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## Global Battlefield

#### Advantage one is the global battlefield

#### The AUMF provides the legal authority for a global battlefield. Others will seize on the AUMF’s expansive view of the battlefield to legitimize their own global wars

**Roth 13** – Executive Director @ Human Rights Watch [Kenneth Roth, “ (JD from Yale University) The Law of Armed Conflict, the Use of Military Force, and the 2001 Authorization for Use of Military Force” “ [Statement to the Senate Armed Services Committee](http://www.hrw.org/news/2013/05/16/us-statement-senate-armed-services-committee-aumf-targeted-killing-guantanamo) , May 16, 2013, pg. http://www.hrw.org/news/2013/05/16/us-statement-senate-armed-services-committee-aumf-targeted-killing-guantanamo

The Authorization for the Use of Military Force

When it comes to our most basic rights, there is probably no more important distinction than the line between peace and war.  In peacetime, the government can use lethal force only if necessary to stop an imminent threat to life, and it can detain only after according full due process.  But in wartime, the government can kill combatants on the battlefield, and it has greatly enhanced power to detain people without charge or trial.  So, safeguarding the right to life and liberty depends in important part on ensuring that the government is not operating by wartime rules when it should be abiding by peacetime rules.

Human Rights Watch does not ordinarily take positions on whether a party to a conflict is justified in taking up arms.  Rather, once armed conflict breaks out, we generally confine ourselves to monitoring how both sides to the conflict fight the war, with the aim of enforcing international standards protecting noncombatants.  In the Latin terms used among legal experts, we focus on jus in bello, not jus ad bellum.

However, the combination of a declared global war and the newly enhanced capacity to kill individual targets far from any traditional battlefield poses new dangers to basic rights—ones that will only grow as the US role in the Afghan armed conflict winds down. That leaves only al-Qaeda and similar armed groups but without the elements that traditionally limit use of the war power: the control of territory and a recognizable battlefield. To paint the problem most starkly, might a government that wants to kill a particular person simply declare “war” on him and shoot him, circumventing the basic due-process rights to which the target would ordinarily be entitled?  Or, might a government intent on wiping out a drug gang simply declare “war” on its members?  If a government wants to be less draconian but still avoid the burden of mounting a criminal prosecution, might it declare “war” on drug trafficking and detain without trial any participants it picks up?

These are not fanciful scenarios.  Drug traffickers pose a violent threat to many Americans and are almost certainly responsible for more American deaths than terrorism.  Already we talk of a metaphorical war on drugs.  Why not a real war?

I hope we cringe at that thought.  Detested as drug traffickers are, I hope we recoil at the thought of summarily killing or detaining them. But that is the risk if we allow the government unhindered discretion to decide when to apply war rules instead of peace rules. This threat of an end run around key constitutional rights highlights the need to articulate clear limits to any war related to terrorism.

Some have suggested that mere transparency around the war-peace distinction should be enough—that Congress might authorize ongoing war against terrorist groups present and future so long as the administration states clearly at any given moment the groups with which it is at war. But that open-ended authorization is dangerous, because governments will be tempted to take the easy path of war rules over the more difficult path of respecting the full panoply of rights that prevail in peacetime. We cannot trust that public scrutiny is enough to restrain abuse given how easy it is to vilify alleged terrorist groups.

If a particular group poses such a serious threat that it can be met only with war, focused war authorization can be sought. But an open invitation to live by war rules makes it too easy for the government to circumvent key rights.

Indeed, it is perilous enough when the government entrusted with the power to set aside certain peacetime rights is the United States. But once the US government takes this step, we can be certain that governments with far less sensitivity to rights will follow suit. The Chinas and Russias of the world will be all too eager to seize this precedent to pursue their enemies under war rules, be they “splittist” Tibetans or “subversive” dissidents.

Even without the AUMF, the United States is hardly defenseless against the scourge of terrorism. Since the September 11 attacks nearly a dozen years ago, the United States has vastly enhanced its intelligence, surveillance, and prosecutorial capacities. And, should these tools prove insufficient to meet a particular threat, the right of self-defense still allows resort to military force.  However, because of the fundamental rights at stake, war should be an option of necessity, not a blank check written in advance, as some are proposing for a revamped AUMF. Now that that Afghan war is winding down, it is time to retire the AUMF altogether.

Drone Attacks

The problem of excessive reliance on the rules of war for using deadly force is illustrated by the use of drones to kill suspects. Drone attacks do not necessarily violate international human rights or humanitarian law. Indeed, given their ability to survey targets for extended periods and to fire with pinpoint accuracy, drones may pose less of a threat to civilian life than many alternatives. Still, their use has become controversial because of profound doubts about whether the Obama administration is abiding by the proper legal standards to deploy them. For example, killing Taliban and al-Qaeda forces fighting US troops may be lawful in a traditional armed conflict like the one still underway in Afghanistan, but what is the justification for killing people who are not part of these groups in places like Yemen and Somalia? And where does northwestern Pakistan fit?

The Obama administration has offered several possible legal rationales for drone strikes, but with little clarity about the concrete, practical limits, if any, under which it purports to operate. Beyond the risk to people in these countries who face possible wrongful targeting, the lack of clarity denies Congress and the American public the ability to exercise effective oversight. It also makes it easier for other countries that are rapidly developing their own drone programs to interpret that ambiguity in a way that is likely to lead to serious violations of international law.

One possible rationale for drone strikes comes from international humanitarian law governing armed hostilities. The Obama administration has formally dropped the Bush administration’s use of the phrase “global war on terror,” but its interpretation of the AUMF as authorizing “war with al Qaeda, the Taliban, and associated forces” looks very similar. This expansive view of the “war” currently facing the United States cries out for a clear statement of its limits. Does the United States really have the right to attack anyone it might characterize as a combatant against the United States anywhere in the world? We would hardly accept summary killing if the target were walking the streets of London or Paris.

John Brennan has said that as a matter of policy the administration has an “unqualified preference” to capture rather than kill all targets. But what are the factors leading the administration to decide that this preference can be met? Will it kill simply because convincing another government to arrest a suspect may be difficult? If so, how much political difficulty will it put up with before launching a drone attack?  Will it kill simply because of the risk involved if US soldiers were to attempt to arrest the suspect? If so, how much risk is the administration willing to accept before pulling the kill switch? The truth is that we have no idea. We don’t know whether these decisions are being made with appropriate care or not. We do know that other governments are likely to interpret this ambiguity in ways that are less respectful than we would want of the fundamental rights involved.

Moreover, away from a traditional battlefield, international human rights law requires the capture of enemies if possible. As noted, failing to apply that law encourages other governments to circumvent it as well—to summarily kill suspects simply by announcing a “war” against their group without there being a traditional armed conflict anywhere in the vicinity. Imagine the mayhem that Russia could cause by killing alleged Chechen “combatants” throughout Europe, or China by killing Uighur “combatants” in the United States. In neither case is the government where the suspect is located likely to cooperate with arrest efforts. And these precedential fears are real: China recently considered using a drone to kill a drug trafficker in Burma. //AT: Executive CP: Lack legal clarity is the issue

#### Drone proliferation is inevitable. Only effective norms will prevent it from eroding firebreaks against nuclear conflict.

**Boyle 13** – Professor of Political Science @ La Salle University [Michael J. Boyle (Former Lecturer in International Relations and Research Fellow in the Centre for the Study of Terrorism and Political Violence @ University of St. Andrews), “The costs and consequences of drone warfare,” International Affairs 89: 1 (2013) pg. 1–29

The race for drones

An important, but overlooked, strategic consequence of the Obama administration’s embrace of drones is that it has generated a new and dangerous arms race for this technology. At present, the use of lethal drones is seen as acceptable to US policy-makers because no other state possesses the ability to make highly sophisticated drones with the range, surveillance capability and lethality of those currently manufactured by the United States. Yet the rest of the world is not far behind. At least 76 countries have acquired UAV technology, including Russia, China, Pakistan and India.120 China is reported to have at least 25 separate drone systems currently in development.121 At present, there are 680 drone programmes in the world, an increase of over 400 since 2005.122 Many states and non-state actors hostile to the United States have begun to dabble in drone technology. Iran has created its own drone, dubbed the ‘Ambassador of Death’, which has a range of up to 600 miles.123 Iran has also allegedly supplied the Assad regime in Syria with drone technology.124 Hezbollah launched an Iranian-made drone into Israeli territory, where it was shot down by the Israeli air force in October 2012.125

A global arms race for drone technology is already under way. According to one estimate, global spending on drones is likely to be more than US$94 billion by 2021.126 One factor that is facilitating the spread of drones (particularly non-lethal drones) is their cost relative to other military purchases. The top-of-the line Predator or Reaper model costs approximately US$10.5 million each, compared to the US$150 million price tag of a single F-22 fighter jet.127 At that price, drone technology is already within the reach of most developed militaries, many of which will seek to buy drones from the US or another supplier. With demand growing, a number of states, including China and Israel, have begun the aggressive selling of drones, including attack drones, and Russia may also be moving into this market.128 Because of concerns that export restrictions are harming US competitiveness in the drones market, the Pentagon has granted approval for drone exports to 66 governments and is currently being lobbied to authorize sales to even more.129 The Obama administration has already authorized the sale of drones to the UK and Italy, but Pakistan, the UAE and Saudi Arabia have been refused drone technology by congressional restrictions.130 It is only a matter of time before another supplier steps in to offer the drone technology to countries prohibited by export controls from buying US drones. According to a study by the Teal Group, the US will account for 62 per cent of research and development spending and 55 per cent of procurement spending on drones by 2022.131 As the market expands, with new buyers and sellers, America’s ability to control the sale of drone technology will be diminished. It is likely that the US will retain a substantial qualitative advantage in drone technology for some time, but even that will fade as more suppliers offer drones that can match US capabilities.

The emergence of this arms race for drones raises at least five long-term strategic consequences, not all of which are favourable to the United States over the long term. First, it is now obvious that other states will use drones in ways that are inconsistent with US interests. One reason why the US has been so keen to use drone technology in Pakistan and Yemen is that at present it retains a substantial advantage in high-quality attack drones. Many of the other states now capable of employing drones of near-equivalent technology—for example, the UK and Israel—are considered allies. But this situation is quickly changing as other leading geopolitical players, such as Russia and China, are beginning rapidly to develop and deploy drones for their own purposes. While its own technology still lags behind that of the US, Russia has spent huge sums on purchasing drones and has recently sought to buy the Israeli-made Eitan drone capable of surveillance and firing air-to-surface missiles.132 China has begun to develop UAVs for reconnaissance and combat and has several new drones capable of long-range surveillance and attack under development.133 China is also planning to use unmanned surveillance drones to allow it to monitor the disputed East China Sea Islands, which are currently under dispute with Japan and Taiwan.134 Both Russia and China will pursue this technology and develop their own drone suppliers which will sell to the highest bidder, presumably with fewer export controls than those imposed by the US Congress. Once both governments have equivalent or near-equivalent levels of drone technology to the United States, they will be similarly tempted to use it for surveillance or attack in the way the US has done. Thus, through its own over-reliance on drones in places such as Pakistan and Yemen, the US may be hastening the arrival of a world where its qualitative advantages in drone technology are eclipsed and where this technology will be used and sold by rival Great Powers whose interests do not mirror its own.

A second consequence of the spread of drones is that many of the traditional concepts which have underwritten stability in the international system will be radically reshaped by drone technology. For example, much of the stability among the Great Powers in the international system is driven by deterrence, specifically nuclear deterrence.135 Deterrence operates with informal rules of the game and tacit bargains that govern what states, particularly those holding nuclear weapons, may and may not do to one another.136 While it is widely understood that nuclear-capable states will conduct aerial surveillance and spy on one another, overt military confrontations between nuclear powers are rare because they are assumed to be costly and prone to escalation. One open question is whether these states will exercise the same level of restraint with drone surveillance, which is unmanned, low cost, and possibly deniable. States may be more willing to engage in drone overflights which test the resolve of their rivals, or engage in ‘salami tactics’ to see what kind of drone-led incursion, if any, will motivate a response.137 This may have been Hezbollah’s logic in sending a drone into Israeli airspace in October 2012, possibly to relay information on Israel’s nuclear capabilities.138 After the incursion, both Hezbollah and Iran boasted that the drone incident demonstrated their military capabilities.139 One could imagine two rival states—for example, India and Pakistan—deploying drones to test each other’s capability and resolve, with untold consequences if such a probe were misinterpreted by the other as an attack. As drones get physically smaller and more precise, and as they develop a greater flying range, the temptation to use them to spy on a rival’s nuclear programme or military installations might prove too strong to resist. If this were to happen, drones might gradually erode the deterrent relationships that exist between nuclear powers, thus magnifying the risks of a spiral of conflict between them.

Another dimension of this problem has to do with the risk of accident. Drones are prone to accidents and crashes. By July 2010, the US Air Force had identified approximately 79 drone accidents.140 Recently released documents have revealed that there have been a number of drone accidents and crashes in the Seychelles and Djibouti, some of which happened in close proximity to civilian airports.141 The rapid proliferation of drones worldwide will involve a risk of accident to civilian aircraft, possibly producing an international incident if such an accident were to involve an aircraft affiliated to a state hostile to the owner of the drone. Most of the drone accidents may be innocuous, but some will carry strategic risks. In December 2011, a CIA drone designed for nuclear surveillance crashed in Iran, revealing the existence of the spying programme and leaving sensitive technology in the hands of the Iranian government.142 The expansion of drone technology raises the possibility that some of these surveillance drones will be interpreted as attack drones, or that an accident or crash will spiral out of control and lead to an armed confrontation.143 An accident would be even more dangerous if the US were to pursue its plans for nuclear-powered drones, which can spread radioactive material like a dirty bomb if they crash.144

Third, lethal drones create the possibility that the norms on the use of force will erode, creating a much more dangerous world and pushing the international system back towards the rule of the jungle. To some extent, this world is already being ushered in by the United States, which has set a dangerous precedent that a state may simply kill foreign citizens considered a threat without a declaration of war. Even John Brennan has recognized that the US is ‘establishing a precedent that other nations may follow’.145 Given this precedent, there is nothing to stop other states from following the American lead and using drone strikes to eliminate potential threats. Those ‘threats’ need not be terrorists, but could be others— dissidents, spies, even journalists—whose behaviour threatens a government.

One danger is that drone use might undermine the normative prohibition on the assassination of leaders and government officials that most (but not all) states currently respect. A greater danger, however, is that the US will have normalized murder as a tool of statecraft and created a world where states can increasingly take vengeance on individuals outside their borders without the niceties of extradition, due process or trial.146 As some of its critics have noted, the Obama administration may have created a world where states will find it easier to kill terrorists rather than capture them and deal with all of the legal and evidentiary difficulties associated with giving them a fair trial.147

Fourth, there is a distinct danger that the world will divide into two camps: developed states in possession of drone technology, and weak states and rebel movements that lack them. States with recurring separatist or insurgent problems may begin to police their restive territories through drone strikes, essentially containing the problem in a fixed geographical region and engaging in a largely punitive policy against them. One could easily imagine that China, for example, might resort to drone strikes in Uighur provinces in order to keep potential threats from emerging, or that Russia could use drones to strike at separatist movements in Chechnya or elsewhere. Such behaviour would not necessarily be confined to authoritarian governments; it is equally possible that Israel might use drones to police Gaza and the West Bank, thus reducing the vulnerability of Israeli soldiers to Palestinian attacks on the ground. The extent to which Israel might be willing to use drones in combat and surveillance was revealed in its November 2012 attack on Gaza. Israel allegedly used a drone to assassinate the Hamas leader Ahmed Jabari and employed a number of armed drones for strikes in a way that was described as ‘unprecedented’ by senior Israeli officials.148 It is not hard to imagine Israel concluding that drones over Gaza were the best way to deal with the problem of Hamas, even if their use left the Palestinian population subject to constant, unnerving surveillance. All of the consequences of such a sharp division between the haves and have-nots with drone technology is hard to assess, but one possibility is that governments with secessionist movements might be less willing to negotiate and grant concessions if drones allowed them to police their internal enemies with ruthless efficiency and ‘manage’ the problem at low cost. The result might be a situation where such conflicts are contained but not resolved, while citizens in developed states grow increasingly indifferent to the suffering of those making secessionist or even national liberation claims, including just ones, upon them.

