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#### Iran strategy working—Congressional rebuke to command in chief flexibility spoils negotiations—results in Iran strikes and prolif

Joel Rubin, Politico, 10/20/13, Iran’s diplomatic thaw with the West, dyn.politico.com/printstory.cfm?uuid=FBFABC3B-C9A8-47F8-A9AC-BC886BCE0552

Congratulations, Congress. Your Iran strategy is working. Now what?

The diplomatic thaw between Iran and the West is advancing, and faster than most of us had imagined. This is the result of years of painstaking efforts by the Obama administration and lawmakers to pressure the Islamic Republic into deciding whether it’s in Iran’s interest to pursue diplomacy or to continue suffering under crushing economic sanctions and international isolation.

Now that Iran has made a clear decision to engage seriously in diplomatic negotiations with the West over its nuclear program, its intentions should be tested. Members of Congress should be open to seizing this opportunity by making strategic decisions on sanctions policy.

The economic sanctions against Iran that are in place have damaged the Iranian economy. A credible military threat — with more than 40,000 American troops in the Persian Gulf — stands on alert. International inspectors are closely monitoring Iran’s every nuclear move. Iran has not yet made a decision to build a bomb, does not have enough medium-enriched uranium to convert to weapons grade material for one bomb and has neither a workable nuclear warhead nor a means to deliver it at long ranges. If Iran were to make a dash for a bomb, the U.S. intelligence community estimates that it would take roughly one to two years to do so.

Congress, with its power to authorize sanctions relief, plays a crucial role in deciding whether a deal will be achieved. This gives Congress the opportunity to be a partner in what could potentially be a stunning success in advancing our country’s security interests without firing a shot.

Consider the alternative: If the administration negotiates a deal that Congress blocks, and Congress becomes a spoiler, Iran will most likely continue to accelerate its nuclear program. Then lawmakers would be left with a stark choice: either acquiesce to an unconstrained Iranian nuclear program and a potential Iranian bomb or endorse the use of force to attempt to stop it. Most military experts rate the odds of a successful bombing campaign low and worry that failed strikes would push Iran to get the bomb outright.

Iran and the United States need a political solution to this conflict. Now is the time to test the Iranians at the negotiating table, not push them away.

Congress is also being tested, but the conventional wisdom holds that lawmakers won’t show the flexibility required to make a deal. Such thinking misses the political volatility just beneath the surface: Americans simply don’t support another war in the Middle East, as the congressional debate over Syria made crystal clear. Would they back much riskier military action in Iran?

Fortunately for Congress, President Barack Obama was agile enough to seize the diplomatic route and begin to eliminate Syria’s chemical weapons. These results are advancing U.S. security interests. And members of Congress breathed a collective sigh of relief as well as they didn’t have to either vote to undercut the commander in chief on a security issue or stick a finger in the eye of their constituents.

The same can happen on Iran. By pursuing a deal, Obama can provide Congress with an escape hatch, where it won’t have to end up supporting unpopular military action or have to explain to its constituents why it failed to block an Iranian bomb. A verifiable deal with Iran that would prevent it from acquiring a nuclear weapon would require sanctions relief from Congress. But that’s an opportunity to claim victory, not a burden. And it would make Congress a partner with the president on a core security issue. Congress could then say, with legitimacy, that its tough sanctions on Iran worked — and did so without starting another unpopular American war in the Middle East.

#### Iran proliferation causes nuclear war

Edelman, distinguished fellow – Center for Strategic and Budgetary Assessments, ‘11

(Eric S, “The Dangers of a Nuclear Iran,” *Foreign Affairs*, January/February)

The reports of the Congressional Commission on the Strategic Posture of the United States and the Commission on the Prevention Of Weapons of Mass Destruction Proliferation and Terrorism, as well as other analyses, have highlighted the risk that a nuclear-armed Iran could trigger additional nuclear proliferation in the Middle East, even if Israel does not declare its own nuclear arsenal. Notably, Algeria, Bahrain, Egypt, Jordan, Saudi Arabia,Turkey, and the United Arab Emirates— all signatories to the Nuclear Nonproliferation Treaty (npt)—have recently announced or initiated nuclear energy programs. Although some of these states have legitimate economic rationales for pursuing nuclear power and although the low-enriched fuel used for power reactors cannot be used in nuclear weapons, these moves have been widely interpreted as hedges against a nuclear-armed Iran. The npt does not bar states from developing the sensitive technology required to produce nuclear fuel on their own, that is, the capability to enrich natural uranium and separate plutonium from spent nuclear fuel. Yet enrichment and reprocessing can also be used to accumulate weapons-grade enriched uranium and plutonium—the very loophole that Iran has apparently exploited in pursuing a nuclear weapons capability. Developing nuclear weapons remains a slow, expensive, and di⁄cult process, even for states with considerable economic resources, and especially if other nations try to constrain aspiring nuclear states’ access to critical materials and technology. Without external support, it is unlikely that any of these aspirants could develop a nuclear weapons capability within a decade.

