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#### The plan codifies loose rules on doctrines of military force for pre-emptive and preventative strikes ---- Only the CP resolves the self-defense doctrine to international standards

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[Olumide, admitted to the Bars of Federal Republic of Nigeria and the State of California, Golden Gate University School of Law, "Article: Legal Standards Governing Pre-Emptive Strikes and Forcible Measures of Anticipatory Self-Defense Under the U.N. Charter and General International Law," 12 Ann. Surv. Int'l & Comp. L. 19, l/n, accessed 9-19-13, mss]

The United States must abide by the rigorous standards set out above that are meant to govern the use of preemptive strikes, because today's international system is characterized by a relative infrequency of interstate war. It has been noted that developing doctrines that lower the threshold for preemptive action could put that accomplishment at risk, and exacerbate regional crises already on the brink of open conflict. n100 This is important as O'Hanlon, Rice, and Steinberg have rightly noted: ...countries already on the brink of war, and leaning strongly towards war, might use the doctrine to justify an action they already wished to take, and the effect of the U.S. posture may make it harder for the international community in general, and the U.S. in particular, to counsel delay and diplomacy. Potential **examples abound**, ranging from Ethiopia and Eritrea, to China and Taiwan, to the Middle East. But perhaps the clearest case is the India-Pakistan crisis. n101 The world must be a safe place to live in. We cannot be ruled by bandits and rogue states. There must be law and order not only in the books but in enforcement as well. No nation is better suited to enforce international law than the United States. The Bush Doctrine will stand the test [\*42] of time and survive. Again, we submit that nothing more would protect the world and its citizens from **nuclear weapons**, terrorists and rogue states than an able and willing nation like the United States, acting as a policeman of the world within all legal boundaries. This is the essence of the preamble to the United Nations Charter.

#### We’ve just got cards that are way too specific to their mechanism ---- the plan codifies a blurred line between pre-emptive and preventative strikes ---- causes unlimited worldwide aggression

DWORKIN 2013 – this is actually their 1ac author too, senior policy fellow at the European Council on Foreign Relations, Anthony, “Drones And Targeted Killing: Defining A European Position”, July, <http://ecfr.eu/page/-/ECFR84_DRONES_BRIEF.pdf>

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

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

Obama’s new policy on drones

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

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

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

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

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

#### Preventative war doctrines guarantees infinite interventions and backlash through arms race- undermining credibility- alternatives solve

Crawford ‘3 (Neta C. Crawford, Professor of Political Science at Brown where her teaching focuses on international relations theory, international ethics and normative change at Brown, Ph.D. & MA, MIT; BA, Brown University, “The Slippery Slope to Preventive War [Full Text]”, Ethics & International Affairs, Volume 17.1, March 3, 2003)

The Bush administration's arguments in favor of a preemptive doctrine rest on the view that warfare has been transformed. As Colin Powell argues, "It's a different world . . . it's a new kind of threat."1 And in several important respects, war has changed along the lines the administration suggests, although that transformation has been under way for at least the last ten to fifteen years. Unconventional adversaries prepared to wage unconventional war can conceal their movements, weapons, and immediate intentions and conduct devastating surprise attacks2. Nuclear, chemical, and biological weapons, though not widely dispersed, are more readily available than they were in the recent past. And the everyday infrastructure of the United States can be turned against it as were the planes the terrorists hijacked on September 11, 2001. Further, the administration argues that we face enemies who "reject basic human values and hate the United States and everything for which it stands."3 Although vulnerability could certainly be reduced in many ways, it is impossible to achieve complete invulnerability. Such vulnerability and fear, the argument goes, means the United States must take the offensive. Indeed, soon after the September 11, 2001, attacks, members of the Bush administration began equating self-defense with preemption: There is no question but that the United States of America has every right, as every country does, of self-defense, and the problem with terrorism is that there is no way to defend against the terrorists at every place and every time against every conceivable technique. Therefore, the only way to deal with the terrorist network is to take the battle to them. That is in fact what we’re doing. That is in effect self-defense of a preemptive nature.4 The character of potential threats becomes extremely important in evaluating the legitimacy of the new preemption doctrine, and thus the assertion that the United States faces rogue enemies who oppose everything about the United States must be carefully evaluated. There is certainly robust evidence to believe that al-Qaeda members desire to harm the United States and American citizens. The National Security Strategy makes a questionable leap, however, when it assumes that "rogue states" also desire to harm the United States and pose an imminent military threat. Further, the administration blurs the distinction between "rogue states" and terrorists, essentially erasing the difference between terrorists and those states in which they reside: "We make no distinction between terrorists and those who knowingly harbor or provide aid to them."5 But these distinctions do indeed make a difference. Legitimate preemption could occur if four necessary conditions were met. First, the party contemplating preemption would have a narrow conception of the "self" to be defended in circumstances of self-defense. Preemption is not justified to protect imperial interests or assets taken in a war of aggression. Second, there would have to be strong evidence that war was inevitable and likely in the immediate future. Immediate threats are those which can be made manifest within days or weeks unless action is taken to thwart them. This requires clear intelligence showing that a potential aggressor has both the capability and the intention to do harm in the near future. Capability alone is not a justification. Third, preemption should be likely to succeed in reducing the threat. Specifically, there should be a high likelihood that the source of the military threat can be found and the damage that it was about to do can be greatly reduced or eliminated by a preemptive attack. If preemption is likely to fail, it should not be undertaken. Fourth, military force must be necessary; no other measures can have time to work or be likely to work. A DEFENSIBLE SELF On the face of it, the self-defense criteria seem clear. When our lives are threatened, we must be able to defend ourselves using force if necessary. But self-defense may have another meaning, that in which our "self" is expressed not only by mere existence, but also by a free and prosperous life. For example, even if a tyrant would allow us to live, but not under institutions of our own choosing, we may justly fight to free ourselves from political oppression. But how far do the rights of the self extend? If someone threatens our access to food, or fuel, or shelter, can we legitimately use force? Or if they allow us access to the material goods necessary for our existence, but charge such a high price that we must make a terrible choice between food and health care, or between mere existence and growth, are we justified in using force to secure access to a good that would enhance the self? When economic interests and vulnerabilities are understood to be global, and when the moral and political community of democracy and human rights are defined more broadly than ever before, the self-conception of great powers tends to enlarge. But a broad conception of self is not necessarily legitimate and neither are the values to be defended completely obvious. For example, the U.S. definition of the self to be defended has become very broad. The administration, in its most recent Quadrennial Defense Review, defines "enduring national interests" as including "contributing to economic well-being," which entails maintaining "vitality and productivity of the global economy" and "access to key markets and strategic resources." Further, the goal of U.S. strategy, according to this document, is to maintain "preeminence."6 The National Security Strategy also fuses ambitious political and economic goals with security: "The U.S. national security strategy will be based on a distinctly American internationalism that reflects the fusion of our values and our national interests. The aim of this strategy is to help make the world not just safer but better." And "today the distinction between domestic and foreign affairs is diminishing."7 If the self is defined so broadly and threats to this greater "self" are met with military force, at what point does self-defense begin to look like aggression? As Richard Betts has argued, "When security is defined in terms broader than protecting the near-term integrity of national sovereignty and borders, the distinction between offense and defense blurs hopelessly. . . . Security can be as insatiable an appetite as acquisitiveness—there may never be enough buffers."8 The large self-conception of the United States could lead to a tendency to intervene everywhere that this greater self might conceivably be at risk of, for example, losing access to markets. Thus, a conception of the self that justifies legitimate preemption in self-defense must be narrowly confined to immediate risks to life and health within borders or to the life and health of citizens abroad. THRESHOLD AND CONDUCT OF JUSTIFIED PREEMPTION The Bush administration is correct to emphasize the United States's vulnerability to terrorist attack. The administration also argues that the United States cannot wait for a smoking gun if it comes in the form of a mushroom cloud. There may be little or no evidence in advance of a terrorist attack using nuclear, chemical, or biological weapons. Yet, under this view, the requirement for evidence is reduced to a fear that the other has, or might someday acquire, the means for an assault. But the bar for preemption seems to be set too low in the Bush administration's National Security Strategy. How much and what kind of evidence is necessary to justify preemption? What is a credible fear that justifies preemption? As Michael Walzer has argued persuasively in Just and Unjust Wars, simple fear cannot be the only criterion. Fear is omnipresent in the context of a terrorist campaign. And if fear was once clearly justified, when and how will we know that a threat has been significantly reduced or eliminated? The nature of fear may be that once a group has suffered a terrible surprise attack, a government and people will, justifiably, be vigilant. Indeed they may, out of fear, be aware of threats to the point of hypervigilance—seeing small threats as large, and squashing all potential threats with enormous brutality. The threshold for credible fear is necessarily lower in the context of contemporary counterterrorism war, but the consequences of lowering the threshold may be increased instability and the premature use of force. If this is the case, if fear justifies assault, then the occasions for attack will potentially be limitless since, according to the Bush administration’s own arguments, we cannot always know with certainty what the other side has, where it might be located, or when it might be used. If one attacks on the basis of fear, or suspicion that a potential adversary may someday have the intention and capacity to harm you, then the line between preemptive and preventive war has been crossed. Again, the problem is knowing the capabilities and intentions of potential adversaries. There is thus a fine balance to be struck. The threshold of evidence and warning cannot be too low, where simple apprehension that a potential adversary might be out there somewhere and may be acquiring the means to do the United States harm triggers the offensive use of force. This is not preemption, but paranoid aggression. We must, as stressful as this is psychologically, accept some vulnerability and uncertainty. We must also avoid the tendency to exaggerate the threat and inadvertently to heighten our own fear. For example, although nuclear weapons are more widely available than in the past, as are delivery vehicles of medium and long range, these forces are not yet in the hands of dozens of terrorists. A policy that assumes such a dangerous world is, at this historical juncture, paranoid. We must, rather than assume this is the present case or will be in the future, work to make this outcome less likely. On the other hand, the threshold of evidence and warning for justified fear cannot be so high that those who might be about to do harm get so advanced in their preparations that they cannot be stopped or the damage limited. What is required, assuming a substantial investment in intelligence gathering, assessment, and understanding of potential advisories, is a policy that both maximizes our understanding of the capabilities and intentions of potential adversaries and minimizes our physical vulnerability. While uncertainty about intentions, capabilities, and risk can never be eliminated, it can be reduced. Fear of possible future attack is not enough to justify preemption. Rather, aggressive intent, coupled with a capacity and plans to do immediate harm, is the threshold that may trigger justified preemptive attacks. We may judge aggressive intent if the answer to these two questions is yes: First, have potential aggressors said they want to harm us in the near future or have they harmed us in the recent past? Second, are potential adversaries moving their forces into a position to do significant harm? While it might be tempting to assume that secrecy on the part of a potential adversary is a sure sign of aggressive intentions, secrecy may simply be a desire to prepare a deterrent force. After all, potential adversaries may feel the need to look after their own defense against their neighbors or even the United States. We cannot assume that all forces in the world are aimed offensively at the United States and that all want to broadcast their defensive preparations—especially if that means they might become the target of a preventive offensive strike by the United States. The conduct of preemptive actions must be limited in purpose to reducing or eliminating the immediate threat. Preemptive strikes that go beyond this purpose will, reasonably, be considered aggression by the targets of such strikes. Those conducting preemptive strikes should also obey the jus in bello limits of just war theory, specifically avoiding injury to noncombatants and avoiding disproportionate damage. For example, in the case of the plans for the September 11, 2001, attacks, on these criteria—and assuming intelligence warning of preparations and clear evidence of aggressive intent—a justifiable preemptive action would have been the arrest of the hijackers of the four aircraft that were to be used as weapons. But, prior to the attacks, taking the war to Afghanistan to attack al-Qaeda camps or the Taliban could not have been justified preemption. THE RISKS OF PREVENTIVE WAR Foreign policies must not only be judged on grounds of legality and morality, but also on grounds of prudence. Preemption is only prudent if it is limited to clear and immediate dangers and if there are limits to its conduct—proportionality, discrimination, and limited aims. If preemption becomes a regular practice or if it becomes the cover for a preventive offensive war doctrine, the strategy then may become self-defeating as it increases instability and insecurity. Specifically, a legitimate preemptive war requires that states identify that potential aggressors have both the capability and the intention of doing great harm to you in the immediate future. However, while capability may not be in dispute, the motives and intentions of a potential adversary may be misinterpreted. Specifically, states may mobilize in what appear to be aggressive ways because they are fearful or because they are aggressive. A preemptive doctrine which has, because of great fear and a desire to control the international environment, become a preventive war doctrine of eliminating potential threats that may materialize at some point in the future is likely to create more of both fearful and aggressive states. Some states may defensively arm because they are afraid of the preemptive-preventive state; others may arm offensively because they resent the preventive war aggressor who may have killed many innocents in its quest for total security. In either case, whether states and groups armed because they were afraid or because they have aggressive intentions, instability is likely to grow as a preventive war doctrine creates the mutual fear of surprise attack. In the case of the U.S. preemptive-preventive war doctrine, instability is likely to increase because the doctrine is coupled with the U.S. goal of maintaining global preeminence and a military force "beyond challenge."9 Further, a preventive offensive war doctrine undermines international law and diplomacy, both of which can be useful, even to hegemonic powers. Preventive war short-circuits nonmilitary means of solving problems. If all states reacted to potential adversaries as if they faced a clear and present danger of imminent attack, security would be destabilized as tensions escalated along already tense borders and regions. Article 51 of the UN Charter would lose much of its force. In sum, a preemptive-preventive doctrine moves us closer to a state of nature than a state of international law. Moreover, while preventive war doctrines assume that today's potential rival will become tomorrow’s adversary, diplomacy or some other factor could work to change the relationship from antagonism to accommodation. As Otto von Bismarck said to Wilhelm I in 1875, "I would . . . never advise Your Majesty to declare war forthwith, simply because it appeared that our opponent would begin hostilities in the near future. One can never anticipate the ways of divine providence securely enough for that."10 One can understand why any administration would favor preemption and why some would be attracted to preventive wars if they think a preventive war could guarantee security from future attack. But the psychological reassurance promised by a preventive offensive war doctrine is at best illusory, and at worst, preventive war is a recipe for conflict.

Preventive wars are imprudent because they bring wars that might not happen and increase resentment. They are also unjust because they assume perfect knowledge of an adversary’s ill intentions when such a presumption of guilt may be premature or unwarranted. Preemption can be justified, on the other hand, if it is undertaken due to an immediate threat, where there is no time for diplomacy to be attempted, and where the action is limited to reducing that threat. There is a great temptation, however, to step over the line from preemptive to preventive war, because that line is vague and because the stress of living under the threat of war is great. But that temptation should be avoided, and the stress of living in fear should be assuaged by true prevention—arms control, disarmament, negotiations, confidence-building measures, and the development of international law.

### Impact uq

#### We control terminal impact uniqueness- war taboo strong and effective now. Norms matter- prevents miscalc and escalation

Beehner, 12 – Council on Foreign Relations senior writer; Truman National Security Project fellow

[Lionel, "Is There An Emerging ‘Taboo’ Against Retaliation?" The Smoke Filled Room, 7-13-12, thesmokefilledroomblog.com/2012/07/13/is-there-an-emerging-taboo-against-retaliation/, accessed 9-22-13, mss]

The biggest international news in the quiet months before 9/11 was the collision of a U.S. Navy spy aircraft and a PLA fighter jet in China, during which 24 American crew members were detained. Even though the incident was lampooned on SNL, there was real concern that the incident would blow up, damaging already-tense relations between the two countries. But it quickly faded and both sides reached an agreement. Quiet diplomacy prevailed. Flash-forward a decade later and we have a similar border incident of a spy plane being shot down between Turkey and Syria. Cue the familiar drumbeats for war on both sides. To save face, each side has ratcheted up its hostile rhetoric (even though Syria’s president did offer something of an admission of guilt). But, as in the spring of 2001, I wouldn’t get too worried. One of the least noted global norms to emerge in recent decades has been the persistence of state restraint in international relations. Retaliation has almost become an unstated taboo. Of course, interstate war is obviously not a relic of previous centuries, but nor is it as commonplace anymore, despite persistent flare-ups that have the potential to escalate to full-blown war. Consider the distinct cases of India and South Korea. Both have sustained serious attacks with mass casualties in recent years: South Korea saw 46 of its sailors killed after the Cheonan, a naval vessel, was sunk by North Korea; India saw 200 citizens killed by the Mumbai attacks, orchestrated by Islamist groups with links to Pakistani intelligence. Yet neither retaliated with military force. Why? The short answer might be: Because a response may have triggered a nuclear war (both Pakistan and North Korea are nuclear-armed states). So nukes in this case may have acted as a deterrent and prevented an escalation of hostilities. But I would argue that it was not the presence of nuclear weapons that led to restraint but rather normative considerations. South Korea and India are also both rising democratic powers with fast-growing economies, enemies along their peripheries, and the military and financial backing of the United States. Their leaders, subject to the whims of an electorate, may have faced domestic pressures to respond with force or suffer reputational costs. And yet no escalation occurred and war was averted. Again, I argue that this is because there is an emerging and under-reported norm of restraint in international politics. Even Russia’s invasion of Georgia in August 2008, which may at first appear to disprove this theory, actually upholds it: The Russians barely entered into Georgia proper and could easily have marched onto the capital. But they didn’t. The war was over in 5 days and Russian troops retreated to disputed provinces. Similarly, Turkey will not declare war on Syria, no matter how angry it is that Damascus shot down one of its spy planes. Quiet diplomacy will prevail. In 1999, Nina Tannenwald made waves by proclaiming the emergence of what she called a “nuclear taboo” – that is, the non-use of dangerous nukes had emerged as an important global norm. Are we witnessing the emergence of a similar norm for interstate war? Even as violence rages on in the form of civil war and internal political violence all across the global map, interstate conflict is increasingly rare. My point is not to echo Steven Pinker, whose latest book, The Better Angles of Our Nature, painstakingly details a “civilizing process” and “humanitarian revolution” that has brought war casualties and murder rates down over the centuries. I’m not fully convinced by his argument, but certainly agree with the observation that at the state level, a norm of non-retaliation has emerged. The question is why. Partly, war no longer makes as much sense as in the past because capturing territory is no longer as advantageous as it once was. We no longer live in a world where marauding throngs of Dothraki-like bandits – or what Mancur Olson politely called “non-stationary bandits” – seek to expand their writ over large unconquered areas. This goes on, of course, at the intrastate level, but the rationale for interstate war for conquest is no longer as strong. Interstate wars of recent memory — the Eritrea-Ethiopia conflicts of 1999 and 2005, the Russia-Georgia War of 2008 — upon closer inspection, actually look more like intrastate wars. The latter was fought over two secessionist provinces; the former between two former rebel leaders-turned-presidents who had a falling out. But if we have reached a norm of non-retaliation to threats or attacks, does that mean that deterrence is no longer valid? After all, if states know there will be no response, why not step up the level of attacks? I would argue that the mere threat of retaliation is enough, as evidenced by Turkish leaders’ harsh words toward Syria (there is now a de facto no-fly zone near their shared border). Still, doesn’t restraint send a signal of weakness and lack of resolve? After all, didn’t Seoul’s non-response to the Cheonan sinking only invite Pyongyang to escalate hostilities? Robert Jervis dismisses the notion that a tough response signals resolve as being overly simplified. The observers’ interpretation of the actor and the risks involved also matter. When Schelling writes about the importance of “saving face,” he describes it as the “interdependence of a country’s commitments; it is a country’s reputation for action, the expectations other countries have about its behavior.” Others note that the presence of nuclear weapons forces states, when attacked, to respond with restraint to avoid the risk of nuclear escalation. Hence, we get “limited wars” rather than full-blown conflicts, or what some deterrent theorists describe as the “stability-instability paradox.” This is not a new concept, of course: Thucydides quoted King Archimadus of Sparta: “And perhaps then they see that our actual strength is keeping pace with the language that we use, they will be more inclined to give way, since their land will still be untouched and, in making up their minds, they will be thinking of advantages which they still possess and which have not yet been destroyed.” There will be future wars between states, of course. But **the days when an isolated incident, such as a spy plane being shot down or a cross-border incursion, can unleash a chain of events that lead to interstate wars** I believe are largely over **because of the emergence of restraint as a powerful norm**ative force in international politics, not unlike Tannenwald’s “nuclear taboo.” Turkey and Syria will only exchange a war of words, not actual hostilities. To do otherwise would be a violation of this existing norm.

## Links

### A2 Link Defense

#### Their link defense is bullshit --- the mechanism is insufficient and unnecessary --- you can’t pay lip service to countries on what sovereignty means

**Travalio and Altenburg ’03** (Greg, Lawrence D. Stanley Professor of Law, Michael E. Moritz College of Law, The Ohio State University; and John, Colonel, Judge Advocate General's Corps, US Army Reserve, Spring, 4 Chi. J. Int'l L. 97)

The limitations on the right to use armed force stated earlier in this Article should be made explicit by the administration, lest the doctrine backfire when applied broadly by other states to justify aggression in the name of self-defense. Unless we clearly articulate both the justifications for our actions and, more importantly, the limitations on our conduct, as well as persuade the international community to accept these justifications and limitations, our restraint will mean little to the Russian government contemplating military action against Georgia, or to the Indian government considering its options in dealing with Pakistan. To date, the public pronouncements of the United States, which seem to impose few limits upon the use of military force in combating terrorism, will not deter the use of force. To the contrary, the breadth of these public statements will only encourage governments to resort to force. More importantly, however, this evolution seems to have spawned an entirely new doctrine--that of "preemption." First announced in a Presidential speech at West Point in June 2002, this doctrine asserts that the US maintains the right to strike first to eliminate weapons that might be used against us or supplied to terrorists. This is the basis, in large part, for the Administration's justification for military action against Iraq, and it is in our newest National Security Strategy. [53](http://www.lexis.com/research/retrieve?_m=6644d0e602cd0712da0435e0a5d1a3b0&docnum=29&_fmtstr=FULL&_startdoc=1&wchp=dGLbVtz-zSkAt&_md5=8e71d1b393cf982617a4d822297e0184&focBudTerms=prevent%21%20w/35%20preempt%21%20w/35%20international%20law&focBudSel=all#n53) It was recently reported that a classified appendix to the recently released National Strategy to Combat Weapons of Mass Destruction authorizes preemptive strikes on states and terrorist groups that are close to acquiring weapons of mass destruction or the long-range missiles capable of delivering them. [**54**](http://www.lexis.com/research/retrieve?_m=6644d0e602cd0712da0435e0a5d1a3b0&docnum=29&_fmtstr=FULL&_startdoc=1&wchp=dGLbVtz-zSkAt&_md5=8e71d1b393cf982617a4d822297e0184&focBudTerms=prevent%21%20w/35%20preempt%21%20w/35%20international%20law&focBudSel=all#n54) We contend that permitting the evolving rules of state responsibility to  [\*118]  metamorphose into a doctrine of preemption is both unnecessary and illadvised. The doctrine of preemption is not recognized by the international community and has been opposed in the past by the United States. In 1981, for example, the United Nations Security Council unanimously passed a resolution condemning Israel's preemptive attack on the Iraqi nuclear facility at Osiraq. [**55**](http://www.lexis.com/research/retrieve?_m=6644d0e602cd0712da0435e0a5d1a3b0&docnum=29&_fmtstr=FULL&_startdoc=1&wchp=dGLbVtz-zSkAt&_md5=8e71d1b393cf982617a4d822297e0184&focBudTerms=prevent%21%20w/35%20preempt%21%20w/35%20international%20law&focBudSel=all#n55) Furthermore, the vast majority of commentators reject any claim of a right to preemptive self-defense. The doctrine of preemption is not necessary to counter the terrorist threat and, more importantly, its potential costs outweigh its benefits. The requirements for state responsibility and for anticipatory self-defense, as articulated in this Article, provide a sufficient basis for the United States to act to prevent terrorist attacks and the use of weapons of mass destruction without entering the uncharted and previously prohibited waters of preemption. An open-ended doctrine of preemption is a Pandora's box we should be very reluctant to open.

