**Advantage 1 is “Wars of Choice”**

**Observation 1: They’re inevitable**

***First - Circumvention - Future President’s will use Obama’s definitions of hostilities as a means to circumvent the WPR***

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WASHINGTON — **The White House, pushing hard against criticism in Congress over the deepening air war in Libya, asserted Wednesday that President Obama had the authority to continue the military campaign without Congressional approval because American involvement fell short of full-blown *hostilities***.¶ In a 38-page report sent to lawmakers describing and defending the NATO-led operation, the White House said the mission was prying loose Col. Muammar el-Qaddafi’s grip on power.¶ In contending that the limited American role did not oblige the administration to ask for authorization under the War Powers Resolution, the report asserted that “U.S. operations do not involve sustained fighting or active exchanges of fire with hostile forces, nor do they involve U.S. ground troops.” Still, the White House acknowledged, the operation has cost the Pentagon $716 million in its first two months and will have cost $1.1 billion by September at the current scale of operations.¶ The report came one day after the House Speaker, John A. Boehner, Republican of Ohio, had sent a letter to Mr. Obama warning him that he appeared to be out of time under the Vietnam-era law that says presidents must terminate a mission 60 or 90 days after notifying Congress that troops have been deployed into hostilities, unless lawmakers authorize the operation to continue.¶ Mr. Boehner had demanded that Mr. Obama explain his legal justification for passing the deadline. On Wednesday, Brendan Buck, a spokesman for Mr. Boehner, said he was still reviewing the documents, adding that “**the creative arguments made by the White House raise a number of questions that must be further explored**.”¶ The escalating confrontation with Congress reflects the radically altered political landscape in Washington: a Democratic president asserting sweeping executive powers to deploy American forces overseas, while Republicans call for stricter oversight and voice fears about executive-branch power getting the United States bogged down in a foreign war.¶ “We are acting lawfully,” said Harold H. Koh, the State Department legal adviser, who expanded on the administration’s reasoning in a joint interview with the White House counsel, Robert Bauer.¶ **The two senior administration lawyers contended that American forces had not been in “hostilities” at least since early April, when NATO took over the responsibility for the no-fly zone and the United States shifted to primarily a supporting role — providing refueling and surveillance to allied warplanes, although remotely piloted drones operated by the United States periodically fire missiles, too**.¶ They argued that United States forces are at little risk because there are no troops on the ground and Libyan forces are unable to exchange fire with them meaningfully. And they said the military mission was constrained by a United Nations Security Council resolution, which authorized air power for the purpose of defending civilians.¶ “We are not saying the president can take the country into war on his own,” said Mr. Koh, a former Yale Law School dean and outspoken critic of the Bush administration’s expansive theories of executive power. “**We are not saying the War Powers Resolution is unconstitutional or should be scrapped or that we can refuse to consult Congress. We are saying the limited nature of this particular mission is not the kind of ‘hostilities’ envisioned by the War Powers Resolution**.”¶ **Jack L. Goldsmith, who led the Justice Department’s *O*ffice of *L*egal *C*ounsel during the Bush administration, said the Obama theory would *set a precedent* expanding future presidents’ unauthorized war-making powers, especially given the rise of remote-controlled combat technology**.¶ “**The administration’s theory implies that the president can wage war with drones and all manner of offshore missiles without having to bother with the *W*ar *P*owers *R*esolution’s time limits**,” Mr. Goldsmith said.¶ **It remains to be seen whether majorities in Congress will acquiesce to the administration’s argument, defusing the confrontation, or if the theory will fuel greater criticism. Either way, because the statute does not define hostilities and the Supreme Court has never ruled on the issue, *the debate is likely to be resolved politically***, **said Richard H. Pildes, a New York University law professor.**¶ Also on Wednesday, 10 lawmakers — led by Representative Dennis J. Kucinich, Democrat of Ohio, and Representative Walter B. Jones, Republican of North Carolina — filed a lawsuit asking a judge to order Mr. Obama to pull out of the Libya operation because Congress did not authorize it. That lawsuit faces steep challenges, however, because courts in the past have dismissed similar cases on technical grounds.¶ The administration had earlier argued that Mr. Obama could initiate the intervention on his own authority as commander in chief because its anticipated nature, scope and duration fell short of a “war” in the constitutional sense. Since then, the conflict has dragged on for longer than expected, and the goal of the NATO allies has all but openly shifted from merely defending civilians to forcing the Libyan leader, Colonel Qaddafi, from power. But Mr. Koh and Mr. Bauer said that while regime change in Libya might be a diplomatic goal, the military’s mission was separate and remained limited to protecting civilians.¶ **While many presidents have challenged the constitutionality of other aspects of the War Powers Resolution — which Congress enacted over President Richard M. Nixon’s veto — no administration has declared that the section imposing the 60-day clock is unconstitutional, and in 1980, the Justice Department’s Office of Legal Counsel concluded that it was within Congress’s power to enact such a limit**.

***Second - Commitment trap --- lack of congressional war power causes presidential utterances to become de facto strategy --- this locks us into unnecessary conflicts***

**Brookings Institution** 6-20-20**13**, The Road to War: Presidential Commitments and Congressional Responsibility, <http://www.brookings.edu/events/2013/06/20-war-presidential-power>, jj

**Ever since WWII**, Kalb said that “**history has led us into conflicts that we don’t understand” because presidents do not seek approval from Congress for declarations of war**. ***The country has reached a point now where “presidential power is so great, words out of his mouth become policy for the United States***.” **Kalb used the Syrian civil war and** President **Obama’s “red line” policy as an example of how a president’s words become strategy for the United States**. Kalb argued **that this presidential “flexibility” in foreign policy decision-making has repeatedly led the country into one misguided war to the next such as the Vietnam and Iraq wars**. ***To nullify these poor decisions***, Kalb believes that ***formal congressional declarations of war will help “trigger the appreciation for the gravity of war*” and assist in “unifying the nation” behind a strategic military intervention, resulting in more positive outcomes for the United States**. ¶ He concluded his remarks by noting that ***declarations of war by Congress are “stark commitments*,” and statements by the president of the United States must be thoroughly discussed to make well-informed decisions that will be in the best interest of the American people**. **Conflicts must be understood before the decision is made to send American troops to war, and presidents of the United States should converse with Congress before taking any military action.**

***Third - Groupthink – Comprehensive analysis proves absent sustained congressional involvement in war-making – unnecessary interventions are inevitable***

**Martin ’11**, Craig Martin, Visiting Assistant Professor, University of Baltimore School of Law, Winter, 2011¶ Brooklyn Law Review¶ 76 Brooklyn L. Rev. 611, ARTICLE: Taking War Seriously: A Model for Constitutional Constraints on the Use of Force in Compliance with In-ternational Law, Lexis, jj

II. The Causes of War

**In beginning to think about how to improve the legal constraints on the resort to war, it is essential to consider the causes of international armed conflict**. n10 The question of what causes war is the subject of a massive amount of re-search and debate, stretching back literally thousands of years. n11 **The focus of the various theories on the causes of war range from the individual decision makers, through small-group dynamics, the structure of the state itself, all the way to the structure and operation of the international system of states**. n12 Thucydides, whose analysis of the Peloponnesian War is one of the earliest studies of the subject known to us, set the stage with a complex explanation for the causes of that war that included the individual attributes of decision makers, the nature and structure of the leading city-states, and the nature of the interstate system itself. n13 Kenneth Waltz continues this classification by defining the three levels as "Images": the individual or human level ("Image I"), the level of the state structure or organization ("Image II"), and the level of the international system ("Image III"). n14 And despite the differing theories, disagreements, and areas of emphasis, there is a widely shared acceptance that all three Images play a role in explaining the causes of war, albeit to varying degrees [\*617] depending on one's theoretical perspective. n15 While it is not necessary for us to examine the various theories in detail, it will be helpful to get a flavor for some of the more important ideas as they relate to each of the three Images, as I will refer back to these ideas to support the argument for the proposed Model.

A. Image I--The Level of the Individual

**There are a wide variety of theories, and indeed a number of different sublevels within the Image I--the individual level--perspective on the causes of war. Some of these focus on aspects such as human nature itself and the inherent aggression of ~~man~~**. n16 **But the theories that relate to both the psychology of decision makers, and a number of systemic problems in small-group decision making are of greatest significance for the argument being advanced here**. **Beginning with individual psychology, one set of theories focus on the personality traits that are common among those who tend to reach the highest offices of government as factors that contribute to unsound judgments regarding the use of armed force**. **Empirical studies suggest that a number of traits that tend to be overrepresented in national leaders--such as au-thoritarian and domineering tendencies, introversion** (which is perhaps counter-intuitive, but Hitler and Nixon are both prime examples of this trait), **narcissism, and high-risk tolerance--also tend to correlate with much higher levels of con-frontation and the use of force to resolve conflicts**. n17

Psychological theories also focus on problems of misperception. **There is powerful evidence that people are prone to systematic patterns of misperception, and that such misperception in government leaders contributes significantly to irrational decisions**. n18 In particular, **decision makers frequently form strong hypotheses regarding the intentions** [\*618] **and capabilities of potential adversaries, and there is a strong tendency to then dismiss or discount information that is inconsistent with the hypothesis, and to interpret ambiguous information in a manner that is consistent with and reinforces the hypothesis**. n19 **Such misperception often constitutes a significant factor in the path to war**. n20

Another set of theories that relate to the Image I causes of war focus not on the individual alone, but on how deci-sions are made within groups and organizations. Contrary to the expectation that government agencies generally operate in accordance with rational choice theory, **studies suggest that group decision making is often characterized by dynamics that can lead to irrational and suboptimal decisions**. One such characteristic is excessive "incrementalism" and "satisfycing"--the tendency to make small incremental policy shifts, coupled with the sequential analysis of options and adoption of the first acceptable alternative, a process captured in the aphorism "the good is the enemy of the best." n21 **A second theory suggests that the dynamic of competing bureaucratic and departmental interests--interests which are often inconsistent with the larger national interest, but which nonetheless command greater loyalty and mobilize greater effort among department or division members--subvert the decision-making process**. n22 **Moreover, each department will itself approach the decision making within the constraints of its own perspectives and mindsets, standard operating procedures, and capabilities. This is the famous "where you stand is where you sit" explanation of internal government politics**, n23 **often referred to as the** [\*619] "**bureaucratic politics model**." n24 For **example, the senior representatives of the U.S. Air Force, with obviously vested interests, strongly argued in favor of the continued strategic bombing of North Vietnam in 1967, even though the Secretary of Defense and others in the Nixon administration had determined that it was at best pointless and at worst counterproductive**. n25

**Finally, there is the phenomenon known as "*groupthink***." n26 **This theory suggests that some decision-making groups--particularly those characterized by a strong leader, considerable internal cohesion, internal loyalty, overconfi-dence, and a shared world view or value system--suffer from a deterioration in their capacity to engage in critical analysis during the decision-making process**. n27 **Decision-making groups that suffer from groupthink are particularly vulnerable to the kind of systemic misperception discussed above, but they suffer from other weaknesses as well, all stemming from a failure to challenge received wisdom, consider alternate perspectives, or bring to bear exogenous criteria or modalities in assessing policy options**. n28

These theories do not, of course, explain all of the problems in decision making in all situations. Groupthink and the bureaucratic politics model generally do not operate at the same time in the same groups. But **the studies of each of these phenomena suggest that these systemic patterns can be a significant factor in the less-than-rational and suboptimal decision making about the use of armed force.** **And these theories together show the importance of introducing exogenous criteria for assessing the merit of competing policy options, and the kinds of checks and balances that might lessen the probability that these tendencies could affect the decision to go to war.** [\*620]

B. Image II--The Level of the State

**The causes of war also operate at the level of the state itself. Again, there is an extensive range of theoretical ex-planations for the causes of war that focus on factors at the state level, but those that are central to Image II relate to the actual structure or form of the government of the state**. n29 **The essential idea is that some forms of government are inherently less prone to wage war than others**. **This idea has been central to liberal theories of the state and international relations since the beginning of the eighteenth century, with the argument that liberal democratic states are less inclined to initiate wars than autocratic or other nondemocratic states**. These arguments were founded upon a number of strands of liberal political theory, including the nature of individual rights within democracies and the manner in which respect for such rights would influence how the state would behave within the international society. n30 They also drew upon liberal ideas about the influence of capitalist economies, arguing that laissez-faire capitalist systems would operate to reduce the incentives for war in liberal democratic states. n31 But **perhaps the most important argument among these liberal claims, is that the very structure of government, both in terms of its leaders being representative of and directly accountable to an electorate, and the separation of political power between the executive and a more broadly representative legislature, would operate to reduce the likelihood that such governments would embark on military adventures**. n32

Rousseau and Madison both wrote about the ramifications of the democratic structure of the state on the propensity for war. n33 But it was Immanuel Kant who developed the argument most fully in the eighteenth century with his [\*621] short work Perpetual Peace: A Philosophical Sketch. n34 Writing at a time when there were less than a handful of fledgling democratic "republics" in the world, n35 **Kant argued that a perpetual peace would result from the spread of the republican form of government among the nations of the world and the development of a form of pacific federation among these free states**. n36 His argument thus straddled the second and third images, and I will return to discuss his overall theory more fully below when we turn to consider Image III. But one of his arguments for why republics would be inherently less likely to wage war is still very much at the heart of current liberal theories relating to Image II. His point was that, **in the kind of republic he envisioned, the consent of citizens would be required for decisions to go to war**. **Those who would "call[] down on themselves all the miseries of war," not only fighting and dying in the conflict but also paying for it and suffering the resulting debt, would be much less likely to agree to such an adventure than the heads of state in other kinds of political systems such as monarchies, who can "decide on war, without any significant reason**." n37

As we will see, Kant himself did not argue that the development of democratic structures within any given state would be sufficient to prevent it from going to war, and his theory of perpetual peace also rested on the requirement that the republican form of government be also spread throughout the international system. Indeed, **one of the problems with liberal theories that rely upon governmental structure as an explanation for the cause of war is that the extensive empirical research and analysis on the subject suggest that liberal democracies are almost as prone to engaging in war as nondemocratic states, at least as against nondemocratic countries**. n38 **Some have tried to argue that liberal democracies nonetheless do not initiate wars to the same degree, and thus** [\*622**] are inherently less aggressive than other forms of government, but even that claim is very difficult to sustain from the perspective of traditional international law conceptions of aggression and self-defense**. n39

What has emerged from this line of research, however, is the widely accepted proposition that liberal democracies do not commence wars against other liberal democracies. The so-called "democratic peace" encompasses both this empirical fact and the principle said to explain it. n40 While there remains some residual debate over the validity of the principle, n41 persuasive evidence suggests that, with the possible exception of two instances of armed conflict between what might be considered democratic states, there have been no wars between liberal democracies during the period between 1816 and 1965. n42 The assertion has been made, and often cited, that the democratic peace is close to being an empirical law in international relations. n43

**There is less agreement over the best explanation for the democratic peace. There are two main theoretical posi-tions: (1) normative and cultural explanations, and (2) institutional and structural constraints**. n44 The normative-cultural explanations argue that the shared norms of democracies, and particularly the shared adherence to the rule of law and commitment to peaceful dispute resolution internally, inform and influence the approach of democratic governments to [\*623] resolving disputes that may arise as between democracies. Moreover, there is a shared respect for the rights of other people who live in a similar system of self-government. These shared beliefs, norms and expectations tip the cost-benefit analysis toward peaceful resolution of disputes when they arise as among democracies. n45

**The structural-institutional advocates argue that the elements of the liberal democratic legal and political system operate to constrain the government from commencing armed conflicts**. **This is entirely in line with the insights of earli-er writers such as Madison, Kant, and Cobden, regarding the lower likelihood of war when representatives of those who will pay and die for the war are deciding, since it is more politically risky for democratic leaders to gamble the blood and treasure of the nation in war unless it is clearly viewed by the public as being necessary**. n46 **The arguments are also based in part on the broader idea that structural checks and balances typical of democratic systems, and the operation of certain other institutional features of deliberative democracy, will reduce the incidence of war**. n47 We will return to some of these arguments in more detail below.

**Observation 2: The US Will Lose These Wars**

***Status quo war-fighting follows a “Vietnam model” – the result is prolonged conflicts without congressional support, and ultimately military failure***

