public usually fails to see this distinction and views the UN as a shapeless aggregation. Sins (of omission or commission) committed by individual governments on the UN stage are thus routinely blamed on the organization itself. Sometimes member states deliberately contribute to this confusion, as when American officials blamed the UN for not preventing genocide in Rwanda -- despite the fact that Washington itself had blocked the Security Council from taking action in that crisis. Indeed, one of the more unpleasant, if convenient, uses to which the UN has regularly been put has been to serve as a pliant scapegoat for the failures of its member states. Former Secretary-General Boutros Boutros-Ghali ruefully noted this point when alleged UN deficiencies were blamed for the purely American-made disaster in Mogadishu in October 1993. And Annan has often joked that the abbreviation by which he is known inside the organization -- "SG" -- stands for "scapegoat," not "secretary-general." There is, sadly, considerable utility in having an institution that, by embodying the collective will (or lack thereof) of 191 member states, can safely be blamed for the errors that no individual state could politically afford to admit. But those who need a whipping boy must be careful not to flog him to death. IN IT TOGETHER The UN's relevance does not stand or fall on its conduct on any one issue. When the crisis has passed, the world will still be left with, to use Annan's phrase, innumerable "problems without passports" -- threats such as the proliferation of weapons of mass destruction (WMD), the degradation of our common environment, contagious disease and chronic starvation, human rights and human wrongs, mass illiteracy and massive displacement. These are problems that no onecountry, however powerful, can solve alone. The problems are the shared responsibility of humankind and cry out for solutions that, like the problems themselves, also cross frontiers. The UN exists to find these solutions through the common endeavor of all states. It is the indispensable global organization for a globalizing world. Large portions of the world's population require the UN's assistance to surmount problems they cannot overcome on their own. As these words are written, civil war rages in Congo and Liberia and sputters in Côte d'Ivoire, while long-running conflicts may be close to permanent solution in Cyprus and Sierra Leone. The arduous task of nation building proceeds fitfully in Afghanistan, the Balkans, East Timor, and Iraq. Twenty million refugees and displaced persons, from Palestine to Liberia and beyond, depend on the UN for shelter and succor. Decades of development in Africa are being wiped out by the scourge of hiv/aids (and its deadly interaction with famine and drought), and the Millennium Development Goals -- agreed on with much fanfare in September 2000, at the UN's Millennium Summit, the largest gathering of heads of government in human history -- remain unfulfilled. Too many countries still lack the wherewithal to eliminate poverty, educate girls, safeguard health, and provide their people with clean drinking water. If the UN did not exist to help tackle these problems, they would undoubtedly end up on the doorstep of the world's only superpower. The UN is also essential to Americans' pursuit of their own prosperity. Today, whether one is from Tashkent or Tallahassee, it is simply not realistic to think only in terms of one's own country. Global forces press in from every conceivable direction; people, goods, and ideas cross borders and cover vast distances with ever greater frequency, speed, and ease. The Internet is emblematic of an era in which what happens in Southeast Asia or southern Africa -- from democratic advances to deforestation to the fight against aids -- can affect Americans. As has been observed about water pollution, we all live downstream now. Thus U.S. foreign policy today has become as much a matter of managing global issues as managing bilateral ones. At the same time, the concept of the nation-state as self-sufficient has also weakened; although the state remains the primary political unit, most citizens now instinctively understand that it cannot do everything on its own. To function in the world, people increasingly have to deal with institutions and individuals beyond their country's borders. American jobs depend not only on local firms and factories, but also on faraway markets, grants of licenses and access from foreign governments, international trade rules that ensure the free movement of goods and persons, and international financial institutions that ensure stability. There are thus few unilateralists in the American business community. Americans' safety, meanwhile, depends not only on local police forces, but also on guarding against the global spread of pollution, disease, terror, illegal drugs, and WMD. As the World Health Organization's successful battle against the dreaded sars epidemic has demonstrated, "problems without passports" are those that only international action can solve. Fortunately, the UN and its broad family of agencies have, in nearly six decades of life, built a remarkable record of expertise and achievement on these issues. The UN has brought humanitarian relief to millions in need and helped people rebuild their countries from the ruins of war. It has challenged poverty, fought apartheid, protected the rights of children, promoted decolonization and democracy, and placed environmental and gender issues at the top of the world's agenda. These are no small achievements, and represent issues the United States cannot afford to neglect. The United Nations is a valuable antidote to the tendency to disregard the problems of the periphery -- the kinds of problems Americans may prefer not to deal with but that are impossible to ignore. Handling them multilaterally is the obvious way to ensure they are tackled; it is also the only way. Americans will be safer in a world improved by the UN's efforts, which will be needed long after Iraq has passed from the headlines. KEEPING GULLIVER ON BOARD The exercise of American power may well be the central issue in world politics today, but that power is only enhanced if its use isperceived as legitimate**.** Ironically, although many in Washington distrust the world body, many abroad think the Security Council is too much in thrall to its most powerful member. The debates over Iraq proved that that is not always the case; but even if it were, it is far better to have a world organization that is anchored in geopolitical reality than one that is too detached from the verities of global power to be effective. A UN that provides a vital political and diplomatic framework for the actions of its most powerful member, while casting them in the context of international law and legitimacy (and bringing to bear on them the perspectives and concerns of its universal membership) is a UN that remains essential to the world in which we live. The goals of the charter, however, cannot be met without embracing the fundamental premise that President Harry Truman enunciated in 1945: We all have to recognize that no matter how great our strength, we must deny ourselves the license to do always as we please. No one nation ... can or should expect any special privilege which harms any other nation. ... Unless we are all willing to pay that price, no organization for world peace can accomplish its purpose. And what a reasonable price that is! The UN, from the start, assumed the willingness of its members to accept restraints on their own short-term goals and policies by subordinating their actions to internationally agreed rules and procedures, in the broader long-term interests of world order. This was an explicit alternative to the model of past centuries, when strong states developed their military power to enforce their politics, and weak states took refuge in alliances with stronger ones. This formula guaranteed large-scale warfare; as Franklin Roosevelt put it to both houses of Congress after the Allied conference at Yalta, the UN would replace the arms races, military alliances, balance-of-power politics, and "all the arrangements that had led to war" so often in the past. The UN was meant to help create a world in which its member states would overcome their vulnerabilities by embedding themselves in international institutions, where the use of force would be subjected to the constraints of international law. Power politics would not disappear from the face of the earth but would be practiced with due regard for universally upheld rules and norms. Such a system also offered the United States -- then, as now, the world's unchallenged superpower -- the assurance that other countries would not feel the need to develop coalitions to balance its power. Instead, the UN provided a framework for them to work in partnership with the United States.

#### The role of the ballot is to judge the desirability of the 1ac plan—even if we have no direct power to enact it, simulating consequences and evaluating the nuances of our hypothetical is important to understand and navigate those complex processes

Donohue, 13 [2013 Nation al Security Pedagogy: The Role of Simulations, Associate Professor of Law, Georgetown Law, <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2172&context=facpub>]