Finally, drones have the capacity to strengthen the surveillance capacity of both democracies and authoritarian regimes, with significant consequences for civil liberties. In the UK, BAE Systems is adapting military-designed drones for a range of civilian policing tasks including ‘monitoring antisocial motorists, protesters, agricultural thieves and fly-tippers’.149 Such drones are also envisioned as monitoring Britain’s shores for illegal immigration and drug smuggling. In the United States, the Federal Aviation Administration (FAA) issued 61 permits for domestic drone use between November 2006 and June 2011, mainly to local and state police, but also to federal agencies and even universities.150 According to one FAA estimate, the US will have 30,000 drones patrolling the skies by 2022.151 Similarly, the European Commission will spend US$260 million on Eurosur, a new programme that will use drones to patrol the Mediterranean coast.152 The risk that drones will turn democracies into ‘surveillance states’ is well known, but the risks for authoritarian regimes may be even more severe. Authoritarian states, particularly those that face serious internal opposition, may tap into drone technology now available to monitor and ruthlessly punish their opponents. In semi-authoritarian Russia, for example, drones have already been employed to monitor pro-democracy protesters.153 One could only imagine what a truly murderous authoritarian regime—such as Bashar al-Assad’s Syria—would do with its own fleet of drones. The expansion of drone technology may make the strong even stronger, thus tilting the balance of power in authoritarian regimes even more decisively towards those who wield the coercive instruments of power and against those who dare to challenge them.

Conclusion

Even though it has now been confronted with blowback from drones in the failed Times Square bombing, the United States has yet to engage in a serious analysis of the strategic costs and consequences of its use of drones, both for its own security and for the rest of the world. Much of the debate over drones to date has focused on measuring body counts and carries the unspoken assumption that if drone strikes are efficient—that is, low cost and low risk for US personnel relative to the terrorists killed—then they must also be effective. This article has argued that such analyses are operating with an attenuated notion of effectiveness that discounts some of the other key dynamics—such as the corrosion of the perceived competence and legitimacy of governments where drone strikes take place, growing anti-Americanism and fresh recruitment to militant networks—that reveal the costs of drone warfare. In other words, the analysis of the effectiveness of drones takes into account only the ‘loss’ side of the ledger for the ‘bad guys’, without asking what America’s enemies gain by being subjected to a policy of constant surveillance and attack.

In his second term, President Obama has an opportunity to reverse course and establish a new drones policy which mitigates these costs and avoids some of the long-term consequences that flow from them. A more sensible US approach would impose some limits on drone use in order to minimize the political costs and long-term strategic consequences. One step might be to limit the use of drones to HVTs, such as leading political and operational figures for terrorist networks, while reducing or eliminating the strikes against the ‘foot soldiers’ or other Islamist networks not related to Al-Qaeda. This approach would reduce the number of strikes and civilian deaths associated with drones while reserving their use for those targets that pose a direct or imminent threat to the security of the United States.

Such a self-limiting approach to drones might also minimize the degree of political opposition that US drone strikes generate in states such as Pakistan and Yemen, as their leaders, and even the civilian population, often tolerate or even approve of strikes against HVTs. Another step might be to improve the levels of transparency of the drone programme. At present, there are no publicly articulated guidelines stipulating who can be killed by a drone and who cannot, and no data on drone strikes are released to the public.154 Even a Department of Justice memorandum which authorized the Obama administration to kill Anwar al-Awlaki, an American citizen, remains classified.155 Such non-transparency fuels suspicions that the US is indifferent to the civilian casualties caused by drone strikes, a perception which in turn magnifies the deleterious political consequences of the strikes. Letting some sunlight in on the drones programme would not eliminate all of the opposition to it, but it would go some way towards undercutting the worst conspiracy theories about drone use in these countries while also signalling that the US government holds itself legally and morally accountable for its behaviour.156

A final, and crucial, step towards mitigating the strategic consequences of drones would be to develop internationally recognized standards and norms for their use and sale. It is not realistic to suggest that the US stop using its drones altogether, or to assume that other countries will accept a moratorium on buying and using drones. The genie is out of the bottle: drones will be a fact of life for years to come. What remains to be done is to ensure that their use and sale are transparent, regulated and consistent with internationally recognized human rights standards. The Obama administration has already begun to show some awareness that drones are dangerous if placed in the wrong hands. A recent New York Times report revealed that the Obama administration began to develop a secret drones ‘rulebook’ to govern their use if Mitt Romney were to be elected president.157

The same logic operates on the international level. Lethal drones will eventually be in the hands of those who will use them with fewer scruples than President Obama has. Without a set of internationally recognized standards or norms governing their sale and use, drones will proliferate without control, be misused by governments and non-state actors, and become an instrument of repression for the strong. One remedy might be an international convention on the sale and use of drones which could establish guidelines and norms for their use, perhaps along the lines of the Convention on Certain Conventional Weapons (CCW) treaty, which attempted to spell out rules on the use of incendiary devices and fragment-based weapons.158 While enforcement of these guidelines and adherence to rules on their use will be imperfect and marked by derogations, exceptions and violations, the presence of a convention may reinforce norms against the flagrant misuse of drones and induce more restraint in their use than might otherwise be seen. Similarly, a UN investigatory body on drones would help to hold states accountable for their use of drones and begin to build a gradual consensus on the types of activities for which drones can, and cannot, be used.159 As the progenitor and leading user of drone technology, the US now has an opportunity to show leadership in developing an international legal architecture which might avert some of the worst consequences of their use.

#### Geographically limiting the AUMF dials back an open ended war

**Brooks 13** - Professor of Law @ Georgetown University [Rosa Brooks (Senior Fellow @ New America Foundation, Former Counselor to the Undersecretary of Defense for Policy @ Department of Defense, Former Special Coordinator for Rule of Law and Humanitarian Policy @ DOD and Recipient of the [Secretary of Defense Medal for Outstanding Public Service](http://en.wikipedia.org/wiki/Secretary_of_Defense_Medal_for_Outstanding_Public_Service)), “The Law of Armed Conflict, the Use of Military Force, and the 2001 Authorization for Use of Military Force,” Statement for the Record Submitted the Senate Committee on Armed Services, May 16, 2013, pg. http://scholarship.law.georgetown.edu/cong/113

If the Administration’s use of force outside traditional battlefields is increasingly hard to justify under the AUMF, what should Congress do in response?

Congress could, of course, choose to do in 2013 what it refused to do in 2001, and broaden the existing AUMF to expressly permit the executive branch to use force to deter or preempt any future attacks or aggression towards the United States or U.S. interests. But such an expansion of the AUMF would give this and all future Administrations virtual carte blanche to wage perpetual war against an undefined and infinitely malleablelist of enemies, without any time limits or geographical restrictions.

In my view, this would amount to an unprecedented abdication of Congress’s constitutional responsibilities. In effect, Congress would be delegating its war powers almost wholesale to the executive branch. And while such a broad authorization to use military force could in theory be narrowed or withdrawn by a subsequent Congress, history suggests that the expansion of executive power tends to be a one-way ratchet: power, once ceded, is rarely regained.

Mr. Chairman, my guess is that few members of this committee would wish to contemplate such a broadened AUMF. What is more, it is worth emphasizing once again that while the Bush administration requested such open-ended authority to use force immediately after 9/11, Congress refused to provide it – even at a moment when the terrorist threat to the United States was manifestly more severe than it is now.

Today, the Obama Administration has not requested or suggested that it sees any need for an expanded AUMF. It would be utterly unprecedented for Congress to give the executive branch a statutory authorization to use force when the president has not requested it. Similar flaws characterize proposals to revise the AUMF to permit the president to use force against any organizations he may, in the future, specifically identify as posing a threat to the United States, based on criteria established by Congress. This is the proposal made by the Hoover Institute White Paper co-authored by my colleague Jack Goldsmith. He and his coauthors argue that Congress could pass a revised AUMF containing “general statutory criteria for presidential uses of force against new terrorist threats but requir[ing] the executive branch, through a robust administrative process, to identify particular groups that are covered by that authorization of force.”

While it would surely be useful for Congress to provide greater clarity on what, in its view, constitutes a threat sufficient to justify the open-ended use of military force -- amounting to a declaration of armed conflict-- such a revised AUMF would still effectively delegate to the president constitutional powers properly entrusted to Congress. Once delegated, these powers would be difficult for Congress to meaningfully oversee or dial back—and, once again, it is notable that the president has not requested such a power.

Mr. Chairman, Senator Inhofe, if what we’re concerned about is protecting the nation, there is no need for an expanded AUMF. With or without the 2001 AUMF, no one disputes that the president has the constitutional authority (and the international law authority) to use military force if necessary to defend the United States from an imminent attack, regardless of whether the threat emanates from al Qaeda or from some as yet unimagined terrorist organization.

If Congress chooses to revise the AUMF, it would be far more appropriate to limit it than to expand it. The 2001 AUMF established – at least as a matter of domestic U.S. statutory law-- an indefinitely continuing state of armed conflict between the United States, on the one hand, and those responsible for the 9/11 attacks, on the other hand. This has enabled the executive branch to argue (both as a matter of U.S. law and international law) that it is the principles of the law of armed conflict (LOAC) that should govern the U.S. use of armed force for counterterrorism purposes. But if the law of armed conflict is the applicable legal framework through which to understand the AUMF and through which to evaluate U.S. drone strikes outside of traditional battlefields, there are very few constraints on the U.S. use of armed force, and no obvious means to end the conflict.

Compared to other legal regimes, including both domestic law enforcement rules and the international law on self defense, the law of armed conflict is extremely permissive with regard to the use of armed force. The law of armed conflict permits the targeting both of enemy combatants and their co-belligerents. It also allows enemy combatants to be targeted by virtue of their status, rather than their activities: it is permissible to target enemy combatants while they are sleeping, for instance, even though they pose no “imminent’ threat while asleep, and the lowest-ranking enemy soldier can be targeted just as lawfully as the enemy’s senior-most military leaders. Indeed, uniformed cooks and clerks with no combat responsibilities can be targeted along with combat troops.

It is this highly permissive law of armed conflict framework that has enabled the executive branch to assert that “associates” of al Qaeda and the Taliban may be targeted beyond traditional battlefields, even though this expansion of the use of force beyond those responsible for 9/11was not contemplated by Congress in the 2001 AUMF. Similarly, it is the law of armed conflict framework that has permitted the executive branch to assert the authority to target ever lower-level terrorists and suspected “militants,” rather than restricting drone strikes to those targeting the most dangerous “senior” operatives. It is also the law of armed conflict framework that permits the executive branch to assert that it may target even those individuals and organizations that pose no imminent threat to the United States, in the normal sense of the word “imminent.”

But as the threat posed by Al Qaeda dissipates and U.S. troops withdraw from Afghanistan, it is appropriate for the U.S. to transition to a domestic (and international) legal framework in which there are tighter constraints on the use of military force. Congress can help this transition along by clarifying that the existing AUMF is not an open-ended mandate to wage a “forever war,” and requiring the president to satisfy more exacting legal standards before military force is authorized or used.

In the event that the president becomes aware of a threat so imminent and grave he cannot wait for Congressional authorization prior to using military force, there is no dispute that he can rely on his inherent constitutional powers to take appropriate action until the threat has been eliminated or until Congress can act. However, by expressly granting the power to declare war and associated powers to Congress, our Constitution presumes that the president will only in rare circumstances rely solely on his inherent executive powers to use military force. Historically, non-congressionally authorized uses of force by the president have generally been

reserved for rare and unusual circumstances, and this is as it should be.

Beyond these rare situations of extreme urgency, if the president believes that there is a sustained and intense threat to the United States, he can and should provide Congress with detailed information about the threat, and request that Congress authorize the use of military force to address the specific threat posed by a specific state or organization.

Congress should authorize the use of military force in these circumstances only -- there is no need for Congress to preemptively authorize the president to use military force indefinitely against unspecified threats that the president has not yet identified. And if Congress does authorize the use of military force at the president’s request, the force authorized should be carefully tailored to the specific threat. Furthermore, Congress should be explicit about whether an AUMF is acknowledging or authorizing an ongoing armed conflict, on the one hand, or whether it is simply authorizing the limited use of force for self-defense, on the other hand.

International law imposes criteria for the use of force in national self-defense that are far more stringent than the criteria for using force in the course of an armed conflict that is ongoing. Unlike the international law of armed conflict, the international law of self-defense permits states to use force only to respond to an armed attack or to prevent an imminent armed attack, and the use of force in self defense is subject to the principles of necessity and proportionality. Under self defense rules (unlike law of armed conflict rules) individuals who pose no imminent threat cannot be targeted, and inquiries into imminence, necessity and proportionality tend to restrict the use of force in self defense to strikes against those who— by virtue of their operational seniority or hostile activities- pose threats that are urgent and grave, rather than speculative, distant or minor.

For this reason, I believe that if Congress wishes to refine or clarify the AUMF, it should consider limiting the AUMF’s geographic scope, limiting its temporal duration, and limiting the authorized use of force to that which would be considered permissible self defense under international law, or all three.

Expressly limiting the AUMF’s geographic scope to Afghanistan and/or other areas in which U.S. troops on the ground are actively engaged in combat, for instance, would clarify that the ongoing armed conflict (and the applicability of the law of armed conflict) is limited to these more traditional battlefield situations. As noted above, such a geographical limitation would by no means undermine the president’s ability to use force to protect the United States from threats emanating from outside of the specified region. Such a geographical limitation would merely make it clear that any presidential desire to use force elsewhere would require him either to request an additional narrowly drawn congressional authorization to use force, or would require that any non-congressionally authorized use of force be justified -- constitutionally and internationally – on self defense grounds, by virtue of the gravity and imminence of a specific threat.

Limiting the AUMF’s temporal scope could be accomplished by adding a “sunset” provision to the AUMF. The current AUMF could be set to expire when U.S. troops cease combat operations in Afghanistan, for instance, or in 2015, whichever date comes first. Here again, such a limitation would not preclude the president from requesting an extension or a new authorization to use force, if clearly justified by specific circumstances, nor would it preclude the president from relying on his inherent constitutional powers if force becomes necessary to prevent an imminent attack.

Finally, the AUMF could be revised to clarify Congress’ view of the applicable legal framework. Congress could state explicitly that it authorizes the president to engage in an ongoing armed conflict within the borders of Afghanistan between the U.S. and Al Qaeda, the Taliban and their co-belligerents, but that it does not currently authorize the initiation or continuation of an armed conflict in any other place, and expects therefore that any U.S. military action elsewhere or against other actors shall be governed by principles of self-defense rather than by the law of armed conflict.

There are many possible ways for Congress to signal its commitment to preventing the AUMF from being used to justify a “forever war.” Each of these approaches has both benefits and drawbacks, and each would require significant further discussion. But I believe that Congress’ focus should be on ensuring that war remains an exceptional state of affairs, not the norm. At a minimum, this should preclude any Congressional expansion of existing AUMF authorities. Pg. 10-14

#### The plan legitimizes currents US policy and moderates TKs internationally

Daskal, ’13 [Jennifer C. Daskal, Fellow and Adjunct Professor, Georgetown Center on National Security and the Law, Georgetown University Law Center. THE GEOGRAPHY OF THE BATTLEFIELD: A FRAMEWORK FOR DETENTION AND TARGETING OUTSIDE THE “HOT” CONFLICT ZONE. University of Pennsylvania Law Review, Vol. 161, No. 5. April 2013. <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2049532>]

Additional work is needed to flesh out the precise standards for concluding that a threat justifies action in self-defense. But by applying the general approach described in Part III both to lethal targeting that takes place outside a zone of active hostilities in the course of an armed conflict and to killings undertaken in self-defense outside an armed conflict, states can begin to develop a clear and consistent set of practices to regulate targeted killings outside the conflict zone.214 Such an approach furthers the important goal of creating and protecting a stable set of expectations as to the rules that apply to these killings. The approach serves to limit the state’s use of premeditated lethal force to instances in which the targets pose a profound and ongoing threat that cannot be dealt with through other means. Finally, the framework protects against the perverse situation in which self-defense justifications are used as end-runs around the more restrictive set of law-of-war rules proposed here.