### First Resort/zones

#### Their first resort mechanism link

Blank 12. [Laurie R. Blank, Targeted Strikes: The Consequences of Blurring the Armed Conflict and Self-Defense Justifications, Emory University School of Law Legal Studies Research Paper Series

Research Paper No. 12-217, <http://ssrn.com/abstract=1981379>]

One core purpose of the LOAC is the protection of innocent ¶ civilians by minimizing harm to civilians and civilian objects during ¶ wartime. Another is to enable effective military operations within ¶ the boundaries of the law. A central purpose of human rights law is ¶ the protection of individuals from violation of their rights and ¶ overreaching, even—and especially—during times of national ¶ emergency. Blurring the lines between armed conflict and self-defense and the targeting authority relevant to each legal regime ¶ directly affects all three of these critical goals. First, the hard-to-define parameters of an ongoing armed conflict with terrorist ¶ groups raise serious concerns about too many areas being ¶ subsumed within an area of armed conflict and the use of lethal ¶ force as a first resort. As more and more areas are viewed as part of ¶ the “zone of combat,” more innocent civilians will face the ¶ consequences of hostilities, whether unintended death, injury, or ¶ property damage. This result runs counter to both the LOAC and ¶ human rights law. The potential spillover between status-based¶ targeting and direct participation in the armed conflict framework ¶ and imminence and necessity (but without belligerent nexus) in ¶ the self-defense framework provoke similar consternation with ¶ regard to the protective and discriminating purposes of both ¶ bodies of law. ¶

#### The aff starts blurring those distinctions

Blank 12. [Laurie R. Blank, Targeted Strikes: The Consequences of Blurring the Armed Conflict and Self-Defense Justifications, Emory University School of Law Legal Studies Research Paper Series

Research Paper No. 12-217, <http://ssrn.com/abstract=1981379>]

Finally, effective implementation of and compliance with the ¶ law, whether the LOAC, the law of self-defense, or human rights ¶ law, depends on regular and respected mechanisms for ¶ enforcement. In the arena of international law, both formal ¶ (courts and tribunals) and informal (public opinion, response ¶ from other states) enforcement have value and effect. Any judicial ¶ body determining the lawfulness of state action or the criminal ¶ responsibility of individuals must first determine the applicable law ¶ in order to reach an appropriate result.141¶ When the legal regimes ¶ become blurred through repeated conflation, application of the ¶ law and thus enforcement will be hampered. The resulting ¶ consequence, of course, is that a lack of effective enforcement then ¶ undermines effective implementation of the law and protection of ¶ persons in the future. These problems often are highlighted in the ¶ more informal enforcement arena of media reporting, public ¶ opinion, advocacy reports, and other responses, where disputes ¶ over applicable law and appropriate analyses abound. When ¶ international or nongovernmental organization reports produce ¶ primarily disputes over which law is applied—rather than how the ¶ law is applied to the facts on the ground—the debate becomes ¶ centered on the law and legal disputes rather than on the victims, ¶ the perpetrators, and how to prevent legal violations in the future. ¶ The blurring of lines between armed conflict and self-defense takes ¶ these challenges to another level as well, however, creating a ¶ situation in which independent analysts may have difficulty ¶ identifying the key pieces of information necessary to an effective ¶ examination of the legality of the state’s policies and actions.

### 1AC Anderson

#### Anderson vote negs- justifies covert action which *wrecks* law

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

What Should Congress Do?

Does this analysis offer any practical policy prescriptions for Congress and the administration? The problem is not so much a need for new legislation to create new structures or new policies. The legislative category in which many instances of targeted killing might take place in the future already exists. The task for Congress and the administration, rather, is instead to preserve a category that is likely to be put under pressure in the future and, indeed, is already seen by many as a legal non-starter under international law. Before addressing what Congress should do in this regard, we might ask from a strictly strategic political standpoint whether, given that the Obama Administration is committed to this policy anyway, whether it is politically prudent to draw public attention to the issue at all. Israeli officials might be threatened with legal action in Spain; but so far no important actor has shown an appetite for taking on the Obama Administration. Perhaps it is better to let sleeping political dogs lie. These questions require difficult political calculations. However, the sources cited above suggest that even if no one is quite prepared at this moment to take on the Obama Administration on targeted killing, the intellectual and legal pieces of the challenge are already set up and on the table. Having asserted certain positions concerning human rights law and its application and the United States having unthinkingly abandoned its self-defense rationale for its policy, the play can be made at any time—at some later time in the Obama Administration or in the next Republican administration, prying apart the “American” position to create a de facto alliance among Democrats and Europeans and thereby undermining the ability of the United States to craft a unified American security strategy.101 The United States would be best served if the Obama Administration did that exceedingly rare thing in international law and diplomacy: Getting the United States out in front of the issue by making plain the American position, rather than merely reacting in surprise when its sovereign prerogatives are challenged by the international soft-law community. The deeper issue here is not merely a strategic and political one about targeted killing and drones but goes to the very grave policy question of whether it is time to **move beyond the careful ambiguity** of the CIA’s **authorizing** statute in referring to covert uses of force under the doctrines of vital national interest and self-defense. Is it time to abandon strategic ambiguity with regards to the Fifth Function and assert the right to use force in self-defense and yet in “peacetime”—that is, outside of the specific context of an armed conflict within the meaning of international humanitarian law? Quite possibly, the strategic ambiguity, in a world in which secrecy is more and more difficult, and in the general fragmentation of voice and ownership of international law, has lost its raison d’etre. This is a larger question than the one undertaken here, but on a range of issues including covert action, interrogation techniques, detention policy, and others, a general approach of **overt legislation** that removes ambiguity is to be preferred. The single most important role for Congress to play in addressing targeted killings, therefore, is the open, unapologetic, plain insistence that the American understanding of international law on this issue of self-defense is legitimate. The assertion, that is, that the United States sees its conduct as permissible for itself and for others. And it is the putting of congressional strength behind the official statements of the executive branch as the opinio juris of the United States, its **authoritative view** of what international law is on this subject. If this statement seems peculiar, that is because the task—as fundamental as it is—remains unfortunately poorly understood. Yet if it is really a matter of political consensus between Left and Right that targeted killing is a tool of choice for the United States in confronting its non-state enemies, then this is an essential task for Congress to play in support of the Obama Administration as it seeks to speak with a single voice for the United States to the rest of the world. The Congress needs to backstop the administration in asserting to the rest of the world— including to its own judiciary—how the United States understands international law regarding targeted killing. And it needs to make an unapologetic assertion that its views, while not dispositive or binding on others, carry international authority to an extent that relatively few others do—even in our emerging multi-polar world. International law traditionally, after all, accepts that states with particular interests, power, and impact in the world, carry more weight in particular matters than other states. The American view of maritime law matters more than does landlocked Bolivia’s. American views on international security law, as the core global provider of security, matter more than do those of Argentina, Germany or, for that matter, NGOs or academic commentators. But it has to speak—and speak loudly—if it wishes to be heard. It is an enormously important instance of the need for the United States to re-take “ownership” of international law— not as its arbiter, nor as the superpower alone, but as a very powerful, very important, and very legitimate sovereign state. Intellectually, continuing to squeeze all forms and instances of targeted killing by standoff platform under the law of IHL armed conflict is probably not the most analytically compelling way to proceed. It is certainly not a practical long-term approach. Not everyone who is an intuitively legitimate target from the standpoint of self-defense or vital national security, after all, will be already part of an armed conflict or combatant in the strict IHL sense. Requiring that we use such IHL concepts for a quite different category is likely to have the deleterious effect of deforming the laws of war, over the long term—starting, for example, with the idea of a “global war,” which is itself a certain deformation of the IHL concept of hostilities and armed conflict.

### 1AC robertrs

#### That Roberts card is neg ev --- gives obama the ability to start circumventing however he wants

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

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

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

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

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

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

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

THE WRONG QUESTION

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

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

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

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

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

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

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

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

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

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

LOWERING THE BAR

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

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

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

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

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

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

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

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

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

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

BEHIND CLOSED DOORS

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

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

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

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

But that’s not who is being targeted.

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

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

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

PEER PRESSURE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### 1AC Brooks

#### causes international backlash and allows Obama to make the term mean whatever he wants- causes circumvention

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

Mr. Chairman, I would like to turn now to the legal framework applicable to US drone strikes. Both the United States and the international community have long had rules governing armed conflicts and the use of force in national self-defense. These rules apply whether the lethal force at issue involves knives, handguns, grenades or weaponized drones. When drone technologies are used in traditional armed conflicts—on “hot battlefields” such as those in Afghanistan, Iraq or Libya, for instance – they pose no new legal issues. As Administration officials have stated, their use is subject to the same requirements as the use of other lawful means and methods of warfare.28 But if drones used in traditional armed conflicts or traditional self-defense situations present no “new” legal issues, some of the activities and policies enabled and facilitated by drone technologies **pose significant challenges to existing legal frameworks**. As I have discussed above, the availability of perceived low cost of drone technologies makes it far easier for the US to **“expand the battlefield**,” striking targets in places where it would be too dangerous or too politically controversial to send troops. Specifically, drone technologies enable the United States to strike targets deep inside foreign states, and do so quickly, efficiently and deniably. As a result, drones have become the tool of choice for so-called “targeted killing” – the deliberate targeting of an individual or group of individuals, whether known by name or targeted based on patterns of activity, inside the borders of a foreign country. It is when drones are used in targeted killings outside of traditional or “hot” battlefields that their use challenges existing legal frameworks. Law is almost always out of date: we make legal rules based on existing conditions and technologies, perhaps with a small nod in the direction of predicted future changes. As societies and technologies change, law increasingly becomes an exercise in jamming square pegs into round holes. Eventually, that process begins to do damage to existing law: it gets stretched out of shape, or broken. Right now, I would argue, US drone policy is on the verge of doing significant damage to the rule of law. A. The Rule of Law At root, the idea of “rule of law” is fairly simple, and well understood by Americans familiar with the foundational documents that established our nation, such as the Declaration of Independence, the Constitution and the Bill of Rights. The rule of law requires that governments follow transparent, clearly defined and universally applicable laws and procedures. The goal of the rule of law is to ensure predictability and stability, and to prevent the arbitrary exercise of power. In a society committed to the rule of law, the government cannot fine you, lock you up, or kill you on a whim -- it can restrict your liberty or take your property or life only in accordance with pre-established processes and rules that reflect basic notions of justice, humanity and fairness. Precisely what constitutes a fair process is debatable, but most would agree that at a minimum, fairness requires that individuals have reasonable notice of what constitutes the applicable law, reasonable notice that they are suspected of violating the law, a reasonable opportunity to rebut any allegations against them, and a reasonable opportunity to have the outcome of any procedures or actions against them reviewed by some objective person or body. These core values are enshrined both in the US Constitution and in international human rights law instruments such as the International Covenant on Civil and Political Rights, to which the United States is a party. In ordinary circumstances, this bundle of universally acknowledged rights (together with international law principles of sovereignty) means it is clearly unlawful for one state to target and kill an individual inside the borders of another state. Recall, for instance, the 1976 killing of Chilean dissident Orlando Letelier in Washington DC. When Chilean government intelligence operatives planted a car bomb in the car used by Letelier, killing him and a US citizen accompanying him, the United States government called this an act of murder—an unlawful political assassination. B. Targeted Killing and the Law of Armed Conflict Of course, sometimes the “ordinary” legal rules do not apply. In war, the willful killing of human beings is permitted, whether the means of killing is a gun, a bomb, or a long-distance drone strike. The law of armed conflict permits a wide range of behaviors that would be unlawful in the absence of an armed conflict. Generally speaking, the intentional destruction of private property and severe restrictions on individual liberties are impermissible in peacetime, but acceptable in wartime, for instance. Even actions that a combatant knows will cause civilian deaths are lawful when consistent with the principles of necessity, humanity, proportionality,29 and distinction.30 It is worth briefly explaining these principles. The principle of necessity requires parties to a conflict to limit their actions to those that are indispensible for securing the complete submission of the enemy as soon as possible (and that are otherwise permitted by international law). The principle of humanity forbids parties to a conflict to inflict gratuitous violence or employ methods calculated to cause unnecessary suffering. The principle of proportionality requires parties to ensure that the anticipated loss of life or property incidental to an attack is not excessive in relation to the concrete and direct military advantage expected to be gained. Finally, the principle of discrimination or distinction requires that parties to a conflict direct their actions only against combatants and military objectives, and take appropriate steps to distinguish between combatants and non-combatants.31 This is a radical oversimplification of a very complex body of law.32 But as with the rule of law, the basic idea is pretty simple. When there is no war -- when ordinary, peacetime law applies -- agents of the state aren't supposed to lock people up, take their property or kill them, unless they have jumped through a whole lot of legal hoops first. When there is an armed conflict, however, everything changes. War is not a legal free-for-all33 -- torture, rape are always crimes under the law of war, as is killing that is willful, wanton and not justified by military necessity34 -- but there are far fewer constraints on state behavior. Technically, the law of war is referred to using the Latin term “lex specialis” – special law. It is applicable in—and only in -- special circumstances (in this case, armed conflict), and in those special circumstances, it supersedes “ordinary law,” or “lex generalis,” the “general law” that prevails in peacetime. We have one set of laws for “normal” situations, and another, more flexible set of laws for “extraordinary” situations, such as armed conflicts. None of this poses any inherent problem for the rule of law. Having one body of rules that tightly restricts the use of force and another body of rules that is far more permissive does not fundamentally undermine the rule of law, as long as we have a reasonable degree of consensus on what circumstances trigger the “special” law, and as long as the “special law” doesn’t end up undermining the general law. To put it a little differently, war, with its very different rules, does not challenge ordinary law as long as war is the exception, not the norm -- as long as we can all agree on what constitutes a war -- as long as we can tell when the war begins and ends -- and as long as we all know how to tell the difference between a combatant and a civilian, and between places where there's war and places where there's no war. Let me return now to the question of drones and targeted killings. When all these distinctions I just mentioned are clear, the use of drones in targeted killings does not necessarily present any great or novel problem. In Libya, for instance, a state of armed conflict clearly existed inside the borders of Libya between Libyan government forces and NATO states. In that context, the use of drones to strike Libyan military targets is no more controversial than the use of manned aircraft. That is because our core rule of law concerns have mostly been satisfied: we know there is an armed conflict, in part because all parties to it agree that there is an armed conflict, in part because observers (such as international journalists) can easily verify the presence of uniformed military personnel engaged in using force, and in part because the violence is, from an objective perspective, widespread and sustained: it is not a mere skirmish or riot or criminal law enforcement situation that got out of control. We know who the “enemy” is: Libyan government forces. We know where the conflict is and is not: the conflict was in Libya, but not in neighboring Algeria or Egypt. We know when the conflict began, we know who authorized the use of force (the UN Security Council) and, just as crucially, we know whom to hold accountable in the event of error or abuse (the various governments involved).35 Once you take targeted killings outside hot battlefields, it’s a different story. The Obama Administration is currently using drones to strike terror suspects in Pakistan, Somalia, Yemen, and –perhaps—Mali and the Philippines as well. Defenders of the administration's increasing reliance on drone strikes in such places assert that the US is in an armed conflict with “al Qaeda and its associates,” and on that basis, they assert that the law of war is applicable -- in any place and at any time -- with regard to any person the administration deems a combatant. The trouble is, no one outside a very small group within the US executive branch has any ability to evaluate who is and who isn’t a combatant. The war against al Qaeda and its associates is not like World War II, or Libya, or even Afghanistan: it is an open-ended conflict with an inchoate, undefined adversary (who exactly are al Qaeda’s “associates”?). What is more, targeting decisions in this nebulous “war” are based largely on classified intelligence reporting. As a result, Administration assertions about who is a combatant and what constitutes a threat are entirely non-falsifiable, because they're based wholly on undisclosed evidence. Add to this still another problem: most of these strikes are considered covert action, so although the US sometimes takes public credit for the deaths of alleged terrorist leaders, most of the time, the US will not even officially acknowledge targeted killings. This leaves all the key rule-of-law questions related to the ongoing war against al Qaeda and its "associates" unanswered.36 Based on what criteria might someone be considered a combatant or directly participating in hostilities? What constitutes “hostilities” in the context of an armed conflict against a non-state actor, and what does it mean to participate in them? And just where is the war? Does the war (and thus the law of war) somehow "travel" with combatants? Does the US have a “right” to target enemy combatants anywhere on earth, or does it depend on the consent of the state at issue? Who in the United States government is authorized to make such determinations, and what is the precise chain of command for such decisions? I think the rule of law problem here is obvious: when “armed conflict” becomes a term flexible enough to be applied both to World War II and to the relations between the United States and “associates” of al Qaeda such as Somalia’s al Shabaab, the concept of armed conflict is not very useful anymore. And when we lack clarity and consensus on how to recognize “armed conflict,” we no longer have a clear or principled basis for deciding how to categorize US targeted killings. Are they, as the US government argues, legal under the laws of war? Or are they, as some human rights groups have argued, unlawful murder? C. Targeted Killing and the International Law of Self-Defense When faced with criticisms of the law of war framework as a justification for targeted killing, Obama Administration representatives often shift tack, arguing that international law rules on national self-defense provide an alternative or additional legal justification for US targeted killings. Here, the argument is that if a person located in a foreign state poses an "imminent threat of violent attack" against the United States, the US can lawfully use force in self-defense, provided that the defensive force used is otherwise consistent with law of war principles. Like law of war-based arguments, this general principle is superficially uncontroversial: if someone overseas is about to launch a nuclear weapon at New York City, no one can doubt that the United States has a perfect right (and the president has a constitutional duty) to use force if needed to prevent that attack, regardless of the attacker's nationality. But once again, the devil is in the details. To start with, what constitutes an "imminent" threat? Traditionally, both international law and domestic criminal law understand that term narrowly: 37 to be "imminent," a threat cannot be distant or speculative.38 But much like the Bush Administration before it, the Obama Administration has put forward an interpretation of the word “imminent” that bears little relation to traditional legal concepts. According to a leaked 2011 Justice Department white paper39—the most detailed legal justification that has yet become public-- the requirement of imminence "does not require the United States to have clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future." This seems, in itself, like a substantial departure from accepted international law definitions of imminence. But the White Paper goes even further, stating that "certain members of al Qaeda are continually plotting attacks...and would engage in such attacks regularly [if] they were able to do so, [and] the US government may not be aware of all... plots as they are developing and thus cannot be confident that none is about to occur." For this reason, it concludes, anyone deemed to be an operational leader of al Qaeda or its "associated forces" presents, by definition, an imminent threat even in the absence of any evidence

whatsoever relating to immediate or future attack plans. In effect, the concept of "imminent threat" (part of the international law relating to self-defense) becomes conflated with identity or status (a familiar part of the law of armed conflict). That concept of imminence has been called Orwellian, and although that is an overused epithet, in this context it seems fairly appropriate. According to the Obama Administration, “imminent” no longer means “immediate,” and in fact the very absence of clear evidence indicating specific present or future attack plans becomes, paradoxically, the basis for assuming that attack may perpetually be “imminent.” The 2011 Justice Department White Paper notes that the use of force in self-defense must comply with general law of war principles of necessity, proportionality, humanity, and distinction. The White Paper offers no guidance on the specific criteria for determining when an individual is a combatant (or a civilian participating directly in hostilities), however. It also offers no guidance on how to determine if a use of force is necessary or proportionate. From a traditional international law perspective, this necessity and proportionality inquiry relates both to imminence and to the gravity of the threat itself, but so far there has been no public Administration statement as to how the administration interprets these requirements. Is any threat of "violent attack" sufficient to justify killing someone in a foreign country, including a U.S. citizen? Is every potential suicide bomber targetable, or does it depend on the gravity of the threat? Are we justified in drone strikes against targets who might, if they get a chance at some unspecified future point, place an IED that might, if successful, kill one person? Ten people? Twenty? 2,000? How grave a threat must there be to justify the use of lethal force against an American citizen abroad -- or against non-citizens, for that matter? As I have noted, it is impossible for outsiders to fully evaluate US drone strikes, since so much vital information remains classified. In most cases, we know little about the identities; activities or future plans of those targeted. Nevertheless, given the increased frequency of US targeted killings in recent years, it seems reasonable to wonder whether the Administration conducts a rigorous necessity or proportionality analysis in all cases. So far, the leaked 2011 Justice Department White Paper represents the most detailed legal analysis of targeted killings available to the public. It is worth noting, incidentally, that this White Paper addresses only the question of whether and when it is lawful for the US government to target US citizens abroad. We do not know what legal standards the Administration believes apply to the targeting of non-citizens. It seems reasonable to assume, however, that the standards applicable to non-citizens are less exacting than those the Administration views as applicable to citizens. Defenders of administration targeted killing policy acknowledge that the criteria for determining how to answer these many questions have not been made public, but insist that this should not be cause for concern. The Administration has reportedly developed a detailed “playbook” outlining the targeting criteria and procedures,40, and insiders insist that executive branch officials go through an elaborate process in which they carefully consider every possible issue before determining that a drone strike is lawful.41 No doubt they do, but this is somewhat cold comfort. Formal processes tend to further normalize once-exceptional activities -- and "trust us" is a rather shaky foundation for the rule of law. Indeed, the whole point of the rule of law is that individual lives and freedom should not depend solely on the good faith and benevolence of government officials. As with law of war arguments, stating that US targeted killings are clearly legal under traditional self-defense principles requires some significant cognitive dissonance. Law exists to restrain untrammeled power. It is no doubt possible to make a plausible legal argument justifying each and every U.S. drone strike -- but this merely suggests that we are working with a legal framework that has begun to outlive its usefulness. The real question isn't whether U.S. drone strikes are "legal." The real question is this: Do we really want to live in a world in which the U.S. government's justification for killing is so malleable? 5. Setting Troubling International Precedents Here is an additional reason to worry about the U.S. overreliance on drone strikes: Other states will follow America's example, and the results are not likely to be pretty. Consider once again the Letelier murder, which was an international scandal in 1976: If the Letelier assassination took place today, the Chilean authorities would presumably insist on their national right to engage in “targeted killings” of individuals deemed to pose imminent threats to Chilean national security -- and they would justify such killings using precisely the same legal theories the US currently uses to justify targeted killings in Yemen or Somalia. We should assume that governments around the world—including those with less than stellar human rights records, such as Russia and China—are taking notice. Right now, the United States has a decided technological advantage when it comes to armed drones, but that will not last long. We should use this window to advance a robust legal and normative framework that will help protect against abuses by those states whose leaders can rarely be trusted. Unfortunately, we are doing the exact opposite: **Instead of articulating norms** about transparency and accountability, the United States is effectively handing China, Russia, and every other repressive state a playbook for how to foment instability and –literally -- get away with murder. Take the issue of sovereignty. Sovereignty has long been a core concept of the Westphalian international legal order.42 In the international arena, all sovereign states are formally considered equal and possessed of the right to control their own internal affairs free of interference from other states. That's what we call the principle of non-intervention -- and it means, among other things, that it is generally prohibited for one state to use force inside the borders of another sovereign state. There are some well-established exceptions, but they are few in number. A state can lawfully use force inside another sovereign state with that state's invitation or consent, or when force is authorized by the U.N. Security Council, pursuant to the U.N. Charter,43 or in self-defense "in the event of an armed attack." The 2011 Justice Department White Paper asserts that targeted killings carried out by the United States don't violate another state's sovereignty as long as that state either consents or is "unwilling or unable to suppress the threat posed by the individual being targeted." That sounds superficially plausible, but since the United States views itself as the sole arbiter of whether a state is "unwilling or unable" to suppress that threat, the logic is in fact circular. It goes like this: The United States -- using its own malleable definition of "imminent" -- decides that Person X, residing in sovereign State Y, poses a threat to the United States and requires killing. Once the United States decides that Person X can be targeted, the principle of sovereignty presents no barriers, because either 1) State Y will consent to the U.S. use of force inside its borders, in which case the use of force presents no sovereignty problems or 2) State Y will not consent to the U.S. use of force inside its borders, in which case, by definition, the United States will deem State Y to be "unwilling or unable to suppress the threat" posed by Person X and the use of force again presents no problem. This is a legal theory that more or less eviscerates traditional notions of sovereignty, and has the potential to **significantly destabilize** the already shaky collective security regime created by the U.N. Charter.44 If the US is the sole arbiter of whether and when it can use force inside the borders of another state, any other state strong enough to get away with it is likely to claim similar prerogatives. And, of course, **if the US executive branch is the sole arbiter** of what constitutes an imminent threat and who constitutes a targetable enemy combatant in an ill- defined war, why shouldn’t other states make identical arguments—and use them to justify the killing of dissidents, rivals, or unwanted minorities?

# CP

### 1nc

The United States Federal Government should restrict the executive’s war power authority to use targeted killing as a first resort outside zones of active hostilities.

vs

#### The United States Federal Government should restrict the executive’s war power authority to conduct targeted killing within spatial zones triggered by the Common Articles of distinction, proportionality, military necessity, and humanity defined under the Geneva Convention

#### The CP is competitive and net-beneficial: restricting to SPATIAL terms RATHER THAN TERRITORIAL is key to minimize global conflict by respecting international armed conflict norms rather than fight it endlessly under USFG discretion --- the aff violates international law and triggers ALL of their impacts

BLANK 2010, Director, International Humanitarian Law Clinic, Emory Law School, Laurie R., 9/16/10, “DEFINING THE BATTLEFIELD IN CONTEMPORARY CONFLICT AND COUNTERTERRORISM: UNDERSTANDING THE PARAMETERS OF THE ZONE OF COMBAT,” Georgia Journal of International and Comparative Law, Vol. 39, No. 1, 2010, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1677965>

In an age of conflict where new terminologies abound, the “zone of combat” may seem to be **simply another descriptive term** that offers a clearer representation of real life than its antecedent. Today’s conflicts are not fought out in the open with artillery batteries and scores of infantrymen lined up in trenches. Rather, when soldiers fight in densely populated urban environments, drones track suspected terrorists across borders, and terrorists attempt to detonate bombs in subways, major tourist destinations, and other civilian locales, the battlefield does indeed seem to be a term from days gone by. In a purely descriptive sense, therefore, “zone of combat” may well have great value.

