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#### Pariah weapons regulation backfires- normalizes militarism and leads to worse forms of violence

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[Neil, PhD from University of Kent at Canterbury, University of Bradford Associate Dean for Research for the School of Social and International Studies, "Humanitarian Arms Control and Processes of Securitization: Moving Weapons along the Security Continuum," Contemporary Security Policy, Vol 32, Issue 1, 2011, tandfonline, accessed 9-5-13, mss]

In this account of contemporary HAC, powerful actors who aim to uphold the status quo principally have a role as agents of resistance to control agendas, not as actors in the production of control regimes. This certainly reﬂects important aspects of contemporary campaigns to regulate pariah weapons but, as I suggest below, it offers a rather incomplete account. Moreover, if such accounts did indeed provide a complete understanding of the dynamics underpinning these control agendas it would certainly represent a novel development, not least because the long history of pariah weapons regulation illustrates the way that weapons taboos frequently reﬂect the interests of the powerful. For example, one factor in the virtual eradication of the gun in 17th and 18th century Japan was that it represented a threat to the warrior class when in the hands of the lower classes.48 The same was true of the rather less successful attempt of the Second Lateran Council to ban the crossbow – a ban partly motivated by the fact that crossbows could pierce the armour of the knight – and a ban that was notably not extended to use against non-Christians.49Similarly, whilst the restrictions on the slave, arms, and liquor trade to Africa embodied in the 1890 Brussels Act were certainly grounded in an ethical discourse, the restrictions imposed on the trade in ﬁrearms were primarily rooted in concerns about the impact of the trade on colonial order. As one British colonial ofﬁcial noted at the time, the restrictions on the small arms trade to Africa reﬂected imperial concern to ‘avoid the development and paciﬁcation of this great continent ... [being] carried out in the face of an enormous population, the majority of whom will probably be armed with ﬁrst-class breechloading riﬂes’.50 The history of pariah weapons regulation would therefore appear to demonstrate a persistent link between the material and political interests of states and / or powerful elites and the emergence of pariah weapons regulation. To be sure, the material and political interests of the same, or other, powerful actors also provide countervailing pressures – the immediate interests of nobles in winnings wars with crossbows mostly won out over their broader class interests,51 whilst colonial competition to secure arms proﬁts and local allies mitigated the impact of the various restrictions on the ﬁrearms trade in the late 19th century.52 But the point is that whilst the genesis of earlier attempts at pariah regulation may, in part, be explained by reference to particular securitizing moments of intervention, the impact of such interventions can only be understood by locating them in particular political economies of power. What is surprising therefore about accounts of post-Cold War humanitarian arms control is that this long history has largely failed to prompt consideration of the way in which contemporary regulation might also reﬂect the interests of powerful states and other actors, albeit in ways that are subject to similar countervailing pressures – an issue that will be taken up below. Pariah Weapons, Heroic Weapons, and Legitimized Military Technology A further recurring theme in the history of pariah regulation is the way in which restrictions on pariah weapons are often related in some way to the construction of a broad arena of legitimized military technology. A particularly extreme example of this is the way in which pariah weapons are sometimes constructed as the antithesis of the ‘heroic weapon’ – a weapon deemed to embody positive values such as honour and / or which is deemed central to national defence. Thus, the series of relatively successful Acts implemented in England between 1508 and 1542 banning crossbows were largely rooted in a concern to preserve the use of the heroic longbow, deemed central to a long line of English military successes.53 The Japanese ban on the gun was similarly connected to the romanticization of the heroic samurai sword as the visible form of one’s honour, as associated with grace of movement in battle and even its status as a work of art.54 In effect both the crossbow in 16th century England and the gun in 17th and 18th century Japan became the ‘other’ which deﬁned legitimized military technologies and militarism. Redford makes much the same point about English attitudes to the submarine, which was constructed as an ‘other’ partly because of the British romanticization of the battleship (‘the upper class or aristocracy of warships’)55 as central to British security and linked to British notions of valour and honour in the conduct of war. This highlights the ways in which the security meaning associated with particular sets of weapons technology are not just a function of the framings speciﬁc to that technology but are also relational, with the representation of one weapon playing an important role in constituting the meaning of another (albeit in sometimes unexpected ways), and vice versa. Not surprisingly perhaps, similar themes also help explain the contemporary taboos constructed around particular sets of military technology such as cluster munitions. Cluster Munitions What is particularly striking about the campaign against cluster munitions is not its success in banning an inhumane weapon but the fact that this success was achieved at a moment in history when, in absolute terms at least, cluster munitions use had fallen from the peak years of use during the Vietnam era (see Table 2). In the latter period cluster bombs such as the CBU-24 represented a ‘major increase in battleﬁeld lethality’ yet its development and deployment was ‘accomplished with no public debate and relatively little subsequent protest’.56 Indeed, for the American military, ‘CBUs were categorised as a standard weapon, to be taken off the shelf – “conventional ironmongery”.57 This is not to suggest that American use of cluster munitions in this period went unremarked. There were certainly some critics at the time who argued that such weapons were inhumane.58 There were also attempts, sponsored by the International Committee of the Red Cross (ICRC) and Sweden in particular, to promote restrictions on cluster munitions in negotiations in the 1970s on the Additional Protocols to the 1949 Geneva Conventions.59 The point is however, that these efforts never achieved traction either with diplomats or with a wider public in the way that the issue would 30 years later. The labels attached to cluster munitions and also landmines only changed dramatically as the move into the post-Cold War era occurred when they moved from being treated as unproblematic elements in global military arsenals to a form of ‘technology non grata’ – weaponry deemed immoral, inhumane, and indiscriminate. Crucially, such a successful process of stigmatization was only made feasible in the context of a post-Cold War widening of the security label to incorporate the notion of human security as a referent object; by the turn to casting security interventions in humanitarian terms; and the representation of modern weaponry as humane because of its perceived capacity to better discriminate between civilians and combatants. The widening and deepening of the security label created the permissive environment necessary for activists to reframe cluster munitions (and APMs) as threats to the human. At the same time, the discussion of intervention in humanitarian terms60 and of precision weapons as instruments of humane warfare61 created a legitimized discursive space into which campaigners could insert a re-representation of landmines and cluster munitions technology as inhumane. Indeed, such a re-representation only exerted a powerful appeal because it was consonant with both the predominant framing of security threats in a postCold War world and a new divide between good and odious military technology. This is not to suggest that such developments reﬂected some teleology in which security and arms control practice progressively evolved to be more humane. As Krause and Latham have noted, for example, whilst the post-Cold War era concern with the impact of ‘inhumane weapons’ represents a notable shift compared with the Cold War arms control agenda, it does have similarities with the late 19th century when a Western discourse of civilized warfare was also prominent. One corollary of this – then as now – was a concern to specify what constituted an ‘inhumane weapon’62 manifest, for example, in the negotiations in the Hague conferences over problem technologies such as the dum dum bullet. As Michael Howard has suggested though, whilst initiatives such as the Hague conferences achieved notable successes, they also reﬂected the fact that liberal internationalists had ‘abandoned their original objects of preventing war and building peace in favour of making war more humane for those actually ﬁghting it’.63 The prohibitions on cluster munitions and also APMs can be understood as similarly ambiguous developments. On the one hand, the legitimizing discourse of Western militaries and arms ﬁrms was turned against them in order to generate powerful taboos against particular categories of weapons – even in the face of opposition from these militaries. The language of state security was coopted to promote human security, to preserve life, and prevent threats to its existence. On the other hand, the same prohibitions can ultimately be understood less as progressive initiatives imposed on foot-dragging states by the bottom-up power of global civil society and more as performative acts that simultaneously function to codify aspects of a new set of criteria for judging international respectability in a post-Cold War era, to reinforce the security framings of the era and to legitimize those categories of weapons successfully constructed as precise, discriminate, and thus humane. Indeed, to the extent that states such as the United States have been able to circumscribe their commitments on landmines etc. they have been able to beneﬁt from the broader legitimizing effects of speciﬁc weapons taboos without being unduly constrained by the speciﬁc regulatory requirements they have given rise to. Moreover, as already noted, the presence of pariah weapons regulation is not necessarily a sign of a more general shift to the tighter regulation of the arms trade – quite the reverse in some cases. Thus, any evaluation of the overall impact of such regulation on global and local security also has to take into account the broader system of arms regulation in which it is located, and the relationship that exists between pariah regulation and this broader system.

#### Sanitization of US policy leads to endless violence and imperialism – turns case

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[A. J., retired career officer in the United States Army, former director of Boston University's Center for International Relations (from 1998 to 2005), The New American Militarism: How Americans Are Seduced by War, 2005 accessed 9-4-13, mss]

Today as never before in their history Americans are enthralled with military power. The global military supremacy that the United States presently enjoys--and is bent on perpetuating-has become central to our national identity. More than America's matchless material abundance or even the effusions of its pop culture, the nation's arsenal of high-tech weaponry and the soldiers who employ that arsenal have come to signify who we are and what we stand for. When it comes to war, Americans have persuaded themselves that the United States possesses a peculiar genius. Writing in the spring of 2003, the journalist Gregg Easterbrook observed that "the extent of American military superiority has become almost impossible to overstate." During Operation Iraqi Freedom, U.S. forces had shown beyond the shadow of a doubt that they were "the strongest the world has ever known, . . . stronger than the Wehrmacht in r94o, stronger than the legions at the height of Roman power." Other nations trailed "so far behind they have no chance of catching up. ""˜ The commentator Max Boot scoffed at comparisons with the German army of World War II, hitherto "the gold standard of operational excellence." In Iraq, American military performance had been such as to make "fabled generals such as Erwin Rommel and Heinz Guderian seem positively incompetent by comparison." Easterbrook and Booz concurred on the central point: on the modern battlefield Americans had located an arena of human endeavor in which their flair for organizing and deploying technology offered an apparently decisive edge. As a consequence, the United States had (as many Americans have come to believe) become masters of all things military. Further, American political leaders have demonstrated their intention of tapping that mastery to reshape the world in accordance with American interests and American values. That the two are so closely intertwined as to be indistinguishable is, of course, a proposition to which the vast majority of Americans subscribe. Uniquely among the great powers in all of world history, ours (we insist) is an inherently values-based approach to policy. Furthermore, we have it on good authority that the ideals we espouse represent universal truths, valid for all times. American statesmen past and present have regularly affirmed that judgment. In doing so, they validate it and render it all but impervious to doubt. Whatever momentary setbacks the United States might encounter, whether a generation ago in Vietnam or more recently in Iraq, this certainty that American values are destined to prevail imbues U.S. policy with a distinctive grandeur. The preferred language of American statecraft is bold, ambitious, and confident. Reflecting such convictions, policymakers in Washington nurse (and the majority of citizens tacitly endorse) ever more grandiose expectations for how armed might can facilitate the inevitable triumph of those values. In that regard, George W. Bush's vow that the United States will "rid the world of evil" both echoes and amplifies the large claims of his predecessors going at least as far back as Woodrow Wilson. Coming from Bush the war- rior-president, the promise to make an end to evil is a promise to destroy, to demolish, and to obliterate it. One result of this belief that the fulfillment of America's historic mission begins with America's destruction of the old order has been to revive a phenomenon that C. Wright Mills in the early days of the Cold War described as a "military metaphysics"-a tendency to see international problems as military problems and to discount the likelihood of finding a solution except through military means. To state the matter bluntly, Americans in our own time have fallen prey to militarism, manifesting itself in a romanticized view of soldiers, a tendency to see military power as the truest measure of national greatness, and outsized expectations regarding the efficacy of force. To a degree without precedent in U.S. history, Americans have come to define the nation's strength and well-being in terms of military preparedness, military action, and the fostering of (or nostalgia for) military ideals? Already in the 19905 America's marriage of a militaristic cast of mind with utopian ends had established itself as the distinguishing element of contemporary U.S. policy. The Bush administrations response to the hor- rors of 9/11 served to reaffirm that marriage, as it committed the United States to waging an open-ended war on a global scale. Events since, notably the alarms, excursions, and full-fledged campaigns comprising the Global War on Terror, have fortified and perhaps even sanctified this marriage. Regrettably, those events, in particular the successive invasions of Afghanistan and Iraq, advertised as important milestones along the road to ultimate victory have further dulled the average Americans ability to grasp the significance of this union, which does not serve our interests and may yet prove our undoing. The New American Militarism examines the origins and implications of this union and proposes its annulment. Although by no means the first book to undertake such an examination, The New American Militarism does so from a distinctive perspective. The bellicose character of U.S. policy after 9/11, culminating with the American-led invasion of Iraq in March 2003, has, in fact, evoked charges of militarism from across the political spectrum. Prominent among the accounts advancing that charge are books such as The Sorrows of Empire: Militarism, Secrecy, and the End of the Republic, by Chalmers Johnson; Hegemony or Survival: Americas Quest for Global Dominance, by Noam Chomsky; Masters of War; Militarism and Blowback in the Era of American Empire, edited by Carl Boggs; Rogue Nation: American Unilateralism and the Failure of Good Intentions, by Clyde Prestowitz; and Incoherent Empire, by Michael Mann, with its concluding chapter called "The New Militarism." Each of these books appeared in 2003 or 2004. Each was not only writ- ten in the aftermath of 9/11 but responded specifically to the policies of the Bush administration, above all to its determined efforts to promote and justify a war to overthrow Saddam Hussein. As the titles alone suggest and the contents amply demonstrate, they are for the most part angry books. They indict more than explain, and what- ever explanations they offer tend to be ad hominem. The authors of these books unite in heaping abuse on the head of George W Bush, said to combine in a single individual intractable provincialism, religious zealotry, and the reckless temperament of a gunslinger. Or if not Bush himself, they fin- ger his lieutenants, the cabal of warmongers, led by Vice President Dick Cheney and senior Defense Department officials, who whispered persua- sively in the president's ear and used him to do their bidding. Thus, accord- ing to Chalmers Johnson, ever since the Persian Gulf War of 1990-1991, Cheney and other key figures from that war had "Wanted to go back and finish what they started." Having lobbied unsuccessfully throughout the Clinton era "for aggression against Iraq and the remaking of the Middle East," they had returned to power on Bush's coattails. After they had "bided their time for nine months," they had seized upon the crisis of 9/1 1 "to put their theories and plans into action," pressing Bush to make Saddam Hussein number one on his hit list." By implication, militarism becomes something of a conspiracy foisted on a malleable president and an unsuspecting people by a handful of wild-eyed ideologues. By further implication, the remedy for American militarism is self-evi- dent: "Throw the new militarists out of office," as Michael Mann urges, and a more balanced attitude toward military power will presumably reassert itself? As a contribution to the ongoing debate about U.S. policy, The New American Militarism rejects such notions as simplistic. It refuses to lay the responsibility for American militarism at the feet of a particular president or a particular set of advisers and argues that no particular presidential election holds the promise of radically changing it. Charging George W. Bush with responsibility for the militaristic tendencies of present-day U.S. for- eign policy makes as much sense as holding Herbert Hoover culpable for the Great Depression: Whatever its psychic satisfactions, it is an exercise in scapegoating that lets too many others off the hook and allows society at large to abdicate responsibility for what has come to pass. The point is not to deprive George W. Bush or his advisers of whatever credit or blame they may deserve for conjuring up the several large-scale campaigns and myriad lesser military actions comprising their war on ter- ror. They have certainly taken up the mantle of this militarism with a verve not seen in years. Rather it is to suggest that well before September 11, 2001 , and before the younger Bush's ascent to the presidency a militaristic predisposition was already in place both in official circles and among Americans more generally. In this regard, 9/11 deserves to be seen as an event that gave added impetus to already existing tendencies rather than as a turning point. For his part, President Bush himself ought to be seen as a player reciting his lines rather than as a playwright drafting an entirely new script. In short, the argument offered here asserts that present-day American militarism has deep roots in the American past. It represents a bipartisan project. As a result, it is unlikely to disappear anytime soon, a point obscured by the myopia and personal animus tainting most accounts of how we have arrived at this point. The New American Militarism was conceived not only as a corrective to what has become the conventional critique of U.S. policies since 9/11 but as a challenge to the orthodox historical context employed to justify those policies. In this regard, although by no means comparable in scope and in richness of detail, it continues the story begun in Michael Sherry's masterful 1995 hook, In the Shadow of War an interpretive history of the United States in our times. In a narrative that begins with the Great Depression and spans six decades, Sherry reveals a pervasive American sense of anxiety and vulnerability. In an age during which War, actual as well as metaphorical, was a constant, either as ongoing reality or frightening prospect, national security became the axis around which the American enterprise turned. As a consequence, a relentless process of militarization "reshaped every realm of American life-politics and foreign policy, economics and technology, culture and social relations-making America a profoundly different nation." Yet Sherry concludes his account on a hopeful note. Surveying conditions midway through the post-Cold War era's first decade, he suggests in a chapter entitled "A Farewell to Militarization?" that America's preoccupation with War and military matters might at long last be waning. In the mid- 1995, a return to something resembling pre-1930s military normalcy, involving at least a partial liquidation of the national security state, appeared to be at hand. Events since In the Shadow of War appear to have swept away these expectations. The New American Militarism tries to explain why and by extension offers a different interpretation of America's immediate past. The upshot of that interpretation is that far from bidding farewell to militariza- tion, the United States has nestled more deeply into its embrace. f ~ Briefly told, the story that follows goes like this. The new American militarism made its appearance in reaction to the I96os and especially to Vietnam. It evolved over a period of decades, rather than being sponta- neously induced by a particular event such as the terrorist attack of Septem- ber 11, 2001. Nor, as mentioned above, is present-day American militarism the product of a conspiracy hatched by a small group of fanatics when the American people were distracted or otherwise engaged. Rather, it devel- oped in full view and with considerable popular approval. The new American militarism is the handiwork of several disparate groups that shared little in common apart from being intent on undoing the purportedly nefarious effects of the I96OS. Military officers intent on reha- bilitating their profession; intellectuals fearing that the loss of confidence at home was paving the way for the triumph of totalitarianism abroad; reli- gious leaders dismayed by the collapse of traditional moral standards; strategists wrestling with the implications of a humiliating defeat that had undermined their credibility; politicians on the make; purveyors of pop cul- turc looking to make a buck: as early as 1980, each saw military power as the apparent answer to any number of problems. The process giving rise to the new American militarism was not a neat one. Where collaboration made sense, the forces of reaction found the means to cooperate. But on many occasions-for example, on questions relating to women or to grand strategy-nominally "pro-military" groups worked at cross purposes. Confronting the thicket of unexpected developments that marked the decades after Vietnam, each tended to chart its own course. In many respects, the forces of reaction failed to achieve the specific objectives that first roused them to act. To the extent that the 19603 upended long-standing conventions relating to race, gender, and sexuality, efforts to mount a cultural counterrevolution failed miserably. Where the forces of reaction did achieve a modicum of success, moreover, their achievements often proved empty or gave rise to unintended and unwelcome conse- quences. Thus, as we shall see, military professionals did regain something approximating the standing that they had enjoyed in American society prior to Vietnam. But their efforts to reassert the autonomy of that profession backfired and left the military in the present century bereft of meaningful influence on basic questions relating to the uses of U.S. military power. Yet the reaction against the 1960s did give rise to one important by-prod: uct, namely, the militaristic tendencies that have of late come into full flower. In short, the story that follows consists of several narrative threads. No single thread can account for our current outsized ambitions and infatua- tion with military power. Together, however, they created conditions per- mitting a peculiarly American variant of militarism to emerge. As an antidote, the story concludes by offering specific remedies aimed at restor- ing a sense of realism and a sense of proportion to U.S. policy. It proposes thereby to bring American purposes and American methods-especially with regard to the role of military power-into closer harmony with the nation's founding ideals. The marriage of military metaphysics with eschatological ambition is a misbegotten one, contrary to the long-term interests of either the American people or the world beyond our borders. It invites endless war and the ever-deepening militarization of U.S. policy. As it subordinates concern for the common good to the paramount value of military effectiveness, it promises not to perfect but to distort American ideals. As it concentrates ever more authority in the hands of a few more concerned with order abroad rather than with justice at home, it will accelerate the hollowing out of American democracy. As it alienates peoples and nations around the world, it will leave the United States increasingly isolated. If history is any guide, it will end in bankruptcy, moral as well as economic, and in abject failure. "Of all the enemies of public liberty," wrote James Madison in 1795, "war is perhaps the most to be dreaded, because it comprises and develops the germ of every other. War is the parent of armies. From these proceed debts and taxes. And armies, debts and taxes are the known instruments for bringing the many under the domination of the few .... No nation could preserve its freedom in the midst of continual Warfare." The purpose of this book is to invite Americans to consider the continued relevance of Madison's warning to our own time and circumstances.

#### The Alternative is to reject the 1AC and imagine Whatever Being--Any point of rejection of the sovereign state creates a non-state world made up of whatever life – that involves imagining a political body that is outside the sphere of sovereignty in that it defies traditional attempts to maintain a social identity

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(Anne, “Bio-Sovereignty and the Emergence of Humanity,” Theory & Event, Volume 7, Issue 2, Project Muse)

Can we imagine another form of humanity, and another form of power? The bio-sovereignty described by Agamben is so fluid as to appear irresistible. Yet Agamben never suggests this order is necessary. Bio-sovereignty results from a particular and contingent history, and it requires certain conditions. Sovereign power, as Agamben describes it, finds its grounds in specific coordinates of life, which it then places in a relation of indeterminacy. What defies sovereign power is a life that cannot be reduced to those determinations: a life "that can never be separated from its form, a life in which it is never possible to isolate something such as naked life. " (2.3). In his earlier Coming Community, Agamben describes this alternative life as "whatever being." More recently he has used the term "forms-of-life." These concepts come from the figure Benjamin proposed as a counter to homo sacer: the "total condition that is 'man'." For Benjamin and Agamben, mere life is the life which unites law and life. That tie permits law, in its endless cycle of violence, to reduce life an instrument of its own power. The total condition that is man refers to an alternative life incapable of serving as the ground of law. Such a life would exist outside sovereignty. Agamben's own concept of whatever being is extraordinarily dense. It is made up of varied concepts, including language and potentiality; it is also shaped by several particular dense thinkers, including Benjamin and Heidegger. What follows is only a brief consideration of whatever being, in its relation to sovereign power. / "Whatever being," as described by Agamben, lacks the features permitting the sovereign capture and regulation of life in our tradition. Sovereignty's capture of life has been conditional upon the separation of natural and political life. That separation has permitted the emergence of a sovereign power grounded in this distinction, and empowered to decide on the value, and non-value of life (1998: 142). Since then, every further politicization of life, in turn, calls for "a new decision concerning the threshold beyond which life ceases to be politically relevant, becomes only 'sacred life,' and can as such be eliminated without punishment" (p. 139). / This expansion of the range of life meriting protection does not limit sovereignty, but provides sites for its expansion. In recent decades, factors that once might have been indifferent to sovereignty become a field for its exercise. Attributes such as national status, economic status, color, race, sex, religion, geo-political position have become the subjects of rights declarations. From a liberal or cosmopolitan perspective, such enumerations expand the range of life protected from and serving as a limit upon sovereignty. Agamben's analysis suggests the contrary. If indeed sovereignty is bio-political before it is juridical, then juridical rights come into being only where life is incorporated within the field of bio-sovereignty. The language of rights, in other words, calls up and depends upon the life caught within sovereignty: homo sacer. / Agamben's alternative is therefore radical. He does not contest particular aspects of the tradition. He does not suggest we expand the range of rights available to life. He does not call us to deconstruct a tradition whose power lies in its indeterminate status.21 Instead, he suggests we take leave of the tradition and all its terms. Whatever being is a life that defies the classifications of the tradition, and its reduction of all forms of life to homo sacer. Whatever being therefore has no common ground, no presuppositions, and no particular attributes. It cannot be broken into discrete parts; it has no essence to be separated from its attributes; and it has no common substrate of existence defining its relation to others. Whatever being cannot then be broken down into some common element of life to which additive series of rights would then be attached. Whatever being retains all its properties, without any of them constituting a different valuation of life (1993: 18.9). As a result, whatever being is "reclaimed from its having this or that property, which identifies it as belonging to this or that set, to this or that class (the reds, the French, the Muslims) -- and it is reclaimed not for another class nor for the simple generic absence of any belonging, but for its being-such, for belonging itself." (0.1-1.2). / Indifferent to any distinction between a ground and added determinations of its essence, whatever being cannot be grasped by a power built upon the separation of a common natural life, and its political specification. Whatever being dissolves the material ground of the sovereign exception and cancels its terms. This form of life is less post-metaphysical or anti-sovereign, than a-metaphysical and a-sovereign. Whatever is indifferent not because its status does not matter, but because it has no particular attribute which gives it more value than another whatever being. As Agamben suggests, whatever being is akin to Heidegger's Dasein. Dasein, as Heidegger describes it, is that life which always has its own being as its concern -- regardless of the way any other power might determine its status. Whatever being, in the manner of Dasein, takes the form of an "indissoluble cohesion in which it is impossible to isolate something like a bare life. In the state of exception become the rule, the life of homo sacer, which was the correlate of sovereign power, turns into existence over which power no longer seems to have any hold" (Agamben 1998: 153). / We should pay attention to this comparison. For what Agamben suggests is that whatever being is not any abstract, inaccessible life, perhaps promised to us in the future. Whatever being, should we care to see it, is all around us, wherever we reject the criteria sovereign power would use to classify and value life. "In the final instance the State can recognize any claim for identity -- even that of a State identity within the State . . . What the State cannot tolerate in any way, however, is that the singularities form a community without affirming an identity, that humans co-belong without a representable condition of belonging" (Agamben 1993:85.6). At every point where we refuse the distinctions sovereignty and the state would demand of us, the possibility of a non-state world, made up of whatever life, appears.

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#### A. Definitions

#### The only War Power authority is the ability to MAKE MILITARY DECISIONS

Bajesky 13 (2013¶ Mississippi College Law Review¶ 32 Miss. C. L. Rev. 9¶ LENGTH: 33871 words ARTICLE: Dubitable Security Threats and Low Intensity Interventions as the Achilles' Heel of War Powers NAME: Robert Bejesky\* BIO: \* M.A. Political Science (Michigan), M.A. Applied Economics (Michigan), LL.M. International Law (Georgetown). The author has taught international law courses for Cooley Law School and the Department of Political Science at the University of Michigan, American Government and Constitutional Law courses for Alma College, and business law courses at Central Michigan University and the University of Miami.)