C. Implementation and Security Benefit

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

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

Second, while the proposed substantive and procedural safeguards are more stringent than those that are currently being employed, their implementation will lead to increased restraint and enhanced legitimacy, which in turn inure to the state. As the U.S. Counterinsurgency Manual explains, it is impossible and self-defeating to attempt to capture or kill every potential insurgent: “Dynamic insurgencies can replace losses quickly. Skillful counterinsurgents must thus cut off the sources of that recuperative power” by increasing their own legitimacy at the expense of the insurgent’s legitimacy. 215 The Counterinsurgency Manual further notes, “[E]xcessive use of force, unlawful detention . . . and punishment without trial” comprise “illegitimate actions” that are ultimately “self-defeating.”216 In this vein, the Manual advocates moving “from combat operations to law enforcement as quickly as feasible.”217 In other words, the high profile and controversial nature of killings outside conflict zones and detention without charge can work to the advantage of terrorist groups and to the detriment of the state. Self-imposed limits on the use of detention without charge and targeted killing can yield legitimacy and security benefits.218

Third, limiting the exercise of these authorities outside zones of active hostilities better accommodates the demands of European allies, upon whose support the United States relies. As Brennan has emphasized: “The convergence of our legal views with those of our international partners matters. The effectiveness of our counterterrorism activities depends on the assistance and cooperation of our allies—who, in ways public and private, take great risks to aid us in this fight.”219 By placing self-imposed limits on its actions outside the “hot” battlefield, the United States will be in a better position to participate in the development of an international consensus as to the rules that ought to apply.

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

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

#### US normative leadership is key

Zenko 13 – Fellow in the Center for Preventive Action @ Council on Foreign Relations [Dr. Micah Zenko (PhD in political science from Brandeis University), “Reforming U.S. Drone Strike Policies,” Council on Foreign Relations, Council Special Report No. 65, January 2013

History shows that how states adopt and use new military capabilities is often influenced by how other states have—or have not—used them in the past. Furthermore, norms can deter states from acquiring new technologies.72 Norms—sometimes but not always codified as legal regimes—have dissuaded states from deploying blinding lasers and landmines, as well as chemical, biological, and nuclear weapons. A well-articulated and internationally supported normative framework, bolstered by a strong U.S. example, can shape armed drone proliferation and employment in the coming decades. Such norms would not hinder U.S. freedom of action; rather, they would internationalize already-necessary domestic policy reforms and, of course, they would be acceptable only insofar as the limitations placed reciprocally on U.S. drones furthered U.S. objectives. And even if hostile states do not accept norms regulating drone use, the existence of an international normative framework, and U.S. compliance with that framework, would preserve Washington’s ability to apply diplomatic pressure. Models for developing such a framework would be based in existing international laws that emphasize the principles of necessity, proportionality, and distinction—to which the United States claims to adhere for its drone strikes—and should be informed by comparable efforts in the realms of cyber and space.

In short, a world characterized by the proliferation of armed drones—used with little transparency or constraint—would undermine core U.S. interests, such as preventing armed conflict, promoting human rights, and strengthening international legal regimes. It would be a world in which targeted killings occur with impunity against anyone deemed an “enemy” by states or nonstate actors, without accountability for legal justification, civilian casualties, and proportionality. Perhaps more troubling, it would be a world where such lethal force no longer heeds the borders of sovereign states. Because of drones’ inherent advantages over other weapons platforms, states and nonstate actors would be much more likely to use lethal force against the United States and its allies. Pg. 22-25

## Europe Advantage

#### Advantage two is Transatlantic Relations –

**Current expansive legal regime triggers end of allied intel cooperation and dooms the Atlantic alliance**

Tom **Parker 12**, Former Policy Dir. for Terrorism, Counterterrorism and H. Rts. at Amnesty International, U.S. Tactics Threaten NATO, September 17, <http://nationalinterest.org/commentary/us-tactics-threaten-nato-7461>

A growing chasm in operational practice is opening up between the **U**nited **S**tates and its allies in NATO. This rift is **putting the Atlantic alliance at risk**. Yet no one in Washington seems to be paying attention. The escalating use of **u**nmanned **a**erial **v**ehicle**s** to **strike terrorist suspects** in an increasing number of operational environments from the Arabian Peninsula to Southeast Asia, **coupled** with the continued use of military commissions and **indefinite** **detention**, is driving a wedge between the **U**nited **S**tates and its allies. Attitudes across the Atlantic are hardening fast. This isn’t knee-jerk, man-on-the-street anti-Americanism. European governments that have tried to turn a blind eye to U.S. counterterrorism practices over the past decade are now **forced to pay attention by their own courts**, which will **restrict cooperation in the future**.As recently as last month, the German federal prosecutor’s office opened a probe into the October 2010 killing of a German national identified only as “Buenyamin E.” in a U.S. drone strike in Pakistan. There are at least four other similar cases involving German nationals and several reported strikes involving legal residents of the United Kingdom. In March, Polish prosecutors charged the former head of Polish intelligence, Zbigniew Siemiatkowski, with “unlawfully depriving prisoners of the their liberty” because of the alleged role he played in helping to establish a CIA secret prison in northeastern Poland in 2002–2003. Last December, British Special Forces ran afoul of the UK courts for informally transferring two Al Qaeda suspects detained in Iraq, Yunus Rahmatullah and Amanatullah Ali, to U.S. forces. The British government has been instructed to recover the men from U.S. custody or face legal sanctions that could result in two senior ministers being sent to prison. Perhaps the most dramatic example illustrating the gap that has opened up between the United States and its European allies concerns the 2009 in absentia conviction of twenty-three U.S. agents in an Italian court for the role they played in the extraordinary rendition of radical Imam Hassan Mustafa Osama Nasr from Milan to Cairo. Britain, Poland, Italy and Germany are among America’s closest military partners. Troops from all four countries are currently serving alongside U.S. forces in Afghanistan, but they are now operating within a **very different set of constraints than their U.S. counterparts**. The **E**uropean **C**ourt of **H**uman **R**ights established its jurisdiction over stabilization operations in Iraq, and by implication its writ extends to Afghanistan as well. The British government has lost a series of cases before the court relating to its operations in southern Iraq. This means that concepts such as the right to life, protection from arbitrary punishment, remedy and due process apply in areas under the effective control of European forces. Furthermore, the possibility that **intel**ligence provided by any of America’s European allies could be used to target a terrorism suspect in Somalia or the Philippines for a lethal drone strike now **raises serious criminal liability issues** for the Europeans. The **U**nited **S**tates conducts such operations under the legal theory that it is in an international armed conflict with Al Qaeda and its affiliates that can be pursued anywhere on the globe where armed force may be required. But **not one other member of NATO shares this legal analysis**, which flies in the face of established international legal norms. The United States may have taken issue with the traditional idea that wars are fought between states and not between states and criminal gangs, but its allies have not. The heads of Britain’s foreign and domestic **intel**ligence services have been surprisingly open about the “inhibitions” that this growing divergence has caused the transatlantic special relationship, telling Parliament that it has become an **obstacle to intelligence sharing**. European attitudes are not going to change—the European Court of Human Rights is now deeply embedded in European life, and individual European governments cannot escape its oversight no matter how well disposed they are to assist the United States. The United States has bet heavily on the efficacy of a new array of counterterrorism powers as the answer to Al Qaeda. In doing so it has evolved a concept of operations that has much more in common with the approach to terrorist threats taken by Israel and Russia than by its European partners. There has been little consideration of the wider strategic cost of these tactics, even as the Obama administration doubles down and extends their use. Meanwhile, some of America’s oldest and closest allies are beginning to place **more** and more **constraints on working with U.S. forces**. NATO cannot conduct military operations under two competing legal regimes for long. Something has to give—and **it may just be the Atlantic alliance**.

#### T-TIP is unique vulnerable. EU concerns about US counterterror strategy will get drawn into the negotiations

**Levanti 13** – Masters in European Public Affairs @ Maastricht University [[Natasha Marie Levanti](http://www.europeanpublicaffairs.eu/author/natashamarielevanti/) , “The Transatlantic Journey – TTIP & Cautious Optimism,” Bursting the Bubble, 2 September 2013, pg. http://www.europeanpublicaffairs.eu/the-transatlantic-journey-ttip-cautious-optimism/

Transatlantic economic cooperation has been something on the minds of those on both sides of the Atlantic before the recent economic woes. For instance, the Transatlantic Economic Council (TEC) was formed in 2007 to deal with increasing regulatory cooperation, as well as aid in addressing non-tariff barriers to transatlantic trade. With the economic situations in both Europe and the United States, starting in 2008 with the housing market collapse, the two entities were more concerned about their individual recovery than cooperation between the two. Yet at the same time, the situation proved for many individuals that now is the time to pursue closer transatlantic trade and investment cooperation.

Data protection and surveillance was recently brought to light as a major issue between the U.S., and the EU. One which almost delayed the transatlantic trade talks due to, most notably, German and French objections after knowledge of possible U.S. surveillance tactics came to light. After some U.S. promises, the trade talks will continue as planned, but this is a glimpse of the extensive number of policy differences which will require discussion during this process. The intention and common belief is that the trade talks will go smoothly, creating a broad spectrum trade relationship between two of the world’s largest regional economies. Yet, with recent events one would think the talks are already off to a rocky start. Therefore, it is important to be aware of some of the issues or perspectives concerning E.U. / U.S. relations before they formally appear in the trade talks that are underway. While not all of these will specifically be discussed as part of the trade negotiations, as is seen with the recent occurrence about data protections, some of these issues may in fact be drawn into the talks surrounding the greater European Union relations with the United States.

After recent events, Data Protection is definitely an issue. Data protection issues have been recurrent between the two since the terror attacks of 9/11, though most recently brought to light again due to accusations of the U.S. tapping into various E.U. offices. In order to prevent this recent development from completely derailing the upcoming trade negotiations, the United States has offered to create ‘working groups’ on the subject.

A hot topic recently has been Cybersecurity. This is mainly due to the court cases surrounding U.S. based companies such as Google and Facebook. Yet despite the fact that there are, and probably will remain to be differences in the regulation of cybersecurity, both sides do appear willing to increase cooperation on this front in order to help counter cybercrime.

The European Union Trading System (ETS) is also a touchy subject, a system put in place to have airlines purchase carbon allowances in an effort to offset CO2 emissions by encouraging airlines to invest in more environmentally friendly aircraft. The E.U., under pressure from international relations has stopped, at least for the moment, the system’s international implementation. Part of this ‘international’ pressure was undoubtedly derived from a piece of legislation passed by U.S. Congress in 2012 that ‘prohibits’ U.S. aircraft operators from actively engaging in the European ETS. This matter has currently been taken up by the U.N.’s International Civil Aviation Organization, which promised in November of 2012 that this would be an issue addressed within the coming year.

Periodically, officials from the U.S. will bring up European energy security as an issue, or at least something that, with deeper trade relations, is considered to be a U.S. interest. Part of this issue is the diversification of European energy resources, since currently it is fairly reliant on Russian supplies. Also of concern in the energy sector is the increase of sustainable energy and the consolidation of the EU’s internal energy market.

The fight against terror and the future of NATO are not likely to be discussed at the trade talks; however these two issues need to be considered when looking at the current level of general cooperation between Europe and the United States**.** Both have been led by joint U.S. / European forces and since September 11, 2001, there has most assuredly been a deeper level of communication and cooperation. This is linked in part to other issues such as cybersecurity and data protection, and was, at least in part, some of the reasoning behind recent developments in those two sectors.

#### T-TIP reduces US dependence on China. They can’t win offense because more US-European trade is inevitable.

**Kelly 13** - PhD Candidate with the Centre for the Study of European Governance @ University of Nottingham [Katrina Kelly, “An American perspective on the EU: The United States should work to ensure European stability,” London School of Economics, February 23, 2013, pg. http://blogs.lse.ac.uk/europpblog/2013/02/23/an-american-perspective-on-the-eu-the-united-states-should-work-to-ensure-european-stability/

Eurosceptiscm is gaining attention and support in the UK, and perhaps throughout Europe. Although this appears to be a European problem, any wavering in the stability of the European Union will have widespread effects on the global political economy. In this post I examine eurosceptiscm from an American standpoint, and assesses how and why the United States must continue, if not increase, its support for unity within the European Union.

The cold war officially ended in 1991. Despite this, the United States has remained skeptical that there is not, nor will be, a future military threat from the Eastern hemisphere. If this statement was once considered debatable, such doubts were surely quelled in the spring of 2006 when the United States began negotiations with both the Czech Republic and Poland to determine the best site for the future installation of an anti-ballistic missile site.

The United States has been an aggressive military nation since, or perhaps because of, its initial creation. We are a nation that profits and rarely shirks from military interference and must be realistic about future military engagements. The rationale for defending the EU solely for its appropriateness as a missile defense system against nations like Iran and North Korea only begins to touch on the benefits that the European Union provides for the United States. By combining 27 nations in unity the European Union provides the strongest ally in defense for the United States. We no longer have to address, nor stress, individual diplomatic relations in Europe, but can instead be sure of support from 27 of the world’s strongest nations. The benefits of having strong diplomatic ties with so many nations versus individual nations surely need no further explanation.

In the United Kingdom there is often a tendency to address only the western European nations when discussing the effectiveness of the European Union. In the United States, we must not adopt the British tendency to dismiss the Union as individual nations and study only the effectiveness of the EU as a whole. The Union is a federal state made up 27 member-states, 17 of which use the euro, and must constantly be examined as such. The benefits of the European Union lie not only in the diplomatic solidarity provided by a unity of such a large number of nations, but also in the economic stability provided by such a vast joining of nations.

Growing from the position as a strong “supporter” of European integration; the US/EU now holds the largest economic relationship in the world. In 2010 $1,537.4 billion flowed between the European Union and the United States. Today, the EU counts for 18.7% of exports from the US. Including services, and not including $131.9 billion of direct investments, the EU makes up more than 31% of all US trade relations. When looking at the increasing trend towards globalization, this relationship will only continue to grow as trade relations continue to dissolve international barriers. At least, this is one scenario. On the opposing side the relationship could completely dissolve, not through choice, but through inevitability.

The economic climate today has forced nations to reconsider their spending habits. In Europe, where the recession has caused some nations, specifically southern nations, to hover on the brink of bankruptcy, spending has been scrutinized to the point that each spending measure has become politicized. Eurosceptiscm, or criticism of the EU, is an act of opposition to the process of European integration. The idea centers on the thought that integration weakens the nation-state and claims that it is undemocratic (on the most-extreme side) or argues that the EU is too bureaucratic and costly (the most common argument). Whereas at one time the EU was considered a highly popular institution, today only 31.9% of citizens polled in a Eurobarometer test believe that the EU views the EU positively.

In the UK this view is especially strong. What used to be a notion of the Conservative Party is now a policy initiative that David Cameron recently delivered a speech on. In an age of increased austerity, Cameron has addressed the concern that the EU’s recent demand of a 6.8% increase in UK spending in the EU is unwarranted. What once seemed to be a mere financial grumbling of the Conservatives has become a popular prediction for some economists.

While the British are considering decreased relations with Europe, it may be useful to consider what increasing our relations with Europe could do for both the American and global economy. For the past year, a free-trade agreement between the US and Europe has become more attainable than any discussions in the past decade have alluded to. Both leaders of the private and public sector seem to agree that a free-trade agreement between the two continents could result in the stimulus that economists have been searching for since the 2008 crisis. Although tariffs between the US and EU are already low, the companies that do the most transatlantic trade argue that a decrease in the 3% average would mean huge savings for the firms.  As an agreement like this would boost the earnings of firms without have repercussions on the taxpayer, increasing support for EU/US relations to mature in a NAFTA-like agreement seems to be a feasible idea.