* Disjointed grand strategy

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**As the practice of declaring war has become passé**, **American strategy has likewise become** ***disjointed and disconnected*** **from national security objectives**. **Following World War II, an acquiescent Congress and an aggressive presidency have**, for decades, **fostered a strategic climate that failed to maintain the links between the political dimensions of the state and its strategy**. **The predominant** “NSC-68 **thinking**,” largely a product of executive national security panels that administrations have embraced and Congress has blithely followed, **provided inadequate guidance on how objectives and capabilities should be joined to produce *coherent overall strategy***.63 **This connection**, Clausewitz observed, ***is necessary for success in war***. For example, **US strategy following World War II ironically came to resemble the German strategy of the early 20th century**, **relying heavily on military ways and means that failed to address the political and economic components of warfare**.64 Historians are quick to extol the superiority of the German military machine, but Germany lost two world wars. **Similarly, the United States has pursued a strategy built on loosely linked operational and tactical successes.** Unfortunately, **without concretely defined end states specified in a coherent all-encompassing strategy, these successes have not achieved national strategic ends**. In Vietnam, Afghanistan, and Iraq, our leaders failed to properly define the national strategic ends, so the attendant strategies have been inchoate. Leaders’ attempts to match ways and means to fluctuating or poorly defined ends resulted in unacceptable levels of uncertainty and risk. **These protracted and strategically uncertain conflicts are alien to America’s strategic culture**, **which has little tolerance for long, risky, or uncertain conflicts**.65 More recently, **as the executive branch exercises greater authority in directing military interventions, the gap between risk and strategy becomes wider**. **Theater commanders** **charged with developing adequate or complete strategies** with sound ends and feasible ways to achieve them ***lack confidence in congressional support to provide the means necessary to achieve these strategic objectives***.66 **As the world’s only superpower, the United States can expect asymmetrical conflict as the norm**. **Future adversaries will increasingly focus on the strategic target of the American people’s collective will in their efforts to *subvert our national strategy***.67 The tragic military and political experience of Vietnam was spawned by an aggressive president promoting foreign policy absent congressional and public blessings.68 **Vietnam War strategy affirms how congressional abdication on war matters resulted in *protracted disaster***. As historian George Herring points out, “America’s failure in Vietnam and the tragedy that resulted also make clear what can happen when major decisions are made without debate or discussion.”69 After Congress passed the Gulf of Tonkin Resolution, the strategy formulation and decision process operated vacuously, failing to determine strategic objectives and the means to obtain them.70 President Johnson made numerous decisions concerning the strategy and operations of the war, resulting in a strategy of incremental gradualism. **Despite some tactical successes, Vietnam strategy never developed sufficient coherence nor the sustained support of the American people**. ***Through executive design***, **Congress and the people never fully vetted the value of the political objective in the context of large-scale military intervention** before **President Johnson** committed forces to combat.71 As a result, President Johnson lacked the top cover of a war declaration. This prevented him from unleashing the nation’s enormous military capability to achieve full, quick military success. Instead, he **implemented a strategy that he thought was least likely to jeopardize his legislative agenda, upset the domestic apple cart, or threaten his reelection**.72 In retrospect, **the incoherence of the Vietnam strategy reflected the real value of the political objective in the eyes of the American people;** they could not have cared less about Vietnam.73 Afghanistan and Iraq Strategies **The strategies for the ongoing conflicts in Iraq and Afghanistan have both failed to properly incorporate national strategic ends, ways, and means in a consistent manner across the whole of government.** In the absence of a national consensus on strategic ends, Congressman James Marshall (D-GA) not surprisingly identified: The mismatches among the needs of post-conflict stability operations in Afghanistan and Iraq, the size and the types of military forces available, and the pitiful scarcity of capability in the civilian branches of our government to effect nation-building efforts, as well as, our utter incompetence as a government in strategic communications.74 US Afghanistan strategy has continually morphed from 2001 to the present. The sweeping language in the September 2001 congressional resolution did little to shape the effort and focus the nation on acceptable long-term national ends.75 A careful analysis of coalition command and control structures indicates how the United States, partners, and allies prosecuted any number of operational strategies.76 Strategic priorities changed from counterterrorism to counterinsurgency, to nation building, back to counterterrorism, then eventually to a combination of all of them. During the lead-up to Operation Iraqi Freedom, significant executive power may have subjected the strategy to unnecessary risk. Indeed, **failure of Congress to deliberate a declaration of war may have resulted in poorly defined national objectives and shoddy strategy**.77 **Significant executive powers facilitated side-stepping full disclosure of policy risk.** The president’s obsession with regime change subordinated other key elements crucial to a comprehensive strategy, particularly with respect to clear strategic ends. This obsession obscured full debate and railroaded the nation into a course of action fraught with unexamined risk. Additionally, it masked the real cost of the strategy in terms of lives and dollars and inevitably compromised support for the effort when the strategy did not unfold as planned.78 Eventually, the wars in Iraq and Afghanistan and their strategies became focal points in the 2008 presidential campaign. Similar to President Johnson on Vietnam, candidate Obama politicized the Iraq and Afghanistan conflicts, promising on the campaign trail that, if elected, he would redeploy US combat forces out of Iraq and refocus on Afghanistan as the central front on the war against extremism. This **politicalization of the war efforts may have removed strategic considerations from decisionmaking, exposing the strategies to additional, unnecessary risk at a crucial time**.79 Another Cry for Reform In 2009, The National War Powers Commission, a bipartisan group commissioned under the auspices of the University of Virginia’s Miller Center for Public Affairs, reviewed the existing WPR and addressed executive overreach with respect to military intervention. Chaired by Warren Christopher and James Baker, the 2009 War Powers Commission concluded that the 1973 WPR does not function as intended and needs replacement.80 Commission members testified before the House Foreign Affairs Committee and Senate Foreign Relations Committee recommending a policy to restore the constitutional grounding for mandatory congressional war declaration for “large” force deployments and “significant armed conflict.”81 The Commission recommended replacing the 1973 WPR with the War Powers Consultation Act of 2009 that adds fidelity to the size, scope, and types of conflict subject to the Act. Most significantly, it directs the president to consult with Congress before introducing troops into “significant armed conflict.”82 Despite the bipartisan clout of former Secretaries of State Warren Christopher and James Baker, the Commission’s recommendations still lacked the necessary political power to prevent the president from deploying forces into significant armed conflict without the full blessing of Congress.83 Conclusion Reminiscent of the 1973 WPR, the National War Powers Commission’s effort to redress war power authority hoists another warning flag about war power overreach and executive presumption of constitutional power. But it is insufficient to have an academic debate over the constitutionality of war authority. **Since the end of World War II, an assertive executive branch has run roughshod over an abdicating Congress, which has compromised US military efficacy**. It has repeatedly resulted in the expenditure of national blood and treasure for strategically hollow ends. The Constitution is, in itself, a strategic national security document. The founders’ wisdom imbued within **Articles I and II capture**, in the Clausewitzian sense, **the necessary prerequisites for successful prosecution of war. As the executive and congressional branches deviate from US constitutional foundations** with respect to war authority, **they increasingly leave** the military—and **the nation**—***vulnerable to unacceptable strategic risk***. **The current interpretations** or disregard for war power authority, as practiced today, **no longer maintain the necessary connective tissue between political and military muscle movements**. **As a result, US national and military strategy has become disjoined from legitimate political will**. **American military operations are hampered** by the leadership’s inability to harness the national will. ***If this nation declared war*** when it engaged in war, **as the Constitution requires**, ***the United States would wage fewer of them—and be far better positioned to win them***.

***This lack of declaring war has caused every military loss since World War II***

Abdication of the Constitutional responsibility to seek a declaration of war before committing troops to conflict has resulted in every military loss since World War II

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There is an imbalance of constitutional power across the branches of the US government. **Congress has failed to preserve its constitutional privileges**, ***specifically its sole authority to declare war***.1 **Over the past 60 years**, through a combination of executive initiative and congressional abdication, **the United States has engaged in large scale offensive wars** ***absent congressional war declarations, despite Congress’s constitutional authority and requirement to formally declare the nation’s wars.***2 **For the 162 notable military deployments after *W*orld *W*ar II,** ***Congress never declared war*, opting instead to pass resolutions that effectively circumvented the constitutional war declaration process.** Arguably, **in its major military actions since 1950**, **the nation has failed to articulate political objectives commensurate with its sacrifice of blood and resources**.3 **This dubious record stands in stark contrast to the ends obtained from wars that Congress actually declared**. **Congressional resolutions are** ***an insufficient substitute for war declarations for a number of reasons***. **The resolution process undercuts the framers’ well-conceived declaration process designed to assure popular support for the nation’s wars.** **Thorough congressional deliberation is *imperative*** **for arguably the most important decision the Congress has the authority to make**—committing the nation to war. ***The executive branch’s recent practice of engaging in war without exercising the process of declaring war has left the nation’s military repeatedly engaged in open-ended conflict. The ensuing uncertainty exacerbates an already complicated strategy formulation process and often leads to truncated, incoherent, or episodic military strategies***. As the keeper of the nation’s treasury, Congress determines the sustainability of any military effort. Ultimately, all war strategy depends on the nation’s ways and means, along with the national will to sustain the effort to meet desired ends. **Whether a result of executive ambition, congressional abdication, or a combination of the two, committing US military forces to “war” without the benefit of the constitutional declaration process has not served the long-term interests of the nation**. In addition to its questionable constitutionality, **the resolution process has led to insufficiently defined national objectives**. **It constantly exposes strategy to political machinations**. Finally, **it fails over time to provide sufficient resources to achieve the uncertain objectives of the military actions that began extraconstitutionally**. First, consider the constitutional issue of power imbalance. Central to the Constitution is the foundational principle of power distribution and provisions to check and balance exercises of that power. This clearly intended separation of powers across the three branches of government ensures that no single federal officeholder can wield an inordinate amount of power or influence. The founders carefully crafted constitutional war-making authority with the branch most representative of the people—Congress.4 The Federalist Papers No. 51, “The Structure of Government Must Furnish the Proper Checks and Balances Between the Different Departments,” serves as the wellspring for this principle. Madison insisted on the necessity to prevent any particular interest or group to trump another interest or group.5 This principle applies in practice to all decisions of considerable national importance. Specific to war powers authority, **the Constitution empowers the legislative branch with the authority to declare war but endows the Executive with the authority to act as Commander-in-Chief**.6 **This construct designates Congress, not the president, as the primary decisionmaking body to commit the nation to war**—a decision that ultimately requires the consent and will of the people in order to succeed. By vesting the decision to declare war with Congress, the founders underscored their intention to engage the people—those who would ultimately sacrifice their blood and treasure in the effort. The Constitution, on the other hand, vaguely delegates authority to execute foreign policy. It contains no instructions regarding the use or custody of that power, except to “preserve, protect, and defend the Constitution of the United States.”7 Alexander Hamilton, known widely as an advocate of executive power, asserted: The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a President of the United States.8 Accordingly, the founders never intended for the military to serve as the nation’s primary agency to interface with the rest of the world or stand as the dominant instrument of foreign policy. So **the presidential authority of Commander-in-Chief does not permit a president to use the nation’s military simply to execute a president’s foreign policy.**9 **Following World War II, the strategic landscape became volatile and uncertain**. Two major events shaped what would become the predominant school of thought for developing US national security policy in this murky post-World War II strategic environment: the successful test of a nuclear weapon by the Soviet Union and the Communist victory in China. These two events fostered a national security staff that focused primarily on halting the advance of communism. US national security strategists formulated a robust, rigid strategy of containing communism as the panacea for foreign policy challenges and for defending national interests in the bipolar strategic landscape of the Cold War. Thus **the doctrine of containment and the directive to implement it,** National Security Council Report 68 (NSC-68), **dominated US foreign policy for several decades following World War II**.10 This new national security climate supported a decisionmaking culture comfortable with the executive branch as the primary or sole crafter of foreign policy.11 It was not a coincidence, therefore, that Cold War security advisors eschewed the war declaration process and replaced it with a desultory resolution process to authorize the nation’s uses of military power, for large and small operations. The NSC-68 culture appeared to facilitate the concentration of power in the executive branch. Dean Acheson declared, “The purpose of the NSC-68 was to bludgeon the mass mind of ‘top government’ that not only could the president make a decision but that the decision could be carried out.”12 **This mentality encouraged congressional abdication because nuclear warfare reduced decision cycles to minutes, not days or weeks**.13 The new strategic concept of **mutually assured destruction would not allow sufficient time for traditional wartime decisionmaking.** **This new strategic environment set the conditions for the gradual migration of war powers from Congress to the executive branch**. The policy formulation process, which gave birth to the NSC-68, led to executive dominance of the war-making powers, leaving Congress virtually irrelevant.14 Additionally, nuclear weapons and the aircraft and missiles that delivered them shifted the national decisionmaking mindset from traditional deliberation to crisis response, strengthening the perception that only the executive branch could act with the speed necessary to address the threat. The policy developed in the NSC-68 era inevitably disregarded congressional consensus and marginalized the traditional constitutional approach for authorizing the nation’s use of force. On 25 June 1950, North Korea invaded South Korea, dramatically challenging the new policy of containment. Additionally, a new international actor in the form of the United Nations introduced another layer of complexity and bureaucracy among the member states with respect to military intervention. President **Truman directed a large military deployment for offensive operations across Korea’s 38th parallel—all without the approval of Congress**.15 **In the process, President Truman formulated language in which the executive branch would circumvent constitutional war-making authority.**16 **The “police action” in Korea at its peak involved over 325,000 US military personnel, resulted in over 35,000 US casualties**, and ended in a frozen conflict that continues to befuddle the United States.17 A product of the new Cold War environment, President Truman’s actions were recklessly unprecedented. No previous president had deployed US forces into a foreign war without obtaining or at least seeking congressional approval.18 Congressional reactions were divided. Some in Congress objected to President Truman’s initiative, but others acquiesced—claiming President Truman’s actions were well within his authority as Commander-in-Chief. Perhaps most frightening was the congressional group that completely offshored oversight. They suggested President **Truman’s actions were consistent with the United Nations (UN) Charter** because the Security Council passed Resolution 83 that recommended “military measures and assistance” from member states to “restore peace and security in Korea.”19 **A UN resolution may serve to justify military intervention to the world community, but it *should never replace the necessity for congressional authorization as the Constitution requires***. **Nonetheless, President Truman’s initiative was accepted as sufficient to meet constitutional muster for taking the nation to war**. He had taken the first step to increasing presidential overreach. With respect to war powers, President Truman’s executive police action arguably set the precedent for empowering future presidents to engage in major war without congressional approval.20 In 1949 President Truman offered financial aid to support French recolonization efforts in Vietnam without congressional debate or justification.21 Following the 1954 French defeat at Dien Bien Phu, the country was partitioned into two “countries” of dubious legitimacy. To strengthen the South against northern communist aggression, the United States began sending military advisors to Vietnam to provide initial support for the South’s noncommunist regime. US security advisors were seeking to avoid the “domino effect,” which posited that other regional nations would fall to communism if South Vietnam fell. Thus, the United States intervened with approximately 700 military advisors under President Eisenhower; their numbers increased to 16,000 under President Kennedy.22 In August 1964, North Vietnamese gunboats allegedly attacked the USS Maddox and USS Turner Joy in the Gulf of Tonkin. In response, President Johnson successfully expedited through Congress the Gulf of Tonkin Resolution amid false reporting, misinformation, and what in hindsight could be called deliberate obfuscation.23 The perceived fog of crisis had dampened Congress’s will to monitor executive initiatives. Congress thus granted President Johnson the authority to use any amount of military force to do whatever he thought was necessary in Vietnam.24 Another axiom the Cold War induced was the notion that foreign policy decisions were too extraordinary for the underclass of Congress and the public to decide.25 President Johnson then launched a war in Vietnam, cloaking his personal agenda and true motivations. A compliant, acquiescent Congress failed to restrain the president’s ambition and by default contributed to a national disaster.26 In a relatively short period, August 1964 to spring of 1965, President Johnson deployed the “first” combat forces to Vietnam. At the war’s height, the United States sent over 400,000 troops to Vietnam to participate in various modes of conventional and unconventional war—all executed under presidential authority granted by a congressional resolution contrived under false pretenses.27 President Johnson took President Truman’s initiative one unprecedented step further; the UN Security Council did not pass a resolution to address aggression in Vietnam as was the case with Korea.28 If there is a positive element to the legacy of America’s involvement in Vietnam, it is Congress’s attempt to reassert its authority and rein in executive war power. The failure in Vietnam and President Nixon’s unprecedented abuses of presidential power aroused Congress to draft legislation restricting executive war powers. In November 1973, **the War Powers Resolution** (WPR) **was passed over President Nixon’s veto and emerged as the congressional effort to limit the president’s ability to intervene militarily without first seeking congressional approval**. Contentious from the outset, the WPR divided lawmakers into camps either for or against limiting executive power.29 The language in the WPR is convoluted and cryptic. It offers very little regarding the critical issue of enforcement. Subsequently, it has been dismissed by every administration since its passage.30 The WPR set the requirement for the president to report to Congress within 48 hours of the introduction of armed forces with the intent to perform combat operations.31 Additionally, it requires congressional authorization for the president to sustain commitments of US forces beyond 60 days—and a new authorization if the commitment extends beyond 90 days.32 In reality, **the WPR fails because the oversight mechanisms, flaccid as they are,** ***do not apply until after US forces are deployed. One could argue that the crowning achievement of the WPR is that it affirms the aphorism that it is easier to beg forgiveness than to seek permission.*** The 1990 Iraqi invasion of Kuwait served again as a justification for massive US intervention. Despite having the time to consult with Congress, President G. H. W. Bush initiated Operation Desert Shield in August 1990 without congressional consultation or authorization.33 Not until November 1990 did Congress earnestly review the situation in the Gulf. In December 1990, the Democratic caucus passed a resolution mandating the president obtain congressional authorization before initiating hostilities, a feeble attempt to close the barn door after the horse departed.34 On 12 January 1991, Congress eventually authorized the use of force by a vote of 250 to 183 in the House and 52 to 47 in the Senate. However, this was months after President G. H. W. Bush directed the deployment of more than 150,000 troops to the Persian Gulf.35 The ensuing resolution was perhaps the closest to a US war declaration since World War II. House Speaker Tom Foley called it the “practical equivalent of a declaration of war.” But it was not functionally a war declaration, because it only authorized the use of force to enforce UN Security Council Resolution 678.36 Nonetheless, the United States mounted a major military operation. At its peak, the United States deployed approximately 350,000 personnel in support of operations to liberate Kuwait under the auspices of the UN resolution.37 The US military campaign of Operation Desert Shield/Desert Storm exhibited operational and tactical genius. The campaign quickly fulfilled the conditions of the UN resolution by evicting Iraqi forces from Kuwait and restoring Kuwaiti sovereignty. But the lack of full, national debate on how to terminate the Persian Gulf War essentially facilitated the transition of quick military success into a 12-year open-ended quasi-war that continued until the 2003 invasion of Iraq—another undeclared war.38 **In 2001, the al Qaeda attacks on New York and Washington DC easily justified authorization for US intervention in Afghanistan**. The 9/11 attacks shocked, bruised, and bloodied a nation which then quickly responded with congressional expediency not seen since the 1941 attack on Pearl Harbor. On the following day, President George W. **Bush** declared “these deliberate and deadly attacks . . . were acts of war.”39 Yet he **did not ask Congress for a war declaration nor did Congress provide one**.40 Instead, on 14 September, **Congress quickly passed a joint resolution authorizing the president: To use all necessary force** and appropriate force against those nations, organizations, or persons, he [emphasis added] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.41 This resolution, which the president signed into law (P.L. 107-40) on 18 September, was unprecedented with regard to all provisions for war power authority. **It provided carte blanche power for the president to invoke military force against all nations**, organizations, and people associated with the 9/11 attack.42 It provided no oversight whatsoever; it indefinitely extended executive authority; it “legalized” a war, not on a defined sovereign entity, but on a vaguely defined instrument of war—a “War on Terror.” ***This broad sweeping language*** **has been interpreted and invoked to support many controversial programs both abroad and at home**.43 **It is important to note the nexus between the 9/11 use-of-force resolution process and the 2002 authorization for the use of force against Iraq. The unlimited, broad authority of the 2001 resolution was perhaps the first brick laid on the road to war with Iraq. This resolution gave the president the perceived authorization to initiate an entirely new and costly preemptive war in Iraq**—a country with no visible, logical, or strategic connection to the 9/11 attack.44 **Ironically, however, congressional resistance to what would become such a polarizing issue and ultimately a tremendous sacrifice of blood and treasure was epitomized by the parody of congressional deliberation prior to the invasion**.45 **At the height of the debates over the Iraq War in the House and Senate, fewer than ten percent of the members attended**—a clear indication of congressional apathy.46 Debate on the Senate floor was pedestrian; most senators read prepared statements and then departed.47 ***The administration’s pre-invasion power grab and Congress’s acquiescence provided the most blatant example of power imbalance across the branches with respect to war power authority since Congress yielded its war powers at the beginning of the Cold War.***48 **Since World War II, a wide gap has developed between Congress and the executive branch with respect to the critical issue of war powers. *Like a black hole***, **this gap draws in the roles and abilities of the branches to execute foreign policy**. Ostensibly, **this gap has resulted from two symbiotic behaviors: *executive aggressiveness and congressional abdication***. The historical record reveals the evolution of this phenomenon. But history does not clearly reveal the structural and political dimensions of this phenomenon. The Constitution grants most foreign policy prerogative to Congress in Article I. Article II grants the president very limited authority in the foreign policy arena.49 This results in a structural dichotomy because the executive branch is better positioned to lead and execute, but congressional actions are more indirect and diffuse. Congress’s bicameral design and widely dispersed support base do not optimize the expeditious exercise of its power. Consequently, considerable power has flowed from Congress to the president.50 Execution of US foreign policy is fraught with political uncertainty and vulnerability. Compared to domestic issues, foreign policy decisions and initiatives are susceptible to greater unpredictability.51 Therefore, when dealing with high levels of uncertainty, Congress often finds it easier to defer to the executive branch, thereby reducing congressional members’ exposure or liability.52 **Because most Americans elect their congressional representatives based on domestic issues, they tend to pay little attention to foreign policy; members of Congress often defer acting on foreign policy matters as a safer political option**.53 **This political safe haven of indecision**, however, does not serve the nation well because it encourages concentrating power in the executive branch. Likewise, it ***severs the link between the electorate, the constitutionally intended legislative process, and the executor***. **Matters of war,** however, **require the collective involvement of the people**. **Militaries fight wars, but** ***nations go to war.*** In the final analysis, ***congressional abdication of its Article I authority to oversee the nation’s foreign policy has exposed America to unacceptable strategic risk.***