A numerical comparison indicates that the Framer's intended for Congress to be the dominant branch in war powers. Congressional war powers include the prerogative to "declare war;" "grant Letters of Marque and Reprisal," which were operations that fall short of "war"; "make Rules for Government and Regulation of the land and naval Forces;" "organize, fund, and maintain the nation's armed forces;" "make Rules concerning Captures on Land and Water," "raise and support Armies," and "provide and maintain a Navy." [n25](http://www.lexisnexis.com/lnacui2api/frame.do?tokenKey=rsh-20.771738.1261791409&target=results_DocumentContent&returnToKey=20_T17974748742&parent=docview&rand=1376677997032&reloadEntirePage=true#n25) In contrast, the President is endowed with one war power, named as the Commander-in-Chief of the Army and Navy. [n26](http://www.lexisnexis.com/lnacui2api/frame.do?tokenKey=rsh-20.771738.1261791409&target=results_DocumentContent&returnToKey=20_T17974748742&parent=docview&rand=1376677997032&reloadEntirePage=true#n26)¶ The Commander-in-Chief authority is a core preclusive power, predominantly designating that the President is the head of the military chain of command when Congress activates the power. [n27](http://www.lexisnexis.com/lnacui2api/frame.do?tokenKey=rsh-20.771738.1261791409&target=results_DocumentContent&returnToKey=20_T17974748742&parent=docview&rand=1376677997032&reloadEntirePage=true#n27) Moreover, peripheral Commander-in-Chief powers are bridled by statutory and treaty restrictions [n28](http://www.lexisnexis.com/lnacui2api/frame.do?tokenKey=rsh-20.771738.1261791409&target=results_DocumentContent&returnToKey=20_T17974748742&parent=docview&rand=1376677997032&reloadEntirePage=true#n28) because the President "must respect any constitutionally legitimate restraints on the use of force that Congress has enacted." [n29](http://www.lexisnexis.com/lnacui2api/frame.do?tokenKey=rsh-20.771738.1261791409&target=results_DocumentContent&returnToKey=20_T17974748742&parent=docview&rand=1376677997032&reloadEntirePage=true#n29) However, even if Congress has not activated war powers, the President does possess inherent authority to expeditiously and unilaterally react to defend the nation when confronted with imminent peril. [n30](http://www.lexisnexis.com/lnacui2api/frame.do?tokenKey=rsh-20.771738.1261791409&target=results_DocumentContent&returnToKey=20_T17974748742&parent=docview&rand=1376677997032&reloadEntirePage=true#n30) Explicating the intention behind granting the President this latitude, Alexander Hamilton explained that "it is impossible to foresee or to define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them." [n31](http://www.lexisnexis.com/lnacui2api/frame.do?tokenKey=rsh-20.771738.1261791409&target=results_DocumentContent&returnToKey=20_T17974748742&parent=docview&rand=1376677997032&reloadEntirePage=true#n31) The Framers drew a precise distinction by specifying that the President was empowered "to repel and not to commence war." [n32](http://www.lexisnexis.com/lnacui2api/frame.do?tokenKey=rsh-20.771738.1261791409&target=results_DocumentContent&returnToKey=20_T17974748742&parent=docview&rand=1376677997032&reloadEntirePage=true#n32)

#### **B. Violation – the affirmative does not prohibit the ability of the President to make a military decision in one of the following areas mentioned in the topic – it merely requires a process or disclosure for the President to go through before exercising his commander and chief power**

Jean Schiedler-Brown 12, Attorney, Jean Schiedler-Brown & Associates, Appellant Brief of Randall Kinchloe v. States Dept of Health, Washington, The Court of Appeals of the State of Washington, Division 1, http://www.courts.wa.gov/content/Briefs/A01/686429%20Appellant%20Randall%20Kincheloe%27s.pdf

3. The ordinary definition of the term "restrictions" also does not include the reporting and monitoring or supervising terms and conditions that are included in the 2001 Stipulation.

Black's Law Dictionary, 'fifth edition,(1979) defines "restriction" as;

A limitation often imposed in a deed or lease respecting the use to which the property may be put. The term "restrict' is also cross referenced with the term "restrain." Restrain is defined as; To limit, confine, abridge, narrow down, restrict, obstruct, impede, hinder, stay, destroy. To prohibit from action; to put compulsion on; to restrict; to hold or press back. To keep in check; to hold back from acting, proceeding, or advancing, either by physical or moral force, or by interposing obstacle, to repress or suppress, to curb.

In contrast, the terms "supervise" and "supervisor" are defined as; To have general oversight over, to superintend or to inspect. See Supervisor. A surveyor or overseer. . . In a broad sense, one having authority over others, to superintend and direct. The term "supervisor" means an individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but required the use of independent judgment.

Comparing the above definitions, it is clear that the definition of "restriction" is very different from the definition of "supervision"-very few of the same words are used to explain or define the different terms. In his 2001 stipulation, Mr. Kincheloe essentially agreed to some supervision conditions, but he did not agree to restrict his license.

### 1NC CP

#### The Counsel to the President of the United States should request to the Office of Legal Counsel for legal counsel and coordination on the President’s war powers authority. The Office of Legal Counsel should advise the President that he should move all targeted killing operations from U.S. Code Title 50 authority to U.S. Code Title 10 authority under Department of Defense.

#### CP is competitive and solves the case ---- Coordination with OLC can ensure executive action

BORRELLI et al 2000 - Professor of Government Chair of the Government and International Relations Department, Connecticut College (Maryanne Borrelli, Karen Hult, Nancy Kassop, “The White House Counsel’s Office”, http://whitehousetransitionproject.org/files/counsel/Counsel-OD.PDF)

The White House Counsel’s Office is at the hub of all presidential activity. Its mandate is to be watchful for and attentive to legal issues that may arise in policy and political contexts in which the president plays a role. To fulfill this responsibility, it monitors and coordinates the presidency’s interactions with other players in and out of government. Often called “the president’s lawyer,” the Counsel’s Office serves, more accurately, as the “presidency’s lawyer,” with tasks that extend well beyond exclusively legal ones. These have developed over time, depending on the needs of different presidents, on the relationship between a president and a Counsel, and on contemporary political conditions. The Office carries out many routine tasks, such as vetting all presidential appointments and advising on the application of ethics regulations to White House staff and executive branch officials, but it also operates as a “command center” when crises or scandals erupt. Thus, the more sharply polarized political atmosphere in recent years has led to greater responsibility and demands, as well as heightened political pressure and visibility, on the traditionally low-profile Counsel’s Office. The high-stakes quality of its work has led to a common sentiment among Counsels and their staff that there is “zero tolerance” for error in this office.

In sum, the Counsel’s Office might be characterized as a monitor, a coordinator, a negotiator, a recommender, and a translator: it monitors ethics matters, it coordinates the president’s message and agenda with other executive branch units, it negotiates with a whole host of actors on the president’s behalf (not the least of which is Congress), it recommends myriad actions to the president, and it translates or interprets the law (whether it is the Constitution, federal rules and regulations, treaties or legislation) for all executive branch officials. Past Counsels have lamented that there is no job description for this office, while the opening quote from Peter Wallison makes clear that even if there was, it would be all-consuming and all-inclusive of everything that goes in and out of the president’s office.

In simple terms, the Counsel’s Office performs five basic categories of functions: (1) advising on the exercise of presidential powers and defending the president’s constitutional prerogatives; (2) overseeing presidential nominations and appointments to the executive and judicial branches; (3) advising on presidential actions relating to the legislative process; (4) educating White House staffers about ethics rules and records management and monitoring adherence; and (5) handling department, agency and White House staff contacts with the Department of Justice (see Functions section). In undertaking these responsibilities, the Counsel’s Office interacts regularly with, among others, the president, the Chief of Staff, the White House Office of Personnel, the Press Secretary, the White House Office of Legislative Affairs, the Attorney General, the Office of Management and Budget (on the legislative process), the General Counsels of the departments and agencies, and most especially, the Office of Legal Counsel in the Department of Justice (see Relationships section). In addition to the Counsel, the Office usually consists of one or two Deputy Counsels, a varying number of Associate and Assistant Counsels, a Special Counsel when scandals arise, a Senior Counsel in some administrations, and support staff. Tasks are apportioned to these positions in various ways, depending on the Counsel’s choices, though most Counsels expect all Office members to share the ongoing vetting for presidential appointments (see Organization and Operations section).

Certain responsibilities within the Office are central at the very start of an administration (e.g., vetting for initial nominations and shepherding the appointment process through the Senate), while others have a cyclical nature to them (e.g., the annual budget, the State of the Union message), and still others follow an electoral cycle (e.g., determining whether presidential travel and other activities are partisan/electoral/campaign or governmental ones) (see Organization and Operations). There is, of course, the always unpredictable (but almost inevitable) flurry of scandals and crises, in which all eyes turn to the Counsel’s Office for guidance and answers. Watergate, Iran-contra, Whitewater, the Clinton impeachment, and the FBI files and White House Travel Office matters were all managed from the Counsel’s Office, in settings that usually separated scandal management from the routine work of the Office, so as to permit ongoing operations to continue with minimal distraction. Among the more regular tasks that occur throughout an administration are such jobs as directing the judicial nomination process, reviewing legislative proposals (the president’s, those from departments and agencies, and bills Congress has passed that need the Counsel’s recommendation for presidential signature or veto), editing and clearing presidential statements and speeches, writing executive orders, and determining the application of executive privilege (see both Relationships and Organization and Operations sections).

Perhaps, the most challenging task for the Counsel is being the one who has the duty to tell the president “no,” especially when it comes to defending the constitutional powers and prerogatives of the presidency. Lloyd Cutler, Counsel for both Presidents Carter and Clinton, noted that, in return for being “on the cutting edge of problems,” the Counsel needs to be someone who has his own established reputation…someone who is willing to stand up t o the President, to say, “No, Mr. President, you shouldn’t do that for these reasons.” There is a great tendency among all presidential staffs to be very sycophantic, very sycophantic. It’s almost impossible to avoid, “This man is the President of the United States and you want to stay in his good graces,” even when he is about to do something dumb; you don’t tell him that. You find some way to put it in a very diplomatic manner. (Cutler interview, pp. 3-4)

LAW, POLITICS AND POLICY

A helpful way to understand the Counsel’s Office is to see it as sitting at the intersection of law, politics and policy. Consequently, it confronts the difficult and delicate task of trying to reconcile all three of these without sacrificing too much of any one. It is the distinctive challenge of the Counsel’s Office to advise the president to take actions that are both legally sound and politically astute. A 1994 article in Legal Times warned of the pitfalls: Because a sound legal decision can be a political disaster, the presidential counsel constantly sacrifices legal ground for political advantage. (Bendavid, 1994, p. 13) For example, A.B. Culvahouse recalled his experience upon arriving at the White House as counsel and having to implement President Reagan’s earlier decision to turn over his personal diaries to investigators during the Iran-contra scandal.

Ronald Reagan’s decision to turn over his diary - that sits at the core of the presidency. …You’re setting up precedents and ceding a little power. But politically, President Reagan wanted to get it behind him. (Bendavid, 1994, p. 13)

Nonetheless, Culvahouse added, the Counsel is “the last and in some cases the only protector of the President’s constitutional privileges. Almost everyone else is willing to give those away in part inch by inch and bit by bit in order to win the issue of the day, to achieve compromise on today’s thorny issue. So a lot of what I did was stand in the way of that process...” (Culvahouse interview, p. 28)

Because of this blend of legal, political and policy elements, the most essential function a Counsel can perform for a president is to act as an “early warning system” for potential legal trouble spots before **(**and, ultimately, after) they erupt. For this role, a Counsel must keep his or her “antennae” constantly attuned. Being at the right meetings at the right time and knowing which people have information and/or the necessary technical knowledge and expertise in specific policy or legal areas are the keys to insuring the best service in this part of the position. C. Boyden Gray, Counsel for President Bush, commented: “As Culvahouse said -- I used to say that the meetings I was invited to, I shouldn’t go to. …It’s the meetings I wasn’t invited to that I’d go to.” (Gray interview, p. 26) Lloyd Cutler noted that

….the White House Counsel will learn by going to the staff meetings, et cetera, that something is about to be done that has buried within it a legal issue which the people who are advocating it either haven’t recognized or push under the rug. He says, “Wait a minute. We’ve got to check this out,” and goes to the Office of Legal Counsel and alerts them and gets their opinion. But for the existence of the White House Counsel, the Office of Legal Counsel would never have learned about the problem until it was too late. (Cutler interview, p. 4)

One other crucial part of the job where the legal overlaps with the policy and the political -- and which can spell disaster for Counsels who disregard this -- is knowing when to go to the Office of Legal Counsel for guidance on prevailing legal interpretations and opinions on the scope of presidential authority. It is then up to the White House Counsel to sift through these legal opinions, and to bring into play the operative policy and political considerations in order to offer the president his or her best recommendation on a course of presidential action. Lloyd Cutler described how this process works:

They [OLC staffers] are where the President has to go or the President’s counsel has to go to get an opinion on whether something may properly be done or not. For example, if you wish to invoke an executive privilege not to produce documents or something, the routine now is you go to the Office of Legal Counsel and you get their opinion that there is a valid basis for asserting executive privilege in this case. ...You’re able to say [to the judge who is going to examine these documents] the Office of Legal Counsel says we have a valid basis historically for asserting executive privilege here. (Cutler interview, p. 4)

C. Boyden Gray underscored the critical importance of OLC’s relationship to the Counsel’s Office: They [OLC] were the memory…We paid attention to what they did. [Vincent] Foster never conferred with them. When they [the Clinton Counsel’s Office] filed briefs on executive privilege, they had the criminal division, the civil division and some other division signing on the brief; OLC wasn’t on the brief… In some ways they [OLC] told us not to do things but that was helpful. They said no to us… I can give you a million examples. They would have said to Vince Foster, “Don’t go in and argue without thinking about it.” They would have prevented the whole healthcare debacle [referring to the Clinton Counsel’s Office’s position that Hillary Rodham Clinton was a government official for FACA purposes] …[T]he ripple effect of that one decision is hard to exaggerate: it’s hard to calculate. (Gray interview, pp. 18-19)

### 1NC DA

#### There are currently no judicial or statutory restrictions on drone use – maintaining that freedom is key to the president’s ability to wage war

**Druck 12** – JD Candidate @ Cornell

(Judah, Cornell Law Review, 98 Cornell L. Rev. 209, NOTE: DRONING ON: THE WAR POWERS RESOLUTION AND THE NUMBING EFFECT OF TECHNOLOGY-DRIVEN WARFARE)

On March 19, 2011, American forces began attacking various targets controlled by Muammar el-Qaddafi as part of NATO's support for the Libyan antigovernment resistance. n1 Promising that no ground [\*210] troops would be used during these operations, n2 President Barack Obama ordered strikes on Qaddafi forces using Tomahawk missiles and bombings from warplanes. n3 This order would later include the use of unmanned Predator drones, signaling a shift toward a supporting role for NATO. n4 Fighting lasted for months, ultimately culminating in the ousting of Qaddafi by rebel forces. n5¶ Despite the limited nature of the U.S. intervention, questions concerning the legality of the President's actions quickly arose. n6 Under the 1973 War Powers Resolution (WPR), n7 which was enacted in the wake of protests during the Vietnam War, the President is required to cease any use of military forces in "hostilities" within sixty days of the conflict's beginning unless he receives congressional authorization to the contrary. n8 Having acted without any support from Congress in the first sixty days, the President had seemingly presented a clear example of a WPR violation. Yet President Obama and State Department legal adviser Harold Koh rejected this view by arguing that the use of force in Libya had not involved the type of "hostilities" covered by the WPR. n9 Emphasizing the absence of U.S. casualties and lack of exposure to "exchanges of fire with hostile forces," the President stood firmly behind his decision to intervene in Libya without consulting Congress. n10¶ [\*211] Legislators, pundits, and academics alike broadly criticized this legal analysis. n11 Yet aside from these particularized complaints, the President ultimately faced no discernible repercussions (judicial, legislative, or social challenges) for his actions. n12 From a historical perspective, the absence of substantial backlash is unsurprising: since its inception, the WPR has generally failed to prevent presidents from using military action in an arguably illegal manner. n13 In those situations, courts, n14 legislators, n15 and social movements n16 have failed to challenge this sort of presidential action, setting the stage for President Obama's similar neglect of the WPR.¶ But perhaps we can examine the apathetic treatment of President Obama's actions in Libya in a different light, one that focuses on the changing nature and conception of warfare itself. Contrary to larger-scale conflicts like the Vietnam War, where public (and political) outrage set the stage for Congress's assertion of war-making power through the WPR, n17 the recent U.S. intervention did not involve a draft, nor a change in domestic industry (requiring, for example, civilians [\*212] to ration food), and, perhaps most importantly, did not result in any American casualties. n18 Consequently, most analyses of the Libyan campaign focused on its monetary costs and other economic harms to American taxpayers. n19 This type of input seems too nebulous to cause any major controversy, especially when contrasted with the concurrent costs associated with the wars in Iraq and Afghanistan. n20 In a sense, less is at stake when drones, not human lives, are on the front lines, limiting the potential motivation of a legislator, judge, or antiwar activist to check presidential action. n21 As a result, the level of nonexecutive involvement in foreign military affairs has decreased.¶ The implications are unsettling: by ameliorating many of the concerns often associated with large-scale wars, technology-driven warfare has effectively removed the public's social and political limitations that previously discouraged a President from using potentially illegal military force. As President Obama's conduct illustrates, removing these barriers has opened the door to an unfettered use of unilateral executive action in the face of domestic law. n22 Consequently, as war becomes more and more attenuated from the American psyche, a President's power to use unilateral force without repercussions will likely continue to grow.

#### That would uniquely decimate Obama and the military’s ability to calm alliances and deter enemies ---- makes terrorism and global nuclear war more likely

WAXMAN 2013 - law professor at Columbia Law School, co-chairs the Roger Hertog Program on Law and National Security (Matthew Waxman, “The Constitutional Power to Threaten War,” August 27, 2013, http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2316777)