A free-trade agreement would not only act as a stimulus, but would help to weaken the growing American dependence on the Chinese. China has dominated the political debate in the US, which may or may not be accurate, but in reality trade with Europe is much larger than trade with China. Increasing our support for the EU would help to set a positive curve for demand and help to decrease the rate of acceleration of dependence on the Chinese. At the same time, Europe is considering the same type of agreement with China, as they recognize and need, the stimulus benefits from such a trade agreement. If we do not act then surely, as the past decade has shown, the Chinese will be quick to make an agreement with the EU. The Chinese know that fluctuation in the Yuan is always a concern and they would be quick to seal a deal that would help to increase stability in export and imports.

In order to benefit from such a trade agreement, a decision must be taken quickly on European and American trade relations. Without it the natural dissolution of trade barriers will allow this to happen inevitably, but in a slow process that would not act as a stimulus to growth on either side of the Atlantic.

#### Trade imbalance encourages China bashing that undermines US-China relations.

**Ramirez & Rong 12** – Professors of Economics @ George Mason University [Carlos D. Ramirez & Rong Rong “China Bashing: Does Trade Drive the “Bad” News about China in the USA?,” Review of International Economics, 20(2), 2012, pg. 350–363

Trade between the USA and China has been growing at a substantial rate over the last two decades (1990–2010). In 1990, total bilateral trade stood at US$20 billion. By 2008 this figure had risen to US$409 billion, implying an annual growth rate of over 4% in real terms—a rate faster than that of the US economy over the same period.1 It is very likely that Sino-American trade relations will continue to grow in the foreseeable future, although perhaps not at the same rate, given the gravity of the 2007–09 recession in the USA.

Despite the phenomenal rate of growth, trade relations between the two countries have been anything but smooth. Trade disputes have frequently surfaced, and over the years, as the size of the bilateral trade deficit has widened, economic relations have become tense: since 2005, the growing bilateral deficit has been linked to a variety of issues, including currency exchange manipulation, health and safety standards, and discriminatory regulation. Indeed, between 1990 and 2010, the tense trade relations¶ have lead to the introduction of numerous bills in Congress with explicit grievances against China.2

Intertwined with these trade-related complaints are other grievances that, though not necessarily directly related to trade issues, nonetheless form part of Sino-American relations. These other grievances relate to China’s political system, human rights, Tibet, repression, and so forth, and are frequently reported on in US media outlets, more often than not with a slant unfavorable to China.

The purpose of this paper is to investigate empirically the extent to which news reports of US grievances against China that are not necessarily directly related to trade (e.g. on the subject of human rights) are driven by cycles in the US–China trade deficit. Many scholars of Sino-American relations suspect that there is such a link. For example, these scholars see an ulterior motive behind the US preoccupation with China’s record on human rights (Wang, 2002).

To conduct this investigation, a China “bad news” index is constructed for the period January 1990–December 2008.3 To develop the index, a count is made of articles that talk about China in connection with one of the following grievance issues: “human rights,” “Tibet,” “child labor,” “democracy,” and “repression.”4 This paper then makes use of a parsimonious transfer model to examine the extent to which unexpected changes in the trade deficit explain movements in the bad news index. The results indicate that 3–4 months after an unexpected widening of the bilateral trade deficit, the frequency of bad news rises sharply, before subsiding in subsequent months. It is found that the likelihood of this relationship’s being purely coincidental is relatively low— about 1%. The relationship is robust to the choice of the model specification as well as to a variety of assumptions about the behavior of the lag structure.

Explaining the relationship between an unexpected widening of the bilateral trade deficit and an increased frequency of bad news is actually quite straightforward and does not rely on esoteric conspiracy theories. The timing of a decision to publish bad news about China can be explained by a publisher’s interest in readership and therefore in revenues. As the bilateral trade deficit unexpectedly widens, many US members of Congress respond to pressure groups by voicing their misgivings and trepidations on the subject. Indeed, this paper finds empirical support for this last argument. In particular, a positive and statistically significant correlation between the annual number of¶ Congressional hearings on China and the US–China bilateral trade deficit is detected. A regression analysis reveals that this relationship is robust to different functional forms.

The fact that Congress becomes more preoccupied about China, in combination with the fact that China is one of the largest US trading partners, makes China a more salient topic of discussion, so that the media find it more worthwhile to run stories about China with a negative slant. The old adage “there is no news like bad news” is illustrative in this regard. The notion that the US media, in deciding what is newsworthy, operate as profit-maximizing enterprises should not be controversial. Indeed, a substantial amount of research finds that this is the case.5

The results lend evidence to the proposition that the reporting of negative news about China may indeed be influenced by tensions arising from the widening bilateral trade deficit. This investigation gives empirical support to the suspicion of many Sino- American scholars that “China bashing” is, at least in part, a reaction to the widening US–China trade deficit. To the present authors’ knowledge, this is the first paper that empirically evaluates the linkage between US–China trade deficits and news— specifically bad news. Given that relations between the two countries are often at the¶ center of attention in US politics, it is believed that this is an important issue that needs to be elucidated. Pg. 350-351

#### Bashing risks nuclear war

**Gross 12** - Senior associate of Pacific Forum CSIS [Donald Gross (A former State Department official who developed diplomatic strategy toward East Asia. Counselor of the U.S. Arms Control and Disarmament Agency and director of legislative affairs at the National Security Council in the White House), “Quit bashing Beijing — China’s rise is good for America,” Salon, Monday, Oct 22, 2012 03:30 PM EDT, pg. http://www.salon.com/2012/10/22/quit\_bashing\_beijing\_chinas\_rise\_is\_good\_for\_america/

The routine scapegoating of China — which no less a figure than Henry Kissinger, the architect of U.S. rapprochement with Beijing in the 1970s, has called “[extremely deplorable](http://www.huffingtonpost.com/2012/10/03/henry-kissinger-2012-election_n_1937157.html)” — is targeted at vulnerable people who have suffered deeply from the effects of the economic recession.

It is easier for both campaigns to shift blame to foreigners than to remind voters that the global financial crisis began on Wall Street, not in Beijing.  Or to point out that trade with China – America’s third-largest export market – has helped pull the United States out of the global financial crisis.

Demagogic attacks by both campaigns on China are particularly dangerous since they play into often unspoken but prevalent anti-Asian racial prejudices in various parts of the United States.  American leaders should try to overcome the sad history of anti-Asian prejudice, not exploit it for political gain.

Perhaps the only consolation one can take in this season of China bashing is that it may finally force a badly needed national debate on U.S. policy toward China.

With respect to national security, the Obama administration benignly describes its large-scale military buildup in the Pacific as a “strategic pivot” to Asia or “rebalancing” U.S. forces.  Both terms are euphemisms that mask the reality of current policy.  We are now implementing an aggressive containment strategy that stimulates China’s military modernization and its own preparations for war.

Increased tensions with China could have a number of dire outcomes.  They could lead to serious military conflict over Taiwan’s political status, over whether Japan or China holds sovereignty to several uninhabitable islands in the East China Sea, or over the ownership of small islands and energy resources in the South China Sea.  In a worst case, those conflicts could escalate, by accident or design, to a nuclear exchange.

#### Security cooperation with Europe solves nuclear war and multiple transnational threats

**Stivachtis 10** – Director of International Studies Program @ Virginia Polytechnic Institute & State University [Dr. Yannis. A. Stivachtis (Professor of Poli Sci & Ph.D. in Politics & International Relations from Lancaster University), THE IMPERATIVE FOR TRANSATLANTIC COOPERATION,” The Research Institute for European and American Studies, 2010, pg. http://www.rieas.gr/research-areas/global-issues/transatlantic-studies/78.html]

There is no doubt that US-European relations are in a **period of transition**, and that the stresses and strains of globalization are increasing both the number and the seriousness of the challenges that confront transatlantic relations.

The events of 9/11 and the Iraq War have added significantly to these stresses and strains. At the same time, international terrorism, the nuclearization of **North Korea** and especially **Iran**, the proliferation of weapons of mass destruction (WMD), the transformation of **Russia** into a stable and cooperative member of the international community, the growing power of **China**, the political and economic transformation and integration of the **Caucasian** and **Central Asian** states, the integration and stabilization of the **Balkan** countries, the promotion of peace and stability in the **Mid**dle **East**, poverty, climate change, AIDS and other emergent problems and situations require further cooperation among countries at the regional, global and institutional levels.

Therefore, cooperation between the U.S. and Europe is more **imperative** than ever to deal effectively with these problems. It is fair to say that the challenges of crafting a new relationship between the U.S. and the EU as well as between the U.S. and NATO are more regional than global, but the implications of success or failure will be global.

The transatlantic relationship is still in crisis, despite efforts to improve it since the Iraq War. This is not to say that differences between the two sides of the Atlantic did not exist before the war. Actually, post-1945 relations between Europe and the U.S. were fraught with disagreements and never free of crisis since the Suez crisis of 1956. Moreover, despite trans-Atlantic proclamations of solidarity in the aftermath of 9/11, the U.S. and Europe parted ways on issues from global warming and biotechnology to peacekeeping and national missile defense.

Questions such as, the future role of NATO and its relationship to the common European Security and Defense policy (ESDP), or what constitutes terrorism and what the rights of captured suspected terrorists are, have been added to the list of US-European disagreements.

There are two reasons for concern regarding the transatlantic rift. First, if European leaders conclude that Europe must become **counterweight** to the U.S., rather than a partner, it will be difficult to engage in the kind of open search for a common ground than an elective partnership requires. Second, there is a risk that public opinion in both the U.S. and Europe will make it difficult even for leaders who want to forge a new relationship to make the necessary accommodations.

If both sides would actively work to heal the breach, a new opportunity could be created. A vibrant transatlantic partnership remains a real possibility, but only if both sides make the necessary political commitment.

There are strong reasons to believe that the security challenges facing the U.S. and Europe are more shared than divergent. The most dramatic case is terrorism. Closely related is the common interest in halting the spread of weapons of mass destruction and the nuclearization of Iran and North Korea. This commonality of threats is clearly perceived by publics on both sides of the Atlantic.

Actually, Americans and Europeans see eye to eye on more issues than one would expect from reading newspapers and magazines. But while elites on both sides of the Atlantic bemoan a largely illusory gap over the use of military force, biotechnology, and global warming, surveys of American and European public opinion highlight sharp differences over global leadership, defense spending, and the Middle East that threaten the future of the last century’s most successful alliance.

There are other important, shared interests as well. The transformation of Russia into a stable cooperative member of the international community is a priority both for the U.S. and Europe. They also have an interest in promoting a stable regime in Ukraine. It is necessary for the U.S. and EU to form a united front to meet these challenges because first, there is a risk that dangerous materials related to **WMD** will fall into the wrong hands; and second, the **spread of conflict** along those countries’ periphery could destabilize neighboring countries and provide **safe havens for terrorists** and other international criminal organizations. Likewise, in the Caucasus and Central Asia both sides share a stake in promoting political and economic transformation and integrating these states into larger communities such as the OSCE.

This would also minimize the risk of instability spreading and prevent those countries of becoming havens for international terrorists and criminals. Similarly, there is a common interest in integrating the Balkans politically and economically. Dealing with Iran, Iraq, Lebanon, and the Israeli-Palestinian conflict as well as other **political issues in the Mid**dle **East** are also of a great concern for both sides although the U.S. plays a dominant role in the region. Finally, US-European cooperation will be more effective in dealing with the **rising power of China** through engagement but also containment.

The post Iraq War realities have shown that it is no longer simply a question of adapting transatlantic institutions to new realities. The changing structure of relations between the U.S. and Europe implies that a new basis for the relationship must be found if transatlantic cooperation and partnership is to continue. The future course of relations will be **determined above all by U.S. policy towards Europe** and the Atlantic Alliance.

Wise policy can help forge a new, more enduring strategic partnership, through which the two sides of the Atlantic cooperate in meeting the many major challenges and opportunities of the evolving world together. But a policy that **takes Europe for granted** and routinely **ignores or** even **belittles Europe**an concerns, may force Europe to conclude that the costs of continued alliance outweigh its benefits.

#### AND, statutory codification of Obama’s policy solves. Failure allows the issue to quickly fester and undermine relations

**Dworkin 13** - Senior policy fellow @ European Council on Foreign Relations [Anthony Dworkin (Web editor of the Crimes of War Project which a site dedicated to raising public awareness of the laws of war), “Actually, drones worry Europe more than spying,” CNN’s Global Public Square, July 17th, 2013, 10:31 AM ET, pg. http://globalpublicsquare.blogs.cnn.com/2013/07/17/actually-drones-worry-europe-more-than-spying/

Relations between the United States and Europe hit a low point following [revelations](http://www.cnn.com/2013/06/30/world/europe/eu-nsa/index.html) that Washington was spying on European Union buildings and harvesting foreign email messages.

Behind the scenes, though, it is not data protection and surveillance that produces the most complications for the transatlantic intelligence relationship, but rather America's use of armed drones to kill terrorist suspects away from the battlefield. Incidents such as the [recent killing](http://www.reuters.com/article/2013/07/03/us-pakistan-drone-attack-idUSBRE96205820130703) of at least 17 people in Pakistan are therefore only likely to heighten European unease.

In public, European governments have displayed a curiously passive approach to American drone strikes, even as their number has escalated under Barack Obama’s presidency. Many Europeans believe that the majority of these strikes are unlawful, but their governments have maintained an uneasy silence on the issue. This is partly because of the uncomfortable fact that information provided by European intelligence services may have been used to identify some targets. It is also because of a reluctance to accuse a close ally of having violated international law. And it is partly because European countries have not worked out exactly what they think about the use of drones and how far they agree within the European Union on the question. Now, however, Europe’s muted stance on drone strikes looks likely to change.

Why? For one thing, many European countries are now trying to acquire armed drones themselves, and this gives them an incentive to spell out clearer rules for their use. More importantly, perhaps, Europeans have noticed that drones are proliferating rapidly, and that countries like China, Russia and Saudi Arabia are soon likely to possess them. There is a clear European interest in trying to establish some restrictive standards on drone use before it is too late. For all these reasons, many European countries are now conducting internal reviews of their policy on drones, and discussions are also likely to start at a pan-European level.

But as Europeans begin to articulate their policy on the use of drones, a bigger question looms. Can Europe and the United States come together to agree on when drone strikes are permissible? Until now, that would have seemed impossible. Since the September 11 attacks, the United States has based its counterterrorism operations on the claim that it is engaged in a worldwide armed conflict with al Qaeda and associated forces — an idea that President Obama inherited from President George W. Bush and has been kept as the basis for an expanded drone strike campaign. European countries have generally rejected this claim.

However, the changes to American policy that President Obama [announced](http://www.theatlantic.com/politics/archive/2013/05/what-mattered-in-obamas-speech-today-ending-the-open-ended-war-on-terror/276208/) in May could open the way to at least the possibility of a dialogue. Obama suggested that he anticipated a time in the not-too-distant future when the armed conflict against al Qaeda might come to an end. More substantially, he made clear that his administration was in the process of switching its policy so that, outside zones of hostilities, it would only use drone strikes against individuals who posed a continuing and imminent threat to the U.S. That is a more restrictive standard than the claim that any member of al Qaeda or an associated force could lawfully be killed with a drone strike at any time.

European countries might be more willing to accept an approach based on this kind of “self-defense” idea. However, there remain some big stumbling blocks.

First, a good deal about Obama’s new standards is still unclear. How does he define a “zone of hostilities,” where the new rules will not apply? And what is his understanding of an “imminent” threat? European countries are likely to interpret these key terms in a much narrower way than the United States.

Second, Obama’s new approach only applies as a policy choice. His more expansive legal claims remain in the background so that he is free to return to them if he wishes.

But if the United States is serious about working toward international standards on drone strikes, as Obama and his officials have sometimes suggested, then Europe is the obvious place to start. And there are a number of steps the administration could take to make an agreement with European countries more likely.