There is, however, at least one state that could receive significant outside support: Saudi Arabia. And if it did, proliferation could accelerate throughout the region. Iran and Saudi Arabia have long been geopolitical and ideological rivals. Riyadh would face tremendous pressure to respond in some form to a nuclear-armed Iran, not only to deter Iranian coercion and subversion but also to preserve its sense that Saudi Arabia is the leading nation in the Muslim world. The Saudi government is already pursuing a nuclear power capability, which could be the first step along a slow road to nuclear weapons development. And concerns persist that it might be able to accelerate its progress by exploiting its close ties to Pakistan. During the 1980s, in response to the use of missiles during the Iran-Iraq War and their growing proliferation throughout the region, Saudi Arabia acquired several dozen css-2 intermediate-range ballistic missiles from China. The Pakistani government reportedly brokered the deal, and it may have also oªered to sell Saudi Arabia nuclear warheads for the css-2s, which are not accurate enough to deliver conventional warheads eªectively. There are still rumors that Riyadh and Islamabad have had discussions involving nuclear weapons, nuclear technology, or security guarantees. This “Islamabad option” could develop in one of several diªerent ways. Pakistan could sell operational nuclear weapons and delivery systems to Saudi Arabia, or it could provide the Saudis with the infrastructure, material, and technical support they need to produce nuclear weapons themselves within a matter of years, as opposed to a decade or longer. Not only has Pakistan provided such support in the past, but it is currently building two more heavy-water reactors for plutonium production and a second chemical reprocessing facility to extract plutonium from spent nuclear fuel. In other words, it might accumulate more fissile material than it needs to maintain even a substantially expanded arsenal of its own. Alternatively, Pakistan might oªer an extended deterrent guarantee to Saudi Arabia and deploy nuclear weapons, delivery systems, and troops on Saudi territory, a practice that the United States has employed for decades with its allies. This arrangement could be particularly appealing to both Saudi Arabia and Pakistan. It would allow the Saudis to argue that they are not violating the npt since they would not be acquiring their own nuclear weapons. And an extended deterrent from Pakistan might be preferable to one from the United States because stationing foreign Muslim forces on Saudi territory would not trigger the kind of popular opposition that would accompany the deployment of U.S. troops. Pakistan, for its part, would gain financial benefits and international clout by deploying nuclear weapons in Saudi Arabia, as well as strategic depth against its chief rival, India. The Islamabad option raises a host of difficult issues, perhaps the most worrisome being how India would respond. Would it target Pakistan’s weapons in Saudi Arabia with its own conventional or nuclear weapons? How would this expanded nuclear competition influence stability during a crisis in either the Middle East or South Asia? Regardless of India’s reaction, any decision by the Saudi government to seek out nuclear weapons, by whatever means, would be highly destabilizing. It would increase the incentives of other nations in the Middle East to pursue nuclear weapons of their own. And it could increase their ability to do so by eroding the remaining barriers to nuclear proliferation: each additional state that acquires nuclear weapons weakens the nonproliferation regime, even if its particular method of acquisition only circumvents, rather than violates, the NPT.

n-player competition

Were Saudi Arabia to acquire nuclear weapons, the Middle East would count three nuclear-armed states, and perhaps more before long. It is unclear how such an n-player competition would unfold because most analyses of nuclear deterrence are based on the U.S.- Soviet rivalry during the Cold War. It seems likely, however, that the interaction among three or more nuclear-armed powers would be more prone to miscalculation and escalation than a bipolar competition. During the Cold War, the United States and the Soviet Union only needed to concern themselves with an attack from the other. Multipolar systems are generally considered to be less stable than bipolar systems because coalitions can shift quickly, upsetting the balance of power and creating incentives for an attack. More important, emerging nuclear powers in the Middle East might not take the costly steps necessary to preserve regional stability and avoid a nuclear exchange. For nuclear-armed states, the bedrock of deterrence is the knowledge that each side has a secure second-strike capability, so that no state can launch an attack with the expectation that it can wipe out its opponents’ forces and avoid a devastating retaliation. However, emerging nuclear powers might not invest in expensive but survivable capabilities such as hardened missile silos or submarinebased nuclear forces. Given this likely vulnerability, the close proximity of states in the Middle East, and the very short flight times of ballistic missiles in the region, any new nuclear powers might be compelled to “launch on warning” of an attack or even, during a crisis, to use their nuclear forces preemptively. Their governments might also delegate launch authority to lower-level commanders, heightening the possibility of miscalculation and escalation. Moreover, if early warning systems were not integrated into robust command-and-control systems, the risk of an unauthorized or accidental launch would increase further still. And without sophisticated early warning systems, a nuclear attack might be unattributable or attributed incorrectly. That is, assuming that the leadership of a targeted state survived a first strike, it might not be able to accurately determine which nation was responsible. And this uncertainty, when combined with the pressure to respond quickly,would create a significant risk that it would retaliate against the wrong party, potentially triggering a regional nuclear war.

## 2

The United States Federal Government should restrict the President's war making authority by limiting targeted killing and detention without charge within zones of active hostilities to declared territories with notice and through a Supreme Court ruling to codify executive branch review policy for those practices; and in addition, by limiting targeted killing and detention without charge outside zones of active hostilities to reviewable operations guided by an individualized threat requirement, a least-harmful-means test, a feasibility test for criminal prosecution, procedural safeguards, and by a Supreme Court ruling to codify executive branch review policy for those practices.