As a prescriptive matter, Part II also shows that examination of threatened force and the credibility requirements for its effectiveness calls into question many orthodoxies of the policy advantages and risks attendant to various allocations of legal war powers, including the existing one and proposed reforms.23 Most functional arguments about war powers focus on fighting wars or hostile engagements, but that is not all – or even predominantly – what the United States does with its military power. Much of the time it seeks to avert such clashes while achieving its foreign policy objectives: to bargain, coerce, deter.24 The President’s flexibility to use force in turn affects decision-making about threatening it, with major implications for securing peace or dragging the United States into conflicts. Moreover, constitutional war power allocations affect potential conflicts not only because they may constrain U.S. actions but because they may send signals and shape other states’ (including adversaries’) expectations of U.S. actions.25 That is, most analysis of war-powers law is inward-looking, focused on audiences internal to the U.S. government and polity, but thinking about threatened force prompts us to look outward, at how war-powers law affects external perceptions among adversaries and allies. Here, extant political science and strategic studies offer few clear conclusions, but they point the way toward more sophisticated and realistic policy assessment of legal doctrine and proposed reform. More generally, as explained in Part III, analysis of threatened force and war powers exposes an under-appreciated relationship between constitutional doctrine and grand strategy. Instead of proposing a functionally optimal allocation of legal powers, as legal scholars are often tempted to do, this Article in the end denies the tenability of any such claim. Having identified new spaces of war and peace powers that legal scholars need to take account of in understanding how those powers are really exercised, this Article also highlights the extent to which any normative account of the proper distribution of authority over this area depends on many matters that cannot be predicted in advance or expected to remain constant.26 Instead of proposing a policy-optimal solution, this Article concludes that the allocation of constitutional war powers is – and should be –geopolitically and strategically contingent; the actual and effective balance between presidential and congressional powers over war and peace in practice necessarily depends on fundamental assumptions and shifting policy choices about how best to secure U.S. interests against potential threats.27 I. Constitutional War Powers and Threats of Force Decisions to go to war or to send military forces into hostilities are immensely consequential, so it is no surprise that debates about constitutional war powers occupy so much space. But one of the most common and important ways that the United States uses its military power is by threatening war or force – and the constitutional dimensions of that activity receive almost no scrutiny or even theoretical investigation. A. War Powers Doctrine and Debates The Constitution grants Congress the powers to create military forces and to “declare war,”28 which the Supreme Court early on made clear includes the power to authorize limited uses of force short of full-blown war.29 The Constitution then vests the President with executive power and designates him commander in chief of the armed forces,30 and it has been well-accepted since the Founding that these powers include unilateral authority to repel invasions if the United States is attacked.31 Although there is nearly universal acceptance of these basic starting points, there is little legal agreement about how the Constitution allocates responsibility for the vast bulk of cases in which the United States has actually resorted to force. The United States has declared war or been invaded only a handful of times in its history, but it has used force – sometimes large-scale force – hundreds of other times.32 Views split over questions like when, if ever, the President may use force to deal with aggression against third parties and how much unilateral discretion the President has to use limited force short of full-blown war. For many lawyers and legal scholars, at least one important methodological tool for resolving such questions is to look at historical practice, and especially the extent to which the political branches acquiesced in common practices.33 Interpretation of that historical practice for constitutional purposes again divides legal scholars, but most would agree at least descriptively on some basic parts of that history. In particular, most scholars assess that from the Founding era through World War II, Presidents and Congresses alike recognized through their behavior and statements that except in certain narrow types of contingencies, congressional authorization was required for large-scale military operations against other states and international actors, even as many Presidents pushed and sometimes crossed those boundaries.34 Whatever constitutional constraints on presidential use of force existed prior to World War II, however, most scholars also note that the President asserted much more extensive unilateral powers to use force during and after the Cold War, and many trace the turning point to the 1950 Korean War.35 Congress did not declare war in that instance, nor did it expressly authorize U.S. participation.36 From that point forward, presidents have asserted broad unilateral authority to use force to address threats to U.S. interests, including threats to U.S. allies, and that neither Congress nor courts pushed back much against this expanding power.37 Concerns about expansive presidential war-making authority spiked during the Vietnam War. In the wind-down of that conflict, Congress passed – over President Nixon’s veto – the War Powers Resolution,38 which stated its purpose as to ensure the constitutional Founders’ original vision that the “collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.”39 Since then, presidentialists have argued that the President still retains expansive authority to use force abroad to protect American interests,40 and congressionalists argue that this authority is tightly circumscribed.41 These constitutional debates have continued through the first decade of the 21st century. Constitutional scholars split, for example, over President Obama’s power to participate in coalition operations against Libya without congressional authorization in 2011, especially after the War Powers Resolution’s 60-day clock expired.42 Some argue that President Obama’s use of military force without specific congressional authorization in that case reflects the broad constitutional discretion presidents now have to protect American interests, at least short of full-blown “war”, while others argue that it is the latest in a long record of presidential violations of the Constitution and the War Powers Resolution.43 B. Threats of Force and Constitutional Powers These days it is usually taken for granted that – whether or not he can make war unilaterally – the President is constitutionally empowered to threaten the use of force, implicitly or explicitly, through diplomatic means or shows of force. It is never seriously contested whether the President may declare that United States is contemplating military options in response to a crisis, or whether the President may move substantial U.S. military forces to a crisis region or engage in military exercises there. To take the Libya example just mentioned, is there any constitutional limitation on the President’s authority to move U.S. military forces to the Mediterranean region and prepare them very visibly to strike?44 Or his authority to issue an ultimatum to Libyan leaders that they cease their brutal conduct or else face military action? Would it matter whether such threats were explicit versus implicit, whether they were open and public versus secret, or whether they were just a bluff? If not a constitutional obstacle, could it be argued that the War Powers Resolution’s reporting requirements and limits on operations were triggered by a President’s mere ultimatum or threatening military demonstration, insofar as those moves might constitute a “situation where imminent involvement in hostilities is clearly indicated by the circumstances”? These questions simply are not asked (at least not anymore).45 If anything, most lawyers would probably conclude that the President’s constitutional powers to threaten war are not just expansive but largely beyond Congress’s authority to regulate directly. From a constitutional standpoint, to the extent it is considered at all, the President’s power to threaten force is probably regarded to be at least as broad as his power to use it. One way to look at it is that the power to threaten force is a lesser included element of presidential war powers; the power to threaten to use force is simply a secondary question, the answer to which is bounded by the primary issue of the scope of presidential power to actually use it. If one interprets the President’s defensive war powers very broadly, to include dealing with aggression not only directed against U.S. territories but also against third parties,46 then it might seem easy to conclude that the President can also therefore take steps that stop short of actual armed intervention to deter or prevent such aggression. If, however, one interprets the President’s powers narrowly, for example, to include only limited unilateral authority to repel attacks against U.S. territory,47 then one might expect objections to arguably excessive presidential power to include his unilateral threats of armed intervention. Another way of looking at it is that in many cases, threats of war or force might fall within even quite narrow interpretations of the President’s inherent foreign relations powers to conduct diplomacy or his express commander in chief power to control U.S. military forces – or some combination of the two – depending on how a particular threat is communicated. A President’s verbal warning, ultimatum, or declared intention to use military force, for instance, could be seen as merely exercising his role as the “sole organ” of U.S. foreign diplomacy, conveying externally information about U.S. capabilities and intentions.48 A president’s movement of U.S. troops or warships to a crisis region or elevation of their alert level could be seen as merely exercising his dayto- day tactical control over forces under his command.49 Generally it is not seriously contested whether the exercise of these powers alone could so affect the likelihood of hostilities or war as to intrude on Congress’s powers over war and peace.50 We know from historical examples that such unilateral military moves, even those that are ostensibly pure defensive ones, can provoke wars – take, for example, President Polk’s movement of U.S. forces to the contested border with Mexico in 1846, and the resulting skirmishes that led Congress to declare war.51 Coming at the issue from Congress’s Article I powers rather than the President’s Article II powers, the very phrasing of the power “To declare War” puts most naturally all the emphasis on the present tense of U.S. military action, rather than its potentiality. Even as congressionalists advance interpretations of the clause to include not merely declarative authority but primary decision-making authority as to whether or not to wage war or use force abroad, their modern-day interpretations do not include a power to threaten war (except perhaps through the specific act of declaring it). None seriously argues – at least not any more – that the Declare War Clause precludes presidential threats of war. This was not always the case. During the early period of the Republic, there was a powerful view that beyond outright initiation of armed hostilities or declaration of war, more broadly the President also could not unilaterally take actions (putting aside actual military attacks) that would likely or directly risk war,52 provoke a war with another state,53 or change the condition of affairs or relations with another state along the continuum from peace to war.54 To do so, it was often argued, would usurp Congress’s prerogative to control the nation’s state of peace or war.55 During the Quasi-War with France at the end of the 18th century, for example, some members of Congress questioned whether the President, absent congressional authorization, could take actions that visibly signaled an intention to retaliate against French maritime harassment,56 and even some members of President Adams’ cabinet shared doubts.57 Some questions over the President’s power to threaten force arose (eventually) in relation to the Monroe Doctrine, announced in an 1823 presidential address to Congress and which in effect declared to European powers that the United States would oppose any efforts to colonize or reassert control in the Western Hemisphere.58 “Virtually no one questioned [Monroe’s proclamation] at the time. Yet it posed a constitutional difficulty of the first importance.”59 Of course, Monroe did not actually initiate any military hostilities, but his implied threat – without congressional action – risked provoking rather than deterring European aggression and by putting U.S. prestige and credibility on the line it limited Congress’s practical freedom of action if European powers chose to intervene.60 The United States would have had at the time to rely on British naval power to make good on that tacit threat, though a more assertive role for the President in wielding the potential for war or intervention during this period went hand in hand with a more sustained projection of U.S. power beyond its borders, especially in dealing with dangers emanating from Spanish-held Florida territory.61 Monroe’s successor, John Quincy Adams, faced complaints from opposition members of Congress that Monroe’s proclamation had exceeded his constitutional authority and had usurped Congress’s by committing the United States – even in a non-binding way – to resisting European meddling in the hemisphere.62 The question whether the President could unilaterally send militarily-threatening signals was in some respects a mirror image of the issues raised soon after the Constitution was ratified during the 1793 Neutrality Controversy: could President Washington unilaterally declare the United States to be neutral as to the war among European powers. Washington’s politically controversial proclamation declaring the nation “friendly and impartial” in the conflict between France and Great Britain (along with other European states) famously prompted a back-and-forth contest of public letters by Alexander Hamilton and James Madison, writing pseudonymously as “Pacificus” and “Helvidius”, about whether the President had such unilateral power or whether it belonged to Congress.63 Legal historian David Currie points out the irony that the neutrality proclamation was met with stronger and more immediate constitutional scrutiny and criticism than was Monroe’s threat. After all, Washington’s action accorded with the principle that only Congress, representing popular will, should be able to take the country from the baseline state of peace to war, whereas Monroe’s action seemed (at least superficially) to commit it to a war that Congress had not approved.64 Curiously (though for reasons offered below, perhaps not surprisingly) this issue – whether there are constitutional limits on the President’s power to threaten war – has almost vanished completely from legal discussion, and that evaporation occurred even before the dramatic post-war expansion in asserted presidential power to make war. Just prior to World War II, political scientist and presidential powers theorist Edward Corwin remarked that “[o]f course, it may be argued, and has in fact been argued many times, that the President is under constitutional obligation not to incur the risk of war in the prosecution of a diplomatic policy without first consulting Congress and getting its consent.”65 “Nevertheless,” he continued,66 “the supposed principle is clearly a maxim of policy rather than a generalization from consistent practice.” In his 1945 study World Policing and the Constitution, James Grafton Rogers noted: [E]xamples of demonstrations on land and sea made for a variety of purposes and under Presidents of varied temper and in different political climates will suffice to make the point. The Commander-in-Chief under the Constitution can display our military resources and threaten their use whenever he thinks best. The weakness in the diplomatic weapon is the possibility of dissidence at home which may cast doubt on our serious intent. The danger of the weapon is war.67 At least since then, however, the importance to U.S. foreign policy of threatened force has increased dramatically, while legal questions about it have receded further from discussion. In recent decades a few prominent legal scholars have addressed the President’s power to threaten force, though in only brief terms. Taylor Reveley noted in his volume on war powers the importance of allocating constitutional responsibility not only for the actual use of force but also “[v]erbal or written threats or assurances about the circumstances in which the United States will take military action …, whether delivered by declarations of American policy, through formal agreements with foreign entities, by the demeanor or words of American officials, or by some other sign of national intent.”68 Beyond recognizing the critical importance of threats and other non-military actions in affecting war and peace, however, Reveley made little effort to address the issue in any detail. Among the few legal scholars attempting to define the limiting doctrinal contours of presidentially threatened force, Louis Henkin wrote in his monumental Foreign Affairs and the Constitution that: Unfortunately, the line between war and lesser uses of force is often elusive, sometimes illusory, and the use of force for foreign policy purposes can almost imperceptibly become a national commitment to war. Even when he does not use military force, the President can incite other nations or otherwise plunge or stumble this country into war, or force the hand of Congress to declare or to acquiesce and cooperate in war. As a matter of constitutional doctrine, however, one can declare with confidence that a President begins to exceed his authority if he willfully or recklessly moves the nation towards war…69 The implication seems to be that the President may not unilaterally threaten force in ways that are dramatically escalatory and could likely lead to war, or perhaps that the President may not unilaterally threaten the use of force that he does not have the authority to initiate unilaterally.70 Jefferson Powell, who generally takes a more expansive view than Henkin of the President’s war powers, argues by contrast that “[t]he ability to warn of, or threaten, the use of military force is an ordinary and essential element in the toolbox of that branch of government empowered to formulate and implement foreign policy.”71 For Powell, the President is constantly taking actions as part of everyday international relations that carry a risk of military escalation, and these are well-accepted as part of the President’s broader authority to manage, if not set, foreign policy. Such brief mentions are in recent times among the rare exceptions to otherwise barren constitutional discussion of presidential powers to threaten force. That the President’s authority to threaten force is so well-accepted these days as to seem self-evident is not just an academic phenomenon. It is also reflected in the legal debates among and inside all three branches of government. In 1989, Michael Reisman observed: Military maneuvers designed to convey commitment to allies or contingent threats to adversaries … are matters of presidential competence. Congress does not appear to view as within its bailiwick many low-profile contemporaneous expressions of gunboat diplomacy, i.e., the physical interposition of some U.S. war-making capacity as communication to an adversary of United States’ intentions and capacities to oppose it.72 This was and remains a correct description but understates the pattern of practice, insofar as even major and high-profile expressions of coercive diplomacy are regarded among all three branches of government as within presidential competence. In Dellums v. Bush – perhaps the most assertive judicial scrutiny of presidential power to use large-scale force abroad since the end of the Cold War – the district court dismissed on ripeness grounds congressmembers’ suit challenging President George H. W. Bush’s intended military operations against Iraq in 1991 and seeking to prevent him from initiating an offensive attack against Iraq without first securing explicit congressional authorization for such action.73 That at the time of the suit the President had openly threatened war – through ultimatums and deployment of several hundred thousand U.S. troops – but had not yet “committed to a definitive course of action” to carry out the threat meant there was no justiciable legal issue, held the court.74 The President’s threat of war did not seem to give the district court legal pause at all; quite the contrary, the mere threat of war was treated by the court as a non-issue entirely.75 There are several reasons why constitutional questions about threatened force have dropped out of legal discussions. First, the more politically salient debate about the President’s unilateral power to use force has probably swallowed up this seemingly secondary issue. As explained below, it is a mistake to view threats as secondary in importance to uses of force, but they do not command the same political attention and their impacts are harder to measure.76 Second, the expansion of American power after World War II, combined with the growth of peacetime military forces and a set of defense alliance commitments (developments that are elaborated below) make at least some threat of force much more common – in the case of defensive alliances and some deterrent policies, virtually constant – and difficult to distinguish from other forms of everyday diplomacy and security policy.77 Besides, for political and diplomatic reasons, presidents rarely threaten war or intervention without at least a little deliberate ambiguity. As historian Marc Trachtenberg puts it: “It often makes sense … to muddy the waters a bit and avoid direct threats.”78 Any legal lines one might try to draw (recall early attempts to restrict the President’s unilateral authority to alter the state of affairs along the peacetime-wartime continuum) have become blurrier and blurrier. In sum, if the constitutional power to threaten war ever posed a serious legal controversy, it does so no more. As the following section explains, however, threats of war and armed force have during most of our history become a greater and greater part of American grand strategy, defined here as long-term policies for using the country’s military and non-military power to achieve national goals. The prominent role of threatened force in U.S. strategy has become the focus of political scientists and other students of security strategy, crises, and responses – but constitutional study has not adjusted accordingly.79 C. Threats of Force and U.S. Grand Strategy While the Korean and Vietnam Wars were generating intense study among lawyers and legal scholars about constitutional authority to wage military actions abroad, during that same period many political scientists and strategists – economists, historians, statesmen, and others who studied international conflict – turned their focus to the role of threatened force as an instrument of foreign policy. The United States was building and sustaining a massive war-fighting apparatus, but its security policy was not oriented primarily around waging or winning wars but around deterring them and using the threat of war – including demonstrative military actions – to advance U.S. security interests. It was the potential of U.S. military might, not its direct application or engagement with the enemy, that would do much of the heavy lifting. U.S. military power would be used to deter the Soviet Union and other hostile states from taking aggressive action. It would be unsheathed to prompt them to back down over disputes. It would reassure allies that they could depend on U.S. help in defending themselves. All this required that U.S. willingness to go to war be credible in the eyes of adversaries and allies alike. Much of the early Cold War study of threatened force concerned nuclear strategy, and especially deterrence or escalation of nuclear war. Works by Albert Wohlstetter, Herman Kahn, and others not only studied but shaped the strategy of nuclear threats, as well as how to use limited applications of force or threats of force to pursue strategic interests in remote parts of the globe without sparking massive conflagrations.80 As the strategic analyst Bernard Brodie wrote in 1946, “Thus far the chief purpose of our military establishment has been to win wars. From now on its chief purpose must be to avert them.”81 Toward that end, U.S. government security and defense planners during this time focused heavily on preserving and improving the credibility of U.S. military threats – while the Soviet Union was doing likewise.82 The Truman administration developed a militarized version of containment strategy against the Soviet empire, emphasizing that stronger military capabilities were necessary to prevent the Soviets from seizing the initiative and to resist its aggressive probes: “it is clear,” according to NSC-68, the government document which encapsulated that strategy, “that a substantial and rapid building up of strength in the free world is necessary to support a firm policy intended to check and to roll back the Kremlin's drive for world domination.”83 The Eisenhower administration’s “New Look” policy and doctrine of “massive retaliation” emphasized making Western collective security both more effective and less costly by placing greater reliance on deterrent threats – including threatened escalation to general or nuclear war. As his Secretary of State John Foster Dulles explained, “[t]here is no local defense which alone will contain the mighty landpower of the Communist world. Local defenses must be reinforced by the further deterrent of massive retaliatory power.”84 As described in Evan Thomas’s recent book, Ike’s Bluff, Eisenhower managed to convince Soviet leaders that he was ready to use nuclear weapons to check their advance in Europe and elsewhere. In part due to concerns that threats of massive retaliation might be insufficiently credible in Soviet eyes (especially with respect to U.S. interests perceived as peripheral), the Kennedy administration in 1961 shifted toward a strategy of “flexible response,” which relied on the development of a wider spectrum of military options that could quickly and efficiently deliver varying degrees of force in response to foreign aggression.85 Throughout these periods, the President often resorted to discrete, limited uses of force to demonstrate U.S. willingness to escalate. For example, in 1961 the Kennedy administration (mostly successfully in the short-run) deployed intervention-ready military force immediately off the coast of the Dominican Republic to compel its government's ouster,86 and that same year it used military exercises and shows of force in ending the Berlin crisis;87 in 1964, the Johnson administration unsuccessfully used air strikes on North Vietnamese targets following the Tonkin Gulf incidents, failing to deter what it viewed as further North Vietnamese aggression.88 The point here is not the shifting details of U.S. strategy after World War II – during this era of dramatic expansion in asserted presidential war powers – but the central role of credible threats of war in it, as well as the interrelationship of plans for using force and credible threats to do so. Also during this period, the United States abandoned its long-standing aversion to “entangling alliances,”89 and committed to a network of mutual defense treaties with dependent allies. Besides the global collective security arrangement enshrined in the UN Charter, the United States committed soon after World War II to mutual defense pacts with, for example, groups of states in Western Europe (the North Atlantic Treaty Organization)90 and Asia (the Southeast Asia Treaty Organization,91 as well as a bilateral defense agreement with the Republic of Korea,92 Japan,93 and the Republic of China,94 among others). These alliance commitments were part of a U.S. effort to “extend” deterrence of Communist bloc aggression far beyond its own borders.95 “Extended deterrence” was also critical to reassuring these U.S. allies that their security needs would be met, in some instances to head off their own dangerous rearmament.96 Among the leading academic works on strategy of the 1960s and 70s were those of Thomas Schelling, who developed the theoretical structure of coercion theory, arguing that rational states routinely use the threat of military force – the manipulation of an adversary’s perceptions of future risks and costs with military threats – as a significant component of their diplomacy.97 Schelling distinguished between deterrence (the use of threats to dissuade an adversary from taking undesired action) and compellence (the use of threats to persuade an adversary to behave a certain way), and he distinguished both forms of coercion from brute force: “[B]rute force succeeds when it is used, whereas the power to hurt is most successful when held in reserve. It is the threat of damage to come that can make someone yield of comply. It is latent violence that can influence someone’s choice.”98 Alexander George, David Hall, and William Simons then led the way in taking a more empirical approach, reviewing case studies to draw insights about the success and failure of U.S. coercive threats, analyzing contextual variables and their effects on parties’ reactions to threats during crises. Among their goals was to generate lessons informed by history for successful strategies that combine diplomatic efforts with threats or demonstrations of force, recognizing that the United States was relying heavily on threatened force in addressing security crises. Coercive diplomacy – if successful – offered ways to do so with minimal actual application of military force.99 One of the most influential studies that followed was Force Without War: U.S. Armed Forces as a Political Instrument, a Brookings Institution study led by Barry Blechman and Stephen Kaplan and published in 1977.100 They studied “political uses of force”, defined as actions by U.S. military forces “as part of a deliberate attempt by the national authorities to influence, or to be prepared to influence, specific behavior of individuals in another nation without engaging in a continued contest of violence.”101 Blechman and Kaplan’s work, including their large data set and collected case studies, was important for showing the many ways that threatened force could support U.S. security policy. Besides deterrence and compellence, threats of force were used to assure allies (thereby, for example, avoiding their own drive toward militarization of policies or crises) and to induce third parties to behave certain ways (such as contributing to diplomatic resolution of crises). The record of success in relying on threatened force has been quite mixed, they showed. Blechman and Kaplan’s work, and that of others who built upon it through the end of the Cold War and the period that has followed,102 helped understand the factors that correlated with successful threats or demonstrations of force without resort or escalation to war, especially the importance of credible signals.103 After the Cold War, the United States continued to rely on coercive force – threatened force to deter or compel behavior by other actors – as a central pillar of its grand strategy. During the 1990s, the United States wielded coercive power with varied results against rogue actors in many cases that, without the overlay of superpower enmities, were considered secondary or peripheral, not vital, interests: Iraq, Somalia, Haiti, Bosnia, and elsewhere. For analysts of U.S. national security policy, a major puzzle was reconciling the fact that the United States possessed overwhelming military superiority in raw terms over any rivals with its difficult time during this era in compelling changes in their behavior.104 As Daniel Byman and I wrote about that decade in our study of threats of force and American foreign policy: U.S. conventional and nuclear forces dwarf those of any adversaries, and the U.S. economy remains the largest and most robust in the world. Because of these overwhelming advantages, the United States can threaten any conceivable adversary with little danger of a major defeat or even significant retaliation. Yet coercion remains difficult. Despite the United States’ lopsided edge in raw strength, regional foes persist in defying the threats and ultimatums brought by the United States and its allies. In confrontations with Somali militants, Serb nationalists, and an Iraqi dictator, the U.S. and allied record or coercion has been mixed over recent years…. Despite its mixed record of success, however, coercion will remain a critical element of U.S. foreign policy.105 One important factor that seemed to undermine the effectiveness of U.S. coercive threats during this period was that many adversaries perceived the United States as still afflicted with “Vietnam Syndrome,” unwilling to make good on its military threats and see military operations through.106 Since the turn of the 21st Century, major U.S. security challenges have included non-state terrorist threats, the proliferation of nuclear and other weapons of mass destruction (WMD), and rapidly changing power balances in East Asia, and the United States has accordingly been reorienting but retaining its strategic reliance on threatened force. The Bush Administration’s “preemption doctrine” was premised on the idea that some dangerous actors – including terrorist organizations and some states seeking WMD arsenals – are undeterrable, so the United States might have to strike them first rather than waiting to be struck.107 On one hand, this was a move away from reliance on threatened force: “[t]he inability to deter a potential attacker, the immediacy of today’s threats, and the magnitude of potential harm that could be caused by our adversaries’ choice of weapons, do not permit” a reactive posture.108 Yet the very enunciation of such a policy – that “[t]o forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively”109 – was intended to persuade those adversaries to alter their policies that the United States regarded as destabilizing and threatening. Although the Obama administration pulled back from this rhetoric and placed greater emphasis on international institutions, it has continued to rely on threatened force as a key pillar of its strategy with regard to deterring threats (such as aggressive Iranian moves), intervening in humanitarian crises (as in Libya), and reassuring allies.110 With regard to East Asia, for example, the credible threat of U.S. military force is a significant element of U.S. strategy for deterring Chinese and North Korean aggression as well as reassuring other Asian powers of U.S. protection, to avert a destabilizing arms race.111 D. The Disconnect Between Constitutional Discourse and Strategy There is a major disconnect between the decades of work by strategists and many political scientists on American security policy and practice since the Second World War and legal analysis and scholarship of constitutional war powers during that period. Lawyers and strategists have been relying on not only distinct languages but distinct logics of military force – in short, when it comes to using U.S. military power, lawyers think in terms of “going to war” while strategists focus on potential war and processes leading to it. These framings manifest in differing theoretical starting points for considering how exercises of U.S. military might affect war and peace, and they skew the empirical insights and normative prescriptions about Presidential power often drawn from their analyses. 1. Lawyers’ Misframing Lawyers’ focus on actual uses of force – especially engagements with enemy military forces – as constitutionally salient, rather than including threats of force in their understanding of modern presidential powers tilts analysis toward a one-dimensional strategic logic, rather than a more complex and multi-dimensional and dynamic logic in which the credible will to use force is as important as the capacity to do so. As discussed above, early American constitutional thinkers and practitioners generally wanted to slow down with institutional checks decisions to go to war, because they thought that would make war less likely. “To invoke a more contemporary image,” wrote John Hart Ely of their vision, “it takes more than one key to launch a missile: It should take quite a number to start a war.”112 They also viewed the exercise of military power as generally a ratchet of hostilities, whereby as the intensity of authorized or deployed force increased, so generally did the state of hostilities between the United States and other parties move along a continuum from peace to war.113 Echoes of this logic still reverberate in modern congressionalist legal scholarship: the more flexibly the President can use military force, the more likely it is that the United States will find itself in wars; better, therefore, to clog decisions to make war with legislative checks.114 Modern presidentialist legal scholars usually respond that rapid action is a virtue, not a vice, in exercising military force.115 Especially as a superpower with global interests and facing global threats, presidential discretion to take rapid military action – endowed with what Alexander Hamilton called “[d]ecision, activity, secrecy, and dispatch”116 – best protects American interests. In either case the emphasis tends overwhelmingly to be placed on actual military engagements with adversaries. Strategists and many political scientists, by contrast, view some of the most significant use of military power as starting well before armed forces clash – and including important cases in which they never actually do. Coercive diplomacy and strategies of threatened force, they recognize, often involve a set of moves and countermoves by opposing sides and third parties before or even without the violent engagement of opposing forces. It is often the parties’ perceptions of anticipated actions and costs, not the actual carrying through of violence, that have the greatest impact on the course of events and resolution or escalation of crises. Instead of a ratchet of escalating hostilities, the flexing of military muscle can increase as well as decrease actual hostilities, inflame as well as stabilize relations with rivals or enemies. Moreover, those effects are determined not just by U.S. moves but by the responses of other parties to them – or even to anticipated U.S. moves and countermoves.117 Indeed, as Schelling observed, strategies of brinkmanship sometimes operate by “the deliberate creation of a recognizable risk of war, a risk that one does not completely control.”118 This insight – that effective strategies of threatened force involve not only great uncertainty about the adversary’s responses but also sometimes involve intentionally creating risk of inadvertent escalation119 – poses a difficult challenge for any effort to cabin legally the President’s power to threaten force in terms of likelihood of war or some due standard of care.120 2. Lawyers’ Selection Problems Methodologically, a lawyerly focus on actual uses of force – a list of which would then commonly be used to consider which ones were or were not authorized by Congress – vastly undercounts the instances in which presidents wield U.S. military might. It is already recognized by some legal scholars that studying actual uses of force risks ignoring instances in which President contemplated force but refrained from using it, whether because of political, congressional, or other constraints.121 The point here is a different one: that some of the most significant (and, in many instances, successful) presidential decisions to threaten force do not show up in legal studies of presidential war powers that consider actual deployment or engagement of U.S. military forces as the relevant data set. Moreover, some actual uses of force, whether authorized by Congress or not, were preceded by threats of force; in some cases these threats may have failed on their own to resolve the crisis, and in other cases they may have precipitated escalation. To the extent that lawyers are interested in understanding from historical practice what war powers the political branches thought they had and how well that understanding worked, they are excluding important cases. Consider, as an illustration of this difference in methodological starting point, that for the period of 1946-1975 (during which the exercise of unilateral Presidential war powers had its most rapid expansion), the Congressional Research Service compilation of instances in which the United States has utilized military forces abroad in situations of military conflict or potential conflict to protect U.S. citizens or promote U.S. interests – which is often relied upon by legal scholars studying war powers – lists only about two dozen incidents.122 For the same time period, the Blechman and Kaplan study of political uses of force (usually threats) – which is often relied upon by political scientists studying U.S. security strategy – includes dozens more data-point incidents, because they divide up many military crises into several discrete policy decisions, because many crises were resolved with threat-backed diplomacy, and because many uses of force were preceded by overt or implicit threats of force.123 Among the most significant incidents studied by Blechman and Kaplan but not included in the Congressional Research Service compilation at all are the 1958-59 and 1961 crises over Berlin and the 1973 Middle East War, during which U.S. Presidents signaled threats of superpower war, and in the latter case signaled particularly a willingness to resort to nuclear weapons.124 Because the presidents did not in the end carry out these threats, these cases lack the sort of authoritative legal justifications or reactions that accompany actual uses of force. It is therefore difficult to assess how the executive branch and congress understood the scope of the President’s war powers in these cases, but historical inquiry would probably show the executive branch’s interpretation to be very broad, even to include full-scale war and even where the main U.S. interest at stake was the very credibility of U.S. defense commitments undergirding its grand strategy, not simply the interests specific to divided Germany and the Middle East region. Of course, one might argue that because the threatened military actions were never carried out in these cases, it is impossible to know if the President would have sought congressional authorization or how Congress would have reacted to the use of force; nonetheless, it is easy to see that in crises like these a threat by the President to use force, having put U.S. credibility on the line in addition to whatever other foreign policy stakes were at issues, would have put Congress in a bind. 3. Lawyers’ Mis-Assessment Empirically, analysis of and insights gleaned from any particular incident – which might then be used to evaluate the functional merits of presidential powers – looks very different if one focuses predominantly on the actual use of force instead of considering also the role of threatened force. Take for example, the Cuban Missile Crisis – perhaps the Cold War’s most dangerous event. To the rare extent that they consider domestic legal issues of this crisis at all, lawyers interested in the constitutionality of President Kennedy’s actions generally ask only whether he was empowered to initiate the naval quarantine of Cuba, because that is the concrete military action Kennedy took that was readily observable and that resulted in actual engagement with Soviet forces or vessels – as it happens, very minimal engagement.125 To strategists who study the crisis, however, the naval quarantine is not in itself the key presidential action; after all, as Kennedy and his advisers realized, a quarantine alone could not remove the missiles that were already in Cuba. The most consequential presidential actions were threats of military or even nuclear escalation, signaled through various means including putting U.S. strategic bombers on highest alert.126 The quarantine itself was significant not for its direct military effects but because of its communicative impact in showing U.S. resolve. If one is focused, as lawyers often are, on presidential military action that actually engaged the enemy in combat or nearly did, it is easy to dismiss this case as not very constitutionally significant. If one focuses on it, as strategists and political scientists often do, on nuclear brinkmanship, it is arguably the most significant historical exercise of unilateral presidential powers to affect war and peace.127 Considering again the 1991 Gulf War, most legal scholars would dismiss this instance as constitutionally a pretty uninteresting military conflict: the President claimed unilateral authority to use force, but he eventually sought and obtained congressional authorization for what was ultimately – at least in the short-run – a quite successful war. For the most part this case is therefore neither celebrated nor decried much by either side of legal war powers debates,128 though some congressionalist scholars highlight the correlation of congressional authorization for this war and a successful outcome.129 Political scientists look at the case differently, though. They often study this event not as a successful war but as failed coercive diplomacy, in that the United States first threatened war through a set of dramatically escalating steps that ultimately failed to persuade Saddam Hussein to withdraw from Kuwait.130 Some political scientists even see U.S. legal debate about military actions as an important part of this story, assessing that adversaries pay attention to congressional arguments and moves in evaluating U.S. resolve (an issue taken up in greater detail below) and that congressional opposition to Bush’s initial unilateralism in this case undermined the credibility of U.S. threats.131 Whether one sees the Gulf War as a case of (successful) war, as lawyers usually do, or (unsuccessful) threatened war, as political scientists usually do, colors how one evaluates the outcome and the credit one might attach to some factors such as vocal congressional opposition to initially-unilateral presidential moves. Notice also that legal analysis of Presidential authority to use force is sometimes thought to turn partly on the U.S. security interests at stake, as though those interests are purely contextual and exogenous to U.S. decision-making and grand strategy. In justifying President Obama’s 2011 use of force against the Libyan government, for example, the Justice Department’s Office of Legal Counsel concluded that the President had such legal authority “because he could reasonably determine that such use of force was in the national interest,” and it then went on to detail the U.S. security and foreign policy interests.132 The interests at stake in crises like these, however, are altered dramatically if the President threatens force: doing so puts the credibility of U.S. threats at stake, which is important not only with respect to resolving the crisis at hand but with respect to other potential adversaries watching U.S. actions.133 The President’s power to threaten force means that he may unilaterally alter the costs and benefits of actually using force through his prior actions.134 The U.S. security interests in carrying through on threats are partly endogenous to the strategy embarked upon to address crises (consider, for example, that once President George H.W. Bush placed hundred of thousands of U.S. troops in the Persian Gulf region and issued an ultimatum to Saddam Hussein in 1990, the credibility of U.S. threats and assurances to regional allies were put on the line).135 Moreover, interests at stake in any one crisis cannot simply be disaggregated from broader U.S. grand strategy: if the United States generally relies heavily on threats of force to shape the behavior of other actors, then its demonstrated willingness or unwillingness to carry out a threat and the outcomes of that action affect its credibility in the eyes of other adversaries and allies, too.136 It is remarkable, though in the end not surprising, that the executive branch does not generally cite these credibility interests in justifying its unilateral uses of force. It does cite when relevant the U.S. interest in sustaining the credibility of its formal alliance commitments or U.N. Security Council resolutions, as reasons supporting the President’s constitutional authority to use force.137 The executive branch generally refrains from citing the similar interests in sustaining the credibility of the President’s own threats of force, however, probably in part because doing so would so nakedly expose the degree to which the President’s prior unilateral strategic decisions would tie Congress’s hands on the matter. \* \* \* In sum, lawyers’ focus on actual uses of force – usually in terms of armed clashes with an enemy or the placement of troops into hostile environments – does not account for much vaster ways that President’s wield U.S. military power and it skews the claims legal scholars make about the allocation of war powers between the political branches. A more complete account of constitutional war powers should recognize the significant role of threatened force in American foreign policy. II. Democratic Checks on Threatened Force The previous Parts of this Article showed that, especially since the end of World War II, the United States has relied heavily on strategies of threatened force in wielding its military might – for which credible signals are a necessary element – and that the President is not very constrained legally in any formal sense in threatening war. Drawing on recent political science scholarship, this Part takes some of the major questions often asked by students of constitutional war powers with respect to the actual use of force and reframes them in terms of threatened force. First, as a descriptive matter, in the absence of formal legal checks on the President’s power to threaten war, is the President nevertheless informally but significantly constrained by democratic institutions and processes, and what role does Congress play in that constraint? Second, as a normative matter, what are the strategic merits and drawbacks of this arrangement of democratic institutions and constraints with regard to strategies of threatened force? Third, as a prescriptive matter, although it is not really plausible that Congress or courts would ever erect direct legal barriers to the President’s power to threaten war, how might legal reform proposals to more strongly and formally constrain the President’s power to use force indirectly impact his power to threaten it effectively? For reasons discussed below, I do not consider whether Congress could legislatively restrict directly the President’s power to threaten force or war; in short, I set that issue aside because assuming that were constitutionally permissible, even ardent congressionalists have exhibited no interest in doing so, and instead have focused on legally controlling the actual use of force. Political science insights that bear on these questions emerge from several directions. One is from studies of Congress’ influence on use of force decisions, which usually assume that Congress’s formal legislative powers play only a limited role in this area, and the effects of this influence on presidential decision-making about threatened force. Another is international relations literature on international bargaining138 as well as literature on the theory of democratic peace, the notion that democracies rarely, if ever, go to war with one another.139 In attempting to explain the near-absence of military conflicts between democracies, political scientists have examined how particular features of democratic governments – electoral accountability, the institutionalized mobilization of political opponents, and the diffusion of decision-making authority regarding the use of force among executive and legislative branches – affect decision-making about war.140 These and other studies, in turn, have led some political scientists (especially those with a rational choice theory orientation) to focus on how those features affect the credibility of signals about force that governments send to adversaries in crises.141 My purpose in addressing these questions is to begin painting a more complete and detailed picture of the way war powers operate, or could operate, than one sees when looking only at actual wars and use of force. This is not intended to be a comprehensive account but an effort to synthesize some strands of scholarship from other fields regarding threatened force to inform legal discourse about how war powers function in practice and the strategic implications of reform. The answers to these questions also bear on raging debates among legal scholars on the nature of American executive power and its constraint by law. Initially they seem to support the views of those legal scholars who have long believed that in practice law no longer seriously binds the President with respect to war-making.142 That view has been taken even further recently by Eric Posner and Adrian Vermeule, who argue that “[l]aw does little constraint the modern executive” at all, but also observe that “politics and public opinion” operate effectively to cabin executive powers.143 The arguments offered here, however, do more to support the position of those legal scholars who describe a more complex relationship between law and politics, including that law is constitutive of the processes of political struggle.144 That law helps constitute the processes of political struggles is true of any area of public policy, though, and what is special here is the added importance of foreign audiences – including adversaries and allies, alike – observing and reacting to those politics, too. Democratic Constraints on the Power to the Threaten Force Whereas most lawyers usually begin their analysis of the President’s and Congress’s war powers by focusing on their formal legal authorities, political scientists usually take for granted these days that the President is – in practice – the dominant branch with respect to military crises and that Congress wields its formal legislative powers in this area rarely or in only very limited ways. A major school of thought, however, is that congressional members nevertheless wield significant influence over decisions about force, and that this influence extends to threatened force, so that Presidents generally refrain from threats that would provoke strong congressional opposition. Even without any serious prospect for legislatively blocking the President’s threatened actions, Congress under certain conditions can loom large enough to force Presidents to adjust their policies; even when it cannot, congressional members can oblige the President expend lots of political capital. As Jon Pevehouse and William Howell explain: When members of Congress vocally oppose a use of force, they undermine the president’s ability to convince foreign states that he will see a fight through to the end. Sensing hesitation on the part of the United States, allies may be reluctant to contribute to a military campaign, and adversaries are likely to fight harder and longer when conflict erupts— thereby raising the costs of the military campaign, decreasing the president’s ability to negotiate a satisfactory resolution, and increasing the probability that American lives are lost along the way. Facing a limited band of allies willing to participate in a military venture and an enemy emboldened by domestic critics, presidents may choose to curtail, and even abandon, those military operations that do not involve vital strategic interests. 145 This statement also highlights the important point, alluded to earlier, that force and threatened force are not neatly separable categories. Often limited uses of force are intended as signals of resolve to escalate, and most conflicts involve bargaining in which the threat of future violence – rather than what Schelling calls “brute force”146 – is used to try to extract concessions. The formal participation of political opponents in legislative bodies provides them with a forum for registering dissent to presidential policies of force through such mechanisms floor statements, committee oversight hearings, resolution votes, and funding decisions.147 These official actions prevent the President “from monopolizing the nation’s political discourse” on decisions regarding military actions can thereby make it difficult for the President to depart too far from congressional preferences.148 Members of the political opposition in Congress also have access to resources for gathering policy relevant information from the government that informs their policy preferences. Their active participation in specialized legislative committees similarly gives opponent party members access to fact-finding resources and forums for registering informed dissent from decisions within the committee’s purview.149 As a result, legislative institutions within democracies can enable political opponents to have a more immediate and informed impact on executive’s decisions regarding force than can opponents among the general public. Moreover, studies suggest that Congress can actively shape media coverage and public support for a president’s foreign policy engagements.150 In short, these findings among political scientists suggest that, even without having to pass legislation or formally approve of actions, Congress often operates as an important check on threatened force by providing the president’s political opponents with a forum for registering dissent from the executive’s decisions regarding force in ways that attach domestic political costs to contemplated military actions or even the threats to use force. Under this logic, Presidents, anticipating dissent, will be more selective in issuing¶ threats in the first place, making only those commitments that would not incite¶ widespread political opposition should the threat be carried through.151 Political¶ opponents within a legislature also have few electoral incentives to collude in an¶ executive’s bluff, and they are capable of expressing opposition to a threatened use of¶ force in ways that could expose the bluff to a threatened adversary.152 This again narrows¶ the President’s range of viable policy options for brandishing military force. Counter-intuitively, given the President’s seemingly unlimited and unchallenged¶ constitutional power to threaten war, it may in some cases be easier for members of¶ Congress to influence presidential decisions to threaten military action than presidential¶ war decisions once U.S. forces are already engaged in hostilities. It is widely believed¶ that once U.S. armed forces are fighting, congress members’ hands are often tied: policy¶ opposition at that stage risks being portrayed as undermining our troops in the field.153¶ Perhaps, it could be argued, the President takes this phenomenon into account and¶ therefore discounts political opposition to threatened force; he can assume that such¶ opposition will dissipate if he carries it through. Even if that is true, before that point¶ occurs, however, members of Congress may have communicated messages domestically¶ and communicated signals abroad that the President will find difficult to counter.154 The bottom line is that a body of recent political science, while confirming the¶ President’s dominant position in setting policy in this area, also reveals that policymaking¶ with respect to threats of force is significantly shaped by domestic politics and¶ that Congress is institutionally positioned to play a powerful role in influencing those¶ politics, even without exercising its formal legislative powers. Given the centrality of¶ threatened force to U.S. foreign policy strategy and security crises, this suggests that the¶ practical war powers situation is not so imbalanced toward the President as many assume. B. Democratic Institutions and the Credibility of Threats A central question among constitutional war powers scholars is whether robust¶ checks – especially congressional ones – on presidential use of force lead to “sound”¶ policy decision-making. Congressionalists typically argue that legislative control over¶ war decisions promotes more thorough deliberation, including more accurate weighing of¶ consequences and gauging of political support of military action.155 Presidentialists¶ usually counter that the executive branch has better information and therefore better¶ ability to discern the dangers of action or inaction, and that quick and decisive military¶ moves are often required to deal with security crises.156 If we are interested in these sorts of functional arguments, then reframing the¶ inquiry to include threatened force prompts critical questions whether such checks also¶ contribute to or detract from effective deterrence and coercive diplomacy and therefore¶ positively or negatively affect the likelihood of achieving aims without resort to war.¶ Here, recent political science provides some reason for optimism, though the scholarship¶ in this area is neither yet well developed nor conclusive. To be sure, “soundness” of policy with respect to force is heavily laden with¶ normative assumptions about war and the appropriate role for the United States in the¶ broader international security system, so it is difficult to assess the merits and¶ disadvantages of constitutional allocations in the abstract. That said, whatever their¶ specific assumptions about appropriate uses of force in mind, constitutional war powers¶ scholars usually evaluate the policy advantages and dangers of decision-making¶ allocations narrowly in terms of the costs and outcomes of actual military engagements¶ with adversaries. The importance of credibility to strategies of threatened force adds important new¶ dimensions to this debate. On the one hand, one might intuitively expect that robust democratic checks would generally be ill-suited for coercive threats and negotiations –¶ that institutional centralization and secrecy of decision-making might better equip nondemocracies¶ to wield threats of force. As Quincy Wright speculated in 1944, autocracies¶ “can use war efficiently and threats of war even more efficiently” than democracies,157¶ especially the American democracy in which vocal public and congressional opposition¶ may undermine threats.158 Moreover, proponents of democratic checks on war powers¶ usually assume that careful deliberation is a virtue in preventing unnecessary wars, but¶ strategists of deterrence and coercion observe that perceived irrationality is sometimes¶ important in conveying threats: “don’t test me, because I might just be crazy enough to¶ do it!”159 On the other hand, some political scientists have recently called into question this¶ view and concluded that the institutionalization of political contestation and some¶ diffusion of decision-making power in democracies of the kind described in the previous¶ section make threats to use force rare but especially credible and effective in resolving¶ international crises without actual resort to armed conflict. In other words, recent¶ arguments in effect turn some old claims about the strategic disabilities of democracies¶ on their heads: whereas it used to be generally thought that democracies were ineffective¶ in wielding threats because they are poor at keeping secrets and their decision-making is¶ constrained by internal political pressures, a current wave of political science accepts this¶ basic description but argues that these democratic features are really strategic virtues.160 Rationalist models of crisis bargaining between states assume that because war is¶ risky and costly, states will be better off if they can resolve their disputes through¶ bargaining rather than by enduring the costs and uncertainties of armed conflict.161¶ Effective bargaining during such disputes – that which resolves the crisis without a resort¶ to force – depends largely on states’ perceptions of their adversary’s capacity to wage an¶ effective military campaign and its willingness to resort to force to obtain a favorable¶ outcome. A state targeted with a threat of force, for example, will be less willing to resist¶ the adversary’s demands if it believes that the adversary intends to wage and is capable of¶ waging an effective military campaign to achieve its ends. In other words, if a state¶ perceives that the threat from the adversary is credible, that state has less incentive to¶ resist such demands if doing so will escalate into armed conflict. The accuracy of such perceptions, however, is often compromised by¶ informational asymmetries that arise from private information about an adversary’s¶ relative military capabilities and resolve that prevents other states from correctly¶ assessing another states’ intentions, as well as by the incentives states have to¶ misrepresent their willingness to fight – that is, to bluff.162 Informational asymmetries¶ increase the potential for misperception and thereby make war more likely; war,¶ consequentially, can be thought of in these cases as a “bargaining failure.”163 Some political scientists have argued in recent decades – contrary to previously common wisdom – that features and constraints of democracies make them better suited than non-democracies to credibly signal their resolve when they threaten force. To bolster their bargaining position, states will seek to generate credible signals of their resolve by taking actions that can enhance the credibility of such threats, such as mobilizing military forces or making “hand-tying” commitments from which leaders cannot back down without suffering considerable political costs domestically.164 These domestic audience costs, according to some political scientists, are especially high for leaders in democratic states, where they may bear these costs at the polls.165 Given the potentially high domestic political and electoral repercussions democratic leaders face from backing down from a public threat, they have considerable incentives to refrain from bluffing. An adversary that understands these political vulnerabilities is thereby more likely to perceive the threats a democratic leader does issue as highly credible, in turn making it more likely that the adversary will yield.166 Other scholars have recently pointed to the special role of legislative bodies in signaling with regard to threatened force. This is especially interesting from the perspective of constitutional powers debates, because it posits a distinct role for Congress – and, again, one that does not necessarily rely on Congress’s ability to pass binding legislation that formally confines the President. Kenneth Schultz, for instance, argues that the open nature of competition within democratic societies ensures that the interplay of opposing parties in legislative bodies over the use of force is observable not just to their domestic publics but to foreign actors; this inherent transparency within democracies – magnified by legislative processes – provides more information to adversaries regarding the unity of domestic opponents around a government’s military and foreign policy decisions.167 Political opposition parties can undermine the credibility of some threats by the President to use force if they publicly voice their opposition in committee hearings, public statements, or through other institutional mechanisms. Furthermore, legislative processes – such as debates and hearings – make it difficult to conceal or misrepresent preferences about war and peace. Faced with such institutional constraints, Presidents will incline to be more selective about making such threats and avoid being undermined in that way.168 This restraining effect on the ability of governments to issue threats simultaneously makes those threats that the government issues more credible, if an observer assumes that the President would not be issuing it if he anticipated strong political opposition. Especially when members of the opposition party publicly support an executive’s threat to use force during a crisis, their visible support lends additional credibility to the government’s threat by demonstrating that political conditions domestically favor the use of force should it be necessary.169 In some cases, Congress may communicate greater willingness than the president to use force, for instance through non-binding resolutions.170 Such powerful signals of resolve should in theory make adversaries more likely to back down. The credibility-enhancing effects of legislative constraints on threats are subject to dispute. Some studies question the assumptions underpinning theories of audience costs – specifically the idea that democratic leaders suffer domestic political costs to failing to make good on their threats, and therefore that their threats are especially credible171 – and others question whether the empirical data supports claims that democracies have credibility advantages in making threats.172 Other scholars dispute the likelihood that leaders will really be punished politically for backing down, especially if the threat was not explicit and unambiguous or if they have good policy reasons for doing so.173 Additionally, even if transparency in democratic institutions allows domestic dissent from threats of force to be visible to foreign audiences, it is not clear that adversaries would interpret these mechanisms as political scientists expect in their models of strategic interaction, in light of various common problems of misperception in international relations.174 These disputes are not just between competing theoretical models but also over the links between any of the models and real-world political behavior by states. At this point there remains a dearth of good historical evidence as to how foreign leaders interpret political maneuvers within Congress regarding threatened force. Nevertheless, at the very least, strands of recent political science scholarship cast significant doubt on the intuition that democratic checks are inherently disadvantageous to strategies of threatened force. Quite the contrary, they suggest that legislative checks – or, indeed, even the signaling functions that Congress is institutionally situated to play with respect to foreign audiences interpreting U.S. government moves – can be harnessed in some circumstances to support such strategies. C. Legal Reform and Strategies of Threatened Force Among legal scholars of war powers, the ultimate prescriptive question is whether the President should be constrained more formally and strongly than he currently is by legislative checks, especially a more robust and effective mandatory requirement of congressional authorization to use force. Calls for reform usually take the form of narrowing and better enforcement (by all three branches of government) of purported constitutional requirements for congressional authorization of presidential uses of force or revising and enforcing the War Powers Resolutions or other framework legislation requiring express congressional authorization for such actions.175 As applied to strategies of threatened force, generally under these proposals the President would lack authority to make good on them unilaterally (except in whatever narrow circumstances for which he retains his own unilateral authority, such as deterring imminent attacks on the United States). Whereas legal scholars are consumed with the internal effects of war powers law, such as whether and when it constrains U.S. government decision-making, the analysis contained in the previous section shifts attention externally to whether and when U.S. law might influence decision-making by adversaries, allies, and other international actors. In prescriptive terms, if the President’s power to use force is linked to his ability to threaten it effectively, then any consideration of war powers reform on policy outcomes and longterm interests should include the important secondary effects on deterrent and coercive strategies – and how U.S. legal doctrine is perceived and understood abroad.176 Would stronger requirements for congressional authorization to use force reduce a president’s opportunities for bluffing, and if so would this improve U.S. coercive diplomacy by making ensuing threats more credible? Or would it undermine diplomacy by taking some threats off the table as viable policy options? Would stronger formal legislative powers with respect to force have significant marginal effects on the signaling effects of dissent within Congress, beyond those effects already resulting from open political discourse? These are difficult questions, but the analysis and evidence above helps generate some initial hypotheses and avenues for further research and analysis. One might ask at this point why, though, having exposed as a hole in war powers legal discourse the tendency to overlook threatened force, this Article does not take up whether Congress should assert some direct legislative control of threats – perhaps statutorily limiting the President’s authority to make them or establishing procedural conditions like presidential reporting requirements to Congress. This Article puts such a notion aside for several reasons. First, for reasons alluded to briefly above, such limits would be very constitutionally suspect and difficult to enforce.177 Second, even the most ardent war-power congressionalists do not contemplate such direct limits on the President’s power to threaten; they are not a realistic option for reform. Instead, this Article focuses on the more plausible – and much more discussed – possibility of strengthening Congress’s power over the ultimate decision whether to use force, but augments the usual debate over that question with appreciation for the importance of credible threats. A claim previously advanced from a presidentialist perspective is that stronger legislative checks on war powers is harmful to coercive and deterrent strategies, because it establishes easily-visible impediments to the President’s authority to follow through on threats. This was a common policy argument during the War Powers Resolution debates in the early 1970s. Eugene Rostow, an advocate inside and outside the government for executive primacy, remarked during consideration of legislative drafts that any serious restrictions on presidential use of force would mean in practice that “no President could make a credible threat to use force as an instrument of deterrent diplomacy, even to head off explosive confrontations.”178 He continued: In the tense and cautious diplomacy of our present relations with the Soviet Union, as they have developed over the last twenty-five years, the authority of the President to set clear and silent limits in advance is perhaps the *most* important of all the powers in our constitutional armory to prevent confrontations that could carry nuclear implications. … [I]t is the diplomatic power the President needs most under the circumstance of modern life—the power to make a credible threat to use force in order to prevent a confrontation which might escalate.179 In his veto statement on the War Powers Resolution, President Nixon echoed these concerns, arguing that the law would undermine the credibility of U.S. deterrent and coercive threats in the eyes of both adversaries and allies – they would know that presidential authority to use force would expire after 60 days, so absent strong congressional support they could assume U.S. withdrawal at that point.180 In short, those who oppose tying the president’s hands with mandatory congressional authorization requirements to use force sometimes argue that doing so incidentally and dangerously ties his hands in threatening it. A critical assumption here is that presidential flexibility, preserved in legal doctrine, enhances the credibility of presidential threats to escalate.