***There are no alt causes – America’s capabilities are second to none – but has won exactly zero wars since we stopped declaring war. It is correlation AND causation***

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One of Clausewitz’ greatest contributions to the study of war is his emphasis on the conceptual link between politics and war. “***War is never a separate phenomenon***,” Clausewitz wrote, “**but the continuation of politics by other means**.”54 Behind this proposition is a deeply textured argument about the intrinsic political purpose of war. **This political purpose encompasses the components comprising war: societal disposition, economic capability, and strategy.** Clausewitz advised leaders to thoroughly consider any use of violence. So the link between war and politics “should never be overlooked.”55 Even in the 21st century, ***war retains this political dimension despite the recent emergence of nonstate actors and transnational groups***.56 In other words, **success at the tactical level of war first requires careful preparations at the political and strategic levels. The enabling institutions for success in war—Congress, the president, the cabinet, and other advisors—all need to be fully engaged in the development of feasible, suitable, and acceptable strategy**.57 **And this carefully crafted strategy needs to include legitimate justification for violence, rigorous calculation and valuation of political objectives, and commitment of resources sufficient to achieve strategic objectives**.58 Since 1945, ***the United States has built the world’s most capable war-fighting machine***. **So why,** then, ***have most of the nation’s large military interventions since World War II ended in defeat or, at best, stalemate***? **Political leaders should attend more to** what Clausewitz calls ***the political dimensions of war***—**national unity and the political value of the objective—as inseparable from national and military strategy**. War theorists have long emphasized the importance of national unity and the political value of the war objective. Thousands of years ago, Sun Tzu identified the necessary pre-condition of national unity for successful war strategy.59 **National unity enables political leaders to muster resources needed to win wars and to amass the human capital that makes an army.** Clausewitz advised, “to discover how much of our resources must be mobilized for war, we must first examine our own political aim.”60 **National unity underwrites the commitment the nation needs to successfully prosecute war, provided the war has political value commensurate to the effort expended.61 The founders directed this nation to use a collaborative process to assess the political value of a war. *So the Constitution requires Congress to deliberate on the decision to go to war and, when it so decides, to declare war. Therefore, the Constitution serves as the guarantor of ensuring national unity and a legitimate valuation of the war’s political objective***—**provided through the mechanism of the war declaration.** Consider the language of the 1941 war declaration against Japan. It captures the national unity, the political value of the objective, and the will and support of Congress to support the war.62

**Observation 3 – Losing Wars is Bad**

***Failure to achieve success in these wars results in the perception of the decline of American leadership and the rise of challengers***

Dr. LOUISE **FAWCETT,** author of International Relations of the Middle East, Oxford University, “The Iraq War ten years on: assessing the fallout”, International Affairs, 20**13** http://www.chathamhouse.org/sites/default/files/public/International%20Affairs/2013/89\_2/89\_2Fawcett.pdf

Had the war been more successful, history might have judged it differently. **As its short-term military achievements gave way to** widely advertised **long-term failures**, **this led to intense speculation about the** possible ***demise of US power and reputation in an emerging multipolar system.* There was** ***undoubtedly* reputational and soft power damage**—‘***a sharp drop in the attractiveness of the United States around the world***’;40 it was also true that the war’s immediate effect was to galvanize local and international opinion against the western ‘coalition of the willing’ and the policies it embodied. **This,** in turn, **presented new opportunities for other aspiring powers**, ***like Russia or China***, **to raise their international profile in a still evolving post-Cold War era**. Retrospectively **this was a kind of** ‘***Vietnam moment’*** **for the United States in which both its allies and its rivals became** ***more critical and assertive.*** In the medium term, **the Iraq War has certainly contributed to a shift in the policy priorities and choices of the US**, UK and other European **government**s, those most intimately involved in the conflict, for whom the ***war became a serious political liability***. **However, viewed from a longer-term** Arab Spring **perspective**, which has seen western powers acting—more often in concert than not—to influence the political future of the region, **it can hardly be said that the** **US** and European priorities, or their **propensity to intervene** where core interests appear threatened, have **suffered an irreversible setback**, even if the modality of intervention has, for the moment, changed. What was the effect of the Iraq War on US standing? **There was widespread domestic and international criticism of the invasion**, and of the prolonged occupation of Iraq that followed. **This was part of a wider critique about the nature and direction of post-Cold War US foreign policy** **in which terms like** unilateralism and **neo-imperialism predominated. There was scoffing at the naivety and hubris** demonstrated by President George W. Bush, as he outlined after the fall of Baghdad his ‘forward strategy of freedom’.41 Certainly, the Iraq War was a factor in the Republican defeat in the 2008 presidential election and in the reshaping of foreign policy-making under a new Democratic administration led by Barack Obama with initially a very different feel. Similarly, in Britain the Iraq War became a liability for the Labour administrations of Tony Blair and Gordon Brown, and a factor also in the latter’s replacement by the current coalition government in 2010. The results of the Iraq (Chilcot) Inquiry, launched in 2009, tasked with considering the different aspects of the UK’s involvement, are still awaited.42

***This perceived loss of leadership ensures lash-out and superpower conflicts – followed by an inward turn that results in the corrosion of the global commons***

**Brzezinski ’12** (Zbigniew Brzezinski, national security advisor under U.S. President Jimmy Carter, is author of the forthcoming book Strategic Vision: America and the Crisis of Global Power, Foreign Policy, After America¶ <http://www.foreignpolicy.com/articles/2012/01/03/after_america?page=0,1>, jj)

For **if America falters, the world is unlikely to be dominated by a single preeminent successor** -- not even China. **International uncertainty, increased tension among global competitors, and** even **outright chaos would be far more likely outcomes**. **While a sudden, massive crisis of the American system** -- for instance, another financial crisis -- **would produce a fast-moving chain reaction leading to global political and economic disorder, a steady drift by America into increasingly pervasive decay or endlessly widening warfare with Islam would be unlikely to produce, even by 2025, an effective global successor**. **No single power will be ready by then to exercise the role that the world,** upon the fall of the Soviet Union in 1991, **expected the United States to play: the leader of a new, globally cooperative world order**. **More probable would be** a protracted phase of rather inconclusive realignments of both global and regional power, with no grand winners and many more losers, in a setting of **international uncertainty and even of potentially fatal risks to global well-being. Rather than a world where dreams of democracy flourish, a Hobbesian world of enhanced national security based on varying fusions of authoritarianism, nationalism, and religion could ensue**. The leaders of the world's second-rank powers, among them India, Japan, Russia, and some European countries, are already assessing the potential impact of U.S. decline on their respective national interests. The Japanese, fearful of an assertive China dominating the Asian mainland, may be thinking of closer links with Europe. Leaders in India and Japan may be considering closer political and even military cooperation in case America falters and China rises. **Russia**, while perhaps engaging in wishful thinking (even schadenfreude) about America's uncertain prospects, **will almost certainly have its eye on the independent states of the former Soviet Union**. Europe, not yet cohesive, would likely be pulled in several directions: Germany and Italy toward Russia because of commercial interests, France and insecure Central Europe in favor of a politically tighter European Union, and Britain toward manipulating a balance within the EU while preserving its special relationship with a declining United States. **Others may move more rapidly to carve out their own regional spheres: Turkey in the area of the old Ottoman Empire, Brazil in the Southern Hemisphere, and so forth**. **None of these countries, however, will have the requisite combination of economic, financial, technological, and military power even to consider inheriting America's leading role**. China, invariably mentioned as America's prospective successor, has an impressive imperial lineage and a strategic tradition of carefully calibrated patience, both of which have been critical to its overwhelmingly successful, several-thousand-year-long history. China thus prudently accepts the existing international system, even if it does not view the prevailing hierarchy as permanent. It recognizes that success depends not on the system's dramatic collapse but on its evolution toward a gradual redistribution of power. Moreover, the basic reality is that **China is not yet ready to assume in full America's role in the world. Beijing's leaders themselves have repeatedly emphasized that on every important measure of development, wealth, and power, China will still be a modernizing and developing state several decades from now, significantly behind not only the United States but also Europe and Japan in the major per capita indices of modernity and national power**. Accordingly, **Chinese leaders have been restrained in laying any overt claims to global leadership.** At some stage, however, **a more assertive Chinese nationalism could arise** and damage China's international interests. **A swaggering, nationalistic Beijing would unintentionally mobilize a powerful regional coalition against itself**. None of China's key neighbors -- India, Japan, and Russia -- is ready to acknowledge China's entitlement to America's place on the global totem pole. They might even seek support from a waning America to offset an overly assertive China. **The resulting regional scramble could become intense, especially given the similar nationalistic tendencies among China's neighbors**. **A phase of acute international tension in Asia could ensue**. ***Asia of the 21st century could then begin to resemble Europe of the 20th century -- violent and bloodthirsty.*** At the same time, **the security of a number of weaker states located geographically next to major regional powers also depends on the international status quo reinforced by America's global preeminence -- and would be made significantly more vulnerable in proportion to America's decline. The states in that exposed position -- including Georgia, Taiwan, South Korea, Belarus, Ukraine, Afghanistan, Pakistan, Israel, and the greater Middle East -- are today's geopolitical equivalents of nature's most endangered species**. Their fates are closely tied to the nature of the international environment left behind by a waning America, be it ordered and restrained or, much more likely, self-serving and expansionist. A faltering United States could also find its strategic partnership with Mexico in jeopardy. America's economic resilience and political stability have so far mitigated many of the challenges posed by such sensitive neighborhood issues as economic dependence, immigration, and the narcotics trade. A decline in American power, however, would likely undermine the health and good judgment of the U.S. economic and political systems. ***A waning United States would likely be more nationalistic, more defensive about its national identity, more paranoid about its homeland security, and less willing to sacrifice resources* for the sake of others' development.** The worsening of relations between a declining America and an internally troubled Mexico could even give rise to a particularly ominous phenomenon: the emergence, as a major issue in nationalistically aroused Mexican politics, of territorial claims justified by history and ignited by cross-border incidents. **Another consequence of American decline could be a corrosion of the generally cooperative management of *the global commons* -- shared interests such as sea lanes, space, cyberspace, and the environment, whose protection is imperative to the long-term growth of the global economy and the continuation of basic geopolitical stability**. In almost every case, **the potential absence of a constructive and influential U.S. role would fatally undermine the essential communality of the global commons because the superiority and ubiquity of American power creates order where there would normally be conflict.** None of this will necessarily come to pass. Nor is the concern that America's decline would generate global insecurity, endanger some vulnerable states, and produce a more troubled North American neighborhood an argument for U.S. global supremacy. In fact, the strategic complexities of the world in the 21st century make such supremacy unattainable. But **those dreaming today of America's collapse would** probably **come to regret it. And as the world after America would be increasingly complicated and chaotic, it is imperative that the United States pursue a new, timely strategic vision for its foreign policy -- or start bracing itself for a dangerous slide into global turmoil.**

***Collapse of the global commons breaks down globalization causing war***

**Owen 11** John M. Owen Professor of Politics at University of Virginia PhD from Harvard "DON’T DISCOUNT HEGEMONY" Feb 11 [www.cato-unbound.org/2011/02/11/john-owen/dont-discount-hegemony/](http://www.cato-unbound.org/2011/02/11/john-owen/dont-discount-hegemony/)

Andrew **Mack and** his **colleagues** at the Human Security Report Project are to be congratulated. Not only do they **present a study with a** striking **conclusion**, **driven by data**, **free of** theoretical or **ideological bias**, but they also do something quite unfashionable: they bear good news. Social scientists really are not supposed to do that. Our job is, if not to be Malthusians, then at least to point out disturbing trends, looming catastrophes, and the imbecility and men dacity of policy makers. And then it is to say why, if people listen to us, things will get better. We do this as if our careers depended upon it, and perhaps they do; for if all is going to be well, what need then for us? Our colleagues at Simon Fraser University are brave indeed. That may sound like a setup, but it is not. I shall challenge neither the data nor the general conclusion that violent **conflict** around the world **has been decreasing** in fits and starts **since the Second World War. When it comes to violent conflict among and within countries, things have been getting better**. (The trends have not been linear—Figure 1.1 actually shows that the frequency of interstate wars peaked in the 1980s—but the 65-year movement is clear.) Instead I shall accept that Mack et al. are correct on the macro-trends, and focus on their explanations they advance for these remarkable trends. With apologies to any readers of this forum who recoil from academic debates, this might get mildly theoretical and even more mildly methodological. Concerning international wars, one version of the “nuclear-peace” theory is not in fact laid to rest by the data. It is certainly true that nuclear-armed states have been involved in many wars. They have even been attacked (think of Israel), which falsifies the simple claim of “assured destruction”—that any nuclear country A will deter any kind of attack by any country B because B fears a retaliatory nuclear strike from A. But the most important “nuclear-peace” claim has been about mutually assured destruction, which obtains between two robustly nuclear-armed states. The claim is that (1) rational states having second-strike capabilities—enough deliverable nuclear weaponry to survive a nuclear first strike by an enemy—will have an overwhelming incentive not to attack one another; and (2) we can safely assume that nuclear-armed states are rational. It follows that states with a second-strike capability will not fight one another. Their colossal atomic arsenals neither kept the United States at peace with North Vietnam during the Cold War nor the Soviet Union at peace with Afghanistan. But the argument remains strong that those arsenals did help keep the United States and Soviet Union at peace with each other. Why non-nuclear states are not deterred from fighting nuclear states is an important and open question. But in a time when calls to ban the Bomb are being heard from more and more quarters, we must be clear about precisely what the broad trends toward peace can and cannot tell us. They may tell us nothing about why we have had no World War III, and little about the wisdom of banning the Bomb now. Regarding the downward trend in international war, Professor **Mack is friendlier to** more palatable theories such as the “**democratic peace**” (democracies do not fight one another, and the proportion of democracies has increased, hence less war); the interdependence or “**commercial peace**” (states with extensive economic ties find it irrational to fight one another, and interdependence has increased, hence less war); **and the notion that people** around the world **are** more **anti-war** than their forebears were. Concerning the downward trend in civil wars, he favors theories of economic growth (where commerce is enriching enough people, violence is less appealing—a logic similar to that of the “commercial peace” thesis that applies among nations) and the end of the Cold War (which end reduced superpower support for rival rebel factions in so many Third-World countries). These are all plausible mechanisms for peace. What is more, none of them excludes any other; all could be working toward the same end. That would be somewhat puzzling, however. Is the world just lucky these days? How is it that an array of **peace-inducing factors happens to be working coincidentally** in our time, when such a magical array was absent in the past? The answer may be that one or more of these mechanisms reinforces some of the others, or perhaps some of them are mutually reinforcing. Some scholars, for example, have been focusing on whether economic growth might support democracy and vice versa, and whether both might support international cooperation, including to end civil wars. **We** would still **need to explain how this** charmed **circle of causes got started**, however. And here **let me raise** another factor, perhaps even less appealing than the “nuclear peace” thesis, at least outside of the United States. That factor is what international relations scholars call hegemony—specifically **American hegemony**. A theory that many regard as discredited, but that refuses to go away, is called hegemonic stability theory. The theory emerged in the 1970s in the realm of international political economy. It asserts that **for the global economy to remain open**—for countries to keep barriers to trade and investment low—**one** powerful **country must take the lead**. Depending on the theorist we consult, “taking the lead” **entails** paying for global public goods (**keeping** the **sea** lanes **open**, **providing liquidity** to the international economy), **coercion (threatening** to raise **trade** **barriers or withdraw military protection** from countries that cheat on the rules), **or both**. The theory is skeptical that international cooperation in economic matters can emerge or endure absent a hegemon. The distastefulness of such claims is self-evident: they imply that it is good for everyone the world over if one country has more wealth and power than others. More precisely, they imply that it has been good for the world that the United States has been so predominant. There is no obvious reason why **hegemonic stability** theory **could** not **apply to other areas** of international cooperation, **including** in **security affairs,** **human rights**, **i**nternational **law**, **peacekeeping** (UN or otherwise), **and so on**. What I want to suggest here—suggest, not test—is that American hegemony might just be a deep cause of the steady decline of political deaths in the world. How could that be? After all, the report states that United States is the third most war-prone country since 1945. Many of the deaths depicted in Figure 10.4 were in wars that involved the United States (the Vietnam War being the leading one). Notwithstanding politicians’ claims to the contrary, a candid look at U.S. foreign policy reveals that the country is as ruthlessly self-interested as any other great power in history. The answer is that U.S. **hegemony might** just **be a deeper cause of the proximate causes** outlined by Professor Mack. Consider **economic growth and** openness to foreign **trade** and investment, which (so say some theories) **render violence irrational**. American power and policies may be responsible for these in two related ways. First, at least since the 1940s **Washington has prodded other countries to embrace** the market capitalism that entails **economic openness** and produces sustainable economic growth. The United States promotes capitalism for selfish reasons, of course: its own domestic system depends upon growth, which in turn depends upon the efficiency gains from economic interaction with foreign countries, and the more the better. During the Cold War most of its allies accepted some degree of market-driven growth. Second, the U.S.-led western victory in the Cold War damaged the credibility of alternative paths to development—communism and import-substituting industrialization being the two leading ones—and left market capitalism the best model. The end of the Cold War also involved an end to the billions of rubles in Soviet material support for regimes that tried to make these alternative models work. (It also, as Professor Mack notes, eliminated the superpowers’ incentives to feed civil violence in the Third World.) What we call **globalization is caused** in part **by the emergence of the U**nited **S**tates **as the** global **hegemon**.