Like many other now-common terms, however, such as enemy combatant, the concept of the “zone of combat” also raises important and interesting legal questions. The Bush administration argued that “the battlefield in the global war on terror extends to every corner of the US itself”7—including locations where suspected al Qaeda sleeper agents were awaiting instructions but not yet carrying out attacks. Interestingly, although the courts in response have generally accepted the concept of an enemy combatant and detention related to that status, they have taken a limited view of the zone of combat in the present struggle.8

In cases regarding detainees at Guantanamo Bay or the Bagram Theater Internment Facility at Bagram Airfield and others arrested in the U.S., the courts have consistently referred to the U.S. as “outside a zone of combat,”9 “distant from a zone of combat,”10 or not within any “active [or formal] theater of war,”11 even while recognizing the novel geographic nature of the conflict. As one court noted, comparing the arrest of Yaser Hamdi— captured after a firefight in Afghanistan—to Jose Padilla—captured upon disembarking a plane at Chicago’s O’Hare airport—would be akin to comparing apples and oranges, showing that the court saw a distinct difference between the characterization of the U.S. and that of Afghanistan.12 Even more recently, in Al Maqaleh v. Gates, both the D.C. District Court and the Court of Appeals for the D.C. Circuit distinguished between Afghanistan, “a theater of active military combat,”13 and other areas outside Afghanistan (including the U.S.), which are described as “far removed from any battlefield.”14

Much has been and will continue to be written about the acceptable responses to terrorist attacks, the appropriate law to be applied to persons within the combat zone and/or suspected of involvement in such attacks, and related issues. One threshold set of questions involves the very nature of the struggle against terrorism, whether in the form of al Qaeda or other groups— it could be a law enforcement action, an armed conflict, a hybrid of the two, or perhaps even something else entirely.15 Scholars and practitioners will continue to debate these questions for quite some time, given the complexity of both the facts on the ground and the interaction of the relevant legal regimes.

This Article will focus on a related question, but one that has not yet been asked: where can we conduct an armed conflict against terrorist groups? Questions of whether the law of armed conflict applies to conflicts with al Qaeda or other terrorist groups are beyond the scope of this Article. Rather, accepting that the United States views itself as engaged “in an armed conflict with al-Qaeda, as well as the Taliban and associated forces,”16 this Article will focus on two hitherto unexamined issues—when and for how long is an area part of the zone of combat, and how far does this designation extend geographically. Although questions of applicable law have been central to legal and policy discussions for the past several years, these issues have remained below the surface and in the shadows. These questions of where and when with regard to the zone of combat are **critical foundational questions** that bear directly on the applicable law within (and without) the zone of combat.

Part I sets forth the traditional conception of the battlefield or zone of combat operations, in both the law of neutrality and the law of armed conflict. The law of neutrality defines the relationship between states engaged in armed conflict and those not participating.17 The Law of Armed Conflict (LOAC) governs the **conduct of both states and individuals** during armed conflict and seeks to minimize suffering in war by protecting persons not participating in hostilities and by **restricting the means and methods** of warfare. 18 These frameworks can demonstrate both how these legal regimes the zone of combat and where the traditional parameters fall short.

Part II then examines the nature of the zone of combat in contemporary conflict and counterterrorism operations to illustrate why the geographic and temporal scope of the battlefield is a critical issue in such conflicts. Because the traditional frameworks fall short in delineating the parameters of the zone of combat, we need to analyze how to better define the temporal and geographic scope of the conflict. For example, if an al Qaeda member is walking down the street in Vancouver, Oslo, or Santiago, is that area necessarily—or not—part of the zone of combat? In Part III, general principles of LOAC and concepts drawn from LOAC’s analysis of noninternational armed conflict suggest three primary factors to consider in delineating the zone of combat: the nature of the hostilities, the government response, and the territorial connections or attachments of the relevant terrorist group or actors.

Using these factors, this Article proposes parameters for conceptualizing the zone of combat, drawing on traditional conceptions of the battlefield and contemporary understandings of armed conflict and operational counterterrorism. By understanding where and when the relevant legal constructs are applicable, we will have a better understanding of the framework within which operational decisions must be made. The policy implications of different legal approaches play an important role, given the ramifications that varying parameters of the zone of combat can have for both national security and individual liberty interests.

II. TRADITIONAL BATTLEFIELD PARAMETERS

Naturally limited—and triggered—by the existence of an armed conflict, LOAC provides guidance for understanding the temporal and geographic scope of armed conflict. Indeed, “[t]he laws of war operate within temporal and geographic realms; considerable attention is given to when it can be said that an ‘armed conflict’ has arisen and ended, and also to where it is that protected persons are located . . . .”19 The temporal and geographic scope, in turn, provides parameters for where and when to apply LOAC’s rights and obligations to persons within that area. LOAC thus offers a paradigm for understanding the parameters of the zone of combat that other legal frameworks—such as human rights law or domestic criminal law—cannot necessarily offer because they do not have any comparable framework for determining applicability.

A. Belligerent Territory and Neutral Territory

Although in any international conflict there will be many states that remain neutral, the nature of an interconnected, globalized world is such that neutrals cannot simply turn a blind eye to a conflict between two or more other countries. Neutrality thus signals the dividing line between the application of the laws of neutrality and the laws of war.20 It thus provides an uncontestable framework for where and when hostilities can be conducted—the very questions that remain so difficult to answer in today’s counterterrorism operations and conflicts with non-state actors and terrorist groups.

Traditionally, states are either belligerents or neutrals during an armed conflict. As Oppenheim explained, “Such States as do not take part in a war between other States are neutrals.”21 The law of neutrality “defines the relationship under international law between states engaged in an armed conflict and those that are not participating in that armed conflict.”22 Based on the fundamental principle that neutral territory is inviolable,23 neutrality law seeks to (1) contain the spread of hostilities, particularly by keeping down the number of participants; (2) define the legal rights of parties and nonparties to the conflict; and (3) limit the impact of war on nonparticipants, especially with regard to commerce.24 Neutrality law thus leads to a geographic-based framework in which belligerents can fight on belligerent territory or the commons but must refrain from any operations on neutral territory. In essence, the battlespace in a traditional armed conflict between two or more states is anywhere outside the sovereign territory of any of the neutral states.25 In a conflict involving many states, such as World War II, for example, the battlefield—or the areas where states could conduct hostilities—certainly extended across the globe, but did not include neutral territory.

The Hague Convention V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land of 1907 (Hague V) sets forth neutrality law’s basic principles.26 Beyond upholding the inviolability of neutral territory, Hague V prohibits the movement of belligerent troops or materiel across neutral territory27 and the use of military installations or communications facilities on neutral territory.28 In addition, belligerent states may not attack targets in neutral territory, unless, as stated below, the neutral state fails to ensure its territory is not used for belligerent purposes.29

For its part, a neutral power must not provide, or enable the provision of, military supplies to any belligerent,30 nor allow its territory to be used for military operations.31 Indeed, it may use force—as necessary and within its capability—to prevent belligerent powers from using its territory for warmaking purposes.32 To the extent a neutral state is unable or unwilling to prevent the use of its territory for such purposes, “a belligerent state may become entitled to use force in self-defence against enemy forces operating from the territory of that neutral state,”33 based on the ordinary rules governing the resort to force

B. LOAC’s Geographic and Temporal Parameters

Beyond the belligerent-neutral paradigm, LOAC provides an **alternative way** to identify temporal and spatial boundaries or, at a minimum, to highlight useful criteria for doing so. Although the Geneva Conventions do not specifically delineate the geographic boundaries of conflict, both Common Article 2 and Common Article 3 take a geographic approach in some way. Common Article 2, which speaks of “all cases of declared war or . . . any other armed conflict which may arise between two or more of the High Contracting Parties,”34 brings the law of neutrality and the division between belligerents and neutrals directly into play. In the event of such a conflict, the theater of war—to use one descriptive term—would be anywhere the forces of two belligerents come into contact or are otherwise using force, such as to attack civilians, outside neutral territory. For noninternational armed conflicts, Common Article 3 refers to conflict “occurring in the territory of one of the High Contracting Parties,”35 suggesting that, at a minimum, the territory of the state in which the conflict is taking place forms part of the geographic area of conflict.

The Geneva Conventions do provide some guidance regarding the temporal scope of armed conflict, referring to the “cessation of active hostilities”36 and the “general close of military operations.”37 When the Conventions were drafted, the general close of military operations was considered to be “when the last shot has been fired.”38 The Commentary to the Fourth Geneva Convention offers further detail, explaining:

When the struggle takes place between two States the date of the close of hostilities is fairly easy to decide: it will depend either on an armistice, a capitulation or simply on debellatio. On the other hand, when there are several States on one or both of the sides, the question is harder to settle. It must be agreed that in most cases the general close of military operations will be the final end of all fighting between all those concerned.39

This approach is based, above all, on a practical understanding of the facts on the ground and not on the formalities of armistice, peace treaty or other legal instrument.40 One final issue relates to the frequency or sustained nature of the violence. Although the International Criminal Tribunal for the Former Yugoslavia (ICTY) speaks of “protracted armed violence”41 in defining noninternational armed conflict in Prosecutor v. Tadic, hostilities need not be continuous to qualify as armed conflict or for LOAC to apply constantly throughout the conflict.42 Beyond this limited guidance from the conventions and the commentaries, we can look to international jurisprudence for some additional understanding of the geographic and temporal parameters of armed conflict. In Tadic, the ICTY stated that LOAC mandates a broad geographic and temporal scope for armed conflict.43 Referring to various provisions in the Geneva Conventions demonstrating that their protections extend beyond the actual fighting, the Tadic Appeals Chamber declared that in both internal and international armed conflicts, the temporal and geographic limits range beyond the exact time and place of hostilities.44 The Tribunal held that:

[i]nternational humanitarian law applies from the initiation of . . . armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.45

As the Tribunal’s examination of relevant provisions in the Geneva Conventions demonstrates, the purpose of such a broad scope is to ensure the maximum protection for all persons engaged in or caught up in the conflict.

As an example, Common Article 3 refers to persons “taking no active part¶ in the hostilities,”46 including members of armed forces who have laid down¶ their arms and those who are hors de combat, suggesting that the protections¶ in that article must apply outside the limited locations of actual combat¶ operations.47 Provisions in the Third and Fourth Geneva Conventions¶ relating to the protection of prisoners of war and civilians, respectively,¶ demonstrate that the law applies anywhere within the territory of the parties¶ to the conflict, not simply where hostilities are taking place.48 Similarly,¶ Article 5 of the First Geneva Convention provides that “[f]or the protected¶ persons who have fallen into the hands of the enemy, the present Convention¶ shall apply until their final repatriation.”49 These protections mandate a¶ broad temporal scope as well to ensure that such persons are protected¶ whenever they are in the hands of the enemy party, not just during combat¶ operations. Thus, there need not be actual fighting taking place at all times¶ in every area for such areas to be part of the conflict.50 The next step then is¶ to examine whether this framework can help in determining the boundaries¶ of the zone of combat in today’s conflicts.

III. APPLYING GEOGRAPHIC AND TEMPORAL PARAMETERS TO¶ CONTEMPORARY CONFLICTS

This Article’s central question—where is the battlefield in the conflict with terrorists and how long does it remain the battlefield—is a **fundamental** and critical **component** of understanding the **parameters** of state action in combating terrorism. In traditional conflicts, military operations could take place beyond the territory of any neutral party.51 Today’s conflicts, however, pit states against non-state entities; actors and groups who often do not have any territorial nexus beyond wherever they can find safe haven from government intrusion. As state and non-state actors¶ have often shifted unpredictably and irregularly between acts characteristic of wartime and those characteristic of notwartime[, t]he unpredictable and irregular nature of these shifts makes it difficult to know whether at any given moment one should understand them as armies and their enemies or as police forces and their criminal adversaries.52

Once we are outside the traditional belligerent-neutral framework that defined the traditional battlespace, determining the parameters of the contemporary battlefield or zone of combat becomes significantly more complicated. In addition, while human rights law—applicable in peacetime or wartime—treats the use of force in response to a threat as a measure of last resort,53 LOAC contemplates—indeed authorizes—the use of force as a first resort against legitimate targets.54 Thus, above all else, when leaders invoke the battlefield or the zone of combat, they seek to harness the authority to use force as a first resort against those identified as the enemy (terrorists, insurgents, etc.). For this reason alone, it is critical to understand both the parameters of the zone of combat and the ramifications of identifying particular areas as falling within that zone of combat.

A. Contemporary Combat Scenarios: Describing the Zone of Combat

At present, the overwhelming proportion of U.S. military forces are deployed to Afghanistan and Iraq and almost all actual combat operations are taking place in those two locales. There is little doubt that Afghanistan and Iraq form part of the zone of combat and a corresponding recognition that the entire territory of each country forms part of that zone of combat.55 The “global war on terror” is not limited to Afghanistan and Iraq, however. Identifying when other areas become a zone of combat—or form part of a broader zone of combat—as a result of terrorist attacks or subsequent military operations proves challenging and has significant legal and policy ramifications.

1. Terrorist Activities and Attacks

A look at major terrorist attacks in the past nine years shows a wide geographic scope and an obvious focus on major metropolitan areas where civilian casualties, and therefore impact, are maximized. Europe, Africa, Asia—the attacks span the globe and, for many, lend credence to the label “global war on terror.” Among countless others in a range of countries, the following are some of the major attacks in the past decade. On October 12, 2002, an Indonesian terrorist group bombed a Bali discotheque popular with Western tourists, killing over 200 people.56 The March 2004 Madrid train bombing killed 191 people and wounded nearly two thousand, the worst terror attack on European soil since the 1988 Lockerbie bombing.57 On July 7, 2005, three suicide bombers hit the London subway and a bomb exploded on a double-decker bus, killing fifty-two and wounding more than seven hundred.58 Mumbai has been the site of two horrific attacks in the past four years, starting with the July 2006 bombings of the Suburban Railway that killed 209 and wounded more than seven hundred.59 Two years later, armed gunmen opened fire at eight sites in a coordinated attack, including a train station, Western hotels, a hospital, a Chabad house, restaurants, and a police station.60

Al Qaeda and other terrorist groups—working alone or in concert, affiliated or independent—have also attempted attacks on U.S. soil or on aircraft traveling to the U.S. In December 2001, Richard Reid, now known as the shoe bomber, tried to detonate an explosive in his shoe on an American Airlines flight from the United Kingdom to Boston.61 A few years later, in August 2006, authorities in the United Kingdom arrested eight men plotting to use liquid explosives to blow up seven airliners en route from London’s Heathrow Airport to the United States.62 Finally, on Christmas Day 2009, Umar Farouk Abdulmutallab attempted to detonate explosives on a Northwest Airlines flight to Detroit.63 U.S. authorities have disrupted and foiled numerous other plots within the United States as well and some attempted attacks have simply failed. Most recently, Faisal Shahzad tried to detonate a car bomb in Times Square in New York City on May 1, 2010.64 Shahzad was subsequently arrested as he tried to leave the country two days later and pleaded guilty in June 2010.65 Other attempts include Jose Padilla’s dirty bomb, the planned attack on the New York City tunnels, and newly revealed plots for twin transit attacks in New York and London.66

In recent years, al Qaeda has begun to retreat from Afghanistan and has regrouped and reorganized in Pakistan’s Northwest Frontier Province and Swat Valley. It has also formed offshoots in Iraq, known as al Qaeda in Mesopotamia, largely ousted by U.S. and allied forces.67 Outside these areas, however, reports suggest that al Qaeda operates and finds sanctuary in a variety of other countries, in particular Yemen, Somalia and the Philippines.68 Al Qaeda has long recruited in or drawn adherents from Yemen and, in recent years, “a resurgent Yemen-based al Qaeda wing that has been trying to strengthen its foothold in the Arabian peninsula state” has made its home in Maarib Province.69 By 2009, al Qaeda leaders from Saudi Arabia had merged with existing al Qaeda forces in Yemen to form Al Qaeda in the Arabian Peninsula, in essence creating a regional franchise.70

Al Qaeda’s influence and foothold in Somalia have grown since Ethiopia’s invasion to overthrow the Islamic Courts Union and install the Transitional Federal Government.71 “Foreign fighters trained in Afghanistan are gaining influence inside Somalia's al-Shabab militia, fueling a radical Islamist insurgency with ties to Osama bin Laden, according to Somali intelligence officials, former al-Shabab fighters and analysts.”72 Finally, al Qaeda has long had a presence in the Philippines, although more as a facilitator for the local insurgent groups, Jemaah Islamiyah and the Abu Sayyaf Group, than as an operator.73

2. U.S. Use of Military Force Outside of Afghanistan and Iraq

For the past few years, the U.S. has engaged in target-specific drone air strikes against Taliban militants in Pakistan. A large proportion of these drone strikes target leaders and members of Tehrik-i-Taliban Pakistan, an umbrella group of what were once locally oriented tribal militias involved in separate conflicts with the state of Pakistan.74 For its part, Tehrik-i-Taliban Pakistan has attacked NATO convoys passing through Pakistan and killed U.S. military advisors in attacks inside Pakistan.75 It launched a “fedayeen style” attack on the U.S. consulate in Peshawar, Pakistan involving both car bombs and an assault team armed with rocket launchers and automatic weapons and likely participated in the suicide bomb attack on Forward Operating Base Chapman that killed seven CIA employees.76

The U.S. launched what is believed to be its first drone attack inside Pakistan in 2004, targeting and killing Nek Muhammad, the South Waziristan tribal leader.77 The U.S. then launched a total of nine drone strikes in Pakistan through the end of 2007.78 Beginning in 2008, the U.S. dramatically increased its use of drones in Pakistan, launching thirty-four attacks and killing over one hundred militants.79 In 2009, the U.S. launched fifty-three strikes—a rate of one drone strike per week—and more than double that number in 2010.80

Since 2001, the U.S. has also targeted al Qaeda leaders and other terrorists in other countries on multiple occasions. Given al Qaeda’s penchant for seeking sanctuary in Yemen, that country has been a frequent locale of such attacks, including the first use of an armed drone outside Afghanistan after September 11th.81 In that attack, a CIA drone launched a Hellfire missile and killed six suspected al Qaeda members traveling in a car in southern Yemen, including the man believed responsible for the bombing of the U.S.S. Cole.82 More recently, the U.S. has deployed drones to target Anwar al-Aulaqi, the al Qaeda terrorist suspected of planning the failed attack against Britain’s ambassador to Yemen in April and allegedly involved in the Fort Hood shooting incident and the Christmas Day bomber’s attempted attack.83

In Somalia, as early as 2007, the U.S. launched attacks against al Qaeda members suspected of involvement in the 1998 Embassy bombings.84 After multiple attempts to target Saleh Ali Saleh Nabhan, the al Qaeda militant suspected of masterminding the 2002 attack on the Paradise Hotel in Mombasa, Kenya, the United States launched a commando raid in broad daylight, killing Nabhan and at least eight others.85 Finally, in an attack related to the war in Iraq, U.S. Special Forces killed eight so-called foreign fighters in Syria in October 2008.86

B. Traditional LOAC Frameworks and Today’s Conflicts

Contemporary conflicts pitting states against terrorist groups, as in the situations described above, significantly challenge traditional frameworks for understanding the parameters of the zone of combat. Simply superimposing the approach applicable in traditional armed conflict onto conflicts with terrorist groups does not provide any means for distinguishing between different conceptions of the battlefield. Just a few weeks after the September 11th attacks, President George W. Bush laid the foundation for the notion of the whole world as a battlefield when he pronounced that “ ‘[o]ur war on terror will be much broader than the battlefields and beachheads of the past. The war will be fought wherever terrorists hide, or run, or plan.’ ”87 When coupled with statements by other high-ranking administration officials,88 the President’s view of a global battlefield, in which the whole world is a war zone, became clear. U.S. resort to military force in numerous countries around the world has borne out this theory over the past nine years since the September 11th attacks. Indeed, in 2004, then-Secretary of Defense Donald Rumsfeld signed a secret order giving the U.S. military authority to strike at al Qaeda targets anywhere in the world.89 In such a global war, the battlefield knows no geographic or temporal boundaries, and the U.S. would be entitled to kill its enemies wherever and whenever it finds them.90

The primary counter to this notion of a global battlefield is founded on traditional conceptions of armed conflict, according to which “[a]rmed conflicts inevitably have a limited and identifiable territorial or spatial dimension because human beings who participate in armed conflict require territory in which to carry out intense, protracted, armed exchanges.”91 As the discussion of the law of neutrality above demonstrates, spatial is a more accurate description than territorial, because territory is only one component of where combat operations take place. Proponents of this limited conception of the battlefield argue that terrorist attacks do not constitute protracted exchanges—one element necessary to finding the existence of a non-international armed conflict—and therefore action against terrorists, even targeted strikes with military force, do not create a combat zone or battlefield. Thus, while the U.S. may be engaged in an armed conflict with al Qaeda, these scholars believe that such conflict only takes place in limited, defined geographic areas—areas that would thus constitute the battlefield or zone of combat—such as Afghanistan, Iraq and the border areas of Pakistan.92 However, without any explanation beyond these conclusory statements regarding why the conflict, and thus the zone of combat, is limited to these geographic areas, this view offers no more justified conception of the zone of combat than the global battlefield theory.

U.S. practice, where decisions to use force are based on belligerent status or conduct rather than any adherence to geographic or spatial concepts, does indeed compel the conclusion that the U.S. views the whole world as a battlefield. And yet, at the same time, the U.S. also seems to view certain areas as outside the scope of appropriate belligerent activity, most likely based on a conception of what the host nation can or will do to address a particular threat. The co-existence of these two themes suggests that delineating the lines between battlefield and non-battlefield is based more on arbitrary decision-making than on a process stemming from traditional lawbased conceptions of the theater of hostilities.

The temporal scope of the conflict with al Qaeda is equally, if not more, perplexing. Terrorism is a phenomenon, not an enemy party; it is thus more likely to be managed over time than defeated outright.93 Terrorist groups morph, splinter, and reconfigure, making it difficult to determine if, let alone when, they have been defeated. Even though some U.S. federal courts have spoken of a time “when operations against al Qaeda fighters end, or the operational capacity of al Qaeda is effectively destroyed,”94 counterterrorism does not involve cease-fires, peaceful settlements, or armistices. The notions of “cessation of active hostilities” and “general close of military operations” thus prove difficult to apply and can lead to the conclusion that the conflict with terrorist groups will continue ad infinitum. As one Bush administration official explained, terrorist attacks such as “the Bali bombing, terrorist attacks in the Philippines, Kuwait, and elsewhere—only **underscore the fact that this conflict remains ongoing** and will continue for the foreseeable future.”95 Traditional notions of repatriation at the end of hostilities may offer helpful guidance in a geographically confined conflict with a non-state actor or terrorist group, such as the Tamil Tigers in Sri Lanka,96 but the diffuse geographic nature of most conflicts with terrorist groups generally makes traditional temporal concepts unlikely to apply effectively to such conflicts.