The CP resolves legal codification and clarification of conflict authority

Jameel Jaffer, human rights and civil liberties attorney who is deputy legal director of the American Civil Liberties Union, 13 [“JUDICIAL REVIEW OF TARGETED KILLINGS,” Harvard Law Review, April, 126 Harv. L. Rev. F. 185]

The argument for some form of judicial review is compelling, not least because such review would clarify the scope of the government's authority to use lethal force. The targeted killing program is predicated on sweeping constructions of the 2001 Authorization for Use of Military Force (AUMF) and the President's authority to use military force in national self-defense. The government contends, for example, that the AUMF authorizes it to use lethal force against groups that had nothing to do with the 9/11 attacks and that did not even exist when those attacks were carried out. It contends that the AUMF gives it authority to use lethal force against individuals located far from conventional battlefields. As the Justice Department's recently leaked white paper makes clear, the government also contends that the President has authority to use lethal force against those deemed to present "continuing" rather than truly imminent threats.¶ These claims are controversial. They have been rejected or questioned by human rights groups, legal scholars, federal judges, and U.N. special rapporteurs. **Even enthusiasts of the drone program have become anxious about its legal soundness**. ("People in Washington need to wake up and realize the legal foundations are crumbling by the day," Professor Bobby Chesney, a supporter of the program, recently said.) **Judicial review could clarify the limits on the government's legal authority and** supply a degree of legitimacy **to actions taken within those limits.**¶ [\*186] It could also encourage executive officials to **observe these limits**. Executive officials would be less likely to exceed or abuse their authority if they were required to defend their conduct to federal judges. Even Jeh Johnson, the Defense Department's former general counsel and a vocal defender of the targeted killing program, acknowledged in a recent speech that judicial review could add "rigor" to the executive's decisionmaking process. In explaining the function of the Foreign Intelligence Surveillance Court, which oversees government surveillance in certain national security investigations, executive officials have often said that even the mere prospect of judicial review deters error and abuse.

## 3

#### The United States Federal Government should restrict the President's war making authority by limiting targeted killing and detention without charge within zones of active hostilities to declared territories with notice and by statutory codification of executive branch review policy for those practices; and in addition, by limiting targeted killing and detention without charge outside zones of active hostilities to reviewable operations guided by an individualized threat requirement, a feasibility test for criminal prosecution, procedural safeguards, and by statutory codification of executive branch review policy for those practices.

**The United States Federal Government should publish its legal guidelines for targeted killing operations and implement ex ante review of targeted killing standards and procedures.**

The CP excludes the least-necessary means test—codifying that collapses military operations and LOAC

Reeves ‘13

Shane, Major, United States Army, Assistant Professor, Department of Law, United States Military Academy, Jeffrey S. Thurnher, Lieutenant Colonel, United States Army, Military Professor, International Law Department, United States Naval War College, “Are We Reaching a Tipping Point? How Contemporary Challenges Are Affecting the Military Necessity Humanity Balance,”