***Failure to reign in “wars of choice” cause entanglement and future retrenchment – scaling back intervention now ensures US engagement in the global commons and sustainable leadership***

**Wagner & Haas 5-28-‘13**, Margaret Wagner, Richard Haass is the president of the Council on Foreign Relations and author of Foreign Policy Begins at Home: The Case for Putting America's House in Order, Time, PBS, 5-28-13, Is the U.S. Overreaching Abroad?, <http://www.pbs.org/newshour/bb/world/jan-june13/haas_05-28.html>, jj

**Yes, there were some things we needed to do after 9/11, but most of what we have done abroad in the last 20 or so years I would say were wars of choice**. And in many cases, **our vital national interests weren't at stake**. Presidents got pressured. And more often than not, they gave into the pressure. In some cases, **the president just decided, like George W. Bush, that we would embark on a major adventure to remake the Middle East**.¶ **And I simply think it was ill-advised. At the same time, they didn't tend for the most part on things at home. So we funded, for example, a new prescription drug benefit program. Well, where's that going to come from? Or we had the Simpson-Bowles commission under this administration. It gets reintroduced and then essentially it gets orphaned. And we're not doing anything now, so five, 10, 20 years from now when all the baby boomers are retired, we have got enough to take care of them**.¶ MARGARET WARNER: Now, you're not saying all wars are to be avoided. Only, we have to be more discriminating.¶ RICHARD HAASS: Absolutely.¶ MARGARET WARNER: What's the criteria?¶ RICHARD HAASS: This is not an isolationist book.¶ I actually want us to do more in Asia, where the great powers, the economic powers of the day are increasingly colliding. **Wars of necessity, where our vital national interests are at stake, where there are not good alternatives, we ought to fight those**. But **something like Syria, which is very much in the news, is not a vital national interest**.¶ There are alternatives to the United States getting heavily involved. We have always got to ask ourselves two questions: Can we make a difference, given local realities? And, second of all, do we have the luxury, if you will, of focusing on one square of a chessboard, given everything else in the world and everything here at home?¶ And what I try to write is something of a guide to working through those challenges.¶ MARGARET WARNER: All right, but that is where your doctrine will be most immediately put to the test is what to do about Syria. So what are the alternatives? You're saying don't get involved at all militarily? Are you say no to no-fly zone? Are you saying no to even further arming the rebels?¶ RICHARD HAASS: I'm OK with selectively arming rebels. That's an indirect form of involvement.¶ I'm OK conceivably with certain very, very limited military actions, for example, cruise missile strikes if chemical weapons are used. But, no, **I don't want to set up no-fly zones. I don't want the U.S. Air Force involved. I certainly don't want soldiers on the ground. *I don't want to be responsible for trying to put Humpty Dumpty back together again***.¶ If and when the Assad regime goes, that's when the really difficult stuff is going to begin. That's what **we should have learned from Afghanistan. That's what we should have learned from Iraq, a little bit of humility. There are limits to what American to power can do**.¶ Instead, we ought to focus it in foreign policy, where we really know our tools can be useful. And, more important, **we ought to focus it here at home**. **We want to be a leader for the long haul. We don't want to be a short-term power**. I have recently written, **we want the 21st century to be a second American century. It will only be that if we first get strong again, and that means fixing things here at home**.¶ MARGARET WARNER: And what are the consequences if we don't?¶ RICHARD HAASS: Interesting enough, **the alternative to an American-led world, it is not a China-led world. It's not an India- or Europe- or Japan-led world. It's a world that no one leads**.¶ **That's a world that's chaotic.** And what we have learned is the world is not Las Vegas. What happens there doesn't stay there. It comes here. So **a world in which there's chaos out there, that chaos will come here in the form of terrorists, the form of a breakdown of economic relations, in the form of climate change, in the form of nuclear proliferation. We have got to stay involved, but, again, we will only be able to do it if we're strong.**

***Even if future warfare is mechanized --- those operations are uniquely prone to mission creep and escalation***

**Druck ’12**, Judah A. Druck, B.A., Brandeis University, 2010; J.D. Candidate, Cornell Law School, 2013; Notes Editor, Cornell Law Review, Volume 98, November, 2012¶ Cornell Law Review¶ 98 Cornell L. Rev. 209, NOTE: DRONING ON: THE WAR POWERS RESOLUTION AND THE NUMBING EFFECT OF TECHNOLO-GY-DRIVEN WARFARE, Lexis, jj¶

The War Powers Resolution in the Era of Technology-Driven Warfare

A. Why an Unconstrained Executive Matters Today

**If public scrutiny acts as a check on presidential action by pressuring Congress into enforcing domestic law** (namely, the WPR), **then that check has weakened given the increased use of technology-driven warfare abroad**. n135 As a result, **fewer checks on presidential military actions exist, implying that we will see more instances of unilateral presidential initiatives**. **But if the new era of warfare removes the very issues associated with traditional warfare, should we be con-cerned about the American public's increasing numbness to it all? The answer is undoubtedly yes.**

**First, from a practical standpoint, the psychology surrounding mechanized warfare makes it easier for the United States to enter hostilities initially**. n136 **Without having to worry about any of the traditional costs of war (such as a draft, rationing, casualties, etc.), the triggers that have historically made the public wary of war are now gone**. **When ma-chines, rather than human beings, are on the front lines, the public** (and, as a result, politicians and courts) **will not act to stop the continued use of drones. In other words, people will simply stop caring about our increased actions abroad**, regardless of their validity, constitutionality, or foreign harm.

But again one must wonder: should we care? After all, even if we increase the number of military conflicts abroad, the repercussions hardly seem worth worrying about. For example, worrying that WPR violations will cause significant harm to the United States seems somewhat misplaced given the limited nature of technology-driven warfare. Granted, this style of warfare might make it easier to enter hostilities, but the risk of subsequent harm (at least to the United States) is low enough to mitigate any real danger. Furthermore, even if the effects of warfare might become increasingly dulled, any use of force that would eventually require traditional, Vietnam-esque types of harms as the result of technology-driven warfare would in a sense "wake up the populace" in order to check potentially unconstitutional action. n137 [\*232] Thus, if our level of involvement requires machines and only machines, why worry about a restrained level of public scrutiny?

The answer is that **a very real risk of harm exists nonetheless. War by its very nature is unpredictable**. n138 Indeed, **one of the major grievances concerning the war in Vietnam was that we ended up in a war we did not sign up for in the first place**. n139 ***The problem is not the initial action itself but the escalation***. Therefore, **while drone strikes might not facially involve any large commitment, the true threat is the looming possibility of escalation**. n140 **That threat exists in the context of drones, whether because of the risk of enemy retaliation or because of a general fear that an initial strike would snowball into a situation that would require troops on the ground**. n141 **In both cases, an apparently harmless initial action could eventually unravel into a situation involving harms associated with traditional warfare**. n142 Worse yet, even if that blowback was sufficient to incentivize the populace and Congress to mobilize, the resulting involvement would only occur after the fact. n143 **If we want restraints on presidential action, they should be in place before the United States is thrown into a war, and this would require public awareness about the use of drones**. n144 As such, **whether it is unforeseen issues arising out of the drones themselves** n145 **or unforeseen consequences stemming from what was ostensibly a minor military undertaking, there is reason to worry about a** [\*233**] populace who is unable to exert any influence on military actions, even as we shift toward a more limited form of warfare**. n146

Another issue associated with a toothless WPR in the era of technology-drive warfare involves humanitarian con-cerns. If one takes the more abstract position that the public should not allow actions that will kill human beings to go unchecked, regardless of their legality or underlying rationale, then that position faces serious pressure in the era of technology-driven warfare. As the human aspect of warfare becomes more attenuated, **the potential humanitarian costs associated with war will fade out of the collective consciousness, making it easier for the United States to act in potentially problematic ways without any substantial backlash**. Rather than take note of whom we target abroad, for example, **the numbing effect of technology-driven warfare forces the public to place "enormous trust in our leaders" despite the fact that good faith reliance on intelligence reports does not necessarily guarantee their accuracy**. n147 Accordingly, **as the level of public scrutiny decreases, so too will our ability to limit unwarranted humanitarian damage abroad**. n148 **At the very least, some dialogue should occur before any fatal action is taken; yet, in the technology-driven warfare regime, that conversation never occurs.** n149

**2**

***Advantage 2 is pre-emption***

***U.S. war powers are modeled internationally --- the precedent of unilateral executive authority encourages preemptive conflict in multiple hotspots***

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***As the world's foremost superpower, the United States has the unique ability to influence the behavior of other states***. **Since the end of World War II, the United States has been the central architect in creating and maintaining a global system of international law and human rights.** Generally, America has used this global system to protect its own interests, but **current U.S. policies concerning preemptive self-defense** and nuclear weapon use **are contrary to the international norms which the United States itself helped to establish**. These policies may have unintentionally encouraged nuclear proliferation and inspired North Korean Kim Jong-il to obtain nuclear weapons.

In the aftermath of 9/11, President Bush emphasized the threat of "rogue states" developing weapons of mass destruction (WMDs). n1 Iraq, Iran, and North Korea, formally called the Democratic People's Republic of Korea (DPRK), were singled out as members of the "axis of evil," n2 and the 2003 invasion of Iraq was premised on disarming Iraq of its WMDs. n3 In the face of U.S. rhetoric warning against the development of WMDs, Kim Jong-il continued his pursuit of nuclear weapons until he procured a tentative deal after six-party talks in February 2007 to receive thousands of tons of oil, humanitarian assistance, and the [\*2] unfreezing of North Korean bank accounts n4 in exchange for closing North Korea's nuclear facilities. n5 The status of North Korea's remaining nuclear arsenal, however, is far from certain. As a Kim Jong-il spokesperson declared in the months after this deal was brokered, "U.S. President George W. Bush [is] waving a white flag, offering to allow the DPRK to retain its nuclear arsenal as it is . . . . Kim Jong-il has built a nuclear-missile force capable of blazing the remotest target on the U.S. mainland." n6

North Korea has steadfastly pursued nuclear weapons under Kim Jong-il's leadership. The United States accuses North Korea of violating every nuclear treaty it has entered since 1992. n7 U.S. State Department spokesman Richard Boucher recently stated, "North Korea's secret nuclear weapons program is a serious violation of North Korea's commitments under the [1994] Agreed Framework as well as under the Nonproliferation Treaty (NPT), its International Atomic Energy Agency safeguards agreement, and the Joint North-South Declaration on the Denuclearization of the Korean Peninsula." n8

Within the past decade, the DPRK has threatened preemptive attack against the United States, n9 test-fired missiles towards Japan, n10 and tested a nuclear weapon in the face of international protest. n11 In 2003, after North Korea withdrew from the Nuclear Non-Proliferation Treaty (NPT), John Bolton, then Undersecretary of State for Arms Control and International Security, declared, "[it is] hard to see how we can have conversations with a government that has blatantly violated its [\*3] agreements." n12 Despite this history, the United States agreed to terms in the February 2007 agreement that were almost identical to the terms of the failed 1994 Agreed Framework. n13 North Korea later violated its February 2007 agreement with the United States by delaying the closure of its nuclear facility by two months. n14

The United States has taken the lead in imploring North Korea to relinquish its nuclear weapons program in compliance with its previous treaty obligations and international principles regarding nuclear non-proliferation. President Bush credits North Korea's nuclear posture with the DPRK's negative reputation among the international community, declaring that "[t]he North Korean regime will find respect in the world and revival for its people only when it turns away from its nuclear ambitions." n15

Nevertheless, ***U.S. actions in the international community may speak louder than its words***. While imploring North Korea to conform to established international norms, the United States has ignored these same norms in its own security policies. In 2002, President Bush withdrew from the Anti-Ballistic Missile Treaty n16 and now advocates for the creation of a missile defense system. n17 Furthermore, the United States steadfastly maintains that nuclear weapons may be employed during warfare, and it continues to modernize its nuclear arsenal while ignoring its commitment to disarm under the NPT. n18 **The Bush administration employed the doctrine of preemptive self-defense in the war against Iraq** without UN approval. n19 Yet, the United States has declined to recognize [\*4] any other country's right to preemptive attack. n20 Finally, the United States has adopted policies for treating detainees that violate the Third Geneva Convention. n21

U.S. disregard for international norms has not gone unnoticed in North Korea. In 2003, following President Bush's "axis of evil" comments, North Korea withdrew from the NPT, citing its right to launch a preemptive strike against the United States in self-defense. n22 North Korea has stated its belief that the only adequate deterrence against a U.S. attack is nuclear development. n23

This Article explores whether the current U.S. nuclear weapons posture and preemptive self-defense policy serve to legitimize Kim Jong-il's pursuit of nuclear weapons. U.S. national interests would be best served through nuclear and defense policies that conform to international principles and treaties. Part II examines the origins of the Bush administration's policy of preemptive self-defense and the unintended consequences of its application in Iraq. Part III considers self-defense in the context of international law and the UN's rejection of the doctrine of preemptive self-defense as a justification for war (the Bush Doctrine). Part IV analyzes the U.S. military's acknowledgement of international law regarding nuclear weapons and examines current U.S. policy legitimizing the use of nuclear weapons. Finally, Part V looks at North Korea's pursuit of nuclear weapons and its reaction to U.S. policies regarding preemptive self-defense and nuclear weapons.

II. THE BUSH DOCTRINE OF PREEMPTIVE SELF-DEFENSE

George W. **Bush was the first American president to fully and openly endorse the doctrine of preemptive self-defense as a justification for war**, the Bush Doctrine. n24 In the 2002 National Security Strategy of the United States, President Bush proclaimed:

[\*5] The greater the threat, the greater is the risk of inaction . . . the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively. n25

A. Preemptive Self-Defense

The Bush administration did not invent the doctrine of preemptive self-defense. In response to terrorism, previous administrations have expressed similar, but more limited, views on this doctrine. In 2000, the Clinton administration released A National Security Strategy for a Global Age, which stated, "[a]s long as terrorists continue to target American citizens, we reserve the right to act in self-defense by striking at their bases and those who sponsor, assist, or actively support them, as we have done over the years in different countries." n26 The Reagan administration also adopted a policy of preemption to address known terrorist activities. n27

While President Bush is not the first president to advocate a right of preemptive self-defense, the Bush Doctrine advocates the most expansive claim of this right. The Bush administration's interpretation of preemptive self-defense asserts the right to unilaterally, without international authorization, use military force to halt development of a threat. n28 Such a threat need not pose imminent danger, but action is nevertheless authorized if ignoring the threat could result in unacceptable dangers. n29 These non-imminent threats include nation-states, not simply individual terrorist groups. n30 Previously, the United States found the law of [\*6] force laid out in the UN Charter adequate to deal with threats to security. n31

Advocates of the Bush Doctrine contend that the international system cannot protect the world from the threat of rogue states such as North Korea obtaining and using nuclear weapons. n32 These advocates complain that under current international law, "we end up hobbling ourselves with legalistic restrictions against carrying the war . . . to those who intend to do us and our way of life severe harm, either now or in the not-[tool]-distant future." n33 A policy of preemptive attack claims to deter potential enemies from developing nuclear weapons and signals that the United States will not wait for an attack to employ its military might. n34 Accordingly, states which remain undeterred from acquiring nuclear weapons risk preemptive attack. n35

B. Unintended Consequences of the Bush Doctrine

Although the preemption doctrine seeks to improve U.S. security against enemies who are impervious to the traditional deterrent of mutual destruction, **a broad application of the preemptive self-defense policy actually serves to undermine international security**. n36 **Even such "hawkish" international realists such as Secretary of State Henry Kissinger have declared that a U.S. policy of preemptive self-defense could have negative security consequences**. n37 Following the release of the 2002 National Security Strategy, Kissinger stated:

**As the most powerful nation in the world, the United States has a special unilateral capacity to implement its convictions**. But it also has a special obligation to justify its actions by principles that transcend the assertions of preponderant power. **It cannot be in either the American national interest or the world's interest to develop principles that grant every nation an** [\*7] **unfettered right of preemption against its own definition of threats to its security.** n38

The principle of preemptive self-defense has never been expanded from the stringent requirement of a known imminent attack, as set forth in the Caroline decision, n39 perhaps because it is too difficult to delineate when military action would not be justified. **A policy based on predicting future attack without any evidentiary basis could produce distrust and anarchy in the international community**. n40

Before the invasion of Iraq, the Bush administration attempted to use preemption as a justification for military action. In 2002, then-National Security Advisor Condoleezza Rice tried to limit the preemptive doctrine when she stated, "[t]he number of cases in which [the preemptive doctrine] might be justified will always be small. It does not give a green light -- to the United States or any other nation -- to act first without exhausting other means, including diplomacy." n41 Despite this statement, **U.S. efforts at diplomacy before undertaking military action in Iraq left much of the international community suspicious**. n42

In 2003, the United States ended diplomatic efforts and employed its new, broader policy of preemptive self-defense against Saddam Hussein. President Bush declared that Saddam Hussein had refused to follow his UN non-proliferation obligations and that he possessed WMDs. n43 The Bush administration presented the UN Security Council with evidence of Hussein's alleged WMD aspirations, but the Council declined to authorize an invasion. n44 Following the U.S. invasion of Iraq, no [\*8] WMDs were ever found. Moreover, in 2004, the U.S. Report on the U.S. Intelligence Community's Prewar Intelligence Assessments on Iraq determined that much of the evidence justifying the war was either presumptuous or false. n45

Common sense dictates that an inappropriate application of preemptive self-defense would draw hostility and distrust from other nations. In fact, the flawed evidence presented by the United States illegitimatized the Iraq war in the eyes of the world. n46 Because **the doctrine of preemptive self-defense authorizes a state to act without the threat of imminent attack and before any actual warning of an attack**, evidence plays a crucial role in evaluating the existence of a serious threat. n47 In this case, the evidence proved faulty, contributing to the chaos and instability in Iraq. n48

**American credibility in the international community, an essential commodity for a world leader, has been severely damaged**. n49 Following the preemptive attack on Iraq, anti-American sentiment has risen. n50 **Perceived "American exceptionalism," the idea that the United States applies one set of rules to itself and another to the rest of the world, has created international animosity, particularly in the Muslim world**. n51 A panel chosen by the Bush administration reported that **"[h]ostility toward America has reached shocking levels" among Arabs and Muslims abroad**. n52

**The preemptive self-defense doctrine is now viewed by some around the world as nothing more than propaganda used to justify U.S. global military actions while the United States pursues its own political or economic interests**. n53 **This sort of international hostility is harmful to national security when combined with the threat of preemptive attack**. In the extreme, ***this environment could*** arguably ***lead to nuclear war.***

[\*9] III. INTERNATIONAL LAW GOVERNING SELF-DEFENSE

Treaties and customs are the central tenets of international law, n54 and, particularly, the law of war. This section will examine the origins of international law surrounding the doctrine of preemptive self-defense in the form of customary law and treaties.