Student Organizations and Journals Mirroring law schools’ growing institutional focus on national security law is increased student interest in the field, manifest through student organizations and student - run journals. Of the top 100 ranked law schools, nearly three dozen have student organizations relating to national security law. 94 Sixteen of these have military law societies. 95 In the law review realm, not only have mainstream journals increasingly published articles in this area, but eight journals have adopted a strong focus on this area, with three solely dedicated to nat ional security law: the Georgetown Law - Syracuse Law Journal of National Security Law and Policy , the annual William Mitchell College of Law Journal of the National Security Forum , and the Harvard Law’s National Security Journal (initiated in Spring 2010). 96 These institutional developments suggest that law schools, as a structural matter, are responding to the growing demand for well - trained students. Thus far, theapproach has been an organic process of responding on a case - by - case basis. **The problem is that**, for the most part, **these** programs and institutions **are situated within traditional models**, thus **reflecting** the **dominant divisions** and pedagogical aims of the broader institutions. Yet many of these approaches were adopted with a view towards the pra ctice of law generally, and not with specific focus on the challenges facing lawyers that want to move into national security law. III. L EGAL P EDAGOGY The practice of law , as suggested above, is deeply political in nature, with lawyers not merely providing a service to the community, but exercising government power and seeking to limit the same. This makes the profession susceptible to political shifts. It is thus perhaps unsurprising that the compromise forged between conflicting aims ( the practical realities of the practice of law, paired with the aspirations of critical distance and debate) r epeatedly surface s in the wake of military conflict. It was , after all, following the Civil War t hat Harvard confronted the outmoded, receptive nature of legal education. Subjected to recitation of treatises prepared years in advance, students had little to no agency in the classroom. 97 Harvard Law Dean Christopher Columbus Langdell sent shock waves through the system when he introduced three fundamental innovations, the aim of which was to inculcate academic achievement in students: he began sequencing courses, he created the case method of teaching, and he invented the (now infamous) issue - spotter examination, requiring students to respond in writing to complex hypothetical problems. 98 At the time, Oxford and Cambridge considered a liberal education to be sufficient preparation for the professions; the study of common law and other professional educ ation was left to the apprenticeship process. Students would be asked merely to present clients’ complaints in the appropriate legal form (i.e., the correct “writ” or “form of action”, as appropriate to the facts of the case) to gain access to the courts. Students would be asked merely to present c lients’ complaints in the appropriate legal form (i.e., the correct “writ” or “form of action”, as appropriate to the facts of the case) to gain access to the courts. Moskovitz explains, “Students listened to lectures (some by professors, but many by judge s and practicing lawyers) and read textbooks that distilled the rules from the cases. Both activities were essentially passive: the student absorbed information but did not interact much with the teacher.” innovations thus flew in the face of both U.S. norms and those adopted across the Atlantic. 99 They at once recognized the importance of the practice of law, while providing to the legal academy the distinction of critical scholarly analysis. The decision to expand into the practice of law subsequently created divisions within the research university. Scholars saw their role as ensuring that students obtained a certain distance from the law and, as s uch, could subject it to more rigorous critique. The goal of practitioners in many ways proved the opposite: to immerse students so directly in the law as to give them fluency in the practice of the same. In the ensuing years, new evaluations of legal pedagogy have accompanied the country’s engagement in military hostilities. World War I , for instance, gave way to the Reed Report, which considered how those returning from war would seek to re - shape the existing institutions. Jerome Frank’s work, calling for greater engagement of the academy in the practice of law, bookended World War II. The close of Vietnam witnessed the first ABA Task Force Report on the role of legal education. The Cramton Report was soon followed by the MacCrate Report — coinc ident with the ending of the Cold War. A crucial weakness in many of these studies is that they have assumed the practice of law writ large to be the object of the inquiry — obfuscating, in the process, the practice of law in discreet contexts. Simultaneo usly, much of the discussion assumes as a given the division between doctrinal and clinical education, missing in the process the potential for developing a new framework for legal education. Perhaps most importantly, these inquiries, like many that mark the current pedagogical debate, have failed to appreciate the importance of the goals most appropriate to national security law. A . Limitations of the Current Pedagogical Debate One problem with the current pedagogical debate in the legal academy is th at it is almost entirely grounded in a general understanding of the practice of law. There is very little new about this approach. In 1978, for instance, t he ABA’s Task Force on Lawyer Competency: The Role of Law Schools , chaired by Dean Roger Cramton, i dentified three competencies required for the practice of law writ large : (1) knowledge about law and legal institutions; (2) fundamental skills; and (3) professional attributes and values. 100 Instead of considering any of the sub - fields in depth, the repor t focused on general legal education. It identified fundamental skills as legal analysis, legal research, fact investigation, written and oral communication, interviewing, counseling, negotiation, and organization. 101 Professional values, in turn, centered on discipline, integrity, 99 A LFRED Z ANTZINGER R EED , T RAINING FOR THE P UBLIC P ROFESSION OF THE L AW (1921), p. 23 (“In accordance with this tradition of the ultimate responsibility of lawyers for their own educational qualifications, the English universities have not only been denied any control over the admission of a law student to practice. They have not even been made directly responsible for providing any portion of his education, in whi ch they participate only as volunteer agencies. In the field of general education they offer much more than the practitioners demand. [...]The conception...of institutional instruction in technical law as an essential part of a lawyer’s education, whether giv en in a university or whether given elsewhere, has never thoroughly reestablished itself in England sinc the decay of the original Inns of Courts. The pedagogical doctrine that this should constitute a distinct intermediate phase of his preparation, to be entered upon after he had completed his general education but before his practical training begins, is still more foreign to English thought. As a rule, an English student, having secured such general education as he thinks worth while or can afford, pro ceeds directly into a lawyer’s office.”) See also B RUCE A. K IMBALL , T HE I NCEPTION OF M ODERN P ROFESSIONAL E DUCATION : C. C. L ANGDELL , 1826 - 1906 (2009), p. 161. 100 A MERICAN B AR A SSOCIATION , S ECTION OF L EGAL E DUCATION AND A DMISSIONS TO THE B AR , R EPORT AND R EC OMMENDATIONS ON THE T ASK F ORCE ON L AWYER C OMPETENCY : THE R OLE OF L AW S CHOOLS (1979), at 9 - 10 [Hereinafter Cramton Report]. 101 Id. 21 conscientiousness, continued professional development, critical self - assessment, and hard work. 102 The report was not uncritical of the current state of play: w hile legal education did a r elatively good job of providing students with the knowledge of law, and legal analytical skills, as well as legal research and writing, it failed in three essential respects: (a) developing some of the fundamental skills underemphasized by traditional le gal education; (b) shaping attitudes, values, and work habits critical to the individual’s ability to translate knowledge and relevant skills into adequate professional performance; and (c) providing integrated learning experiences focused on particular fi elds of lawyer practice. 103 The Report offered dozens of recommendations to address the gap. 104 Ten years later, following the end of the Cold War, the American Bar Association’s Section of Legal E ducation and Admissions to the Bar appointed yet another task force to look at the role of legal education in preparing attorneys for practice. Once again, it took a cookie - cutter approach to the subject, assuming legal education prepared students for a uniform fi eld. Chaired by Robert MacCrate, the resulting 414 - page report included within it a “Statement of Fundamental Lawyering Skills and Professional Values”, in which it highlighted ten fundamental skills and four values to guide those seeking to enter the pr ofession. 105 The goal of legal education was and ought to be developing students’ skills with regard to problem - solving, legal analysis and reasoning, legal research, factual investigation, communication, counseling, negotiation, litigation and ADR, organiz ation and management of legal work, and recognizing and resolving legal dilemmas . 106 With the aim of legal education thus defined, the report went on to note the fundamental values of the profession: the provision of competent representation, striving to p romote justice, fairness, and morality, working to improve the profession, and professional development. 107 Cognizant of the critiques that would inevitably follow, the Report noted that the skills and values thus presented was not definitive; instead, the y provided a starting point for further discussion of different areas of the profession. The aim was not to lock schools into a specific curriculum, to create criteria for accreditation, or to cement bar examiners into one approach. In achieving these goa ls, the Report emphasized the importance of clinical education: Clinics have made, and continue to make, an invaluable contribution to the entire legal education enterprise. They are a key component in the development and advancement of skills and values throughout the profession. . . . clinics provide students with the opportunity to integrate, in an actual practice setting, all of the fundamental lawyering skills. In clinic courses, students sharpen their understanding of professional responsibility an d deepen their appreciation for their own values as well as those of the profession as a whole. 108 102 Id., at 10. 103 Id., at 14. 104 Id., at 3 - 7, recommendations 3 - 5. 105 A MERICAN B AR A SSOCIATION S ECTION OF L EGAL E DUCATION AND A DMI SSION TO THE B AR , L EGAL E DUCATION AND P ROFESSIONAL D EVELOPMENT : A N E DUCATIONAL C ONTINUUM , R EPORT OF THE T ASK F ORCE ON L AW S CHOOLS AND THE P ROFESSION : N ARROWING THE G AP (1992) [hereinafter, MacCrate Report]. 106 MacCrate Report, supra , at 121 - 22. 107 MacCrate Report, supra , at 140 - 41. 108 MacCrate Report, supra ,at 238. 25 la wyer. Not only must students understand these processes, Baker argues, but they must take into account the way in which processes unique to national security law influence lawyers’ ability to engage in traditional legal analysis and recommendation. The opportunity, for instance, for lawyers to engage in considered debate about legal interpretations or to have their work cross - checked by other attorneys, perhaps even more steeped in these fields, may be limited. Baker explains, Lawyers tend to focus on t he formal aspects of constitutional government – legislation, the oversight hearing, the Justice Department opinion, and presidential statements. For sure, these legal events dominate constitutional history and precedent. However, much of constitutional practice within each branch, and between each branch, is informal in nature, outside public view, and without documentation. 126 Beyond the informal nature of such processes is the classified context within which government attorneys operate. Two salient p oints here stand out: first is the difficulty of working collaboratively in a classified context when time is of the essence . That is, even where a number of legal experts may be privy to the information, the abbreviated timeline under which national security attorneys must work **limits** the extent to which collaboration may occur. The second point centers on limitations on the number of individuals with whom a lawyer can discuss the specific matter in question. There may be very few legal experts with whom an attorney can consult. Nevertheless, **decisions** reached **in these contexts** may have **significant implications**: they may shift the U.S. legal posture on domestic and international instruments, with formidable consequences for operations, U.S. policy, and safety and security. These characteristics of national security law mean that law schools must sharpen students’ analytical skills, as well as their substantive knowledge. That is, schools must not just teach students how to think about the law, but they must convey a significant amount of what the law actually is so that students have some idea of the current authorities and the framing and the groundwork on which future initiatives are built. Simultaneously, they must make students aware of the way in which formal and informal process influences the quality of their legal analysis and understanding, and help them to develop different tools to manage such processes to ensure better performance. With the black letter law in national security rapidly changing and growing, law schools must further look at what the emerging topics are and adjust existing courses and offer new top ics accordingly. This is a different model than the relative stasis marking much of the 20 th Century. Most schools have generally agreed over the course of decades that criminal law, criminal procedure, constitutional law, civil procedure, contracts, tor ts, and property, merit attention. Eventually schools began to offer courses in new areas, such as international law, and environmental law. But the sudden explosion in national security law here means two things: first, the re - evaluation of traditional classes to include new and emerging areas. Material support provisions, new surveillance authorities, and the difference between Title III orders and Foreign Intelligence Surveillance Court warrants may thus become an important part of Criminal Procedure . Regulatory courses, in turn, may need to expand to include new financial regulations unique to the national security world. Second, rapid changes suggest the construction of new courses, offering both novel combinations of subjects as well as new substa ntive areas, such as courses focused on international law and habeas corpus, pandemic disease and consequence management law, intelligence law, or cyber threats. 126 B AKER , supra note 5 , at 63. 26 As a pedagogical matter then, examination of new and emerging areas must be incorporated into the doctrinal study of legal authorities, even as the processes at work in the national security realm are featured. Active review of courses across the board wi ll further accomplish this aim — an approach somewhat antithetical to traditional approaches to teaching, where faculty members typically offer (relatively static) introductory courses, paired with upper level courses on matters of particular interest. New organization may therefore be required to bring national security law faculty and curriculum together, as an intellectual and structural enterprise, to consider the breadth and range of current course offerings. b. “ Washington Context ” While recognizing t he importance of legal authorities and processes, in the field of national security law, both may be overridden by considerations unique to what may be called the “ Washington context ” . The inherent political friction between the branches of government, the institutional frictions between Departments and Agencies, and the interpersonal components that accompany the exercise of power all influence the manner in which national security l aw evolves. To the extent that law schools ignore this aspect of the practice, they do students a great disservice. To take an example that arose in one of my course s , students may (correctly) read HSPD 5 and the Homeland Security Act of 2002 to mean th at the Secretary of Homeland Security has the authority to order an evacuation. To act on this authority, however, without direct communication with (and permission from) the White House, would be inappropriate. This type of Washington - based, p olitical a uthority is critical to the exercise of power. Herein lies the rub: national security instruments often incorporate power that has significant domestic and international political ramifications. The stakes are high. It is thus imperative that students **understand** the broader authorities and **processes** at work. Such processes extend beyond the executive branch to dealings with Congress — a branch often sidelined in law school curricula. Lawyers working in the field, from the executive branch and legislati ve branches to private industry, must understand the political processes in Congress in order to be more effective. The relative strength of different committees, the contours of legislative oversight, the range of policy documents applicable to the field (and required by Congress via statute), the formal and informal mechanisms to obtain information relating to executive branch national security matters, the role of party politics — all of this proves relevant. Understanding political authority extends to chain of command, as well as inter - agency processes. c. Policy Environment The “ Washington context” can be distinguished from a second way in which political considerations enter into national security law: namely, the broader policy environment. On e way to understand this is in terms of the push and pull of policymaking. In the former realm, law constitutes just one of many competing demands that policymakers take into account before deciding which actions to pursue. In the latter area, the impact of the actions taken is felt in both the domestic and international arena. Each constitutes an ex ante consideration for lawyers operating in this domain. Within government practice, in determining which course to set, the role that law plays may be just one of many competing demands on the policymaker’s decision - making strategy. In order to secure a place for legal considerations, lawyers must therefore be cognizant of the different pressures influencing the process. Part of this is 27 learning how to communicate clearly with those involved in making and implementing policy. It also entails developing a feel for when and how to initiate appropriate participa tion. That is, lawyers must insert themselves into the conversation, representing the interests of law itself. I n policy discussions, lawyers are often n ot seated at the table. T hey may be a “plus one” in the discussion, and, in this capacity, they mus t come to terms with the fact that the law is only one consideration at play. They may have to accept being relegated to a supporting role, with their recommendation overridden. In this context, they must grapple with not just personality management, but issues related to ego and subordination. They must then decide how to react to this situation, when and how to take the initiative, when to concede, and when to pr oceed through other channels. In brief, they must learn both how to insert legal considerations into what is essentially a policy debate , and how to treat the outcome of such efforts in the context of professional and personal goals . At the back end, legal recommendations carry with them strong policy implications. It is worth noting at the ou tset that t here is disagreement over whether national security lawyers need to take this into account. Professor John Yoo, for instance, argues that it is not the national security lawyer’s role to think about the policy impact of legal advice given — even when delivered at the highest levels of government . 127 The logic behind this is that separating law from policy is essential to good lawyering , and that to combine policy considerations with strict legal analysis undermines the strength of the intellectual endeavor, as well as the integrity of the advisory system itself. As an ex ante consideration, taking into account either competing interests or the resulting policy impact thus runs counter to the purpose of obtaining strict legal advice. Instead, it is for policymakers to balance competing concerns and to determine the most approp riate course of action. There is much to commend this strict adherence to the distinction between law and policy. The problem with this approach, however, is that it results in a sort of false silo, where lawyers ostensibly operate in a manner completely insulated from policy concerns. In national security law, this is simply not the case. Law and policy — for reasons discussed in Part I of this Article — often overlap. The result of attempting to ignore the policy side of the eq uation, moreover, may sidel ine law at the front end: i.e., when lawyers present not just a particular legal analysis, but act to insert considerations of law qua law into the policymaker’s decisionmaking process . Here, identifying and thinking about competing policy concerns provi des lawyers with important knowledge about how and when to insert legal considerations. Failure to take account of policy concerns may further entail a breach of professional responsibility and ethical obligations at the back end . It may be, for instanc e, that there is no legal bar to acting in a certain manner. ( It is precisely for this reason that criminal law continues to evolve. ) But absence of prohibition does not automatically translate into permission for action. A strict legal analysis may thu s suggest legality, where the actual implications of such actions would run contrary to legal or ethical norms. The role of national security law is here of great importance: as an exercise of power — indeed, at one extreme, the most coercive powers available to the state — failure to take into account the implications of the legal analysis may suggest a failure of professional responsibility. d . Adaptation and Evolution 127 John Yoo, Remarks , Debate on Guantanamo Bay Detainees, Oct. 12, 2005, Stanford Law School, Co - sponsored by the Federalist Society and the American Constitution Society. 28 Not only must students learn about legal and authorities and processes, the Washington context, and policy concerns, but they must learn how to adapt and evolve to deal with new and emerging bureaucratic and administrative structures. Innovation is the hallmark of this skill, and it is one that requires a different kind of learning than dominates in doctrinal settings. 128 In the national security world, p olitical leadership rapidly changes, with constant movement of personnel. Institutions themselves are in flux: the creation of the Department of Homeland Security, as aforemen tioned, placed twenty - two executive branch agencies — some of which were major and complex organs of the government, such as the U.S. Customs Service, the U.S. Coast Guard, the U.S. Secret Service, the Transportation Security Administration, and the Federal Emergency Management Agency — under one umbrella, growing by 2012 to some 216,000 people. 129 DHS agencies continue to evolve and morph as the mission of the Department steadily expands. The Department of Defense’s creation of NORTHCOM similarly generated two new domestic intelligence institutions and a substantial infrastructure to support the command. Treasury, the Department of Health and Human Services, the Department of State, and others have had to adapt to the new environment, in the process shifting i nstitutional structures. Collectively, what these characteristics mean is that those who take up positions within these entities need to be able to quickly adapt to new and changing legal and political authorities and processes. So, too, must **those outside of government**, who **need to respond** to new initiatives and rapidly changing institutional arrangements. The sheer size of the infrastructure and the number of new initiatives requires the ability to work in a fluctuating environment and to quickly iden tify changing power structures. 2 . Factual Chaos and Uncertainty One of the most important skills for students going into national security law is the ability to deal with factual chaos. This significantly differs from the traditional model of legal edu cation, which tends to provide students with a set of facts, which they must then analyze. In contrast, l awyers working in national security law must figure out what information they need, integrate enormous amounts of data from numerous sources, determin e which information is reliable and relevant, and proceed with analysis and recommendations. These recommendations, moreover, must be based on contingent conditions: facts may be classified and unavailable to the legal analyst, or facts may change as new information emerges. This is as true for government lawyers as it is for those outside of governmental structures. They must be aware of what is known, what is unsure, what is unknown, and the possibility of changing circumstances , and they must advise their clients, from the beginning, how the legal analysis might shift if the factual basis were to be altered. a. Chaos Concern about information overload in the national security environment is not new: in the 1970s scholars discussed and debated how to handle the sequential phases of 128 For rel ated discussion of innovation in the context of self - learning for corporate law, see Karl S. Okamoto, Learning and Learning - to - Learn by Doing: Simulating Corporate Practice in Law School , 45 J. OF L EGAL E D ., 495 (1995). 129 The Department of Homeland Security, the Executive Branch, available at http://www.whitehouse.gov/our - government/executive - branch (accessed Jan. 6, 2012). 29 intelligence gathering and analysis in a manner that yielded an optimal result. 