### 1NC Solvency

#### Obama can circumvent the plan- covert loopholes are inevitable

Lohmann 13, Julia, director of the Harvard Law National Security Research Committee, BA in political science from the University of California, Berkeley, “Distinguishing CIA-Led from Military-Led Targeted Killings,” January 28, 2013, <http://www.lawfareblog.com/wiki/the-lawfare-wiki-document-library/targeted-killing/effects-of-particular-tactic-on-issues-related-to-targeted-killings/>]

The U.S. military—in particular, the Special Operations Command (SOCOM), and its subsidiary entity, the Joint Special Operations Command (JSOC)—is responsible for carrying out military-led targeted killings.¶ Military-led targeted killings are subject to various legal restrictions, including a complex web of statutes and executive orders. For example, because the Covert Action Statute does not distinguish among institutions undertaking covert actions, targeted killings conducted by the military that fall within the definition of “covert action” set forth in 50 U.S.C. § 413(b) are subject to the same statutory constraints as are CIA covert actions. 50 U.S.C. § 413b(e). However, as Robert Chesney explains, many military-led targeted killings may fall into one of the CAS exceptions—for instance, that for traditional military activities—so that the statute’s requirements will not always apply to military-led targetings. Such activities are exempted from the CAS’s presidential finding and authorization requirements, as well as its congressional reporting rules.¶ Because such unacknowledged military operations are, in many respects, indistinguishable from traditional covert actions conducted by the CIA, this exception may provide a “loophole” allowing the President to circumvent existing oversight mechanisms without substantively changing his operational decisions. However, at least some military-led targetings do not fall within the CAS exceptions, and are thus subject to that statute’s oversight requirements. For instance, Chesney and Kenneth Anderson explain, some believe that the traditional military activities exception to the CAS only applies in the context of overt hostilities, yet it is not clear that the world’s tacit awareness that targeted killing operations are conducted (albeit not officially acknowledged) by the U.S. military, such as the drone program in Pakistan, makes those operations sufficiently overt to place them within the traditional military activities exception, and thus outside the constraints of the CAS.¶ Chesney asserts, however, that despite the gaps in the CAS’s applicability to military-led targeted killings, those targetings are nevertheless subject to a web of oversight created by executive orders that, taken together, largely mirrors the presidential authorization requirements of the CAS. But, this process is not enshrined in statute or regulation and arguably could be changed or revoked by the President at any time. Moreover, this internal Executive Branch process does not involve Congress or the Judiciary in either ex ante or ex post oversight of military-led targeted killings, and thus, Philip Alston asserts, it may be insufficient to provide a meaningful check against arbitrary and overzealous Executive actions.

#### Transparency fails – disclosure isn’t seen as credible

Groves 4-10-13 [Steven, the Bernard andhas to Barbara Lomas Senior Research Fellow in Heritage’s Margaret Thatcher Center for Freedom, former senior counsel to the U.S. Senate Permanent Subcommittee on Investigations, former associate at Boies, Schiller & Flexner LLP, where he specialized in commercial litigation, holds a law degree from Ohio Northern University's College of Law and a bachelor of arts degree in history from Florida State University, “Drone Strikes: The Legality of U.S. Targeting Terrorists Abroad,” <http://www.heritage.org/research/reports/2013/04/drone-strikes-the-legality-of-us-targeting-terrorists-abroad>]

Continue to affirm existing use-of-force authorities. During the past three years, senior officials of the Obama Administration have publicly set out in significant detail U.S. policies and practices regarding drone strikes. The Administration should continue to do so, emphasizing that U.S. policies adhere to widely recognized international law. Critics of the United States will continue to claim that a lack of transparency surrounds U.S. policy and actions. Such critics will likely never be satisfied, not even with full disclosure of the relevant classified legal memoranda, and their criticism will not cease until the United States abandons its practice of targeting terrorist threats in Pakistan, Yemen, and elsewhere. However, consistent repetition of the U.S. legal position on targeted drone strikes may blunt such criticism.

#### Transparency tanks drone operations – data acquisition

Foust ’13 [Joshua, former fellow at the American Security Project and a civilian cultural advisor for the US Army, member of the Atlantic Council's Young Atlanticist Working Group, DC-based analyst who writes about strategy, counterterrorism, and futures, “Understanding the Strategic ¶ and Tactical Considerations ¶ of Drone Strikes,” January, <http://americansecurityproject.org/ASP%20Reports/Ref%200110%20-%20Understanding%20the%20Strategic%20and%20Tactical%20Considerations%20of%20Drone%20Strikes.pdf>]

However, increased government transparency is not a simple prospect. The different organizations that operate drones do so under different parts of U.S. law. The CIA’s activities take place under one section of national ¶ security law (Title 50), while the military functions under another (Title 10).104 Additionally, most of the drone ¶ strikes in Yemen and Somalia are considered clandestine, which means they’re secret but the government can ¶ officially acknowledge. Drone strikes in Pakistan, on the other hand, are covert, which means the government ¶ cannot even acknowledge their existence. ¶ In addition, each organization has dramatically different reporting requirements – the CIA reports to a ¶ small group of cleared officials in the administration and Congress, while the military has broader reporting ¶ requirements throughout its chain of command. Resolving the different legal authorizations for drone strikes, ¶ and unifying reporting requirements, is a vital step toward getting government data about drone strikes.

#### Transparency makes it easier for the U.S. to justify continued strikes because it gives the appearance of oversight – means we still use strikes and destroys cred

**Waxman 3-20**-13 [Matthew Waxman is a professor at Columbia Law School, a fellow at the Council on Foreign Relations, and a member of the Hoover Institution Task Force on National Security and Law, “Going Clear,” <http://www.foreignpolicy.com/articles/2013/03/20/going_clear>]

So, moving operations to the Pentagon may modestly improve transparency and compliance with the law but -- ironically for drone critics -- it may also entrench targeted-killing policy for the long term.¶ For one thing, the U.S. government will now be better able to defend publicly its practices at home and abroad. The CIA is institutionally oriented toward extreme secrecy rather than public relations, and the covert status of CIA strikes makes it difficult for officials to explain and justify them. The more secretive the U.S. government is about its targeting policies, the less effectively it can participate in the broader debates about the law, ethics, and strategy of counterterrorism.¶ Many of the criticisms of drones and targeting are fundamentally about whether it's appropriate to treat the fight against al Qaeda and its allies as a war -- with all the legal authorities that flow from that, like the powers to detain and kill. The U.S. government can better defend its position without having to maintain plausible deniability of its most controversial program and without the negative image (whether justified or not) that many audiences associate with the CIA. Under a military-only policy, the United States would also be better positioned to correct lingering misperceptions about targeted killings and to take remedial action when it makes a mistake.¶ Moreover, clearer legal limits and the perception of stricter oversight will make drone policy more legitimate in the public's eyes. Polling shows that Americans support military drone strikes more strongly than CIA ones, so this move will likely strengthen political backing for continued strikes. Consider the case of Guantanamo: The shuttering of black sites, as well as the Supreme Court's decisions that detainees there can challenge their detention in federal court and that all detainees are protected by the Geneva Convention, have muted criticism of the underlying practice of detention without trial. Here, too, the proposed reforms would put the remaining policy on stronger footing.

### 1NC Heg

#### Systemic opposition dooms soft power- drones aren’t key

**Wike ’12** [Richard Wike is associate director of the Pew Global Attitudes Project, “Wait, You Still Don't Like Us?” September 19, <http://www.foreignpolicy.com/articles/2012/09/19/you_still_don_t_like_us?page=full>]

Anti-Americanism in the Muslim world, an issue that was front and center throughout much of the George W. Bush era, is squarely back in the news following the protests that swept across more than 20 countries in reaction to a controversial anti-Islam film. The all-too-familiar images of angry demonstrators burning the Stars and Stripes are a dramatic reminder that, while the image of the United States has improved throughout many parts of the world during Barack Obama's presidency, negative views of America remain stubbornly persistent in key Muslim countries. Much of this animosity is due to continuing concerns about U.S. power and widespread opposition to major elements of American foreign policy. But it's not just about the United States -- rather, anti-Americanism needs to be seen within a broader context of distrust between Muslims and the West.¶ Following his election, Obama made it a priority to change America's dismal image in the Muslim world, most prominently in his June 2009 Cairo speech. And he has had some successes; in fact, Muslim publics still generally give him more positive ratings than Bush received. For instance, in a spring 2012 survey by the Pew Research Center's Global Attitudes Project, only 24 percent of Turks express confidence in Obama; still, that's a whole lot better than the 2 percent who felt this way about Bush during his final year in office. Also, due in part to having lived there for a few years as a child, Obama has consistently received high marks in Indonesia, and his popularity has helped turn around America's image in the world's most populous Muslim nation.¶ But overall, the picture remains grim. In Egypt, for example, despite all the tumult of the revolution, America's image remains roughly where it was four years ago -- then 22 percent expressed a favorable opinion of the United States; in the 2012 poll, it was 19 percent. Among Pakistanis and Jordanians, America's already poor ratings have declined further since 2008 -- in both countries, 19 percent held a positive view of the U.S. four years ago, compared with just 12 percent in 2012.¶ Why hasn't America's image improved? In part, many Muslims around the world continue to voice the same criticisms of U.S. foreign policy that were common in the Bush years. U.S. anti-terrorism efforts are still widely unpopular. America is still seen as ignoring the interests of other countries. Few think Obama has been even-handed in dealing with the Israelis and the Palestinians. And the current administration's increased reliance on drone strikes to target extremists is overwhelmingly unpopular -- more than 80 percent of Jordanians, Egyptians, and Turks oppose the drone campaign.¶ The opposition to drone strikes points to a broader issue: a widespread distrust of American power. This is especially true when the United States employs hard power, whether it's the wars in Afghanistan and Iraq or the drone attacks in Pakistan, Somalia, and Yemen. But it is true even for elements of American soft power. Predominantly Muslim nations are generally among the least likely to embrace U.S. popular culture or the spread of American ideas and customs. Only 36 percent of Egyptians like American music, movies, and television, and just 11 percent believe it is good that U.S. ideas and customs are spreading to their country.¶ But America's image problems are not due solely to fears of American power. In some ways, the issue of anti-Americanism is part of a broader story about mutual distrust between Muslims and Westerners. Polling by Pew in 2006 and 2011 highlighted the extent to which Muslim and Western publics see their relations with each other as bad, and the degree to which they blame each other for the poor state of affairs.¶ In the West, fears about extremism and violence continue to play a role in driving these views. Among Muslims, many describe Westerners as selfish, greedy, and violent, and the 2011 poll found majorities of Muslims in Egypt, the Palestinian territories, Pakistan, and Turkey saying that both Americans and Europeans tend to be hostile toward Muslims. Also, large numbers of Muslims surveyed in 2011 blamed Western policies for the lack of prosperity in Muslim nations.¶ Just like the headlines from the past week, the survey data paint a fairly bleak picture. The "Obama effect" that changed America's battered image in Europe and other parts of the globe did not register in many predominantly Muslim nations. Even so, there are some hopeful signs. For one thing, it is important to keep in mind that the "Muslim world" is not monolithic. In the 2012 Pew survey, two-thirds of Lebanese Sunni Muslims expressed a positive view of the United States. In newly democratic Tunisia, opinions were equally divided, with 45 percent giving the United States a positive rating and 45 percent a negative one. Previous polling found largely positive views of the United States among Muslims in Indonesia and Nigeria following Obama's election.