Treaties specifically enunciate the rights and duties of signatory nations and provide a concrete point of analysis for international law. n55 Though treaties can illustrate international ideals, the extent to which signatory states view their obligations within a treaty as effective and binding often varies. n56 Treaties often lack strong international enforcement, and nations often interpret them expediently, as opposed to accurately. n57

Customary law provides a better indicator of a state's actual behavior and is considered by some experts to be the nucleus of international law. n58 **Customary law is derived from the consistent practice of states over time and a sense of legal obligation**. n59 **Modern scholars argue that the behavior of powerful states greatly influences the behavior of weaker states**. n60 ***A large amount of empirical data supports this contention***. n61

***Customary law is therefore highly influenced by the world's hegemonic power, the United States***. n62 Robert Keohane defines a "hegemon" as a state that is "powerful enough to maintain the essential rules governing interstate relations, and willing to do so." n63 **The hegemon uses its power to influence international institutions** and laws to parallel its own interests. n64 When a hegemon claims a new right or alters an existing right, it has a considerable, if not dispositive, effect on the international system and customary law. n65 Because the making of international law is [\*10] largely political, **the actions of the hegemonic power loom large in the eyes of the international community**. n66 Therefore, **actions of hegemons have significant worldwide ramifications**. n67

***It’s reverse causal—the plan’s key to separation of powers internationally***

**Martin ’11**, Craig Martin, Visiting Assistant Professor, University of Baltimore School of Law, Winter, 2011¶ Brooklyn Law Review¶ 76 Brooklyn L. Rev. 611, ARTICLE: Taking War Seriously: A Model for Constitutional Constraints on the Use of Force in Compliance with In-ternational Law, Lexis, jj

**The requirement to consider the legality of the proposed action under international law**, as mandated by the first element of the Model, **would of course inject precisely the kind of exogenous criteria and divergent perspectives that could operate to reduce the effects of the domestic causes of war**. And conversely, the requirement for legislative approval, bringing to bear the foregoing parliamentary functions on the considerations of legality, would vastly increase the traction of that aspect of the process. Evidence has recently emerged, for instance, on the extent to which disputes within the British cabinet over the legality of the contemplated invasion of Iraq [\*685] severely complicated the prime minister's decision making, even in the absence of any constitutional or statutory to consider such issues. Had there been such a legal obligation, and in addition a requirement to take the debate of that issue to parliament, it is quite conceivable that the decision would have gone the other way. n272¶ Finally, **the requirement to obtain legislative approval will also serve to *enhance international law objectives*** and engage the Image III causes of war. Thus far in our discussion of this element of the Model we have been looking pri-marily at the domestic perspective--the extent to which legislative involvement assists the state in avoiding the ruinous costs of military misadventure. But **Kant in particular contemplated the benefits that such a government structure would provide to the international system as a whole**. n273 **The spread of a constitutional system that included representative government and a separation of powers between the executive and the legislature would lead to an ever-widening circle of peace** among these like-minded states. It is ironic that he has been proved prescient, with the actual spread of constitutional democracy and the realization of the democratic peace, while at the same time the feature of **his model involving the separation of powers with respect to the decision to go war has been very imperfectly realized among the world's community of liberal democracies**. n274 It has been argued that this is changing, and indeed as already discussed, **there is some significant evidence that a trend is developing, with legislatures in many liberal democracies around the world increasingly addressing the** [\*686] **issue and mobilizing for change**. n275 ***The proposed Model merely builds on the theory and seeks to encourage this actual trend.***

***Specifically, reinvigoration of international declarations of war solves the Israeli-Hamas conflict***

Kwartin, **Ilana**; Michael, Kobi, Department of political science, Ariel University, Ariel, Israel, and Law School, Sapir Academic College, Sderot, Israel, “Declaration of War - Between a Ceremony and a Strategy: The Case of Israel and Hamas in the Gaza Strip”, Journal of Politics and Law6.3 (Sep 2013): 198-208., Sept 20**13**,

3. Declaration of War In the past, **a declaration of war was considered an act of law** that was a prerequisite to starting a war. The significance of the declaration was the abolition and end of any diplomatic and commercial relations between the two countries in question, and the annulment of any treaties between them. In today's world, the implications of a declaration of war (should it be issued) are less dramatic. In effect, since World War II formal declarations of war have become extremely rare (Elsea & Grimmett, 2007). **There are widespread, acknowledged and established war laws within normative frameworks, which are widely recognized at both legal and practical levels by most countries of the world** (Biton, 2006-2007). Such laws were formulated to arrange the obligations, rights, and privileges of parties to armed conflicts and apply both to the parties to the conflict and to relations between those parties and neutral parties. As such, the laws apply to both state and non-state organizations and are also binding on states and organizations that are not signatories to them. As a general mle, **international law imposes restrictions on the rights of nations to employ military force in their relations with other nations**. Chapter I, Article 2(4), the Charter of the United Nations (1945) prohibits the use of force. It says members "shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations" (Seibel, 2003). The prohibition against the use of force as a rule of conduct is also binding on non-UN member nations. The only two exceptions to the prohibition on the use of force are a Security Council resolution permitting the use of force or warfare for individual or collective self-defense. ***A belief prevails*** among researchers and jurists today ***that nations have waived their right to resolve conflicts by means of a declaration of war* because of treaties to which they are party**. (Note 3) Whether the entry into the arena of terror organizations and other non-state actors overturns that waiver and reinstates the right of nations to make formal declarations of war, as in the past, has yet to be addressed (Elsea & Grimmett, 2007: 28). It is our belief that a declaration of war is also a ceremony, which as such has the innate and significant power to influence every group of people, whether defined as nation, organization, non-state entity, population or any other body. (Note 4) 4. Declaration of War as a Ceremony - an Anthropological View When speaking of a declaration of war, Austin (1963, 2006) explains it as a "speech act", a declaratory performative sentence. Kenny (2010) argues that a declaration is a political act performed in public "as part of the regulation of power relations" (Kenny, 2010: 29). The very fact of **making a declaration creates a new scenario even before any specific action occurs**; thus the actual moment of declaration constitutes both a beginning and an end simultaneously, and has the power to bring about a transformation in the existing status. Austin (1963) suggests acknowledging the power of words by paying special attention to the language and relevant contexts in which the words are spoken. For our purposes, Kenny (2010) explains that it is political activity, such as a declaration of war that shapes the legal dialogue addressing it, and not the other way around. Hence, even if a declaration of war is an anachronism and perhaps even unacceptable in strictly legal terms today, that does not detract from its optional impact at the political and transformative level. Since a formal declaration of war is determined in law and is deeply embedded in the world's tradition, it is perceived as a cross cultural act and applicable to different forms of government. As such it has retained its original ritual format. The ceremony of declaring war is recognized as representing a clear-cut division between two statuses - peace and war. Thus a ceremony is a social phenomenon with symbolic meaning performed according to ritual mies which are clear, known, rigid, strict and common to all human society. It bears an important new message of change of status (Van Gennep, in: Turner, 2004: 87) and is in fact a rite of passage "accompanying any change of a collective nature from one state to another" (Turner, 2004: 147). It also emphasizes the lasting impact of the ceremony as a political tool for change or substitution (Ibid: 152). Handelman (1990) underlines the importance of ceremonies as significant phenomena accompanied by symbols that are relevant to a particular group of people, whose performance may result in a major or minor transformation: "The result of ritual action is ... the small- or large-scale transformation of both the actor and the audience" (Trexler, in: Handelman, 1990: 11). Handelman, more than others, stresses ritual as a tool with the ability to produce change on a cosmological level, to generate a transformation in the world, in addition to change in the actors themselves. He explains that the format of the ceremony shapes the ritual experience and creates the meaning bestowed on it. Ceremonies have their own fixed order and predetermined accompanying documents. Their intention is to create a certain conscious and emotional situation, a social obligation and legitimization of the action and thus are undertaken in public, so as to broadcast the message and its meaning to the public and the world at large (Handelman, 1990). 5. Conflict Resolution, Protracted Conflicts and Conflict Transformation The period after the end of World War II saw the dawning of the field of Conflict Resolution (CR), with 1957 marking its formal establishment. Conflict Resolution views conflicts as an inherent phenomenon to the human experience. Recognized theories in the field seek to discover the generic organizing principles of conflicts. (Note 5) 5.1 The Conflict Transformation Approach Beyond the principal tenets of CR, a new approach, Conflict Transformation (CT), has arisen more recently. CT maintains that in cases of protracted and intractable conflicts, the objective should be to create a transformation of those conflicts (Botes, 2003). The theory of Conflict Transformation (Lederach, 2003) is perceived as an alternative to the traditional paradigms of Conflict Resolution, (Note 6) and for many researchers it represents a new development in the field (Ramsbotham, Woodhouse & Miall, 2005(3), 22) and more comprehensive than other approaches (Botes, 2003). According to the theory of Conflict Transformation, in any given situation, psychological and other blocks prevent the resolution of a conflict. Hence it must be converted into a different kind of conflict, involving a transformation both of the conflict itself and of the socio-political system within which it exists (Botes, 2003). Since interpersonal relationships are at the heart of conflicts, intensifying them can actually result in their resolution via a change in some essential structure (Lederach, 2003). As we discuss in further sections of this article, declaration of war is a tool used to intensify the level of violence, creating structural transformation. According to this approach, the desired transformation is one that creates "a turnaround in the dynamics of conflicting interactions" (Kriesberg, 2008: 407). The model of the approach is a spiral shape expressing circularity together with linearity, thus effectively emphasizing the complexity of the conflict process, whose progress is not exclusively linear. This approach aspires to help not only in the resolution or management of conflicts, but also by offering "[T]he ability to transform the dynamics of the conflict and the relationship between the parties - indeed to transform the very creators of the conflict" (Botes, 2003). As we later elaborate in this article, declaration of war changes the dynamics of the conflict and the relationships between the parties. It Shifts the mies of the game - from a sporadic front everywhere a population exists, to an organized and defined battle field. Väyrynen identifies a series of transformations that are vital components of conflicts, in the absence of which the conflict may be diverted towards protracted violence and war (Väyrynen, in: Botes, 2003; Väyrynen, in: Ramsbotham, Woodhouse & Miall, 2005(3), 205). Among the transformations he proposes are: Context Transformation: Since conflicts are rooted in social, regional and international contexts that contribute to their persistence, a change is first needed in the context itself before any change is possible in the relationships between the parties. Structural Transformation: The structure of conflicts consists of the actors, the contradictory objectives of the parties and the relationships between the latter. If the conflict is based on the structure of the relationships between the parties, then a structural transformation (in the socio-political sense, as well as the structure and strength of the parties involved) will contribute to resolving the conflict. In asymmetrical conflicts, for instance, a structural transformation means bringing about a change in the relations between the state and the non-state actors. 5.2 Protracted Conflict Azar (1985) points out that present-day conflicts are essentially generated by social causes and are characterized by extensive violence and open hostility. He coined the term "Protracted Social Conflict" (PSC) in reference to the Israeli-Arab conflict in the Middle East. He describes protracted conflicts as comprising a mixture of ethnic and inter-State elements and "hostile interactions which extend over long periods of time with sporadic outbreaks of open warfare fluctuating in frequency and intensity". The entire society is involved in a protracted conflict, creating a national identity and solidarity. Despite periods of peace, no clear end to the conflict can be pinpointed, and a process leading to a conclusion can only be seen retrospectively (Azar, 1978). Further, Rouhana and Bar-Tal (1998) denoted the term coined by Connor (1994): "Ethno-National Conflict", and defined the predominant characteristics of protracted intractable conflicts, i.e. continuous, total, central, violent and irresolvable. The weight and force of such characteristics varies from one conflict to another, but all of these qualities must exist in order to meet this definition. (Note 7) 5.3 The Local Conflict as Protracted Conflict The local conflict is considered a protracted conflict since it fulfills all the above-mentioned features, including the presence of a psychological infrastructure. From a regional analysis (Levy, 2001), the conflict between the parties can be defined as an interlocking conflict (Kriesberg, 1980), inasmuch as it is interlocked with other conflicts and influenced by the reinstatement of the concept of a "nation state." This makes and will continue to make it more difficult to settle and resolve the conflict, and ensures that it will be even more protracted and intractable. An Asymmetrical Conflict, usually occurring between state entities and organized armies on the one side, and on the other non-state actors, in the guise of terror and guerilla organizations (Michael, 2009), falls by definition into the category of such protracted conflicts and is their ultimate manifestation. Today more and more conflicts erupt between minority groups and hegemonies, between states and quasi-state entities or between states and terror organizations (various kinds of protracted wars) (Shai, 2006), with asymmetry as a prominent feature. For the most part it is the "weak" party which initiates the conflict, and in some cases employs a strategy of attrition, (Note 8) via terrorist and guerilla means, aimed at reaching a conscious resolution for the "strong" (state) party, with the understanding that a physical resolution is unattainable (Shay, 2006). These organizations rely on the population for support and legitimization, as well as cover. "Low intensity conflict" is a military phenomenon referring to hostilities between a state entity and non-state. It is typified by "erosion" (Note 9) and a lack of resolution, and because it continues over the long term it wears the parties down socially and economically. Another term used in military jargon to describe "low intensity conflict" is "limited conflict." (Note 10) The primary characteristics of low intensity conflict are: zero-sum game; typically asymmetrical; protracted, long-term conflict with no chance of decisive military resolution; collective punishment by the state entity; blurring the distinction between the military front and the home front; cynical use by the weaker party of psychological warfare and the media; and the absence of a clear time for the conclusion and resolution of the conflict. (Note 11) 6. The Conflict between Israel and Hamas in Gaza Hamas (an acronym for Harakat al-Muqäwamah al-'Islamiyyah or Islamic Resistance Movement) was founded in 1987 as a socio-religious-political and military movement of fundamentalist Sunni Palestinians. Its activities are almost entirely concentrated in the Gaza Strip (Schiff and Yaari, 1990). The movement's members oppose the existence of the State of Israel, believe that all territory under Israeli sovereignty belongs to the Muslim Waqf, and believe it is the duty of every Muslim to restore it to the Palestinians. The movement's objective is the establishment of a formal Palestinian state where the State of Israel currently stands. **The relationship between Israel and Hamas has been through many crises**. (Note 12) Their relationship corresponds to the characteristics of conflicts described above: it is protracted and intractable; it overlaps and interlocks with other conflicts; and it exists simultaneously on a number of levels. Furthermore, the conflict between the two parties exists within the Normal Relations Range (NRR) coined by Edward Azar; Any deviation towards escalation - in our case, a declaration of war - could result in region-wide danger, affect the interests of actors in the international arena (Egypt and Turkey directly, Iran indirectly), and hence give rise to international intervention in such a way as to suppress or reduce the level of violence and cause it to return to the "normal" range. At the same time, a trend towards increasing appeasement, extending beyond the lower threshold of the NRR towards cooperation, would create domestic pressure to renew and escalate violence and revert to the "normal" relations range. Over time **there has been a sharp rise in the level and extent of violence in the conflict**, which reinforces the military standing of Hamas but brings the conflict no closer to resolution. We believe that **transforming the conflict by means of the ceremony of** ***a declaration of war***, **has the power to change the existing structure of power thereby creating the necessary conditions for resolving the conflict.** 7. Discussion: The Contribution of a Declaration of War to the Transformation of the Conflict This section examines the effect of a declaration of war on the conflict between Israel and Hamas in Gaza. The first part discusses the advantages and disadvantages of a declaration of war (7.1 and 7.2); the second describes the types of transformation to which a declaration of war can cause (8); the third presents fomenters and mollifiers of a declaration of war (9). This will allow for a more balanced examination of the strategic considerations facing Israel in the difficult political and strategic decision-making process vis-à-vis the conflict with Hamas. 7.1 The Advantages of a Declaration of War **A formal declaration of war unambiguously assigns responsibility to the authorities concerned**. It also serves to inform the entire nation that civilian life is about to change and that the population will have to make many sacrifices. Another important advantage is that **such declaration grants the authorities political and moral legitimization to initiate a war on behalf of the nation and to direct military forces as it deems fit**. Finally, the declaration through a public binding legal procedure might even prevent the advent of other unnecessary wars (Sidak, 1991), as was hoped by the creators of the declaration of war in the last century. Furthermore, **the declaration of war communicates a very real threat, both for the opposing party and for the declaring nation itself, that the nation is ready and willing to use all its power, allocate all necessary resources to the war effort, and adjust its priorities accordingly** (Sidak, 1191: 41). **Thus, it represents a shift in position and beliefs and is the direct result of a learning process** (LeVine) **as well as an expression of the "ripeness"** (Zartman, 1985) **of the leadership**. One example is President Bush's declaration of war on terror in 2001, which delineated the interests of the United States and specified the measures that would be undertaken to defend them. Beyond authenticity, a declaration of war announces that this is not the private action of any single individual or marginal group, but one backed by the entire nation, united in its support and authorizing its representatives to declare war. Hence a declaration of war is a "collective act", a fact conveying power and advantage. A declaration of war can, of course, result in actual warfare. Among the advantages of this possibility are: 7.1.1 The Arena Is Moved From the Heart of the Population to a Defined Front **Currently the greatest challenge facing the IDF,** different from other Western armies, **is that the war is conducted against an enemy that deliberately sacrifices its own people** and tries to lure Israel into killing innocent civilians (Kemp, 2009). **By its very definition**, ***a declaration of war*** **can help transfer that arena to its natural location,** viz. **the battlefield**, or can create such an arena. 7.1.2 Cessation of the Conflict's Protracted Nature and Erosion **Endless conflict and long-term exhaustion exposes Israel's relative disadvantage vis-à-vis the enemy**, which is a terror organization. **In order for Israel to maximize its advantages, it must create a situation where warfare is concentrated on a single defined front,** achieve decisive and conclusive military resolution on that front, and only then move on to the next one. Any other situation will dilute Israel's forces and result in civilian and political erosion and eventually failure. Moreover, **Israel is unable to withstand a war of attrition precisely because it is a democracy**. The population's trust in the State to provide all its needs in terms of resources and welfare ("trust and coherency in the government-army-civilian triangle" (Tira, 2008: 68)), will be to its detriment in the event that the low intensity conflict lasts long enough to damage the Israeli economy and civilian morale. ***A declaration of war will help break the paradox of asymmetry to Israel's benefit***. It is well known that most IDF units were designed for high intensity warfare and trained accordingly even though since 1982 they have actually been more engaged in a war on terror and guerilla warfare (Zalmanovitch, 2006). Therefore, ***paradoxically, a switch to high intensity warfare following a declaration of war would transform the asymmetry in Israel's favor*** (Weiner, 2006). 7.1.3 Legitimization for a War on Terror, and in Particular the Use of Military Force The prohibitions on the use of force or limitations on proportionality laid down in international law apply for the most part to situations that are defined as conflicts, rather than to war. Subject to such limitations, a nation that finds itself at war may do anything in its power to defend itself. The realm for military action and possibilities for maneuvers increase, since Israel would be in a situation where the use of force is expected, permitted, and necessary. If the enemy is unable to win a war, but for many years has engaged in a low intensity conflict, a declaration of war will transform disadvantage to advantage: Armed opposition groups are not able to win a direct confrontation with regular armed forces because they lack firepower, but they can win small local engagements, keep large numbers of regular forces tied up and, perhaps, prevent control by the armed forces of the whole territory (Rogers, 2004). 7.1.4 A Superior Collaboration between the Political and Military Echelons and Creation of a Dialogue between the Two **A declaration of war will force the political echelon to clarify its political directive and encourage dialogue regarding the nature of the war to be conducted, the type of resolution desired, the political objective from which the military operation is derived, and ways to achieve that objective, i.e. "the relationship between Ends and Means" (JOE, 2010). A declaration of war forces dialogue and coordination (by virtue of the law), not required in a targeted response or sporadic operations.** 7.1.5 Determining the Rules of the Game War, by nature, is a scenario in which each party defines its objectives differently and views the ultimate outcome differently. If Hamas has thus far laid down the rules, a declaration of war would enable Israel to regain control and have the upper hand by means of advantageous characteristics (superior military capability). "A party that enforces the nature of the war it is suited for, can act effectively to implement its goals, whereas the other party will be less relevant from the outset" (Tira, 2008: 68). 7.1.6 Subordinating the Struggle between the Parties to War Laws Hamas is aware that Israel and other Western armies operate according to international law. Accordingly, Hamas, which does not adhere to the international mies of war, does everything it can to exploit the limitations which its enemy imposes on itself. It works on the basic assumption that Western armies will act largely according to the laws of war and for this reason adopts an intentional policy of acting outside of those laws. In fact this forms the basis of its operational doctrine (Kemp, 2009). 7.2 The Disadvantages of a Declaration of War (1) Apart from the irrelevance of a declaration of war in the present era, there is no overall agreement about the desirability of using it today or at all. Moreover, a declaration of war could lead to an internal rift or to widespread panic, and not necessarily to a closing of ranks or an outburst of patriotism among the Israeli public. (2) A declaration of war could be construed as tantamount to granting legitimization to a movement which is defined and known as a terror organization. (3) ft can even be argued that an act which is not used, and was abandoned during the century in which it was created and legislated, becomes as irrelevant on the political front as on the legal front. Furthermore, at least for the global community, a major disadvantage of a declaration of war is that it opens up a front that could lead to Israel's de-legitimization and hurt the country's interests with Egypt, Iran and the USA. (4) Since war is designed to serve policy and complement diplomacy, there should first be an examination of whether any coherent policy is in place regarding the Gaza Strip. Such an examination shows that Israel has not yet resolved its basic dilemma about Gaza. On the one hand Israel needs to assure military control in the territories bordering Israel to prevent high-trajectory missiles from being fired into Israel. On the other hand continued control perpetuates accusations from the opposing side, including Hamas, that Israel is an occupying and oppressive power. In that case, occupation of the territories where the firing originates could play into the hands of the enemy (Shay, 2010). Under the circumstances it is in Israel's interest to have a Hamas government which is effective and responsible towards the Palestinian population in Gaza, but militarily weakened and deterred with regard to Israel. (5) Although one of the main contributions of a declaration of war is to express the determination and decisiveness of the political ranks, in a place with no history of declarations of war, determination or persistence, or coherent policy on the part of political ranks, a declaration of war could actually deliver a message of lack of reliability, and be more damaging than beneficial to Israel. 8. The Transformations Created by a Ceremony of Declaration of War in the Conflict between Israel and Hamas in Gaza **Declaration of war** as we propose to understand it in this article **is used for neutralizing the violent dimension of the conflict which via its constant and persistent presence overshadows the ability to cope with all other aspects of the conflict, therefore leaving no room for using the diplomatic channels for settling the conflict**. As described above, **declaration of war is a speech act and therefore has a transformative potential to generate a new status between the parties**. Hence, our primary claim in this article is that ***declaration of war has the power to create a substantial transformation in the conflict between Israel and Hamas*** (Botes, 2003; Kriesberg, 2008) so long as it is reconstructed in its new anthropological meaning. As mentioned above, Väyrynen (Väyrynen, in: Botes, 2003; Väyrynen, in: Romsbotham, Woodhouse & Miall, 2005(3), 205) denoted several types of possible transformations. We propose to examine them in the context of the conflict with Hamas as follows: 8.1 Structural Transformation The transformation accurse in the relationships between the parties. The conflict between Israel and Hamas cam demonstrate three ways of such transformation: 8.1.1 Declaration of War as Recognition of Hamas as a State In this case, **when Israel performs a declaration of war**, ***it transforms the relations between the parties from state/non-state relations to state/state relations***. **As a result, Hamas may have to submit to war laws or other international norms**. Although it may seem contradictory to one's initial intuition, we maintain that "upgrading" the enemy's status, will break the asymmetrical dimension of the conflict while paradoxically allowing Israel to express its military advantage to resolve the conflict. Although it is unclear whether it can be done legally, at least in the perceptional sense, ***it is possible to "declare" Hamas as a state through declaration of war.*** In other words, a pro-active strategy (declaration of war) will create a change within Hamas, forcing change in the attitude and behavior of Hamas and allowing for management of the conflict. This way, declaration of war is a "generator" for learning processes and ripeness (Zartman, 1985) of the leadership of Hamas and an important part on the lead towards resolution. 8.1.2 Declaration of War as Recognition of Hamas as a Belligerent **Declaration of war serves here as recognition of the legitimacy of Hamas by marking them as equal belligerent in this conflict, since one declares war on an entity that is equal to it.** Being that declaration of war is a complex phenomena, such transformation can be viewed as both an advantage and disadvantage for Israel's strategic interests: alongside the advantage of breaking the asymmetry, it also gives legitimacy to the other party by labeling its military arm as a proper state army in a conflictual situation. This demonstrates the dialectical aspect of declaration of war. 8.1.3 Structural Transformation through a Change in Israel's Policy towards Hamas Through complex learning (Levy, 1994) the leadership will change its foreign policy. A declaration of war will clarify how the leadership sees the conflict - are they fighting criminals or soldiers? Declaration of war will label the conflict as "military" with no room for ambiguity. 8.2 Actor Transformation The Israeli leadership adopts new goals and objectives since a declaration of war forces them to define clear and decisive policy to support the need for warfare. Although a declaration of war was neglected as a formal step prior to opening hostilities, the need to define clear objectives still exists. In this sense, it is not the declaration itself that transforms the conflict towards resolution, but the fact that the political echelon is forced to define objectives for policy making as well as for military action. We maintain that this transformation will also shift the conflict from low intensity to high intensity - war. The need for Israeli leadership to develop objectives may help creating a strategy towards defeating Hamas. 8.3 Declaration of War Serves as a Message of Credibility and Decisiveness In other words, a declaration of war is a clear declaration of intentions. Since we view a declaration as a ceremony, it accompanies a collective undergoing a major change (Temer, 2004). This aspect is not drawn directly from the Conflict Transformation approach but in our view is defined as crucial for creating a combination between a cognitive process (learning) and a behavioral one (ripeness) when the Israeli leadership undergoes a learning process that leads to a change in its attitude, policy and strategy. Harkabi suggests that "the shift towards war is an event, an actual action and not only a behavior, and such action depends on one decisive decision" (Harkabi, 1990, 318). Such an "event" is the ceremony of declaration of war which leads to a Structural Transformation (Väyrynen, in: Botes, 2003; Väyrynen, in: Romsbotham, Woodhouse & Miall, 2005(3), 205). Analysis of those types of transformations challenges the traditional conception of a dichotomy between diplomacy and war, where declaration of war was firmly a strategic move and not a diplomatic one. Through our new conceptualization, we place a declaration of war as a tool for policy, which marks declaration of war as diplomatic in nature having the potential to contribute greatly to the settlement of the conflict with Hamas with no actual warfare included. This approach is exemplified in the transformation of the conflict from state/non-state to state/state relations, and in the transformation of Hamas to an equal belligerent. In this sense, a declaration of war can be viewed as an extension of the diplomacy, with "strategy" only beginning when (and if) warfare commences. Placing a declaration of war in this new framework - policy making - gives it a new interpretation and allows for understanding its proper contribution to conflict resolution. 9. Fomenters and Mollifiers of a Declaration of War While a declaration of war could bring about a transformation that might contribute to the chances of a resolution; the same transformation could also work against Israel's strategic interests. Therefore it is important to conceptualize the factors having the power to foment and to mollify a declaration of war. It should be noted that the same factor might appear to simultaneously foment and mollify, as might be expected of something as complex and dichotomous as a declaration of war. 9.1 Mollifiers Acclimatization of the Israeli public. Alongside a sharp increase in the level and extent of violence, the Israeli public becomes accustomed to a constant state of emergency, anxiety and threat. As the intensity of the conflict rises on the NRR axis, adjustment to it reaches proportionately new and surprising levels. Throughout the peaks we observe the population's resilience as it adapts to this changing and escalating reality. Therefore we view such acclimatization as a mollifier to declaring war. National resilience. National resilience is defined as the level of preparedness of a nation's home front to cope with crises, in relation to various threatening scenarios, with the involvement of all bodies comprising emergency deployment, such as health and education systems, home front security, including defense measures, and more (Elran, 2010). Most prominent of them all is "social resilience," which translates into civilian readiness to cope with the harsh consequences of a military conflict, and a subsequent rapid recovery and return to routine functioning in an effort to avoid the public becoming overwhelmed and fragmented. Quick acclimatization of the nation gives rise to the emergence of national resilience, which mollifies the motivation of political echelons to declare war. Time and international legitimization. Time works against Israel. The longer the duration of bouts of violence, the greater the international pressure and the more the country's resources dwindle. The act of declaring war turns the dialogue on human rights into a strategic and political one, with the result that Israel is ultimately unable to convert its clear military advantage into a decisive resolution. This is what happened, for instance, in the last operation (Pillar of Defense) that Israel conducted in Gaza in November 2012, which was seen by many as a "rerun" of Operation Cast Lead, with no resolution forced on Hamas. Hence, the longer the conflict continues, the less likely a declaration of war will be issued. 9.2 Fomenters Level and extent of violence. Over the many years of the present conflict Hamas has markedly escalated and increased the militancy of its measures against Israel and its civilian population. While building up its military and technological capability, Hamas does not consider itself subject to the laws of war. As a result, the organization increases the impact of its success by committing terror attacks ever closer to the center of Israel. Operation Pillar of Defense in November 2012 provides a clear example. Overall, since Hamas took power, the number of terror attacks originating from Gaza has grown: from 2,137 in the year when Hamas came to power (as compared to 1,831 during the previous year) to 3,023 in 2008, prior to the start of Operation Cast Lead (www.shabak.gov.il). Such a sharp increase indicates an ongoing rise in the intensity of the conflict; hence the pressing need to bring it to an end. The rising level of violence then can be viewed as a fomenter to declaring war. Establishment of a state governed by Hamas. As Hamas progresses further towards establishing itself as a state, it becomes more vulnerable to threats by Israel. Cost-benefit considerations change as responsibility to its civilian population increases and Israel's superior military capability has a greater influence in those calculations. (Note 13) Hence, the more established Hamas becomes, the easier it will be for Israel to threaten it by declaring war. 9.3 Factors that Foment and Mollify Simultaneously International legitimization of the use of force. Israel suffers from a fundamental international de-legitimization of its actions, especially in relation to the use of force against a civilian population. Following Operation Cast Lead (2008-2009), and notwithstanding IDF's efforts to avoid collateral injury to civilians, the Goldstone Report was severely critical of Israel's use of force in the Gaza Strip. (Note 14) In May 2010, a Turkish flotilla (the MV Mavi Marmara) arrived off Gaza, further undermining Israel and its legitimization. Israel's inherent need to legitimize its actions in the broader international community could be construed as both a modifier and a fomenter. On the one hand the country's need for legitimization could lead to a declaration of war under international law. On the other hand, Israel's fear of being perceived as hostile by the world in general and its need for external legitimization act as modifiers. Internal legitimization of the use of force. The democratic system dictates the need to obtain domestic legitimization for the political regime, but "the complexity of strategic thought and the paradoxical principles on which it is based make it a difficult matter to market and explain [...] to the Israeli public [...]. Such paradoxical inconsistencies, the synergies of opposites and contradictions, are almost impossible for the general public to grasp" (Michael, 2009). Therefore, the need for legitimization from the Israeli public if seen as a unifying act promising a widespread shift in consciousness could prove a fomenter. On the other hand, it could turn out to be a mollifier in a situation where society is divided, or if the political echelons anticipate that the public will not support a declaration of war and will be unwilling to join the ranks of the struggle. "Legalization" in political and military echelons: There is a significant difference between the way the ceremony of declaration of war is perceived in the eyes of the law and the way it is viewed from a strategic and anthropological point of view. The more the dialogue veers towards the legal, the more will it mollify a possibility to declare war. The more strategic and anthropological the focus of the dialogue, the more it is based on a broad interdisciplinary view, the more likely it is to foment the issuance of declaration of war. 10. Summary This article presents a variety of paradigms to examine and take a fresh look at the phenomenon of a declaration of war on the assumption that a declaration can make a significant contribution to settling protracted conflicts characterized by extreme violence. Instead of looking at a declaration of war from a one-dimensional, strictly legal angle, it can instead be seen as a ceremony and a means for transformation. The connection and overlap between various contrasting disciplines is actually helpful in redefining the phenomenon and highlighting the contribution it can make, a contribution which for many decades was ignored and overlooked by decision makers. Despite the clear disadvantages of declaring war, **a declaration has the ability to alter the asymmetrical dimension of the conflict and promote more balanced relations between enemies**. Among other things, **this means legitimizing the struggle of the other party, i.e. Hamas, to the conflict. Although that statement might sound contradictory to the political rationale that has hitherto shaped political activity and policy towards Hamas, it may be in line with another kind of strategic rationale,** ***whereby a transformation in the very structure of the conflict, affected by altering the balance of power and asymmetry between the parties, can result in resolution of the conflict.***