130 But the digital revolution has exponentially transformed the quantitative terms of reference, the technical means of collection and analysis , and the volume of information available. At the same time, t he number of s ources of information — not least in the online world — is staggering. Added to this is the rapid expansion in national security law itself: myriad new Executive Orders, Presidentia l Directives, institutions, programs, statutes, regulations, lawsuits, and judicial decisions mean is that national security law itself is rapidly changing. What this means is that l awyers inside and outside of government must keep abreast of constantly e volving provisions. The international arena too is in flux, as global entities, such as the United Nations, the European Court of Human Rights, the G7/G8, and other countries introduce new instruments whose reach includes U.S. interests. Rapid geopoliti cal changes relating to critical national security concerns, such as worldwide financial flows, the Middle East, the Arab Spring, South American drug Cartels, North Korea, the former Soviet Union, China, and other issues increase the importance of keeping up on what is happening globally, as a way of understanding domestic concerns. Further expanding the information overload is the changing nature of what constitutes national security itself. 131 In sum, the sheer amount of information the national security l awyer needs to assimilate is significant. The basic skills required in the 1970s thus may be the same — such as the ability (a) to know where to look for relevant and reliable information; (b) to obtain the necessary information in the most efficient manner possible; (c) to quickly discern reliable from unreliable information; (d) to know what data is critical; and (e) to ascertain what is as yet unknown or contingent on other conditions. But the volume of information, the diversity of information sources, and the heavy reliance on technology requires lawyers to develop new skills . They must be able to obtain the right information and to ignore chaos to focus on the critical issues. These features point in opposite directions — i.e., to both a broadening of knowledge and a narrowing of focus. A law school system built on the gradual and incremental advance of law, bolstered or defeated by judicial decisions and solidified through the adhesive nature of stare decisis appea rs particularly inapp osite for this rapidly - changing environment. An important question that will thus confront students upon leaving the legal academy is how to keep abreast of rapidly changing national security and geopolitical concerns, in an information - rich world, in a m anner that allows for capture of relevant information, while retaining the ability to focus on the immediate task at hand. Part of staying ahead of the curve means developing a sense of timing — when to respond to important legal and factual shifts — and identifying the best means of doing so. Again, this applies to government and non - government employees. How should students prioritize certain information and then act upon it? This, too, is an aspect of information overloadNational security law proves an information - rich, factually - driven environment. The ability to deal with such chaos, however, may be further hampered by gaps in the information available and the difficulty of engaging i n complex fact - finding — a skill often under - taught in law school. Investigation of relevant information may need to reach far afield in order to generate more careful legal analysis. Uncertainty here plays a key role. In determining, for instance, the contours of quarantine authority, lawye rs may need to understand how the pandemic in question works, where there have been outbreaks, how it will spread, what treatments are available, which social distancing measures may prove most effective, what steps are being taken locally, at a state - leve l, and internationally, and the like. Lawyers in non - profit organizations, legal academics, in - house attorneys, and others, in turn, working in the field, must learn how to find out the relevant information before commenting on new programs and initiative s, agreeing to contractual terms, or advising clients on the best course of action. For both government and non - government lawyers, the secrecy inherent in the field here is of great consequence. The key here is learning to ask intelligentquestions to a ccommodate for chaos and uncertainty to generate the best legal analysis possible. It may be the case that national security lawyers are not aware of the facts they are missing — facts that would be central to legal analysis. This phenomenon front - loads the type of advice and discussions in which national security lawyers must engage. That is, it means that analysis must be given in a transparent manner, i.e., contingent on a set of facts as are then currently known, with indication given up front as to how that analysis might change, should the factual basis shift. This is particularly true of government attorneys, who may be advising policymakers — who may or may not have a background in the law and who may have access to more information than the attorney. Signaling the key facts on which the legal decision rests and indicating how such analysis might change if the facts change, provides for more robust consideration of critically important issues. c. Creative Problem Solving Part of dealing with factu al uncertainty in a rapidly changing environment is learning how to construct new ways to address emerging issues. Admit t edly, m uch has been made in the academy about the importance of problem - based learning as a method in developing students’ critical thinking skills. 132 Problem - solving, however, is not merely a method of teaching. It is itself a goal for the type of activities in which lawyers will be engaged. The means - ends distinction is an important one to make here, as problem - solving in a classro om environment may be merely a conduit for learning a specific area of the law or a limited set of skills. But problem - solving as an ends suggests the accumulation of a broader set of tools, such as familiarity with multidisciplinary approaches, creativit y and originality, sequencing, collaboration, identification of contributors’ expertise and how to leverage each skill set. This goal presents itself in the context of fact - finding, but it draws equally on strong understanding of legal authorities and pr actices , the Washington context, and policy considerations . Similarly, l ike the factors highlighted in the first pedagogical goal, adding to the tensions inherent in factual analysis is the abbreviated timeline in which national security attorneys must op erate. Time may not be a commodity in surplus. This context means that legal education must not only develop students’ complex fact - finding skills and the ability provide contingent analysis, but it must teach them how to swiftly and efficiently engage i n these activities. 3 . Critical Distance As was recognized more than a century ago, analytical skills by themselves are insufficient training for individuals moving into the legal profession. 133 Critical thinking **provides** the **necessary distance from the law that is required** in order **to move the legal system forward**. Critical thought, influenced by the Ancient Greek tradition, finds itself bound up in the Socratic method of dialogue that continues to define the legal academy. But it goes beyond such const ructs as well. Scholars and educators disagree, of course, on what exactly critical thinking entails. 134 For purposes of our present discussion, I understand it as the meta - conversation in the law. Whereas legal analysis and substantive knowledge focus o n the law as it is and how to work within the existing structures, critical thought provides distance and allows students to engage in purposeful discussion of theoretical constructs that deepen our understanding of both the actual and potential constructs of law. It is inherently reflective. For the purpose of practicing national security law, critical thought is paramount. Part of the reason for this is because of the unique conditions that tend to accompany the introduction of national security provisions: often **introduced in the midst of** an **emergency**, new powers frequently **have significant implications** for distribution of authority at a federal level, a diminished role for state and local government in the federalism realm, and a direct impact on individual rights. 135 Constitutional implications demand careful scrutiny. Yet at the time of an attack, enormous pressure is on officials and legislators to act and to be seen to act to respond. 136 With the impact on rights, in particular, foremost in legislators’ minds, the first recourse often is to make such powers temporary. However, they rarely turn out to be so, instead becoming embedded in the legislative framework and providing a baseline on which further measures are built. 137 In order to be withdrawn, legislators must demonstrate either that the provisions are not effective or that by withdrawing them, no violence will ensue Alternatively, legislators woul d have to acknowledge that some level of violence may be tolerated — a step no politician is willing to take. This steady ratcheting effect means that new powers, introduced in the heat of the moment, may become a permanent part of the statutory and re gulato ry regime. They may not operate the way in which they were intended. They may impact certain groups in a disparate manner . They may have unintended and detrimental consequences. For all of this, it is necessary for national security lawyers to be able to view such provisions, and related policy decisions, from a distance and to be able to think through such authorities outside of the contemporary regime. There are many other reasons such critical analysis matters that reflect in other areas of the law. The ability to recognize problems, articulate underlying assumptions and values, understand how language is being used, assess whether argument is logical, test conclusions, and determine and analyze pertinent information depends on critical thinking skills. Indeed, one could draw argue that it is the goal of higher education to build the capacity to engage in critical thought. Deeply humanistic theories underlie this approach. The ability to develop discerning judgment — the very meaning of the Greek ter m, κριτιχοσ , provides the basis for advancing the human condition through reason and intellectual engagement. There is yet another way in which critical thought presents in national security law which may seem somewhat antithetical to the legal enterprise: particularly for government lawyers and consultants, there may be times in which not providing legal advice, when asked for it, may be as important as providing legal analysis. That is, it may be important not to put certain options on the table, with a legal justification behind them. Such concerns are bound up in considerations of policy, professional respons ibility, and ethics. They may also relate to questions as to who one’s client is in the wo rld of national security law. 138 I t may be unclear whether and at what point one’s client is a supervisor, the legal (or political) head of an agency, a cross - agency organization, the White House, the Constitution, or the American public. Depending upon this determination, the national security lawyer may or may not want to provide legal advice to one of the potential clients. A lternatively, such a lawyer may want to call attention to certain analyses to other clients. Determining when and how to act in these circumstances requires critical distance. 4 . Nontraditional Written and Oral Communication Skills Law schools have long focused on written and oral communication skills that are central to the practice of law. Brief writing, scholarly analysis, criminal complaints, contractual agreements, trial advocacy, and appellate arguments constitute standard far e. What is perhaps unique about the way communication skills present in the national security world is the importance of modes of communication not traditionally recognized via formal models, such as concise (and precise) oral briefings, email exchanges, private and passing conversations, agenda setting, meeting injects, and communications built on swiftly evolving and uncertain information. For m any of these types of exchanges — and unlike the significant amounts of time that accompany preparation of leng thy legal documents (and the painstaking preparation for oral argument that marks moot court preparations) — speed may be of the essence. Much of the activity that goes on within the Executive Branch occurs within a hierarchical system, wherein those closes t to the issues have exceedingly short amounts 138 For a thoughtful discussion of who constitutes the client in national security law, see B AKER , supra note 5, chapter 10. 33 of time to deliver the key points to those with the authority to exercise government power. Unexpected events, shifting conditions on the ground, and deadlines require immediate input, without the opportunity for lengthy consideration of the different facets of the issue presented. This is a different type of activity from the preparation of an appellate brief, for instance, involving a fuller exposition of the issues involved. It is closer to a blend of Sup reme Court oral argument and witness cross - examination — although national security lawyers often may not have the luxury of the months, indeed, years, that cases take to evolve, to address the myriad legal questions involved. Facts on which the legal anal ysis rests, moreover, as discussed above, may not be known. This has substantive implications for written and oral communications. Tension between the level of legal analysis possible and the national security process itself may lead to a different norm than in other areas of the law. Chief Judge Baker explains, If lawyers insist on knowing all the facts all the time, before they are willing to render advice, or, if they insist on preparing a written legal opinion in response to every question, then na tional security process would become dysfunctional. The delay alone would cause the policymaker to avoid**,** and perhaps evade, legal review . 139 Simultaneously, lawyers cannot function without some opportunity to look carefully at the questions presented and to consult authoritative sources. “The art of lawyering in such context,” Baker explains, “lies in spotting the issue, accurately identifying the timeline for decision, and applying a meaningful degree of formal or informal review in r e s p o n s e . ” 140 The lawye r providing advice must resist the pressure of the moment and yet still be responsive to the demand for swift action. The resulting written and oral communications thus may be shaped in different ways. Unwilling to bind clients’ hands, particularly in li ght of rapidly - changing facts and conditions, the potential for nuance to be lost is considerable. The political and historical overlay of national security law here matters. In some circumstances, even where written advice is not formally required, it ma y be in the national security lawyer’s best interests to commit informal advice to paper in the form of an email, notation, or short memo. The process may serve to both provide an external check on the pressures that have been internalized, by allowing th e lawyer to separate from the material and read it. It may give the lawyer the opportunity to have someone subject it to scrutiny. Baker suggests that “on issues of importance, even where the law is clear, as well as situations where novel positions are taken, lawyers should record their informal advice in a formal manner so that they may be held accountable for what they say, and what they don’t s a y . ” 141 Written and oral communication, may occur at highly irregular moments — yet it is at these moments (in th e elevator, during an email exchange, at a meeting, in the course of a telephone call), that critical legal and constitutional decisions are made. This model departs from the formalized natur e of legal writing and research . Yet it is important that students are prepared for these types of written and oral communication as an ends in and of themselves. 5 . Leadership, Integrity and Good J udgment National security law often takes place in a high s takes environment. There is tremendous pressure on attorneys operating in the field — not least because of the coercive 139 B AKER , supra note 5 , at 65. 140 Id. 141 B AKER , supra note 5 , at 66. 34 nature of the authorities in question . The classified environment also plays a key role: m any of the decisions made will never be known publicly; nor will they be examined outside of a small group of individuals — much less in a court of law. In this context, leadership, integrity, and good judgment stand paramount. The types of powers at issue in national security law are among the most coercive authorities available to the government. Decisions may result in the death of one or many human beings, the abridgment of rights, and the bypassing of protections otherwise incorporated into the law. The amount of pressure under which attorneys are thus placed is of a different order of magnit ude than many other areas of the law. Overlaying this pressure is the highly political nature of national security law and the necessity of understanding the broader Washington context, within which individual decision - making , power relations and institut ional authorities compete . Policy concerns similarly dominate the landscape . It is not enough for national security attorneys to claim that they si mply deal in legal advice. T heir analyses carry consequences for those exercising power, for those who are the targets of such authorities , and for the public at large. The function of leadership in this context may be more about process than substantive authority. It may be a willingness to act on critical thought and to accept the impact of legal analysis. It is closely bound to integrity and professional responsibility and the ability to retain good judgment in extraordinary circumstances. Equally important in considerations of leadership and good judgment is the classified nature of so much of what is d one in national security law. All data , for instance, relating to the design, manufacture, or utilization of atomic weapons, the production of special nuclear material, or the use of nuclear material in the production of energy is classified from birth. 142 N ational security information (NSI), the bread and butter of the practice of national security law, is similarly classified. U.S. law defines NSI as “ ..information which pertains to the national defense and foreign relations (National Security) of the U nited States and is classified in acco rdance with an Executive Order.” Nine primary Executive Orders and two subsidiary ones have been issued in this realm . 143 The sheer amount of information incorporated within the classification scheme is here relevant. While original classification authorities have steadily decreased since 1980, and the number of original classification decisions is beginning to fall, the num bers are still high: in FY 2010, for instance, there were nearly 2,300 original classification authorities and almost 225,000 original classification d e c i s i o n s . 144 The classification realm , moreover, in which national security lawyers are most active , is e xpanding . Namely, d erivative classification decisions — i.e., classification resulting from the incorporation, paraphrasing, restating, or generation of classified information in some new form, is increasing . In FY 2010, there were more than 76 million such decisions made. 145 This number is tr ipple what it was in FY 2008. Legal decisions and advice tend to be based on information already classified relating to programs, initiatives, facts, intelligence, and previously classified legal opinions . The key issue here is that with so much of the essential information, decisionmaking, and executive branch jurisprudence necessarily secret, lawyers are limited in their opportunity for outside appraisal and review . Even w ithin the executive branch, stove - piping occurs. The use of secure compartmentalized information (SCI) further compounds this problem as only a limited number of individuals — much less lawyers — may be read into a program. This diminishes the opportunity to identify and correct errors or to engag e in debate and discussion over the law . O nce a legal opinion is drafted, the opportunity to expose it to other lawyers may be restricted . The effect may be felt for decades, as successive Administrations reference prior legal deci sions within certain ag encies. The Office of Legal Counsel, for instance, has an entire body of jurisprudence that has never been made public, which continues to inform the legal analysis provided to the President. Only a handful of people at OLC may be aware of the previous d ecisions. They are prevented by classification authorities from revealing these decisions, resulting in a sort of generational secret jurisprudence. Questions related to professional responsibility thus place the national security lawyer in a difficult position: not only may opportunit ies to check factual data or to consult with other attorneys be limited, but the impact of legal advice rendered may be felt for years to come. The problem extends beyond the executive branch . There are limited opportunities , for instance, for external ju dicial review. Two elements are here at work: first, v ery few cases relating to the many national security concerns that arise make it into court. Much of what is happening is simply not known. Even when it is known, it may be impossible to demonstrate standing — a persistent problem with regard to challenging, for instance, surveillance programs underway. Second , courts have historically proved particularly reluctant to intervene on national security matters. J udicially - created devices such as politica l question doctrine and state secrets underscore the reluctance of the judiciary to second - guess the executive in this realm. The exercise of these doctrines is increasing in the post - 9/11 environment. Consider state secrets. While much was made of some 5 - 7 state secrets cases that came to court during the Bush Administration, in more than 100 cases the executive branch formally invoked state secrets, which the courts a c c e p t e d . 146 Many times judges did not even bother to look at the evidence in question, before blocking evidence and/or dismissing the suit. In numerous additional cases, the courts treated the claims as though state secrets had been asserted — even where it had not been formally invoked. 147 In light of t he pressure put on national security lawy ers in the performance of their duties, the profound consequences of m any national security decisions, the existence of stovepiping even within the executive branch, and limited opportunity for external review , the practice of national security law depends upon a particularly rigorous and committed adherence to ethical standards an d professional responsibility. In other words, this is a unique world in which there are enormous pressures, with potentially few external consequences for not acting in accordan ce with high standards. It thus becomes particularly important, from a pedagogical perspective, to think through the types of situations that may present to national security attorneys, and to address the types of questions related to professional respons ibility that will confront them in the course of their careers . Closely related to this area is the necessity of exercising good judgment and leadership. This skill, like many of those discussed, may also be relevant to other areas of the law; however, th e type of leadership called f or in the world described above may 146 See Laura K. Donohue, The Shadow of State Secrets , U. P ENN . L. R EV . (2009). 147 Id. 36 be different in important ways. Good judgment, for instance, may mean any number of things, depending upon the attorney’s position within the political hierarchy. Policymaking positions, fo r instance, may be considerably different from the provision of legal advice to policymakers. Leadership , too , may mean something different in a field intimately tied to political circumstance. It may mean breaking ranks with the political hierarchy, visibly adopting unpopular public or private positions, creating new bureaucratic structures to more effectively r espond to threats, resigning when faced by unethical situations, or holding off clients until the attorneys within one’s group have the opportunity to look at issues while still being sensitive to the political needs of the institution. Recourse in such s ituations may be political, either through public statements and use of the media, or by going to different branches of government for a solution. 6 . Creating Opportunities for Learning In addition to the above skills, national security lawyers must be a ble to engage in continuous self - learning in order to improve their performance. In other words, they must be able to generate frameworks for identifying new and emerging legal and political authorities and processes, systems for handling factual chaos an d uncertainty, mechanisms to ensure critical distance, evaluating written and oral performance, and analyzing leadership skills. Law schools do not traditionally focus on how to teach students to continue their learning beyond the walls of academia. Yet it is vital for their future success to give students the wherewithal to create conditions of learning. Some of this learning may be generated by interpersonal feedback. Supervisors, law partners, and formal and informal mentors have traditionally perfor med a similar function. But in a highly political environment, where personnel frequently change, individuals repeatedly cross agencies in the course of their career, and classification limits cross - pollination, such opportunities may be limited. Thus, w hile feedback and growth may involve students’ ability to create and inculcate mentoring relationships, it may equally depend upon creating peer - to - peer learning opportunities, gaining feedback from colleagues, developing ex ante markers for reaching certa in goals, and following through with ex post analysis of one’s performance. In addition to the foregoing, n ational security lawyers need to be able to perform the six goals in tandem. That is, they need to be able to integrate these different skills into one experience. It is thus incumbent on law schools not just to emphasize these skills, but to give students the opportunity to layer their experiences. Students must learn to perform on all these fronts at once. Recognizing the importance of integrativ e learning, of course, is not new; however, for reasons discussed below, the structures that have been more broadly adopted within the legal academy to accomplish this aim are, on the whole, ill - suited to the substantive nature of the skills students need to develop as well as the task of performing such skills in near - simultaneous manner