The so-called “capture or kill” debate starkly highlights the extreme pressure states are presently under to shift the balance underpinning the law toward humanitarian concerns and away from the notion of military necessity.14 Notwithstanding this current debate, a seemingly noncontroversial question, easily answered by the Law of Armed Conflict, is whether an affirmative legal duty exists which requires combatants to attempt to capture enemy belligerents before resorting to deadly force.15 The prevailing view among legal scholars is that the law places no obligation on a state actor engaged in an armed conflict to consider capture before targeting an enemy.16 **Nevertheless**, a vocal and determined group of legal commentators assert the opposite viewpoint, namely that the use of force should be regulated by a least-restrictive means type of analysis.17 Though this viewpoint is unsupported by **treaty law** or state opinio juris, proponents of the capture-rather-than-kill position continue to press states to adopt this unnecessary targeting methodology. In 2009, the International Committee of the Red Cross (ICRC) issued its Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (Guidance). The Guidance was intended to be the culmination of a five-year examination by a panel of legal scholars into the customary norm found in Article 51(3) of the 1977 Additional Protocol I to the Geneva Conventions (AP I), which describes the loss of targeting protections for civilians who take a “direct part in hostilities.”18 These experts failed to reach a consensus about the norm, and the “capture or kill” issue was among the major causes of the breakdown. Many experts withdrew their support for the project when the ICRC insisted on adding a separate section about “restraints on the use of force in direct attack.”19 It is particularly telling that the strongest opposition to the ICRC’s positions on the “capture or kill” related issues came from experts who represented specially affected states, or those states that are most heavily involved in military missions or hostilities around the world.20 By contending that the law should require combatants to provide the enemy with an “opportunity to surrender,” the ICRC effectively established a least-restrictive-means analysis in “capture or kill” situations.21 The ICRC’s adoption and recommendation of the least-restrictive-means standard is problematic for several reasons. First, the ICRC mistakenly treats the principles of humanity and military necessity as **distinct** rules,22 and the Guidance incorrectly implies that during a military operation a separate, stand-alone analysis of each principle is required. In actuality, these concepts are foundational and undergird the entirety of the Law of Armed Conflict,23 such that both military necessity and humanity are already accounted for throughout subsidiary positive laws.24 As an example, some legal scholars have described these principles in these terms: “Military necessity is a meta-principle of the law of war … in the sense that it justifies destruction in war. It permeates all subsidiary rules.”25 Second, the ICRC approach greatly overreaches. The Law of Armed Conflict requires combatants to accept an effective and unambiguous surrender from an enemy and to then protect that surrendered individual from further attack as hors de combat.26 However, contrary to the ICRC’s assertions, there is no further duty to offer an enemy belligerent the opportunity to surrender.27 While such a requirement may exist in a law enforcement paradigm, it is misplaced in a discussion of the Law of Armed Conflict.28 Third, if enforced, the ICRC’s interpretation would inappropriately shift the onus for surrendering to the capturing force.29 Removing the requirement that a surrendering individual make his or her intentions clear is dangerous and unsupported in the law.30 Despite the fact that numerous scholars have criticized the Guidance for these and other reasons, the ICRC continues to advocate its position and recommend that states adopt the position of the Guidance. More recently, in February 2013, many of the ICRC’s “capture or kill” arguments were revived by Professor Ryan Goodman of New York University in his forthcoming work The Power to Kill or Capture Enemy Combatants. A proponent of the least-restrictive-means analysis, Professor Goodman claims to have uncovered previously overlooked or mischaracterized evidence which purportedly establishes this obligation.31 He contends that the modern Law of Armed Conflict requires, at least in certain circumstances, that the use of force be regulated by a least-restrictive-means analysis.32 Like the ICRC, Professor Goodman relies, in part, on the notion that the principles of humanity and military necessity impose separate restrictions on the Law of Armed Conflict. However, he also advocates an “alternative path” for establishing a requirement to capture before killing an adversary, and that path involves the definition of hors de combat. Professor Goodman asserts that an expanded characterization and understanding of the concept of hors de combat, and, in particular, the subset of individuals who are “in the power” of an adversary, properly represents the law.33 After analyzing the various commentaries and negotiations involved with the AP I, Professor Goodman claims that a defenseless person qualifies as hors de combat and must be captured rather than killed. Although more detailed and nuanced than previous least-restrictive-means proposals, Professor Goodman’s assertions are similarly flawed and unsupported by the law. His premise that the principles of humanity and military necessity constitute separate positive rules echoes the ICRC’s Guidance and is, as noted above, incorrect.34 Further, Professor Goodman’s expansive view of hors de combat and his assertions that defenseless individuals are “in the power” of the adversary are belied by the final text, which does not include such language, and the official records of the proceeding, which fail to show a state consensus for the idea.35 There is simply no existing legal authority reflecting “such a broad conception of ‘in the power of’” promoted by Professor Goodman and his position is “at best an aspirational constraint on belligerent targeting derived from a tactically incoherent interpretation of a LOAC concept whose meaning has been settled for centuries.”36 Only by **manipulating** the long-resolved and **universally recognized** definition of hors de combat can Professor Goodman find an “alternative path” to the least-restrictive-means analysis. While a state may develop a policy imposing a capture obligation on its forces, the law makes no such demands. When restrictions are applied for operational or political reasons, as was the case with various limits imposed during the United States’ counterinsurgency efforts of the past decade or the targeted killing drone strikes in the fight against al Qaeda,37 they do not make the norm **customary**. The arguments made by the proponents of the least-restrictive-means analysis in “capture or kill” scenarios are inconsistent with the Law of Armed Conflict and, no matter how well-intentioned, **create uncertainty and ambiguity for those engaged in combat operations**. States must therefore recognize the consequences of this misguided emphasis on the principle of humanity and resist any suggestion that the Law of Armed Conflict obligates state actors to capture those who choose to participate in warfare.

Nuclear war

Frederick Kagan and Michael O’Hanlon 7, Fred’s a resident scholar at AEI, Michael is a senior fellow in foreign policy at Brookings, “The Case for Larger Ground Forces”, April, <http://www.aei.org/files/2007/04/24/20070424_Kagan20070424.pdf>