**That codification key to solve military tech spillover, great power war and extinction**

**Weston 91** – Chair of the International and Comparative Law Program @ The University of Iowa [Weston, Burns H., “Logic and Utility of a Lawful United States Foreign Policy,” Transnational Law & Contemporary Problems, Vol. 1, Issue 1 (Spring 1991), pp. 1-14

George Will and others like him are right, of course, that the rhetoric of international law can be used, like a double-edged sword, against the United States as well as by it. They are wrong, however, to bemoan this fact-unless, of course, they bemoan the nature of law itself, a process of legitimized politics that, in Benjamin Cardozo's unforgettable words, seeks the "reconciliation of the irreconcilable," the "merger of antitheses," the "synthesis of opposites," in "one unending paradox."12 Though the "real world" often is not a very nice place and though for this reason it sometimes may seem that the responsible pursuit of national interests requires realpolitik policies and practices, a foreign policy that corresponds with what most people have in mind when they think of "The Rule of Law" (i.e., notions of equality, mutuality, reciprocity, cooperation, and third-party procedure) is more likely to find itself on the winning side of most political and strategic battles than one that does not. Legality, like honesty, is generally the best policy. It enhances power used under its aegis. In the pages following, I suggest six concrete reasons why the United States-indeed, all nations- should take international law seriously, even¶ when others do not. Viewed in isolation, they may not persuade the hardened realpolitiker. Viewed together, however, they should. 1. Respect for International Law Assists Human Survival To begin with, it is not healthy for people (and for other living things) to resist principles of international law in a world that is bristling with more than 50,000 nuclear weapons and other greatly expanded technologies of war and mass destruction. If the history of the last half century has taught us anything, it is that our present militarily competitive international order cannot be expected to prevent large-scale war for very long (e.g.,Kuwait). There is, therefore, little hope for genuine security, national or global, without a strengthening of the legal foundations, bilateral and multilateral, for the nonmilitary-preferably democratic-resolution of international disputes. These would include, but not be limited to, the improvement of U.N. peacekeeping and peacemaking opportunities and capabilities, and the improvement of both national and international opportunities and capabilities for legal challenges to coercive foreign policies. 13 Even if other countries do not always follow suit, surely our country and our children's future will be better served if we strive hard to build as peaceful and just a world society as we can, and while we still have the chance. 14 The Soviet Union, home to more than 25,000 nuclear weapons and many newly-awakened nationalisms, faces a world history that demonstrates little support for the proposition that collapsing empires fade quietly. And in our increasingly "high-tech" world, with military research and development fast at work on atomic guns, particle-beam cannons, and other space age deviltries that divert attention from the perils of nuclear proliferation, many regimes in Western Asia and elsewhere have been acquiring nuclear and other weapons of mass destruction-and the means to deliver them, with frightening ease and speed, to almost anywhere on earth. In sum, it is respect (or lack of respect) for international law that, in the end, will determine the fate of the Earth. As the late Bill Bishop counseled pithily over two decades ago, "under present conditions all [States]¶ need international law in order to continue to exist together on this planet."15 Rededication to the world rule of law and cooperation in this Age of Nuclear Anxiety is not a matter of choice. It is, quite simply, a matter of survival. 2. Respect for International Law Enhances International Stability Living as we do in the twilight years of the global Middle Ages, characterized by more than 160 separate fiefdoms, each with a monopoly control over the military instrument and each only barely accountable in any formal sense either to each other or to the larger arena in which each operates, it is easy to be seduced by the popular claim that ours is an anarchical world. Such an outlook does not, however, comport with reality. Every hour of every day, ships ply the sea, planes pierce the clouds, and artificial satellites probe outer space. Every hour of every day, communications are transmitted, goods and services traded, and people andthings transported from one country to another. Every hour of every day, transactions are negotiated, resources exploited, and institutions established across national and equivalent frontiers. And in all these respects, the many processes of authoritative and controlling decision that help to regulate such endeavors-what we call international law-are observed rather well on the whole. On the other hand, when States bend, twist, or otherwise show disrespect for this ordering force to suit their special interests, international law, because it is an essentially voluntarist process of decision that is seriously lacking in centralized command and enforcement structures, quickly loses its otherwise stabilizing influence.

The kidnapping of sixty-two Americans at the U.S. Embassy in Teheran in 1979, for example, demonstrates well the fundamental instability that can flow from a failure or refusal to abide by international law. Without, in this instance, a commitment to the basic rules of diplomatic protection, diplomacy ceased to exist and respectable discourse became impossible. Without a commitment to the world rule of law there could be no assurance of inter-governmental stability. Of course, States-especially the major powers-are perfectly capable of unilaterally resisting the doctrines, principles, and rules of international law without necessarily feeling directly the destabilizing impact that their noncompliance ultimately has on the wider structure of international law and order itself. The probability of being formally punished for violating international law is usually so slim that foreign policy strategists commonly give little or no weight to the cost of decision-making marked by dubious legality. However, the increasingly interdependent and interpenetrating character of today's world is of such magnitude and complexity that no nation, least of all the United States, can sensibly afford to insist upon its own independence of action without simultaneously threatening its own ultimate good and the ultimate good of others, and potentially in very fundamental ways. Though not understood by most Americans, it is in fact the United States "which stands to lose the most in a state of world anarchy." 16 Because the United States and its citizens have such wide-ranging and far-flung international interests, we urgently need a stable, predictable environment of international legal rules and procedures that can help to secure those interests on a cooperative basis worldwide. It is not in the first instance our freedom of action that should be our concern when we refuse to commit to the world rule of law, but rather, the stability of our world public order itself. 3. Respect for International Law Advances Our Geopolitical Interests Allowing principles of international law and multilateral cooperation to inform our foreign policy also serves our geopolitical interests, especially our long-term geopolitical interests. For example, in contrast to our recent hegemonic warmongering in Grenada, Nicaragua, and Panama, a record of faithful adherence to the principle of nonintervention and to the right to self-determination would have helped, politically at least, to neutralize the Israelis in southern Lebanon and the Occupied Territories, the Soviets in the Baltics, and the Iraqis in Kuwait. As the late L.F.E. Goldie observed a number of years ago: "Obedience to law... is not only a categorical value but also a prudential one." 1'7 My colleague and former Prime Minister of New Zealand Sir Geoffrey W. R. Palmer, referring to the need for strict compliance with arms control and disarmament treaties, once put it this way: "[I]s it possible on the one hand to look to international law to provide essential security guarantees, while on the other hand, in other areas, the right is quietly being reserved to undermine, ignore and indeed walk away from the rule of law in international affairs?"18 In recent years, however, during the Reagan presidency especially, the United States has come before the world community more to bury international law than to praise it. Selectively displaying its military strength to the general disregard of international law, it has chosen, at least when the risks have been low, to advance several broadly defined but narrowly determined national interests: (1) demonstrating American will to act with decisiveness and reinforcing deterrence against the Soviet Union in the Third World; (2) displaying the ability of U.S. armed forces to defend American and allied interests; (3) inducing countries that challenge the U.S. to cease and desist; and (4) enhancing in the broadest terms an international perception of the U.S. as the great world power. 19 But to favor such special interests over the common interest of a world rule of law is to shoot ourselves in the geopolitical foot-perhaps not always, but more often than is commonly realized. It gets us into quagmires from which it is hard to extricate ourselves and it subverts our ability to ensure in other settings that other governments, especially our adversaries, will fulfill their obligations under international law that are in our interest for them to fulfill. The point is depressingly simple to illustrate. If we can unilaterally reinterpret and abrogate an arms control treaty with the Soviet Union,20 why cannot the Soviets do the same with us? If we can excuse the kidnapping and killing of innocent civilians by the Nicaraguan Contras because they were "freedom fighters,"21 what right do we have to condemn the Palestinians or Shiites for doing the same thing in Lebanon? If we can ignore a World Court decision relative to the human rights violations we encouraged in Nicaragua,2 how can we complain when Iran ignores a World Court decision relative to the taking of U.S. hostages in Teheran?2 If we can claim the right to seize fugitives from abroad,2 what logic compels our right to object when the Iranian Majlis (parliament) approves legislation authorizing Iranian officials to arrest Americans anywhere in the world for violations of Iranian law?25 If we can intercept a civilian aircraft over the Mediterranean on the grounds that it appears to threaten our national security interests, 26 what is to stop the Soviet Union from doing the same thing over the Pacific for the same reason?27 If we can condone a U.S. military raid upon an ambassadorial residence in Panama despite our obligations under the 1961 Vienna Convention on Diplomatic Relations, how can we complain when Iranian students seize a U.S. embassy protected by the 1961 Vienna Convention on Diplomatic Relations? 28 And so forth. Such partisan uses of international law are illustrative of what, during the 1980s, has been referred to as the "Reagan Corollary" of international law-which is to claim a right "to pressure the international legal system into changing in a manner beneficial to United States interests."9 However, such uses do not, in the end, correspond to our long-term national interest of ensuring that other governments in other settings fulfill their obligations under international law. Were every nation to adopt this Reagan Corollary, a perverted interpretation of international doctrines, principles, and rules would become the standard practice and the international legal system would quickly disintegrate into a system of retributive justice extremely unsafe for the geopolitical interests of even the most powerful States. Thus, if the United States wants to insist upon compliance with international law to protect American interests, it will be to its advantage to obey international law, even when its application proves inconvenient. If we want meaningful international law to be available when we find it useful, we must respect it even when we do not. 4. Respect for International Law Promotes Policy Efficacy A failure to adhere to international law-in particular the prohibitions against the threat and use of nondefensive force and the admonitions to¶ promote and safeguard human rights-tends also to be counterproductive, hence not very efficacious. While militarism and support of repressive regimes to the disregard of international law may sometimes yield tactical victories that are viscerally pleasing in the short-run, they rarely achieve strategically satisfying gains, to say nothing of justice, over the long-run. Consider, for example, the Reagan administration's decision, pursuant to what came to be known as the "Schultz Doctrine," to fight terrorism with American-sponsored counterterrorism, 30 the ultimate denouement of which was the sordid Iran-Contra affair. In keeping with this decision, the United States provided Israel with diplomatic, financial, and material support of Israel's illegal invasion of southern Lebanon in 1982,31 in violation of common Article 1 of the four Geneva Conventions on the laws of war of 194932 and involving the killing of more than 20,000 people (at a time when, ironically, Palestinian terrorist attacks against American persons and property had been in decline). Not surprisingly, the victims of the invasion and their sympathizers held Washington responsible, in conjunction with Israel, for the atrocities committed by the Israeli army and the Lebanese Phalange militia against Palestinian civilians in the Sabra and Shatilla refugee camps in southern Lebanon.33 American interests immediately began to experience a pronounced increase in terrorist attacks-via airplane hijackings, kidnappings, assassinations, bombings, and other paramilitary activitiesfrom Palestinian, Shiite, and other groups throughout the Middle East. Consider also the refusal of the United States to accept the jurisdiction of the International Court of Justice in the case brought by Nicaragua in April 1985 in protest of Washington's illegal assistance to, and support of, the Contra guerrillas against Nicaragua's democratically elected Sandinista government.34 Instead of making its substantive case before the Court, the United States contended that what it considered to be an issue of Western Hemispheric security was not properly for the World Court to decide and that, in any event, there was no reason for the United States to submit to the Court's jurisdiction when, over the years, the Soviet Union had consistently refused to do so. 35 As one sensitive observer put it, "[this] argument was politically attractive domestically, but it eroded the stature of the World Court that American values had once tried to build up."36 More such examples could easily be recounted. It might be asked, for example, whether our aiding and abetting the assassination of Chile's Allende or our legally dubious support of the Shah of Iran really did serve our long-term national interest. And the same might be asked, as well, of the Iran-Contra affair and of our legally questionable assistance to Saddam Hussein during and after the Iran-Iraq war. But the efficacy argument is perhaps best demonstrated by noting the large-scale political support that was extended to Washington, internationally as well as nationally, during at least the early months of the 1990-91 Persian Gulf crisis when the United States pressed hard for economic sanctions against Iraq that were, it can be said, not only timely and measured but in keeping with the collective security system authorized in San Francisco in 1945.37 Adherence to the principles and procedures of international law, President Bush discovered, was essential to gaining the world's support to force Iraq's hand. Lawful foreign policies are consensusbuilding policies-politically pragmatic or efficient policies-and they are useful even to a superpower. To put it all another way, we abandoned lynching parties on the western frontier not only because they turned into orgies of wasteful bloodlust but also because they simply did not stop horse thieves. International law violations, like violations of law in general, have a dubious pragmatic record at best. 5. Respect for International Law Safeguards Domestic Society Disregard of international law and institutions tends to be self destructive as well as destructive of international order. The consequences of our unilateral and disproportionate uses of force in Vietnam should be proof enough. Over a decade and a half later, as such movies as Platoon, Born on the Fourth of July, and Casualties of War alone bear witness, we are still licking the socioeconomic, political, and ethical wounds. Though not always immediately apparent or discernible, international law violations and "go-it- alone" policies that fail to show a decent respect for the rights and opinions of others invariably corrode our core essence, diminishing our national integrity and threatening even our individual liberties. As Professor Bilder has asked, can we legitimately expect to separate the standards that govern the way our government operates internationally from those that govern it internally? 8 If we tell our elected officials that it's okay to act illegally, corruptly, or brutally abroad, can we be completely sure that they will really listen when we tell them that they should not act that way at home? If we say to the Secretary of State, the CIA, or the National Security Council that it's okay to bend the law a little because we do not like another country's ideology, can we rightfully expect that the Attorney General or the FBI will not bend the law a little when it comes to those of our citizens who do not share the government's ideology in domestic affairs? In other words, when we show contempt for international law and cooperation, we badly damage our sense of national self-respect and purpose and, in so doing, invite civil unrest. In addition to the widespread civil disobedience that characterized the era of the legally problematic Vietnam War, we may note the popular protests that, more recently, accompanied Washington's extraordinary build-up of offensive nuclear weapons, its policy of "constructive engagement" with apartheid South Africa, and its military adventurism in Central America.3 9 One of the wondrous things about our country-deep-rooted in our ideology even if not always borne out in practice-is our commitment to decent behavior and the rule of law. From our very beginnings, we have officially embraced the notion of a Higher Law based upon "principles of right and justice that prevail because of their own obvious merit:"40 liberty, equality, participation, and due process. And since at least the turn of the century, cognate international principles have been added: the self-determination of peoples, the sovereign equality of States, respect for international law and organization, and the peaceful settlement of international disputes. So, when our government resorts to¶ foreign policy plots and maneuvers of a Machiavellian sort that sacrifice or otherwise diminish these principles, the spillover into the domestic arena is predictable. The government soon loses the support of the people. Our Founding Fathers established that ours is a society of laws, not of men. To most of us, therefore, "standing tall" in the global community does not mean being the toughest kid on the block, pushing other countries around and breaking our promises as we once accused the Soviet Union of doing, but acting humanely and honorably. Intuitively we know that it is necessary for us to uphold the rule of law abroad in order to uphold it at home. Intuitively we know that "[t]he two are inextricably connected." 41 Intuitively we know that a double standard erodes our claim to moral leadership in the international community.42 6. Respect for International Law Ennobles Our National Rectitude As evidenced by the U.N. General Assembly's declaration of the 1990s as the "Decade of International Law,"43 there is a growing realization that an effective system of international law is fundamental to the achievement¶ of a world public order of human dignity. It is essential to peace and security, and it is indispensable for just solutions to the many complex and urgent problems that otherwise currently make up the human agenda. International law provides, potentially, the most durable framework for undertaking cooperative action toward the abolition of war, the promotion of human rights, the ending of mass poverty, and the creation of a sustainable global environment. Its progressive evolution, in keeping with Article 28 of the Universal Declaration of Human Rights ("Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized"),4 is the key to all that is right and good. To insist upon respect for international law and cooperation is, thus, the morally correct thing to do, and for this reason alone it is in our longterm best interest. Rather than throw our weight around as if at some shootout at the OK Corral, the United States should reaffirm its commitment to a law-oriented foreign policy and, from this posture, through carefully planned and diligently executed diplomatic strategy, regain a once assumed (even if not always demonstrated) moral stature among the family of nations-the "American difference," as President Reagan used to call it. Along the way, discovering that it would thus gain the upper hand in the global competition for hearts and minds, including the enthusiastic support of otherwise doubting allies, the United States would also discover that commitment to international law and cooperation is fundamentally a matter of self-interest. Our reputation as a law-abiding nation, one that genuinely honors the world rule of law in practice, is a vital asset, strongly affecting our ability to win friends and influence people. It is a reputation that cannot-must not-be squandered. Most importantly, however, the United States has an especial obligation in this regard. Quite simply, the size of our economy, the sophistication of our technology, the ubiquity of our investments, and the power of our arsenals make us so globally consequential that the acts and omissions of our government transmit a powerful and usually lasting message. Like it or not, our words and our deeds count heavily in the normative, institutional, and procedural development of world affairs. 45 And this establishes for us, a professedly democratic and peace-loving country, an historically unique moral responsibility. Pg. 4-13

## 1NR

### Overview – Distinction

#### Our evidence is COMPARATIVE --- LOAC principles solve the case and avoids our net benefits, sovereignty violations and alliance blow-back

BLANK 2010 – aff author, Director, International Humanitarian Law Clinic, Emory Law School, Laurie R., 9/16/10, “DEFINING THE BATTLEFIELD IN CONTEMPORARY CONFLICT AND COUNTERTERRORISM: UNDERSTANDING THE PARAMETERS OF THE ZONE OF COMBAT,” Georgia Journal of International and Comparative Law, Vol. 39, No. 1, 2010, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1677965>

As a result, the entire concept of neutrality is problematic in this context—but yet it seems hard to imagine that the absence of declaratively neutral states means that no territory is inviolable in counterterrorism and military operations against terrorists. One certainly might argue that any country using military force against terrorists constitutes a belligerent in this type of conflict. Similarly, one could argue that any state acting in concert with or directly supporting terrorist groups on its territory could become a belligerent state as well. But what about states where terrorists operate or find safe haven without state support or even in direct opposition to state policy? Or state sponsors of terrorist groups operating in another state’s territory? If the territory of any state where a terrorist group operates or a terrorist is found were to become belligerent territory even against its will, then state sovereignty is simply eliminated. It is thus difficult to translate neutrality law’s framework into the murky world of today’s conflicts, nonstate actors, and dispersed terrorist groups.

IV. INTO THE FUTURE: FINDING A MIDDLE GROUND

The ramifications of including areas within the zone of combat, such as the accompanying authority to use lethal force as a first resort, raise a variety of policy considerations. The two primary considerations weigh directly against each other and perhaps, as a result, lend credence to the need for a middle ground in defining the zone of combat. First, some argue that creating geographic limits to the battlefield has the problematic effect of granting terrorists a safe haven. For example, a member of al Qaeda can be a legitimate target as a result of continuous participation in hostilities, thus losing any immunity from attack he might have had by dint of being a civilian.105 If the zone of combat is limited geographically to certain areas, then this member of al Qaeda can avoid being targeted—and thus regain civilian immunity, in essence—simply by crossing an international border even while remaining active in a terrorist organization engaged in a conflict with the U.S.106 Geographic limits designed to curtail the use of governmental military force thus effectively grant terrorists a safe haven and extend the conflict by enabling them to regroup and continue their attacks.

Alternatively, others argue that the lack of geographic limitations on the zone of combat has grave consequences, both locally and globally. In particular, “[t]he implications of allowing the use of armed force to capture or kill enemies outside a country’s own territory, and outside a theater of traditional armed conflict, may include **spiraling violence, the erosion of territorial sovereignty, and a weakening of international cooperation**.”107 Use of military force to target a person inside the territory of another state without its consent inherently violates that state’s sovereignty. A conception of the battlefield enabling regular incursions into another state’s territory will, over time, have the effect of weakening the importance of state sovereignty as a defining part of the international legal order. It also increases the likelihood of violence on a more regular and more widespread basis, as more and more locations fall within the arena of military operations.

With these tensions as a backdrop, one can look to LOAC to derive a framework or set of parameters. Such factors can be drawn from LOAC itself—from the general principles at the heart of LOAC and from the way we understand whether there is an armed conflict in existence that triggers LOAC.

A. Seeking Guidance from LOAC’S General Principles

LOAC is a living body of law rather than a set of static concepts, repeatedly adapting to uncertainties and changing circumstances. As Jean Pictet wrote in 1985:

The international Conventions contain a multitude of rules which specify the obligations of states in very precise terms, but this is not the whole story. Behind these rules are a number of principles which inspire the entire substance of the documents. . . . They serve in a sense as the bone structure in a living body, providing guidelines in unforeseen cases and constituting a complete summary of the whole, easy to understand and indispensable for the purposes of dissemination.108

When unforeseen situations have demanded new answers, LOAC’s basic principles have guided interpretations and helped find solutions to preserve and protect the law’s core values.

The Geneva Conventions, and the laws of war for centuries before that, are based on four key principles: distinction, proportionality, military necessity, and humanity.109 The principle of distinction requires all parties in a conflict to distinguish between those who are fighting and those who are not and only target the former when launching attacks.110 The principle of proportionality seeks to balance military goals with protection of civilians, prohibiting attacks when the expected civilian casualties will be excessive compared to the anticipated military advantage.111 Military necessity recognizes that the goal of war is the complete submission of the enemy as quickly as possible and allows any force necessary to achieve that goal as long as not forbidden by the law.112 Finally, humanity aims to minimize suffering in armed conflict; the infliction of suffering not necessary for legitimate military purposes is therefore forbidden.

For the purposes of this analysis, military necessity and humanity are the two key principles that can help provide guidance in delineating the zone of combat. Military necessity naturally suggests a broad view of the zone of combat in order to offer the most comprehensive opportunity to defeat the enemy effectively. In essence,

[t]he appeal [of invoking armed conflict] is obvious: the IHL applicable in armed conflict arguably has more permissive rules for killing than does human rights law or a State’s domestic law, and generally provides immunity to State armed forces. Because the law of armed conflict has fewer due process safeguards, States also see a benefit to avoiding compliance with the more onerous requirements for capture, arrest, detention or extradition of an alleged terrorist in another State. . . . [Finally,] labeling a situation as an armed conflict might also serve to expand executive power both as a matter of domestic law and in terms of public support.113

At first glance, the principle of humanity seems to support a broad view of the zone of combat as well. The Commentary to the Fourth Geneva Convention emphasizes that the drafters sought to ensure the widest possible field of application for LOAC’s protective goals. First, the Commentary explains that the phrase “ ‘in the hands of’ is used in an extremely general sense.”114 In particular, Part II of the Fourth Geneva Convention, entitled “General Protection of Populations Against Certain Consequences of War,” has a broad application, covering “the whole of the populations of the countries in conflict . . . .”115 In the past, this goal of maximizing protection has been a driving force facilitating interpretations of complicated questions regarding protected persons or other issues. For example, the ICTY’s approach in Tadic and other cases, basing protected person status on allegiance rather than nationality, fulfills LOAC’s general need for broad applicability across territory, time, and categories of persons.116

This goal may not work as effectively, however, when correlated to conflicts with terrorist groups. Simply put, taking a broad view of the time and space dimensions in the war against terrorist groups could—with little imagination—lead one to conclude that a large portion of the world falls within the zone of combat, by dint of terrorist groups having a presence in many countries and terrorist attacks taking place in many countries. While this approach would, theoretically, mean that large numbers of persons might benefit from the rights and protections of LOAC, it also means that large swaths of the globe would fall within the use of force as first resort authority that LOAC grants to belligerents. Thus, the principle of humanity more rationally supports a **narrow view** of the zone of combat’s parameters, one that seeks to protect the most people by keeping conflict, and the battlefield, away from their countries altogether. Because the risk of mistake increases dramatically as we move farther away from the conventional battlefield, **humanity and its accompanying limitations on** the use of **force are ever more** critical. This result—broad based on military necessity and narrow based on humanity—mirrors in some ways LOAC’s essential and inherent balancing of military necessity and humanity. Nonetheless, even though resort to the general principles of LOAC and the object and purpose of the law can often be a useful tool for resolving complicated or unforeseen issues, here it leaves us with lingering uncertainties regarding how best to fulfill those goals.

B. Factors From LOAC’s Armed Conflict Trigger

As explained above, this Article does not address the much-debated question whether the conflict with al Qaeda constitutes an armed conflict as understood within the framework of the Geneva Conventions and LOAC. However, a number of the factors relevant to analyzing whether any conflict situation meets the threshold of LOAC application can be useful here in developing a paradigm for framing the battlefield in the “war on terror.”

Determining whether violence between states, between a state and a nonstate actor, or between two or more non-state actors rises to the level of an armed conflict is a foundational analytical step for LOAC, which only applies during armed conflict. The most common and oft-cited contemporary definition of armed conflict is from the Tadic case: an armed conflict exists whenever “there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”117 According to the Commentary, recognizing the existence of international armed conflict in accordance with Common Article 2 is straightforward. “Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war.”118 The length of the hostilities or the number of casualties does not impact the characterization as armed conflict.119 For this reason, analysis and interpretation of Common Article 2 will not be particularly useful here. Rather, this section draws factors and other relevant insights from LOAC’s approach to noninternational conflict and Common Article 3.

The parameters of Common Article 3 conflicts can be harder to identify concretely than those of Common Article 2 conflicts; according to the Commentary, no specific test for determining the applicability of Common Article 3 exists. Rather, the goal is to interpret Common Article 3 broadly120 based on a number of indicative—but not dispositive—factors regarding the nature and behavior of both state and non-state parties. For example, the state’s response is a critical component, in particular whether it employs its regular armed forces in combating the non-state actor.121 Another key factor is the intensity of the hostilities and whether it rises above the level of riots and internal disturbances.122 Finally, the Commentary considers the nonstate actor’s authority, organization, and territorial connections.123

The United States, like selected other countries, views itself as operating within an armed conflict paradigm in combating terrorism.124 Much of the continuing debate centers on the nature of this conflict rather than on whether it exists at all. Some argue that this conflict falls outside this framework altogether,125 **leaving us with a conflict** unregulated by the laws of war

, a problematic conclusion, but an armed conflict nonetheless. Alternatively, in Hamdan v. Rumsfeld, the U.S. Supreme Court held that the conflict with al Qaeda is a non-international armed conflict governed by Common Article 3 of the Geneva Conventions.126 Finally, some scholars point to a new category of conflict, so-called “transnational armed conflict,”127 which involves the “transnational characteristics of international armed conflict, but the military operational characteristics of noninternational armed conflicts (because of the state versus nonstate nature of the operations).”128 However contentious this debate, it rests on the fundamental presumption that the U.S. is engaged in some type of armed conflict. Thus, several factors identified above from traditional LOAC analyses regarding non-international armed conflict can prove helpful to the instant analysis: the nature of the hostilities, the government response, and the territorial connections of the non-state actor or terrorist group.