#### It’s not just abstract extinction scenarios—there's unique value to focused discussions on specific simulations—it helps bridge the gap between theory and practice by informing provisional conclusions based on complex information.

Donohue, 13 [2013 Nation al Security Pedagogy: The Role of Simulations, Associate Professor of Law, Georgetown Law, <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2172&context=facpub>]

V . T OTAL I MMERSION S IMULATION S The concept of simulations as an aspect of higher education, or in the law school environment, is not new . 162 Moot court, after all, is a form of simulation and one of the oldest teaching devices in the law. What is new, however, is the idea of designing a civilian national s ecurity course that takes advantage of the doctrinal and experiential comp onents of law school education, and integrating the experience through a multi - day simulation. In 2009 I taught the first module based on this design at Stanford Law, which I develo ped the following year into a full course at Georgetown Law. It has since gone through multiple iterations. The initial concept followed on the federal full - scale Top Off icial (“TopOff”) exercises, used to train government officials to respond to domestic c r i s e s . 163 It adapted a Tabletop Exercise, designed with the help of exercise officials at DHS and FEMA, to the law school environment. The Tabletop used one storyline to push on specifi c legal questions, as students, assigned roles in the discussion, sat around a table and for six hours engaged with the material. The problem with the Tabletop Exercise was that it was too static, and the rigidity of the format left little room, or time, for student agency. U nlike the government’s TopOff exercises, which gave officials the opportunity to fully engage with the many different concerns that arise in the course of a national security crisis as well as the chance to deal with externalities, t he Tabletop focused on specific legal issues, even as it controlled for external chaos. The opportunity to provide a more full experience for the students came with the creation of first a one - day, and then a multi - day simulation. The course design an d simulation conti nues to evolve . It offers a one model for achieving the pedagogical goals outlined above, in the process developing a rigorous training ground for the next generation of national security l a w y e r s . 164 A . Course Design The central idea in structuring the course, which I refer to as National Security Law Simulation 2.0 (“ NSL Sim 2.0 ”) was to bridge the gap between theory and practice by conveying doctrinal material and creating an alternative reality in which students would be forced to act upon legal c o n c e r n s . 165 The exercise itself is a form of problem - based learning, wherein students are given both agency and responsibility for the results. Towards this end, the structure must be at once bounded (i.e., directed and focused on certain areas of the law and legal education) and flexible (i.e., responsive to student input and decision - making). P erhaps the most significant weakness in the use of any constructed universe is the problem of authenticity. Efforts to replicate reality will in evitably fall short. There is simply too much uncertainty, randomness, and complexity in the real world. One way to address this shortcoming, however, is through design and agency. The scenarios with which students grapple, and the structural design of the simulation must reflect the national security realm, even as students themselves must make choices that carry consequences. Indeed, to some extent, **student decisions** themselves must **drive the evolution of events** within the simulation. 166 Additionally**, while authenticity matters**, it is worth noting that at some level, the fact that the incident does not take place in a real - world setting can be a great advantage. That is, the simulation creates an environment where students can make mistakes and learn from these mistakes— without what might otherwise be devastating consequences. It also allows instructors to develop multiple points of feedback to enrich student learning in a way that would be much more difficult to do in a regular practice setting. NSL Si m 2.0 takes as its starting point the national security pedagogical goals discussed above. It works backwards to then engineer a classroom, cyber, and physical/simulation experience to delve into each of these areas. As a substantive matter, the course f ocuses on the constitutional, statutory, and regulatory authorities in national security law, placing particular focus on the interstices between black letter law and areas where the field is either unsettled or in flux. A key part of the course design is in retaining both the doctrinal and experiential components of legal education. Divorcing simulations from the doctrinal environment risks falling short on the first and third national security pedagogical goals: (1) analytical skills and substantive kn owle dge, and (3 ) critical thought. To be sure, a certain amount of both can be learned in the course of a simulation; however, the national security crisis environment is not well - suited to the more thoughtful and careful analytical discussion. What I am thus proposing is a course design in which doctrine is paired with the type of experiential learning more common in a clinical realm. The former precedes the latter, giving students the opportunity to develop depth and breadth prior to the exercise. In order to capture problems related to adaptation and evolut ion [1(d )], the simulation itself takes place over a multi - day period. Because of the intensity involved in national security matters (and conflicting demands on student time), the model makes use of a mu lti - user virtual environment. The use of such technology is critical to creating more powerful, immersive s i m u l a t i o n s . 167 It also allow s for continual interaction between the players. Multi - user virtual environments have the further advantage in h elping to transform the traditional teaching culture, predominantly concerned with manipulating textual and symbolic knowledge, into a culture where students learn and can then be assessed on the basis of their participation in changing p r a c t i c e s . 168 I thus worked with the Information Technology group at Georgetown Law to build the cyber portal used for NSL Sim 2.0. The twin goals of adaptation and evolution require students to be given a significant amount of agency and responsibility for decisions taken in the course of the simulation. To further this aim, I constituted a Control Team, with six professors, two attorneys in practice, a media expert, six to eight former simulation students, and technology experts. Four of the professors specialize in different areas of national security law and assume roles in the course of the exercise, with the aim of pushing students towards a deeper doctrinal understanding of the shifting authorities. One professor plays the role of President of the United States. The sixth professor focuses on questions of professional 44 respo nsibility. The two attorneys fro m practice help to build the simulation and then, along with all the professors, assume active roles during the simulation itself. Returning students assist in the execution of the play, further developing their understanding of national security law. T hroughout the simulation, the C ontrol T eam is constantly reacting to student choices . Where unexpected decisions are made, professors may choose to pursue the evolution of the story to accomplish the pedagogical aims, or they may choose to cut off play in that area (there are various devices for doing so, such as denying requests, sending materials to labs to be analyzed, drawing the players back into the main storylines, and l eaking information to the media ). Unlike the more limited experiential tools of hypotheticals or doctrinal problems, a total immersion simulation involves a number of scenarios, as well as systemic noise, to give students experience in dealing with the second pedagogical goal: i.e., factual chaos and information overload. The drivin g aim here is to teach students how to manage information more effectively. Five to six storylines are thus developed, each with its own arc and evolution. To this are added multiple injects relating to background noise. Thus, unlike hypotheticals , doct rinal problems, single - experience exercises, or even Tabletop exercises, the goal is not to eliminate external conditions, but to embrace them as part of the challenge facing national security lawyers. The simulation itself is problem - based, giving players agency in driving the evolution of the experience— thus addressing goal [2(c)]. This requires a real - time response from the professor(s) overseeing the simulation, pairing bounded storylines with flexibility to push on different areas of the law and the s tudents’ practical skills. Indeed, each storyline is based on a problem facing the government, to which players must then respond, generating in turn a set of new issues that must be addressed. The written and oral components of the simulation conform to the fourth pedagogical goal — i.e., the types of situations in which national security lawyers will find themselves . Particular emphasis is placed on nontraditional modes of communication : e.g., legal documents in advance of the crisis itself, meetings in the midst of breaking national security concerns, multiple informal interactions, media exchanges, telephone calls, Congressional testimony, and formal briefings to senior level officials in the course of the simulation as well a s during the last class ses sion . This is paired with the preparation of formal legal instruments, such as applications to the Foreign Intelligence Surveillance Court, legal memos, applic ations for search warrants under Title III, and administrative subpoenas such as National Securi ty Letters. In addition, students are required to prepare a paper prior to the simulation, outlining their legal authorities – and following the session, to deliver a 90 second oral briefing. To replicate the high - stakes, political environment at issue in goals (1) and (5), students are divided into political and legal roles, and assigned to different (and competing) institutions: the White House, DoD, DHS, HHS, DOJ, DOS, Congress, state officials, nongovernmental organizations, and the media. This req uires students to acknowledge and work within the broader Washington context, even as they are cognizant of the policy implications of their decisions. They must get used to working with policymakers and to representing one of (many) different considerati ons that decisionmakers take into account in the national security domain. Scenarios are then selected with high consequence events in mind , to ensure that students recognize both the domestic and international dimensions of national security law . Further injects into the simulation provide for the broader political context — for instance, whether it is an election year, which parties control different branches, and state and local issues in related but distinct areas. The media is given a particularly prom inent role. One member of the Control Team runs an AP wire service, while two student players represent print and broadcast me dia, respectively. The Virtual News Network (“VNN”), which performs in the second capacity, runs continuously during the exercis e, in the course of which players may at times be required to appear before the camera. This media component thus helps to emphasize the broader political context within which national security law is practiced. Both anticipated and unanticipated decision s give rise to ethical questions and matters related to the fifth goal: professional responsibility. The way in which such issues arise stems from simulation design as well as spontaneous injects from both the Control Team and the participants in the sim ulation itself. As aforementioned, one professor on the Control Team , and a practicing attorney who has previously gone through a simulation , focus on raising decision points that encourage students to consider ethical and professional considerations. Th roughout the Frameworkjudgment and leadership play a key role , directly impacting the players’ effectiveness , with the exercise itself hitting the aim of the integration of the various pedagogical goals. Finally, there are multiple layers of feedb ack that players receive prior to, during, and following the simulation to help t hem to gauge their effectiveness. T he Socratic method in the course of doctrinal studies provides immediate assessment of the students’ grasp of the law . Written assignments focused on the contours of individual players’ authorities give professors an opportunity to assess students’ level of understanding prior to the simulation. And the simulation itself provides real - time feedback from both peers and professors . The Contr ol Team provides data points for player reflection — for instance, the Control Team member playing President may make decisions based on player input, giving students an immediate impression of their level of persuasiveness, while another Control Team member may reject a FISC application as insufficientThe simulation goes beyond this, however, focusing on teaching students how to develop (6) opportunities for learning in the future. Student meetings with mentors in the field, which take place before the si mulation, allow students to work out the institutional and political relationships and the manner in which law operates in practice, even as they learn how to develop mentoring relationships. (Prior to these meetings we have a class discussion about mento ring, professionalism, and feedback). Students, assigned to simulation teams about one quarter of the way through the course, receive peer feedback in the lead - up to the simulation and during the exercise itself. Following the simulation the Control Team and observers provide comments . Judges , who are senior members of the bar in the field of national security law, observe player interaction s and provide additional debriefing . The simulation, moreover, is recorded through both the cyber portal and throu gh VNN, allowing students to go back and to assess their performance. Individual meetings with the professors teaching the course similarly follow the event. Finally, students end the course with a paper reflecting on their performance and issues that ar ose in the course of the simulation and with an aim towards developing frameworks for how to analyze uncertainty, tension with colleagues, mistakes, and successes in the future.B . Substantive Areas: Interstices and Threats As a substantive matter, NSL Sim 2.0 is designed to take account of areas of the law central to national security . It focuses on specific authorities that may be brought to bear in the course of a crisis . The decision of which areas to explore is made well in advance of the cour se. It is particularly helpful here to think about national security authorities on a continuum, as a way to press students on shifting standards depending upon the type of threat faced. One course, for instance, might center on the interstices between c rime, drugs, terrorism and war. Another might push on the intersection of pandemic disease and biological weapons. A third could turn to cybercrime and cyberterrorism. This is the most important determination, because the substance of the doctrinal port ion of the course and the simulation follows from this decision. For a course focused on the interstices between pandemic disease and biological weapons, for instance, preliminary inquiry would lay out what authorities apply, where the courts have weighed in on the question, and what matters are unsettled. Relevant areas might include public health law, biological weapons provisions, federal quarantine and isolation authorities, habeas corpus and due process, military enforcement and posse comitatus , emine nt domain and appropriation of land/property, takings, contact tracing, thermal imaging and surveillance, electronic tagging, vaccination, and intelligence - gathering. The critical areas can then be divided into the dominant constitutional authority, statut ory authorities, regulations, key cases, general rules, and constitutional questions. This, then, becomes a guide for the doctrinal part of the course, as well as the grounds on which the specific scenarios developed for the simulation are based. The aut horities, simultaneously, are included in an electronic resource library and embedded in the cyber portal (the Digital Archives) to act as a closed universe of the legal authorities needed by the students in the course of the simulation. Professional resp onsibility in the national security realm and the institutional relationships of those tasked with responding to biological weapons and pandemic disease also come within the doctrinal part of the course. The simulation itself is based on five to six storyl ines that push on the interstices between different areas of the law. The storylines are used to present a coherent, non - linear scenario that can adapt to student injects. Each scenario is mapped out in a three to seven page document, which is then check ed with scientists, government officials, and area experts for consistency with how the scenario would likely unfold in real life. For the biological weapons and pandemic disease emphasis, for example, one narrative might relate to the presentation of a patient suspected of carrying yersinia pestis at a hospital in the United States. The document would map out a daily progression of the disease consistent with epidemiological patterns and the central actors in the story: perhaps a U.S. citizen, potentia l connections to an international terrorist organization, intelligence on the individual’s actions overseas, etc. The scenario would be designed specifically to push on the intersection of public health and counterterrorism/biological weapons threats, and the associated (shifting) authorities, thus requiring the disease initially to look like an innocent presentation ( e.g., by someone who has traveled from overseas), but then for the storyline to move into the second realm (i.e., awareness that this was in fact a concerted attack). A second storyline might relate to a different disease outbreak in another part of the country, with the aim of pushing the Stafford Act/Insurrection Act line and raising federalism concerns. The role of the military here and T itle 10/Title 32 questions would similarly arise — with the storyline designed to raise these questions. A third storyline might simply be (well developed) noise in the system: reports of suspicious activity potentially linked to radioactive material, with the actors linked to nuclear material. A fourth storyline would focus perhaps on container security concerns overseas, progressing through newspaper reports, with containers showing up in local police precincts. State politics would constitute the fifth storyline, raising question of the political pressures on the state officials in the exercise. Here, ethnic concerns, student issues, economic conditions, and community policing concerns might prove the focus. The sixth storyline could be further noise in the system — loosely based on current events at the time. In addition to the storylines, a certain amount of noise is injected into the system through press releases, weather upda tes, private communications, and the like. The five to six storylines, prep ared by the Control Team in consultation with experts, becomes the basis for the preparation of scenario “injects”: i.e., newspaper articles, VNN 47 broadcasts, reports from NGOs, private communications between officials, classified information, government l eaks, etc., which , when put together, constitute a linear progression. These are all written and/or filmed prior to the exercise. The progression is then mapped in an hourly chart for the unfolding events over a multi - day period. All six scenarios are p laced on the same chart, in six columns, giving the Control Team a birds - eye view of the progression. C . How it Works As for the nuts and bolts of the simulation itself, it traditionally begins outside of class, in the evening, on the grounds that national security crises often do not occur at convenient times and may well involve limited sleep and competing d e m a n d s . 169 Typically, a phone call from a Control Team member posing in a role integral to one of the main storylines, initiates play. Student s at this point have been assigned dedicated simulation email addresses and provided access to the cyber portal. The portal itself gives each team th e opportunity to converse in a “ classified ” domain with other team members, as well as access to a public AP wire and broadcast channel, carrying the latest news and on which press releases or (for the media roles) news stories can be posted. The complete universe of legal authorities required for the simulation is located on the cyber portal in the Digital A rchives, as are forms required for some of the legal instruments (saving students the time of developing these from scratch in the cour se of play). Additional “ classified ” material — both general and SCI — has been provided to the relevant student teams. The Control Team has access to the complete site. For the next two (or three) days, outside of student initiatives (which, at their prompting , may include face - to - face meetings), the entire simulation takes place through the cyber portal. The Control Team, immediately active, begins responding to player decisions as they become public (and occasionally, through monitoring the “classified” communications, before they are released) . This time period provides a ramp - up to the third (or fourth) day of play, all owing for the adjustment of any substantive, student, or technology concerns, while setting the stage for the breaking crisis. The third (or fourth) day of play takes place entirely at Georgetown Law. A special room is constructed for meetings between the President and principals, in the form of either the National Security Council or the Homeland Security Council, with breakout rooms assigned to each of the agencies involved in the NSC process. Congress is provided with its own physical space, in which m eetings, committee hearings and legislative drafting can take place. State government officials are allotted their own area, separate from the federal domain, with the Media placed between the three major interests. The Control Team is sequestered in a d ifferent area, to which students are not admitted. At each of the major areas, the cyber portal is publicly displayed on large flat panel screens, allowing for the streaming of video updates from the media, AP wire injects, articles from the students assi gned to represent leading newspapers, and press releases. Students use their own laptop computers for team decisions and communication. As the storylines unfold, the Control Team takes on a variety of roles, such as that of POTUS, the Vice President, the President’s Chief of Staff, the Governor of a state, and public health officials. Some of the roles are adopted on the fly, depending upon player responses and queries as the storylines progress. Judges, given full access to each player domain, determine how effectively the students accomplish the national security goals. The judges are themselves well - experienced in the practice of national security law, as well as in legal education. They thus can offer a unique perspective on the scenarios confronted by the students, the manner in which the simulation unfolded, and how the students performed in their various capacities. At the end of the day, the exercise terminates and an immediate hotwash is held, in which players are first debriefed on what occurre d during the simulation. Because of the players’ divergent experiences and the different roles assigned to them, the students at this point are often unaware of the complete picture. **The judges** (and formal observers) then offer reflections on the simulat ion and **determine which teams performed most effectively.** Over the next few classes, more details about the simulation emerge, as students discuss it in more depth and consider limitations created by their knowledge or institutional position, questions t hat arose in regard to their grasp of the law, the types of decision - making processes that occurred , and the effectiveness or their — and other students’ — performance s . Reflection papers, paired with oral briefings, focus on the substantive issues raised by the simulation and introduce the opportunity for students to reflect on how to create opportunities for learning in the future . The course then c o n c l u d e s . 17V I .