#### Obama mishandles soft power- no impact

**Lagon ’11** [Mark P. Lagon is the International Relations and Security Chair at Georgetown University's Master of Science in Foreign Service Program and adjunct senior fellow at the Council on Foreign Relations. He is the former US Ambassador-at-Large to Combat Trafficking in Persons at the US Department of State, “The Value of Values: Soft Power Under Obama,” September/October, <http://www.worldaffairsjournal.org/article/value-values-soft-power-under-obama>]

Tne irony of the Obama presidency is how much it relies on hard power. The president came into office proposing a dramatic shift from George W. Bush’s perceived unilateralism, and most of his predecessor’s hard-edged counterterrorism tactics and massive deployments in wars abroad. Yet after three years, Obama has escalated forces in Afghanistan, embraced the widespread use of unmanned drones to kill terrorists at the risk of civilian casualties, kept Guantánamo open, and killed Osama bin Laden in Pakistan in a thoroughly unilateral fashion.¶ What he hasn’t accomplished to any great degree is what most observers assumed would be the hallmark of his approach to foreign affairs—a full assertion of the soft power that makes hard power more effective. His 2008 campaign centered on a critique of President Bush’s overreliance on hard power. Obama suggested he would rehabilitate the damaged image of America created by these excesses and show that the United States was not a cowboy nation. Upon taking office, he made fresh-start statements, such as his June 2009 remarks in Cairo, and embraced political means like dialogue, respectful multilateralism, and the use of new media, suggesting that he felt the soft power to change minds, build legitimacy, and advance interests was the key element missing from the recent US approach to the world—and that he would quickly remedy that defect.¶ Yet President Obama’s conception of soft power has curiously lacked the very quality that has made it most efficacious in the past—the values dimension . This may seem odd for a leader who is seen worldwide as an icon of morality, known for the motto “the audacity of hope” and his deployment of soaring rhetoric. Yet his governance has virtually ignored the values dimension of soft power, which goes beyond the tradecraft of diplomacy and multilateral consultation to aggressively assert the ideals of freedom in practical initiatives. The excision of this values dimension renders soft power a hollow concept.¶ The Obama presidency has regularly avoided asserting meaningful soft power, particularly in its relations with three countries—Iran, Russia, and Egypt—where it might have made a difference not only for those countries but for American interests as well. His reaction to the challenges these countries have posed to the US suggest that it is not soft power itself that Obama doubts, but America’s moral standing to project it.

### 1NC Pakistan

#### Pakistan instability is inevitable- drones aren’t decisive

**Akins 8-20**-13 [Harrison Akins (London School of Economics, MSc ’10) is the Ibn Khaldun Chair Research Fellow at American University’s School of International Service in Washington, DC. He served as the senior researcher for Professor Akbar Ahmed’s study ‘The Thistle and the Drone: How America’s War on Terror Became a Global War on Tribal Islam,’ “Drones or No Drones, The Violence Will Continue in Pakistan,” <http://blogs.lse.ac.uk/ideas/2013/08/drones-or-no-drones-the-violence-will-continue-in-pakistan/>]

Speaking from Islamabad, U.S. Secretary of State John Kerry recently hinted at the possibility of ending the use of the drone in Pakistan. Reflecting an earlier speech by President Obama at the National Defense University in Washington, DC, Secretary Kerry stated, “I think the programme will end as we have eliminated most of the threat and continue to eliminate it.” He continued, “I think the President has a very real timeline and we hope it’s going to be very, very soon.”¶ The drone campaign in the Tribal Areas of Pakistan, primarily in Waziristan, has become a flashpoint for the increasingly poor relations between Pakistan and the United States in recent years and a focus of Pakistani politics, with many major candidates in the recent elections campaigning against their use including the new Prime Minister Nawaz Sharif.[1] While the cessation of drone strikes will be a positive step towards improving relations between these two countries, something which will be vital to the Americans as they withdraw from Afghanistan, the use of the drone is but one small part of a much larger problem—the conflict between the central government and tribal periphery. It is this conflict which drives much of the violence being witnessed throughout the country.¶ While the drone strikes exacerbate the violence in this northwestern periphery, ceasing the strikes will do little to resolve it. Only by addressing the structural breakdown between the centre and periphery and the deteriorating law and order situation can Pakistan have any respite from the violence which has plagued the country for almost a decade. This should be the first priority for Nawaz Sharif and the new government in the Tribal Areas.¶ The Tribal Areas of Pakistan are a region of extremes: high mountains, baking deserts, harsh winters, and the fiercest of the Pashtun tribes which populate Afghanistan and northwest Pakistan. Known as the land of riwaj, or tribal custom, the Tribal Areas have been outside of the control of the central government since the era of the Mughal rulers and the British Raj. During the time of British rule, government authority effectively extended only hundred yards on either side of the road.[A1] Tribesmen conducted their lives according to their tribal code of honor and revenge, Pashtunwali, rather than a legal or civil code. The tribes were able to maintain stability and order through the interaction of the three pillars of authority: the council of elders, or jirga, religious leaders acting as mediators, and the central government representative, the Political Agent. It was the often fluid relationship between these three positions which was able to check the violent elements of society before lengthy blood feuds and tribal wars began.[2¶ Over the past decade, it was a combination of factors that led to the instability: drone strikes, Pakistani military actions, and the dreaded suicide bombers. The Pakistani military invasion of 2004 in the Tribal Areas, the largest since the military garrisons were withdrawn by M.A. Jinnah in 1947, under the auspices of catching fleeing militants from Afghanistan sparked the first violent responses from the Tribal Areas. The military invasion was followed shortly by the first drone strikes targeting the leaders of the local Taliban organizations in Waziristan.¶ And the pace of the violence across Pakistan quickened after the 2007 Red Mosque incident in which Pakistani commandos stormed the mosque complex. Students had barricaded themselves inside after detaining individuals for being “un-Islamic” and setting up sharia courts. A large number of them were killed including a number of female students. A string of suicide bombings and other revenge attacks quickly followed with the Pakistani military continuing its operations in the Tribal Areas.[3]¶ The Tehrik-e-Taliban Pakistan (TTP), the fiercest of the Taliban groups, was formed in Waziristan in the wake of the Red Mosque attack. Its first targets were the remnants of the traditional pillars of authority who could challenge their authority, with elders, religious leaders, and political officers being killed by suicide bombers or fleeing the Tribal Areas. It was now the TTP who filled the vacuum left by the destruction of the three pillars, the very structure which traditionally checked such men of violence. The conflict in Waziristan has been characterized by a cycle of strike and counterstrike between the TTP and the Pakistani military.[4]¶ Drone strikes were occurring with increased frequency in this chaotic environment, reaching their peak in 2010. The drone only made the conflict between centre and periphery worse, with increasing reports of innocent people being killed. The TTP views the Pakistan government as complicit in the strikes; a view confirmed recently in an interview with former President Pervez Musharraf. Many of the suicide bombings in Pakistan are in revenge for the drone strikes, according to statements made by the TTP.[5] And all the while it is the innocent tribesmen, many of whom have fled the region as destitute refugees, who suffer the most.¶ Neither the use of the drone or the cessation of the drone strikes is a solution to the violence in the Tribal Areas. The near daily attacks by militant groups in recent months, despite nearly a decade of drone strikes, is proof that the use of the drone is doing little to abate the violence and further proof that the US continues to misunderstand the turmoil in the Tribal Areas. The resentment and anger aroused by the drone and the many innocent deaths that it causes ripples throughout a population already under siege by the actions of its own government and groups of violence from its own tribal population.¶ Yet peace will never come to the Tribal Areas until the underlying cause of the turmoil is addressed –the structural breakdown between center and periphery. In order to check the violence, the local administrative structure working with traditional tribal leaders, through which law and order is maintained, needs to be reconstructed and supported, an argument made in Akbar Ahmed’s latest book The Thistle and the Drone which is based on 40 case studies of tribal societies across the Muslim world. And only when such a structure is in place can Pakistan begin to address the other ills of tribal society, such as the lack of development, womens rights, and education (female literacy rates in the Tribal Areas are essentially zero[6]). To attempt to address these substantive issues without an administrative structure in place first is letting the cart get in front of the horse.¶ As the US increases its use of the drone in Yemen and in other tribal societies, it should learn the lessons from the failed drone campaign in Pakistan. Such use of force only increases the tempo of the violence and does nothing to address the underlying causes, creating more enemies than it can eliminate. Only by working towards long-term, holistic, and political solutions will peace come to these troubled peripheries in the Muslim world.

#### Alt causes to Pakistan instability outweigh terrorism- political crisis, refugees, ethnic conflict

**Price 7-24**-13 [Dr. Gareth Price is a Senior Research Fellow, Asia Programme at Chatham House, “State Weakness and Internal Instability in Pakistan,” <http://www.isn.ethz.ch/Digital-Library/Articles/Detail/?lng=en&id=165903>]

ISN: Pakistan is widely regarded as a fragile state, teetering on the brink of outright failure. Is this an accurate portrayal of the country?¶ Gareth Price: Pakistan is often described as a fragile, or even a failed state. But while it has many systemic and structural problems – in the areas of security and governance, for instance – this narrative is an oversimplification. In many ways, Pakistani people and the Pakistani state are resilient. Historically, the weakness of civilian governments has been used to justify military rule, with the military frequently being seen as Pakistan’s most resilient institution. But the previous government – while weak – completed a full term. Civilian institutions will only be strengthened gradually over time. And while the long-standing perception in Pakistan that India, rather than internal militancy, is the country’s existential threat lends further support for military rule, that perception too seems to be gradually changing.¶ Nevertheless, it is clear that Pakistan faces other threats. The failure to resolve power struggles between the civilian government, the military and the judiciary does little to deepen public support for any of the ruling institutions. At the same time, if Nawaz Sharif is to be successful he faces a significant challenge in reviving Pakistan‘s stagnating economy.¶ Many of these predictions are related to Islamabad’s continued struggle to control its restive tribal regions situated on the border with Afghanistan. But is this the only source of state fragility in Pakistan?¶ The ongoing battle with militants in Pakistan’s tribal regions has undoubtedly added to instability in Pakistan. However, what is being felt far more across the country is a broader breakdown of law and order, a rise in criminality, increased ethnic violence (notably in Karachi), and suicide bombings and targeted sectarian killings (particularly in Baluchistan).¶ Military operations in the North West and tribal regions of Pakistan led to an exodus of millions of Pathans from their homes to Karachi, Pakistan’s largest city and economic hub. Many of them have stayed despite calls for them to return to their homes in the north. Karachi is now home to the second largest Pathan population outside of Khyber Pakhtunkhwa and the Federally Administered Tribal Areas (FATA).¶ Over the years this has upset the ethnic balance in Karachi which was already unable to absorb the millions of people emigrating to the city from rural areas in search of jobs and better livelihoods as well as those who moved as a result of displacement because of natural disasters such as the Kashmir earthquake and the 2010 floods. Over the past six years Karachi‘s population has risen by 1 million inhabitants every year. This has led the Pathan population into direct conflict with the city‘s existing inhabitants, principally the Muhajirs (immigrants from India at Independence) and the local Sindhi population. Each group supports different political parties which have run various types of protection rackets in the city.¶ Quetta, a city that has been home to Afghan refugees since the 1970s, has also turned into a battleground of sectarian violence with regular attacks against the Shia Hazara community. Religious minorities, including the Christian, Hindu and Bohra communities, have also come under attack while many advocates for a secular, tolerant Pakistan, such as Punjab’s former governor, Salman Taseer, have been killed. In addition, the power struggle between the civilian government and the military continues to be an underlying cause of instability in Pakistan. The military has controlled much of Pakistan’s foreign policy, particularly concerning India, Afghanistan and the United States. If Sharif chooses to push for greater involvement in these policies, this could lead to tension with the military.

#### No impact to Pakistan instability- their ev is hype

**Hundley ’12** (Before joining the Pulitzer Center, Tom Hundley was a newspaper journalist for 36 years, including nearly two decades as a foreign correspondent for the Chicago Tribune. During that time he served as the Tribune’s bureau chief in Jerusalem, Warsaw, Rome and London, reporting from more than 60 countries. He has covered three wars in the Persian Gulf, the Arab-Israeli conflict and the rise of Iran’s post-revolutionary theocracy. His work has won numerous journalism awards. He has taught at the American University in Dubai and at Dominican University in River Forest, Illinois. He has also been a Middle East correspondent for GlobalPost and a contributing writer for the Chicago News Cooperative. Tom graduated from Georgetown University and holds a master’s degree in international relations from the University of Pennsylvania. He was also National Endowment for the Humanities journalism fellow at the University of Michigan. Published September 5, 2012

With both sides armed to the teeth, **it is easy to exaggerate the fears** and much harder to pinpoint where the real dangers lie. For the United States, the nightmare scenario is that some of Pakistan's warheads or its fissile material falls into the hands of the Taliban or al Qaeda -- or, worse, that the whole country falls into the hands of the Taliban. For example, Rolf Mowatt-Larssen, a former CIA officer now at Harvard University's Belfer Center for Science and International Affairs, has warned of the "lethal proximity between terrorists, extremists, and nuclear weapons insiders" in Pakistan. This is a reality, but on the whole, Pakistan's nuclear arsenal appears to be reasonably secure against internal threats, according to those who know the country best. To **outsiders**, Pakistan **appears** to be permanently teetering on the **brink** of collapse. The fact that large swaths of the country are literally beyond the control of the central government is not reassuring. But a weak state **does not mean** a **weak society**, and **powerful internal dynamics based** largely on kinship and tribe **make it highly unlikely** that Pakistan would **ever fall** under the control of an outfit like the Taliban. During the country's intermittent bouts of democracy, its civilian leaders have been consistently incompetent and corrupt, but **even in the worst of times,** the military has maintained a high standard of professionalism. And there is **nothing** that **matters more** to the Pakistani military than keeping the nuclear arsenal -- **its crown jewels** -- out of the hands of India, the United States, and homegrown extremists. "Pakistan struggled to acquire these weapons against the wishes of the world. Our nuclear capability comes as a result of great sacrifice. It is our most precious and powerful weapon -- for our defense, our security, and our political prestige," Talat Masood, a retired Pakistani lieutenant general, told me. "We keep them safe." Pakistan's nuclear security is in the responsibility of the Strategic Plans Division**,** which appears to function pretty much as **a separate branch** of the military. It has its **own training facility and an elaborate set of controls** and screening proceduresto keep track of **all warheads and fissile material** and to monitor **any blips** in the behavior patterns of its personnel. The 15 or so sites where weapons are stored **are the mostly heavily guarded** in the country. **Even if** some group managed to steal or commandeer a weapon, **it is highly unlikely the group would be able to use it**. The greater danger is the theft of fissile material, which could be used to make a crude bomb. "With 70 to 80 kilos of highly enriched uranium, it would be fairly easy to make one in the basement of a building in the city of your choice," said Pervez Hoodbhoy, a distinguished nuclear physicist at Islamabad's Quaid-i-Azam University. At the moment, Pakistan has a stockpile of about 2.75 tons -- or some 30 bombs' worth -- of highly enriched uranium. It does not tell Americans where it is stored. "All nuclear countries are conscious of the risks, nuclear weapons states especially so," said Gen. Ehsan ul-Haq, who speaks with the been-there-done-that authority of a man who has served as both chairman of Pakistan's Joint Chiefs of Staff Committee and head of the ISI, its controversial spy agency. "Of course there are concerns. Some are genuine, butmuch of what you read in the U.S. media is **irrational and reflective of paranoia**. Rising radicalism in Pakistan? Yes, this is true, and the military is very conscious of this." Perhaps **the most credible endorsement** of Pakistan's nuclear security regime comes from its **most steadfast enemy.** The **consensus among India's top generals and defense experts** is that Pakistan's nukes are pretty secure. "No one can be 100 percent secure, but I think they are **more than 99 percent secure**," said Shashindra Tyagi, a former chief of staff of the Indian Air Force. "They keep a very close watch on personnel. All of the steps that could be taken have been taken. This business of the Taliban taking over -- it can't be ruled out, but I think **it's unlikely**. **The** Pakistani **military understands the threats** they face better than anyone, **and** they **are smart enough to take care it."** Yogesh Joshi, an analyst at the Institute for Defense Studies and Analyses in New Delhi, agrees: "Different states have different perceptions of risk. The U.S. has contingency plans [to secure Pakistan's nukes] because its nightmare scenario is that Pakistan's weapons fall into terrorist hands. The view from India over the years is that **Pakistan,** probably **more than any other nuclear** weapons **state, has taken measures to secure its weapons.** At the political level here, there's a lot of confidence that Pakistan's nuclear weapons are secure."

## 2NC

### --OLC

### Overview

### Solvency

#### OLC advice can force constraints on the Executive

BRADLEY\* AND MORRISON\*\* 2013 - \*William Van Alstyne Professor of Law, Duke Law School AND \*\* Liviu Librescu Professor of Law, Columbia Law School (Curtis A. Bradley AND Trevor W. Morrison, "Presidential Power, Historical Practice, And Legal Constraint”, January 15, 2013, http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2191700)

Perhaps the most obvious way that law can have a constraining effect is if the relevant actors have internalized the legal norms, whether those norms are embodied in authoritative text, judicial decisions, or practice. When speaking of such internalization as it relates to the presidency, it is important to note that presidents act through a wide array of agencies and departments, and that presidential decisions are informed—and often made, for all practical purposes—by officials other than the President. In most instances involving presidential power, therefore, the relevant question is whether there has been an internalization of legal norms by the Executive Branch.

The Executive Branch contains thousands of lawyers. 117 The President and other executive officials are regularly advised by these lawyers, and sometimes they themselves are lawyers. Although lawyers serve in a wide variety of roles throughout the Executive Branch, their experience of attending law school means that they have all had a common socialization—a socialization that typically entails taking law seriously on its own terms. 118 Moreover, the law schools attended by virtually all U.S. government lawyers are American law schools, which means that the lawyers are socialized in an ethos associated with being part of the American polity and that takes for granted the American style of law and government. 119 These lawyers are also part of a professional community with at least a loosely shared set of norms of argumentative plausibility. Finally, as government lawyers they inherit a set of institutional practices from their predecessors, including a general tendency to privilege established ways of doing things. 120

Certain legal offices within the Executive Branch have developed their own distinctive law-internalizing practices. This is particularly true in places like OLC, which, as noted above, provides legal advice based on its best view of the law. OLC has developed a range of practices and traditions—including a strong norm of adhering to its own precedents even across administrations—that help give it some distance and relative independence from the immediate political and policy preferences of its clients across the Executive Branch, and that make it easier for OLC to act on its own internalization of legal norms. 121 Of course, OLC’s practices are not the only way for a government legal office to internalize the law. For example, an office committed not to seeking the best view of the law but to providing professionally responsible legal defenses of certain already determined policy positions could still operate under legal constraints if it took the limits of professional responsibility seriously. As noted above, although it can be difficult to identify with consistent precision the outer boundaries of legal plausibility, a commitment to remain within those boundaries is a commitment to a type of legal constraint.

If Executive Branch legal offices operate on the basis of certain internalized norms that treat law as a constraint, the next question is whether those offices have any effect on the actual conduct of the Executive Branch. In the case of OLC, there are two key points. First, although OLC possesses virtually no “mandatory” jurisdiction, there is a general expectation that, outside the litigation context, legal questions of special complexity, controversy, or importance will be put to OLC to address. 122 Second, established traditions treat OLC’s legal conclusions as *presumptively* binding within the Executive Branch, unless overruled by the Attorney General or the President (which happens extremely rarely). 123 Combined, these practices make OLC the most significant source of centralized legal advice within the Executive Branch.

Still, OLC addresses only a very small fraction of all the legal questions that arise within the Executive Branch, and a complete picture of the extent to which executive officials internalize legal norms (or are affected by others who internalize such norms) must extend well beyond that office. 124 Looking across the Executive Branch more broadly, there may be a practical imperative driving at least some measure of legal norm internalization. The Executive Branch is a vast bureaucracy, or series of bureaucracies. Executive officials responsible for discharging the government’s various policy mandates cannot act effectively without a basic understanding of who is responsible for what, and how government power is to be exercised—all topics regulated by law, including practice-based law. 125 Some of the understandings produced by those allocations are probably so internalized that the relevant actors cannot even imagine (at least in any serious way) a different regime.

Even on the more high profile policy questions that receive the attention of the White House itself, the internalization of law may have a constraining effect. There are lawyers in the White House, of course, including the Office of Counsel to the President (otherwise known as the White House Counsel’s Office). Some commentators—most notably Bruce Ackerman, as part of his general claim that the Executive Branch tends towards illegality— have characterized that office as populated by “superloyalists” who face “an overwhelming incentive to tell [the President] that the law allows [him] to do whatever [he] want[s] to do.” 126 If that were an accurate portrayal, it would suggest that there is little to no internalization of the law in the White House Counsel’s Office. But there are serious descriptive deficiencies in that account. 127 Still, politics does surely suffuse much of the work of the White House Counsel’s Office in a way that is not true of all of the Executive Branch. The more fundamental point, however, is that it is in the nature of modern government that the President’s power to act often depends at least in part on the input and actions of offices and departments outside the White House. That commonly includes the input of legal offices from elsewhere across the Executive Branch. 128 To the extent that those offices internalize the relevant legal norms, the President may be constrained by law without regard to whether he or his most senior White House advisers think about the law.

Internalization of legal norms may at least partially explain the now-famous standoff during the George W. Bush Administration between high-ranking lawyers in the Justice Department and various White House officials over the legality of a then-secret warrantless surveillance program. The program was deeply important to the White House, but the Attorney General, Deputy Attorney General, and head of OLC all refused to certify the legality of the program unless certain changes were made. When the White House threatened to proceed with the program without certification from the Justice Department, the leaders of the Department (along with the Director of the FBI and others) all prepared to resign. Ultimately, the White House backed down and acceded to the changes. 129 Some substantial part of the explanation for why the Justice Department officials acted as they did seems to lie in their internalization of a set of institutional norms that not only take law seriously as a constraint, but that insist on a degree of independence in determining what the law requires. 130 Buckling under pressure from the White House was evidently inconsistent with the Justice Department officials’ understanding of their professional roles.

#### The CP ensures political constraint

BRADLEY\* AND MORRISON\*\* 2013 - \*William Van Alstyne Professor of Law, Duke Law School AND \*\* Liviu Librescu Professor of Law, Columbia Law School (Curtis A. Bradley AND Trevor W. Morrison, "Presidential Power, Historical Practice, And Legal Constraint”, January 15, 2013, http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2191700)

In addition to an Executive Branch lawyer’s or other official’s own internalization of legal norms, law could constrain the President if there are “external” sanctions for violating it. The core idea here is a familiar one, often associated, as noted in Section II.B, with Holmes’s “bad man”: 131

One who obeys the law only because he concludes that the cost of noncompliance exceeds the benefits is still subject to legal constraint, to the extent that the cost of noncompliance is affected by the legal status of the norm. This is true even though the law is likely to impose less of a constraint on such “bad men” than on those who have internalized legal norms, and even though it is likely to be difficult in practice to disentangle internal and external constraints.

Importantly, external sanctions for noncompliance need not be formal. If the existence or intensity of an informal sanction is affected by the legal status of the norm in question, compliance with the norm in order to avoid the sanction should be understood as an instance of law having a constraining effect. In the context of presidential compliance with the law, we can plausibly posit a number of such informal sanctions. One operates on the level of professional reputation, and may be especially salient for lawyers in the Executive Branch. If a lawyer’s own internalization of the relevant set of legal norms is insufficient to prevent him from defending as lawful actions that he knows are obviously beyond the pale, he might respond differently if he believed his legal analysis would or could be disclosed to the broader legal community in a way that would threaten his reputation and professional prospects after he leaves government. 132 (This concern might help further explain the OLC and other Justice Department officials’ resistance to the White House in the warrantless surveillance example discussed above.)

A related sanction could operate on government leaders, including the President. If being perceived to act lawlessly is politically costly, a President’s political rivals have an incentive to invoke the law to oppose his actions with which they disagree. Put another way, legal argumentation might have a salience with the media, the public at large, and influential elites that could provide presidential opponents in Congress and elsewhere with an incentive to criticize executive actions in legal terms. If the threat of such a sanction is credible, law will impose a constraint whether or not the President himself has internalized the law as a normative matter. This might help explain, for example, why modern presidents do not seem to seriously contemplate disregarding Supreme Court decisions. And if presidents are constrained to follow the practice-based norm of judicial supremacy, they may be constrained to follow other normative practices that do not involve the courts.

Work by political scientists concerning the use of military force is at least suggestive of how a connection between public sanctions and law compliance might work. As this work shows, the opposition party in Congress, especially during times of divided government, will have both an incentive and the means to use the media to criticize unsuccessful presidential uses of force. The additional political costs that the opposition party is able to impose in this way will in turn make it less likely that presidents will engage in large-scale military operations. 133 It is at least conceivable, as the legal theorist Fred Schauer has suggested, that the political cost of pursuing an ultimately unsuccessful policy initiative (such as engaging in a war) goes up with the perceived illegality of the initiative. 134 If that is correct, then actors will require more assurance of policy success before potentially violating the law. We think that should count as a legal constraint on policymaking even if the relevant actors themselves do not see any normative significance in the legal rule in question.