1. What are Hostilities?

Traditionally, LOAC looks to the intensity of the hostilities to determine whether violence in a particular area or situation has passed the threshold necessary to constitute a non-international armed conflict. For the purposes of this article, it will be helpful to examine the types of violence, attacks and acts that are normally considered to fall within the category of hostilities in the framework of LOAC. Analogizing terrorist acts and activities to hostilities can be a useful starting point in identifying the parameters of the zone of combat. As a general rule, classical definitions of armed conflict and hostilities exclude “civil unrest or terrorist activities.”129 But our analysis should not stop there, because just as traditional conceptions of armed conflict may not be effective in analyzing the conflict with al Qaeda, so classical understandings of hostilities may not hold all the answers.

First, Article 49 of Additional Protocol I defines an attack as an “[act] of violence against the adversary, whether in offence or in defence.”130 Attack thus “means ‘combat action’ ”131 and refers to “physical force.”132 The Commentary further defines hostile acts as “acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces” and explains that the term “ ‘hostilities’ covers not only the time that [a] civilian actually makes use of a weapon, but also, for example, . . . situations in which he undertakes hostile acts without using a weapon.”133 Most terrorist acts fall within one or more of these definitions with little trouble.

A next step in this analysis is to incorporate information about the types of acts that constitute hostilities for the purposes of analyzing the intensity of hostilities. ICTY cases have involved a wide range of types of hostilities and the Tribunal has concomitantly pointed to a number of considerations in making determinations about intensity. Among those considerations, particularly relevant ones for this analysis include the number of civilian casualties, the extent of material destruction and the types of weapons used.134 By those measures, many terrorist attacks could fall within a general notion of hostilities. Many attacks over the past decade have caused hundreds—even thousands in the case of 9/11—of civilian deaths, have wrought substantial material destruction, and have used sophisticated explosives or coordinated attacks with automatic weapons, such as in Mumbai. One definition of “attack” used at the ICTY is “incidents in which firearms, hand-grenades, and other explosive devices were used against civilians” and enemy forces.135 In addition, the target of particular attacks can be determinative—attacks on a military target will often be more likely to constitute hostilities that fall within the category of armed conflict.136 One might therefore distinguish the attack on the U.S.S. Cole—a military target— from an attack on a civilian vessel or other civilian target in assessing how each might constitute hostilities within a zone of combat.

Admittedly, the ordinary use of the term “hostilities” within LOAC and international criminal jurisprudence does not necessarily translate well to a world in which terrorists attack in diverse geographic locations and seek safe haven in multiple remote locations around the world. But just as there is an emerging “recognition . . . that [LOAC] principles must . . . ‘migrate’ to the realm of transnational armed conflicts,”137 so perhaps the notion of hostilities may begin to encompass certain terrorist acts, at least for limited analytical purposes. In the interim, the characterization and description of hostilities can be useful in understanding how different types of terrorist attacks can impact **identification of the zone** of combat.

2. Government Response

The nature of the government response is the most adaptable of these three factors to a conflict with terrorist groups. In assessing whether a noninternational armed conflict exists, how the government responds to provocation or violence is one way courts have traditionally understood a distinction between riots or internal disturbances and armed conflict. The use of law enforcement personnel is usually a sign that the government views the situation as one falling within the former arena and not within the overall framework of armed conflict. In contrast, armed conflict often requires the government “to have recourse to the regular military forces” to combat the threats or challenges it faces.138 The most-oft cited example of this factor is the decision of the Inter-American Commission on Human Rights in the La Tablada case. In analyzing whether LOAC applied to an attack on an Argentine military barracks and the thirty-hour firefight that ensued, the Commission found that the distinctly military nature of the government’s response was persuasive, if not determinative.139

In the context of the current conflict, many see the U.S. government’s decision to use military force “to combat terrorism . . . as one important indication of the existence of an armed conflict.”140 Given that the U.S. and other governments have a range of tools at their disposal to combat terrorists—military force, law enforcement options, etc.—the nature of the government response can also be a relevant factor in identifying the parameters of the zone of combat. One complex analysis of how the government’s response impacts the nature—and thus location—of the conflict addresses how the government chooses to categorize and characterize the enemy for purposes of targeting and other uses of force. Rules Of Engagement authorizing targeting **based on status,** and thus specifically based on the concept of military objective, suggest the existence of an armed conflict; rules of engagement based on conduct would suggest otherwise.141 Applying this type of analysis to the location of a conflict rather than the existence of a conflict, for example, shows how the government’s response can be a useful factor in identifying the parameters of the zone of combat.

3. Territory

Although Common Article 3 includes no requirement that a non-state party control or occupy a specific territorial area, territory can play a role in the analysis of whether a particular situation qualifies as an armed conflict. Among the criteria the Commentary mentions are: the non-state actor is “acting within a determinate territory,” or “the insurgent civil authority exercises de facto authority over persons within a determinate portion of the national territory.”142 As with other factors in the Commentary, these criteria are merely considerations that may play a role in assessing the nature of a conflict under Common Article 3. In contrast, Additional Protocol II only applies to conflicts in which “dissident armed forces or other organized groups . . . , under responsible command, exercise such control over a part of [the] territory as to enable them to carry out sustained and concerted military operations.”143 Whether territorial control is required or merely considered, the link between the non-state forces and some territory is a relevant factor in analyzing the nature of the conflict.

But the notion of territory and territorial control or administration does not translate effectively to most conflicts with terrorist groups. Terrorist groups generally do not seek to control territory, but rather use particular areas as safe havens, training grounds, or launching pads for attacks. One remote area is often as good as another in many ways. Nonetheless, territorial concepts and links can be a relevant factor in creating a paradigm for understanding the zone of combat, albeit in a more creative way. Those who propound a “global battlefield theory” use territory as a factor by looking at where terrorists are presently located; that is, according to this theory, anywhere one finds a designated terrorist would constitute part of the battlefield. Without going so far, territory can also be useful in a more intermediate approach to defining the zone of combat. Terrorist groups may not occupy or administer territory, but they have a more concrete footprint in certain areas, such as where they find safe haven, where they establish training camps, and if relevant, where they launch repeated attacks. These locations naturally have a stronger connection to the ongoing conflict than other areas where no attacks have taken place or where an identifiable terrorist is located but not engaged in any activity. Another way of looking at this factor is to consider that as an al Qaeda member’s connection, geographic or otherwise, to the areas of traditional combat operations grows more attenuated, the **presumption of deadly force authority weakens.** As such, perhaps, this interpretation of territory can be a helpful factor in defining the geographic parameters of the zone of combat. Similarly, we can add temporal considerations as well, differentiating between time periods when a terrorist group is using certain territorial areas as described above, and when it, perhaps, vacates a safe haven or training camp area.

#### CP is the ONLY way to solve all of their case

Ellison ’13 (Keith Ellison, “Time for Congress to build a better drone policy”, <http://articles.washingtonpost.com/2013-01-13/opinions/36311903_1_drone-strikes-drone-program-drone-policy>, January 13, 2013)

An unmanned U.S. aerial vehicle — or drone — reportedly killed eight people in rural Pakistan last week, bringing the estimated death toll from drone strikes in Pakistan this year to 35. As the frequency of drone strikes spikes again, some questions must be asked: How many of those targeted were terrorists? Were any children harmed? And what is the standard of evidence to carry out these attacks? The United States has to provide answers, and Congress has a critical role to play. The heart of the problem is that our technological capability has far surpassed our policy. As things stand, the executive branch exercises unilateral authority over drone strikes against terrorists abroad. In some cases, President Obama approves each strike himself through “kill lists.” While the president should be commended for creating explicit rules for the use of drones, unilateral kill lists are unseemly and fraught with hazards. When asked about the drone program in October during an interview on the “The Daily Show,” the president said, “One of the things we’ve got to do is put a legal architecture in place, and we need congressional help in order to do that, to make sure that not only am I reined in, but any president’s reined in terms of some of the decisions that we’re making.” It’s time to put words into action. Weaponized drones have produced results. They have eliminated 22 of al-Qaeda’s top 30 leaders and just last week took out a Taliban leader. Critically, they lessen the need to send our troops into harm’s way, reducing the number of U.S. casualties. Yet the costs of drone strikes have been ignored or inadequately acknowledged. The number of innocent civilian casualties may be greater than people realize. A recent study by human rights experts at Stanford Law School and the New York University School of Law found that the number of innocent civilians killed by U.S. drone strikes is much higher than what the U.S. government has reported: approximately 700 since 2004, including almost 200 children. This is unacceptable. Another cost is how drone strikes are shaping views of the United States around the world. You might develop a negative attitude toward the United States if your only perception of it is a foreign aircraft buzzing over your house that occasionally fires missiles into your neighborhood. In Pakistan, where 95 percent of U.S. drone strikes have occurred, people familiar with them overwhelmingly express disapproval (97 percent, according to Pew polling from June) and believe they kill too many innocent people (94 percent). Drone strikes may well contribute to the extremism and terrorism the United States seeks to deter. U.S. drone use has also lowered the threshold for the use of lethal force in foreign countries. Would we fire so many missiles into Pakistan, Yemen and Somalia if doing so required sending U.S. troops into harm’s way? Our drone policy must be guided by more than capability. It must be guided by respect for noncombatants, necessity and urgency. It is Congress’s responsibility to exercise oversight and craft policies that govern the use of lethal force. But lawmakers have yet to hold a single hearing examining U.S. drone policy. Any rules must provide adequate transparency, respect the rule of law, conform with international standards and prudently advance U.S. national security over the long term. In codifying a legal framework to guide executive action on drone strikes, Congress should consider these steps: First, we must do more to avoid innocent civilian casualties. The Geneva Conventions, which have governed the rules of war since World War II, distinguish between combatants and noncombatants in the conduct of hostilities and state that civilian casualties are not acceptable except in cases of demonstrated military necessity. This is the standard we must follow. Second, Congress must require an independent judicial review of any executive-branch “kill list.” The U.S. legal system is based on the principle that one branch of government should not have absolute authority. Congress should object to that concentration of power, especially when it may be used against U.S. citizens. A process of judicial review would diffuse executive power and provide a mechanism for greater oversight. Third, the United States must collaborate with the international community to develop a widely accepted set of legal standards. No country — not even our allies — accepts the U.S. legal justification for targeted killings. Our justification must rest on the concept of self-defense, which would allow the United States to protect itself against any imminent threat. Any broader criteria would create the opportunity for abuse and set a dangerous standard for other countries to follow, which could harm long-term U.S. security interests. The United States will not always enjoy a monopoly on sophisticated drone technology. The Iranian-made drone that Hezbollah recently flew over Israel should compel us to think about the far-reaching implications of current policy. A just, internationally accepted protocol on the use of drones in warfare is needed. By creating and abiding by our own set of reasonable standards, the United States will demonstrate to the world that we believe in the rule of law.

### A2 Perm do Both

#### They send mixed signals about law of armed conflict: that undermines all parts of their aff

**Kels ‘12** [Maj. Charles G. Kels is an attorney for the Department of Homeland Security and an individual mobilization augmentee with the U.S. Air Force Office of the Judge Advocate General, “Mixed messages on drone strikes,” July 16, <https://wiki.nps.edu/display/CRUSER/2012/07/16/Mixed+messages+on+drone+strikes>]

Finally, the administration emphasizes its "rigorous standards and process of review ... when considering and authorizing strikes" outside of "hot" war zones. The State Department's Koh has insinuated that this robust vetting process is integral to validating our legitimate self-defense claim in each and every targeted killing operation. This is a somewhat disconcerting line of argument, because it is seemingly at odds with the government's overall assertion that we are in an armed conflict with al-Qaida. Self-defense is a jus ad bellum principle; once we are at war, the appropriate legal standards for applying force are guided by jus in bello. Applying a self-defense analysis to each individual drone strike - as opposed to the time-honored LOAC principles of war fighters - sends mixed signals about whether we really believe we are in an armed conflict.¶

Given that the lawful imperative of U.S. self-defense in World War II was the unconditional surrender of the Axis powers, we would seem to be on firm ground today by strictly maintaining that our right of self-defense, as triggered by the terrorist attacks of 9/11, is geared toward the much narrower goal of degrading or eliminating al-Qaida's capability to launch another deadly attack against the U.S. homeland. Within that framework, we are guided by LOAC in the conduct of hostilities. Indeed, the U.S. government clearly believes that drone warfare is particularly suited to the task of waging an armed conflict with limited goals, because the new technology enables to us to synergize the campaign's means and ends as never before.¶ At least in the context of an American citizen such as al-Awlaki, the attorney general has stated that on top of traditional LOAC principles, the elaborate "kill list" procedure considers the imminence of the threat posed by the individual, as well as the feasibility of capture in lieu of deadly force. Such robust executive deliberation, Holder argues, satisfies the Fifth Amendment's accordance of due process of law; this provides the context in which he famously said that "the Constitution guarantees due process, not judicial process." The attorney general has taken considerable heat for this statement, in large part because an ultra-secretive executive war-making function is an odd tool with which to safeguard constitutional rights. From an armed conflict perspective, however, law professor Jack Goldsmith is surely correct in his estimation that the current U.S. system, as described in the administration's speeches, "goes far beyond any process given to any target in any war in American history."¶ Does It Hold Water?¶ Taken individually, each of these arguments is reasonable, accurate and perhaps even persuasive. Viewed as a whole, however, the U.S. position suffers from a degree of cognitive dissonance which results from our trying to please everyone at once instead of holding firm to basic, time-tested principles. In the end, this scattershot approach risks undermining our legal authority and - ironically - pleasing no one. The problem emanates from attempting to superimpose legal doctrines on top of one another

rather than insisting on their own internal logic. The net effect is to make us appear hesitant about the wisdom and legality of our own actions, which merely emboldens those critics whom we can never hope to satisfy anyway - at least not without compromising our own security.¶ To see why it's so crucial for us to speak boldly and plainly, it's important to understand what entities such as the U.N. Human Rights Council and the Red Cross are really trying to do. At base, these noble organizations - reflective of the international human rights law community as a whole, with a decidedly continental European outlook - believe that "sporadic, low-intensity attacks" from nonstate actors "do not rise to the level of armed attack" that would enable us to invoke the right of self-defense as a basis for resorting to force. As the aforementioned U.N. report approvingly remarks, "the legality of a defensive response must be judged in light of each armed attack, rather than by considering occasional, although perhaps successive, armed attacks in the aggregate."¶ In other words, the human rights community rejects our jus ad bellum argument that we are at war with al-Qaida wherever they may be. Moreover, these institutions deny that we are in an armed conflict at all - at least outside of "hot" war zones - both because al-Qaida is not cohesive enough and because the intensity and duration of the havoc it wreaks is insufficiently destructive. Thus, the applicable standard for applying force in each instance is not LOAC; jus in bello is out the window because there is no war. Rather, the peacetime model of human rights law prevails. This clearly is not a position that the U.S. can abide: first, because it eradicates any realistic deterrent for states to rein in terrorist attacks emanating from their territory; and second, because it effectively neuters our considerable national security apparatus as a counterterrorism asset. Simply put, it is an attempt to hem us in by wedding us to a police paradigm rather than a military one.¶ What To Do¶ This context illustrates precisely why the government has to stop straddling the fence and sending mixed messages about what we are doing. We must emphatically state that any complex vetting process undertaken by the president before targeting an individual terrorist is simply a matter of discretionary policy and grand strategy, not legal obligation. The bizarre "bureaucratic ritual" of White House "Terror Tuesday" meetings attended by high-level political advisers - as reported in a recent, much-publicized New York Times article - bears an unsettling resemblance to President Lyndon Johnson's well-documented "Tuesday lunches" reviewing target lists for Vietnam. Although the conflicts and eras clearly differ, the U.S. must not repeat the mistakes of the Rolling Thunder campaign by allowing overly restrictive and centralized targeting rules to degrade the efficient and lawful application of our military might.

### 1AC Daskal

Daskal concludes neg- the US has an expanded definition so they can’t solve

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

Legal scholars, policymakers, and state actors are embroiled in a heated debate about whether the conflict with al Qaeda is concentrated within specific geographic boundaries or extends to wherever al Qaeda members and associated forces may go. The United States' expansive view of the conflict, coupled with its broad definition of the enemy, has led to a legitimate concern about the creep of war. Conversely, the European and human rights view, which confines the conflict to a limited geographic region, ignores the potentially global nature of the threat and unduly constrains the state's ability to respond. Neither the law of international armed conflict (governing conflicts between states) nor the law of noninternational armed conflict (traditionally understood to govern intrastate conflicts) provides the answers that are so desperately needed. The zone approach proposed by this Article fills the international law gap, effectively mediating the multifaceted liberty and security interests at stake. It recognizes the broad sweep of the conflict, but distinguishes between zones of active hostilities and other areas in determining which rules apply. Specifically, it offers a set of standards that would both limit and legitimize the use of out-of-battlefield targeted killings and law of war-based detentions, subjecting their use to an individualized threat assessment, a least-harmful-means test, and significant procedural safeguards. This approach confines the use of out-of-battlefield targeted killings and detention without charge to extraordinary situations in which the security of the state so demands. It thus limits the use of force as a first resort, protects against the unnecessary erosion of peacetime norms and institutions, and safeguards individual liberty. At the same time, the zone approach ensures that the state can effectively respond to grave threats to its security, wherever those threats are based. The United States has already adopted a number of policies that distinguish between zones of active hostilities and elsewhere, implicitly recognizing the importance of this distinction. By adopting the proposed framework as a matter of law, the United States can begin to set the standards and build an international consensus as to the rules that ought to apply, not only to this conflict, but to future conflicts. The likely reputational, security, and foreign policy gains make acceptance of this framework a worthy endeavor.

### Clear Definition

#### Fails- no clear definition of combatant means no definition of “zone of hostility”

Goodman and Knuckley ’13 (Ryan Goodman is the Anne and Joel Ehrenkranz Professor of Law at New York University School of Law, where he also serves as Co-Chair of the Center for Human Rights and Global Justice. Sarah Knuckey is Director of the Project on Extrajudicial Executions at New York University School of Law, and a Special Advisor to the UN Special Rapporteur on extrajudicial executions, “What Obama's New Killing Rules Don't Tell You”, <http://www.esquire.com/blogs/politics/obama-counterterrorism-speech-questions-052413>, May 24, 2013)

In a landmark speech on counterterrorism yesterday, President Obama outlined rules for the conduct of lethal operations abroad. The speech itself may mark a turning point as the president tries to steer the country away from "perpetual war," and toward a counterterrorism policy that better balances security and rights. The administration also published written rules for the use of lethal force, an important response to years of criticism of the administration’s secretive killing program. Many hoped this moment would herald a new era of transparency. To be sure, these steps bring clarity to some issues. But, the framework he presented also raises some troubling questions and leaves important older questions completely unanswered. Where do the rules apply? The new rules apply only to operations conducted outside "areas of active hostilities." A lot turns on the definition of that geographic boundary. For all we know, the administration may define parts of Pakistan, Yemen, and elsewhere as a zone of hostilities. The administration, however, doesn’t tell you how it decides when and where places of active hostilities exist. And wherever such zones exist, the new rules are irrelevant. In short, it is possible that the "new" rules may leave completely untouched some of the most significant parts of the existing drone program. Signature strikes: in or out? Some suggest that the new rules put an end to controversial signature strikes, carried out based on patterns of behavior assumed to indicate militancy. The new rules do finally rebut reports (sourced originally to anonymous government officials) that "all military-aged males in the vicinity of a target are deemed to be combatants." Yet there is no clarity at all about what actual "signatures" were used, or might still be in use. Nothing in the new rules requires that the government kill only named targets, and nothing in the rules prohibits behavior-based targeting. On the contrary, senior administration officials, hours before the President’s speech, suggested that signature strikes will continue but perhaps decrease "over time." Whether to capture or kill?: One of the rules, already known from the leaked Department of Justice white paper is that the government may kill only when "capture is not feasible." This phrase begs the question: at what price is capture considered infeasible? The answer, according to the government, is clearly not limited to situations in which it is physically impossible to apprehend an individual. The rule apparently includes situations in which it is not possible to capture the individual without significant risks to U.S. forces or to nearby civilians. The President's speech was at its most persuasive in explaining those types of concerns. His remarks however failed to address a nagging concern, and may have needlessly aggravated it. The concern, raised in recent books by Daniel Klaidman and Mark Mazzetti, is that Obama turned to drone strikes as the tactic of choice once the apprehension and detention of international terrorists became a political "briar patch" for the administration. In his speech, the President suggested that wrapped up in the definition of feasibility are concerns about the political fallout from ground forces capturing an individual. The President appeared to suggest that he may consider capture "foreclosed" — that is, off the table — when that option would result in a public "backlash" among local populations or spark international tensions. We trust the President is not actually saying that when apprehending an individual is politically costly, that person might instead be killed. But his speech missed an opportunity to dismiss such frequently voiced concerns once and for all. Killed but not "specifically" targeted: In its belated acknowledgement that the US has killed four American citizens since 2009, the administration gave us another novel turn of phrase: "not specifically targeted." This is carefully crafted, but highly opaque wording. The government says that one American, Anwar al-Aulaqi, was "specifically targeted and killed." The other three, it says, were "not specifically targeted" but no explanation whatsoever is given for their deaths. Were these Americans purposely or knowingly killed in signature strikes? Were they intentional or accidental collateral damage in a strike on some other target? Or killed by mistake? We just don't know, and this raises significant questions not just about the targeting of Americans, but of the thousands of others killed. Senior operational leaders, or any terrorist? In an important piece, McClatchy reporter Jonathan Landay accurately notes that the new rules do not limit force to senior operational leaders, although this limit appeared in numerous prior government statements and the much discussed White Paper. The new rules are at odds with some popular assumptions that only high-level leaders are targeted. The written rules indicate instead that any member of a terrorist group carrying out attacks is targetable. This revelation appears consistent with past findings that only 2 percent of killings have been of “high-level” militants, and that the vast majority of strikes have killed low-level fighters. The administration thus appears to be taking a more explicitly expansive approach to its kill list. Threats to U.S. persons and the end of bargaining chip strikes? What or whom does a terrorist have to threaten to make them targetable by the U.S. government? The new rules say that the government will kill only to "prevent or stop attacks against U.S. persons." This would seem to rule out U.S. attacks carried out at the request of Pakistan or Yemen and involvement in other countries’ purely domestic insurgencies, attacks sometimes called "side-payment strikes" or "goodwill strikes." However, a "reservation" at the end of the written rules states that the President can still take action to protect U.S. allies – does this leave open future strikes carried out for other countries? And given reports indicating that such strikes have taken place in the past, should we now assume that the administration has decided to completely forgo all such tactics? When can civilians be killed? The rules set out a strict test: strikes will take place only when there is a "near certainty" that civilians will not be injured or killed. This is far stricter than the traditional test in armed conflict, which permits civilian deaths proportionate to a military advantage. Officials suggested that this test may have existed "for the last several years." However, the demanding test is difficult to reconcile with specific allegations of civilian harm, such as the 2009 Al-Majala strike in which 21 children were reportedly killed, or numerous individual reports of civilian harm in Pakistan. To fulfill its transparency and accountability commitments, the administration must now answer the specific allegations. Still no clarity about key terms: "associated forces" and "imminence." The administration has received much criticism for its "elongated" imminence concept. Its position that it can kill "associated forces" of al-Qa'ida has also been a key point of controversy because the government has never adequately defined who these forces are. Although many anticipated increased transparency on these points, little was offered, and we still don't meaningfully know how these categories are being applied or defined.

### Judicial Interp DA

#### Now scholars also agree that territorial limits against terrorists will be defined by judicial interpretations:

BLANK 2010, Director, International Humanitarian Law Clinic, Emory Law School, Laurie R., 9/16/10, “DEFINING THE BATTLEFIELD IN CONTEMPORARY CONFLICT AND COUNTERTERRORISM: UNDERSTANDING THE PARAMETERS OF THE ZONE OF COMBAT,” Georgia Journal of International and Comparative Law, Vol. 39, No. 1, 2010, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1677965>

The third factor—territory—requires the most creative application. Terrorist groups do not use or connect to territory in the same manner as either states or non-state actors seeking to gain power or independence. Conflicts against terrorist groups, as a result, do not follow the boundaries on a map or the dictates of state sovereignty or international legal niceties. But territory can be a contributing factor to a paradigm defining the zone of combat nonetheless. Looking at territory from a new angle, we can see that terrorists use certain areas for safe havens and training camps and identify certain areas as prime targets for repeated attacks. Those territorial areas must therefore have a stronger connection to the zone of combat than others, both geographically and temporally, because the way terrorists use particular areas will naturally change over time.

Besides these factors drawn from the law of armed conflict, we can look to judicial interpretations and policy considerations as well. Taken as a whole, these analytical tools form a first step in the critical task of identifying where and when a state can conduct operations within an armed conflict framework, a necessary companion to the ongoing debate about whether a state can conduct operations within such a framework.