#### The plan is key – creates legal convergence

**Daskal 12** – Professor and Fellow in the Center on National Security and the Law @ Georgetown University Law Center [Jennifer C. Daskal (Former counsel to the Assistant Attorney General for National Security @ Department of Justice (DOJ). Served on the joint Attorney General and Secretary of Defense-led Detention Policy Task Force and provided legal advice on detention, surveillance, and interrogation practice. Former senior counterterrorism counsel @ Human Rights Watch. JD from Harvard University), “The Geography of the Battlefield: A Framework for Detention and Targeting Outside the 'Hot' Conflict Zone,” University of Pennsylvania Law Review, Vol. 161, May 2012

Second, limiting the exercise of these authorities outside zones of active hostilities better accommodates the demands of European allies, whose support the United States relies upon. As John Brennan has emphasized, “[t]he convergence of our legal views with those of our international partners matters. The effectiveness of our counterterrorism activities depends on the assistance and cooperation of our allies – who, in ways public and private, take great risks to aid us in this fight. But their participation must be consistent with their laws, including their interpretation of international law.” Key European partners have long viewed the conflict with al Qaeda as limited to the hot battlefield of Afghanistan and northwest Pakistan (and formerly Iraq). According to this view, use of force outside such areas is only permitted under a self-defense framework in response to those who pose an “imminent” threat, and law of war detentions are arguably prohibited altogether.98 By accepting self-imposed limits on its out-of-hot battlefield actions, the United States better positions itself to develop international consensus as to the rules that ought to apply.

## Plan

**The United States federal government should statutorily clarify that its authorization to use force is for zones of active hostilities**

#### The executive will comply. Obama is asking for the plan

**Brown 13** [Hayes Brown, "Obama Lays Out Plan To End The War Against Al Qaeda,” Think Progress, May 23, 2013 at 3:52 pm, pg . http://thinkprogress.org/security/2013/05/23/2055331/obama-aumf-repeal/

President Obama delivered a wide ranging speech on Thursday, laying out his vision for countering terrorism in his second term, including announcements on the use of drones, the future closure of the military prison at Guantanamo Bay, and the eventual end of the long war against al Qaeda.

Most importantly, Obama announced that he intends to work closely with Congress to “refine, and ultimately repeal” the 2001 Authorization for the Use of Military Force (AUMF). Passed in the aftermath of 9/11, the AUMF gave the president broad authority to carry out military action against “those nations, organizations, or persons” who “planned, authorized, committed, or aided” the 2001 attack.

“Groups like [Al Qaeda in Arabian Peninsula] must be dealt with, but in the years to come, not every collection of thugs that labels themselves al Qaeda will pose a credible threat to the United States,” Obama said. “Unless we discipline our thinking and our actions, we may be drawn into more wars we don’t need to fight, or continue to grant presidents unbound powers more suited for traditional armed conflicts between nation states.”

Congress recently began its first set of hearings into possible revisions of the AUMF, which is about to enter its twelfth year in force. Currently, there are competing proposals in the Senate and House to either repeal the authorization in its entirety or revise it to allow for the use of force beyond the perpetrators of 9/11. Obama, however, refused to go along with any broadening of the AUMF, saying he “will not sign laws designed to expand this mandate further.”

CAP expert Ken Gude hailed Obama’s commitment to repealing the AUMF as the “beginning of the end” of the war against al Qaeda. While remnants of al Qaeda and new groups remain threats, “the extraordinary military response that followed the attacks of 9/11 embodied in the 2001 Authorization to Use Military Force can now be wound down, the permanent war footing retired, and we can rebalance our efforts to fight terrorism to rely more on our effective and efficient law enforcement and intelligence agencies,” Gude told ThinkProgress.

In his speech today, Obama continued: “Our systematic effort to dismantle terrorist organizations must continue. But this war, like all wars, must end. That’s what history advises. That’s what our democracy demands.” The clear declaration builds upon previous statements from former members of Obama’s administration that the battle against al Qaeda cannot go on indefinitely.

That desire to eventually repeal the AUMF makes up the cornerstone of the counterterrorism strategy Obama laid out today. The current Obama administration approach to conducting targeting killing and other portions that strategy were only just recently codified, as Obama acknowledged in his remarks. In it, the use of drone strikes and other applications of force will be streamlined to a more limited set of targets, with a higher level of scrutiny applied when determining those targets, while a renewed focus on the other elements of preventing terrorism will be implemented.

#### Congress cabins executive military discretion.

**Huq 12** - Professor of Law @ University of Chicago [Aziz Z. Huq, “Review: Binding the Executive (by Law or by Politics),” University of Chicago Law Review, 79 U. Chi. L. Rev. 777, Spring 2012

B. The Executive Unbound paints an image of executive discretion almost or completely unbridled by law or coequal branch. But PV also concede that "the president can exert control only in certain [policy] areas" (p 59). n51 They give no account, however, of what limits a President's discretionary actions. To remedy that gap, this Section explores how the President has been and continues to be hemmed in by Congress and law. My aim here is not to present a comprehensive account of law as a constraining mechanism. Nor is my claim that law is always effective. Both as a practical matter and as a result of administrative law doctrine, the executive has considerable authority to leverage ambiguities in statutory text into warrants for discretionary action. n52 Rather, my more limited aspiration here is to  [\*791]  show that Congress and law do play a meaningful role in cabining executive discretion than The Executive Unbound credits. I start with Congress and then turn to the effect of statutory restrictions on the presidency.

Consider first a simple measure of Presidents' ability to obtain policy change: Do they obtain the policy changes they desire? Every President enters office with an agenda they wish to accomplish. n53 President Obama came into office, for example, promising health care reform, a cap-and-trade solution to climate change, and major immigration reform. n54 President George W. Bush came to the White House committed to educational reform, social security reform, and a new approach to energy issues. n55 One way of assessing presidential influence is by examining how such presidential agendas fare, and asking whether congressional obstruction or legal impediments - which could take the form of existing laws that preclude an executive policy change or an absence of statutory authority for desired executive action - is correlated with presidential failure. Such a correlation would be prima facie evidence that institutions and laws play some meaningful role in the production of constraints on executive discretion.

Both recent experience and long-term historical data suggest presidential agenda items are rarely achieved, and that legal or institutional impediments to White House aspirations are part of the reason. In both the last two presidencies, the White House obtained at least one item on its agenda - education for Bush and health care for Obama - but failed to secure others in Congress. Such limited success is not new. His famous first hundred days notwithstanding, Franklin Delano Roosevelt saw many of his "proposals for reconstruction [of government] ... rejected outright." n56 Even in the midst of economic crisis, Congress successfully resisted New Deal initiatives from the White House. This historical evidence suggests that the diminished success of presidential agendas cannot be  [\*792] ascribed solely to the narrowing scope of congressional attention in recent decades; it is an older phenomenon. Nevertheless, in more recent periods, presidential agendas have shrunk even more. President George W. Bush's legislative agenda was "half as large as Richard Nixon's first-term agenda in 1969-72, a third smaller than Ronald Reagan's first-term agenda in 1981-84, and a quarter smaller than his father's first-term agenda in 1989-92." n57 The White House not only cannot always get what it wants from Congress but has substantially downsized its policy ambitions.

Supplementing this evidence of presidential weakness are studies of the determinants of White House success on Capitol Hill. These find that "presidency-centered explanations" do little work. n58 Presidents' legislative agendas succeed not because of the intrinsic institutional characteristics of the executive branch, but rather as a consequence of favorable political conditions within the momentarily dominant legislative coalition. n59 Again, correlational evidence suggests that institutions and the legal frameworks making up the statutory status quo ante play a role in delimiting executive discretion.

But attention to the White House's legislative agenda may be misleading. Perhaps the dwindling of legislative agendas is offset by newly minted technologies of direct "presidential administration." n60 The original advocate of this governance strategy has conceded, however, that presidential administration is available only when "Congress has left [] power in presidential hands." n61 Where there is no plausible statutory or constitutional foundation for a White House agenda-item, or where there is a perceived need for additional congressional action in the form of new appropriations or the like, Presidents cannot act alone.

The notion of a legislatively constrained presidential agenda is consistent with two canonical political science accounts of the contemporary presidency. Richard Neustadt, perhaps the most influential presidential scholar of the twentieth century,  [\*793] encapsulated the Constitution's system as one of "separated institutions sharing powers" in which "a President will often be unable to obtain congressional action on his terms or even ... halt action he opposes." n62 Writing in 1990, Neustadt concluded that the President "still shares most of his authority with others and is no more free than formerly to rule by command." n63 Neustadt's finding of a weak presidency rested in part on his discernment of political constraints. But he also stressed "Congress and its key committees" as necessary partners in the production of policy. n64 Neustadt thus identified institutions, as much as public opinion, as impediments to the White House.

In harmony with Neustadt's view, Stephen Skowronek's magisterial survey of presidential leadership suggests Presidents are not free to ignore or sideline Congress. Skowronek points out that "it is not just that the presidency has gradually become more powerful and independent over the course of American history, but that the institutions and interests surrounding it have as well." n65 His complex argument (much simplified) situates presidential authority within a cyclical pattern of political "regime" creation, maintenance, and disintegration. n66 In this cycle, the presidency is primarily a destructive force. Chief executives affiliated with past regimes have fewer tools at their disposal than oppositional leaders who "come[] to power with a measure of independence from established commitments and can more easily justify the disruptions that attend the exercise of power." n67 Executive discretion, in this account, is a function of a President's location in the cycle of historical change. It is not a necessary attribute of the institution.

Skowronek also argues that Congress maintains and enforces prior regimes' policy commitments against presidential innovation. He finds congressional abdication to be "virtually unknown to the modern presidency." n68 To the contrary, Skowronek contends, Congress has become more effective over time. Thomas Jefferson in the early 1800s, working with an "organizationally inchoate and politically malleable" legislature, had greater discretion than Ronald  [\*794]  Reagan in the 1980s. n69 By President Reagan's time in office, the "governmental norms and institutional modalities" used to resist presidential initiatives had secured sufficient political capital to become resilient to presidential efforts at change. n70 Until then, political movements proposing greater presidential authority also tended to advocate "some new mechanisms designed to hold [presidential] powers to account." n71 Skowronek provides a useful corrective to the assumption that historical change occurs only at one end of Pennsylvania Avenue. Echoing Neustadt's analysis, his bottom line is that the contemporary executive remains "constrained by Congress" n72 in ways that meaningfully hinder achievement of presidential goals. n73

Nevertheless, neither Neustadt nor Skowronek articulate the precise role of law in congressional obstruction of presidential goals. Perhaps observed executive reticence is merely a result of political calculations, consistent with PV's core hypothesis. But the evidence that the limits on executive authority tend to arise when Congress or existing law preclude a discretionary act suggests that institutions and statutes do play a meaningful role. Such correlations do not, however, establish the precise mechanisms whereby laws and institutions impose frictions on the employment of executive discretion.

Alternatively, perhaps the Neustadt and Skowronek accounts can be explained solely in terms of Congress's negative veto in bicameralism and presentment, which is anticipated by the White House and so delimits the scope of presidential agendas. This would suggest that Congress's power is asymmetrical: it can block some  [\*795] executive initiatives but do little midstream to regulate the use of discretion powers already possessed by the presidency. Consistent with this interpretation, The Executive Unbound stresses the failure of framework laws passed after the Nixon presidency to regulate war and emergency powers (pp 86-87). n74 If the executive can so easily find work-arounds, PV explain, it follows that Congress also has less incentive to pass such laws. In the long term, the incentives for Congress to enact statutory limits on presidential authorities will accordingly atrophy.

There is some merit to this story. But in my view it again understates the observed effect of positive legal constraints on executive discretion. Recent scholarship, for example, has documented congressional influence on the shape of military policy via framework statutes. This work suggests Congress influences executive actions during military engagements through hearings and legislative proposals. n75 Consistent with this account, two legal scholars have recently offered a revisionist history of constitutional war powers in which "Congress has been an active participant in setting the terms of battle," in part because "congressional willingness to enact [] laws has only increased" over time. n76 In the last decade, Congress has often taken the initiative on national security, such as enacting new statutes on military commissions in 2006 and 2009. n77 Other recent landmark security reforms, such as a 2004  [\*796]  statute restructuring the intelligence community, n78 also had only lukewarm Oval Office support. n79 Measured against a baseline of threshold executive preferences then, Congress has achieved nontrivial successes in shaping national security policy and institutions through both legislated and nonlegislated actions even in the teeth of White House opposition. n80

The same point emerges more forcefully from a review of our "fiscal constitution." n81 Article I, § 8 of the Constitution vests Congress with power to "lay and collect Taxes" and to "borrow Money on the credit of the United States," while Article I, § 9 bars federal funds from being spent except "in Consequence of Appropriations made by Law." n82 Congress has enacted several framework statutes to effectuate the "powerful limitations" implicit in these clauses. n83 The resulting law prevents the President from repudiating past policy commitments (as Skowronek suggests) as well as imposing barriers to novel executive initiatives that want for statutory authorization. n84

Three statutes merit attention here. First, the Miscellaneous Receipts Act of 1849 n85 requires that all funds "received from customs, from the sales of public lands, and from all miscellaneous sources, for the use of the United States, shall be paid ... into the treasury of the  [\*797] United States." n86 It ensures that the executive cannot establish off-balance-sheet revenue streams as a basis for independent policy making. Second, the Anti-Deficiency Act, n87 which was first enacted in 1870 and then amended in 1906, n88 had the effect of cementing the principle of congressional appropriations control. n89 With civil and criminal sanctions, it prohibits "unfunded monetary liabilities beyond the amounts Congress has appropriated," and bars "the borrowing of funds by federal agencies ... in anticipation of future appropriations." n90 Finally, the Congressional Budget and Impoundment Control Act of 1974 n91 (Impoundment Act) channels presidential authority to decline to expend appropriated funds. n92 It responded to President Nixon's expansive use of impoundment. n93 Congress had no trouble rejecting Nixon's claims despite a long history of such impoundments. n94 While the Miscellaneous Receipts Act and the Anti-Deficiency Act appear to have succeeded, the Impoundment Act has a more mixed record. While the Supreme Court endorsed legislative constraints on presidential impoundment, n95 President Gerald Ford increased impoundments through creative interpretations of the law. n96 But two decades later, Congress concluded the executive had too little discretionary spending authority and expanded it by statute. n97

 [\*798]  Moreover, statutory regulation of the purse furnishes a tool for judicial influence over the executive. Judicial action in turn magnifies congressional influence. A recent study of taxation litigation finds evidence that the federal courts interpret fiscal laws in a more pro-government fashion during military engagements supported by both Congress and the White House than in the course of unilateral executive military entanglements. n98 Although the resulting effect is hard to quantify, the basic finding of the study suggests that fiscal statutes trench on executive discretion not only directly, but also indirectly via judicially created incentives to act only with legislative endorsement. n99

To be sure, a persistent difficulty in debates about congressional efficacy, and with some of the claims advanced in The Executive Unbound, is that it is unclear what baseline should be used to evaluate the outcomes of executive-congressional struggles. What counts, that is, as a "win" and for whom? What, for example, is an appropriate level of legislative control over expenditures? In the examples developed in this Part, I have underscored instances in which a law has been passed that a President disagrees with in substantial part, and where there are divergent legislative preferences reflected in the ultimate enactment. I do not mean to suggest, however, that there are not alternative ways of delineating a baseline for analysis. n100

In sum, there is strong evidence that law and lawmaking institutions have played a more robust role in delimiting the bounds of executive discretion over the federal sword and the federal purse than The Executive Unbound intimates. Congress in fact impedes presidential agendas. The White House in practice cannot use  [\*799] presidential administration as a perfect substitute. Legislation implementing congressional control of the purse is also a significant, if imperfect, tool of legislative influence on the ground. This is true even when Presidents influence the budgetary agenda n101 and agencies jawbone their legislative masters into new funding. n102 If Congress and statutory frameworks seem to have such nontrivial effects on the executive's choice set, this at minimum implies that the conditions in which law matters are more extensive than The Executive Unbound suggests and that an account of executive discretion that omits law and legal institutions will be incomplete.