#### The CP makes accommodation more likely

BORRELLI et al 2000 - Professor of Government Chair of the Government and International Relations Department, Connecticut College (Maryanne Borrelli, Karen Hult, Nancy Kassop, “The White House Counsel’s Office”, http://whitehousetransitionproject.org/files/counsel/Counsel-OD.PDF)

Despite the primacy of high-stakes politics in these stand-offs between the branches, some degree of political accommodation, rather than a purely “legal” answer, is more often the outcome of such conflicts. Although presidents are fiercely protective of their prerogatives, they may also recognize the practical need to find some compromise to break the political logjam. White House Counsels often find themselves caught in the cross-hairs, where their best legal judgment about the appropriate presidential response is often overridden by more forceful political considerations from influential political advisors. Once we began to understand it, we decided to negotiate when the problem came up. As a result, I don’t think we ever had a showdown on [executive privilege]. For instance, if a committee wanted certain documents and certain information we would try to figure out everything we could properly give to them and sit down with them – either I would, [Assistant to the President for Congressional Relations] Frank Moore would or someone else would – and try to negotiate on disclosing everything we possible could. I don’t think we had any confrontations of any serious consequence on the whole executive privilege issue as a result of that. (Lipshutz interview, p. 27) I think this President operated on the premise pretty much and I certainly did that whatever the legal consequences or legal parameters were of executive privilege, if Congress really wanted something, politically it almost was impossible to deny it. The more you stood on privilege, the more you pointed to precedents, the more you showed these are the things that the President didn’t turn over, the more they could make political hay out of it. As I say, we operated on the premise that you could resist and you could maybe negotiate but that, by and large, if Congress really wanted anything you have to give [it] to them, therefore, better act forthcoming. I think the worst rap they put on this administration was that they have stonewalled on anything with the exception of Monica – obviously it was stonewalled. (Mikva interview, p. 5) A more detailed discussion of executive privilege, specifically referencing recent decisions in this area, can be found in the Relationships and in the Lessons Learned sections. Advising on War Powers In relative terms, the Counsel’s role in regard to war powers has seemed less controversial. As chair of the War Powers Committee, the Counsel is responsible for notifications to Congress. In keeping with presidential views of the War Powers Resolution as unconstitutional, though, Counsels have provided Congress with a minimum of information “in the interest of comity.” In the words of A.B. Culvahouse, “There is a real kabuki dance that was done. You sent a notice up to the Hill while protesting all the time that you’re not providing notice.” (Culvahouse interview, p. 5) Like a kabuki dance, the war powers dialogue is often quite ceremonial, lacks a clear beginning or ending, and reveals much about the competition for political power. Typically, precedent is followed very closely, with past letters serving as models for correspondence. War Powers is less of a problem because you can always rely on OLC to give you the tick-tock on that. That’s a shared responsibility; I never worried much about war powers... (Gray interview, p. 6)

### A2 Say No

#### Requesting OLC advice is a strategic maneuver to say yes

BORRELLI et al 2000 - Professor of Government Chair of the Government and International Relations Department, Connecticut College (Maryanne Borrelli, Karen Hult, Nancy Kassop, “The White House Counsel’s Office”, http://whitehousetransitionproject.org/files/counsel/Counsel-OD.PDF)

The resources of the OLC -- including its institutional memory -- render this office an invaluable source of legal expertise for the White House Counsel. Quite simply, the Counsel’s Office cannot provide all the information and the advising that an administration needs.

OLC is the single most important legal office in the government. More important really in terms of scholarship and memory and research – White House Counsel’s Office doesn’t really have the staff to do all [that] and they shouldn’t. It should be done in OLC.... [T]he White House doesn’t go to court without the department.... OLC was a huge problem for us in the sense that they were putting on a brake. We were free to ignore their advice but you knew so you did so at your peril because if you got into trouble you wouldn’t have them there backing you up, you wouldn’t have the institution backing you up. So you did it at your risk; you did it at your risk.... You’re best able to avoid the land mines if ... you restore the rightful place of the Office of Legal Counsel. When in doubt, ask them and they’ll tell you where the land mines are. (Gray interview, pp. 18-19, 21)

Several other Counsels echoed Gray’s description of the OLC as a formidable ally and a significant check on the White House. However, precisely because of the similarities in their responsibilities, the relationship between the White House Counsel and the OLC can be highly competitive. Both are recognized as legal experts immersed in politics and policy. Exacerbating matters, the jurisdictions of their offices, having evolved through practice, are blurred and lack strict bureaucratic rationality.

Yet, to an even larger extent, this competitive relationship reflects differences between the organizations. The White House Counsel is appointed by the president and does not require Senate confirmation. The members of the Justice Department include presidential appointees who are free of Senate confirmation, presidential nominees who are subject to Senate confirmation, and careerists. As such, Department officials have numerous and crosscutting loyalties. Further, while the president’s claim to executive privilege in regard to communications with the White House Counsel has been delimited in recent years, any possibility of the president successfully making such a claim in regard to the OLC may have been sacrificed in the Reagan administration.

... it had to do with a request by the Senate Judiciary Committee for all of William Rehnquist’s files when he was head of the Office of Legal Counsel at the Justice Department.... I thought that was simply harassment and I thought they were trying to create the kind of issue they could use to stop the nomination. I and the person who was then head of the Office of Legal Counsel in the Justice Department both felt this was a good executive privilege claim because the Office of Legal Counsel is the lawyer for the entire government, and in effect for the President, and everyone discloses everything to them to get rulings about legal issues. The whole underpinning of the attorney/client privilege, which is part of the executive privilege, is to get people to disclose all relevant information so you can give them the right advice. I thought, if there was ever a case, this was it. So I sent a memo to the President saying I thought he ought to claim executive privilege in this case, but Meese did not like at all that idea. We debated it in front of the President and the President decided he wouldn’t claim it.... [I]t turned out not to be as serious a problem as I thought, except that it creates a precedent. In the future, if someone wants the files of the Office of Legal Counsel, they are more likely to get them because this precedent exists. The result of that is that some people aren’t going to go to the Office of Legal Counsel for advice if they have to disclose things that they don’t want turned over to a Senate committee. (Wallison interview, p. 20)

Requesting a legal interpretation from the OLC, therefore, is clearly a strategic undertaking. If the Counsel does not involve the OLC -- or, having received the OLC’s interpretation, proceeds to set it aside -- the White House is isolated and will lack support for its actions. Politically, this is risky and even dangerous. C. Boyden Gray, for example, unequivocally concluded that the White House should never go to court without Justice’s support. At the same time, the OLC is staffed by experts who cannot claim executive privilege and, in any event, have allegiances that extend beyond the White House.

### A2 Perm

#### Distinction between exercise and restrict --- the CP is an exercise means we maintain flex

MCFADDEN 2008 (Daniel McFadden, Boston College Law Review, 49 B.C. L. Rev 1131, Retrieved 6/1/2013 from Lexis/Nexis)

("Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers." (citing Steel Seizure, 343 U.S. at 637 ( Jackson, J., concurring))); Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842-43 (1984) (stating that, in an administrative law context, "the [C]ourt, as well as the agency, must give effect to the unambiguously expressed intent of Congress"); Little v. Barreme, 6 U.S. (2 Cranch) 170, 177-78 (1804) (declaring unlawful a military order authorizing captures on the high seas because the order exceeded authority granted by Congress). But see David J. Barron & Martin S. Lederman, The Commander in Chief at the Lowest Ebb--Framing the Problem, Doctrine, and Original Understanding, 121 HARV. L. REV. 689, 766 (2008) (concluding that, although the Court has accepted the proposition that Congress may restrict executive military activity, the Court has not ruled out the possibility that the executive retains some inherent and inviolable military authority).

#### Only the CP solves the net benefit – OLC deflects loss/blame on the President – key to maintain his credibility

POSNER 2011 - Kirkland & Ellis Professor, University of Chicago Law School (Eric A. Posner, “Deference To The Executive In The United States After September 11: Congress, The Courts, And The Office Of Legal Counsel”, http://www.harvard-jlpp.com/wp-content/uploads/2012/01/PosnerFinal.pdf)

However, there is an important twist that complicates the analysis. The president may choose to publicize OLC’s opinions. Naturally, the president will be tempted to publicize only favorable opinions. When Congress 22 claims that a policy is illegal, the president can respond that his lawyers advised him that the policy is legal. This response at least partially deflects blame from the president. There are two reasons for this. First, the Senate consented to the appointment of these lawyers; thus, if the lawyers gave bad advice, the Senate is partly to blame, and so the blame must be shared. Second, OLC lawyers likely care about their future prospects in the legal profession, which will turn in part on their ability to avoid scandals and to render plausible legal advice; they may also seek to maintain the office’s reputation. When OLC’s opinions are not merely private advice, but are used to justify actions, then OLC takes on a quasi-judicial function. Presidents are not obliged to publicize OL C’s opinions, but clearly they see an advantage to doing so, and they have in this way given OLC quasi-judicial status.

### --Flex

### UQ

#### We have a unique internal link – strong deference right now key to credible resolve

WAXMAN 11/7/2013 - law professor at Columbia Law School, co-chairs the Roger Hertog Program on Law and National Security (Matthew Waxman, “Syria, Threats of Force, and Constitutional War Powers”, http://yalelawjournal.org/the-yale-law-journal-pocket-part/executive-power/syria,-threats-of-force,-and-constitutional-war-powers/)

In August 2013, the Syrian government of Bashar al-Assad launched a major sarin gas attack against opponents and civilians inside Syria, flagrantly crossing the “red line”—widely interpreted as an implicit threat to intervene militarily in response to chemical weapons use—that President Obama had previously declared and reiterated in public remarks.1 Amid widespread suggestions that American credibility was now on the line, President Obama responded on August 31 with two simultaneous announcements: first, he had decided that the United States should respond militarily with limited strikes against Syrian government targets; and, second, notwithstanding his insistence that he had constitutional authority as Commander-in-Chief to take that action unilaterally, he would seek congressional approval to do so.2 The Obama Administration then began an intensive lobbying campaign to convince skeptical legislators and the public that following through on the proposed military strike was necessary not only to deter further chemical weapons attacks by Syrian government forces, but to deter the acquisition and use of weapons of mass destruction by other hostile regimes and terrorist organizations.3 Almost two hundred years earlier, another President drew a red line. In his 1823 address to Congress, President Monroe declared to European powers that the United States would oppose any efforts to colonize or reassert control in the Western Hemisphere.4 Monroe’s cabinet had been divided over the wisdom of this implied threat—which the United States at the time lacked capability to enforce without relying on British naval supremacy—but they unanimously understood that military action against any European power that crossed the line would constitutionally require congressional authorization.5 Monroe’s successor, John Quincy Adams, later faced complaints from opposition members of Congress that Monroe’s proclamation had exceeded his constitutional authority and had usurped Congress’s by committing the United States—even in a non-binding way—to resisting European meddling in the hemisphere.6 A lot changed during those two hundred intervening years. As a strategic matter, the United States grew after World War II into a military superpower with global interests and global security commitments. As a legal matter, the President effectively asserted vast powers to use military force since then, too, and neither Congress nor the courts have generally stood in his way. Every student of American constitutional war powers learns that the Framers split them between the political branches: the President is the chief executive and Commander-in-Chief, but Congress has the power to raise and support a military and to declare war. Most scholars interpret the original intent of this division as giving Congress responsibility for deciding if and when the United States should use military force (except for some narrow exceptions like repelling an invasion) and giving the President responsibility for managing the military operations authorized by Congress. At least as interpreted by the executive branch and as exercised in practice, the President now wields vast unilateral discretion to use military force to protect U.S. interests.7 This basic story of American constitutional war powers—divided authority evolving with the vast expansion of U.S. military power into unilateral presidential authority—gives rise to several major debates among scholars and commentators about the functional merits of different constitutional allocations of power.8 One major dispute concerns what allocation of power best helps to avoid unnecessary and costly wars. “Congressionalists”—or those who favor tight legislative checks on the President’s authority to use force—still rely heavily on logic, invoked by James Madison at the time of the Founding, that the more flexibly the President can use military force, the more likely it is that the United States will find itself in wars; better, therefore, to clog decisions to make war with legislative checks.9 Their calls for reform usually involve narrowing and better enforcement (by all three branches of government) of purported constitutional requirements for congressional authorization of presidential uses of force, or revising and enforcing the War Powers Resolution or other framework legislation requiring express congressional authorization for military actions.10 Modern “presidentialist” legal scholars—or those who favor vast unilateral executive authority to use force—usually respond that rapid action is a virtue, not a vice, in exercising military force.11 Especially as a superpower maintaining global interests and facing global threats, presidential discretion to take rapid military action—wielded by a branch endowed with what Alexander Hamilton called “[d]ecision, activity, secrecy, and dispatch”12—best protects American interests. Meanwhile, almost no attention has been devoted to an issue highlighted by the Syria case: How does constitutional allocation of power affect the United States’s ability to deter conduct inimical to American interests or to resolve foreign crises by threatening force—that is, by communicating through words and deeds the possible future use of armed violence to affect the behavior of other actors, usually other states?13 This lack of attention to threats of force and constitutional powers is ironic because, since World War II, such threats have formed the backbone of U.S. grand strategy. The United States has relied heavily on the manipulation of risk to deter aggression or other actions by adversaries, to coerce or compel certain actions by other states or international actors, to reassure allies, and to pursue other political designs under the shadow of armed threats.14 When wars or large-scale force actually have been used, it has been because a prior policy or strategy failed—for instance, because deterrent threats were insufficiently credible, or crises involving U.S. threats of force escalated in ways that were difficult to control. In this regard, most of the time that U.S. military power is “used”—and often when it is most successful—it does not manifest as a war or major military engagement at all. If we are worried ultimately about avoiding wars through constitutional design, we should be thinking about threats of war and the Constitution. In a forthcoming article, titled The Power to Threaten War,15 I consider in detail the relationship between constitutional powers and strategies of threatened force. This Essay highlights several critical aspects of that relationship, especially as illustrated in the Syria case. In particular, it shows that the President’s power to carry out threats is only half the story; the other half is how distributions of constitutional power between the political branches help or impede the President’s ability to issue effective threats. When President Obama remarked in announcing his Syria decisions that although he had the legal authority to take action without congressional authorization, “our actions will be even more effective” by obtaining it,16 he was probably correct in two narrow senses: yes, presidents have relied on similar authority in the past,17 and yes, if Congress affirmatively backed his actions at this stage, this military action would likely be more potent. But would commitment—political commitment or even legal commitment—to stronger congressional control over future U.S. decisions to intervene generally enhance the credibility and effectiveness of American threats of force? It is such future effects of any U.S. action, as the President himself acknowledged, that are critical to American strategic interests, and they are also critical to understanding the practical consequences of how constitutional war powers are allocated. I. Constitutional Powers and Threats of Force These days it is usually taken for granted that—whether or not he can make war unilaterally—the President is constitutionally empowered to threaten the use of force, implicitly or explicitly, through diplomatic means or shows of force. It is never seriously contested whether the President has full, independent authority to, for example, proclaim that the United States is contemplating military intervention in response to a crisis, or whether the President may move substantial U.S. military forces to a crisis region or engage in military exercises there. From a constitutional standpoint, the President’s power to threaten force is at least as broad as his power to use it. One way to think about it is that the power to threaten force is a lesser-included element of presidential war powers; the power to threaten to use force is simply a secondary question, the answer to which is bounded by the President’s vast, primary authority to use force in protecting U.S. national interests. Depending on how a particular threat is communicated, it is likely to fall within even quite narrow interpretations of the President’s inherent foreign relations powers to conduct diplomacy or his express Commander-in-Chief power to control U.S. military forces—or some combination of the two. A President’s verbal warning, ultimatum, or declared intention to use military force, for instance, could be justified as merely exercising his role as the “sole organ” of U.S. foreign diplomacy (at least so long as he does not formally declare war), conveying externally information about U.S. capabilities and intentions.18 A president’s movement of U.S. troops or warships to a crisis region or elevation of their alert level could be justified as merely exercising his day-to-day operational control over forces under his command.19 This virtually unchecked executive authority to threaten force or war has affected U.S. security and foreign policy in ways often neglected by legal scholars, who tend to focus predominantly on actual wars and other hostile engagements of U.S. forces abroad. The Korean and Vietnam Wars are generally considered the most salient events of the Cold War for understanding constitutional allocations of war powers, yet during that time frame presidents also unilaterally wielded threats of nuclear war to deter Soviet aggression, to bargain, and to reassure allies, and they unilaterally (or sometimes with congressional backing) resorted to small-scale shows of force on dozens of occasions in pursuit of U.S. strategic interests. In the 1990s, U.S. presidents wielded threats of force against dictators or militia leaders in places such as Iraq, Haiti, and Bosnia—with varying effectiveness and prior to actual U.S. military operations that attracted the attention of legal scholars. While legal scholars have recently been focused on whether U.S. actions in Iraq and against al Qaida affiliates reflect an imperial executive, presidents have been wielding without direct legal constraint the threat of U.S. military force in East Asia—for example, to deter North Korean aggression and signal to China and restive U.S. allies American intentions to maintain regional security balances—in a manner that is sometimes consistent with defense treaties and sometimes outside them.20 The power to threaten force is significant not only for its influence in provoking or defusing crises, and perhaps causing or preventing major wars, but also because threats put American credibility and reputation for resolve on the line, and thereby alter the interests and stakes involved in carrying them out. Constitutional scholars often make much of the fact that Congress ultimately authorized the 1991 Persian Gulf war and declined to authorize the 1999 Kosovo intervention—two of the most significant U.S. military adventures following the end of the Cold War. It is important, however, to understand those congressional decisions as a very late, not early, stage of a decision tree. The President’s ability to threaten force was critically important at earlier stages in determining whether that final stage would even occur at all, and what policy payoffs would be associated with different choices.21 Once President George H.W. Bush placed hundreds of thousands of U.S. troops in the Persian Gulf region and issued an ultimatum to Saddam Hussein in 1990, the credibility of U.S. threats and assurances to regional partners were put on the line.22 In threatening force against Serbian President Slobodan Milošević over the 1999 Kosovo crisis, President Clinton and allied leaders altered the strategic stakes by putting perceptions (among both allies and adversaries) of collective NATO resolve on the line.23 In the Syria case, a major argument by executive branch officials lobbying Congress to back military action was that failure to act would have deleterious effects on U.S. capacity to deter hostile actions by Iran, North Korea, and other possible adversaries.24 They also argued that failure to act, now that the President had stated his intention to do so, would undermine U.S. allies’ confidence in American commitments to their defense.25 Many of the strongest congressional supporters of military action made similar arguments to sway their colleagues.26 Especially when taken together, these factors—the president’s vast legal authority to make threats, the importance of threats to American security strategy after World War II, and the difficulty of climbing down from threats once they are made—might mean that the shift in powers of war and peace since World War II from Congress to the President has been even more dramatic than usually supposed, at least in terms of how formal congressional checks are exercised. Political scientists have often observed, however, that Congress wields considerable political clout over the President’s decision whether to threaten force—and in ways that differ from Congress’s ability to affect ultimate decisions to use force or ongoing military operations. Whereas most lawyers usually begin their analysis of the President’s and Congress’s war powers by focusing on their formal legal authorities, political scientists usually take for granted these days that the President is—in practice—the dominant branch with respect to military crises and that Congress wields its formal legislative powers in this area rarely or in only very limited ways. Yet a major school of thought holds that Congress nevertheless wields significant influence over decisions about force, and that this influence extends to threatened force, so that Presidents generally refrain from threats that would provoke strong congressional opposition. Even without any serious prospect for legislatively blocking the President’s threatened actions, Congress under certain conditions can loom large enough to force Presidents to adjust their policies; when it cannot, congressional members can oblige the President to expend lots of political capital.27 Political opponents in legislative bodies have a ready forum for registering dissent to presidential policies of force through such mechanisms as floor statements, committee oversight hearings, resolution votes, and funding decisions.28 These official actions prevent the President from monopolizing political discourse on decisions regarding military actions and thereby make it difficult for the President to depart too far from congressional preferences with regard to wielding threats of force.29 Political opponents within a legislature also have few electoral incentives to collude in an executive’s bluff, and they are capable of expressing opposition to a threatened use of force in ways that could expose the bluff to a threatened adversary.30 Even without exercising formal legislative powers, members of Congress can shape public debate in ways that affect perceptions of U.S. resolve abroad. As William Howell and Jon Pevehouse explain, “Congress matters, and matters greatly,” not just to the decision to strike militarily but “to a nation’s ability to credibly convey resolve to enemies and allies alike.”31 The strength of these congressional political constraints on presidential threats of force is not well understood, and the Syria case demonstrates their limits. It is impossible even to know with certainty Congress’s position on whether to threaten Syria with military force over chemical weapons at the time President Obama drew a red line—as a general matter, the sprawling institutional structure of Congress and rarity of definitive collective pronouncements make that impossible.32 President Obama’s difficulty in securing congressional authorization to strike after the August 2013 Syrian gas attacks suggests that the President may have underestimated congressional wariness.33 An important question for understanding the practical consequences of war power allocations, then, is whether greater legal constraints on presidential decisions to use force—such as a much stricter requirement for legislative authorization or stronger enforcement of the War Powers Resolution—would indirectly limit even further the President’s actual flexibility in making and wielding threats. Perhaps the marginal and indirect effect of stronger congressional control of force would be substantial. However, the political system already achieves some degree of interbranch checking. II. Constitutional Checks and Credible Threats Whereas legal scholars are usually consumed with the internal effects of war powers law on actors within the U.S. government, the Syria case highlights a question about their possible external effects: how, if at all, does the legal allocation of power between the President and Congress affect the credibility of U.S. threats among adversaries, allies, and other international actors? In prescriptive terms, if the President’s power to use force is linked to his ability to threaten it effectively, then any consideration of the impact of war powers reform on policy outcomes and long-term interests should include the important secondary effects on deterrent and coercive strategies—and on how U.S. legal doctrine is observed and understood abroad.34 Would stronger requirements for congressional authorization to use force reduce a president’s opportunities for bluffing, and, if so, would this improve U.S. coercive diplomacy by making ensuing threats more credible? Or would it undermine diplomacy, including deterrence of adversaries and reassurance of allies, by taking some threats off the table as viable policy options? Would stronger formal legislative powers with respect to force have significant marginal effects on the ability to signal abroad dissent within Congress, beyond that already resulting from open American political discourse? Intuitively, greater congressional veto power over the use of force would seem generally to undermine the credibility of threats. For this reason, it has long been assumed that democracies are at a disadvantage relative to autocracies when it comes to threats of force and saber-rattling bargaining contests under the shadow of possible war. Quincy Wright speculated in 1942 that autocracies “can use war efficiently and threats of war even more efficiently” than democracies,35 especially democracies like the United States, in which vocal public and congressional opposition may undermine threats.36 Additional, formal legal powers over war or force in the hands of Congress would, it might seem, further disable the President from wielding threats effectively, because opponents and other players in the international system might doubt not only his willingness but his ability to carry them out. This was a common policy argument during the War Powers Resolution debates in the early 1970s. Eugene Rostow, an advocate inside and outside the government for executive primacy, remarked during consideration of legislative drafts that serious restrictions on presidential use of force would mean that, in practice, “no President could make a credible threat to use force as an instrument of deterrent diplomacy, even to head off explosive confrontations.”37 This view holds that the merits of Madisonian “clogging” with regard to waging eighteenth century wars are liabilities with regard to deterring twentieth and twenty-first century wars.38 The Syria case would seem to bear out these concerns. By giving Congress a vote, the President appears not only to have tied his own hands in carrying out his threat, but to have tipped off American rivals and partners that congressional support for new military actions (for which the President might also seek congressional authorization) is generally frail. On the other hand, some recent strands of political science have called into question the value of presidential flexibility in wielding threats. Some of this work concludes that the institutionalization of political debate in democracies makes threats to use force rare but especially credible and effective in resolving international crises without resort to actual armed conflict. In other words, recent arguments turn some old claims about the strategic disabilities of democracies on their heads. Whereas it used to be generally thought that democracies were ineffective in wielding threats because they are poor at keeping secrets and their decision-making is constrained by internal political pressures, a current wave of scholarship in political science accepts this basic description but argues that these democratic features are really strategic virtues.39 If that view is correct, a question for constitutional scholars is how, specifically, legal doctrine and allocations of power strengthen or weaken these features. Some political scientists argue that democracies are less likely to bluff because transparency makes it harder to do so.40 To the extent that adversaries and allies understand this, threats will seem more serious than bluster. Informational asymmetries also increase the potential for misperception and thereby make some wars more likely; war, consequentially, can be thought of in these cases as a “bargaining failure,” and greater transparency about American policy preferences may help avoid unnecessary escalation of crises.41 For the reasons discussed in the previous section, legislative politics may already contribute to this credibility-enhancing and conflict-avoiding transparency.42 Perhaps stricter legal requirements for congressional approval of military action would push even more information about American political and policy inclinations to the surface and into the open. For example, turning more media attention to congressional opinion and elevating the significance of congressional hearings or other maneuvers might make it more difficult to conceal or misrepresent American preferences about war and peace with regard to specific crises or threats. Moreover, especially if presidentialists are correct about the importance of flexibility to credibility, in a hypothetical world of very stringent congressional force-authorization requirements, Congress might be inclined to delegate or pre-authorize some discretion back to the President. As mentioned above, political transparency stemming from congressional debate about Syria strikes likely weakened the President’s coercive leverage abroad rather than strengthening it. But, for those interested in whether stronger inter-branch checks are inherently disadvantageous to strategies of threatened force, an important question is whether, ex ante, a legal requirement for congressional approval to launch strikes would have caused the President to be more cautious in drawing a red line to begin with and, if he did so, would have made any threat backing it especially credible in the eyes of intended audiences abroad.

#### Balance struck now

ROSEN 1/8/2014 – McClatchy Washington Bureau (Rosen, James “Fine print of new defense law reveals Obama-Congress power struggle”, http://www.mcclatchydc.com/2014/01/08/213873/fine-print-of-new-defense-law.html#storylink=cpy)

Before President Barack Obama finally signed it into law the day after Christmas, a defense-authorization measure bogged down for months in Congress over disputes about sexual assault prosecutions, terror detainees, Iran sanctions, surveillance of Americans and other hot-button issues. But beyond the headlines, camera glare and Twitter buzz, the legislation reveals a complex struggle between the president and Congress over the direction of American military policy for years to come. Away from the spotlight, White House and congressional aides haggled over a broad range of significant issues, from base closings, nuclear arms development and force realignment in the Pacific to security clearance rules and pay caps for defense contractors. The differences are spread across reams of paper and buried in the small print. The bill in its final form was 1,105 pages. An accompanying legislative report that explained its intricacies and translated its legalese into normal English filled an additional 532 pages. The struggle between the executive and legislative branches cuts across Washington’s usual party lines: Republicans backed Obama on some issues and Democrats pushed to increase congressional oversight on others. In some ways the struggle has historical roots in the Founders’ decision to make the president commander in chief, but to give Congress the power of the purse to wage war. In other ways, the struggle reflects how lawmakers and their constituents have become wary of war and leery of expanding presidential prerogatives after a dozen years of conflict in Afghanistan and Iraq, with unclear outcomes in both countries. “The president would like unfettered authority to manage the military, but Congress sees that as an invitation to abuse,” said Loren Thompson, a defense analyst with the Lexington Institute, a nonprofit public-policy think tank in Arlington, Va. “So (lawmakers) insist on reports, regulations and restraints.” In passing both chambers of Congress by wide margins, the measure gives Obama broad bipartisan support on some of his key defense policies, but it expresses bipartisan opposition to others. “Unlike a lot of other bills, you often find that divisions on the Defense Authorization Act don’t fall neatly into partisan categories,” said Claude Chafin, an aide to Rep. Howard “Buck” McKeon, a California Republican who helped negotiate the measure’s final version as the chairman of the House Armed Services Committee. “Often there are honest disagreements about the best way to move forward on a particular policy or to resolve a particular issue.” There’s a mixed result in the newly enacted law for Obama’s desire to close the U.S. prison at Guantanamo Bay, Cuba. The defense bill continues the congressional prohibition on transferring terrorism suspects from Guantanamo to prisons in the United States, but it gives the president more flexibility to move some of them to other countries.