We live at a time when wars not only rage in nearly every region but threaten to erupt in many places where the current relative calm is tenuous. To view this as a strategic military challenge for the United States is not to espouse a specific theory of America’s role in the world or a certain political philosophy. Such an assessment flows directly from the basic bipartisan view of American foreign policy makers since World War II that overseas threats must be countered before they can directly threaten this country’s shores, that the basic stability of the international system is essential to American peace and prosperity, and that no country besides the United States is in a position to lead the way in countering major challenges to the global order. Let us highlight the threats and their consequences with a few concrete examples, emphasizing those that involve key strategic regions of the world such as the Persian Gulf and East Asia, or key potential threats to American security, such as the spread of nuclear weapons and the strengthening of the global Al Qaeda/jihadist movement. The Iranian government has rejected a series of international demands to halt its efforts at enriching uranium and submit to international inspections. What will happen if the US—or Israeli—government becomes convinced that Tehran is on the verge of fielding a nuclear weapon? North Korea, of course, has already done so, and the ripple effects are beginning to spread. Japan’s recent election to supreme power of a leader who has promised to rewrite that country’s constitution to support increased armed forces—and, possibly, even nuclear weapons— may well alter the delicate balance of fear in Northeast Asia fundamentally and rapidly. Also, in the background, at least for now, SinoTaiwanese tensions continue to flare, as do tensions between India and Pakistan, Pakistan and Afghanistan, Venezuela and the United States, and so on. Meanwhile, the world’s nonintervention in Darfur troubles consciences from Europe to America’s Bible Belt to its bastions of liberalism, yet with no serious international forces on offer, the bloodletting will probably, tragically, continue unabated. And as bad as things are in Iraq today, they could get worse. What would happen if the key Shiite figure, Ali al Sistani, were to die? If another major attack on the scale of the Golden Mosque bombing hit either side (or, perhaps, both sides at the same time)? Such deterioration might convince many Americans that the war there truly was lost—but the costs of reaching such a conclusion would be enormous. Afghanistan is somewhat more stable for the moment, although a major Taliban offensive appears to be in the offing. Sound US grand strategy must proceed from the recognition that, over the next few years and decades, the world is going to be a very unsettled and quite dangerous place, with Al Qaeda and its associated groups as a subset of a much larger set of worries. The only serious response to this international environment is to develop armed forces capable of protecting America’s vital interests throughout this dangerous time. Doing so requires a military capable of a wide range of missions—including not only deterrence of great power conflict in dealing with potential hotspots in Korea, the Taiwan Strait, and the Persian Gulf but also associated with a variety of Special Forces activities and stabilization operations. For today’s US military, which already excels at high technology and is increasingly focused on re-learning the lost art of counterinsurgency, this is first and foremost a question of finding the resources to field a large-enough standing Army and Marine Corps to handle personnel intensive missions such as the ones now under way in Iraq and Afghanistan. Let us hope there will be no such large-scale missions for a while. But preparing for the possibility, while doing whatever we can at this late hour to relieve the pressure on our soldiers and Marines in ongoing operations, is prudent. At worst, the only potential downside to a major program to strengthen the military is the possibility of spending a bit too much money. Recent history shows no link between having a larger military and its overuse; indeed, Ronald Reagan’s time in office was characterized by higher defense budgets and yet much less use of the military, an outcome for which we can hope in the coming years, but hardly guarantee. While the authors disagree between ourselves about proper increases in the size and cost of the military (with O’Hanlon preferring to hold defense to roughly 4 percent of GDP and seeing ground forces increase by a total of perhaps 100,000, and Kagan willing to devote at least 5 percent of GDP to defense as in the Reagan years and increase the Army by at least 250,000), we agree on the need to start expanding ground force capabilities by at least 25,000 a year immediately. Such a measure is not only prudent, it is also badly overdue.

Executive order establishing transparency of targeting decisions resolves drone legitimacy and resentment

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

4. Procedural Requirements

Currently, officials in the executive branch carry out all such ex ante review of out-of-battlefield targeting and detention decisions, reportedly with the involvement of the President, but without any binding and publicly articulated standards governing the exercise of these authorities. n163 All ex post review of targeting is also done internally within the executive branch. There is no public accounting, or even acknowledgment, of most strikes, their success and error rates, or the extent of any collateral damage. Whereas the Department of Defense provides solatia or condolence payments to Afghan civilians who are killed or injured as a result of military actions in Afghanistan (and formerly did so in Iraq), there is no equivalent effort in areas outside the active conflict zone. n164

Meanwhile, the degree of ex post review of detention decisions depends on the location of detention as opposed to the location of capture. Thus, [\*1219] Guantanamo detainees are entitled to habeas review, but detainees held in Afghanistan are not, even if they were captured far away and brought to Afghanistan to be detained. n165

Enhanced ex ante and ex post procedural protections for both detention and targeting, coupled with transparency as to the standards and processes employed, serve several important functions: they can minimize error and abuse by creating time for advance reflection, correct erroneous deprivations of liberty, create endogenous incentives to avoid mistake or abuse, and increase the legitimacy of state action.

a. Ex Ante Procedures

Three key considerations should guide the development of ex ante procedures. First, any procedural requirements must reasonably respond to the need for secrecy in certain operations. Secrecy concerns cannot, for example, justify the lack of transparency as to the substantive targeting standards being employed. There is, however, a legitimate need for the state to protect its sources and methods and to maintain an element of surprise in an attack or capture operation. Second, contrary to oft-repeated rhetoric about the ticking time bomb, few, if any, capture or kill operations outside a zone of active conflict occur in situations of true exigency. n166 Rather, there is often the time and need for advance planning. In fact, advance planning is often necessary to minimize damage to one's own troops and nearby civilians. n167 Third, the procedures and standards employed must be transparent and sufficiently credible to achieve the desired legitimacy gains.

These considerations suggest the value of an independent, formalized, ex ante review system. Possible models include the Foreign Intelligence [\*1220] Surveillance Court (FISC), n168 or a FISC-like entity composed of military and intelligence officials and military lawyers, in the mode of an executive branch review board. n169

Created by the Foreign Intelligence Surveillance Act (FISA) in 1978, n170 the FISC grants ex parte orders for electronic surveillance and physical searches, among other actions, based on a finding that a "significant purpose" of the surveillance is to collect "foreign intelligence information." n171 The Attorney General can grant emergency authorizations without court approval, subject to a requirement that he notify the court of the emergency authorization and seek subsequent judicial authorization within seven days. n172 The FISC also approves procedures related to the use and dissemination of collected information. By statute, heightened restrictions apply to the use and dissemination of information concerning U.S. persons. n173 Notably, the process has been extraordinarily successful in protecting extremely sensitive sources and methods. To date, there has never been an unauthorized disclosure of an application to or order from the FISC court.