***This draws in the entire region and goes nuclear --- it bypasses their generic Middle East defense***

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**It begins with a single Qassam rocket, one of the thousands of homemade projectiles fired in recent years by** the Islamic radicals of **Hamas** from the Gaza Strip into southern Israel. The rockets have made life nightmarish for many Israelis but have largely missed their targets. But this one gets "lucky": **It smashes into an elementary school**, wounding 40 children and killing 15. **The Israeli government**, which had heretofore responded to the Qassams with airstrikes and small ground raids, **cannot resist the nationwide demand for action**. Within hours, **tens of thousands of Israeli troops and hundreds of tanks are rushing into Gaza**, battling house-to-house in teeming refugee camps. Just as swiftly, Palestinian officials accuse Israel of perpetrating a massacre and invite the foreign press to photograph the corpse-strewn rubble. **The images flash around the Middle East on al-Jazeera** TV and **trigger violent demonstrations** in Arab capitals. **Hezbollah**, the radical Lebanese Shiite militia, then **gets into the act**, raining Katyusha rockets on northern Israel. But **when Israeli warplanes bomb the Katyusha batteries, Syria leaps in**, sending its commandos to retaliate by capturing key Israeli bunkers atop the Israeli-occupied Golan Heights. **Israel's counterattack succeeds only in precipitating a hailstorm of Syrian Scud-D missiles, some armed with chemical warheads, into Israeli cities**. Then, just as Israeli planes are incinerating the main electrical plant in Damascus, the first of **hundreds of** Shehab-3 **rockets, pre-targeted at Tel Aviv, lift off from Tehran.** Sound fantastical or too horrific to ponder? Not to Israeli intelligence analysts it doesn't. **The Israeli military recently conducted a round of large-scale war games based precisely on this scenario.** In some rounds, Israel managed to humble Hamas and Hezbollah while shooting down most of the Iranian and Syrian rockets with its own Arrow and Patriot antimissile systems. But other forecasts went far less well: **Israel survives but barely, with its cities devastated and countless civilians killed**. This is the mess that will soon land in the lap of President Clinton, President Obama or President McCain. Despite the shadows of 9/11 and Iraq, the U.S. primary season thus far has been dominated by the economy. But it's a mistake to assume that the next presidency will be. Instead of a honeymoon**, the** new **president could inherit a brush fire raging out of control in a volatile region where U.S. involvement has never been deeper.** Would he or she merely convene the U.N. Security Council, or rush to Israel's defense? And how, in the event of a general Middle East war, would the president safeguard the woefully exposed U.S. forces in Iraq? **The Middle East will continue to be the source of the gravest threats to U.S. security, whether in the long-term form of a nuclear-armed Iran or the short-term one of an unforeseen multistate war**. So the candidates must be pressed about how they would handle a chain reaction in which events in Gaza suddenly engulf the entire region. To borrow an old slogan: It's the Middle East, stupid. **The possibility that a border scrap between Israelis and Palestinians could ignite a regional conflagration should not be too surprising.** A very similar concatenation of events led to the most volcanic eruption in the region's modern history, irreparably convulsing the Middle East and carving many of the furrows that still destabilize it. That conflict, too, began with Palestinian attacks into Israel, a series of Israeli reprisals and a mass clamoring for revenge. The countdown began just over 43 years ago, on New Year's Eve, 1964, when Palestinian guerrillas belonging to the Fatah faction crossed the Lebanese border to attack Israel. Though the infiltrators were intercepted, Fatah's leader, Yasser Arafat, declared the raid a heroic victory and dared Arab rulers to match his audacity. Few could. The Arab world at the time was split between two warring camps: the socialist, pro-Soviet dictators in Egypt, Syria and Iraq and the conservative, pro-Western monarchs in Saudi Arabia, Jordan and elsewhere. Egypt's fiery leader, Gamal Abdul Nasser, gleefully branded King Hussein of Jordan a Zionist "whore," ratcheting up the tension by hinting that the kings were American lackeys. Despite the rhetoric, Arab rulers did not really want war with Israel. But Arafat's challenge left them little choice. Nasser responded by ordering the Palestine Liberation Organization, originally established as an Egyptian propaganda tool, to launch its own cross-border attacks. The Israelis lashed back, blowing up Fatah's West Bank headquarters. Jordan accused Nasser of "hiding behind the skirts" of the U.N. peacekeepers deployed in the Sinai to separate Egypt and Israel. Mortified, Nasser ousted the U.N. forces on May 15, 1967, and closed a strategic Red Sea shipping route to Israeli vessels. Suddenly, Nasser was the champion of the Arab "street," hailed by huge demonstrations that demanded Israel's destruction. The Arab world closed ranks behind him. Shorn of international allies, Israelis were convinced that they faced annihilation. But then Israel struck first. On the morning of June 5, Israeli warplanes obliterated almost the entire Egyptian air force, and Israeli tanks rumbled through Gaza and Sinai. At the end of six days of fighting, Israel had nearly quadrupled the territories under its control, among them the West Bank, the Golan Heights and Gaza. A new era -- and new sources of Middle East bloodshed -- had emerged. Much has since changed in the Middle East. The Cold War is largely forgotten, as is the 1960s enmity among most Arab regimes. Israel remains a powerhouse, with more high-tech companies than Western Europe, an ironclad alliance with the United States and (it's widely assumed) a nuclear arsenal. Arafat's successor, Mahmoud Abbas, now rules the West Bank as the head of a Palestinian Authority publicly committed to coexistence with the Jewish state. But for all these transformations, **the Middle East remains the same explosive context of conflict it was in the 1960s. The region is still bitterly divided** -- not between Arab nationalism and conservatism but between religious moderation and the surge of Islamist extremism spurred, in part, by the Six-Day War. **Backed by Syria and Iran, a phalanx of terrorist groups threatens Israeli and Arab societies alike. Israel** has peace treaties with Egypt and Jordan and is engaged again in peace talks with the Palestinians, but it **is still an object of abomination for the overwhelming majority of Middle Easterners.** And violence in Gaza -- now run by a democratically elected Hamas government -- can still spark turbulent demonstrations throughout the region's streets. If anything, **the Middle East is even more flammable today than in the 1960s because of the countless thousands of short- and long-range missiles in its armies' arsenals. These weapons vastly amplify the potential destruction of any military** **confrontation while slashing the amount of decision-making time that might be needed to avert all-out war**. And **modern weapons, including unconventional ones, make everything scarier.** **A conflict between Israel and Iran might not last six days but six hours, unleashing shock waves even more seismic than those of 1967.** Contemporary Middle Eastern leaders cannot afford to ignore these lessons. Neither can decision-makers -- and would-be ones -- in the United States. Though **the** waning Bush **administration** is focused on trying to reach an Israeli-Palestinian peace treaty, shore up Iraq and flex its muscles at Iran, it **should not downplay the danger that a seemingly limited border skirmish could rapidly** **escalate into a regional catastrophe**. Nor should Bush's heir. **The** next **commander in chief may have to proceed directly from the inauguration to the Situation Room to try to defuse a Middle Eastern crisis of monumental dimensions. That moment could be a single Qassam away.**

***That causes extinction --- most likely and fastest impact***

**Russell, ‘09** [James, senior lecturer in the Department of National Security Affairs at the Nava Postgraduate School, Strategic Stability Reconsidered: Prosepects for Nuclear War and Escalation in the Middle East, in collaboration with the Atomic Energy Commission, <http://www.nps.edu/academics/sigs/ccc/people/biolinks/russell/PP26_Russell_2009.pdf>]

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

***Only formal, structural checks restrain preemption --- perception of binding law is key***

**Damrosch 97** – Lori Fisler Damrosch, Professor of Law at the Columbia University School of Law, "Use of Force and Constitutionalism", Columbia Journal of Transnational Law, 36 Colum. J. Transnat’l L. 449, Lexis