#### It’s not a passive endeavor—tying knowledge to a specific recommendation creates a conduit for testing that research in a competitive space—that's a useful starting point

Farrar-Myers, 07 [Victoria A. Farrar-Myers, professor University of Texas at Arlington, PROMOTING ACTIVE LEARNING THROUGH SIMULATIONS IN PRESIDENCY CLASSES, <http://cstl-cla.semo.edu/Renka/PRG/PRG_Reports/Fall_2007.pdf>]

Lao-Tse’s insight captures the essence of an active learning based approach to education. Such an approach calls for students to have a role and responsibility in developing their own knowledge; in the words of John Dewey, learning is “something that an individual does when he studies. It is an **active**, personally conducted **affair**” (1924). Unlike more traditional teaching styles where the instructor simply transfers information to the student, who is required to do little more than act as a depository for such information (Freire, 1970) or as a sponge soaking it up (Keeley, Ali & Gebing, 1998; Fox-Cardamone & Rue, 2003), an active learning approach places an emphasis on students’ independent inquiry, restructuring of their knowledge, and other constructivist qualities (Niemi, 2002). Employing active learning strategies in political science classes not only has been shown to work (Brock & Cameron, 1999), but more importantly would seem to be a natural fit. “Learning is not a spectator sport” (Chickering and Gamson, 1987), and neither is the world of politics. As a result, one way to enhance students’ learning about the political world is for them to “talk about what they are learning, write about it, relate it to past experiences and apply it to their daily lives. They must make what they learn part of themselves” (Chickering and Gamson, 1987). Further, active learning techniques – particularly if tied to learning outcomes designed to promote higher order thinking skills such as analysis, application, synthesis, and evaluation (Bloom, 1956) – can help students prepare “to tackle a multitude of challenges that they are likely to face in their personal lives, careers, and duties as responsible citizens” (Tsui, 2002). As political scientists, we may be in the best position in the academy to promote a sense of civic engagement in our students, and the use of intentionally designed active learning techniques tied to specific learning outcomes can greatly assist us in helping to instill this sense. The use of active learning encompasses a wide array of teaching techniques that can be used in large classes as well as small ones; techniques such as: using guided lectures and answering open-ended, student-generated questions (Bonwell & Eison, 1991); using primary sources in the classroom (May, 1986); cooperative learning (Smith, 1986); and simulations and role-playing games (Shannon, 1986; for a general discussion on active learning strategies, see Bonwell & Eison, 1991; Astin et al., 1984; and Schomberg, 1986). However, finding a technique that works successfully can be influenced by: •Institutional variables: e.g., size of class, physical arrangement of classrooms, and lack of incentives for professors to undertake new active learning strategies (see generally Bonwell & Eison, 1991); •The professor: e.g., the professor’s comfort level with student interaction and the amount of control in the classroom the professor desires (see generally Bonwell & Sutherland, 1996); and •The students: e.g., prior exposure and experiences (Hoover, 2006), students’ different learning styles (Kolb, 1981; Cross, 1998), and student motivation (Gross Davis, 1993) or indifference (Warren, 1997) to participate in active learning activities. The POTUS and PASS projects were two semester-long, in-class simulations employing active learning techniques and designed to achieve desired course learning outcomes. Despite some initial reluctance by the students, these simulations helped them achieve the course outcomes, but more significantly generated a high level of efficacy, engagement, and understanding. Although the specific model employed may not work in every context (the variables noted above will create a different dynamic in each class), the process by which these projects were developed and employed may provide those who teach presidency-related classes with insights on how to best employ active learning techniques in their own setting. The 2008 presidential election marks the first time since 1952 that a sitting president or vice president will not be a candidate for nomination in either major party. As I was developing my general survey course on the U.S. Presidency in the fall of 2005, I contemplated how to make this factoid become more relevant to my students, especially since encouraging civic engagement and voter participation in the 18-24 year-old age group has been a focus in recent presidential races. I wanted a way to bring to life the usual discussion of presidential elections and encourage my students to become active participants in the process of identifying, evaluating, and promoting various candidates. Out of these thoughts germinated The POTUS Project – short for The President Of The United States Project. In this simulation, my students took on the role of political consultants responsible for developing a plan to guide their candidate to the Oval Office. Each student started by assessing the viability of a chosen candidate and then developing a strategy for winning that candidate’s party nomination. At mid-semester, the class divided into two groups – the two major parties – to hold a nomination convention where each party chose its own presidential-vice presidential ticket. Students had to caucus and advocate for their own candidate much like the Iowa caucus. From there, each team developed a “Vision Statement” for its candidate to let the voters know their candidate’s strategy for winning the general election, transitioning into power, and governing as president once in office. Each group presented its “Vision Statement” to the full class and to two real-world politiFall 2007 11 cal consultants. The students were not alone in their learning endeavor. I took the liberty of writing to each of our selected candidates, telling them about the project and asking them to write my students. Two of the candidates did and in sharing these letters with the class, my students and I became acutely aware that what we were learning has meaning outside the four walls of our classroom; the very lesson I hope to impart in each of my classes. In the end, The POTUS Project allowed the students to combine the course material with real life events and possibilities, and to work with their classmates to create a comprehensive electoral plan for someone who might become the next President of the United States. In doing so, the students were able to reinforce their learning through individual and group-effort written analysis and oral presentation. Further, the Project achieved the desired outcome of fostering collaborative action after individual analysis. Since most political enterprises take place within working groups or teams, these simulations allowed the students to gain experience with, as well as a direct appreciation for, this important political enterprise. Most significantly, through both a formal student evaluation of The POTUS Project and informal discussions with individual students, I found that they applied their knowledge in more sophisticated ways than in my more traditional course offering as well as reported **more ownership and comfort with the core concepts** of the class. They also reported a greater sense of efficacy and understanding of the presidential selection process; even two years later, I received an email from a student indicating how she is using the knowledge and insights gained from her class experience to be more engaged with this year’s actual presidential primaries. With the lessons I learned from The POTUS Project, I decided to employ a similar model in an upper-division course entitled Presidency and Foreign Policy. In The PASS Project (Presidential Advisory Strategy Simulation), the students played the role of foreign policy analysts and advisors. Each student selected his or her country of expertise, completed an assessment of the U.S. foreign relations with that country, and prepared a briefing paper for a current presidential candidate based upon a vision statement outlined by their candidate in the journal Foreign Affairs. Students then teamed-up with classmates who selected the same candidate and developed a comprehensive foreign policy/ national security strategy for that candidate. The students worked with their teams during the semester, and then shared their collective insights with their classmates in a final presentation during an “Advisory Summit.” The PASS Project required the students to play different roles throughout the simulation and, as a result, develop and employ different cognitive skills. In becoming a country expert, the students served as foreign policy analysts responsible for obtaining knowledge and being able to critically analyze it in meaningful ways. In fact, I was able to have a foreign policy analyst from the Department of State as a guest speaker by means of teleconferencing, and he showed the students how the skills they were using in class were the same ones that the speaker used in his job. The next portion of the simulation, where the students prepared a briefing paper, required them to apply their knowledge in a specific context of a presidential candidate’s general statements on foreign affairs. Finally, the group project required the students to synthesize their collective knowledge into a coherent plan for their presidential candidate and evaluate the effectiveness of their proposals. From the POTUS and PASS projects, a number of lessons emerged for effectively employing simulations in presidency classes, including: •Intentionality of design: Although the rewards in successfully employing an active-learning simulation are well worth it for both student and teacher, doing so requires that the instructor put substantial thought up front into the design of the program. Certainly, this lesson speaks to understanding the desired learning outcomes of the simulation, but also extends to such matters as evaluation and simulation mechanics. For example, students tend to be wary of group projects and free-riders who might bring a student’s grade down. To address this concern, I structured the evaluative aspects of the simulations so that most of the items for which the students were graded upon were based solely on their own work (e.g., individual assignments that were then later used in the group project or reflection papers on the group project process). In a few instances, though, where a student received the same grade as other group members for their collective effort, I limited both the number of people within each working subgroup, and also limited the percentage of the student’s overall grade attributed to the group effort. As far as design mechanics, the instructor needs to identify as many potential glitches as possible and develop prevention methods. For example, to ensure a proper balance of students working for either party in The POTUS Project or for any candidate in The PASS Project, I reserved the right to require students to switch to a different party or candidate as needed. •Assessing achievement of learning outcomes: Active learning techniques have been shown to have a powerful impact on students’ learning, for example on “measures of transfer of knowledge to new situations or measures of problem-solving, thinking, attitude change, or motivation for further learning” (McKeachie et al., 1986; for other studies measuring the impact of active learning techniques, see Kuh et al., 1997; Springer, 1997; Cabrera et al., 1998; McCarthy and Anderson, 2000; and Pascarella and Terenzini, 2005). Therefore, any simulation design should incorporate assessment tools that allow the instructor to measure the impact of the learning technique. For example, a pre- and post-test was administered to ascertain students’ base level of understanding of course material being covered by the simulation. Students also completed self-assessment and group assessments of their and their classmates’ participation in the simulation. Further, a reflection session was held to provide the students with the ability to discuss the strengths and weaknesses of the simulation. The insights culled from all of these various Fall 2007 12 assessments were later employed to refine implementation of similar models in future classes. •Obtaining student buy-in: As one scholar noted, “many active learning techniques fail simply because teachers do not take time to explain them” (Warren, 1997). Perhaps the best way to obtain the necessary student buy-in, therefore, appears to be communication and guidance from the professor (Felder & Brent, 2006). To this end, I included a detailed addendum to my syllabus in each class outlining every step of the simulation process and then discussed the simulation in the first day of class. Doing so put the students on notice of what was expected of them and giving them the opportunity to drop the class if they were not willing to put forth the necessary effort. Further, I sought input and feedback from the students throughout the semester – something that has been known to mitigate students’ concern related to the simulation (Sutherland, 1996) – and found ways to act on the feed back. For example, based on discussions with students, I decided to provide an additional incentive for students to do well on their oral presentation in The PASS Project by giving the winning team, as voted on by the students themselves, two extra questions to chose from in the short-answer portion of their final exam (i.e., instead of answering all eight short answer questions I gave them, the winning team had to answer eight of ten questions with each student choosing which eight she would answer). •Surrendering control: Ultimately, if the simulation is going to be a “personally conducted affair” of learning, to use John Dewey’s words, the students at some point have to control the process for themselves. Certainly, as the instructor, I established the framework of the simulations, the minimum requirements that needed to be satisfied, and the desired outcomes. In the context of oral presentations, the students showed great initiative in their presentations – from complex slide shows, to informative and eye-catching displays, to even doing their presentation in the form of a game show (Foreign Policy Jeopardy). By my surrendering some of the control over the process to the students, they made it their own and, in doing so, learned greater lessons for themselves than I simply could have told them. Of all the ways to evaluate and document the success of these simulations, the best way to do so is in the words of the students themselves. At the end of The POTUS Project, I asked the students to evaluate the Project, their contributions, and the contributions of others. Many pointed to the nominating convention as an astonishing experience – one where they were using the course material to persuade others. They noted how one student, who was alone in backing his candidate, used his knowledge to lobby others to place the candidate on the party’s ticket as the vice presidential candidate. As one student indicated, “the power of one armed with knowledge can really rule the world of poli tics!” This is the lesson of civic engagement that I wanted my students to learn – that one person, with commitment, informa tion, and passion, can influence and better the world around them – and it is a lesson that the use of active learning simulations can help them achieve.