An ex parte review system for targeting and detention outside zones of active hostility could operate in a similar way. Judges or the review board would approve selected targets and general procedures and standards, while still giving operators wide rein to implement the orders according to the approved standards. Specifically, the court or review board would determine whether the targets meet the substantive requirements and would [\*1221] evaluate the overarching procedures for making least harmful means-determinations, but would leave target identification and time-sensitive decisionmaking to the operators. n174

Moreover, there should be a mechanism for emergency authorizations at the behest of the Secretary of Defense or the Director of National Intelligence. Such a mechanism already exists for electronic surveillance conducted pursuant to FISA. n175 These authorizations would respond to situations in which there is reason to believe that the targeted individual poses an imminent, specific threat, and in which there is insufficient time to seek and obtain approval by a court or review panel as will likely be the case in instances of true imminence justifying the targeting of persons who do not meet the standards applicable to operational leaders. As required under FISA, the reviewing court or executive branch review board should be notified that such an emergency authorization has been issued; it should be time-limited; and the operational decisionmakers should have to seek court or review board approval (or review, if the strike has already taken place) as soon as practicable but at most within seven days. n176

Finally, and critically, given the stakes in any application namely, the deprivation of life someone should be appointed to represent the potential target's interests and put together the most compelling case that the individual is not who he is assumed to be or does not meet the targeting criteria.

The objections to such a proposal are many. In the context of proposed courts to review the targeting of U.S. citizens, for example, some have argued that such review would serve merely to institutionalize, legitimize, and expand the use of targeted drone strikes. n177 But this ignores the reality of their continued use and expansion and imagines a world in which targeted [\*1222] killings of operational leaders of an enemy organization outside a zone of active conflict is categorically prohibited (an approach I reject n178). If states are going to use this extraordinary power (and they will), there ought to be a clear and transparent set of applicable standards and mechanisms in place to ensure thorough and careful review of targeted-killing decisions. The formalization of review procedures along with clear, binding standards will help to avoid ad hoc decisionmaking and will ensure consistency across administrations and time.

Some also condemn the ex parte nature of such reviews. n179 But again, this critique fails to consider the likely alternative: an equally secret process in which targeting decisions are made without any formalized or institutionalized review process and no clarity as to the standards being employed. Institutionalizing a court or review board will not solve the secrecy issue, but it will lead to enhanced scrutiny of decisionmaking, particularly if a quasi-adversarial model is adopted, in which an official is obligated to act as advocate for the potential target.

That said, there is a reasonable fear that any such court or review board will simply defer. In this vein, FISC's high approval rate is cited as evidence that reviewing courts or review boards will do little more than rubber-stamp the Executive's targeting decisions. n180 But the high approval rates only tell part of the story. In many cases, the mere requirement of justifying an application before a court or other independent review board can serve as an internal check, creating endogenous incentives to comply with the statutory requirements and limit the breadth of executive action. n181 Even if this system does little more than increase the attention paid to the stated requirements and expand the circle of persons reviewing the factual basis for the application, those features in and of themselves can lead to increased reflection and restraint.

Additional accountability mechanisms, such as civil or criminal sanctions in the event of material misrepresentations or omissions, the granting of far-reaching authority to the relevant Inspectors General, and meaningful ex post review by Article III courts, n182 are also needed to help further minimize abuse.

Conversely, some object to the use of courts or court-like review as stymying executive power in wartime, and interfering with the President's Article II powers. n183 According to this view, it is dangerous and potentially unconstitutional to require the President's wartime targeting decisions to be subject to additional reviews. These concerns, however, can be dealt with through emergency authorization mechanisms, the possibility of a presidential override, and design details that protect against ex ante review of operational decisionmaking. The adoption of an Article II review board, rather than an Article III-FISC model, further addresses some of the constitutional concerns.

Some also have warned that there may be no "case or controversy" for an Article III, FISC-like court to review, further suggesting a preference for an Article II review board. n184 That said, similar concerns have been raised with respect to FISA and rejected. n185 Drawing heavily on an analogy to courts' roles in issuing ordinary warrants, the Justice Department's Office of Legal Counsel concluded at the time of enactment that a case and controversy existed, even though the FISA applications are made ex parte. n186 [\*1224] Here, the judges would be issuing a warrant to kill rather than surveil. While this is significant, it should not fundamentally alter the legal analysis. n187 As the Supreme Court has ruled, killing is a type of seizure. n188 The judges would be issuing a warrant for the most extreme type of seizure. n189

It is also important to emphasize that a reviewing court or review board would not be "selecting" targets, but determining whether the targets chosen by executive branch officials met substantive requirements much as courts do all the time when applying the law to the facts. Press accounts indicate that the United States maintains lists of persons subject to capture or kill operations lists created in advance of specific targeting operations and reportedly subject to significant internal deliberation, including by the President himself. n190 A court or review board could be incorporated into the existing ex ante decisionmaking process in a manner that would avoid interference with the conduct of specific operations reviewing the target lists but leaving the operational details to the operators. As suggested above, emergency approval mechanisms could and should be available to deal with exceptional cases where ex ante approval is not possible.

Additional details will need to be addressed, including the temporal limits of the court's or review board's authorizations. For some high-level operatives, inclusion on a target list would presumably be valid for some set period of [\*1225] time, subject to specific renewal requirements. Authorizations based on a specific, imminent threat, by comparison, would need to be strictly time-limited, and tailored to the specifics of the threat, consistent with what courts regularly do when they issue warrants.