**Structural-institutional explanations**, on the other hand, **point to features of liberal-democratic systems that could act as brakes on conflict-initiation**, as the American framers and Kant in Perpetual Peace had long ago suggested. n27 **To the extent that executive military powers are subject to checks and balances**--for example, **by accountability to the legislature--war** (or at least war-initiation) **ought to become less likely under the structural-institutional view**. Latter-day exponents of [\*457] the Kantian claim have thus hypothesized that **structural constraints on executive military powers belong among the factors that may well explain** (or help explain) **the peace among democracies**. n28 For this reason, democracy-and-peace research has pointed to the extent of constraints on the chief executive as one of the components of democracy which ought to be measured and studied in relation to the war-involvement of democratic regimes; n29 but the role of such constraints in keeping democratic polities from becoming involved in wars (or certain wars) is still only imperfectly understood. n30 ***The perception that one's adversary is (or is not) constrained may be just as important as actual constraints: "the presence of democratic institutions provides a visible and generally correct signal of "practical dovishness'--restraints on war in the form of institutional constraint if not of inherent disposition***." n31

***Skips to footnote 31…***

n31. Russett, supra note 23, at 39 (citing War and Reason, supra note 23, at 157-58) (the "presence of democratic institutions provides a basis for rivals to have an above-average prior belief that the potential foe is restrained from using force too readily. When this restraint exists for both sides, amicable settlements of disputes are more likely." ). See also War and Reason, supra note 23, at 272 ("**When both sides are democracies, each actor is likely to be dovish, to see the other as dovish, and to be encouraged to pursue negotiated solutions to differences**."); Russett, supra note 23, at 141 n.17 (tracing precursors of "the insight that forms of government signal a state's likely international behavior"). **Conversely, where one or both sides do not perceive the other as possessing democratic institutions (e.g., U.S. perception of Spain in 1898), the restraint may fail to take effect.**

**plan**

***The United States Congress should require a declaration of war for any decision to use or deploy armed forces in circumstances likely to lead to an armed attack.***

***Congress should define “armed attack” as: The use of force of a magnitude that is likely to produce serious consequences, epitomized by territorial intrusions, human casualties, or considerable destruction of property.***

***Congress should allow an exception in the event of an armed attack against the United States requiring the urgent use of armed forces making prior approval from the legislature impractical. Congress should require immediate notice of such a determination, and shall require a declaration of war within 14 days or the executive shall cease such use of armed force.***

**Solvency**

***Redefining hostilities in the WPR boosts congressional involvement, checks intervention, and stops circumvention***

**Farley ’12**, Benjamin R. Farley, J.D. with honors, Emory University School of Law, 2011. Editor-in-Chief, Emory International Law Review, 2010-2011. M.A., The George Washington University Elliott School of International Affairs, 2007, Winter, 2012¶ South Texas Law Review¶ 54 S. Tex. L. Rev. 385, ARTICLE: Drones and Democracy: Missing Out on Accountability?, Lexis, jj

**Congress should strengthen the WPR regime by defining hostilities in a manner that links hostilities to the scope and intensity of a use of force, irrespective of the attendant threat of U.S. casualties**. **Without defining hostilities, Con-gress has ceded to the President the ability to evade the trigger and the limits of the WPR**. **The President's adoption of a definition of hostilities that is tied to the threat of U.S. casualties or the presence of U.S. ground troops opens the door to long-lasting and potentially intensive operations that rely on drones** - at least beyond the sixty-day window - **that escape the WPR by virtue of drones being pilotless** (which is to say, by virtue of drones being drones). **Tying hostilities to the intensity and scope of the use of force will limit the President's ability to evade Congressional regulation of war**. **It will curtail future instances of the United States being in an armed conflict for purposes of international law but not for purposes of domestic law, as was the case in Libya**. Finally, ***a statutory definition of hostilities will provide the judiciary with a meaningful standard for determining presidential compliance with the WPR*** - assuming the future existence of a plaintiff able to surmount the various prudential doctrines that have counseled against entertaining WPR cases thus far.

***\*\*\*The plan rectifies all the contributing factors to war***

The president can’t go crazy getting dec’s of war --- the pltl costs would be huge

**Martin ’11**, Craig Martin, Visiting Assistant Professor, University of Baltimore School of Law, Winter, 2011¶ Brooklyn Law Review¶ 76 Brooklyn L. Rev. 611, ARTICLE: Taking War Seriously: A Model for Constitutional Constraints on the Use of Force in Compliance with In-ternational Law, Lexis, jj

Turning to the second element of the Model--the provision that would require legislative approval of decisions to use force--there is of course considerable theoretical support for such a constitutional structure. As we have already discussed, the concept dates back at least to the development of the American Articles of Confederation, and the war powers provisions of the U.S. Constitution continues to be a model of the principle. It is also one of the central issues in the war powers debate that has been raging in the United States for over a hundred years. But much of the modern debate in the United States is over the precise meaning and exact scope of the war powers provisions of the U.S. Constitution, and the particulars of many of those arguments need not concern us [\*680] here. n257 As we have already reviewed, however, **the primary motive of many of the drafters of the U.S. Constitution, as expressed most clearly by Madison, was to reduce the likelihood of war**. n258 **And the theoretical arguments of Madison, Kant, and others in support of such a separation of powers related to both the domestic objectives of the state: putting an important check on the state's rush to war and increasing the democratic accountability of the process of deciding on war; and the broader goals of reducing the incidence of war generally in the international system**. In this sense, the arguments in support of this element of the Model again relate to the causes of war at both the domestic level and the international level.

The starting point is the insight that **requiring legislative approval of executive decision making on the use of force will likely reduce the risk of rash decisions to go to war for the wrong reasons**. This argument was initially advanced by Madison and Kant, among others, and indeed can be traced all the way back to Thucydides. n259 Madison and John Jay both argued **that the executive is more likely to be motivated by parochial self-interest and narrow perspectives, and thus more likely to enter into armed conflict than the legislature**. n260 Madison further argued that there ought to be a separation between those who are charged with the conduct of war, as the President is as the Commander in Chief, and those who have the authority to decide on the commencement of war. n261 But **the argument becomes more compelling when unpacked and explained in a little more detail, with the support of more modern theory. We need to explore the question of how exactly the legislative involvement improves decision making or** [\*681] **engages the causes of war in a manner that would reduce the incidence of war.**

It is helpful to begin by recalling the functions of legislatures. n262 In addition to passing legislation, **the legislature in virtually all liberal democracies**, whether parliamentary or presidential in structure, **performs the core functions of representation, oversight, and control over government expenditure.** n263 **Representation and oversight in particular are important to the argued benefit of legislative involvement in the decision to use force**. **Both functions are tied to the core notions of democratic accountability and to deliberative democracy, which overlap in important ways**. **Democratic accountability is understood to include the idea that the people who are likely to be impacted by decisions ought to be able to participate in the decision making. Participation in this sense means not only having some expectation that the collective will of constituents will be taken into consideration in the decision-making process, but that the public debate and deliberation that is part of the parliamentary process of decision making will also serve the vital function of informing constituents and affording them some sense of access to the decision-making process**. n264

**Obviously, this process of debate and information exchange is also at the heart of ideas of deliberative democracy**. The perspective here, though, is not so much on the importance of making the process accountable to and representative of the people, but on the extent to which the **very process of deliberation among the representatives of disparate stake-holders and interests will result in the generation of sounder judgments**. **The argument is that the process results in better decisions due to the attenuation of extreme positions, the canvassing of a wider range of perspectives and sources of information, and the vigorous public interrogation of reasons** [\*682] **and motives underlying proposals**. n265 More specifically, theories of deliberative democracy hold that **the deliberative process**, of which the parliamentary debate and decision-making process is a key feature, **actually involves the transformation of preferences through the consideration of the justifications offered by various perspectives, rather than merely serving as a means by which society can aggregate preferences**. n266

**The oversight function of legislatures also feeds into both these aspects of democracy, in that the employment of specialized committees to engage in public inquiries into policy choices or proposed courses of action, provides a deeper level of deliberation that ensures a more thorough interrogation of policy justifications and the underlying information upon which policy proposals are based**. **Senate committee hearings during the Vietnam War illustrate how such oversight can reveal important information underlying policy debates, which in turn can influence public opinion and better inform the policy preferences of the representatives of the people**. In 1967, the Senate Armed Services Committee held hearings on the escalation of the strategic bombing of North Vietnam. After the representatives of the Joint Chiefs, and in particular the Chief of the Air Force, had testified before the committee on the necessity of the continued strategic bombing, Secretary of Defense Robert S. McNamara stunned the committee, the government, and the public by testifying that the bombing was entirely ineffective. n267

**The performance of these functions of the legislature, to the extent that they are permitted or required to operate in the decision-making process on the use of force, engage the domestic causes of war in important ways**. The fuller realization of the representative and oversight functions--serving as they do to both incorporate the will of the broader population and to arguably contribute to the arrival at sounder judgments through **the deliberative process**--**would result in those structural aspects of democratic states that comprise the Image II factors most related to the causes of the "democratic [\*683] peace," being brought to bear more directly on the decision-making process**. **In other words, the structure would thus more perfectly reflect the theoretical ideal that is part of the structural explanations of the democratic peace. n268**

**The institutional structure of the decision-making process created by the Model's separation of powers element would also affect the political costs of going to war** in a manner that would further engage the Image II causes of war. **Absent an overwhelming or obvious threat, the procedural requirements to obtain the support of the majority of the legislature would impose significant political costs upon the executive**. n269 The structure would effectively create a sliding scale, in the sense that **the greater the threat or the more obvious the case for war--such as the use of force in self-defense against an ongoing armed attack--the lower the costs would be in obtaining legislative approval**. Converse-ly, **the more tenuous the case for engaging in armed conflict, the more** [\*684] **politically costly it would be to win over the majority of the legislature for support.** **This is precisely the kind of structural characteristic that reduces the Image II causes of war.**

**The second element of the Model would also engage the** Image I **causes of war, which include particular psycho-logical traits that are common in many executive officers, systemic problems of misperception among decision makers, and the irrational behavior of small-group decision making reflected in "groupthink" and the "bureaucratic politics model" of decision making**. n270 **The risks that such tendencies could lead to irrational or suboptimal decisions to use armed force would be reduced, in the case of each of these particular phenomenon, by spreading the decision-making process more widely through the inclusion of the legislative body**. **The requirement to obtain legislative approval, bringing to bear the core functions of deliberative democracy on the decision-making process, such that a wider set of perspectives and criteria are brought to the process, as well as a more public interrogation of reasons and rationales, would significantly reduce the potential for these potential features of government decision making to manifest themselves in the form of unsound or dangerous decisions regarding the use of force.** n271

***Redefining “hostilities” as “armed attack” solves***

**Martin ’11**, Craig Martin, Visiting Assistant Professor, University of Baltimore School of Law, Winter, 2011¶ Brooklyn Law Review¶ 76 Brooklyn L. Rev. 611, ARTICLE: Taking War Seriously: A Model for Constitutional Constraints on the Use of Force in Compliance with In-ternational Law, Lexis, jj