#### Which they would cite the most recent appeals court brief provided

BLANK 2010, Director, International Humanitarian Law Clinic, Emory Law School, Laurie R., 9/16/10, “DEFINING THE BATTLEFIELD IN CONTEMPORARY CONFLICT AND COUNTERTERRORISM: UNDERSTANDING THE PARAMETERS OF THE ZONE OF COMBAT,” Georgia Journal of International and Comparative Law, Vol. 39, No. 1, 2010, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1677965>

7 Warren Richey, Appeals Court Weighs Who’s an Enemy Combatant, CHRISTIAN SCI.¶ MONITOR, Oct. 31, 2007, http://www.csmonitor.com/2007/1031/p02s01-usju.html (describing the government’s argument in a brief submitted in the case of Ali Saleh al-Marri before the¶ Fourth Circuit Court of Appeals).

8 In assessing if a particular detainee is an enemy combatant, courts consider the location¶ of his capture or his activities as one consideration, thus tentatively touching on the¶ parameters of the zone of combat.

#### Which applies to literally ANYONE.

CSM 7 (<http://www.csmonitor.com/2007/1031/p02s01-usju.html>)

At issue before the appeals court is who can validly be held by US forces as an enemy combatant in the war on terror. The law of war permits the military to take war prisoners and hold them in detention facilities to prevent enemy combatants from rejoining the battle.

There is no doubt that someone captured while using an AK-47 on a battlefield in Afghanistan can legitimately be detained by the American military for the duration of the conflict.

What is less clear is whether the president can use his power as commander in chief to order similar open-ended military detentions of civilians in the US who are suspected of conspiring with Al Qaeda to commit future acts of terrorism in America.

The Bush administration argues that the battlefield in the global war on terror extends to every corner of the US itself. It does not just apply to those engaged in traditional combat on a raging battlefield. It also applies to those who secretly associate themselves with Al Qaeda and come to the US to conduct hostile, warlike acts on behalf of Al Qaeda.

Otherwise, government lawyers say in a brief, the president would be "without the authority to use the military force necessary to prevent individuals identically situated with Mohamed Atta and his cohorts from planning and executing another September 11 attack."

The president can use his military detention power against anyone in the US – including American citizens and foreign nationals who are in the US under a valid visa, government lawyers say. Once designated an enemy combatant and held in military custody, the detainee is stripped of most legal and constitutional protections and is held as if he had been taken prisoner on a traditional battlefield.

# Case

### 1

**CIR is Passing now because of political capital- its top of the docket**

**Rojas, 10-17** (Nicole, “Congressman Luis Gutierrez: 'Votes Exist for Comprehensive Immigration Reform' [Exclusive Video],” <http://www.latinospost.com/articles/29855/20131017/congressman-luis-gutierrez-votes-exist-comprehensive-immigration-reform-exclusive-video.htm>)

It comes as little surprise that immigration reform has taken a backseat to the government shutdown that began on October 1. But while the White House and Congress have devoted the last 16 days to the fiscal cliff and debt ceiling, all signs indicate that immigration reform will be the next issue on the docket.¶ In an exclusive interview with Latinos Post at the onset of the government shutdown, Rep. Luis Gutierrez, D- Ill., discussed the “detrimental effect” the shutdown had on immigration reform talks. Gutierrez, who has made immigration reform one of his top priorities, also discussed what he expects will happen to the immigration reform debate in the future.¶ “I think that if we didn’t have the government shutdown, if we didn’t have this looming fiscal cliff because of the debt ceiling, I think there’d be more of an appetite to take [it] up,” Gutierrez told Latinos Post. “We’re not going to take up immigration reform while we’re dealing with the fiscal cliff. Absolutely, it’s taking a detrimental effect.”¶ “That doesn’t mean we can’t do it,” the congressman added. “It’s just we’re going to have to get this [the government shutdown] done first.”¶ Gutierrez, who spoke at the Congressional Hispanic Caucus Institute’s Public Policy Conference earlier this month, has special interest in immigration reform through his participation in the House of Representative’s “Gang of Seven.” The “Gang of Seven,” which is the House’s bipartisan team currently working on overhauling the country’s immigration laws, saw the departure of two Republican members in late September, including Reps. John Carter, R-Texas, and Sam Johnson, R-Texas.¶ Despite their departures, Gutierrez assured that the group is committed to bringing about immigration reform. “The votes exist for comprehensive immigration reform,” he said. “The fact that Johnson and Carter have left does not change that.”¶ Gutierrez added, “Never before have we seen such broad based support for it. And because that broad based support for it exists, sooner or later we’re going to get a vote.”¶ According to a recent report by [Buzzfeed](http://www.buzzfeed.com/evanmcsan/obama-has-already-won-the-shutdown-fight-and-hes-coming-for), advocates for immigration reform contest that immigration reform could be the next issue the House tackles once the government shutdown comes to an end. Frank Sharry, the executive director of the immigration reform group America’s Voice, told Buzzfeed that “sinking poll numbers for Republican” and a “badly damaged” GOP image could be enough to address immigration reform.¶ It appears that the White House is also eager to have immigration reform as their top priority once the fiscal crisis is resolved, Reuters reported. During an interview with Univision, President Barack Obama said, “Once that’s down, you know, the day after, I’m going to be pushing to say, call a vote on immigration reform.”¶ On Tuesday, Obama blamed House Speaker John Boehner for preventing immigration reform from going to a vote, Reuters reported. “We had a very strong Democratic and Republican vote in the Senate,” he said. “The only thing right now that’s holding it back is, again, Speaker Boehner now willing to call the bill on the floor of the House of Representatives.”¶ Despite the House’s inability to call the bill to a vote, Gutierrez seemed confident that it would before the end of the year. “I can see the House of Representatives passing the bill,” he said. “I can see the House of Representatives passing the bill and going to conference by the end of the year.”

**Plan wrecks PC**

Douglas L. Kriner 10, Assistant Professor of Political Science at Boston University, 2010, After the Rubicon: Congress, Presidents, and the Politics of Waging War, p. 68-69

Raising or Lowering Political Costs by Affecting Presidential Political Capital

Shaping both real and anticipated public opinion are two important ways in which Congress can raise or lower the political costs of a military action for the president. However, focusing exclusively on opinion dynamics threatens to obscure the much broader political consequences of domestic reaction—particularly congressional opposition—to presidential foreign policies. At least since Richard Neustadt's seminal work Presidential Power, presidency scholars have warned that costly political battles in one policy arena frequently have significant ramifications for presidential power in other realms. Indeed, two of Neustadt's three "cases of command"—Truman's seizure of the steel mills and firing of General Douglas MacArthur—explicitly discussed the broader political consequences of stiff domestic resistance to presidential assertions of commander-in-chief powers. In both cases, Truman emerged victorious in the case at hand—yet, Neustadt argues, each victory cost Truman dearly in terms of his future power prospects and leeway in other policy areas, many of which were more important to the president than achieving unconditional victory over North Korea."¶ While congressional support leaves the president's reserve of political capital intact, congressional criticism saps energy from other initiatives on the home front by forcing the president to expend energy and effort defending his international agenda. Political capital spent shoring up support for a president's foreign policies is capital that is unavailable for his future policy initiatives. Moreover, any weakening in the president's political clout may have immediate ramifications for his reelection prospects, as well as indirect consequences for congressional races.59 Indeed, Democratic efforts to tie congressional Republican incumbents to President George W. Bush and his war policies paid immediate political dividends in the 2006 midterms, particularly in states, districts, and counties that had suffered the highest casualty rates in the Iraq War.60¶ In addition to boding ill for the president's perceived political capital and reputation, such partisan losses in Congress only further imperil his programmatic agenda, both international and domestic. Scholars have long noted that President Lyndon Johnson's dream of a Great Society also perished in the rice paddies of Vietnam. Lacking both the requisite funds in a war-depleted treasury and the political capital needed to sustain his legislative vision, Johnson gradually let his domestic goals slip away as he hunkered down in an effort first to win and then to end the Vietnam War. In the same way, many of President Bush's highest second-term domestic priorities, such as Social Security and immigration reform, failed perhaps in large part because the administration had to expend so much energy and effort waging a rear-guard action against congressional critics of the war in Iraq.61¶ When making their cost-benefit calculations, presidents surely consider these wider political costs of congressional opposition to their military policies. If congressional opposition in the military arena stands to derail other elements of his agenda, all else being equal, the president will be more likely to judge the benefits of military action insufficient to its costs than if Congress stood behind him in the international arena.

**Immigration reform is key to food security**

**ACIR ‘7** (December 4, 2007 THE AGRICULTURE COALITION FOR IMMIGRATION REFORM

Dear Member of Congress: The Agriculture Coalition for Immigration Reform (ACIR) is deeply concerned with pending immigration enforcement legislation known as the ‘Secure America Through Verification and Enforcement Act of 2007' or ‘SAVE Act’ (H.R.4088 and S.2368). While these bills seek to address the worthy goal of stricter immigration law enforcement, they fail to take a comprehensive approach to solving the immigration problem. History shows that a one dimensional approach to the nation’s immigration problem is doomed to fail. Enforcement alone, without providing a viable means to obtain a legal workforce to sustain economic growth is a formula for disaster. Agriculture best illustrates this point. Agricultural industries that need considerable labor in order to function include the fruit and vegetable, dairy and livestock, nursery, greenhouse, and Christmas tree sectors. Localized labor shortages have resulted in actual crop loss in various parts of the country. More broadly, producers are making decisions to scale back production, limit expansion, and leave many critical tasks unfulfilled. Continued labor shortages could force more producers to shift production out of the U.S., thus stressing already taxed food and import safety systems. Farm lenders are becoming increasingly concerned about the stability of affected industries. This problem is aggravated by the nearly universal acknowledgement that the current H-2A agricultural guest worker program does not work. Based on government statistics and other evidence, roughly 80 percent of the farm labor force in the United States is foreign born, and a significant majority of that labor force is believed to be improperly authorized. The bills’ imposition of mandatory electronic employment eligibility verification will screen out the farm labor force without providing access to legal workers. Careful study of farm labor force demographics and trends indicates that there is not a replacement domestic workforce available to fill these jobs. This feature alone will result in chaos unless combined with labor-stabilizing reforms. Continued failure by Congress to act to address this situation in a comprehensive fashion is placing in jeopardy U.S. food security and global competitiveness. Furthermore, congressional inaction threatens the livelihoods of millions of Americans whose jobs exist because laborintensive agricultural production is occurring in America. If production is forced to move, most of the upstream and downstream jobs will disappear as well. The Coalition cannot defend of the broken status quo. We support well-managed borders and a rational legal system. We have worked for years to develop popular bipartisan legislation that would stabilize the existing experienced farm workforce and provide an orderly transition to wider reliance on a legal agricultural worker program that provides a fair balance of employer and employee rights and protections. We respectfully urge you to oppose S.2368, H.R.4088, or any other bills that would impose employment-based immigration enforcement in isolation from equally important reforms that would provide for a stable and legal farm labor force.

**Food insecurity sparks World War 3**

**Calvin ’98** (William, Theoretical Neurophysiologist – U Washington, Atlantic Monthly, January, Vol 281, No. 1, p. 47-64)

The population-crash scenario is surely the most appalling. Plummeting crop yields would cause some powerful countries to try to take over their neighbors or distant lands -- if only because their armies, unpaid and lacking food, would go marauding, both at home and across the borders. The better-organized countries would attempt to use their armies, before they fell apart entirely, to take over countries with significant remaining resources, driving out or starving their inhabitants if not using modern weapons to accomplish the same end: eliminating competitors for the remaining food. This would be a worldwide problem -- and could lead to a Third World War -- but Europe's vulnerability is particularly easy to analyze. The last abrupt cooling, the Younger Dryas, drastically altered Europe's climate as far east as Ukraine. Present-day Europe has more than 650 million people. It has excellent soils, and largely grows its own food. It could no longer do so if it lost the extra warming from the North Atlantic.

**CIR key to economy**

Smith 12. [Gerry, technology reporter, "Brain Drain: Why We're Driving Immigration Talent Overseas" Huffington Post -- November 5 -- www.huffingtonpost.com/2012/11/09/immigrant-entrepreneur\_n\_2077183.html]

Stories like his are not unique. They’re also troubling for the U.S. economy, advocates say. For the first time, the number of immigrant-founded startups is in decline, as foreign-born entrepreneurs struggle to obtain a limited number of visas and green cards and decide to launch companies in other countries that offer perks to start businesses there. Losing founders like Darash, who launch startups that create jobs, means that America risks losing a source of employment and a competitive edge in the global economy as the country claws its way out of a recession, they say.¶ For years, immigrant entrepreneurs have propelled the growth of Silicon Valley, building some of the most successful tech companies in the world: Sergey Brin, co-founder of Google, was born in Russia; Elon Musk, co-founder of PayPal and Tesla, was born in South Africa; Vinod Khosla, co-founder of Sun Microsystems, was born in India. When they immigrated, it was likely easier for them because there was not a backlog that there is today, according to Vivek Wadhwa, a professor at the Pratt School of Engineering at Duke University who researches high-tech immigration. Immigrants are more than twice as likely to start a business as native-born Americans, according to a report earlier this year by the Partnership for a New American Economy. And their companies have produced sizable economic benefits. This year, engineering and technology companies founded in the United States employed about 560,000 workers and generated $63 billion in sales, according to Wadhwa. About a quarter of those companies had at least one foreign-born founder.¶ An estimated three out of every four startups fail, if not more. But by the conventional wisdom of Silicon Valley, Darash’s chances were even slimmer. For one, he does not have a co-founder. He insists he doesn’t need one. (Paul Graham, creator of the startup incubator Y Combinator, has said having a co-founder is critical because “a startup is too much for one person to bear.”) Darash also never worked for a major tech company before, so he did not have the network of contacts that help other entrepreneurs find engineers and meet investors.¶ But what he has lacked in support and connections he has made up for through a work ethic that borders on obsession.¶ “Asaf is a stubborn guy,” said Adam Gries, a childhood friend and founder of Smart Bites, a smartphone app that teaches people English. “He gets into his head that something is going to happen and he’s tenacious.”¶ Darash awakes every morning at 4:30 a.m., takes the BART train from his home in Berkeley to San Francisco, and arrives at the office by 6 a.m. He works for an hour, then walks across the street to the gym to swim and lift weights (A back injury he suffered while serving in the Israeli army requires him to stay physically strong). He typically does not go home until 9 p.m., after his children have gone to bed. Employees say he is a “total workaholic” who sends emails past midnight and sleeps just a few hours a night.¶ “I have a one-and-a-half year old who sees his Daddy maybe three hours a week,” Darash said. “It’s hard to explain how much sacrifice you make to bring a company from an idea to something real, especially if it’s a company with high-level technology.”¶ He is hands-on about all aspects of the company, from courting new clients to writing code. But lately, Darash has been distracted, spending valuable hours gathering documents and talking to lawyers, instead of running his company. His wife recently flew back to Israel to find housing and a school for their kids in case they have to leave the United States. He describes feeling a range of emotions: anger, fear, frustration. Mostly, though, he is confused. In his homeland of Israel, politicians fight over who can attract more foreign entrepreneurs. The United States, he says, should be rolling out the welcome mat for him, not ushering him out the door.¶ “I could not even comprehend this would become a problem,” he said. “I’m creating a company. I’m creating jobs. There’s nothing bad in what I’m doing and there’s nothing I’m taking away from someone else. The only thing I’m doing is creating more!”¶ “SERIOUS ALARM”¶ Since 2005, the number of immigrant-founded startups in Silicon Valley has declined from 52 percent to 44 percent, according to Wadhwa, who argues this drop is cause for “serious alarm” because America needs to attract immigrant entrepreneurs for its economy to recover.¶ “The United States risks losing a key growth engine right at the moment when it’s economy is stuck in a deep ditch, growing slowly and struggling to create jobs,” Wadhwa wrote in his new book, The Immigrant Exodus.¶ Their recent decline could be linked to entrepreneurs finding better business prospects abroad, especially in countries with growing economies like India and China. But advocates say a major reason why immigrants are launching fewer startups in the United States is because they are struggling to secure visas to remain in the country.

**Economic decline causes nuclear war**

Merlini 11

[Cesare Merlini, nonresident senior fellow at the Center on the United States and Europe and chairman of the Board of Trustees of the Italian Institute for International Affairs (IAI) in Rome. He served as IAI president from 1979 to 2001. Until 2009, he also occupied the position of executive vice chairman of the Council for the United States and Italy, which he co-founded in 1983. His areas of expertise include transatlantic relations, European integration and nuclear non-proliferation, with particular focus on nuclear science and technology. A Post-Secular World? DOI: 10.1080/00396338.2011.571015 Article Requests: Order Reprints : Request Permissions Published in: journal Survival, Volume 53, Issue 2 April 2011 , pages 117 - 130 Publication Frequency: 6 issues per year Download PDF Download PDF (357 KB) View Related Articles To cite this Article: Merlini, Cesare 'A Post-Secular World?', Survival, 53:2, 117 – 130]

Two neatly opposed scenarios for the future of the world order illustrate the range of possibilities, albeit at the risk of oversimplification. The first scenario entails the premature crumbling of the post-Westphalian system. One or more of the acute tensions apparent today evolves into an open and traditional conflict between states, perhaps even **involving the use of nuclear weapons**. The crisis might be triggered by a collapse of the global economic and financial system, the vulnerability of which we have just experienced, and the prospect of a second Great Depression, with consequences for peace and democracy similar to those of the first. Whatever the trigger, the unlimited exercise of national sovereignty, exclusive self-interest and rejection of outside interference would likely be amplified, emptying, perhaps entirely, the half-full glass of multilateralism, including the UN and the European Union. Many of the more likely conflicts, such as between Israel and Iran or India and Pakistan, have potential religious dimensions. Short of war, tensions such as those related to immigration might become unbearable. Familiar issues of creed and identity could be exacerbated. One way or another, the secular **rational approach would be sidestepped** by a return to theocratic absolutes, competing or converging with secular absolutes such as unbridled nationalism.

**High skilled workers key to biotech**

**Mowad 7.** [Michelle, Doctor, “Cap on Visas for Skilled Foreign Workers Stifling Biotech, Tech”, San Diego Business Journal, 4-23, http://www.allbusiness.com/legal/immigration-law-passports-visas-employment/10582800-1.html]

The local biotechnology and technology industries, highly dependent on very highly skilled workers, are waiting to see if their foreign job applicants have been awarded work visas. U.S. immigration officials received twice the maximum number of applications for H-1B visas given to foreign individuals holding advanced degrees on the first day of the application process. The U.S. Citizenship and Immigration Services opened the application process on April 2 for granting visas for the new fiscal year that starts Oct. 1. Because the "cap" was exceeded the first day, the USCIS will hold a lottery to select from the applicants who applied on the first and second days. There are enormous economic and health benefits to opening up employment to international candidates, said Kristie Ford with Biocom, a life sciences industry association representing 530-plus member companies in Southern California. "Biotech is an industry that is going to continue to boom, and we need a work force that fits the industry needs," she said. Domestic businesses use the H-1B program so they can hire foreign workers In occupations that require theoretical or technical expertise in specialized fields, such as accounting, architecture, education, engineering, law, mathematics, medicine and health, physics, social sciences and theology. Kevin Carroll, executive director of the San Diego chapter of the American Electronics Association, said technology businesses have a history of welcoming the best and brightest workers. He said there is a need to raise the cap. "We need more (H-1B visas) and we need them now," said Carroll, whose AeA chapter consists of 150 technology-based member businesses. He said that demand for technology employers is extremely high. The unemployment rate for engineers is significantly low at 2 percent, according to Carroll. "This has an impact on the ability of San Diego to stay competitive," he said. Carroll added that a limited number of work visas forces companies to go to extraordinary lengths for recruiting. Each year, the USCIS processes 65,000 H-1B visas. This year, the agency received 124,000 applications in the first two days. In addition, the USCIS will issue an additional 20,000 H-1B visas to foreigners who hold advanced degrees from U.S. universities. USCIS received 13,000 applications for this type of visa within the first two days of the processing period. Individuals who applied for the work visa earlier this month will now have to wait up to four weeks after April 12 before they know if they have been approved or need to leave the country. The wait and importance of H-1B visas to San Diego is at the forefront of many minds. Attorneys from the San Diego office of Duane Morris LLP will host a seminar on the current trends in employment, benefits and immigration law on April 26. Topics to be covered include H-1B visas and the caps being met so early. Lisa Spiegel, an immigration and nationality attorney with Duane Morris, said two years ago applications reached the cap amount in August. Last year, the applications reached the cap amount in May and this year on the first day. "It is a sign of the economy growing," she said. "Companies need more high-tech workers." She said highly skilled jobs in the computer and biotechnology industries are driving the need for a higher cap number. "Companies need employees with a certain level of education and skill set, and they can't find enough in the U.S. so they are willing to hire top talent from around the world, but the problem is that they can't get them into the U.S.," she said. She added that domestic companies often resort to opening foreign satellite offices because it is so difficult to bring professionals here. "The U.S. is losing out on attracting foreign workers and top talent to come here, we are losing their taxes, we are losing the company's tax base and we are losing the ability to make the U.S. a place where the top talent wants to come for graduate school," she said. And if foreigners can't be certain they can obtain a work visa after graduation from a U.S. university, they may be reluctant to attend school here, she said. "These are not people coming in illegally, these are people coming in and contributing to our country," she said. The economy of California will suffer as a result of this cap, said Spiegel. "Companies are losing workers and losing the ability to remain competitive because they cannot get enough people to staff their projects," she said. The San Diego office of Mintz Levin Cohn Ferris Glovsky and Popeo PC hosted an immigration strategies conference April 19 at Estancia La Jolla Hotel & Spa. William L. Coffman, an attorney with Mintz Levin's Boston office, was a speaker at the event. Coffman reviewed alternative visa options for foreigners who may not be awarded an H-1B visa. Biocom offers several programs aimed to attract a local and national work force. The association created a Life Sciences Success program to facilitate student internships, teacher externships and a summer life sciences boot camp to connect students and teachers with leading companies in San Diego's life sciences community. Last year, 34 students attended boot camp, 44 participated in summer internships and 18 educators carried out externships. "Bottom line is that life sciences companies need a skilled work force," said Ford, associate director of Workforce Development for Biocom. "Biocom is trying to help it two ways - we are trying to grow our homegrown work force, but then we also support raising the H-1B visa cap as well." While many companies are not optimistic applicants will receive these coveted H-1B visas, talk of immigration reform has permeated the market. For now, industry associates including Biocom and local businesses are attempting to garner support for reform to make life easier for biotechnology and technology.

**Solves extinction**

**Trewavas 00** [Anthony, Institute of Cell and Molecular Biology – University of Edinburgh, “GM Is the Best Option We Have”, AgBioWorld, 6-5, http://www.agbioworld.org/biotech-info/articles/biotech-art/best\_option.html]

But these are foreign examples; global warming is the problem that requires the UK to develop GM technology. 1998 was the warmest year in the last one thousand years. Many think global warming will simply lead to a wetter climate and be benign. I do not. Excess rainfall in northern seas has been predicted to halt the Gulf Stream. In this situation, average UK temperatures would fall by 5 degrees centigrade and give us Moscow-like winters. There are already worrying signs of salinity changes in the deep oceans. Agriculture would be seriously damaged and necessitate the rapid development of new crop varieties to secure our food supply. We would not have much warning. Recent detailed analyses of arctic ice cores has shown that the climate can switch between stable states in fractions of a decade. Even if the climate is only wetter and warmer new crop pests and rampant disease will be the consequence. GM technology can enable new crops to be constructed in months and to be in the fields within a few years. This is the unique benefit GM offers. The UK populace needs to much more positive about GM or we may pay a very heavy price. In 535A.D. a volcano near the present Krakatoa exploded with the force of 200 million Hiroshima A bombs. The dense cloud of dust so reduced the intensity of the sun that for at least two years thereafter, summer turned to winter and crops here and elsewhere in the Northern hemisphere failed completely. The population survived by hunting a rapidly vanishing population of edible animals. The after-effects continued for a decade and human history was changed irreversibly. But the planet recovered. Such examples of benign nature's wisdom, in full flood as it were, dwarf and make miniscule the tiny modifications we make upon our environment. There are apparently 100 such volcanoes round the world that could at any time unleash forces as great. And even smaller volcanic explosions change our climate and can easily threaten the security of our food supply. Our hold on this planet is tenuous. In the present day an equivalent 535A.D. explosion would **destroy** much of our **civilisation**. Only those with agricultural technology sufficiently advanced would have a chance at **survival**. Colliding asteroids are another problem that requires us to be forward-looking accepting that **technological advance may be the only buffer between us and annihilation**.

**Solves US-India relations --- builds trade relationships**

LA Times 12, 11/9/2012 (Other countries eagerly await U.S. immigration reform, p. http://latimesblogs.latimes.com/world\_now/2012/11/us-immigration-reform-eagerly-awaited-by-source-countries.html)

"**C**omprehensive **i**mmigration **r**eform will see expansion of skilled labor visas," predicted B. Lindsay Lowell, director of policy studies for the Institute for the Study of International Migration at Georgetown University. A former research chief for the congressionally appointed Commission on Immigration Reform, Lowell said he expects to see at least a fivefold increase in the number of highly skilled labor visas that would provide "a significant shot in the arm for India and China."¶ There is widespread consensus among economists and academics that skilled migration fosters new trade and business relationships between countries and enhances links to the global economy, Lowell said.¶ "Countries like India and China weigh the opportunities of business abroad from their expats with the possibility of brain drain, and I think they still see the immigration opportunity as a bigger plus than not," he said.