In the absence of such a system, the President ought to, at a minimum, issue an executive order establishing a transparent set of standards and procedures for identifying targets of lethal killing and detention operations outside a zone of active hostilities. n192 To enhance legitimacy, the procedures should include target list reviews and disposition plans by the top official in each of the agencies with a stake in the outcome the Secretary of Defense, the Director of the CIA, the Secretary of State, the Director of Homeland Security, and the Director of National Intelligence, with either the Secretary of Defense, Director of National Intelligence, or President himself, responsible for final sign-off. n193 In all cases, decisions should be unanimous, or, in the absence of consensus, elevated to the President of the United States. n194 Additional details will need to be worked out, including critical questions about the standard of proof that applies. Given the stakes, a clear and convincing evidentiary standard is warranted. n195

While this proposal is obviously geared toward the United States, the same principles should apply for all states engaged in targeting operations. n196 States would ideally subject such determinations to independent review or, alternatively, clearly articulate the standards and procedures for their decisionmaking, thus enhancing accountability.

b. Ex Post Review

For targeted-killing operations, ex post reviews serve only limited purposes. They obviously cannot restore the target's life. But retrospective review either by a FISC-like court or review board can serve to identify errors or overreaching and thereby help avoid future mistakes. This can, and ideally would, be supplemented by the adoption of an additional Article III damages mechanism. n197 At a minimum, the relevant Inspectors General should engage in regular and extensive reviews of targeted-killing operations. Such post hoc analysis helps to set standards and controls that then get incorporated into ex ante decisionmaking. In fact, post hoc review can often serve as a more meaningful and often more searching inquiry into the legitimacy of targeting decisions. Even the mere knowledge that an ex post review will occur can help to protect against rash ex ante decisionmaking, thereby providing a self-correcting mechanism.

Ex post review should also be accompanied by the establishment of a solatia and condolence payment system for activities that occur outside the active zone of hostilities. Extension of such a system beyond Afghanistan and Iraq would help mitigate resentment caused by civilian deaths or injuries and would promote better accounting of the civilian costs of targeting operations. n198

## 4

LRM requirement destroys operations and hollows out LOAC precedent

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(Geoffrey, Laurie, Chris, and Eric, “Belligerent Targeting and the Invalidity of a Least Harmful Means Rule,” 89 INT’L L. STUD. 536)\*\*footnote 234 included