## Global battlefield again

Unrestricted drone use causes nuclear war in the Caucuses

Clayton 12 (Nick Clayton, Worked in several publications, including the Washington Times the Asia Times and Washington Diplomat. He is currently the senior editor of Kanal PIK TV's English Service (a Russian-language channel), lived in the Caucuses for several years,10/23/2012, "Drone violence along Armenian-Azerbaijani border could lead to war", www.globalpost.com/dispatch/news/regions/europe/121022/drone-violence-along-armenian-azerbaijani-border-could-lead-war)

Armenia and Azerbaijan could soon be at war if drone proliferation on both sides of the border continues. In a region where a fragile peace holds over three frozen conflicts, the nations of the South Caucasus are buzzing with drones they use to probe one another’s defenses and spy on disputed territories. The region is also host to strategic oil and gas pipelines and a tangled web of alliances and precious resources that observers say threaten to quickly escalate the border skirmishes and airspace violations to a wider regional conflict triggered by Armenia and Azerbaijan that could potentially pull in Israel, Russia and Iran. To some extent, these countries are already being pulled towards conflict. Last September, Armenia shot down an Israeli-made Azerbaijani drone over Nagorno-Karabakh and the government claims that drones have been spotted ahead of recent incursions by Azerbaijani troops into Armenian-held territory. Richard Giragosian, director of the Regional Studies Center in Yerevan, said in a briefing that attacks this summer showed that Azerbaijan is eager to “play with its new toys” and its forces showed “impressive tactical and operational improvement.” The International Crisis Group warned that as the tit-for-tat incidents become more deadly, “there is a growing risk that the increasing frontline tensions could lead to an accidental war.” “Everyone is now saying that the war is coming. We know that it could start at any moment.” ~Grush Agbaryan, mayor of Voskepar With this in mind, the UN and the Organization for Security and Co-operation in Europe (OSCE) have long imposed a non-binding arms embargo on both countries, and both are under a de facto arms ban from the United States. But, according to the Stockholm International Peace Research Institute (SIPRI), this has not stopped Israel and Russia from selling to them. After fighting a bloody war in the early 1990s over the disputed territory of Nagorno-Karabakh, Armenia and Azerbaijan have been locked in a stalemate with an oft-violated ceasefire holding a tenuous peace between them. And drones are the latest addition to the battlefield. In March, Azerbaijan signed a $1.6 billion arms deal with Israel, which consisted largely of advanced drones and an air defense system. Through this and other deals, Azerbaijan is currently amassing a squadron of over 100 drones from all three of Israel’s top defense manufacturers. Armenia, meanwhile, employs only a small number of domestically produced models. Intelligence gathering is just one use for drones, which are also used to spot targets for artillery, and, if armed, strike targets themselves. Armenian and Azerbaijani forces routinely snipe and engage one another along the front, each typically blaming the other for violating the ceasefire. At least 60 people have been killed in ceasefire violations in the last two years, and the Brussels-based International Crisis Group claimed in a report published in February 2011 that the sporadic violence has claimed hundreds of lives. “Each (Armenia and Azerbaijan) is apparently using the clashes and the threat of a new war to pressure its opponent at the negotiations table, while also preparing for the possibility of a full-scale conflict in the event of a complete breakdown in the peace talks,” the report said. Alexander Iskandaryan, director of the Caucasus Institute in the Armenian capital, Yerevan, said that the arms buildup on both sides makes the situation more dangerous but also said that the clashes are calculated actions, with higher death tolls becoming a negotiating tactic. “This isn’t Somalia or Afghanistan. These aren’t independent units. The Armenian, Azerbaijani and Karabakh armed forces have a rigid chain of command so it’s not a question of a sergeant or a lieutenant randomly giving the order to open fire. These are absolutely synchronized political attacks,” Iskandaryan said. The deadliest recent uptick in violence along the Armenian-Azerbaijani border and the line of contact around Karabakh came in early June as US Secretary of State Hillary Clinton was on a visit to the region. While death tolls varied, at least two dozen soldiers were killed or wounded in a series of shootouts along the front. The year before, at least four Armenian soldiers were killed in an alleged border incursion by Azerbaijani troops one day after a peace summit between the Armenian, Azerbaijani and Russian presidents in St. Petersburg, Russia. “No one slept for two or three days [during the June skirmishes],” said Grush Agbaryan, the mayor of the border village of Voskepar for a total of 27 years off and on over the past three decades. “Everyone is now saying that the war is coming. We know that it could start at any moment." Azerbaijan refused to issue accreditation to GlobalPost’s correspondent to enter the country to report on the shootings and Azerbaijan’s military modernization. Flush with cash from energy exports, Azerbaijan has increased its annual defense budget from an estimated $160 million in 2003 to $3.6 billion in 2012. SIPRI said in a report that largely as a result of its blockbuster drone deal with Israel, Azerbaijan’s defense budget jumped 88 percent this year — the biggest military spending increase in the world. Israel has long used arms deals to gain strategic leverage over its rivals in the region. Although difficult to confirm, many security analysts believe Israel’s deals with Russia have played heavily into Moscow’s suspension of a series of contracts with Iran and Syria that would have provided them with more advanced air defense systems and fighter jets. Stephen Blank, a research professor at the United States Army War College, said that preventing arms supplies to Syria and Iran — particularly Russian S-300 air defense systems — has been among Israel’s top goals with the deals. “There’s always a quid pro quo,” Blank said. “Nobody sells arms just for cash.” In Azerbaijan in particular, Israel has traded its highly demanded drone technology for intelligence arrangements and covert footholds against Iran. In a January 2009 US diplomatic cable released by WikiLeaks, a US diplomat reported that in a closed-door conversation, Azerbaijani President Ilham Aliyev compared his country’s relationship with Israel to an iceberg — nine-tenths of it is below the surface. Although the Jewish state and Azerbaijan, a conservative Muslim country, may seem like an odd couple, the cable asserts, “Each country finds it easy to identify with the other’s geopolitical difficulties, and both rank Iran as an existential security threat.” Quarrels between Azerbaijan and Iran run the gamut of territorial, religious and geo-political disputes and Tehran has repeatedly threatened to “destroy” the country over its support for secular governance and NATO integration. In the end, “Israel’s main goal is to preserve Azerbaijan as an ally against Iran, a platform for reconnaissance of that country and as a market for military hardware,” the diplomatic cable reads. But, while these ties had indeed remained below the surface for most of the past decade, a series of leaks this year exposed the extent of their cooperation as Israel ramped up its covert war with the Islamic Republic. In February, the Times of London quoted a source the publication said was an active Mossad agent in Azerbaijan as saying the country was “ground zero for intelligence work.” This came amid accusations from Tehran that Azerbaijan had aided Israeli agents in assassinating an Iranian nuclear scientist in January. Then, just as Baku had begun to cool tensions with the Islamic Republic, Foreign Policy magazine published an article citing Washington intelligence officials who claimed that Israel had signed agreements to use Azerbaijani airfields as a part of a potential bombing campaign against Iran’s nuclear sites. Baku strongly denied the claims, but in September, Azerbaijani officials and military sources told Reuters that the country would figure in Israel’s contingencies for a potential attack against Iran. "Israel has a problem in that if it is going to bomb Iran, its nuclear sites, it lacks refueling," Rasim Musabayov, a member of the Azerbiajani parliamentary foreign relations committee told Reuters. “I think their plan includes some use of Azerbaijan access. We have (bases) fully equipped with modern navigation, anti-aircraft defenses and personnel trained by Americans and if necessary they can be used without any preparations." He went on to say that the drones Israel sold to Azerbaijan allow it to “indirectly watch what's happening in Iran.” According to SIPRI, Azerbaijan had acquired about 30 drones from Israeli firms Aeronautics Ltd. and Elbit Systems by the end of 2011, including at least 25 medium-sized Hermes-450 and Aerostar drones. In October 2011, Azerbaijan signed a deal to license and domestically produce an additional 60 Aerostar and Orbiter 2M drones. Its most recent purchase from Israel Aeronautics Industries (IAI) in March reportedly included 10 high altitude Heron-TP drones — the most advanced Israeli drone in service — according to Oxford Analytica. Collectively, these purchases have netted Azerbaijan 50 or more drones that are similar in class, size and capabilities to American Predator and Reaper-type drones, which are the workhorses of the United States’ campaign of drone strikes in Pakistan and Yemen. Although Israel may have sold the drones to Azerbaijan with Iran in mind, Baku has said publicly that it intends to use its new hardware to retake territory it lost to Armenia. So far, Azerbaijan’s drone fleet is not armed, but industry experts say the models it employs could carry munitions and be programmed to strike targets. Drones are a tempting tool to use in frozen conflicts, because, while their presence raises tensions, international law remains vague at best on the legality of using them. In 2008, several Georgian drones were shot down over its rebel region of Abkhazia. A UN investigation found that at least one of the drones was downed by a fighter jet from Russia, which maintained a peacekeeping presence in the territory. While it was ruled that Russia violated the terms of the ceasefire by entering aircraft into the conflict zone, Georgia also violated the ceasefire for sending the drone on a “military operation” into the conflict zone. The incident spiked tensions between Russia and Georgia, both of which saw it as evidence the other was preparing to attack. Three months later, they fought a brief, but destructive war that killed hundreds. The legality of drones in Nagorno-Karabakh is even less clear because the conflict was stopped in 1994 by a simple ceasefire that halted hostilities but did not stipulate a withdrawal of military forces from the area. Furthermore, analysts believe that all-out war between Armenia and Azerbaijan would be longer and more difficult to contain than the five-day Russian-Georgian conflict. While Russia was able to quickly rout the Georgian army with a much superior force, analysts say that Armenia and Azerbaijan are much more evenly matched and therefore the conflict would be prolonged and costly in lives and resources. Blank said that renewed war would be “a very catastrophic event” with “a recipe for a very quick escalation to the international level.” Armenia is militarily allied with Russia and hosts a base of 5,000 Russian troops on its territory. After the summer’s border clashes, Russia announced it was stepping up its patrols of Armenian airspace by 20 percent. Iran also supports Armenia and has important business ties in the country, which analysts say Tehran uses as a “proxy” to circumvent international sanctions. Blank said Israel has made a risky move by supplying Azerbaijan with drones and other high tech equipment, given the tenuous balance of power between the heavily fortified Armenian positions and the more numerous and technologically superior Azerbaijani forces. If ignited, he said, “[an Armenian-Azerbaijani war] will not be small. That’s the one thing I’m sure of.”

Largest and most likely impact

Blank 2k

(Stephen, Prof. Research at Strategic Studies Inst. @ US Army War College, “U.S. Military Engagement with Transcaucasia and Central Asia”, www.strategicstudiesinstitute.army.mil/pdffiles/pub113.pdf)

Washington’s burgeoning military-political-economic involvement seeks, inter alia, to demonstrate the U.S. ability to project military power even into this region or for that matter, into Ukraine where NATO recently held exercises that clearly originated as an anti-Russian scenario. Secretary of Defense William Cohen has discussed strengthening U.S.-Azerbaijani military cooperation and even training the Azerbaijani army, certainly alarming Armenia and Russia.69 And Washington is also training Georgia’s new Coast Guard. 70 However, Washington’s well-known ambivalence about committing force to Third World ethnopolitical conflicts suggests that U.S. military power will not be easily committed to saving its economic investment. But this ambivalence about committing forces and the dangerous situation,

 where Turkey is allied to Azerbaijan and Armenia is bound to Russia, create the potential for wider and more protracted regional conflicts among local forces. In that connection, Azerbaijan and Georgia’s growing efforts to secure NATO’s lasting involvement in the region, coupled with Russia’s determination to exclude other rivals, foster a polarization along very traditional lines.71 In 1993 Moscow even threatened World War III to deter Turkish intervention on behalf of Azerbaijan. Yet the new Russo-Armenian Treaty and Azeri-Turkish treaty suggest that Russia and Turkey **could be dragged into a confrontation to rescue their allies** from defeat. 72 Thus many of the conditions for conventional war or protracted ethnic conflict in which third parties intervene are present in the Transcaucasus. For example, many Third World conflicts generated by local structural factors have a great potential for unintended escalation. Big powers often feel obliged to rescue their lesser proteges and proxies. One or another big power may fail to grasp the other side’s stakes since interests here are not as clear as in Europe. Hence commitments involving the use of nuclear weapons to prevent a client’s defeat are not as well established or apparent. Clarity about the nature of the threat could prevent the kind of rapid and almost uncontrolled escalation we saw in 1993 when Turkish noises about intervening on behalf of Azerbaijan led Russian leaders to threaten a nuclear war in that case. 73 Precisely because Turkey is a NATO ally, Russian nuclear threats **could trigger a potential nuclear blow (**not a small possibility given the erratic nature of Russia’s declared nuclear strategies). The real threat of a Russian nuclear strike against Turkey to defend Moscow’s interests and forces in the Transcaucasus makes the danger of major war there higher than almost everywhere else. As Richard Betts has observed, The greatest danger lies in areas where (1) the potential for serious instability is high; (2) both superpowers perceive vital interests; (3) neither recognizes that the other’s perceived interest or commitment is as great as its own; (4) both have the capability to inject conventional forces; and, (5) neither has willing proxies capable of settling the situation.74 that preclude its easy attainment of regional hegemony. And even the perceptions of waning power are difficult to accept and translate into Russian policy. In many cases, Russia still has not truly or fully accepted how limited its capabilities for securing its vital interests are. 76 While this hardly means that Russia can succeed at will regionally, it does mean that for any regional balance, either on energy or other major security issues, to be realized, someone else must lend power to the smaller Caspian littoral states to anchor that balance. Whoever effects that balance must be willing to play a protracted and potentially even military role in the region for a long time and risk the kind of conflict which Betts described. There is little to suggest that the United States can or will play this role, yet that is what we are now attempting to do. This suggests that ultimately its bluff can be called. That is, Russia could sabotage many if not all of the forthcoming energy projects by relatively simple and tested means and there is not much we could do absent a strong and lasting regional commitment.

# 2AC

## Perm

#### The 1NC is not a reason not to endorse the 1AC. Voting aff in no way precludes rejecting the 1NC or even prioritizing the 1AC. Our argument is that the 1AC is a good thing. That is a reason we should win. We aren’t Stalin. Obviously that’s bad.

**Omission is not exclusion; NO discursive act can include everything; this doesn't mean we reject or marginalize these concerns**

Rorty, Professor of Comparative Literature @ Stanford, `02 (Richard, Peace Review, vol. 14, no. 2, p. 152-153)

I have no quarrel with Cornell's and pivak's claim that "what is missing in a literary text or historical narrative leaves its mark through the traces of its expulsion." For that seems simply to say that any text will presupospe the existence of people, things, and institutions that it hardly mentions. So the readers of a literary text will always be able to ask themselves questions such as: "Who prepared the sumptuous dinner the lovers enjoyed?" "How did they get the money to afford that meal?" The reader of a historical narrative will always be able to wonder about where the money to finance the war came from and about who got to decide whether the war would take place. "Expulsion," however, seems too pejorative a term for the fact that no text can answer **all possible questions** about its own background and its own presuppositions. Consider Captain Birch, the agent of the East Indian Company charged with persuading the Rani of Sirmur not to commit suicide. Spivak is not exactly "expelling" Captain Birch from her narrative by zeroing in on the Rani, even though she does not try to find out much about Birch's early days as a subaltern, nor about the feelings of pride or shame or exasperation he may have experienced in the course of his conversations with the Rani. In the case of Birch, Spivak does not try to "gently blow precarious ashes into their ghostly shape," nor does she speculate about the possible sublimity of his career. Nor should she. S.ivak has her own fish to and her own witness to bear just as Kipling had his when he spun tales of the humiliations to which newly arrived subalterns were subjected in the regimental messes of the Raj. So do all authors of literary texts and historical narratives, and such texts and narratives should not alwa s be read as disingenuous exercises in repression. They should be read as one version of a story that could have been told, and should be told, in many other ways.