**India-Pakistan war would trigger nuclear winter**

Fai 1 (Ghulam, Kashmiri American Council, July 8, Washington Times)

The foreign policy of the United States in South Asia should move from the lackadaisical and distant (with India crowned with a unilateral veto power) to aggressive involvement at the vortex. The most dangerous place on the planet is Kashmir, a disputed territory convulsed and illegally occupied for more than 53 years and sandwiched between nuclear-capable India and Pakistan. It has ignited two wars between the estranged South Asian rivals in 1948 and 1965, and a third could trigger nuclear volleys and a nuclear winter threatening **the** entire **globe**. The United States would enjoy no sanctuary. This apocalyptic vision is no idiosyncratic view. The Director of Central Intelligence, the Department of Defense, and world **experts** generally **place Kashmir at the peak of their** nuclear **worries**. Both India and Pakistan are racing like thoroughbreds to bolster their nuclear arsenals and advanced delivery vehicles. Their defense budgets are climbing despite widespread misery amongst their populations. Neither country has initialed the Nuclear Non-Proliferation Treaty, the Comprehensive Test Ban Treaty, or indicated an inclination to ratify an impending Fissile Material/Cut-off Convention.

### 2

**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.

**Vote neg---Only prohibitions on authority guarantee neg ground---their interpretation lets affs no link the best neg offense like deference**

### 3

**The President of the United States should request his Counsel and the Office of Legal Counsel for coordination over his war powers authority on targeted killing authority. The President should restrict his war power authority to use targeted killing as a first resort outside zones of active hostilities**

**Constraints through executive coordination solves signaling**

**POSNER & VERMEULE 2006** --- \*Prof of Law at U Chicago, AND \*\* Prof of Law at Harvard (9/19/2006, Eric A. Posner & Adrian Vermeule, “The Credible Executive,” <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=931501)>)

IV. Executive Signaling: Law and Mechanisms

We suggest that the executive’s credibility problem can be solved by second-order mechanisms of executive signaling. In the general case, well-motivated executives send credible signals by taking actions that are more costly for ill-motivated actors than for well-motivated ones, thus distinguishing themselves from their ill-motivated mimics. Among the specific mechanisms we discuss, an important subset involve executive self-binding, whereby executives commit themselves to a course of action that would impose higher costs on ill-motivated actors. Commitments themselves have value as signals of benign motivations.This departs from the usual approach in legal scholarship. Legal theory has often discussed self-binding by “government” or government officials. In constitutional theory, it is often suggested that constitutions represent an attempt by “the people” to bind “themselves” against their own future decisionmaking pathologies, or relatedly that constitutional prohibitions represent mechanisms by which governments commit themselves not to expropriate investments or to exploit their populations.71 Whether or not this picture is coherent,72 it is not the question we examine here, although some of the relevant considerations are similar.73 We are not concerned with binding the president so that he cannot abuse his powers, but with how he might bind himself or take other actions that enhance his credibility, so that he can generate support from the public and other members of the government. Furthermore, our question is subconstitutional; it is whether a well-motivated executive, acting within an established set of constitutional and statutory rules, can use signaling to generate public trust. Accordingly we proceed by assuming that no constitutional amendments or new statutes will be enacted. Within these constraints, what can a well-motivated executive do to bootstrap himself to credibility? The problem for the well-motivated executive is to credibly signal his benign motivations; in general, the solution is to engage in actions that are less costly for good types than for bad types. We begin with some relevant law; then examine a set of possible mechanisms, emphasizing both the conditions under which they might succeed and the conditions under which they might not; and then examine the costs of credibility. A. A Preliminary Note on Law and Self-Binding Many of our mechanisms are unproblematic from a legal perspective, as they involve presidential actions that are clearly lawful. But a few raise legal questions; in particular, those that involve self-binding.74 Can a president bind himself to respect particular first-order policies? With qualifications, the answer is “yes, at least to the same extent that a legislature can.” Formally, a duly promulgated executive rule or order binds even the executive unless and until it is validly abrogated, thereby establishing a new legal status quo.75 The legal authority to establish a new status quo allows a president to create inertia or political constraints that will affect his own future choices. In a practical sense, presidents, like legislatures, have **great de facto power to adopt policies that shape the legal landscape for the future.** A president might commit himself to a long-term project of defense procurement or infrastructure or foreign policy, narrowing his own future choices and **generating new political coalitions** that will act to defend the new rules or policies.More schematically, we may speak of formal and informal means of self-binding: (1) The president might use formal means to bind himself. This is possible in the sense that an executive order, if otherwise valid, legally binds the president while it is in effect and may be enforced by the courts. It is not possible in the sense that the president can always repeal the executive order if he can bear the political and reputational costs of doing so. (2) The president might use informal means to bind himself. This is not only possible but frequent and important. Issuing an executive rule providing for the appointment of special prosecutors, as Nixon did, is not a formal self-binding.76 However, there may be large political costs to repealing the order. This effect does not depend on the courts’ willingness to enforce the order, even against Nixon himself. Court enforcement makes the order legally binding while it is in place, but only political and reputational enforcement can protect it from repeal. Just as a dessert addict might announce to his friends that he is going on a no-dessert diet in order to raise the reputational costs of backsliding and thus commit himself, so too the repeal of an executive order may be seen as a breach of faith even if no other institution ever enforces it. In what follows, we will invoke both formal and informal mechanisms. For our purposes, the distinction between the authority to engage in de jure self-binding (legally limited and well-defined) and the power to engage in de facto self-binding (broad and amorphous) is secondary. So long as policies are **deliberately chosen with a view to generating credibility**, and do so by constraining the **president’s own future choices** in ways that impose greater costs on ill-motivated presidents than on well-motivated ones, **it does not** **matter whether the constraint is formal or informal**. B. Mechanisms What signaling mechanisms might a well-motivated executive adopt to credibly assure voters, legislators and judges that his policies rest on judgments about the public interest, rather than on power-maximization, partisanship or other nefarious motives? Intrabranch separation of powers. In an interesting treatment of related problems, Neal Katyal suggests that the failure of the Madisonian system counsels “internal separation of powers” within the executive branch.77 Abdication by Congress means that there are few effective checks on executive power; second-best substitutes are necessary. Katyal proposes some mechanisms that would be adopted by Congress, such as oversight hearings by the minority party, but his most creative proposals are for arrangements internal to the executive branch, such as redundancy and competition among agencies, stronger civil-service protections and internal adjudication of executive controversies by insulated “executive” decisionmakers who resemble judges in many ways.78Katyal’s argument is relevant because the mechanisms he discusses might be understood as signaling devices, but his overall approach is conceptually flawed, on two grounds. First, the assumption that second-best constraints on the executive should reproduce the Madisonian separation of powers within the executive branch is never defended. The idea seems to be that this is as close as we can get to the first-best, while holding constant everything else in our constitutional order. But the general theory of second-best states that approaching as closely as possible to the first-best will not necessarily be the preferred strategy;79 the best approach may be to adjust matters on other margins as well, in potentially unpredictable ways. If the Madisonian system has failed in the ways Katyal suggests, the best compensating adjustment might be, for all we know, to switch to a parliamentary system. (We assume that no large-scale changes of this sort are possible, whereas Katyal seemingly assumes that they are, or at least does not make clear his assumptions in this regard). Overall, Katyal’s view has a kind of fractal quality – each branch should reproduce within itself the very same separation of powers structure that also describes the whole system – but it is not explained why the constitutional order should be fractal. Second, Katyal’s proposals for internal separation of powers are self-defeating: the motivations that Katyal ascribes to the executive are inconsistent with the executive adopting or respecting the prescriptions Katyal recommends.80 Katyal never quite says so explicitly, but he clearly envisions the executive as a power-maximizing actor, in the sense that the president seeks to remove all constraints on his current choices.81 Such an executive would not adopt or enforce the internal separation of powers to check himself. Executive signaling is not, even in principle, a solution to the lack of constraints on a power-maximizing executive in the sense Katyal implicitly intends. Although an illmotivated executive might bind himself to enhance his strategic credibility, as explained above, he would not do so in order to restore the balance of powers. Nor is it possible, given Katyal’s premise of legislative passivity or abdication, that Congress would force the internal separation of powers on the executive. In what follows, we limit ourselves to proposals that are consistent with the motivations, beliefs, and political opportunities that we ascribe to the well-motivated executive, to whom the proposals are addressed. This limitation ensures that the proposals are not self-defeating, whatever their costs. The contrast here must not be drawn too simply. A well-motivated executive, in our sense, might well attempt to increase his power. The very point of demonstrating credibility is to encourage voters and legislators to increase the discretionary authority of the executive, where all will be made better off by doing so. Scholars such as Katyal who implicitly distrust the executive, however, do not subscribe to this picture of executive motivations. Rather, they see the executive as an unfaithful agent of the voters; the executive attempts to maximize his power even where fully-informed voters would prefer otherwise. An actor of that sort will have no incentive to adopt proposals intended to constrain that sort of actor. Independent commissions. We now turn to some conceptually coherent mechanisms of executive signaling. Somewhat analogously to Katyal’s idea of the internal separation of powers, a well-motivated executive might establish independent commissions to review policy decisions, either before or after the fact. Presidents do this routinely, especially after a policy has had disastrous outcomes, but sometimes beforehand as well. Independent commissions are typically blue-ribbon and bipartisan.82 We add to this familiar process the idea that the President might gain credibility by publicly committing or binding himself to give the commission authority on some dimension. The president might publicly promise **to follow the recommendations** of such a commission, or to allow the commission to exercise de facto veto power over a policy decision before it is made, or might promise before the policy is chosen that the commission will be given power to review its success after the fact. To be sure, there will always be some wiggle room in the terms of the promise, but that is true of almost all commitments, which raise the costs of wiggling out even if they do not completely prevent it. Consider whether George W. Bush’s credibility would have been enhanced had he appointed a blue-ribbon commission to examine the evidence for weapons of mass destruction in Iraq before the 2003 invasion, and publicly promised not to invade unless the commission found substantial evidence of their existence. Bush would have retained his preexisting legal authority to order the invasion even if the commission found the evidence inadequate, but the political costs of doing so would have been large. Knowing this, and knowing that Bush shared that knowledge, the public could have inferred that Bush’s professed motive – elimination of weapons of mass destruction – was also his real motive. Public promises that inflict reputational costs on badly motivated behavior help the well-motivated executive to credibly distinguish himself from the ill-motivated one. The more common version of this tactic is to appoint commissions after the relevant event, as George W. Bush did to investigate the faulty reports by intelligence agencies that Iraq possessed weapons of mass destruction.83 If the president appoints after-the-fact commissions, the commissions can enhance his credibility for the next event—by showing that he will be willing, after that event, to subject his statements to scrutiny by public experts. Here, however, the demonstration of credibility is weaker, because there is no commitment to appoint any after-the-fact commissions in the future – merely a plausible inference that the president’s future behavior will track his past behavior. Bipartisan appointments. In examples of the sort just mentioned, the signaling arises from public position-taking. The well-motivated executive might produce similar effects through appointments to office.84 A number of statutes require partisan balance on multimember commissions; although these statutes are outside the scope of our discussion, we note that presidents might approve them because they allow the president to commit to a policy that legislators favor, thus encouraging legislators to increase the scope of the delegation in the first place.85 For similar reasons, presidents may consent to restrictions on the removal of agency officials, because the restriction enables the president to commit to giving the agency some autonomy from the president’s preferences.86 Similar mechanisms can work even where no statutes are in the picture. As previously mentioned, during World War II, FDR appointed Republicans to important cabinet positions, making Stimson his Secretary of War. Clinton appointed William Cohen, a moderate Republican, as Secretary of Defense in order to shore up his credibility on security issues. Bipartisanship of this sort might improve the deliberation that precedes decisions, by impeding various forms of herding, cascades and groupthink;87 however, we focus on its credibility-generating effects. By (1) expanding the circle of those who share the president’s privileged access to information, (2) ensuring that policy is partly controlled by officials with preferences that differ from the president’s, and (3) inviting a potential whistleblower into the tent, bipartisanship helps to dispel the suspicion that policy decisions rest on partisan motives or extreme preferences, which in turn encourages broader delegations of discretion from the public and Congress. A commitment to bipartisanship is only one way in which appointments can generate credibility. Presidents might simply appoint a person with a reputation for integrity, as when President Nixon appointed Archibald Cox as special prosecutor (although plausibly Nixon did so because he was forced to do so by political constraints, rather than as a tactic for generating credibility). A person with well-known preferences on a particular issue, even if not of the other party or widely respected for impartiality, can serve as a credible whistleblower on that issue. Thus presidents routinely award cabinet posts to leaders of subsets of the president’s own party, leaders whose preferences are known to diverge from the president’s on the subject; one point of this is to credibly assure the relevant interest groups that the president will not deviate (too far) from their preferences. The Independent Counsel Statute institutionalized the special prosecutor and strengthened it. But the statute proved unpopular and was allowed to lapse in 1999.88 This experience raises two interesting questions. First, why have presidents confined themselves to appointing lawyers to investigate allegations of wrongdoing; why have they not appointed, say, independent policy experts to investigate allegations of policy failure? Second, why did the Independent Counsel Statute fail? Briefly, the statute failed because it was too difficult to control the behavior of the prosecutor, who was not given any incentive to keep his investigation within reasonable bounds.89 Not surprisingly, policy investigators would be even less constrained since they would not be confined by the law, and at the same time, without legal powers they would probably be ignored on partisan grounds. A commission composed of members with diverse viewpoints is harder to ignore, if the members agree with each other. More generally, the decision by presidents to bring into their administrations members of other parties, or persons with a reputation for bipartisanship and integrity, illustrates the formation of domestic coalitions of the willing. Presidents can informally bargain around the formal separation of powers90 by employing subsets of Congress, or of the opposing party, to generate credibility while maintaining a measure of institutional control. FDR was willing to appoint Knox and Stimson, but not to give the Republicans in Congress a veto. Truman was willing to ally with Arthur Vandenbergh but not with all the Republicans; Clinton was willing to appoint William Cohen but not Newt Gingrich. George W. Bush likewise made a gesture towards credibility by briefing members of the Senate Intelligence Committee – including Democrats – on the administration’s secret surveillance program(s), which provided a useful talking point when the existence of the program(s) was revealed to the public. Counter-partisanship. Related to bipartisanship is what might be called counterpartisanship: presidents have greater credibility when they choose policies that cut against the grain of their party’s platform or their own presumed preferences.91 Only Nixon could go to China, and only Clinton could engineer welfare reform. Voters and publics rationally employ a political heuristic: the relevant policy, which voters are incapable of directly assessing, must be highly beneficial if it is chosen by a president who is predisposed against it by convictions or partisan loyalty.92 Accordingly, those who wish to move U.S. terrorism policy towards greater security and less liberty might do well to support the election of a Democrat.93 By the same logic, George W. Bush is widely suspected of nefarious motives when he rounds up alleged enemy combatants, but not when he creates a massive prescription drug benefit. Counter-partisanship can powerfully enhance the president’s credibility, but it depends heavily on a lucky alignment of political stars. A peace-loving president has credibility when he declares a military emergency but not when he appeases; a belligerent president has credibility when he offers peace but not when he advocates military solutions. A lucky nation has a well-motivated president with a belligerent reputation when international tensions diminish (Ronald Reagan) and a president with a pacific reputation when they grow (Abraham Lincoln, who opposed the Mexican War). But a nation is not always lucky. Transparency. The well-motivated executive might **commit to transparency**, as a way to reduce the costs to outsiders of monitoring his actions.94 The FDR strategy of inviting potential whistleblowers from the opposite party into government is a special case of this; the implicit threat is that the whistleblower will make public any evidence of partisan motivations. The more ambitious case involves actually exposing the executive’s decisionmaking processes to observation. To the extent that an ill-motivated executive cannot publicly acknowledge his motivations or publicly instruct subordinates to take them into account in decisionmaking, transparency will exclude those motivations from the decisionmaking process. The public will know that only a well-motivated executive would promise transparency in the first place, and the public can therefore draw an inference to credibility.Credibility is especially enhanced when transparency is effected through journalists with reputations for integrity or with political preferences opposite to those of the president. Thus George W. Bush gave Bob Woodward unprecedented access to White House decisionmaking, and perhaps even to classified intelligence,95 with the expectation that the material would be published. This sort of disclosure to journalists is not real-time transparency – no one expects meetings of the National Security Council to appear on CSPAN – but the anticipation of future disclosure can have a disciplining effect in the present. By inviting this disciplining effect, the administration engages in signaling in the present through (the threat of) future transparency.There are complex tradeoffs here, because transparency can have a range of harmful effects. As far as process is concerned, decisionmakers under public scrutiny may posture for the audience, may freeze their views or positions prematurely, and may hesitate to offer proposals or reasons for which they can later be blamed if things go wrong.96 As for substance, transparency can frustrate the achievement of programmatic or policy goals themselves. Where security policy is at stake, secrecy is sometimes necessary to surprise enemies or to keep them guessing. Finally, one must take account of the incentives of the actors who expose the facts—especially journalists who might reward presidents who give them access by portraying their decisionmaking in a favorable light.97 We will take up the costs of credibility shortly.98 In general, however, the existence of costs does not mean that the credibility-generating mechanisms are useless. Quite the contrary: where the executive uses such mechanisms, voters and legislators can draw an inference that the executive is well-motivated, precisely because the existence of costs would have given an ill-motivated executive an excuse not to use those mechanisms.

**The plan would uniquely decimate Obama and the military’s credibility to calm alliances and deter enemies ---- makes terrorism and global nuclear war more likely --- INDEPENDENTLY prevents ability to negotiate Iranian miscalc**

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** maysend **signal**s **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.

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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.

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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

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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.

**Iran miscalc would spark nuclear war**

Ben-Meir, 2/6/2007 (Alon – professor of international relations at the Center for Global Affairs, Ending iranian defiance, United Press International, p. lexis)

That Iran stands today able to challenge or even defy the United States in every sphere of American influence in the Middle East attests to the dismal failure of the Bush administration's policy toward it during the last six years. **Feeling emboldened and unrestrained**, Tehran may, however, miscalculate the consequences of its own actions, which could **precipitate a catastrophic regional war**. The Bush administration has less than a year to rein in Iran's reckless behavior if it hopes to prevent such an ominous outcome and achieve, at least, a modicum of regional stability. By all assessments, Iran has reaped the greatest benefits from the Iraq war. The war's consequences and the American preoccupation with it have provided Iran with an historic opportunity to establish Shiite dominance in the region while aggressively pursuing a nuclear weapon program to deter any challenge to its strategy. Tehran is fully cognizant that the successful pursuit of its regional hegemony has now become intertwined with the clout that a nuclear program bestows. Therefore, it is most unlikely that Iran will give up its nuclear ambitions at this juncture, unless it concludes that the price will be too high to bear. That is, whereas before the Iraq war Washington could deal with Iran's nuclear program by itself, now the Bush administration must also disabuse Iran of the belief that it can achieve its regional objectives with impunity. Thus, while the administration attempts to stem the Sunni-Shiite violence in Iraq to prevent it from engulfing other states in the region, Washington must also take a clear stand in Lebanon. Under no circumstances should Iranian-backed Hezbollah be allowed to topple the secular Lebanese government. If this were to occur, it would trigger not only a devastating civil war in Lebanon but a wider Sunni-Shiite bloody conflict. The Arab Sunni states, especially, Saudi Arabia, Egypt and Jordan, are terrified of this possible outcome. For them Lebanon may well provide the litmus test of the administration's resolve to inhibit Tehran's adventurism but they must be prepared to directly support U.S. efforts. In this regard, the Bush administration must wean Syria from Iran. This move is of paramount importance because not only could Syria end its political and logistical support for Hezbollah, but it could return Syria, which is predominantly Sunni, to the Arab-Sunni fold. President Bush must realize that Damascus' strategic interests are not compatible with Tehran's and the Assad regime knows only too well its future political stability and economic prosperity depends on peace with Israel and normal relations with the United States. President Bashar Assad may talk tough and embrace militancy as a policy tool; he is, however, the same president who called, more than once, for unconditional resumption of peace negotiation with Israel and was rebuffed. The stakes for the United States and its allies in the region are too high to preclude testing Syria's real intentions which can be ascertained only through direct talks. It is high time for the administration to reassess its policy toward Syria and begin by abandoning its schemes of regime change in Damascus. Syria simply matters; the administration must end its efforts to marginalize a country that can play such a pivotal role in changing the political dynamic for the better throughout the region. Although ideally direct negotiations between the United States and Iran should be the first resort to resolve the nuclear issue, as long as Tehran does not feel seriously threatened, it seems unlikely that the clergy will at this stage end the nuclear program. In possession of nuclear weapons Iran will intimidate the larger Sunni Arab states in the region, bully smaller states into submission, threaten Israel's very existence, use oil as a political weapon to blackmail the West and instigate regional proliferation of nuclear weapons' programs. In short, if unchecked, Iran could **plunge the Middle East into** a deliberate or inadvertent **nuclear conflagration**. If we take the administration at its word that it would not tolerate a nuclear Iran and considering these regional implications, Washington is left with no choice but to warn Iran of the severe consequences of not halting its nuclear program.