#### That's why the particulars of our UN arguments are key—it’s not enough to have an ethical relationship to the Presidency or war powers—only interrogating the nuances of specific ideas captures the benefits of an open dialogue without sacrificing the importance of the topic

Mucher, 12 [“Malaise in the Classroom: Teaching Secondary Students about the Presidency” [Stephen Mucher](http://www.bard.edu/academics/faculty/faculty.php?action=details&id=1969) is assistant professor of history education in the Master of Arts in Teaching Program at Bard College, <http://www.hannaharendtcenter.org/?p=7741>]

Contemporary observers of secondary education have appropriately decried the startling lack of understanding most students possess of the American presidency. This critique should not be surprising. In textbooks and classrooms across the country, curriculum writers and teachers offer an abundance of disconnected facts about the nation’s distinct presidencies—the personalities, idiosyncrasies, and unique time-bound crises that give character and a simple narrative arc to each individual president. Some of these descriptions contain vital historical knowledge. Students should learn, for example, how a conflicted Lyndon Johnson pushed Congress for sweeping domestic programs against the backdrop of Vietnam or how a charismatic and effective communicator like Ronald Reagan found Cold War collaboration with Margaret Thatcher and Mikhail Gorbachev. But what might it mean to ask high school students to look across these and other presidencies to encourage more sophisticated forms of historical thinking? More specifically, what might teachers begin to do to promote thoughtful writing and reflection that goes beyond the respective presidencies and questions the nature of the executive office itself? And how might one teach the presidency, in Arendtian fashion, encouraging open dialogue around common texts, acknowledging the necessary uncertainty in any evolving classroom interpretation of the past, and encouraging flexibility of thought for an unpredictable future? By provocatively asking whether the president “matters,” the [2012 Hannah Arendt Conference](http://www.bard.edu/hannaharendtcenter/conference9-12/) provided an ideal setting for New York secondary teachers to explore this central pedagogical challenge in teaching the presidency. Participants in this special writing workshop, scheduled concurrently with the conference, attended conference panels and also retreated to consider innovative and focused approaches to teaching the presidency. Conference panels promoted a broader examination of the presidency than typically found in secondary curricula. A diverse and notable group of scholars urged us to consider the events and historical trends, across multiple presidencies, constraining or empowering any particular chief executive. These ideas, explored more thoroughly in the intervening writing workshops, provoked productive argument on what characteristics might define the modern American presidency. In ways both explicit and implicit, sessions pointed participants to numerous and complicated ways Congress, the judiciary, mass media, U.S. citizens, and the president relate to one another. This sweeping view of the presidency contains pedagogical potency **and has a place in** secondary **classrooms**. Thoughtful history educators should ask big questions, encourage open student inquiry, and promote civic discourse around the nature of power and the purposes of human institutions. But as educators, we also know that the aim and value of our discipline resides in place-and time-bound particulars that beg for our interpretation and ultimately build an evolving understanding of the past. Good history teaching combines big ambitious questions with careful attention to events, people, and specific contingencies. Such specifics are the building blocks of storytelling and shape the analogies students need to think through an uncertain future. Jimmy Carter’s oval office speech on July 15, 1979, describing a national “crisis of confidence” presented a unique case study for thinking about the interaction between American presidents and the populations the office is constitutionally obliged to serve. Workshop participants prepared for the conference by watching the [video footage](http://www.youtube.com/watch?v=KCOd-qWZB_g) from this address and reading parts of Kevin Mattson’s [history of the speech](http://www.nytimes.com/2009/07/15/books/excerpt-what-the-heck-mr-president.html). In what quickly became known as the “Malaise Speech,” Carter attempted a more direct and personal appeal to the American people, calling for personal sacrifice and soul searching, while warning of dire consequences if the nation did not own up to its energy dependencies. After Vietnam and Watergate, Carter believed, America needed a revival that went beyond policy recommendations. His television address, after a mysterious 10-day sequestration at Camp David, took viewers through Carter’s own spiritual journey and promoted the conclsions he drew from it. Today, the Malaise Speech has come to symbolize a failed Carter presidency. He has been lampooned, for example, on The Simpsons as our most sympathetically honest and humorously ineffectual former president. In one [episode](http://www.youtube.com/watch?v=D91IlKLtIH8), residents of Springfield cheer the unveiling of his presidential statue, emblazoned with “Malaise Forever” on the pedestal. Schools give the historical Carter even less respect. Standardized tests such as the NY Regents exam ask little if anything about his presidency. The Malaise speech is rarely mentioned in classrooms—at either the secondary or post-secondary levels. Similarly, few historians identify Carter as particularly influential, especially when compared to the leaders elected before and after him. Observers who mention his 1979 speeches are most likely footnoting a transitional narrative for an America still recovering from a turbulent Sixties and heading into a decisive conservative reaction. Indeed, workshop participants used writing to question and debate Carter’s place in history and the limited impact of the speech. But we also identified, through [primary sources](http://www.livingroomcandidate.org/commercials/1976) on the 1976 election and documents around the speech, ways for students to think expansively about the evolving relationship between a president and the people. A quick analysis of the [electoral map](http://en.wikipedia.org/wiki/File:1976prescountymap2.PNG) that brought Carter into office reminded us that Carter was attempting to convince a nation that looks and behaves quite differently than today. The vast swaths of blue throughout the South and red coastal counties in New York and California are striking. Carter’s victory map can resemble an electoral photo negative to what has now become a familiar and predictable image of specific [regional alignments](http://www.washingtonpost.com/wp-srv/politics/interactives/campaign08/election/uscounties.html) in the Bush/Obama era. The president who was elected in 1976, thanks in large part to an electorate still largely undefined by the later rise of the Christian Right, remains an historical enigma. As an Evangelical Democrat from Georgia, with roots in both farming and nuclear physics, comfortable admitting his sins in both Sunday School and Playboy, and neither energized by or defensive about abortion or school prayer, Carter is as difficult to image today as the audience he addressed in 1979. It is similarly difficult for us to imagine the Malaise Speech ever finding a positive reception. However, this is precisely what [Mattson](http://www.nytimes.com/2009/08/02/books/review/Bai-t.html) argues. Post-speech weekend polls gave Carter’s modest popularity rating a surprisingly respectable 11-point bump. Similarly, in a year when most of the president’s earlier speeches were ignored, the White House found itself flooded with phone calls and letters, almost universally positive. The national press was mixed and several prominent columnists praised the speech. This reaction to such an unconventional address, Mattson goes on to argue, suggests that the presidency can matter. Workshop participants who attended later sessions heard Walter Russell Mead reference the ways presidents can be seen as either transformative or transactional. In many ways, the “malaise moment” could be viewed as a late term attempt by a transactional president to forge a transformational presidency. In the days leading up to the speech, Carter went into self-imposed exile, summoning spiritual advisors to his side, and encouraging administration-wide soul searching. Such an approach to leadership, admirable to some and an act of desperation to others, defies conventions and presents an odd image of presidential behavior (an idea elaborated on by conference presenter Wyatt Mason). “Malaise” was never mentioned in Carter’s speech. But his transformational aspirations are hard to miss. In a nation that was proud of hard work, strong families, close-knit communities, and our faith in God, too many of us now tend to worship self-indulgence and consumption. Human identity is no longer defined by what one does, but by what one owns. But we've discovered that owning things and consuming things does not satisfy our longing for meaning. We've learned that piling up material goods cannot fill the emptiness of lives which have no confidence or purpose. It is this process—the intellectual act of interpreting Carter and his [in]famous speech as aberrant presidential behavior—that allows teachers and their students to explore together the larger question of defining the modern presidency. And it is precisely this purposeful use of a small number of primary sources that forces students to rethink, through writing and reflection, the parameters that shape how presidents relate to their electorate. In our workshop we saw how case studies, in-depth explorations of the particulars of history, precede productive debate on whether the presidency matters. The forgotten Carter presidency can play a disproportionately impactful pedagogical role for teachers interested in exploring the modern presidency. As any high school teacher knows, students rarely bring an open interpretive lens to Clinton, Bush, or Obama. Ronald Reagan, as the first political memory for many of their parents, remains a polarizing a figure. However, few students or their parents hold strong politically consequential opinions about Carter. Most Americans, at best, continue to view him as a likable, honest, ethical man who is much more effective as an ex-president than he was as president. Workshop participants learned that the initial support Carter received after the Malaise Speech faded quickly. Mattson and some members of the administration now argue that the President lacked a plan to follow up on the goodwill he received from a nation desiring leadership. Reading [Ezra Klein](http://m.newyorker.com/reporting/2012/03/19/120319fa_fact_klein), we also considered the possibility that, despite all the attention educators give to presidential speeches (as primary sources that quickly encapsulate presidential visions), there is little empirical evidence that any public address really makes much of a difference. In either case, Carter’s loss 16 months later suggests that his failures of leadership both transformational and transactional. Did Carter’s speech matter? The teachers in the workshop concluded their participation by attempting to answer this question, working collaboratively to draft a brief historical account contextualizing the 1979 malaise moment. In doing so, we engaged in precisely the type of activity missing in too many secondary school classrooms today: interrogating sources, corroborating evidence, debating conflicting interpretations, paying close attention to language, and doing our best to examine our underlying assumptions about the human condition. These efforts produced some clarity, but also added complexity to our understanding of the past and led to many additional questions, both pedagogical and historical. In short, our writing and thinking during the Arendt Conference produced greater uncertainty. And **that reality alone suggests that study of the presidency does indeed matter.**

#### Legal strategy is key—no matter what our orientation to the state is, the details of certain mechanisms to address problems predetermine the value of a moral stance

Smith 2012 (Andrea, “The Moral Limits of the Law: Settler Colonialism and the Anti-Violence Movement” settler colonial studies 2, 2 (2012) Special Issue: Karangatia: Calling Out Gender and Sexuality in Settler Societies)

Aside from Derrick Bell, because racial and gender justice legal advocates are so invested in the morality of the law, there has not been sustained strategising on what other possible frameworks may be used. Bell provides some possibilities, but does not specifically engage alternative strategies in a sustained fashion. Thus, it may be helpful to look for new possibilities in an unexpected place, the work of anti-trust legal scholar Christopher Leslie. Again, the work of Leslie may seem quite remote from scholars and activists organizing against the logics of settler colonialism. But it may be the fact that Leslie is not directly engaging in social justice work that allows him to disinvest in the morality of the law in a manner which is often difficult for those who are directly engaged in social justice work to do. This disinvestment, I contend is critical for those who wish to dismantle settler colonialism to rethink their legal strategies. In ‘Trust, Distrust, and Anti-Trust’, Christopher Leslie explains that while the economic impact of cartels is incalculable, cartels are also unstable.18 Because cartel members cannot develop formal relationships with each other, they must develop partnerships based on informal trust mechanisms in order to overcome the famous ‘prisoners’ dilemma’. The prisoner’s dilemma, as described by Leslie, is one in which two prisoners are arrested and questioned separately with no opportunity for communication between them. There is enough evidence to convict both of minor crimes for a one year sentence but not enough for a more substantive sentence. The police offer both prisoners the following deal: if you confess and implicate your partner, and your partner does not confess, you will be set free and your partner will receive a ten-year sentence. If you confess, and he does as well, then you will both receive a five-year sentence. In this scenario, it becomes the rational choice for both to confess because if the first person does not confess and the second person does, the first person will receive a ten-year sentence. Ironically, however, while both will confess, it would have been in both of their interests not to confess. Similarly, Leslie argues, cartels face the prisoners’ dilemma. If all cartel members agree to fix a price, and abide by this price fixing, then all will benefit. However, individual cartel members are faced with the dilemma of whether or not they should join the cartel and then cheat by lowering prices. They fear that if they do not cheat, someone else will and drive them out of business. At the same time, by cheating, they disrupt the cartel that would have enabled them to all profit with higher prices. In addition, they face a second dilemma when faced with anti-trust legislation. Should they confess in exchange for immunity or take the chance that no one else will confess and implicate them? Cartel members can develop mechanisms to circumvent pressures. Such mechanisms include the development of personal relationships, frequent communication, goodwill gestures, etc. In the absence of trust, cartels may employ trust substitutes such as informal contracts and monitoring mechanisms. When these trust and trust substitute mechanisms break down, the cartel members will start to cheat, thus causing the cartel to disintegrate. Thus, Leslie proposes, anti-trust legislation should focus on laws that will strategically disrupt trust mechanisms. Unlike racial or gender justice advocates who focus on making moral statements through the law, Leslie proposes using the law for strategic ends, even if the law makes a morally suspect statement. For instance, in his article, ‘Anti-Trust Amnesty, Game Theory, and Cartel Stability’, Leslie critiques the federal Anti-Trust’s 1993 Corporate Lenience Policy that provided greater incentives for cartel partners to report on cartel activity. This policy provided ‘automatic’ amnesty for the first cartel member to confess, and decreasing leniency for subsequent confessors in the order to which they confessed. Leslie notes that this amnesty led to an increase of amnesty applications.19 However, Leslie notes that the effectiveness of this reform is hindered by the fact that the ringleader of the cartel is not eligible for amnesty. This policy seems morally sound. Why would we want the ringleader, the person who most profited from the cartel, to be eligible for amnesty? The problem, however, with attempting to make a moral statement through the law is that it is counter-productive if the goal is to actually break up cartels. If the ringleader is never eligible for amnesty, the ringleader becomes inherently trustworthy because he has no incentive to ever report on his partners. Through his inherent trustworthiness, the cartel can build its trust mechanisms. Thus, argues Leslie, the most effective way to destroy cartels is to render all members untrustworthy by granting all the possibility of immunity. While Leslie’s analysis is directed towards policy, it also suggests an alternative framework for pursuing social justice through the law, to employ it for its strategic effects rather than through the moral statements it purports to make. It is ironic that an anti-trust scholar such as Leslie displays less ‘trust’ in the law than do many anti-racist/anti-colonial activists and scholars who work through legal reform.20 It also indicates that it is possible to engage legal reform more strategically if one no longer trusts it. As Beth Richie notes, the anti-violence movement’s primary strategy for addressing gender violence was to articulate it as a crime.21 Because it is presumed that the best way to address a social ill is to call it a ‘crime’, this strategy is then deemed the correct moral strategy. When this strategy backfires and does not end violence, and in many cases increases violence against women, it becomes difficult to argue against this strategy because it has been articulated in moral terms. If, however, we were to focus on legal reforms chosen for their strategic effects, it would be easier to change the strategy should our calculus of its strategic effects suggest so. We would also be less complacent about the legal reforms we advocate as has happened with most of the laws that have been passed on gender violence. Advocates presume that because they helped pass a ‘moral’ law, then their job is done. If, however, the criteria for legal reforms are their strategic effects, we would then be continually monitoring the operation of these laws to see if they were having the desired effects. For instance, since the primary reason women do not leave battering relationships is because they do not have another home to go, what if our legal strategies shifted from criminalising domestic violence to advocating affordable housing? While the shift from criminalisation may seem immoral, women are often removed from public housing under one strike laws in which they lose access to public housing if a ‘crime’ (including domestic violence) happens in their residence, whether or not they are the perpetrator. If our goal was actually to keep women safe, we might need to creatively rethink what legal reforms would actually increase safety.

## 2ac

### Defense of Legal Strategy

#### Legal strategy is key—no matter what our orientation to the state is, the details of certain mechanisms to address problems predetermine the value of a moral stance

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### AT: Speed Bad

#### Fast, technical debate is good—the alternative is getting spread out by real-world fine print and replacing detailed knowledge with “accessible” sound-bites

**Lerner 2012** – poet, novelist, essayist, and critic, winner of the Hayden Carruth prize (October, Ben, Harpers, “Contest of Words: High school debate and the demise of public speech”, http://harpers.org/archive/2012/10/contest-of-words/?single=1&src=longreads&utm\_source=buffer&buffer\_share=b1dd3)

I’m not interested here in attempting to present these various activities in their considerable internal complexity but rather in noting the fearful symmetry between the ideological compartmentalization of high school debate and what passes for our national political discourse. It almost outpaces parody: in the year of my birth—the year of the Iranian Revolution, the year before “the Great Communicator” thrashed Carter in a televised debate by dismissing points of fact (“There you go again”) and focusing on framing—Phillips Petroleum helped formalize the sundering of values from policy in high school interscholastic debate. The parallel isn’t perfect, but it’s undeniable: the supposedly disinterested policy wonks debate the intricacies of health care or financial regulation in a jargon designed to be inaccessible to the uninitiated while the more presidential speakers test out plainspoken value claims on “lay judges,” i.e., civilians. And this division was underwritten by petrodollars. High school L–D is infinitely more intelligent than our actual presidential debates, and I’m not claiming policy debaters never made an argument about right and wrong, but I can’t believe that the existence of a corporately sponsored separation of value and policy in high school debate can be separated from that separation in the political culture at large.