### Link – Drones

#### Drone reform kills credibility

**Oliphant 13**, James, National Journal deputy magazine editor, “Vetting the Kill List,” May 30th, <http://www.nationaljournal.com/magazine/vetting-the-kill-list-20130404>

To many following President Obama’s targeted-killing program, the idea of some formal oversight over the use of drones, some legal authority checking the administration’s conduct, seems prudent, even desirable. Americans are fundamentally suspicious people. Power unrestrained makes us edgy. It’s why we vote for divided government and gridlock, even though we like to complain about it. It’s why we don’t let police officers search our homes without a warrant. To that mix, add some old-fashioned hysteria, courtesy of senators such as Rand Paul and Ted Cruz—who, in a matter of days last month, seemed to have convinced half the nation that Skynet was real, that malevolent drones were about to start cutting down U.S. citizens in line at Panera Bread—and it’s easy to see why some sort of outside monitor, a “drone court” if you will, might make sense. The administration has inadvertently helped that argument by its stubborn refusal to reveal even the smallest, most benign details of the counterterrorism program. The stonewalling has fueled speculation that the process by which authorities select and kill targets is suspect, that the whole endeavor has an ad hoc quality about it. And even as administration officials have refuted this suspicion—reporters such as Newsweek’s Daniel Klaidman have pulled back the curtain on careful White House deliberations—a gnawing sense of unease lingers. Civil libertarians and even hawks such as former Rep. Jane Harman of California, who served on the House Intelligence Committee, have suggested creating a court modeled on the one that signs off on federal wiretaps of suspected foreign agents. The Foreign Intelligence Surveillance Court in Washington operates in secret and requires the government to make a case before approving a tap. Harman and other proponents say such a body could review names on the “kill list” and weigh in on whether they merit inclusion based on the White House’s criteria for targeting potential threats. Robert Gates, the former Defense secretary, also favors such an approach. But even among supporters, no consensus exists on what questions a drone court would actually review or even whether its scrutiny would come before or after a strike. The most problematic scenario involves any sort of preoperational clearance. Possible windows for action open and shut in a matter of hours. The kill lists are constantly being revised and updated. Even many of those who argue for some sort of oversight mechanism, such as University of Texas law professor Robert Chesney, don’t believe a judge should be involved when it comes to “pulling the trigger.” Still, Chesney says such a court could still vet the names on the list in advance to ensure the administration is following its own guidelines for a strike: the target is connected to al-Qaida; he poses some threat of “imminent” harm; and the government is operating within its legal authority. “Whether and when to fire is a totally separate question,” Chesney says. (He notes that there’s a range of disagreement over how the administration classifies an “imminent” threat and whether a judge would be qualified to make that determination.) But even that small degree of oversight, warns Gregory McNeal, a counterterrorism expert at Pepperdine University, risks throwing sand in the gears by extending the timeline of an op. And to McNeal, this point leads directly to the larger issue of accountability—or, to use the Washington synonym, blame. Judges, he says, simply aren’t ever going to be equipped to identify and navigate the variables involved in a drone strike. Jeh Johnson, formerly the Obama administration’s top lawyer at the Pentagon, expressed his discomfort with court-based oversight in a speech last month at Fordham University. Questions of feasibility and imminence, he said, “are up-to-the-minute, real-time assessments.” More important, Johnson emphasized, “we want military and national security officials to continually assess and reassess these two questions up until the last minute of the operation.” Given that reality, shifting the responsibility of a sign-off to a set of federal judges, who are unelected and serve for life, would allow the White House to escape the consequences of its actions, or more crucially, perhaps its failure to act if a target slips out of harm’s way and then masterminds an attack. Military decisions are, at heart, political ones, McNeal says, and they are rightly made by the branch of government whose top official, the president, faces voters. (A case in point: Republicans suffered at the ballot box in 2006 and 2008 as a result of the public’s displeasure with the Iraq war.) “If you’re a politician,” McNeal says of a drone court, “this is great. Because you aren’t on the hook for anything.” By and large, federal judges don’t want to be in this position. They worry about damaging the integrity of the bench. Retired Judge James Robertson, who served on the U.S. Appeals Court in Washington, argued in The Washington Post that the Constitution forbids the judiciary from issuing advisory opinions. “Federal courts rule on specific disputes between adversary parties,” he wrote. “They do not make or approve policy; that job is reserved to Congress and the executive.” The FISA court is a different animal, because approving surveillance is related to Fourth Amendment protections on search warrants.

#### Only a risk of a link – any external checks on executive power triggers the perception of weakness

POSNER 2011 - Kirkland & Ellis Professor, University of Chicago Law School (Eric A. Posner, “Deference To The Executive In The United States After September 11: Congress, The Courts, And The Office Of Legal Counsel”, http://www.harvard-jlpp.com/wp-content/uploads/2012/01/PosnerFinal.pdf)

Let us consider the stages in reverse order. We already have addressed some of the problems with Professor Holmes’s ar‐ gument from protocols. Rules are seldom as bright‐line as they first appear. They often turn out to be presumptions which are themselves subject to standards (drive under the speed limit unless there is an emergency). It is true that security threats, like medical emergencies, often fall into patterns and can be addressed in partially rule‐governed fashion. Thus, when a gunman takes a hostage, the police follow certain rules: first clearing the area, then making contact with the gunman, and so on. Some officers will be given very simple rule‐governed tasks (“don’t let anyone cross this line”). But the rules quickly give out. Every hostage‐taker is different, and the most highly trained police officers will be given a great deal of discretion to deal with him and to make the crucial decision to use force. But even these types of threats are simple compared with the scenario that opened up on September 11. The government knew virtually nothing about the nature of the threat. It did not know how many more members of al Qaeda were in the United States, what their plans were, what resources were at their disposal, what their motives were, or how much support they had among American Muslims. 28 Protocols were worthless because nothing like the attack had ever happened before. (The closest analogy seemed to be the absurdly irrelevant example of Pearl Harbor.) The government could not follow rules; it had to improvise subject to a vague standard—protect the public while maintaining civil liberties to the extent possible. Improvise it did—instituting detentions, sweeps, profiling, surveillance, and many other policies on an unprecedented (in peacetime, if that was what it was) scale. 29

For the rule‐application stage, the deference thesis counsels Congress and the judiciary to (presumptively) defer. Congress simply cannot set about holding hearings, debating policy, and voting on laws in the midst of emergency. Either the problem will not be addressed, or Congress will end up voting on a bill that it has not written, debated, or even read. 30 For courts, too, the alternatives are unrealistic. If courts enforce rules developed for normal times, then they will interfere with the proper response to the terrorist threat, just as they would if they required the U.S. military to comply with the Fourth Amendment on the battlefield. Alternatively, the courts could insist on applying a standard and halt executive actions that, in the courts’ view, violated the standard described above—protect the nation while maintaining civil liberties to the extent possible. But here the courts are at a significant disadvantage. They do not have information about the nature of the threat. 31 Courts can demand this information from the government, but the government will not give it to them because the government fears leaks (to say nothing of recalcitrance caused by rivalries among intelligence agencies). Moreover, judges are inexperienced in national security unlike the specialists in the executive branch.

None of this is to deny Professor Holmes’s basic point that protocols can be valuable. Indeed, the Bush administration was as protocol‐happy as any other institution. Consider the protocols for interrogation which were disclosed in a leaked OLC memo: In this procedure, the individual is bound securely to an in‐ clined bench, which is approximately four feet by seven feet. The individual’s feet are generally elevated. A cloth is placed over the forehead and eyes. Water is then applied to the cloth in a controlled manner. As this is done, the cloth is lowered until it covers both the nose and mouth. Once the cloth is saturated and completely covers the mouth and nose, air flow is slightly restricted for 20 to 40 seconds due to the presence of the cloth. . . . During those 20 to 40 seconds, water is continuously applied from a height of twelve to twenty‐four inches. After this period, the cloth is lifted, and the individual is allowed to breathe unimpeded for three or four full breaths. The sensation of drowning is immediately relieved by the removal of the cloth. The procedure may then be repeated. 32

So not even the Bush administration disagreed with Profes‐ sor Holmes’s argument that lower‐level officials faced with re‐ current situations should be subject to protocols where they are appropriate. In this sense, Professor Holmes’s argument misses the mark entirely. The problem was not so much that protocols were not used; the problem, if it was a problem, was that they were developed, modified, and revised solely by the executive branch. This leads to the question of rule development.

Recall that Professor Holmes says that the argument that the executive can act more swiftly than Congress and the courts does not apply to the rule‐development stage because the crisis is past even if the threat remains. 33 But if we think back to September 11, the crisis did not end on that day, even if the immediate threat of violence did. It was reasonable to believe that other plots had been put into action and that violence could erupt at any moment. As the weeks and months passed, these concerns faded. But it also became clear that al Qaeda had sympathizers in the United States, and that these people might strike at any time, possibly on their own initiative, or volunteer for training that would later make them considerably more dangerous. The anthrax scare brought home the possibility that al Qaeda could use even more deadly weapons than hijacked airplanes. Every day brought another revelation of a hole in border security. Thus, it was a matter of urgency to develop new rules that would address the threat.

 The government maintained the confidentiality of a constant supply of intelligence, for fear of exposing sources and meth‐ ods. 34 Meanwhile, the government was already taking secret actions (many of which were later exposed), including tapping cell phone calls, tracking monetary transfers, and infiltrating terrorist organizations. 35 Optimal policy going forward necessarily depended on secrecy. Policy X, which might seem plausible given publicly available information, might turn out to be unnecessary, redundant, or even counterproductive in light of secret information about the activities of al Qaeda or secret Pol‐ icy Y. Thus, although Congress could no doubt give useful advice, it seems hard to believe that it could have contributed much to the development of counterterrorism tactics, any more than it can contribute to military tactics (where to invade, where to bomb) during a regular war.

A set of constitutional protocols normally applies to the making of policy and its embodiment in government action. The executive must act with Congress, and it must respect the courts; it cannot act by itself. But these rules apply to normal times, and the medical protocol analogy is of little use here. Medical protocols do not need to be secret because patients have no incentive to game them—unlike terrorists who benefit greatly from knowing the methods that the United States uses to spy on them, capture them, and interrogate them. Furthermore, medical protocols are not based on secret information; they are based on widely available medical research. Thus, when medical researchers develop medical protocols at the rule development stage, they can do so publicly without undermining the purpose of developing the protocols in the first place.

By contrast, rules governing counterterrorism operations must be developed mostly in secret, and mostly on the basis of secret information. Hence the importance of keeping rule development as much as possible *within* the only branch that possesses the power to act against security threats. Those rules, of course, would constrain only lower‐level executive agents, not the executive itself. There is an obvious reason for this; if the rules are wrong, they need to be corrected. It would similarly make little sense for doctors to develop emergency room protocols that could never be changed in the future as new technologies and new health problems rendered the old protocols worthless. Professor Holmes argues that the executive becomes subject to groupthink and other decision‐making pathologies when it makes policy itself rather than with Congress and other agents. 36 But the same point can be made about executive decisionmaking during regular wars, when the risk of groupthink (if it is a risk) is tolerated because of the need for secrecy.

If Congress and the judiciary cannot constrain the executive during emergencies because of the problem of secrecy, then perhaps this problem can be overcome by putting the source of constraint in the executive branch itself, where norms of secrecy prevail. That brings us to the Office of Legal Counsel.

### Impact

Disad outweighs the case –

#### Magnitude – lack of presidential authority to stabilization coalitions and international institutions increases the chances of escalation due to misinterpretation and miscalculation of attacks, including terrorism. That GREATLY lowers the threshold for nuclear weapons use – means we control escalation and miscalc ladder

Caves ’10, John P. Caves, Senior Research Fellow in the Center for the Study of Weapons of Mass Destruction at the National Defense University, “Avoiding a Crisis of Confidence in the U.S. Nuclear Deterrent”, <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ada514285>

Perceptions of a compromised U.S. nuclear deterrent as described above would have profound policy implications, particularly if they emerge at a time when a nucleararmed great power is pursuing a more aggressive strategy toward U.S. allies and partners in its region in a bid to enhance its regional and global clout. ■ A dangerous period of vulnerability would open for the United States and those nations that depend on U.S. protection while the United States attempted to rectify the problems with its nuclear forces. As it would take more than a decade for the United States to produce new nuclear weapons, ensuing events could preclude a return to anything like the status quo ante. ■ The assertive, nuclear-armed great power, and other major adversaries, could be willing to challenge U.S. interests more directly in the expectation that the United States would be less prepared to threaten or deliver a military response that could lead to direct conflict. They will want to keep the United States from reclaiming its earlier power position. ■ Allies and partners who have relied upon explicit or implicit assurances of U.S. nuclear protection as a foundation of their security could lose faith in those assurances. They could compensate by accommodating U.S. rivals, especially in the short term, or acquiring their own nuclear deterrents, which in most cases could be accomplished only over the mid- to long term. A more nuclear world would likely ensue over a period of years. ■ Important U.S. interests could be compromised or abandoned, or a major war could occur as adversaries and/or the United States miscalculate new boundaries of deterrence and provocation. At worst, war could lead to state-on-state employment of weapons of mass destruction (WMD) on a scale far more catastrophic than what nuclear-armed terrorists alone could inflict. Continuing Salience of Nuclear Weapons Nuclear weapons, like all instruments of national security, are a means to an end— national security—rather than an end in themselves. Because of the catastrophic destruction they can inflict, resort to nuclear weapons should be contemplated only when necessary to defend the Nation’s vital interests, to include the security of our allies, and/or in response to comparable destruction inflicted upon the Nation or our allies, almost certainly by WMD. The retention, reduction, or elimination of nuclear weapons must be evaluated in terms of their contribution to national security, and in particular the extent to which they contribute to the avoidance of circumstances that would lead to their employment. Avoiding the circumstances that could lead to the employment of nuclear weapons involves many efforts across a broad front, many outside the military arena. Among such efforts are reducing the number of nuclear weapons to the level needed for national security; maintaining a nuclear weapons posture that minimizes the likelihood of inadvertent, unauthorized, or illconsidered use; improving the security of existing nuclear weapons and related capabilities; reducing incentives and closing off avenues for the proliferation of nuclear and other WMD to state and nonstate actors, including with regard to fissile material production and nuclear testing; enhancing the means to detect and interdict the transfer of nuclear and other WMD and related materials and capabilities; and strength ening our capacity to defend against nuclear and other WMD use. For as long as the United States will depend upon nuclear weapons for its national security, those forces will need to be reliable, adequate, and credible. Today, the United States fields the most capable strategic nuclear forces in the world and possesses globally recognized superiority in any conventional military battlespace. No state, even a nuclear-armed near peer, rationally would directly challenge vital U.S. interests today for fear of inviting decisive defeat of its conventional forces and risking nuclear escalation from which it could not hope to claim anything resembling victory. But power relationships are never static, and current realities and trends make the scenario described above conceivable unless corrective steps are taken by the current administration and Congress. Consider the challenge posed by China. It is transforming its conventional military forces to be able to project power and compete militarily with the United States in East Asia, 1 and is the only recognized nuclear weapons state today that is both modernizing and expanding its nuclear forces. 2 It weathered the 2008 financial crisis relatively well, avoiding a recession and already resuming robust economic growth. 3 Most economists expect that factors such as openness to foreign investment, high savings rates, infrastructure investments, rising productivity, and the ability to leverage access to a large and growing market in commercial diplomacy are likely to sustain robust economic growth for many years to come, affording China increasing resources to devote to a continued, broadbased modernization and expansion of its military capabilities. In contrast, the 2008 financial crisis was the most severe for the United States since the Great Depression, 4 and it led in 2009 to the largest Federal budget deficit—by far—since the Second World War 5 (much of which is financed by borrowing from China). Continuing U.S. military operations in Iraq and Afghanistan are expensive, as will be the necessary refurbishment of U.S. forces when those con flicts end. Those military expenses, however, are expected to be eclipsed by the burgeoning entitlement costs of the aging U.S. “baby boomer” generation. 6 As The Economist recently observed: China’s military build-up in the past decade has been as spectacular as its economic growth. . . . There are growing worries in Washington, DC, that China’s military power could challenge America’s wider military dominance in the region. China insists there is nothing to worry about. But even if its leadership has no plans to displace American power in Asia . . . America is right to fret this could change. 7 As an emerging nuclear-armed near peer like China narrows the wide military power gap that currently separates it from the United States, Washington could find itself more, rather than less, reliant upon its nuclear forces to deter and contain potential challenges from great power competitors. The resulting security dynamics may resemble the Cold War more than the U.S. “unipolar moment” of the 1990s and early 2000s. Concerns about Longterm Reliability With continuing U.S. dependence upon nuclear forces to deter conflict and contain challenges from (re-)emerging great power(s), perceptions of the reliability, adequacy, and credibility of those forces will determine how well they serve those purposes. Perception is all important when it comes to nuclear weapons, which have not been operationally employed since 1945 and not tested (by the United States) since 1992, and, hopefully, will never have to be employed or tested again. If U.S. nuclear forces are to deter other nuclear-armed great powers, the individual weapons must be perceived to work as intended (reliability), the overall forces must be perceived as adequate to deny the adversary the achievement of his goals regardless of his actions (adequacy), and U.S. leadership must be perceived as prepared to employ the forces under conditions that it has communicated via its declaratory policy (credibility) These perceptions must be, of course, those of the leadership of adversaries that we seek to deter (as well as of the allies that we seek to assure), but they also need to be those of the U.S. leadership lest our leaders fail to convey the confidence and resolve necessary to shape adversaries’ perceptions to achieve deterrence. Weapons reliability is the essential foundation for deterrence since there can be no adequacy or credibility without it.

#### Timeframe and Probability – decrease readiness and primacy triggers the perception of vulnerability and hampers war fighting capabilities

Zeisberg, ‘4 [Mariah Zeisberg, PhD in Politics from Princeton, Postdoc Research Associate at the Political Theory Project of Brown University; “INTERBRANCH CONFLICT AND CONSTITUTIONAL MAINTENANCE: THE CASE OF WAR POWERS”; June 2004; found in Word document, can be downloaded from [www.brown.edu/Research/ppw/files/Zeisberg%20Ch5.doc](http://www.brown.edu/Research/ppw/files/Zeisberg%20Ch5.doc)]

The first significant argument of pro-Presidency insularists is that flexibility is a prime value in the conduct of foreign affairs, and especially war. Implicit in this argument is the recognition that the executive is functionally superior to Congress in achieving flexibility and swiftness in war operations, a recognition I share. The Constitution cannot be meant to curtail the very flexibility that may be necessary to preserve the nation; and yet, according to the insularists, any general norm which would include Congress in decision-making about going to war could only undermine that flexibility. Writing on the War Powers Act, Eugene Rostow predicts that it would, “put the Presidency in a straightjacket of a rigid code, and prevent new categories of action from emerging, in response to the necessities of a tense and unstable world.” In fact, Rostow believes, “[t]he centralization of authority in the president is particularly crucial in matters of national defense, war, and foreign policy, where a unitary executive can evaluate threats, consider policy choices, and mobilize national resources with a speed and energy that is far superior to any other branch.” Pro-presidency insularists are fond of quoting Hamilton, who argued that “[o]f all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand.” This need for flexibility, some insularists argue, is especially acute given modern conditions, where devastating wars can develop quickly. Today, “many foreign states have the power to attack U.S. forces - and some even the U.S. mainland - almost instantly,” and in such a world it is impracticable to require the President to seek advance authorization for hostilities. Such a requirement would simply be too risky to U.S. security. We furthermore face a nuclear age, and the system of deterrence that operates to contain that threat requires that a single person be capable of responding to nuclear attack with nuclear weapons immediately. Rostow writes, “the requirement for advance authorization would collapse the system of deterrence, making preemptive strikes by our enemies more likely.” Hence, “modern conditions” require the President to “act quickly, and often alone.” While this does not mean that Congress has no role to play in moments of crisis, it does mean that Congress should understand its role largely in terms of cooperating with the President to support his negotiations and decisions regarding relationships with foreign powers. Rostow writes, “Congress should be able to act effectively both before and after moments of crisis or potential crisis. It may join the President in seeking to deter crisis by publicly defining national policy in advance, through the sanctioning of treaties or other legislative declarations. Equally, Congress may participate formally in policymaking after the event through legislative authorization of sustained combat, either by means of a declaration of war, or through legislative action having more limited legal and political consequences. Either of these devices, or both in combination, should be available in situations where cooperation between the two branches is indicated at many points along an arc ranging from pure diplomacy at one end to a declaration of war at the other.” In other words, for Congress to understand itself as having any justifiable role in challenging executive security determinations, especially at moments of crisis, would be to undermine the strength that the executive requires in order to protect the nation. Conflict in this domain represents political degradation.

And it Turns Case –

#### It turns every impact

DUNN 2007 – PhD, former Assistant Director of the U.S. Arms Control and Disarmament Agency and Ambassador to the 1985 Nuclear Non- Proliferation Treaty Review Conference (Lewis Dunn, Proliferation Papers, “Deterrence Today: Roles, Challenges, and Responses.”)

On the one hand, among many U.S. defense experts and officials it has become almost a cliché to state that an alleged *asymmetry of stakes* between the United States (and/or other outsiders) and a regional nuclear power would make it much more difficult to provide credible nuclear security assurances along the lines suggested above. That purported asymmetry of stakes also is widely seen by those same experts and officials as putting the United States (or other outsiders) at a fundamental disadvantage in any crisis with a regional power and shifting the deterrence balance in its favor. Emphasis on the impact of a perceived asymmetry of stakes partly reflects a view that the intensity of the stakes in any given crisis or confrontation is dependent most on what has been called “the proximity effect”: stakes’ intensity is a function of geography. Concern about an asymmetry of stakes also gains support from the fact that a desire to deter the United States or other outsiders probably is one incentive motivating some new or aspiring nuclear . This line of argument should not be accepted at face value. To the contrary, in two different ways, the stakes for the United States (and other outsiders) in a crisis or confrontation with a regional nuclear adversary would be extremely high. To start, what is at stake is the likelihood of cascades of proliferation in Asia and the Middle East. Such proliferation cascades almost certainly would bring greater regional instability, global political and economic disruption, a heightened risk of nuclear conflict, and a jump in the risk of terrorist access to nuclear weapons. Equally important, nuclear blackmail let alone nuclear use against U.S. and other outsiders’ forces, those of U.S. regional allies and friends, or any of their homelands would greatly heighten the stakes for the United States and other outsiders. **Perceptions of** American **resolve** and credibility **around the globe**, the likelihood that an initial nuclear use would be followed by a virtual collapse of a six-decades’ plus nuclear taboo, and the danger of runaway proliferation all would be at issue. So viewed, how the United States and others respond is likely to have a far-reaching impact on their own security as well as longer term global security and stability.

Specifically, flex is key to maintain credibility with other international actors

GRACIA 2013 - political scientist and a former senior adviser to the Human Services and International Affairs committees at the Hawaii State Legislature, Danny de Gracia, “DE GRACIA: How Obama’s scandals weaken U.S. diplomacy and security”, June 12, 2013, http://communities.washingtontimes.com/neighborhood/making-waves-hawaii-perspective-washington-politic/2013/jun/12/de-gracia-how-obamas-scandals-weaken-us-diplomacy-/

Once a bright light among nations for freedom, innovation and prosperity, the United States of America is now in its death throes as a collapsing empire. Even as large stars that burn out in space often transform into black holes, America’s burdensome government is turning the entire nation into a swirling gyre of political darkness, scandal and public discontent. Nations that are prosperous are seldom paranoid. The emphasis on razor-wire defined borders guarded by assault rifle toting paramilitaries and internal security maintained by armies of secret police is a mark of third world scarcity rather than first world prosperity. When a nation is prosperous, its emphasis is on advancing commerce, science, exploration, philosophy and the arts. When a nation is weak, the apparatus of the state is directed towards counterinsurgency, anti-terrorism, border security and internal suppression. Since all states are at their core a compulsory jurisdictional monopoly for determining the “price” of justice and security, the worse an economy gets, the more a state’s security apparatus is deployed as a pretext for revenue collection. As Thucydides famously wrote in History of the Peloponnesian War, “the revenues of the state increasing, tyrannies were by their means established almost everywhere.” The problem that President Barack Obama faces in this state of decline is that America’s allies and enemies alike are carefully observing the health of the United States. What political scientists call high politics ― the realm of decision-making that involves matters of national survival ― is very much a game of perception. Foreign leaders constantly ponder whether it is in their nation’s best interest to continue to side with the United States or whether they should develop their own regional alliances and security agreements. As an example, the question of whether to side with the United States on matters involving Syria or to side with Russia and China increasingly hinges on whether the U.S. is perceived as a reliable power. The message that Obama’s wave of scandals projects to the world is that the United States is becoming increasingly unstable and her leadership’s diplomatic assurances may not be at all sincere or enforceable. This ultimately restricts our future diplomatic credibility and national security.

It’s also the only way to maintain central Asian stability

COES 2011 (Ben, former speechwriter for George H.W. Bush, September 30, “The Disease of a Weak President,” <http://dailycaller.com/2011/09/30/the-disease-of-a-weak-president/>

The disease of a weak president usually begins with the Achilles’ heel all politicians are born with — the desire to be popular. It leads to pandering to different audiences, people and countries and creates a sloppy, incoherent set of policies. Ironically, it ultimately results in that very politician losing the trust and respect of friends and foes alike.

In the case of Israel, those of us who are strong supporters can at least take comfort in the knowledge that Tel Aviv will do whatever is necessary to protect itself from potential threats from its unfriendly neighbors. While it would be preferable for the Israelis to be able to count on the United States, in both word and deed, the fact is right now they stand alone. Obama and his foreign policy team have undercut the Israelis in a multitude of ways. Despite this, I wouldn’t bet against the soldiers of Shin Bet, Shayetet 13 and the Israeli Defense Forces.

But Obama’s weakness could — in other places — have implications far, far worse than anything that might ultimately occur in Israel. The triangular plot of land that connects Pakistan, India and China is held together with much more fragility and is built upon a truly foreboding foundation of religious hatreds, radicalism, resource envy and nuclear weapons. If you can only worry about preventing one foreign policy disaster, worry about this one.

Here are a few unsettling facts to think about: First, Pakistan and India have fought three wars since the British de-colonized and left the region in 1947. All three wars occurred before the two countries had nuclear weapons. Both countries now possess hundreds of nuclear weapons, enough to wipe each other off the map many times over.

Second, Pakistan is 97% Muslim. It is a question of when — not if — Pakistan elects a radical Islamist in the mold of Ayatollah Khomeini as its president. Make no mistake, it will happen, and when it does the world will have a far greater concern than Ali Khamenei or Mahmoud Ahmadinejad and a single nuclear device.

Third, China sits at the northern border of both India and Pakistan. China is strategically aligned with Pakistan. Most concerning, China covets India’s natural resources. Over the years, it has slowly inched its way into the northern tier of India-controlled Kashmir Territory, appropriating land and resources and drawing little notice from the outside world.