### Allies

#### No nuke terror- can’t use, steal, or transfer bombs

**Clarke 4-17**-13 [Michael, PhD, Senior Research Fellow at Griffith Asia Institute with a special focus in terrorism, Griffith University, Bachelor of Arts (Honors) in Asian and International Studies, “Pakistan and Nuclear Terrorism: How Real is the Threat?” Comparative Strategy, 32:2, 98-114, online]

Although the acquisition of an intact nuclear weapon would be “the most difﬁcult¶ challenge for any terrorist organization,” there remain a number of scenarios that involve¶ a terrorist organization acquiring an intact nuclear weapon,5¶ such as the deliberate transfer¶ of a warhead by a national government, “insider” collusion from senior ofﬁcials, seizure or¶ theft without collusion, and political instability or state failure/collapse. The direct transfer¶ scenario is difﬁcult to imagine as it is almost impossible to conceive of any national¶ government voluntarily gifting their “crown jewels” to a terrorist group due to the likely¶ reprisals they would incur if the weapon were used and the probability that the weapon¶ would be traced back to the state of origin.6¶ The scenario of “insider” collusion in the¶ diversion or transfer of nuclear materials has also been perceived as a major threat. To¶ cope with this threat, most advanced nuclear weapons states such as the United States,¶ France, the United Kingdom, the Russian Federation, and the People’s Republic of China¶ have instituted Personnel Reliability Programs (PRP), which establishes a centralized set of¶ procedures designed to ensure that individuals developing, managing, and guarding nuclear¶ weapons and related facilities are trustworthy.7¶ It has been asserted that theft of “weapons-usable materials” is “a proven and recurring¶ fact.”8¶ However, such a claim tends to refer to instances when small quantities of nuclear¶ material have been stolen. For example. Zimmerman and Lewis noted in 2006 that they¶ were aware of “only one particularly disturbing instance in which smugglers obtained a¶ signiﬁcant quality of highly enriched uranium: a 1994 case in Prague . . . involving Czech,¶ Slovak and Russian nationals.”9¶ In addition, in June 2011, authorities also interdicted¶ a smuggling gang in Moldova attempting to smuggle a small quantity of non–weapons¶ usable uranium-238 (U-238).10¶ The collapse or failure of a state with a nuclear arsenal would raise the potential¶ for nuclear weapons and materials to be diverted or stolen. However, even if a terrorist¶ organization did manage to acquire an intact weapon through one of these scenarios, there¶ would remain a variety of obstacles to be overcome in order to be able to detonate it. In¶ particular, there are a variety of safety and security measures/procedures that protect nuclear¶ weapons against accidents or unauthorized use, such as environmental sensing devices¶ (ESD) that block arming systems until a prescribed environment is achieved (e.g., missile¶ launch acceleration); insensitive high explosives (IHE) that make the weapon resistant to being detonated by mechanical shock; and permissive action links (PALs), which is an¶ electronic device that prevents arming of the weapon unless correct codes are inserted.11¶ To produce an IND, terrorists would need to acquire signiﬁcant quantities of ﬁssile¶ material, either HEU or plutonium.12 Two types of INDs are considered to be theoretically¶ possible for a terrorist organisation to construct—the gun-type weapon and the implosiontype weapon.13The former consists of a gun barrel in which a projectile of subcritical HEU¶ is ﬁred into a stationary piece of subcritical HEU, producing a supercritical mass leading to a¶ nuclear explosion. Bunn and Wier note that the gun type is “simple and robust” and “allows¶ the builder high conﬁdence that it will perform properly without the trouble, expense and¶ exposure of a test explosion.”14 However, as only a small amount of the HEU ﬁssions in a¶ gun-type weapon, a signiﬁcant quantity—between 50 and 60 kilograms (kg)—of HEU is¶ required.15¶ An implosion device, in contrast, “uses a set of shaped explosives arranged around a¶ less-than-critical mass of HEU or plutonium to crush the atoms of material closer together”¶ to produce a nuclear explosion.16Weapons-grade plutonium (plutonium that contains more¶ than 90% of plutonium isotope 239) is the desired type of plutonium for production of¶ such a device as it is most readily detonated, although, reactor-grade plutonium (containing¶ between 50 to 70% plutonium 239) could also produce a nuclear explosion.17 A much¶ smaller amount of plutonium—between 6 and 8 kg—is also required for an implosion device¶ compared to the HEU required for a gun-type device. Unlike uranium, however, plutonium is¶ not a naturally occurring element and is produced when U-238 absorbs neutrons in a nuclear¶ reactor where it is intimately mixed with the U-238. The plutonium must then be separated¶ or “reprocessed” from the U-238 before it can be used for either weapons applications¶ or for reactor fuel.18 Plutonium separation is technically easier than uranium enrichment¶ as it is affected by chemical means rather than isotopic mass in the case of uranium¶ enrichment. The production of plutonium, however, “is made greatly more difﬁcult by the¶ intense radiation emanating from the commingled ﬁssion products.”19 The complexity of an implosion device also poses additional challenges in terms of manufacture/acquisition¶ and testing of components, which could also increase the likelihood of detection.20¶ The acquisition of the required quantity of ﬁssile material remains the major obstacle¶ to terrorists fabricating a nuclear device. Acquisition of ﬁssile material could be achieved in¶ two ways: through terrorists undertaking the process of enrichment or through purchase or¶ theft of weapons grade HEU or plutonium. A terrorist organization is unlikely to attempt the¶ enrichment of natural uranium as this is a technically demanding process, the technologies¶ for which are tightly controlled.21 The theft of a sufﬁcient quantity and quality of HEU is¶ the more likely option due not only to technical requirements but also to the amount of¶ HEU stockpiled around the world. According to the International Panel on Fissile Materials (IPFM), there exists approximately 1,700 metric tons of HEU worldwide in various¶ locations, and 99% is estimated to be in possession of the nuclear weapons states.22 The¶ bulk of this HEU is accounted for by acknowledged military uses, although it is estimated¶ that between 50 and 100 metric tons is in the civilian sector, where it is primarily used in¶ research reactors, the production of medical isotopes, and to fuel Russian icebreakers.23

#### Plan doesn’t solve cyber- author says key steps

Bendiek 9/9/13

Annegret Bendiek is a Fellow with the EuroFuture Project of The German Marshall Fund of the United States, based in Washington, DC and a Senior Associate and Deputy Head of the EU External Relations Division of the German Institute for International and Security Affairs, German Marshall Fund, September 9, 2013, "Why We Need a Transatlantic Deal on Cyber Security and Privacy", <http://blog.gmfus.org/2013/09/09/why-we-need-a-transatlantic-deal-on-cyber-security-and-privacy/>

Secondly, the private sector needs to be involved in any legally binding mechanism to ensure adherence to codes of conduct in cyberspace. A code of conduct can only benefit from the expertise of large global corporations, and their involvement will help ensure that they adhere to universal standards on security, informational self-determination, and data protection. Finally, the EU and the United States should push for an update to the General Comments on Article 17 of the International Covenant on Civil and Political Rights of the UN Human Rights Commission, which serves as an international anchor for the right to privacy. The last such interpretation of international human rights law on the protection of privacy took place in 1988 and is in desperate need of being updated for the Internet age. Only when the political, social, and economic dimensions of the Internet are considered and legislatures are more fully involved can a transatlantic Internet and cyber security market truly develop. Only in this way, can the transatlantic community ensure that security is not sacrificed for liberty and that the interests of the state are not pitted against privacy. Such a forward-looking transatlantic market will also hopefully function as an important bridge to other countries at the international level.

#### US-EU cooperation is resilient despite controversies

**Mix ’13** [Derek E. Mix, Analyst in European Affairs at the Congressional Research Service, “The United States and Europe: Current Issues,” March 30, <http://www.fas.org/sgp/crs/row/RS22163.pdf>]

Due to extensive cooperation on a wide range of issues, the relationship between the United ¶ States and Europe is often called the transatlantic partnership. The two sides have many common ¶ values and concerns, and have grown increasingly interdependent in terms of security and ¶ prosperity. The transatlantic relationship and the main areas of U.S.-European cooperation and ¶ shared interest are likely to have continuing implications for U.S. policy during the 113th¶ Congress. Members of Congress may have an interest in considering the dimensions and ¶ dynamics of current issues in U.S.-European relations in the course of oversight or legislative ¶ activities, or in the context of direct interactions with European legislators and officials. ¶ According to most observers, the overall tone of transatlantic relations during the Obama ¶ Administration has been largely positive. At the same time, a constructive tone does not ¶ necessarily translate into tangible results with regard to foreign policy objectives or other goals. ¶ With respect to certain issues, such as terrorist detainee policy or climate change, U.S. and ¶ European policies have often been at odds and have generated frictions in the relationship from time to time. ¶ This report selects a number of issues that both illustrate the nature of U.S.-European cooperation ¶ based on shared interests and present challenges in terms of the efficacy of such cooperation: ¶ • The United States and the European Union (EU) have the largest trade and ¶ investment relationship in the world. Over the past several years, the Eurozone ¶ crisis has posed a danger to economic recovery and financial stability worldwide. ¶ Members of Congress and Administration officials have been concerned about ¶ the potential effects of the crisis, but avenues for U.S. involvement in resolving it ¶ have remained limited. In early 2013, the United States and the EU announced ¶ their intention to begin negotiations on a comprehensive Transatlantic Trade and ¶ Investment Partnership aimed at boosting jobs and growth on both sides. ¶ • The United States and Europe continue to cooperate closely on a wide range of ¶ foreign policy and international security issues. Many of these challenges are in ¶ the wider Middle East region: countering Iran’s nuclear ambitions, seeking to halt ¶ the violence in Syria, adjusting to the regional transitions of the so-called “Arab ¶ Spring,” and managing the transfer and withdrawal of U.S. and European troops ¶ in Afghanistan. Managing difficult relations with Russia also remains a priority ¶ and common interest of both the United States and Europe. Additionally, in the ¶ context of the pending conclusion of operations in Afghanistan and low defense ¶ spending in many European countries, officials and analysts continue to debate a ¶ number of on-going questions about the future role and capabilities of NATO. ¶ • Europe remains both a primary target of radical Islamist terrorists and a potential ¶ base for those seeking to carry out attacks against the United States. Transatlantic ¶ counterterrorism cooperation has been strong since the terrorist attacks of 9/11, ¶ although U.S.-EU differences regarding data privacy have posed some key ¶ information-sharing challenges. ¶ • Cybersecurity issues have received growing attention and emphasis on both sides ¶ of the Atlantic. Although some differences exist regarding regulation of the ¶ Internet, the United States and the EU have pursued initiatives to deepen ¶ cybersecurity cooperation and counter cybercrime. • In 2012, the U.S. Congress passed legislation prohibiting U.S. aircraft operators ¶ from participating in the EU Emissions Trading System (ETS). Airlines ¶ participating in the ETS must purchase carbon allowances in order to offset CO2 ¶ emissions. The EU has delayed implementing the international application of the ¶ ETS for aviation pending negotiations on a broader multilateral agreement. ¶ • Concerned by Europe’s reliance on Russian energy, many U.S. officials and ¶ analysts regard European energy security as a U.S. interest. With its energy ¶ import needs expected to rise, Europe has had mixed success in seeking ways to ¶ diversify its energy supplies and consolidate its internal energy market. ¶ As the United States and Europe face a changing geopolitical environment, some ¶ observers assert that the global influence of the Euro-Atlantic partnership is in decline. In ¶ addition, the Obama Administration’s announced “re-balancing” toward Asia has caused ¶ some anxiety among Europeans. Overall, however, most analysts maintain that the ¶ United States and Europe are likely to remain one another’s closest partner, and that U.S.-¶ European cooperation is likely to remain the foundation of international action on a wide ¶ range of critical issues.

**Intel sharing is sustainable**

NYT ’13 (January 30, “Drone Strike Prompts Suit, Raising Fears for U.S. Allies”)

The issue is more complex than drone-strike foes suggest, the current and former officials said, and is based on decades of cooperation rather than a shadowy pact for the United States to do the world’s dirty work. The arrangements for intensive intelligence sharing by Western allies go back to World War II, said Richard Aldrich, professor of international security at the University of Warwick, when the United States, Canada, Britain, Australia and New Zealand agreed to continue to collaborate. “There’s a very high volume of intelligence shared, some of which is collected automatically, so it’s impossible to track what every piece is potentially used for,” said Mr. Aldrich, who is also the author of a history of the Government Communications Headquarters, the British signal-intelligence agency. Britain’s history and expertise in South Asia means that the intelligence it gathers in Pakistan, Afghanistan and the tribal areas in between is in high demand, Mr. Aldrich said. The arrangement has been focused recently by a chill in relations between the United States and Pakistan, and by the shared war in Afghanistan. Other nations, too, intercept communications in the region that are shared broadly with the United States, he said. In Afghanistan, for example, German and Dutch forces run aggressive electronic interception operations, he said, because their rules on collaborating with local interpreters are less stringent than those of the United States. A spokesman for the coalition forces in Afghanistan, Lt. Col. Lester Carroll, declined to give details about intelligence sharing, saying agreements were classified. But he confirmed that American military forces “do share information with other U.S. government organizations on a need-to-know basis.” Few argue against the notion that European nations, many of which have been attacked by terrorists, have benefited from the drone killing, however controversial, of many of the most hardened Islamic extremist leaders.

**The public loves drones—more likely to roll back the plan**

LaFranchi 6/3/13

Howard LaFranchi, Staff writer, CSMonitor, June 3, 2013, "American public has few qualms with drone strikes, poll finds", http://www.csmonitor.com/USA/Military/2013/0603/American-public-has-few-qualms-with-drone-strikes-poll-finds

When a US drone strike last week killed a top Taliban leader in Pakistan, critics of the strikes that have become a staple of President Obama’s counterterrorism policy were quick to condemn it. The killing of Waliur Rehman in the North Waziristan region on May 29 would only make reconciliation talks between the Taliban and the Afghan government – a US priority – more difficult to convene, some critics said. Others said such strikes infuriate local populations and are a recruiting tool for Al Qaeda and other Islamist extremists. But the American public appears to be unmoved by such arguments. A new Monitor/TIPP poll finds that a firm majority of Americans – 57 percent – support the current level of drone strikes targeting “Al Qaeda targets and other terrorists in foreign countries.” Another 23 percent said the use of drones for such purposes should increase. Only 11 percent said the use of drones should decrease. The poll, conducted from May 28-31, followed a major speech in which Mr. Obama suggested the use of drone strikes would decline. In the May 26 address, he also hinted at his own ambivalence about the controversial tactic, weighing the program’s efficacy against the moral questions and long-term impact. Obama acknowledged that the pluses of drone strikes – no need to put boots on the ground and the accuracy and secrecy they offer – can “lead a president and his team to view drone strikes as a cure-all for terrorism.” He balanced that against words of caution: “To say a military tactic is legal, or even effective, is not to say it is wise or moral in every instance.” The drone strikes, which under Obama have mostly been carried out in secrecy by the CIA, are credited with killing as many as 3,000 terrorists and Islamist militants – at least four of whom were American citizens. Obama is planning to shift most drone operations to the military as part of an effort to make the program more transparent. Americans are by and large comfortable with drone strikes being ordered by the president, the CIA, or by the military, according to the Monitor poll. **Less popular is the idea of creating a** separate **“drone court” –** a panel that would presumably increase the accountability of the program. Almost two-thirds of Americans (62 percent) say they approve of drone-strike authorization coming **from the president, the Pentagon, or** the **CIA**. About a quarter (26 percent) favor setting up a drone court to sign off on strikes.

### Sovereignty

**Prolif is inevitable- no one models US restraint**

**Etzioni ‘13** [Amitai, professor of international relations at George Washington University, “The Great Drone Debate,” March-April, <http://usacac.army.mil/CAC2/MilitaryReview/Archives/English/MilitaryReview_20130430_art004.pdf>]

Other critics contend that by the United States using drones, it leads other countries into making and using them. For example, Medea Benjamin, the cofounder of the anti-war activist group CODEPINK and author of a book about drones argues that, “The proliferation of drones should evoke reﬂection on the precedent that the United States is setting by killing anyone it wants, anywhere it wants, on the basis of secret information. Other nations and non-state entities are watching—and are bound to start acting in a similar fashion.”60 Indeed scores of countries are now manufacturing or purchasing drones. There can be little doubt that the fact that drones have served the United States well has helped to popularize them. However, it does not follow that United States should not have employed drones in the hope that such a show of restraint would deter others. First of all, this would have meant that either the United States would have had to allow terrorists in hardto-reach places, say North Waziristan, to either roam and rest freely—or it would have had to use bombs that would have caused much greater collateral damage. Further, the record shows that even when the United States did not develop a particular weapon, others did. Thus, China has taken the lead in the development of anti-ship missiles and seemingly cyber weapons as well. One must keep in mind that the international environment is a hostile one. Countries—and especially non-state actors— most of the time do not play by some set of selfconstraining rules. Rather, they tend to employ whatever weapons they can obtain that will further their interests. The United States correctly does not assume that it can rely on some non-existent implicit gentleman’s agreements that call for the avoidance of new military technology by nation X or terrorist group Y—if the United States refrains from employing that technology.

**Drone prolif doesn’t escalate or cause terrorism**

**Singh ’12** [Joseph Singh is a researcher at the Center for a New American Security, an independent and non-partisan organization that focuses on researching and analyzing national security and defense policies, also a research assistant at the Institute for Near East and Gulf Military Analysis (INEGMA) North America, is a War and Peace Fellow at the Dickey Center, a global research organization, “Betting Against a Drone Arms Race,” 8-13-12, <http://nation.time.com/2012/08/13/betting-against-a-drone-arms-race/>]

Bold predictions of a coming drones arms race are all the rage since the uptake in their deployment under the Obama Administration. Noel Sharkey, for example, argues in an August 3 op-ed for the Guardian that rapidly developing drone technology — coupled with minimal military risk — portends an era in which states will become increasingly aggressive in their use of drones.¶ As drones develop the ability to fly completely autonomously, Sharkey predicts a proliferation of their use that will set dangerous precedents, seemingly inviting hostile nations to use drones against one another. Yet, the narrow applications of current drone technology coupled with what we know about state behavior in the international system lend no credence to these ominous warnings.¶ Indeed, critics seem overly-focused on the domestic implications of drone use.¶ In a June piece for the Financial Times, Michael Ignatieff writes that “virtual technologies make it easier for democracies to wage war because they eliminate the risk of blood sacrifice that once forced democratic peoples to be prudent.”¶ Significant public support for the Obama Administration’s increasing deployment of drones would also seem to legitimate this claim. Yet, there remain equally serious diplomatic and political costs that emanate from beyond a fickle electorate, which will prevent the likes of the increased drone aggression predicted by both Ignatieff and Sharkey.¶ Most recently, the serious diplomatic scuffle instigated by Syria’s downing a Turkish reconnaissance plane in June illustrated the very serious risks of operating any aircraft in foreign territory.¶ States launching drones must still weigh the diplomatic and political costs of their actions, which make the calculation surrounding their use no fundamentally different to any other aerial engagement.¶ This recent bout also illustrated a salient point regarding drone technology: most states maintain at least minimal air defenses that can quickly detect and take down drones, as the U.S. discovered when it employed drones at the onset of the Iraq invasion, while Saddam Hussein’s surface-to-air missiles were still active.¶ What the U.S. also learned, however, was that drones constitute an effective military tool in an extremely narrow strategic context. They are well-suited either in direct support of a broader military campaign, or to conduct targeted killing operations against a technologically unsophisticated enemy.¶ In a nutshell, then, the very contexts in which we have seen drones deployed. Northern Pakistan, along with a few other regions in the world, remain conducive to drone usage given a lack of air defenses, poor media coverage, and difficulties in accessing the region.¶ Non-state actors, on the other hand, have even more **reasons to steer clear** of drones:¶ – First, they are wildly expensive. At $15 million, the average weaponized drone is less costly than an F-16 fighter jet, yet much pricier than the significantly cheaper, yet equally damaging options terrorist groups could pursue.¶ – Those alternatives would also be relatively more difficult to trace back to an organization than an unmanned aerial vehicle, with all the technical and logistical planning its operation would pose.¶ – Weaponized drones are not easily deployable. Most require runways in order to be launched, which means that any non-state actor would likely require state sponsorship to operate a drone. Such sponsorship is unlikely given the political and diplomatic consequences the sponsoring state would certainly face.¶ – Finally, drones require an extensive team of on-the-ground experts to ensure their successful operation. According to the U.S. Air Force, 168 individuals are needed to operate a Predator drone, including a pilot, maintenance personnel and surveillance analysts.¶ In short, the doomsday drone scenario Ignatieff and Sharkey predict results from an excessive focus on rapidly-evolving military technology.

Instead, we must return to **what we know about state behavior** in an anarchistic international order. Nations will confront the same principles of deterrence, for example, when deciding to launch a targeted killing operation regardless of whether they conduct it through a drone or a covert amphibious assault team.

Drones may make waging war more domestically palatable, but they don’t change the very serious risks of retaliation for an attacking state. Any state otherwise deterred from using force abroad will not significantly increase its power projection on account of acquiring drones.

What’s more, the very states whose use of drones could threaten U.S. security – countries like China – are not democratic, which means that the possible political ramifications of the low risk of casualties resulting from drone use are irrelevant. For all their military benefits, putting drones into play requires an ability to meet the political and security risks associated with their use.

Despite these realities, there remain a host of defensible arguments one could employ to discredit the Obama drone strategy. The legal justification for targeted killings in areas not internationally recognized as war zones is uncertain at best.

Further, the short-term gains yielded by targeted killing operations in Pakistan, Somalia and Yemen, while debilitating to Al Qaeda leadership in the short-term, may serve to destroy already tenacious bilateral relations in the region and radicalize local populations.

Yet, the past decade’s experience with drones bears no evidence of impending instability in the global strategic landscape. Conflict may not be any less likely in the era of drones, but the nature of 21st Century warfare remains fundamentally unaltered despite their arrival in large numbers.

**China won’t use drones aggressively- rationality checks**

**Erickson and Strange 5-29**-13 [Andrew Erickson is an associate professor at the Naval War College and an Associate in Research at Harvard University's Fairbank Centre, Austin Strange is a researcher at the Naval War College's China Maritime Studies Institute, “China has drones. Now how will it use them?” <http://www.nationmultimedia.com/opinion/China-has-drones-Now-how-will-it-use-them-30207095.html>]

Drones, able to dispatch death remotely, without human eyes on their targets or a pilot's life at stake, make people uncomfortable - even when they belong to democratic governments that presumably have some limits on using them for ill. (On May 23, in a major speech, US President Barack Obama laid out what some of those limits are.) An even more alarming prospect is that unmanned aircraft will be acquired and deployed by authoritarian regimes, with fewer checks on their use of lethal force.¶ Those worried about exactly that tend to point their fingers at China. In March, after details emerged that China had considered taking out a drug trafficker in Myanmar with a drone strike, a CNN blog post warned, "Today, it's Myanmar. Tomorrow, it could very well be some other place in Asia or beyond." Around the same time, a National Journal article entitled "When the Whole World Has Drones" teased out some of the consequences of Beijing's drone programme, asking, "What happens if China arms one of its remote-piloted planes and strikes Philippine or Indian trawlers in the South China Sea?"¶ Indeed, the time to fret about when China and other authoritarian countries will acquire drones is over: they have them. The question now is when and how they will use them. But as with its other, less exotic military capabilities, Beijing has cleared only a technological hurdle - and its behaviour will continue to be constrained by politics.¶ China has been developing a drone capacity for over half a century, starting with its reverse engineering of Soviet Lavochkin La-17C target drones that it had received from Moscow in the late 1950s. Today, Beijing's opacity makes it difficult to gauge the exact scale of the programme, but according to Ian Easton, an analyst at the Project 2049 Institute, an American think-tank devoted to Asia-Pacific security matters, by 2011 China's air force alone had over 280 combat drones. In other words, its fleet of unmanned aerial vehicles is already bigger and more sophisticated than all but the United States'; in this relatively new field Beijing is less of a newcomer and more of a fast follower. And the force will only become more effective: the Lijian ("sharp sword" in Chinese), a combat drone in the final stages of development, will make China one of the very few states that have or are building a stealth drone capacity.¶ This impressive arsenal may tempt China to pull the trigger. The fact that a Chinese official acknowledged that Beijing had considered using drones to eliminate the Myanmar drug trafficker, Naw Kham, makes clear that it would not be out of the question for China to launch a drone strike in a security operation against a non-state actor. Meanwhile, as China's territorial disputes with its neighbours have escalated, there is a chance that Beijing would introduce unmanned aircraft, especially since India, the Philippines and Vietnam distantly trail China in drone funding and capacity, and would find it difficult to compete. Beijing is already using drones to photograph the Senkaku/Diaoyu islands it disputes with Japan, as the retired Chinese major-general Peng Guangqian revealed earlier this year, and to keep an eye on movements near the North Korean border.¶ Beijing, however, is unlikely to use its drones lightly. It already faces tremendous criticism from much of the international community for its perceived brazenness in continental and maritime sovereignty disputes. With its leaders attempting to allay notions that China's rise poses a threat to the region, injecting drones conspicuously into these disputes would prove counterproductive. China also fears setting a precedent for the use of drones in East Asian hotspots that the United States could eventually exploit. For now, Beijing is showing that it understands these risks, and to date it has limited its use of drones in these areas to surveillance, according to recent public statements from China's Defence Ministry.¶ What about using drones outside of Chinese-claimed areas? That China did not, in fact, launch a drone strike on the Myanmar drug criminal underscores its caution. According to Liu Yuejin, the director of the anti-drug bureau in China's Ministry of Public Security, Beijing considered using a drone carrying a 20-kilogram TNT payload to bomb Kham's mountain redoubt in northeast Myanmar. Kham had already evaded capture three times, so a drone strike may have seemed to be the best option. The authorities apparently had at least two plans for capturing Kham. The method they ultimately chose was to send Chinese police forces to lead a transnational investigation that ended in April 2012 with Kham's capture near the Myanmar-Laos border. The ultimate decision to refrain from the strike may reflect both a fear of political reproach and a lack of confidence in untested drones, systems, and operators.¶ The restrictive position that Beijing takes on sovereignty in international forums will further constrain its use of drones. China is not likely to publicly deploy drones for precision strikes or in other military assignments without first having been granted a credible mandate to do so. The gold standard of such an authorisation is a resolution passed by the UN Security Council, the stamp of approval that has permitted Chinese humanitarian interventions in Africa and anti-piracy operations in the Gulf of Aden. China might consider using drones abroad with some sort of regional authorisation, such as a country giving Beijing explicit permission to launch a drone strike within its territory. But even with the endorsement of the international community or specific states, China would have to weigh any benefits of a drone strike abroad against the potential for mishaps and perceptions that it was infringing on other countries' sovereignty - something Beijing regularly decries when others do it. The limitations on China's drone use are reflected in the country's academic literature on the topic. The bulk of Chinese drone research is dedicated to scientific and technological topics related to design and performance. The articles that do discuss potential applications primarily point to major combat scenarios -such as a conflagration with Taiwan or the need to attack a US aircraft carrier - which would presumably involve far more than just drones. Chinese researchers have thought a great deal about the utility of drones for domestic surveillance and law enforcement, as well as for non-combat-related tasks near China's contentious borders. Few scholars, however, have publicly considered the use of drone strikes overseas.¶ Yet there is a reason why the United States has employed drones extensively despite domestic and international criticism: it is much easier and cheaper to kill terrorists from above than to try to root them out through long and expensive counterinsurgency campaigns. Some similar challenges loom on China's horizon. Within China, Beijing often considers protests and violence in the restive border regions, such as Xinjiang and Tibet, to constitute terrorism. It would presumably consider ordering precision strikes to suppress any future violence there. Even if such strikes are operationally prudent, China's leaders understand that they would damage the country's image abroad, but they prioritise internal stability above all else. Domestic surveillance by drones is a different issue; there should be few barriers to its application in what is already one of the world's most heavily policed societies. China might also be willing to use stealth drones in foreign airspace without authorisation if the risk of detection were low enough; it already deploys intelligence-gathering ships in the exclusive economic zones of Japan and the United States, as well as in the Indian Ocean.¶ Still, although China enjoys a rapidly expanding and cutting-edge drone fleet, it is bound by the same rules of the game as the rest of the military's tools. Beyond surveillance, the other non-lethal military actions that China can take with its drones are to facilitate communications within the Chinese military, support electronic warfare by intercepting electronic communications and jamming enemy systems, and help identify targets for Chinese precision strike weapons, such as missiles. Beijing's overarching approach remains one of caution - something Washington must bear in mind with its own drone programme.