One of the most common criticisms I’ve heard of the spread was that it detached Policy Debate from the real world, that nobody used language the way policy debaters did, except maybe auctioneers or rappers. Those are significant exceptions, but I’d also note that corporate persons use a version of the spread all the time: think of the spoken warnings at the end of television commercials for prescription drugs, when risk information is disclosed at a speed designed to make it difficult to comprehend. Or think about all the various forms of “fine print” one receives from financial institutions and health-insurance companies; the last thing you’re supposed to do with those hundreds of thousands of words is comprehend them. These types of disclosure are designed to conceal; they expose you to information that, should you challenge the institution in question, will be treated like a “dropped argument” in a fast round of debate—you have already conceded the validity of the point by failing to address it when it was presented. It’s no excuse that you didn’t have the time. Americans are always getting “spread” in their daily lives. Meanwhile our politicians speak very, very slowly about values utterly disconnected from their policies.

#### Fast debate is beautiful—it pushes the limits of what language can do and teaches you to link values and policy—if you think affirming their style is important enough to vote on, then they have to answer this

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If I have recognized the spread in drug warnings and financial doublespeak, where the corporate use of language approaches the absurd, where the shell of a communicative form is used to foreclose communication, I have also recognized it in forms of poetry that deliberately push us to confront the contingency and craziness of our culture’s use and abuse of words. When I participated in fast debate or caught the rhythm of freestyle or Extemp or discovered in the act of poetic composition energies I did not possess prior to the activity of writing, I was making contact, however briefly, with the generative, transpersonal powers of language. When I was in my Dillard’s suit spewing arguments in a largely empty school, when I was a belligerent little wankster rhyming in a basement, when I was an ignorant undergrad abandoning the clichés of my macho midwestern romanticism for the clichés of poetic vanguardism, I was, in all my preposterousness, responding to a very real crisis: the standardization of landscape and culture, a national separation of value and policy, an impoverished political discourse (“There you go again”) that served to naturalize our particular cultural insanity. I was a privileged young subject—white, male, middle class—of an empire in which every available identity was a lie, but when I felt the language breaking down as I spoke it—as it spoke me—I felt, amid a general sense of doom, that other worlds were possible.

### 2ac permutation

#### Our Framework arguments just outline the benefits of normative debate --- they aren’t exclusive their argument complements ours rather than supplementing it

Donohue, 13 [2013 Nation al Security Pedagogy: The Role of Simulations, Associate Professor of Law, Georgetown Law, <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2172&context=facpub>]

I. I NTRODUC TION Much has been made as of late about the impact of the retracting economy on law students. 1 The loss of big firm jobs and the breakdown of the traditional apprenticeship 2 structure has reverberated in law schools, as they struggle to address the consequences, not least of which has been a renewed public debate about the value of legal education. 2 The uneasy compromise forged in the 1870s by Harvard President Eliot and law school Dean Christopher Columbus Langdell now stands in question. 3 On the one hand, the practice of law itself, for which judgment, public responsibility, and e xercise of legal doctrine prove paramount, define the profession — skills taught in some form through the Socratic and case - based method. On the other hand, the research strand of the modern university emphasizes critical thought and scholarly independence, essentially driving the engine of normative debate. The public discourse of late has eschewed the latter as unnecessary, superfluous in the context of the making of lawyers, suggesting that law schools should instead narrowly emphasize lawyering skills i n new, more efficient ways, so as to reduce the costs of legal education and more adequately prepare students to become members of the trade. 4 **There is much to lament about the current state of affairs**. P erhaps the most unfortunate aspect of the current d ebate is the anti - intellectual nature of the Sirens’ song, which calls for the academy to abandon the pursuit of scholarship in favor of the assembly line model. But e qually regrettable is the assumption that one size fits all when it comes to different a reas of the law. T he demands placed on lawyers in specialized fields cry out for more careful consideration. Three points here with respect to national security law deserve notice. First, the generalizations made about diminishing job prospects for stude nts following graduation generally do not apply. 5 To the contrary, job opportunities in the field are expanding. There is a demand for talented and well - trained national security lawyers in the federal government, law firms, private industry, consultanci es, think tanks, advocacy groups, special interest organizations, journalism, international organizations, state and local government, and the legal academy. Second, while an important part of the picture, economic considerations may be only partially rele vant to understanding what is driving this debate. I t is remarkable how frequently , throughout U.S. history, major conflicts have been followed by legal ref orm movements. The present may be no different. Perhaps the reason that war gives rise to such de bate stems in part from the deeply political and policy - oriented role that lawyers serve. Law is a public function and lawyering not merely a service rendered, but an action that at once both reflects and shapes government power. It is thus sensitive to the political environment and forced to conform to the changing conditions occasioned by war. It is worth noting here that t he War of 1812 and the U.S. Civil War were both followed by periods of innovation in legal education. 6 World War I gave birth to new ideas, as a generation of soldiers returned. Little disposed to blindly accept inherited formulas, they critically scrutinized legal education, adjusting it to suit an altered worldview. 7 It was with this in mind that the 1921 Reed Report issued — an effort to consider the function of lawyers, in light of rapidly changing circumstances. Jerome Frank’s widely cited article on the importance of clinical education came in the wake of World War II, 8 while the ABA at the close o f the conflict in Vietnam commissioned a report to consider the appropriate role of law schools. 9 T his point is not to be over - emphasized, as numerous other factors contribute to the need for the legal profession to re - evaluate its position. But it is wo rth recognizing that t he end of the Cold War saw a 4 similar phenomenon, with the release of the ABA’s now famous MacCrate Report. 10 And s ince 9/11 the country has been engaged in military conflict. Domestic and international threats faced by the country ha ve morphed and federal institutions and powers have radically altered. The question that now faces law schools is how to conform legal education to changing realities. Economic downturn thus may be an important consideration, but it is not the only driv ing force. With this in mind, it is particularly important to look carefully at national security law, which is playing such a pivotal role in the formation of new institutions, new social arrangements, and the evolution of U.S. Constitutional, statutory, and regulatory law. Third, looking more carefully at national security law in the contemporary context, there are features unique to its practice that sit uneasily in the traditional pedagogical approach. It is one thing to question the function of legal education writ large, within society, in light of swiftly changing social, political, and economic conditions. It is another thing entirely to look specifically at one sub - field — indeed, an area that has profound influence on the broader dialogue — and to question how this particular area should adapt. New and innovative thinking is required. This does not mean that law schools should abandon the enterprise embraced by Eliot and Langdell in the wake of the Civil War — that of critical distance and thoughtfu l scholarly debate. 11 If ever such a conversation were needed, it is now. Yet it does raise the question of whether law schools could do a better job of preparing students for the types of challenges they will be facing in the years to come, specifically in relation to national security. This Article challenges the dominant pedagogical assumptions in the legal academy. It begins by briefly considering the state of the field of national security , noting the rapid expansion in employment and the breadth o f related positions that have been created post - 9/11. It considers , in the process, how the legal academy has, as an institutional matter, responded to the demand. Part III examines traditional legal pedagogy, grounding the discussion in studies initiat ed by the American Bar Association, the Carnegie Foundation, and others. It suggests that using the law - writ - large as a starting point for those interested in nation al security law is a mistake. Instead, it makes more sense to work backwards from the ski lls most essential in this area of the law. The Article then proposes six pedagogical goals that serve to distinguish national security law : (1) understanding the law as applied , (2) dealing with factual chaos and uncertainty, (3) obtaining critical distance — including, inter alia , when not to give legal advice, (4) developing nontraditional written and oral communication skills, (5) exhibiting leadership, integrity, and good judgment in a high - stakes, highly - charged environment, and (6) creating continued opportunities for self - learning. Equally important to the exercise of each of these skills is the ability to integrate them in the course of performance. These goals , and the su bsidiary points they cover, are neither conclusive nor exclusive . Many of them incorporate skills that all lawyers should have — such as the ability to handle pressure, knowing how to modulate the mode and content of communications depending upon the circum stances, and managing ego, personality, and subordination. T o the extent that they are overlooked by mainstream legal education, 5 however, and present in a unique manner in national security law, they underscore the importance of more careful consideration of the skills required in this particular field. Having proposed a pedagogical approach, the Article turns in Part IV to the question of how effective traditional law school teaching is in helping to students reach these goals. Doctrinal and experiential courses both prove important. T he problem is that in national security law, the way in which these have become manifest often falls short of accomplishing the six pedagogical aim s . G aps left in doctrinal course are not adequately covered by devices typically adopted in the experiential realm , even as c linics, externships, and moot court competitions are in many ways ill - suited to national security. The Article thus proposes in Part V a new model for national security legal education, based on innovat ions currently underway at Georgetown Law. NSL Sim 2.0 adapts a doctrinal course to the special needs of national security. Course design is preceded by careful regulatory, statutory, and Constitutional analysis, paired with policy considerations. The c ourse takes advantage of new and emerging technologies to immerse students in a multi - day, real - world exercise, which forces students to deal with an information - rich environment, rapidly changing facts, and abbreviated timelines. It points to a new model of legal education that advances students in the pedagogical goals identified above, while complementing, rather than supplanting, the critical intellectual discourse that underlies the value of higher legal education.

### Psycho Bad

#### Pyschoanalysis is non-falsifiable hindsight thinking

Samuels 93—Training Analyst – Society of Analytical Psychology and Science Associate – American Academy of Psychoanalysis (Andrew, Free Associations, “The mirror and the hammer: depth psychology and political transformation”, Vol. 3D, Psychoanalytic Electronic Publishing)

The paper is about the depth psychology of political processes, focusing on processes of political change. It is a contribution to the longstanding ambition of depth psychology to develop a form of political and cultural analysis that will, in Freud's words, 'under-stand the riddles of the world'. It has to be admitted that there is an equally longstanding reluctance in the non-psychological commun¬ity to accept the many and varied ideas and suggestions concerning political matters that have been offered by analysts of all persua¬sions. I do not believe this can all be put down to resistance. There is something offensive above **reductive interpretations** of complex socio-political problems **in exclusively psychological terms**. The tendency to **panpsychism** on the part of some depth psychologists has led me to wonder if an adequate methodology and ethos actually exists with which to make an **engagement of** depth **psychology with the public sphere possible**.¶ By 'politics' I mean the arrangements within a culture for the organization and distribution of power, especially economic power, and the way in which power is deployed to maintain the survival and enhance the quality of human life. Economic and political power includes control of processes of information and representation as well as the use of physical force and possession of vital resources such as land, food and water. On a more personal level, political power reflects the ability to choose freely whether to act and what action to take in a given situation. 'Politics' refers to the interplay between the personal and public dimensions of power. That is, there is an articulation between public, economic power and power as expressed on the personal, private level. This articulation is demonstrated in family organization, gender and race relations, and in religious and artistic assumptions as they affect the life of individuals. (I have also tried to be consistent in my use of the terms 'culture', 'society' and 'collective'.)'¶ Here is an example of the difficulty with psychological rcduc-tionism to which I am referring. At a conference 1 attended in London in 1990, a distinguished psychoanalyst referred to the revolutionary students in Paris in 1968 as 'functioning as a regressive group'. Now, for a large group of students to be said to regress, there must be, in the speaker's mind, some sort of normative developmental starting point for them to regress to. The social group is supposed to have a babyhood, as it were. Similarly, the speaker must have had in mind the possibility of a healthier, progressive group process — what a more mature group of revolutionary students would have looked like. But complex social and political phenomena do not conform to the individualistic, chronological, moralistic, pathologizing framework that is often imported.¶ The problem stems from treating the entire culture, or large chunks of it, as if it were an individual **or, worse, as if it were a baby**. Psychoanalysts project a version of personality development couched in judgemental terms onto a collective cultural and political process**. If we look in this manner for pathology in the culture, we will surely find it**. **As we are looking with a psychological theory in mind**, then, **lo and behold, the theory will explain the pathology**, **but this is a retrospective prophecy** (to use a phrase of Freud's), **twenty-twenty hindsight**. In this psychoanalytic tautologizing there is really nothing much to get excited about. Too much psychological writing on the culture, my own included, has suffered from this kind of smug 'correctness' when the 'material' proves the theoretical point. Of course it does! If we are interested in envy or greed, then we will find envy or greed in capitalistic organization. If we set out to demonstrate the presence of archetypal patterns, such as projection of the shadow, in geopolitical relations, then, without a doubt, they will seem to leap out at us. We influence what we analyse and so psychological reflection on culture and politics needs to be muted- there is not so much 'aha!' as one hoped.