A. A Process-Based Constitutional Incorporation of Jus ad Bellum The article begins with the incorporation of the principles of jus ad bellum. The first section provides: (1) **Any decision to use armed force, or to deploy armed forces in circumstances likely to lead to the use of armed force, of a level in scale, duration, and intensity equal to that constituting an armed attack in international law, shall be made only after sufficient and demonstrable consideration of whether the proposed action is consistent with the applicable principles of international law relating to the use of armed force, as found in the United Nations Charter, other relevant treaties to which the State is a party, and the related principles of customary international law. The key elements of this section**, which require some further discussion and explanation, **are that**: (i) it incorpo-rates both conventional international law (that is, treaty law) and customary international law; (ii) it specifies the regime of law from which the principles are drawn, with reference by name to the most important governing convention (the U.N. Charter); (iii) it incorporates the relevant principles of international law by reference only, rather than explicitly stipulating the substance of those principles; (iv) it is process based rather than substantive, in the sense that it does not purport to incorporate and impose the actual prohibitions from international law, but rather it only creates an obligation for decision makers to sufficiently consider compliance with those prohibitions (and the exceptions thereto); and finally, (v) **it provides a threshold level of force that would trigger the operation of the provision, with some criteria for defining that trigger**. Beginning with the first element, there are a number of reasons underlying the decision to incorporate both treaty and customary international law. There is a wide range of approaches among constitutional democracies regarding the manner in which international law is treated within their domestic legal systems, and great variation in the extent to which there is already some constitutional provision for such treatment. This not only relates to the classic theoretical division between monist and dualist perspectives, but also relates, in practical terms, to the significant differences among [\*706] states regarding how the different forms of international law are received and the status each is af-forded within the domestic legal system. n330 The mechanisms and processes by which states incorporate (or transform, as the case may be) customary international law are typically different than those used for the incorporation of conventional international law, and many states also afford one a higher status within the domestic legal system than the other. Moreover, these differences themselves vary considerably across states, even among liberal democracies, with some such as the Netherlands placing a primacy on treaty law, n331 while others such as Germany, Austria, and Italy giving customary international law higher status. n332 States vary as well on how each of these is to be received by the domestic legal systems. n333 All of this suggests a couple of inferences. First, there are clear examples of constitutional democracies incorpo-rating within their constitutions both conventional international law and customary international law, and indeed examples of each being afforded a higher status than domestic statutes and even a national constitution. Second, given the very uneven treatment among democracies for the purposes of developing a universal model of incorporation, and given that there are principles from both a treaty and custom that are thought to be [\*707] important, the incorporation mechanism should explicitly incorporate the principles of both systems as part of the Model. That way, regardless of the more general approach within the particular constitutional system, the provision would make quite clear that the principles of both systems are being incorporated directly into the constitution for the purposes of this constraint on the use of armed force. This of course raises the question of whether there are significant differences between the principles of jus ad bel-lum to be found in conventional international law and custom. There is in fact very little difference, as the International Court of Justice went to some pains to establish in Nicaragua v. United States (Merits). n334 And the most fundamental principles of the jus ad bellum regime, the incorporation of which is central to the Model, are essentially found in Article 2(4) and Chapter VII (which includes Article 51) of the U.N. Charter. Nonetheless, it will be recalled that one of the theoretical arguments in support of adopting the Model to begin with is that the jus ad bellum regime is coming under pressure to change, leading to the possible development of new principles and new legal tests to determine their application. The extent to which there is indeed some change to the jus ad bellum regime in the near to mid-term, it is unlikely to come in the form of amendments to the U.N. Charter or the adoption of any new treaty. It is much more likely to come in the form of changes to customary international law. In such circumstances, it will be important that the Model will have been structured so as to incorporate the relevant principles of customary international law, and to require that the decision making on the use of armed force be informed by the most current developments in the law. The second element of this subsection of the provision is the manner in which it refers specifically to the principles of the jus ad bellum regime, and refers even more explicitly to a particular treaty regime, namely the U.N. Charter. This is in contrast to the option of a much broader incorporation of international law as a whole, as many national con-stitutions already have. Some of the reasons for a more narrow and specific incorporation will be obvious and were discussed earlier. n335 In addition, given fairly widespread concerns about [\*708] the legitimacy in permitting interna-tional law to trump domestic law--concerns grounded in arguments about the democratic deficiency of the international law-making process, the erosion of national sovereignty, and the negating of the democratic will of the state's citizenry--it may be considerably easier in practical terms to mobilize support for a carefully tailored provision than a blanket incorporation of international law along the lines of the Netherlands. In addition to this, however, the incorporation of specific principles or regimes of international law provides a much more fertile basis for the internal interpretation and internalization of the associated norms, which as was dis-cussed earlier is an important aspect of the process of enhancing compliance with international law according to trans-national legal process theory. Moreover, by identifying particular regimes and specifying the precise treaty from which principles are drawn, examples from a number of countries suggest that the constitutional provision will thereby create the legitimate basis for courts and other domestic institutions to consider how those principles have been interpreted by international tribunals and organizations. This can be an important factor in insuring that the principles that are incor-porated remain organically connected to the international law sources from which they were drawn. One of the best examples of this approach is the constitutional incorporation of human rights principles by a number of countries over the last few decades. For instance, Article 10(2) of the Spanish Constitution of 1978 provides that "the norms relative to basic human rights and liberties which are recognized by the constitution, shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements on those matters ratified by Spain." n336 This has been interpreted to mean that such human rights conventions as the European Convention on Human Rights and the International Convention on Civil and Political Rights n337 have constitutional status within the Spanish legal system; or, to put it another way, the relevant provisions of those conventions have effectively been incorporated by reference into the [\*709] Constitution. n338 What is more, this incorporation by explicit reference to the conventions themselves has provided a basis for the Spanish courts to not only interpret the constitutional provisions in light of the principles in the conventions, but also to draw upon the interpretation of the relevant provisions of the conventions by international courts and other interpretative bodies. n339 The third element of this subsection of the Model relates to the manner in which the provision incorporates the principles of jus ad bellum by reference only, rather than specifying the content of those principles as part of the consti-tutional text. In other words, **the provision requires decision makers to consider the applicable principles relating to the use of force, as found in the U.N. Charter and other sources,** but it does not provide an explicit list of what those princi-ples are. An alternative approach would have been to provide a set of subsections detailing the content of each principle and rule taken from international law that decision makers had to consider before taking action. Aside from the sheer awkwardness of trying to stipulate all the relevant rules and principles, the reasons for employing the "by reference" mechanism are similar to those discussed above in relation to the importance of including general references to customary international law and treaty sources. That is, **incorporation by reference preserves the flexibility of the Model, such that the provision can essentially evolve as the underlying international law principles change over time, and it retains the organic link to those principles for purposes of interpretation**. As already discussed, that has its own inherent risks, but given the likelihood that the jus ad bellum regime will develop over the next few decades, coupled with the difficulty associated with any constitutional amendment, building in that kind of flexibility is important. An example of this approach, albeit in a regular statute rather than a constitutional context, can be found in the Alien Tort Statute in the United States, the key clause of which states that "the district courts shall have original juris-diction of any civil action by an alien for a tort only, committed in violation of [\*710] the law of nations or a treaty of the United States." n340 This does not incorporate international law norms per se, but as the Supreme Court held in Sosa v. Alvarez-Machain, the statute confers subject matter jurisdiction and creates a cause of action for the violation of the "laws of nations," which is a reference to customary international law. n341 Two advantages of the incorporation by reference are well illustrated by this example. The first is the flexibility of the legislative provision, as its content can essentially evolve over time without requiring any change to statutory lan-guage. Thus, in Sosa it was recognized that the content of the "narrow set of violations of the law of nations" today is certainly not the same as the narrow set of violations that were contemplated back in 1789 when the statute was enacted. Rather, the range of what types of violations within the law of nations was defined, but the content of those violations was not specified, and is left to be ascertained according to the current principles of customary international law. n342 Second, but very much related, is the advantage of maintaining an organic connection to the international law principles, which thus continue to be the living source of the rules. The employment of the term "in violation of the laws of nations" constituted an intermediary within the statute, or a trigger, for the application of the primary norms that are promulgated in detail somewhere else--in this instance in the sources of the laws of nations. In the sense of Hart's pri-mary and secondary rules, therefore, the reference in the statute is merely a secondary norm, and leaves the primary norm as the source of the content. n343 [\*711] As explained earlier, this retention of an organic connection with the underlying international law principles also ensures that there will be full access to the associated interpretations and understanding of those principles, including the decisions of international tribunals and organizations, as they have developed over time. This relationship tends to be lost when the contemporary understanding of customary international law rules is taken or the language of a rule is lifted from some treaty and then dropped into the text of a constitution (often in some slightly revised form). Moreover, the juxtaposition of the revised language with other provisions, severed as it is from its conceptual source, can lead to significant unintended consequences. n344 The fourth element of the subsection is that it is process-based rather than substantive in nature. In other words, the provision does not incorporate the prohibitions (and corresponding exceptions) of the jus ad bellum regime as sub-stantive clauses in the Constitution. Rather, it merely requires that the decision makers contemplating the use of force sufficiently and demonstrably consider whether the proposed action is consistent with the international law principles that have been incorporated. There are several reasons for choosing to develop the mechanism in this fashion, but they largely relate to the practical issues of implementation. It can be anticipated that there would be significant political objection in many jurisdictions to any contemplated adoption of this Model. The foundation of many of these objections, principled and otherwise, would be a resistance to the idea of incorporating international law principles to bind the hands of government on issues of national security--issues relating to self-preservation and defending "vital interests." As has already been suggested above, the arguments behind many of these objections are misplaced. But the fact remains that if the Model proposed the incorporation of the principles as binding constitutional prohibitions, which would also entail conferring upon the judiciary the power to decide whether a proposed use of force did or did not comply with the exceptions to the prohibition as a matter of both constitutional and international [\*712] law, then the volume of these objections would likely be overwhelming. Such implementation of binding prohibitions may be possible and desirable in the future, but for now a process-based model may serve as an initial and more viable step along the road to that objective. And for the reasons already discussed in the previous Part, a process-based provision will still have a significant effect. **The final element in the subsection is the initial gate-keeping mechanism, which limits the application of the pro-vision to only those decisions regarding the use of armed force that could constitute an "armed attack," as that term is understood in international law**. **This is to ensure that there is a de minimis level below which the government would not be bound by the provision.** Moreover, as will be discussed in the next section, the same trigger would apply to the other elements of the Model, thus ensuring that the various elements of the Model operate in harmony, and the domestic elements are triggered by criteria that are consistent with valid concepts in international law. **The parameters of this threshold test are not novel**. As explained briefly in the discussion of the modern system of jus ad bellum, **the occurrence of an armed attack is a condition precedent to the exercise of the right of self-defense (or, for the exercise of anticipatory or preemptive self-defense, that an armed attack is imminent, in the sense that it is irrevocably in motion**). n345 Similarly, **the current understanding in international law is that the use of force against a state must reach a certain level--or be of "sufficient gravity**," **to use the language of the U.N. Resolution on the Definition of Aggression--before it can be considered an act of aggression**. n346 **The I**nternational **C**ourt of **J**ustice **has adopted this language in holding that the use of armed force must rise to a certain level before it constitutes an "armed attack" justifying the exercise of the right of self-defense, and it is clearly well above the mere use of force that would violate the prohibition in Article 2(4) of the U.N. Charter**. n347 **Where that line is actually drawn, or what criteria are to be used to determine exactly where to draw the line, has not yet been clearly established in international law, but the principle itself has been. It is no** [\*713] **more uncertain or incapable of determination than any number of other constitutional principles**. **Dinstein suggests that an armed attack requires that the use of force must be of a magnitude that is likely to "produce serious consequences, epitomized by territorial intrusions, human casualties, or considerable destruction of property**." n348 **The trigger mechanisms in current constitutions, in legislation such as the War Powers Act, and proposed legisla-tion such as that in the War Powers Commission Report, are not any clearer, and what is more, they often employ terms that are not related to known and valid concepts in international law**. We have already seen that the constitutions of many countries, including that of the United States, require legislative approval of any "declaration of war." While declarations of war continue to be theoretically part of the international law on the use of force, they are no longer reflected in state practice, and are certainly no longer considered necessary to trigger the operation of the laws of war or bring into existence the legal state of war. n349 To the extent the term is interpreted to mean anything other than a formal declaration that triggers a technical state of war, it becomes highly ambiguous, as the war powers debate in the United States illustrates. **The War Powers Act lowered the threshold significantly, using as the trigger "any case in which United States Armed Forces are introduced: . . . into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances**." n350 **There is no definition of "hostilities," and so there is no indication of what scale, intensity, or duration of armed conflict that would be required to constitute "hostilities" for the purpose of the provision**. **It could arguably encompass peace-keeping operations, or the lowest-level border skirmishes, yet could potentially be interpreted to exclude such uses of force as cruise missile strikes on foreign targets.** The proposed legislation of the War Powers Commission Report, in contrast, tries to raise the threshold by requir-ing a "significant armed conflict" as a condition precedent, which is defined as being "any combat operation by U.S. armed forces [\*714] lasting more than a week or expected by the president to last more than a week." It explicitly excludes a number of activities, such as "limited acts of reprisal against terrorists or states that sponsor terrorism," "covert operations," and "missions to protect or rescue American citizens or military or diplomatic personnel abroad." n351 Again, "combat operation" remains undefined, creating uncertainty as to what precisely is contemplated. More sig-nificantly, not only does this formulation similarly employ concepts for the trigger that do not equate with the principles of jus ad bellum, but the provision also explicitly endorses unilateral executive action for purposes that could very well violate the prohibition on the use of force in international law. Reprisals, as the term is understood in international law, are illegal. n352 Covert ops and missions to protect nationals abroad would easily encompass the support provided to the Contras in Nicaragua, and the invasions of Grenada and Panama, all actions that are widely seen as having been unlawful. n353 Moreover, aside from the explicit exceptions, the threshold would not be crossed by such uses of force as extensive missile or air strikes, including strikes with nuclear weapons, so long as they would not be expected to lead to "combat" lasting more than one week. There is little apparent relationship between the requirements of international law and that which the War Powers Commission Report considered important enough to require Congressional involvement. **The trigger that is contemplated in the Model**, while it admittedly contains some uncertainty as to its precise scope, **is a concept understood in international law.** **By employing it in the Model, we ensure that the same criterion is used for both requiring consideration of international legality and for obligating the government to obtain legislative approval, and that the criterion itself is comprised of concepts taken from international law**. **It is the kind of principle that courts are in any event well accustomed to working with, and it is necessary to have some threshold to ensure that the government is able to act more freely in circumstances that would not implicate the jus ad bellum regime in interna-tional law. It is only the use** [\*715] **of force constituting an armed attack, whether legally justified or not, which is likely to escalate into an armed conflict. Armed attack, therefore, is arguably the appropriate level of force to trigger the requirement to involve the other branches of government and focus consideration on the questions of whether that use of force will comply with international law**. n354 **A final word should be said about whether the trigger makes any distinction between the use of force for individu-al self-defense and that used for other purposes, be it collective self-defense or collective security operations**. **Constitu-tional controls of some countries do make such a distinction**, as discussed in Part III. The Constitution of Denmark, for instance, provides that "except for purposes of defence against an armed attack upon the Realm or Danish forces the King shall not use military force against any foreign state without the consent of the Parliament." n355 This clearly limits the exception to the exercise of individual self-defense. **The trigger as it is employed in both this element of the Model** and in the separation of powers element to be dis-cussed next, **makes no such distinction**. **In this element, the whole point is to force the decision makers to consider whether the proposed action complies with the principles of jus ad bellum--that is, to determine whether it falls within the scope of either self-defense, individual or collective, or collective security operations authorized by the U.N. Security Council** (to state the current exceptions on the prohibition on the use of force). **It would simply beg the question to suggest that they could avoid such a requirement in the event that the contemplated use of force was to be an exercise of self-defense. Whether it is legally a case justifying self-defense is the very thing to be determined by considering compliance with international law principles. In the context of the next element of the Model, the requirement to obtain approval of the legislature, the trigger would serve the same function. Permitting the government to avoid obtaining legislative approval in the event the force is to be used for self-defense would simply create further incentives** [\*716] **for the government to manipulate the record to provide support for a claim that the action is in fact an exercise of self-defense. It would thereby defeat the very objective of having such assertions subjected to inquiry and debate in the legislature. If the case is obvious and pressing, the analysis will be easy and the approval from the legislature quickly forthcoming; if it is not easy, than there is all the more reason for having the legislature involved in the deliberations, with all the advantages that such delibera-tion brings to the exercise. In the event of an invasion or the like, there is an emergency exception**, as will be discussed in the next section. B. Separation of Powers: Legislative Approval and Judicial Review **The second element of the Model would require legislative approval of any decision to use force**, while the third element would explicitly confer jurisdiction and establish standing for judicial review of the decision-making process. Together they form the "separation of powers" component of the Model, and as such they will be considered together here. The two provisions would read as follows, allowing, of course, for the necessary changes to conform to the cir-cumstances of each jurisdiction: 2. (i) **Any decision to use armed force, or to deploy armed forces in circumstances likely to lead to the use of armed force, of a level in scale, duration, and intensity equal to that constituting an armed attack in international law, shall be approved by both houses of the legislature by a simple majority of votes cast.** (ii) **In the event of an armed attack against the territory or armed forces of the state, or other such national security emergency requiring the urgent use of armed force, making prior approval from the legislature impractical, the government may use armed force without prior approval, but shall immediately provide notice of such determination to the legislature, and it shall obtain approval from each house of the legislature in accordance with the terms of subsection (i) above within 14 days of providing such notice, failing which the executive shall cease any such use of armed force.** (iii) **The approval of any use of force by the legislature in accordance with subsections (i) and (ii) above shall also constitute a decision to use force, subject to the requirements of Section 1 above.** 3. (i) Any person may apply to a court of competent jurisdiction to obtain a declaration, injunctive relief, or dam-ages, or any other remedy that the Court may consider just and appropriate in the circumstances, for any violation of this Article. [\*717] (ii) Any person who has made application under subsection 3(i) above shall have standing so long as the issue raised is a serious issue to be tried, the person has a genuine interest in the issue, even if only as a representative of the general public, and there would be no other reasonable or effective means for the issue to be brought before the Court. Again, a number of the elements of these two sections require further explanation, namely, (i) the terms of the re-quirement for legislative approval of the use of armed force; (ii) the trigger for the provision, being the same de minimis level that was provided for in the first section of the Model; (iii) the emergency exception and ex post approval re-quirement; (iv) the fact that the approval of the legislature is a "decision to use force," thus triggering the application of the requirements of Section 1 of the same Article; (v) the provision of specific jurisdiction for judicial review, and the remedies provided for; and (vi) the creation of broad standing for applications for judicial review. The first element, legislative approval for the use of armed force, is obviously an explicit move away from a "dec-laration of war," and it does not even require that the approval be in the form of a law. But it does require "approval," expressed through a formal vote. This is in contrast to the "consultation" that is contemplated by the draft legislation proposed in the War Powers Commission Report. n356 **As discussed earlier, legislatures may have natural tendencies to avoid making difficult decisions in these kinds of situations, but that is precisely why the Model should require the ex-ecutive to work to obtain the legislature's approval**. At the same time, while in some jurisdictions such approval requires supermajorities of some form, a simple majority of votes cast should be sufficient for the purposes of a general model, albeit in both houses if the system consists of a bicameral [\*718] legislature. n357 **The requirement to obtain a majority vote in each house should be sufficient to engage the deliberative and representational features of the parliamentary process in a manner that will have an impact on the operation of the domestic causes of war**. The second element is the employment of the same trigger or threshold level of force as was used in the first sec-tion of the Article. The reasons for employing this particular concept as the threshold has already been discussed at some length in the explanation of Section 1 so will not be repeated here. **It is perhaps helpful to emphasize yet again, however, how important it is to use a concept that has real meaning in international law for the purposes of triggering the involvement of the legislature in the decision to use armed force**. n358 **Even if a provision providing for the separation of powers with respect to the use of force does not have as one of its objectives an increased compliance with international law, the principles of jus ad bellum would naturally serve as a good proxy for the kinds of armed force that are likely to both escalate conflict and attract international censure. The trigger employed in this Model is taken directly from international law, based on precisely the kind of action that is most likely to lead to wider armed conflict, which are exactly the types of action that should be subject to legislative deliberation and oversight. Moreover, it still provides the executive with significant scope for limited use of force that falls below that threshold. The third element is the emergency carve out**. As mentioned earlier, **this too is not a novel concept, and various forms of such an emergency exception with ex post approval requirements can be found in a number of constitutions, though more frequently with respect to the power to declare emergencies and thus trigger emergency powers domesti-cally**. An early example of such a mechanism can be seen in the [\*719] Constitution of France of 1791. n359 **A varia-tion on this form of emergency carve-out is also the cause of much of the controversy regarding the structure and operation of the U.S. War Powers Act of 1973. Upon closer inspection, however, the War Powers Act provisions in question are not so much an emergency carve out as the grant of a carte blanche for up to ninety days, followed by an effective legislative veto of further action if Congress does not move to approve the operation. n360 That is very different from what is contemplated by the Model.** Many of the criticisms of the War Powers Act may be quite valid, but they ought not to be extended to constitu-tional provisions that require the executive to obtain legislative approval, and which include an automatic termination mechanism in the event that approval is not obtained within a specified period following an emergency use of force. Precisely because the provision is constitutional rather than statutory, the legislature would be less able to shirk its obli-gations to take up the issue when approval is sought by the executive. And requiring the executive to overcome the difficulty of mobilizing support within the legislature is a key element of the Model. That it is difficult and costly is not a basis for criticism, but one of the virtues of the structure. If the executive cannot galvanize the legislature to approve the use of force by a simple majority, particularly where the use of force has already been undertaken in what are al-leged to be urgent circumstances, then that by itself ought to raise significant questions about both the necessity and legitimacy of the use of force in question. The fourth element of this subsection of the article specifies that any approval to use force enacted by the legisla-ture constitutes a "decision to use force" as contemplated by the provisions of section 1 of the article, thus being subject to the requirements of that section. This means that **the legislature** too, in **deliberating on the question of whether or not to approve the use of force, must sufficiently and demonstrably consider whether the use of force in question is in com-pliance with the relevant prevailing principles of international law**. This is key to the combined operation of the distinct elements of the Model, as **it is the mechanism through which the Model effectively causes the deliberative functions of** [\*720] the **legislature to engage the issues of international law compliance, and which causes the criteria of legitimacy under international law to be integrated into the deliberative process of the legislature**. **It is only by requiring both branches of government to grapple with the question of compliance with international law that the Model can ensure that this perspective will be brought to bear in a meaningful and serious fashion in the decision-making process, and that over time the international law norms will be internalized and subsequently exercise influence, in the manner contemplated by transnational process theory and the ideational strand of the liberal theories of international law compliance.**

***We don’t have to stop intervention in every instance --- just when vital national interests aren’t at stake***

**Martin ’11**, Craig Martin, Visiting Assistant Professor, University of Baltimore School of Law, Winter, 2011¶ Brooklyn Law Review¶ 76 Brooklyn L. Rev. 611, ARTICLE: Taking War Seriously: A Model for Constitutional Constraints on the Use of Force in Compliance with In-ternational Law, Lexis, jj

**The most fundamental objection**, grounded in the theories of Carl Schmitt, **is that it is simply not possible to de-velop effective constitutional constraints on the use of armed force, for in moments of crisis such constitutional provi-sions will be simply ignored**. n276 **This form of argument comes in a number of variations. It is reflected in the U.S. war powers debate, in which it is frequently argued that requiring Congressional approval of the use of armed force would not really provide for a sober second look, and thereby reduce the incidence of imprudent wars, because Congress would either be just as prone as the executive to patriotic fervor or other inflamed emotions in the midst of a severe crisis**. n277 An analogous form of argument, much more explicitly grounded in or responsive to the theories of Schmitt, is to be found in much of the post 9/11 theoretical literature regarding the impact of national security imperatives on the normative power of constitutional protections, and the role of the judiciary in times of national crisis or emergen-cy--what Schmitt called the moment of "exception." n278 [\*687]

David **Dyzenhaus and others have marshaled several persuasive arguments to refute the Schmittian attack on the idea, central to liberal legal theory, that the law, and more importantly the rule of law, can operate effectively in periods of emergency**. n279 Dyzenhaus draws upon the theories of Dicey to argue that **the continued operation of a thick substantive notion of the rule of law during the period of emergency is not only possible, but that cooperation among the executive, legislature, and judiciary to ensure that legal responses to the emergency comply with the rule of law is crucial to the liberal democratic idea of the state being constituted by law**. n280 **Under this theory of the liberal democratic constitution and a thick conception of the rule of law, the exception does not provide the justification for the creation of legal black holes or the suspension of constitutional constraints at all, and neither does it operate so as to necessarily create such lawlessness.** **On the contrary, it is feasible to develop constitutional provisions that can survive the exception and operate to govern the response to national security emergencies**. n281

**It is not necessary, however, to refute Schmittian theoretical arguments to defend the Model**. **This is because the Model is designed primarily to constrain conduct in the moment of true exception**. The rationales advanced to justify the use of armed force cover a broad spectrum, from protecting national interests as ephemeral as national prestige and credibility, to the desperate need to repulse a massive invasion of the homeland. **It may be true that when a state is suddenly confronted with an immediate existential threat, one that truly threatens the "life of the nation," it might be less likely that a constitutional provision prohibiting any use of armed force will effectively govern state behavior**. n282 Thus, while the war [\*688] renouncing provision of the Constitution of Japan operated effectively to constrain Japanese policy on the use of armed force even in moments of perceived crisis, the provision "would not likely have exercised much influence over national policy in the event of a Soviet invasion of Hokkaido." n283 But **the Model being developed here is not intended to prevent or even hinder the use of force in such dire circumstances.**

First, **the constitutional incorporation of principles** of jus ad bellum **being proposed here would not actually oper-ate to prohibit an appropriate response to such existential crises**. **The** jus ad bellum **regime itself provides for the exer-cise of the right to self-defense, and since most true existential threats would more than satisfy the conditions for the exercise of self-defense** in international law, **the requirement** to consider compliance with international law **would not create any constraint on government action**. **Similarly, requiring legislative approval would not operate as any constraint in such circumstances.** **So quite aside from the argument that the constitutional provisions will not operate in moments of existential crisis, this Model is neither intended to be, nor would it actually operate as, a constraint in such circumstances.**

**The Model is intended, rather, to operate as a constraint with respect to the use of force when the life of the nation is not at stake, but where "vital interests" and other such imperatives provoke calls for action**. **For the fact remains that few armed conflicts that have involved Western constitutional democracies in the last 60 years have been responsive to existential threats**. **Rather, they range from such low-level operations as the U.S. invasions of Grenada and Panama at one end of the spectrum, which were defended as being for the purpose of protecting nationals overseas**, n284 **to such larger conflicts as the Korean conflict, the Vietnam war, the first Gulf war, the Kosovo war, the Falklands war, or the invasions of Afghanistan and Iraq since 2001, all of which were justified as being exercises of collective or individual self-defense**. **None of these, however, were in response to existential threats to the Western** [\*689] **democracies cen-tral to the conflicts**. Some were consistent with international law, some were not, but with the possible exception of the invasion of Afghanistan in response to 9/11, **none was a reaction to a national security crisis of such a scale that consti-tutional provisions would likely be ignored in liberal democracies engaged in the conflicts**. n285