## Framework

#### The plan is a good thing. That means we should win.

#### Framework. 9 minutes. Prerequisite engagement

#### Modest predictability is worth potential substantive tradeoff. The resolution creates space for relevant debate.

Toni M. MASSARO, Professor of Law, University of Florida, 89 [August, 1989, “Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?” *Michigan Law Review*, 87 Mich. L. Rev. 2099, Lexis]

Yet despite their acknowledgment that some ordering and rules are necessary, empathy proponents tend to approach the rule-of-law model as a villain. Moreover, they are hardly alone in their deep skepticism about the rule-of-law model. Most modern legal theorists question the value of procedural regularity when it denies substantive justice.52 Some even question the whole notion of justifying a legal decision by appealing to a rule of law, versus justifying the decision by reference to the facts of the case and the judges' own reason and expe-rience.53 I do not intend to enter this important jurisprudential de-bate, except to the limited extent that the "empathy" writings have suggested that the rule-of-law chills judges' empathic reactions. In this regard, I have several observations.

My first thought is that the rule-of-law model is only a model. If the term means absolute separation of legal decision and "politics," then it surely is both unrealistic and undesirable.54 But our actual statutory and decisional "rules" rarely mandate a particular (unempathetic) response. Most of our rules are fairly open-ended. "Relevance," "the best interests of the child," "undue hardship," "negligence," or "freedom of speech" - to name only a few legal concepts - hardly admit of precise definition or consistent, predictable application. Rather, they represent a weaker, but still constraining sense of the rule-of-law model. Most rules are guidelines that establish spheres of relevant conversation, not mathematical formulas.

Moreover, legal training in a common law system emphasizes the indeterminate nature of rules and the significance of even subtle variations in facts. Our legal tradition stresses an inductive method of discovering legal principles. We are taught to distinguish different "stories," to arrive at "law" through experience with many stories, and to revise that law as future experience requires. Much of the effort of most first-year law professors is, I believe, devoted to debunking popular lay myths about "law" as clean-cut answers, and to illuminate law as a dynamic body of policy determinations constrained by certain guiding principles.55

As a practical matter, therefore, our rules often are ambiguous and fluid standards that offer substantial room for varying interpretations. The interpreter, usually a judge, may consult several sources to aid in decisionmaking. One important source necessarily will be the judge's own experiences -including the experiences that seem to determine a person's empathic capacity. In fact, much ink has been spilled to illuminate that our stated "rules" often do not dictate or explain our legal results. Some writers even have argued that a rule of law may be, at times, nothing more than a post hoc rationalization or attempted legitimization of results that may be better explained by extralegal (including, but not necessarily limited to, emotional) responses to the facts, the litigants, or the litigants' lawyers,56 all of which may go un-stated. The opportunity for contextual and empathic decisionmaking therefore already is very much a part of our adjudicatory law, despite our commitment to the rule-of-law ideal.

Even when law is clear and relatively inflexible, however, it is not necessarily "unempathetic." The assumed antagonism of legality and empathy is belied by our experience in rape cases, to take one important example. In the past, judges construed the general, open-ended standard of "relevance" to include evidence about the alleged victim's prior sexual conduct, regardless of whether the conduct involved the defendant.57 The solution to this "empathy gap" was legislative action to make the law more specific - more formalized. Rape shield statutes were enacted that controlled judicial discretion and specifically defined relevance to exclude the prior sexual history of the woman, except in limited, justifiable situations.58 In this case, one can make a persuasive argument not only that the rule-of-law model does explain these later rulings, but also that obedience to that model resulted in a triumph for the human voice of the rape survivor. Without the rule, some judges likely would have continued to respond to other inclinations, and admit this testimony about rape survivors. The example thus shows that radical rule skepticism is inconsistent with at least some evidence of actual judicial behavior. It also suggests that the principle of legality is potentially most critical for people who are least understood by the decisionmakers - in this example, women - and hence most vulnerable to unempathetic ad hoc rulings.

A final observation is that the principle of legality reflects a deeply ingrained, perhaps inescapable, cultural instinct. We value some procedural regularity - "law for law's sake" - because it lends stasis and structure to our often chaotic lives. Even within our most intimate relationships, we both establish "rules," and expect the other party to follow them.59 Breach of these unspoken agreements can destroy the relationship and hurt us deeply, regardless of the wisdom or "substantive fairness" of a particular rule. Our agreements create expectations, and their consistent application fulfills the expectations. The modest predictability that this sort of "formalism" provides actually may encourage human relationships.60

#### Fiat is a tool not a trap. Even if we have no chance to cause the energy changes we wish, we should build momentum and support for these ideas.

Elizabeth **SHOVE** Sociology @ Lancaster **AND** Gordon **WALKER** Geography @ Lancaster **‘7** “CAUTION! Transitions ahead: politics, practice, and sustainable transition management” *Environment and Planning C* 39 (4)

For academic readers, our commentary argues for loosening the intellectual grip of ‘innovation studies’, for backing off from the nested, hierarchical multi-level model as the only model in town, and for exploring other social scientific, but also systemic theories of change. The more we think about the politics and practicalities of reflexive transition management, the more complex the process appears: for a policy audience, our words of caution could be read as an invitation to abandon the whole endeavour. If agency, predictability and legitimacy are as limited as we’ve suggested, this might be the only sensible conclusion.However, we are with Rip (2006) in recognising the value, productivity and everyday necessity of an ‘illusion of agency’, and of the working expectation that a difference can be made even in the face of so much evidence to the contrary. The outcomes of actions are unknowable, the system unsteerable and the effects of deliberate intervention inherently unpredictable and, ironically, it is this that sustains concepts of agency and management. As Rip argues ‘illusions are productive because they motivate action and repair work, and thus something (whatever) is achieved’ (Rip 2006: 94). Situated inside the systems they seek to influence, governance actors – and actors of other kinds as well - are part of the dynamics of change: even if they cannot steer from the outside they are necessary to processes within. This is, of course, also true of academic life. Here we are, busy critiquing and analysing transition management in the expectation that somebody somewhere is listening and maybe even taking notice. If we removed that illusion would we bother writing anything at all? Maybe we need such fictions to keep us going, and maybe – fiction or no - somewhere along the line something really does happen, but not in ways that we can anticipate or know.

#### Policy focus is useful to actualize political change.

John G **GUNNELL** Political Science @ SUNY Albany **’98** *Politeia* “Speaking politically: politics and the academic intellectual in the United States”(Winter 1998) http://www.unisa.ac.za/default.asp?Cmd=ViewContent&ContentID=11579&P\_XSLFile=unisa/accessibility.xsl

POLITICAL THEORY AS A METAPRACTICE We often fail to recognise how much contemporary political theory bears the genetic imprint of its nineteenth-century origins. Political science and political theory in the United States originated as a surrogate for religion and moral philosophy, but what scholars have failed to figure out is exactly how this academic community can have practical significance. Michael Walzer, for example, has advanced the idea of the theorist as a `connected critic' who, while seeking necessary `critical distance', enters the `mainstream' and pursues criticism as `interpretation' and `opposition' and seeks to mediate between `specialists and commoners' or `elite and mass' (1987; 1988). Walzer acknowledges the conflict between the claim of philosophy to `objective truths' and the authority of the political community but, as with so many conceptual solutions, he fails to situate this image. None of Walzer's many historical examples, from the Hebrew prophets to Michel **Foucault**, touch directly upon the circumstances of **contemporary institutionalised academic metapractices.** Charles Lindblom has grappled intensively with the problem of whether social science can provide `usable knowledge' (Cohen and Lindblom 1979) and how social scientific inquiry can contribute to social change (1990), with what might be called the problem of relating knowing about to knowing how, but in the end, the issue seems to come down to the place and role of the university in contemporary society. Russell Jacoby has argued that the American university has come to function as a sort of `brain drain' which has attracted but also absorbed and neutralised the potential public intellectual, particularly on the Left (1988). This is a provocative claim, but it is based on a romanticised image of the existence and impact of public intellectuals in American political life. Thomas Bender, for example, has more carefully explored the impact of the modern university on the participation of academics in public life (1993). Those attracted to the university seldom really had a stomach for political life and dirty hands. Jacoby's more recent analysis, in The Chronicle of Higher Education, probably hits close to the mark. He suggests that the university is at once politicised and apolitical (1996). Academicians take positions on a variety of political and moral issues but in a universe and language that is quite **disconnected from practical politics**. In the academy there is a kind of virtual politics represented in discussions of feminism, liberalism, citizen identity and the like, but this seldom reaches the political world. Allan Bloom's claim, and lament, that Leftist ideology has taken over the university assumes that the university (1988) is a staging zone for political education, but this would be difficult to sustain empirically. And despite abstractly voiced concerns about, and attestations to, political relevance, most scholarly activity is generated and propelled by academic concerns and professionalism. A dominant theme in many humanistic fields such as **literary criticism is that they are**, in one way or another, **a form of political action** or that they can exercise significant influence on public life (Lentrecchia 1983; Norris 1985). Most of these claims are advanced by individuals who fancy themselves **radical** and **oppositional thinkers**. At the same time conservatives, such as Bloom, Roger Kimball (1990), Dinesh D'Sousa (1991), Martin Anderson (1992) and Lynne Cheney (1995), protest the influence of these individuals in the American academy and warn of their corrosive impact on public life and morals. What these commentators have in common, however, is the belief that what takes place in the university really has consequences, but specifying, or determining, the exact nature of these consequences is another matter. Claims, such as those of Isaac and myself, about the alienation of political theory from politics as well as arguments, such as Jacoby's, about the apolitical character of the academy are countered in a number of ways. One response is to point to what is sometimes called the `cross-over' phenomenon, that is, instances of academics entering political life or politicians moving to the academy, but this fails to take account of what the metapractical dream has been all about, that is, to have authority over practice without joining it. And it has other difficulties attached to it. While `crossover' may seem intuitively significant - cases like those of Woodrow Wilson, Henry Kissinger, Hubert Humphrey in one direction, and those of Jimmy Carter and similar instances in the other direction -- these are exceptions that do not prove the rule. What these classic cases, as well as instances of Straussians joining the Reagan and Bush administration or the influence of communitarian liberals and academic advocates of strong democracy in the Clinton White House, tell us about the general relationship between political theory and politics is that for the most part these realms are actually quite disparate. They represent more choices between vocations than articulation. We note these incidents because they are so unusual, not because they represent the manner in which political theorists are characteristically involved in politics. And even though we might wish to think that these are examples of theory leading practice, they probably are closer to instances of practice using theory. Another line of argument is based on the `trickle-down' hypothesis that the university can and does play, through education and other processes of cultural diffusion, a major role in shaping the public consciousness. Some also subscribe to the view that there are many individual theorists who are actually talking about politics and confronting pressing political problems, both by dealing with the philosophical dimension of these issues and by speaking to and for various concrete and sometimes marginalised constituencies. And there is the further claim that many do not simply give at the office but take their work home and through their individual efforts carry it into the relevant communities. While these are interesting theses, they remain largely at the level of professional folklore. To the extent that they can be demonstrated, they may indicate something about a few individuals but do not tell us very much about the general structural relationship between political theory and politics. Although it would be interesting to know if and to what extent and in what manner academic discourse does reverberate in the world of social practices, claims about such influence remain largely matters of **faith, rhetoric and metapractical fantasy**. There is, however, a more significant point. In instances as diverse as nineteenth-century social science, various images of political science as a policy analysis, critical theory, and Wolin's account of political theory as a vocation, the vision involved transcending the vagaries and unpredictability of individual action and establishing a professional cadre as an institutional social force that would carry authority and inform practice on a systematic basis. What received short-shrift in Isaac's analysis, however, was a consideration of whether political theory actually had anything to say about the events of 1989. I happened to be in Berlin, at an academic conference dealing with the historical origins of modern social science, the day that the `wall' came down. It was a profoundly moving event and, as usual, theorists were in awe at being so proximate to actual politics. What was most striking, however, was the general lack of any sense of the imminence of the event and the inability to provide more that the most mundane explanation of its occurrence. I remember asking an East German border guard, who was being plied with champagne and roses, what he thought of it all, and his answer was much the same as that of my colleagues: `Rationalitat hat gesieget.' In the recent NOMOS volume on `theory and practice', (Shapiro and DeCew 1995) there is still a failure to recognise that the problem of the relationship of metapractices to their object is less a universal with various manifestations than a category for subsuming historically situated issues that have a certain family resemblance. `Theory' is used generically to encompass everyone from Aristotle to Rawls, and practice often appears as an abstract and equally undifferentiated datum. There is scant attention either to the situation of the academician, who for the most part, either explicitly or implicitly, is the principal reference for `theory', or to the particularities of politics and other practices. Here philosophers embrace positions such as `critical race theory', talk about the environment and claim that justice as fairness demands the use of solar technology, assess the quality of life in developing countries, and make a variety of claims which suggest that they somehow have a voice in the matters they discuss, but such **metapractical discourse is quite different from talking to and in politics**. There seems to be the assumption, as one contributor put it, that `political theory is simply conscientious civic conversation without a deadline'. Finally, and maybe most significant, there is the seldom confronted issue of justifying the very idea of theoretical intervention when there is a simultaneous commitment to democracy. There is a presumption that although such intervention may be difficult to achieve, it is, as Isaac implies, in principle, desirable, but the claim of theory to epistemic and moral privilege and to some special form of political authority is not easily reconciled with an image of democratic deliberation. It is, in the end, difficult to say what ethical imperatives should govern the practice of academic political theory and what constitutes authenticity in this enterprise, but maybe the greatest ethical lapse is not the failure to speak to or about certain events or address certain normative issues but rather the refusal to come to terms with the actual situation and character of theoretical practice. There is a persistent, but often unreflective, assumption that academicians, by simply doing what comes naturally, that is, **practising academic virtuosity**, are somehow acting in other spheres - politics, moral discourse, or the pursuit of human emancipation. The **danger of** such **false consciousness**, however, is something that is **ever present** in the very nature of metapractices which both long to return to their origins and yearn for authority over the universe from which they sprung. Much of the talk about political theorists speaking politically represents little more than the discursive residue of **unrequited hope**.

**Debate jargon is good – provides a role in understanding society's problem**

**Muir, 93** – Department of Communications at George Mason

(Star A., “A Defense of the Ethics of Contemporary Debate,” Philosophy and Rhetoric, Vol. 26, No. 4. Gale Academic Onefile)

Even the specialized jargon required to play the game successfully has benefits in terms of analyzing and understanding society's problems. Consider the terminology of the "disadvantage" against the affirmative's plan: There is a "link" between the plan and some effect, or "impact"; the link can be actions that push us over some "threshold" to an impact, or it can be a "linear" relationship where each increase causes an increase in the impact; the link from the affirmative plan to the impact must be "unique," in that the plan itself is largely responsible for the impact; the affirmative may argue a "turnaround" to the disadvantage, claiming it as an advantage for the plan. Such specialized jargon may separate debate talk from other types of discourse, but the ideas represented here are also significant and useful for analyzing the relative desirability of public policies. There really are threshold and brink issues in evaluating public policies. Though listening to debaters talk is somewhat disconcerting for a lay person, familiarity with these concepts is an essential means of connecting the research they do with the evaluation of options confronting citizens and decision makers in political and social contexts. This familiarity is directly related to the motivation and the ability to get involved in issues and controversies of public importance.

#### Imagining governmental change helps expand what is politically possible. Democratic societies require guidelines for political hope.