#### Even if they win superior explanatory power, psychoanalytic imaginings are useless in advancing political change

Adam Rosen-Carole 10, Visiting Professor of Philosophy at Bard College, 2010, “Menu Cards in Time of Famine: On Psychoanalysis and Politics,” Psychoanalytic Quarterly, Vol. LXXIX, No. 1, p. 205-207

On the other hand, though in these ways and many others, psychoanalysis seems to promote the sorts of subjective dispositions and habits requisite for a thriving democracy, and though in a variety of ways psychoanalysis contributes to personal emancipation— say, by releasing individuals from self-defeating, damaging, or petrified forms action and reaction, object attachment, and the like—in light of the very uniqueness of what it has to offer, one cannot but wonder: to what extent, if at all, can the habits and dispositions—broadly, the forms of life—cultivated by psychoanalytic practice survive, let alone flourish, under modern social and political conditions? If the emancipatory inclinations and democratic virtues that psychoanalytic practice promotes are systematically crushed or at least regularly unsupported by the world in which they would be realized, then isn’t psychoanalysis implicitly making promises it cannot redeem? Might not massive social and political transformations be the condition for the efficacious practice of psychoanalysis? And so, under current conditions, can we avoid experiencing the forms of life nascently cultivated by psychoanalytic practice as something of a tease, or even a source of deep frustration?¶ (2) Concerning psychoanalysis as a politically inclined theoretical enterprise, the worry is whether political diagnoses and proposals that proceed on the basis of psychoanalytic insights and forms of attention partake of a fantasy of interpretive efficacy (all the world’s a couch, you might say), wherein our profound alienation from the conditions for robust political agency are registered and repudiated?¶ Consider, for example, Freud and Bullitt’s (1967) assessment of the psychosexual determinants of Woodrow Wilson’s political aspirations and impediments, or Reich’s (1972) suggestion that Marxism should appeal to psychoanalysis in order to illuminate and redress neurotic phenomena that generate disturbances in working capacity, especially as this concerns religion and bourgeois sexual ideology. Also relevant are Freud’s, Žižek’s (1993, 2004), Derrida’s (2002) and others’ insistence that we draw the juridical and political consequences of the hypothesis of an irreducible death drive, as well as Marcuse’s (1970) proposal that we attend to the weakening of Eros and the growth of aggression that results from the coercive enforcement of the reality principle upon the sociopolitically weakened ego, and especially to the channeling of this aggression into hatred of enemies. Reich (1972) and Fromm (1932) suggest that psychoanalysis be employed to explore the motivations to political irrationality, especially that singular irrationality of joining the national-socialist movement, while Irigaray (1985) diagnoses the desire for the Same, the One, the Phallus as a desire for a sociosymbolic order that assures masculine dominance.¶ Žižek (2004) contends that only a psychoanalytic exposition of the disavowed beliefs and suppositions of the United States political elite can get at the fundamental determinants of the Iraq War. Rose (1993) argues that it was the paranoiac paradox of sensing both that there is every reason to be frightened and that everything is under control that allowed Thatcher “to make this paradox the basis of political identity so that subjects could take pleasure in violence as force and legitimacy while always locating ‘real’ violence somewhere else—illegitimate violence and illicitness increasingly made subject to the law” (p. 64). Stavrakakis (1999) advocates that we recognize and traverse the residues of utopian fantasy in our contemporary political imagination.1¶ Might not the psychoanalytic interpretation of powerful figures (Bush, Bin Laden, or whomever), collective subjects (nations, ethnic groups, and so forth), or urgent “political” situations register an anxiety regarding political impotence or “castration” that is pacified and modified by the fantasmatic frame wherein the psychoanalytically inclined political theorist situates him- or herself as diagnosing or interpretively intervening in the lives of political figures, collective political subjects, or complex political situations with the idealized efficacy of a successful clinical intervention? If so, then the question is: are the contributions of psychoanalytically inclined political theory anything more than tantalizing menu cards for meals it cannot deliver**?**¶As I said, the worry is twofold. These are two folds of a related problem, which is this: might the very seductiveness of psychoanalytic theory and practice—specifically, the seductiveness of its political promise—register the lasting eclipse of the political and the objectivity of the social, respectively? In other words, might not everything that makes psychoanalytic theory and practice so politically attractive indicate precisely the necessity of wide-ranging social/institutional transformations that **far exceed the powers of psychoanalysis**?¶ And so, might not the politically salient transformations of subjectivity to which psychoanalysis can contribute overburden subjectivity as the site of political transformation, blinding us to the necessity of largescale institutional reforms? Indeed, might not massive institutional transformations be necessary conditions for the efficacy of psychoanalytic practice, both personally and politically? Further, might not the so-called interventions and proposals of psychoanalytically inclined political theory similarly sidestep the question of the institutional transformations necessary for their realization, and so conspire with our blindness to the enormous institutional impediments to a progressive political future?

### 2ac framework evidence

#### The AFF’s approach to the topic is a method for dispute resolution – normative policy prescriptions are educationally valuable and don’t deny agency

Ellis, et al, 09 [Richard, LOL that’s my Debate partner, but actually…. Ph.D. University of California, Berkeley, degree completed December 1989, M.A. University of California, Berkeley, Political Science, 1984, B.A. University of California, Santa Cruz, Politics, 1982, Debating the Presidency: Conflicting Perspectives on the American Executive, p. google books,]

In 1969 the political scientist Aaron Wildavsky published a hefty reader on the American presidency. He prefaced it with the observation that “the presidency is the most important political institution in American life” and then noted the paradox that an institution of such overwhelming importance had been studied so little. “The eminence of the institution,” Wildavsky wrote, “is matched only by the extraordinary neglect shown to it by political scientists. Compared to the hordes of researchers who regularly descend on Congress, local communities, and the most remote foreign principalities, there is an extraordinary dearth of students of the presidency, although scholars ritually swear that the presidency is where the action is before they go somewhere else to do their research.”1 Political scientists have come a long way since 1969. The presidency remains as central to national life as it was then, and perhaps even more so. The state of scholarly research on the presidency today is unrecognizable compared with what it was forty years ago. A rich array of new studies has reshaped our understanding of presidential history, presidential character, the executive office, and the presidency’s relationship with the public, interest groups, parties, Congress, and the executive branch. Neglect is no longer a problem in the study of the presidency. In addition, those who teach about the presidency no longer lack for good textbooks on the subject. A number of terrific books explain how the office has developed and how it works. Although students gain a great deal from reading these texts, even the best of them can inadvertently **promote a passive learning experience.** Textbooks convey what political scientists know, but the balance and impartiality that mark a good text can **obscure the contentious nature** of the scholarly enterprise. Sharp disagreements **are often smoothed over** in the writing. The primary purpose of Debating the Presidency **is to allow students to** participate **directly in the ongoing real-world controversies swirling around the presidency and to judge for themselves which side is right.** It is premised philosophically on our view of students as active learners to be engaged rather than as passive receptacles to be filled. The book is designed to promote a classroom experience in which students debate and discuss issues rather than simply listen to lectures. Some issues, of course, lend themselves more readily to this kind of classroom debate. In our judgment, questions of a normative nature —**asking** not just what is, **but what ought to be**—are likely to foster the most interesting and engaging classroom discussions. So in selecting topics for debate, we generally eschewed narrow but important empirical questions of political science—such as whether the president receives greater support from Congress on foreign policy than on domestic issues—for broader questions that include empirical as well as normative components—such as **whether the president has usurped the war power** that rightfully belongs to Congress. We aim not only to teach students to think like political scientists, **but also to encourage them to think like democratic citizens**. Each of the thirteen issues selected for debate in this book’s second edition poses questions on which thoughtful people differ. These include whether the president should be elected directly by the people, whether the media are too hard on presidents, and whether the president has too much power in the selection of judges. Scholars are trained to see both sides of an argument, but we invited our contributors to choose one side and defend it vigorously. Rather than provide balanced scholarly essays impartially presenting the strengths and weaknesses of each position, Debating the Presidency leaves the balancing and weighing of arguments and evidence to the reader. The essays contained in the first edition of this book were written near the end of President George W. Bush’s fifth year in office; this second edition was assembled during and after Barack Obama’s first loo days as president. The new edition includes four new debate resolutions that should spark spirited classroom discussion about the legitimacy of signing statements, the war on terror, the role of the vice presidency, and the Twenty-second Amendment. Nine debate resolutions have been retained from the first edition and, wherever appropriate, the essays have been revised to reflect recent scholarship or events. For this edition we welcome David Karol, Tom Cronin, John Yoo, Lou Fisher, Peter Shane, Nelson Lund, Doug Kriner, and Joel Goldstein, as well as Fred Greenstein, who joins the debate with Stephen Skowronek over the importance of individual attributes in accounting for presidential success. In deciding which debate resolutions to retain from the first edition and which ones to add, we were greatly assisted by advice we received from many professors who adopted the first edition of this book. Particularly helpful were the reviewers commissioned by CQ Press: Craig Goodman of Texas Tech University, Delbert J. Ringquist of Central Michigan University, Brooks D. Simpson of Arizona State University, and Ronald W. Vardy of the University of Houston. We are also deeply grateful to chief acquisitions editor Charisse Kiino for her continuing encouragement and guidance in developing this volume. Among the others who helped make the project a success were editorial assistants Jason McMann and Christina Mueller, copy editor Mary Marik, and the book’s production editor, Gwenda Larsen. Our deepest thanks go to the contributors, not just for their essays, but also for their excellent scholarship on the presidency.

## 1ar

### delgado

#### This is an independent reason to vote aff—they said we CANNOT use the government without changing their mindset—that's so high a threshold that we could NEVER DO ANYTHING—that's why our strategy key arguments outweigh their ethics arguments, because they determine the SALIENCE of those ethics

**Grossberg, 92** [Lawrence, Morris Davis Professor of Communication Studies at the University of North Carolina at Chapel Hill, “We Gotta Get Out of this Place: Popular Conservatism and Postmodern Culture”, page 388-389 //liam ]

﻿The demand for moral and ideological purity often results in the rejection of any hierarchy or organization. The question-can the master's tools be used to tear down the master's house?-ignores both the contingency of the relation between such tools and the master's power and, even more importantly, the fact that there may be no other tools available. Institutionalization is seen as a repressive impurity within the body politic rather than as a strategic and **tactical**, even empowering, necessity. It sometimes seems as if every progressive organization is condemned to recapitulate the same arguments and crisis, often leading to their collapse. 54 For example, Minkowitz has described a crisis in Act Up over the need for efficiency and organization, professionalization and even hierarchy,55 as if these inherently contradicted its commitment to democracy. This is particularly unfortunate since Act Up, whatever its limitations, has proven itself an effective and imaginative political strategist. The problems are obviously magnified with success, as membership, finances and activities grow. This refusal of efficient operation and the moment of organization is intimately connected with the Left's appropriation and privileging of the local (as the site of democracy and resistance). This is yet another reason why structures of alliance are inadequate, since they often assume that an effective movement can be organized and sustained without such structuring. The Left needs to recognize the necessity of institutionalization and of systems of hierarchy, without falling back into its own authoritarianism. It needs to find reasonably democratic structures of institutionalization, even if they are impure and compromised.

#### Delgado is wrong—their attitude risks FATALISM which cedes the political

Farber 98

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PROFESSOR FARBER: As I was getting ready to leave for the airport, my wife gave me a final piece of advice about this debate. She said, "Don't be too reasonable." Nevertheless, I would like to begin by stressing some common ground that I think may get lost because the debate format naturally encourages us to take adversarial positions. In reality, Professor Delgado and I share a great deal in our views of law and American society. Both of us see the issue of racial inequality as being central and requiring the most serious possible attention. Both of us reject the conservative dogma of color blindness, and both of us, as I think will be shown tonight, believe that one imperative need is for dialogue and discussion of this topic if we are to make any progress. So we do have something in common. But we also have a fundamental disagreement, I think, a disagreement that is illustrated by the fact that we are on the opposite sides of this debate about the inherent racism of American law. As Professor Delgado said in his introductory remarks, critical race theory's view is essentially that racism is embedded in the DNA of American law. And that in effect, racism is not merely a widespread blemish on American law, but is instead, a radical infection that goes right to the heart of the legal system. I disagree with that for reasons that I will hopefully make clear. [\*375] I think that this thesis rests on a one-sided view of the legal system. I think that it is based on a misunderstanding of some of the fundamental principles of the system. I think in the end, despite what I know are Professor Delgado's good intentions, that the inherent racism position (and critical race theory, in general) risks being more destructive than constructive in terms of advancing our national conversation on race. I noticed that Professor Delgado postponed the issue of inherent racism, or the inherency of racism, until his next ten minutes. I may also put off, to some extent, my discussion of that point as well, though I will refer to it briefly. Let me begin with the vision of the American legal system that Professor Delgado presented in his first twenty minutes. I do not intend to deny the reality of the dark side of American law in American legal history, and that dark side has indeed been very bad at times. Nevertheless, I think one might equally point to some more positive aspects of American legal society, and that we get only a skewed and incomplete picture if we focus only on one side of the picture: if we ignore the Thirteenth, n15 Fourteenth, n16 and Fifteenth n17 Amendments; if we ignore Brown v. Board of Education n18 and the work of the Warren Court; if we ignore the Civil Rights Acts of 1964, n19 1965, n20 and 1990; n21 and if we ignore or minimize the commitment to affirmative action that many American institutions, especially educational institutions, have had for the past two decades. I do not think you have to be a triumphalist to think that these are important developments-you only have to be a realist. Similarly, as serious as the problem of racial inequality remains in our society, it is also unrealistic to ignore the considerable amount of progress that has been made. Consider the emergence of the black middle class in the last generation or generation and a half, and the [\*376] integration of important American institutions such as big-city police forces, which are important in the day-to-day lives of many minority people. The military has sometimes been described as the most successfully integrated institution in American society. We all know, as well, that the number of minority lawyers has risen substantially. In state and federal legislatures, there was no such thing as a black caucus in Congress thirty or forty years ago, because there would not have been enough black people present to call a caucus. And do not forget the considerable evidence of sharp changes in white attitudes over that period in a more favorable and tolerant direction.

### 3 tier

#### Our alternative is situated impartial knowledge. It’s not a view from nowhere OR privileged insight to reality based on your own experience—it’s the claim to look at claims on face for their merits, irrespective of the power relations we diagnose

**DISCH ‘93** (Lisa J.; Professor of Political Theory – University of Minnesota, “More Truth Than Fact: Storytelling as Critical Understanding in the Writings of Hannah Arendt,” Political Theory 21:4, November)

What Hannah Arendt called “my old fashioned storytelling”7 is at once the most elusive and the most provocative aspect of her political philosophy. The apologies she sometimes made for it are well known, but few scholars have attempted to discern from these “scattered remarks” as statement of epistemology or method.8 Though Arendt alluded to its importance throughout her writings in comments like the one that prefaces this essay, this offhandedness left an important question about storytelling unanswered: how can thought that is “bound” to experience as its only “guidepost” possibly be critical? I discern an answer to this question in Arendt’s conception of storytelling, which implicitly redefines conventional understandings of objectivity and impartiality. Arendt failed to explain what she herself termed a “rather unusual approach”9 to political theory because she considered methodological discussions to be self-indulgent and irrelevant to real political problems.10 This reticence did her a disservice because by failing to explain how storytelling creates a vantage point that is both critical and experiential she left herself open to charges of subjectivism.11 As Richard Bernstein has argued, however, what makes Hannah Arendt distinctive is that she is neither a subjectivist nor a foundationalist but, rather, attempts to move “beyond objectivism and relativism.”12 I argue that Arendt’s apologies for her storytelling were disingenuous; she regarded it not as an anachronistic or nostalgic way of thinking but as an innovative approach to critical understanding. Arendt’s storytelling proposes an alternative to the model of impartiality defined as detached reasoning. In Arendt’s terms, impartiality involves telling oneself the story of an event or situation form the plurality of perspectives that constitute it as a public phenomenon. This critical vantage point, not from outside but from within a plurality of contesting standpoints, is what I term “situated impartiality.” Situated impartial knowledge is neither objective disinterested nor explicitly identified with a single particularistic interest. Consequently, its validity does not turn on what Donna Haraway calls the “god trick,” the claim to an omnipotent, disembodied vision that is capable of “seeing everything from nowhere.”13 But neither does it turn on a claim to insight premised on the experience of subjugation, which purportedly gives oppressed peoples a privileged understanding of structures of domination and exonerates them of using power to oppress. The two versions of standpoint claims – the privileged claim to disembodied vision and the embodied claim to “antiprivilege” from oppression – are equally suspect because they are simply antithetical. Both define knowledge positionally, in terms of proximity to power; they differ only in that they assign the privilege of “objective” understanding to opposite poles of the knowledge/power axis. Haraway argues that standpoint claims are insufficient as critical theory because they ignore the complex of social relations that mediate the connection between knowledge and power. She counters that any claim to knowledge, whether advanced by the oppressed or their oppressors, is partial. No one can justifiably lay claim to abstract truth, Haraway argues, but only to “embodied objectivity,” which she argues “means quite simply situated knowledges.”14 There is a connection between Arendt’s defense of storytelling and Haraway’s project, in that both define theory as a critical enterprise whose purpose is not to defend abstract principles or objective facts but to tell provocative stories that invite contestation form rival perspectives.15