In my book, Coup D’Etat, I consider this tinderbox of colliding forces in Pakistan, India and China as a thriller writer. But thriller writers have the luxury of solving problems by imagining solutions on the page. In my book, when Pakistan elects a radical Islamist who then starts a war with India and introduces nuclear weapons to the theater, America steps in and removes the Pakistani leader through a coup d’état. I wish it was that simple.

The more complicated and difficult truth is that we, as Americans, must take sides. We must be willing to be unpopular in certain places. Most important, we must be ready and willing to threaten our military might on behalf of our allies. And our allies are Israel and India.

There are many threats out there — Islamic radicalism, Chinese technology espionage, global debt and half a dozen other things that smarter people than me are no doubt worrying about. But the single greatest threat to America is none of these. The single greatest threat facing America and our allies is a weak U.S. president. It doesn’t have to be this way. President Obama could — if he chose — develop a backbone and lead. Alternatively, America could elect a new president. It has to be one or the other. The status quo is simply not an option.

#### Tie-breaker – strong alliances solve the use of WMD

ROSS 1999 - Douglas Ross, Professor of Political Science – Simon Fraser University, Winter 1998/1999, International Journal, Vol. 54, No. 1, “Canada’s Functional Isolationism And The Future Of Weapons Of Mass Destruction”, Lexis

Thus, an easily accessible tax base has long been available for spending much more on international security than recent governments have been willing to contemplate. Negotiating the landmines ban, discouraging trade in small arms, promoting the United Nations arms register are all worthwhile, popular activities that polish the national self-image. But they should all be supplements to, not substitutes for, a proportionately equitable commitment of resources to the management and prevention of international conflict – and thus the containment of the WMD threat. Future American governments will not ‘police the world’ alone. For almost fifty years the Soviet threat compelled disproportionate military expenditures and sacrifice by the United States. That world is gone. Only by enmeshing the capabilities of the United States and other leading powers in a co-operative security management regime where the burdens are widely shared does the world community have any plausible hope of avoiding warfare involving nuclear or other WMD.

### --Agamben

#### The executive will redefine the law to violate and ignore the plan – especially in the instance of drones

Pollack, 13 -- MSU Guggenheim Fellow and professor of history emeritus [Norman, "Drones, Israel, and the Eclipse of Democracy," Counterpunch, 2-5-13, www.counterpunch.org/2013/02/05/drones-israel-and-the-eclipse-of-democracy/, accessed 9-1-13, mss]

Bisharat first addresses the transmogrification of international law by Israel’s military lawyers. We might call this damage control, were it not more serious. When the Palestinians first sought to join the I.C.C., and then, to receive the UN’s conferral of nonmember status on them, Israel raised fierce opposition. Why? He writes: “Israel’s frantic opposition to the elevation of Palestine’s status at the United Nations was motivated precisely by the fear that it would soon lead to I.C.C. jurisdiction over Palestinian claims of war crimes. Israeli leaders are unnerved for good reason. The I.C.C. could prosecute major international crimes committed on Palestinian soil anytime after the court’s founding on July 1, 2002.” In response to the threat, we see the deliberate reshaping of the law: Since 2000, “the Israel Defense Forces, guided by its military lawyers, have attempted to **remake the laws** of war by consciously violating them and then **creating new legal concepts to provide juridical cover** for their misdeeds.” (Italics, mine) In other words, habituate the law to the existence of atrocities; in the US‘s case, targeted assassination, repeated often enough, seems permissible, indeed clever and wise, as pressure is steadily applied to the laws of war. Even then, “collateral damage” is seen as unintentional, regrettable, but hardly prosecutable, and in the current atmosphere of complicity and desensitization, never a war crime. (**Obama is hardly a novice at** this game of **stretching the law to suit the convenience of**, shall we say, the **national interest**? In order to ensure the distortion in counting civilian casualties, which would bring the number down, as Brennan with a straight face claimed, was “zero,” the Big Lie if ever there was one, placing him in distinguished European company, Obama **redefined the meaning** of “combatant” status to be any male of military age throughout the area (which we) declared a combat zone, which noticeably led to a higher incidence of sadism, because it allowed for “second strikes” on funerals—the assumption that anyone attending must be a terrorist—and first responders, those who went to the aid of the wounded and dying, themselves also certainly terrorists because of their rescue attempts.) These guys play hardball, perhaps no more than in using—by report—the proverbial baseball cards to designate who would be next on the kill list. But funerals and first responders—verified by accredited witnesses–seems overly much, and not a murmur from an adoring public.

#### Pariah weapons regulation legitimizes militarism- labeling specific weapons as bad naturalizes others

Beier, 11 – McMaster University political science professor

[J. Marshall, "Dangerous Terrain: Re-Reading the Landmines Ban through the Social Worlds of the RMA," Contemporary Security Policy, 32:1, April 2011, 159-175, accessed 9-12-13, mss]

Although turned to a more progressive purpose, the rhetorical /discursive strategies of the landmine ban effect and work through a similar disturbance of sites of responsibility. The success of the mine ban movement owes in no small measure to the marking of antipersonnel landmines as 'bad' weapons - a move that has enabled even states that have widely used mines to join in denouncing them as a humanitarian scourge without simultaneously repudiating recourse to militarized violence more generally. At the campaign level and with the specific practical objective of securing the broadest possible ban on landmines, this was a very well conceived approach. Indeed, had this strategy not been adopted, it is unlikely that the movement would have swayed many - if any - states to the cause. But practically expedient though it may have been, it is also contingent on putting responsibility out of sight. Like errant cruise missiles. landmines intend nothing. What makes them bad, then, speaks not of disposition, but rather a technological limitation resulting in an objective property of indiscriminacy. While this might at first seem suggestive of the need for a technological solution. recall that, in deference to the goal of a com- plete prohibition, the mine ban movement quite rightly worked to foreclose the possi- bility of recourse to "˜smart mines`. Though this might appear to mark it decidedly apart from the war-enabling technologies of the RMA and their part in refashioning the bases of legitimacy in contemporary warfare, the mystification of responsibility so crucial to the ban reveals some disturbing points of intersection. On first gloss, the approach of the mine ban movement seems quite clearly to disavow any recourse to "˜better` technology as a fix for landmine indiscriminacy. The importance of this cannot be overstated since, as has been the case with the RMA, distinguishing between "˜good` and "˜bad` weapons raises the spectre of a like distinction in terms of the conduct of those who use them - a distinction not always well sustained by the actual consequences of their use. In refusing to concede that some mines might be less pernicious than others, therefore, the move- ment simultaneously refused all bases of legitimacy in mine use that might otherwise have been claimed by the technologically advantaged and denied to those less so. But things become rather more problematic when considered from without the narrow context of the landmines issue. While the rhetorical casting of mines as bad proved a remarkably effective strategy in pursuit of a ban, it only makes sense if it in fact is imagined that there are somewhere 'good' weapons. Since it is not killing per se but killing with landmines that is rendered indefensible, the use of other presumably more discriminating weapons is lent a certain legitimacy it might not otherwise have enjoyed. And this is revealing of the important sense in which the core claims of the mine ban contribute to the reproduction of essential ideational bases of the 'new American way of war'. Inviting none of the cynicism about motives that might have attached to a wholly state-led initiative, the central involvement of civil society actors in the mine ban movement - well known and respected peace and human rights advocacy groups among them - both naturalizes and valorizes a much larger constellation of claims to meaningful discriminacy, whether overt or subsumed. Pressing for a ban on landmines thus involved the complete disaggregation of this one issue not only from peace activism in general, but from the more particular realm of disarmament advocacy as well, parcelling it off in such a way as to suggest that there are more effective ways to do the sorts of things landmines are intended to do.

## 1NR

### Circumvention

#### Checks on the executive are a myth – State power mean’s they’ll inevitably do what they want and maintain secrecy

Gowder, ‘6 [Paul Gowder, PhD in Political Science, Stanford University; Symposium: Federal Secrecy Policy After September 11 and the Future Of The Information Society: Introductory Essay: Secrecy as Mystification of Power: Meaning and Ethics in the Security State Winter; 2005-2006; <http://moritzlaw.osu.edu/students/groups/is/files/2012/02/Gowder__Final__formatted_.pdf>]

In addition, each type of secrecy as currently applied is visible in the abstract: we know the government is keeping secrets, we simply do not know what those secrets are. This is suboptimal for the State; since such awareness carries a risk of investigation by angry citizens, the State would prefer the populace to be completely unaware that secrets are being kept. Since the public tends to discover the secrets, sooner or later, anyway, the State has openly established the legal authority for its secrecy. Consequently, the people are placed into apprehension of their own interests being affected by government secrecy.44 Knowing the government is keeping secrets, one is subjected to uncertainty as to whether those secrets are about, or connected with, oneself. Similarly, knowing specific examples of secret-keeping raises the suspicion that there are additional examples of secret-keeping that are not known. The essential feature of risk-secrecy is that, from the perspective of the object of secrecy, it converts what was once a calculable risk into an incalculable uncertainty. Before the imposition of risk-secrecy, each citizen was free to make an individual and autonomous decision about the risks she was willing to take in exchange for whatever benefits. She might, for example, choose to move to a neighborhood with a dangerous nuclear plant in exchange for a higher-paying job. In the risk-secrecy regime, not only is that choice forced upon her, but it is done invisibly, so that the possible presence of secret risk is presented as pure facticity, impossible to cognitively incorporate or take a position in regard to. In my existential-Kantian terms, we no longer have the freedom to make meaningful and responsible choices regarding that portion of our lives. We cannot connect our decisions (like where to live) to the factors (like environmental risk) that would, were we free, enter into that decision, nor can we take a cognitive position on those factors. In Beauvoir’s terms, risk-secrecy is a mystification: the choices of the state actors and the consequences of her own choices are concealed from the object of secrecy. They are instead made to appear as uncontrollable acts of nature whose injurious potential presents as random. Because the fact of the secrecy is known, we are all aware that we might be subject to an unknown risk. As a consequence, we subjectively must experience the world as less within our control and thus, less meaningful.45 The keeper of the secrets appropriates the right and burden of self-definition for his charges, and thus reduces them to a state of protected obedience similar to that of a parent and a child, or a pre-feminist woman under the stifling protection of a patriarchal husband. This is unlike ordinary state protection (e.g. police work) where the protected person still has some role in her own safety. Consequently, that secret-keeper takes upon himself her anguish of choice:46 he must decide who is to risk destruction without any input from the actual victim of the risk. He thereby objectifies those for whom he decides. By making the decision for them, according to his values, the secret-keeper turns the objects of secrecy from ends in themselves– autonomous subjects with their own meaning to be respected in their own right – into means – objects of his suspicion and protection priorities. This is the behavior of the person Beauvoir describes as the “serious man” (and characterizes as “mak[ing] himself a tyrant”)47 – the installation of an abstract ideal (of “security”) above the freedom of the people supposedly to be served by the ideal, and thereby above his own freedom as well, since his freedom depends on their freedom to have intersubjective meaning. Kantians too would object to this secret paternalism. As Korsgaard explains in the context of a lie, the object of such a non-consensual transaction can not “‘contain in himself’ the end”48 of the action, not even if she would consent if she knew about it, because she is denied the opportunity to “choose, freely, to contribute to its realization.49” Since she can not rationally or autonomously choose the end of the secret act, her involvement is as a “mere means.”50 Should the feared risk come into being, the people injured experience a loss of meaning in the understanding sense: what appeared before as the possibility of a random, uncontrollable harm now appears as the fact of a random, incomprehensible harm. Risk-secrecy is converted into reason-secrecy because she is not permitted to know why what has happened to her occurred. She is not permitted to see the reasons and the choices and the autonomous actors behind the maybe-seen catalyst security lapse and understand that act as an act of the subjects who are (supposedly) accountable to her, rather than as a fact. She is not permitted to take a position in relation to the other people whose actions she experienced as injury.51 This, mutatis mutandis to the risk before it came into being, is an unethical mystification, and our victim will experience it as a loss of meaning. Much the same holds for reason-secrecy. When the State carries out its will on a person on the basis of a secret standard, that person has the experience of an arbitrary imposition of power. The experience of being put on a no-fly list must be seen as akin to the experience of being hit by a meteorite: an utterly meaningless and unpredictable event, impossible to ground in familiar reality.52 Reason-secrecy necessarily depends on invasions of privacy and undermining of the control that the object of such secrecy has over her own identity. In order for people to become fields for the exercise of power, the State must first collect data about them.53 If the State is to exercise its power, on the basis of that data, pursuant to secret reasoning, it must collect (or transfer and misuse) the data secretly (unless the reasons are some grossly visible characteristic of the object of secrecy, like race). Otherwise, the objects of secrecy might be able to learn the sort of data that the State is examining and infer the secret reasons. Even worse for the secret state, the individual objects of secrecy might learn of and evade the examination. Consequently, the disciplinary power of the security state comes from the conjunction of the power of the officials to watch everyone and the lack of power in the watched class to reciprocally watch the officials.54 This permits the application of power universally on each citizen under the panoptic eye, since no citizen can know whether she is being watched at any moment. Reason-secrecy achieves this effect by secretly examining data about the public, which then is used to exercise power on individuals selected by this secret examination. The security state thus exercises power over us all by placing us in anticipation of power being exercised on us.55 Because of that structural feature of reason-secrecy, it implies all the ethical difficulties inherent in risk-secrecy. The panoptic nature of the relationship between the holder of secret reasons and a citizen who is the object of secrecy implies that each person presenting herself for inspection under secret reasons (i.e. at an airport) has no way of knowing whether or not harm will be inflicted on her (i.e. a denial of flight) by the State. Thus, whether or not she is actually harmed, the citizen is not able to ground the possibility of harm in any choice or characteristic of herself. From the point of view of the experience of the person presenting herself for inspection, the State is placed in exactly the same position as the terrorist: each may strike at any moment and do injury to our beleaguered citizen without any rhyme, reason, or predictability. Act-secrecy also necessarily implicates the ethical objections to reason-secrecy (and thereby to risk-secrecy), because the concealment of an act implies a concealment of the reasons for the act. (The State can not announce “we will search the homes of anyone who does X” without disclosing the searches to its targets.) Moreover, in the case of unexplained, arbitrary, and random risks (whether imposed by third parties or the government as in risk and reason secretly respectively), the citizen has at least a minimal opportunity to ascribe meaning to the random nature of the act and initiate some project. For example, the citizen might gain a sense of control by participating in political action to demand disclosure of the secret reasons or punishment for risk-negligent officials. The same can not be said for act-secrecy. Because act-secrecy conceals not only the reasons for the act, but the very act itself, it deprives the victim of such an act of any way of taking a position with regard to that concealed act. Each citizen is placed in apprehension of utterly random exercises of power that she will never have the opportunity to resist or understand. The function of these forms of secrecy is thus to reduce the decisions of individual people to nothingness. The decisions of government agents become invisible and appear as mere manifestations of nature. The decisions of third parties become random and unavoidable chance. The decisions even of the object of secrecy are disconnected from their consequences.56 If the ability to understand and choose to act in the world is the fundamental characteristic of humanity, an act upon another that renders the choices both parties have made invisible, so that the situation seems a meaningless “brute fact” rather a changeable choice, must be seen as dehumanizing and consequently, unethical.57

#### Congress empirically fails to close loopholes- Obama can circumvent

**Druck ‘12** [Judah A. Druck, law associate at Sullivan & Cromwell LLP, Cornell Law School graduate, magna cum laude graduate from Brandeis University, “Droning On: The War Powers Resolution and the Numbing Effect of Technology-Driven Warfare,” <http://www.lawschool.cornell.edu/research/cornell-law-review/upload/Druck-final.pdf>]

Of course, despite these various suits, Congress has received¶ much of the blame for the WPR’s treatment and failures. For example, Congress has been criticized for doing little to enforce the WPR¶ in using other Article I tools, such as the “power of the purse,”76 or by¶ closing the loopholes frequently used by presidents to avoid the WPR in the first place.77 Furthermore, in those situations where Congress¶ has decided to act, it has done so in such a disjointed manner as to¶ render any possible check on the President useless. For example, during President Reagan’s invasion of Grenada, Congress failed to reach¶ an agreement to declare the WPR’s sixty-day clock operative,78 and¶ later faced similar “deadlock” in deciding how best to respond to President Reagan’s actions in the Persian Gulf, eventually settling for a bill¶ that reflected congressional “ambivalence.”79 Thus, between the lack¶ of a “backbone” to check rogue presidential action and general ineptitude when it actually decides to act, Congress has demonstrated its¶ inability to remedy WPR violations.¶ Worse yet, much of Congress’s interest in the WPR is politically¶ motivated, leading to inconsistent review of presidential military decisions filled with post-hoc rationalizations. Given the political risk associated with wartime decisions,81 Congress lacks any incentive to act¶ unless and until it can gauge public reaction—a process that often¶ occurs after the fact.82 As a result, missions deemed successful by the¶ public will rarely provoke “serious congressional concern” about presidential compliance with the WPR, while failures will draw scrutiny.83¶ For example, in the case of the Mayaguez, “liberals in the Congress¶ generally praised [President Gerald Ford’s] performance” despite the¶ constitutional questions surrounding the conflict, simply because the public deemed it a success.84 Thus, even if Congress was effective at¶ checking potentially unconstitutional presidential action, it would only act when politically safe to do so. This result should be unsurprising: making a wartime decision provides little advantage for politicians, especially if the resulting action succeeds.85 Consequently,¶ Congress itself has taken a role in the continued disregard for WPR¶ enforcement.¶ The current WPR framework is broken: presidents avoid it, courts¶ will not rule on it, and Congress will not enforce it. This cycle has¶ culminated in President Obama’s recent use of force in Libya, which¶ created little, if any, controversy,86 and it provides a clear pass to future presidents, judges, and congresspersons looking to continue the¶ system of passivity and deferment.

### Transparency Fails

#### Transparency fails – disclosure isn’t seen as credible

Groves 4-10-13 [Steven, the Bernard andhas to Barbara Lomas Senior Research Fellow in Heritage’s Margaret Thatcher Center for Freedom, former senior counsel to the U.S. Senate Permanent Subcommittee on Investigations, former associate at Boies, Schiller & Flexner LLP, where he specialized in commercial litigation, holds a law degree from Ohio Northern University's College of Law and a bachelor of arts degree in history from Florida State University, “Drone Strikes: The Legality of U.S. Targeting Terrorists Abroad,” <http://www.heritage.org/research/reports/2013/04/drone-strikes-the-legality-of-us-targeting-terrorists-abroad>]

Continue to affirm existing use-of-force authorities. During the past three years, senior officials of the Obama Administration have publicly set out in significant detail U.S. policies and practices regarding drone strikes. The Administration should continue to do so, emphasizing that U.S. policies adhere to widely recognized international law. Critics of the United States will continue to claim that a lack of transparency surrounds U.S. policy and actions. Such critics will likely never be satisfied, not even with full disclosure of the relevant classified legal memoranda, and their criticism will not cease until the United States abandons its practice of targeting terrorist threats in Pakistan, Yemen, and elsewhere. However, consistent repetition of the U.S. legal position on targeted drone strikes may blunt such criticism.

### ! Defense

#### Heg doesn’t solve conflict

**Fettweis 10** – Professor of national security affairs @ U.S. Naval War College (Chris, Georgetown University Press, “Dangerous times?: the international politics of great power peace” 173-75)

Simply stated, the hegemonic stability theory proposes that international peace is only possible when there is one country strong enough to make and enforce a set of rules. At the height of Pax Romana between 27 BC and 180 AD, for example, Rome was able to bring unprecedented peace and security to the Mediterranean. The Pax Britannica of the nineteenth century brought a level of stability to the high seas. Perhaps the current era is peaceful because the United States has established a de facto Pax Americana where no power is strong enough to challenge its dominance, and because it has established a set of rules that a generally in the interests of all countries to follow. Without a benevolent hegemony, some strategists fear, instability may break out around the globe. Unchecked conflicts could cause humanitarian disaster and, in today’s interconnected world economic turmoil that would ripple throughout global financial markets. If the United States were to abandon its commitments abroad, argued Art, the world would “become a more dangerous place” and, sooner or later, that would “rebound to America’s detriment.” If the massive spending that the United States engages in actually produces stability in the international political and economic systems, then perhaps internationalism is worthwhile. There are good theoretical and empirical reasons, however, the belief that U.S. hegemony is not the primary cause of the current era of stability. First of all, the hegemonic stability argument overstates the role that the United States plays in the system. No country is strong enough to police the world on its own. The only way there can be stability in the community of great powers is if self-policing occurs, ifs **states have decided that their interest are served by peace**. **If no pacific normative shift had occurred** among the great powers that was filtering down through the system, then **no amount of** international constabulary **work** by the United States **could maintain stability**. Likewise, if it is true that such a shift has occurred, then most of what the hegemon spends to bring stability would be wasted. The 5 percent of the world’s population that live in the United States simple could not force peace upon an unwilling 95. At the risk of beating the metaphor to death, the United States may be patrolling a neighborhood that has already rid itself of crime. Stability and unipolarity may be simply **coincidental**. In order for U.S. hegemony to be the reason for global stability, the rest of the world would have to expect reward for good behavior and fear punishment for bad. Since the end of the Cold War, the United States has not always proven to be especially eager to engage in humanitarian interventions abroad. Even rather incontrovertible evidence of genocide has not been sufficient to inspire action. Hegemonic stability can only take credit for influence those decisions that would have ended in war without the presence, whether physical or psychological, of the United States. Ethiopia and Eritrea are hardly the only states that could go to war without the slightest threat of U.S. intervention. Since most of the world today is free to fight without U.S. involvement, something else must be at work. Stability exists in many places where no hegemony is present. Second, the limited **empirical evidence** we have **suggests** that there is **little connection between** the relative level of U.S. **activism and** international **stability**. During the 1990s the United States cut back on its defense spending fairly substantially, By 1998 the United States was spending $100 billion less on defense in real terms than it had in 1990. **To** internationalists, defense hawks, and other **believers in hegemonic stability this** irresponsible "peace dividend" **endangered** both national and **global security "**No serious analyst of American military capabilities," argued Kristol and Kagan, "doubts that the defense budget has been cut much too far to meet Americas responsibilities to itself and to world peace."" If the pacific trends were due not to U.S. hegemony but a strengthening norm against interstate war, however, one would not have expected an increase in global instability and violence. The verdict from the past two decades is fairly plain: **The world grew more peaceful** while the United States cut its forces. **No state** **seemed to believe** that its **security was endangered** by a less-capable Pentagon, **or** at least none **took any action** that would suggest such a belief. No militaries were enhanced to address power vacuums; **no** **security dilemmas drove mistrust and arms races; no regional balancing occurred** once the stabilizing presence of the U.S. military was diminished. The rest of the world acted as if the threat ofinternational war was not a pressing concern, despite the reduction in U.S. capabilities. The incidence and magnitude of global conflict declined while the United States cut its military spending under President Clinton, and it kept declining as the Bush Administration ramped spending back up. No complex statistical analysis should be necessary to reach the conclusion that the two are unrelated. It is also worth noting for our purposes that the United States was no less safe. Military spending figures by themselves are insufficient to disprove a connection between overall U.S. actions and international stability. Once again, one could presumably argue that spending is not the only or even the best indication of hegemony, and that it is instead U.S. foreign political and security commitments that maintain stability. Since neither was significantly altered during this period, instability should not have been expected. Alternately, advocates of hegemonic stability could believe that relative rather than absolute spending is decisive in bringing peace. Although the United States cut back on its spending during the 1990s, its relative advantage never wavered. However, even if it is true that either U.S. commitments or relative spending account for global pacific trends, then at the very least stability can evidently be maintained at drastically lower levels of both. In other words, even if one can be allowed to argue in the alternative for a moment and suppose that there is in fact a level of engagement below which the United States cannot drop without increasing international disorder, a rational grand strategist would still recommend cutting back on engagement and spending until that level is determined. Grand strategic decisions are never final; continual adjustments can and must be made as time goes on. Basic logic suggests that the United States ought to spend the minimum amount of its blood and treasure while seeking the maximum return on its investment. And if the current era of stability is as stable as many believe it to be, no increase in conflict would ever occur irrespective of U.S. spending, which would save untold trillions for an increasingly debt-ridden nation. It is also perhaps worth noting that if opposite trends had unfolded, if other states had reacted to news of cuts in U.S. defense spending with more aggressive or insecure behavior, then internationalists would surely argue that their expectations had been fulfilled. If increases in conflict would have been interpreted as proof of the wisdom of internationalist strategies, then logical consistency demands that the lack thereof should at least pose a problem. As it stands, the only evidence we have regarding the likely systemic reaction to a more restrained United States suggests that the current peaceful trends are **unrelated** to U.S. military spending. Evidently **the rest of the world can operate** quite **effectively without the presence of a global policeman**. **Those who think otherwise base their view on faith alone.**

#### The only comprehensive study proves no transition impact.

**MacDonald and Parent 11**—Professor of Political Science at Williams College & Professor of Political Science at University of Miami [Paul K. MacDonald & Joseph M. Parent, “Graceful Decline? The Surprising Success of Great Power Retrenchment,” International Security, Vol. 35, No. 4 (Spring 2011), pp. 7–44]

In this article, we question the logic and evidence of the retrenchment pessimists. To date there has been neither a **comprehensive study** of great power retrenchment nor a study that lays out the case for retrenchment as a practical or probable policy. This article fills these gaps by **systematically examining** the relationship between acute relative decline and the responses of great powers. We examine **eighteen cases** of acute relative decline since 1870 and advance three main arguments. First, we challenge the retrenchment pessimists’ claim that domestic or international constraints inhibit the ability of declining great powers to retrench. In fact, when states fall in the hierarchy of great powers, **peaceful retrenchment** **is the most common** response, even over short time spans. Based on the empirical record, we find that great powers retrenched in no less than eleven and no more than fifteen of the eighteen cases, a range of 61–83 percent. When international conditions demand it, states renounce risky ties, increase reliance on allies or adversaries, draw down their military obligations, and impose adjustments on domestic populations. Second, we find that the magnitude of relative decline helps explain the extent of great power retrenchment. Following the dictates of neorealist theory, great powers retrench for the same reason they expand: the rigors of great power politics compel them to do so.12 Retrenchment is by no means easy, but necessity is the mother of invention, and declining great powers face powerful incentives to contract their interests in a prompt and proportionate manner. Knowing only a state’s rate of relative economic decline explains its corresponding degree of retrenchment in as much as 61 percent of the cases we examined. Third, we argue that the rate of decline helps explain what forms great power retrenchment will take. How fast great powers fall contributes to whether these retrenching states will internally reform, seek new allies or rely more heavily on old ones, and make diplomatic overtures to enemies. Further, our analysis suggests that great powers facing acute **decline are less likely to** initiate or **escalate** militarized interstate disputes. **Faced with diminishing resources**, great **powers** **moderate their** foreign policy **ambitions** and offer concessions in areas of lesser strategic value. Contrary to the pessimistic conclusions of critics, **retrenchment neither requires aggression nor invites predation**. Great powers are able to rebalance their **commitments through compromise, rather than conflict**. In these ways, states respond to penury the same way they do to plenty: they seek to adopt policies that maximize security given available means. Far from being a hazardous policy, retrenchment can be successful. States that retrench often regain their position in the hierarchy of great powers. Of the fifteen great powers that adopted retrenchment in response to acute relative decline, 40 percent managed to recover their ordinal rank. In contrast, none of the declining powers that failed to retrench recovered their relative position. Pg. 9-10