Melissa **LANE** Politics @ Princeton **’11** “Constraint, Freedom, and Exemplar: history and theory without teleology” in *Political Philosophy versus History?* Eds. Floyd & Stears p. 135-136

Pettit's theory may even be said to have functioned as a blueprint for Zapatero's government. This is a term which has been given a bad name by those like Burke and de Maistre, followed by Hayek and Popper, who attacked any idea that society could be remade from head to toe in accordance with a rational plan. The idea of the 'blueprint' became implicated in this rejected rationalism, precisely as part of a conception of social engineering. But social engineering, in a less totalising version, is an inherent part of democratic politics. Political manifestos are, in parliamentary democracies, precisely blueprints. A blueprint is, after all, a practical instrument: it is not the architect's dream-vision, one which might have been sketched without any regard for practicalities, but rather precisely the tool which translates a vision into constructive engineering specifications so that people can assess the value and feasibility of their various proposals as a practical and interrelated whole.13 Blueprints will reveal very quickly whether the sides of a building don't join up, or that the loadbearing pillars are too slender. Those are useful engineering virtues; that is why, more prosaically, manifesto commitments have to be casted. At the same time, a blueprint may have the virtues of a dramatically new vision: it can translate such a vision into feasible and evaluable terms. The point here is that history is not the only possible practical guide for political agents. Normative political theory - even issuing in the wrongly despised blueprints - can be a valuable guide in particular for elected politicians. (Administrative policy-makers have less autonomy and are generally more sensitive to, and constrained by, existing public opinion.) This is because theorists and elected politicians alike should sometimes dream big, expanding the horizon of what is taken to be possible. The prevailing social imaginary can sometimes be changed by a cascade of actions and reactions set off by theoretical provocation.14 Such visionary activity should not be wilfully disdainful of history, but may learn different lessons from it than conventional wisdom teaches, and may be inspired and guided more by moral principles (such as those embodied in a normative political theory) than by history directly. Visionaries informed by normative political theory may sometimes, at least, outflank historically bound pessimists in the forum of political action.

#### Giving up on connecting to conventional democratic institutions creates a higher level of cooptation and complacency.

**Lobel 07** (Orly Lobel, Assistant Professor of Law, University of San Diego, THE PARADOX OF EXTRALEGAL ACTIVISM: CRITICAL LEGAL CONSCIOUSNESS AND TRANSFORMATIVE POLITICS, Harvard Law Review, 2007, Vol. 120)

Both the practical failures and the fallacy of rigid boundaries generated by extralegal activism rhetoric permit us to broaden our inquiry to the underlying assumptions of current proposals regarding transformative politics — that is, attempts to produce meaningful changes in the political and socioeconomic landscapes. The suggested alternatives produce a new image of social and political action. This vision rejects a shared theory of social reform, rejects formal programmatic agendas, and embraces a multiplicity of forms and practices. Thus, it is described in such terms as a plan of no plan,211 “a project of pro- jects,”212 “anti-theory theory,”213 politics rather than goals,214 presence rather than power,215 “practice over theory,”216 and chaos and openness over order and formality. As a result, the contemporary message rarely includes a comprehensive vision of common social claims, but rather engages in the description of fragmented efforts. As Professor Joel Handler argues, the commonality of struggle and social vision that existed during the civil rights movement has disappeared.217 There is no unifying discourse or set of values, but rather an aversion to any metanarrative and a resignation from theory. Professor Handler warns that this move away from grand narratives is self-defeating precisely because only certain parts of the political spectrum have accepted this new stance: “[T]he opposition is not playing that game . . . . [E]veryone else is operating as if there were Grand Narratives . . . .”218 Intertwined with the resignation from law and policy, the new bromide of “neither left nor right” has become axiomatic only for some.219 The contemporary critical legal consciousness informs the scholarship of those who are interested in progressive social activism, but less so that of those who are interested, for example, in a more competitive securities market. Indeed, an interesting recent development has been the rise of “conservative public interest lawyer[ing].”220 Although “public interest law” was originally associated exclusively with liberal projects, in the past three decades conservative advocacy groups have rapidly grown both in number and in their vigorous use of traditional legal strategies to promote their causes.221 This growth in conservative advocacy is particularly salient in juxtaposition to the decline of traditional progressive advocacy. Most recently, some thinkers have even suggested that there may be “something inherent in the left’s conception of social change — focused as it is on participation and empowerment — that produces a unique distrust of legal expertise.”222 Once again, this conclusion reveals flaws parallel to the original disenchantment with legal reform. Although the new extralegal frames present themselves as apt alternatives to legal reform models and as capable of producing significant changes to the social map, in practice they generate very limited improvement in existing social arrangements. Most strikingly, the cooptation effect here can be explained in terms of the most profound risk of the typology — that of legitimation. The common pattern of extralegal scholarship is to describe an inherent instability in dominant structures by pointing, for example, to grassroots strategies,223 and then to assume that specific instances of counterhegemonic activities translate into a more complete transformation. This celebration of multiple micro-resistances seems to rely on an aggregate approach — an idea that the multiplication of practices will evolve into something substantial. In fact, the myth of engagement obscures the actual lack of change being produced, while the broader pattern of equating extralegal activism with social reform produces a false belief in the potential of change. There are few instances of meaningful reordering of social and economic arrangements and macro-redistribution. Scholars write about decoding what is really happening, as though the scholarly narrative has the power to unpack more than the actual conventional experience will admit.224 Unrelated efforts become related and part of a whole through mere reframing. At the same time, the elephant in the room — the rising level of economic inequality — is left unaddressed and comes to be understood as natural and inevitable.225 This is precisely the problematic process that critical theorists decry as losers’ self-mystification, through which marginalized groups come to see systemic losses as the product of their own actions and thereby begin to focus on minor achievements as representing the boundaries of their willed reality. The explorations of micro-instances of activism are often fundamentally performative, obscuring the distance between the descriptive and the prescriptive. The manifestations of extralegal activism — the law and organizing model; the proliferation of informal, soft norms and norm-generating actors; and the celebrated, separate nongovernmental sphere of action — all produce a fantasy that change can be brought about through small-scale, decentralized transformation. The emphasis is local, but the locality is described as a microcosm of the whole and the audience is national and global. In the context of the humanities, Professor Carol Greenhouse poses a comparable challenge to ethnographic studies from the 1990s, which utilized the genres of narrative and community studies, the latter including works on American cities and neighborhoods in trouble.226 The aspiration of these genres was that each individual story could translate into a “time of the nation” body of knowledge and motivation.227 In contemporary legal thought, a corresponding gap opens between the local scale and the larger, translocal one. In reality, although there has been a recent proliferation of associations and grassroots groups, few new local-statenational federations have emerged in the United States since the 1960s and 1970s, and many of the existing voluntary federations that flourished in the mid-twentieth century are in decline.228 There is, therefore, an absence of links between the local and the national, an absent intermediate public sphere, which has been termed “the missing middle” by Professor Theda Skocpol.229 New social movements have for the most part failed in sustaining coalitions or producing significant institutional change through grassroots activism. Professor Handler concludes that this failure is due in part to the ideas of contingency, pluralism, and localism that are so embedded in current activism.230 **Is the focus on small-scale dynamics simply an evasion of the need to engage in broader substantive debate**? It is important for next-generation progressive legal scholars, while maintaining a critical legal consciousness, to recognize that not all extralegal associational life is transformative. We must differentiate, for example, between inward-looking groups, which tend to be self- regarding and depoliticized, and social movements that participate in political activities, engage the public debate, and aim to challenge and reform existing realities.231 We must differentiate between professional associations and more inclusive forms of institutions that act as trustees for larger segments of the community.232 As described above, extralegal activism tends to operate on a more divided and hence a smaller scale than earlier social movements, which had national reform agendas. Consequently, within critical discourse there is a need to recognize the limited capacity of small-scale action. We should question the narrative that imagines consciousness-raising as directly translating into action and action as directly translating into change. Certainly not every cultural description is political. Indeed, it is questionable whether forms of activism that are opposed to programmatic reconstruction of a social agenda should even be understood as social movements. In fact, when groups are situated in opposition to any form of institutionalized power, they may be simply mirroring what they are fighting against and merely producing moot activism that settles for what seems possible within the narrow space that is left in a rising convergence of ideologies. The original vision is consequently coopted, and contemporary discontent is legitimated through a process of self-mystification.

#### Solidarity strategies should reform state institutions – rejection of institutional change undermines democratic rights.

Martha **McCLUSKEY** William J. Magavern Faculty Scholar and Professor @ SUNY Buffalo **‘7** Book Review: Thinking with Wolves: Left Legal Theory After the Right's Rise 54 Buffalo L. Rev. 1191 L/N

More generally, Left Legalism's examples of the failures of liberal law reforms may be evidence of the weakness of left politics as much as the weakness of left legalism. The equal treatment/special treatment dilemma that confronts feminist and anti-racist law reforms, for example, is not a natural (or supernatural) feature of equality law but instead is the product of a particular political strategy addressing inequality as a problem of individual irrational prejudice against "difference" rather than a problem of systemic subordination that produces, institutionalizes, and rationalizes certain "differences" as really and reasonably inferior. 376 Outside the United States, in some countries where equality movements - and legal scholars - have more widely adopted a left-leaning analysis of structural subordination, equality law has gone further to incorporate [\*1275] a disparate impact standard that can require the government to question and change this production and rationalization of difference. 377 An impact-based equality rule can require the government to respond to "differences" of race, gender, and disability (for instance) not as "special" needs of a particular identity group but as normal and equal public benefits. 378 Indeed, anti-legalism among non-conservative legal scholars may reflect and reinforce not gutsy left politics but left political cowardice (or capitulation to right politics) given a political context in which advocating left law is less likely to be rewarded than challenging left law. 379 It seems likely that non-conservative scholars will do more to advance right rather than left politics if, for example, they attribute liberal law's inadequacies in promoting racial justice to legalism in general rather than to particular legal rules (and particular political movements) that presume and protect white privilege. 380 [\*1276] Finally, in amplifying the longstanding CLS (and neoliberal) argument that legal rights do not trump political interests, Left Legalism risks naturalizing political interests as somehow more independent, authentic, and determinate than legal rights. A critical left analysis should understand that those interests are not fixed, but are dynamically shaped by a variety of social and political factors including the law. From a critical perspective, judging the social and political impact of those interests is every bit as convoluted, unpredictable, and ideological as judging the impact of legal rights. Kelman and Lester, for example, mythologize - and depoliticize - the process of formulating and contesting political interests when they complain that "left multiculturalists" threaten irrational and chaotic distributive politics by replacing careful measurement and balancing of "genuine" costs and benefits with ideological claims to "rights" based on disablity status. 381 A Foucauldian insight that rights produce as well as reflect - or mask - interests and identities challenges not just the natural superiority and authenticity of legalistic rights but also the natural superiority and authenticity of political interests. In contrast to Kelman and Lester's analysis, for instance, sociolegal scholars David Engel and Frank Munger show the rich interdependence of legal rights, personal identity, and political interests in their study of persons negotiating identities as learning disabled. 382 Engel and Munger conclude that even when formal rights-based claims are rarely invoked or weakly enforced, a liberal civil rights framework can serve to dramatically and meaningfully reconstruct ideas about individual capabilities and interests. 383 [\*1277] Left law reform advocates, like those on the right, have often effectively used rights-based advocacy to change political interests and identification in circumstances where their political strength is insufficient to meaningfully secure or enforce those legal rights. For example, Martha Davis describes how welfare rights advocates have used international human rights claims to inspire, inform, and mobilize new political activism and coalitions even while recognizing that international law will have little or no binding impact on U.S. welfare policy in the near future. 384 Similarly, right-wing campaigns against abortion, welfare, affirmative action, or gay rights, for example, may often be directed less at changing specific laws on these "cultural" issues and more at reshaping politics so that many working and middle class Americans sacrifice their economic interests (whether willingly or unwittingly) out of hopes or fears that more symbolic forms of status will offer better security. 385 2. Adding a Left Critique of Extra-Legal Innocence. Second, Left Legalism needs to go further to strip law's outside of its guise of essentialized innocence. Both left and right critics are right that law's power cannot be neatly contained by formal rules of law (liberal law reforms have unintended consequences that may be harmful and illiberal). But the same is true of any supposedly non-legal exercise of power, regardless of any assumed connection to market, divinity, social tradition, or radical transgression of any of the foregoing. That means that eschewing legalism is as illusory a route to moral (or anti-moralist) purity as embracing legalism. Left Legalism [book] tends to drift from its critical recognition that all law involves potentially dangerous power toward a wistful desire for liberalism's neutrality. The contributors [\*1278] often seem seduced by the neoliberal fantasy that an unregulated space of free, independent, and authentic individual subjectivity awaits those who reject liberal rights. 386 When Halley criticizes feminist law reforms for engaging in moral regulation, she admits that this complaint "makes one sound like a libertarian." 387 Similarly, when Ford criticizes left and liberal "cultural rights" for exercising moral and political power, he tends to avoid the harder questions of which moral and political power is most justified. For example, he rejects a construction of racial equality that would include a right of workers to wear braided hair out of fear that such a right would constrain individuals' ability to define their own cultural identity. 388 "Private institutions, in marked contrast to the state, with a very few exceptions, do not even attempt to provide such authoritative censorship and approval. When and if they do, they usually are met with equally legitimate competitors who censor and approve of different things." 389 From a critical perspective, state power and legal rights pervade these supposedly "private" institutions. And from a left perspective, the supposedly "private" spheres of workplace, church, family, plantation, housing market, health care system, and mass media - for just a few examples - historically have been deeply enmeshed in, constrained by, and productive of the same historical inequalities and coercive powers that pervade the state. If courts deny cultural rights to black workers who choose to wear cornrows, to consider Ford's example, they will likely recognize and enforce not individual freedom to define identity, but employers' rights, for example, to fire a white woman whose make-up is deemed insufficiently "feminine," or to fire a black woman whose un-straightened hair is deemed insufficiently "professional." And without unblinking faith in a fundamentally fair market, it seems [\*1279] unlikely that those "unfeminine" and "unprofessional" women will readily find an equal number of similarly rewarding jobs where employers are equally eager to reward their particular gender and race expressions and to penalize others for instance, white men without make-up or white men who don't alter their naturally straight, balding, or graying hair. Taking seriously the capacity of legal rights to produce as well as to protect individuals and their interests, left activism and intellectualism should have all the more reason to engage, rather than cede, rights-based law reform. Wendy Brown's chapter on rights affirms the paradoxical necessity and danger of feminist rights, but then tends to imagine that the productive capacity of rights will necessarily threaten left ideals. 390 Why does Brown see a problem, rather than a possibility, when she observes that left visions of rights based on intersecting identities will bring into being new political subjects? 391 When welfare mothers, for instance, seize on human rights discourse to build legitimacy as political actors participating in a global quest for political, racial, gender, and economic justice, their new identity - however risky and regulatory - might still well be a welcome change from the regulatory impact of an anti-rights identity as needy or greedy societal dependents, sexual deviants, or market failures. Finally, when Brown and Halley criticize "governance legalism" for implicating left politics in potentially coercive power, they seem to refuse left power as much as left statism. Commenting on the example of AIDS activists who sought participation in Food and Drug Administration procedures, they argue that, "this kind of left legalism seeks to involve the left directly in governance: once you win, you are the state." 392 They are right to warn that any particular left regulatory effort should be scrutinized for anti-left impact, and that in a society of systematic [\*1280] subordination, few regulatory reforms will be free of political constraints that make liberation for some contingent on oppression of other subordinated groups. Yet they ignore that the same problematic effects equally challenge any left abstention from (or resistance to) state governance, unless we fall back on fundamentalist faith in an autonomous private sphere inherently and naturally safe from oppressive power (as do right-wing market or moral fundamentalists).

From a critical perspective that refuses such fundamentalism, the hard and urgent question is not whether or not to be "the state," but which state structures, governed in whose interests, we (and others) will have the risk and responsibility of being part of and being subjected to. Guerrilla theater by Act-Up activists may feel more liberating, transgressive, and comfortable to some U.S. activists and scholars than tedious, marginalized, and morally messy involvement in federal bureaucracy. But those feelings provide no guarantee of left moral superiority or political effectiveness in a time when pharmaceutical companies and right-wing Christians are happy to seize state authority to advance their interests at the expense of millions of lives. 393 As the "stupidest housemaid" concludes in Paul Butler's rewriting of the classic jurisprudential story of the Spelunkian Explorer, surrendering the power to invoke the rule of law is even stupider and more pitiful than believing in the rule of law. 394