If a least harmful means rule did exist within the LOAC, or if such a rule were to be imposed, it would present significant and potentially crippling impediments in the implementation of that obligation. From training, to execution of operations, to investigation and accountability for violations of the law, **no aspect** of the intersection between law and military opera-tions would be untouched or unhindered by the rule’s consequences. Fur-thermore, although proponents of a least harmful means rule argue that it fulfills the LOAC’s core humanitarian purpose, such a rule has an equally opposite effect of undermining the LOAC’s role in protecting soldiers from the corrosive psychological and moral effects of combat. 1. Training The first and most obvious of these challenges is translating the rule into training and the ROE applicable to a declared hostile force. Proponents of the least harmful means rule cite the practice of including such a restriction in ROE to rebut any assertion that such a challenge is in any way significant.230 These proponents fail to appreciate, however, two significant fac-tors that undermine this argument. First, even if it is operationally feasible to implement such a restriction in one tactical environment, this does not mean it is feasible in all tactical environments. Relying on the counterinsur-gency context as a touchstone of feasibility therefore lacks credibility. What is necessary, rather, is to consider implementation of such a rule in every tactical context associated with the full range of operations that occur in armed conflict. Second, ROE are never effectively implemented simply by enunciating the relevant restriction on the use of force in an order, di-rective, or ROE card. Rather, these restrictions are only as effective as the training that prepares soldiers to implement them. Accordingly, training for a combat environment is indelibly linked to the effectiveness of any ROE or other imposition of battlefield regulation. In considering this latter impediment, it is essential to note that if a least harmful means obligation were recognized, the obligation would not be context-specific, like ROE for a particular conflict or mission, but would require adherence in **all** conflict situations. As a result, this least harmful means rule would have to become an element of the baseline training for all members of the armed forces. From the inception of all combat training, an effective method would have to be developed to incorporate compliance with this obligation into the combat instincts that military train-ing seeks to instill in the soldier. Certainly, the LOAC’s protection for individuals rendered hors de combat means that limitations on the legality of using force in combat are already an aspect of such training. The symmetry between the clarity provided by the rules of presumption associated with status-based targeting authority and such training is essential, however. The explicit indicia that trigger hors de combat status discussed above, coupled with the requirement that the non-disabled belligerent operative bears the burden to affirmatively mani-fest surrender, facilitates a baseline standard of training and development that is effective for all soldiers, from the newly-minted private to the senior attack aircraft pilot. Injecting a least harmful means rule into this equation would compromise the efficacy of this warrior development process. By demanding the exercise of case-by-case judgment when engaged in hostili-ties with a declared hostile opponent, it would significantly increase the burden on the attacking force to assess when the enemy belligerent oppo-nent fell within the protections afforded to those considered hors de combat. In contrast, leaving any least harmful means limitation within the policy realm provides the military commander the flexibility to tailor it to the mis-sion, enemy, terrain, troops available, time and civilian considerations231 applicable during a given operation. Training armed forces for armed conflict is thus in no way analogous to the training provided for peace officers or even for armed forces fo-cused on a peacekeeping or stability support mission precisely because in armed conflict there is no expectation that responding to enemy threats will be graduated. Instead, unlike hostile actors encountered during peace operations, enemy combatants are presumed to always represent a threat of death or grievous bodily harm. Furthermore, the organizations they belong to also pose such a threat. It might be tempting to assume that shifting from one use of force paradigm to another is a simple task, but those fa-miliar with the relationship between training and operational effectiveness know this is a **highly complex** process.232 As a result, effective training must be mission-driven, which means that preparation for armed conflict must focus primarily on developing a warrior ethos derived from the armed con-flict use of force paradigm.233 Therefore, soldiers are trained to employ deadly force against such targets, irrespective of the conduct they encoun-ter. The inclusion of a least harmful means rule in contemporary counterin-surgency ROE indicates that this challenge is not insurmountable, of course. Indeed, soldiers can be trained to even more restrictive ROE standards, such as when they are engaged in peace-support or occupation operations. However, imposition of this type of policy-based constraint, as noted above, reflects a conscious command judgment that the increased risk imposed on friendly forces is offset by the tactical, operational, and strategic value of the constraint. This might make sense in the context of counterinsurgency (COIN) operations, where the cost of perceived use of force over-breadth produced by status-based presumptions is not consid-ered acceptable based on the risk associated with limiting that authority. In such contexts, the benefits of restraining otherwise lawful uses of force may justify this increased risk, but they do not dictate it. In other contexts, such as a high intensity conflict in Korea, the cost/benefit equation would likely be **fundamentally different**. Nor does the imposition of such constraints reflect recognition of a humanitarian obligation to impose such ad-ditional risk on friendly forces. Furthermore, units operating pursuant to such ROE require significant training that prepares them to “ramp down” from the LOAC-based norm of pure status-based targeting.234 As a practical matter, restraining the in-stinctual level of combat aggressiveness developed in baseline training pur-suant to a pure status-based targeting standard makes it feasible to “ramp up” to the baseline norm on order. If, in contrast, the baseline standard of training must prepare the soldier to constantly question the permissibility of employing deadly combat power against a declared hostile enemy bellig-erent operative who is still physically capable of engaging in operations and has not surrendered, it will produce an inevitable dilution of the aggres-siveness that is frequently an essential component of seizing and retaining the initiative during an attack against enemy personnel. [footnote 234 begins] 234. One of the authors, while advising a U.S. Army ground combat unit in Mosul, Iraq, during Operation Iraqi Freedom, observed the difficulties in quickly “ramping down” the ROE. In Mosul, suicide bombings of U.S. and Iraqi checkpoints and convoys were unfortunately commonplace. The corresponding ROE reflected that reality and U.S. forces would employ lethal force against vehicles approaching checkpoints or convoys that failed to heed warning signs and measures. Operational needs dictated reassigning one U.S. Army unit, which had been operating under these permissive ROE, to the Kurdish region of northern Iraq. That region was considerably safer and force was employed dif-ferently and sparingly. But soldiers are not light switches, and within hours of relocating, the former Mosul-based soldiers were conducting a vehicle convoy, and when an un-known vehicle approached the convoy at a high rate of speed and ignored warnings, the soldiers instinctively employed force appropriate for their previous operating environment with tragic results to the occupants of the approaching vehicle, a family of four. [footnote 234 ends] 2. Operational Complexity and Lack of Clarity The mix of status-based targeting authority with a conduct-based limitation that a least harmful means rule mandates would also compromise opera-tional clarity. Unlike in the traditional execution of combat operations, bel-ligerents would be adversely influenced by a de facto (if not de jure) presump-tion that every use of force could be assessed as potentially unjustified and excessive, and every “shoot/don’t shoot” decision would be subject to cri-tique requiring belligerents to justify their decision to attack on an individu-al basis. This is acceptable in an operational context that does not involve confrontation with organized opposition belligerent groups, precisely be-cause individuals encountered in such operational contexts are not pre- sumptively hostile. As a result, requiring individualized justification for em-ploying deadly force would not be expected to compromise mission effec-tiveness or subject friendly forces to significant risk. When, however, the operational context involves confronting organized belligerent opponents whose operations transcend normal criminality and rise to the level of armed conflict, imposing an individualized threat justification not only en-dangers individual members of the force by producing an inevitable hesi-tancy to employ deadly force, but also compromises the legitimate function of the state action by degrading the effectiveness of forces in subduing the opponent.235 It is therefore unsurprising that the history of armed conflict and the law developed to regulate armed conflict compel the conclusion that it is the precise opposite presumption that must dictate belligerent rela-tions in the battle space. It cannot be overemphasized that a legal obligation to implement a least harmful means rule would not apply only to certain types of tactical contexts (such as COIN operations) or certain methods of warfare (such as attack with remotely piloted vehicles). Instead, were the LOAC to include such a rule, it would be one of universal applicability. How would such a rule be translated into ROE language that is simple and clear enough to facilitate combat decision-making in the context of a medium or high-intensity armed conflict against a declared hostile enemy? Just attempting to propose such a rule indicates the level of analytical complexity that would result, with its accordant tactical hesitation. For example, perhaps the ROE would initially indicate: “Redland forces are declared hostile and may be attacked at all times once positively identified unless captured or disabled by wounds.” But then the least harmful means rule would require a further qualifier: “However, if you assess that a positively identified member of the Redland forces cannot [meaningfully] [seriously] [viably] [genuinely] resist or threaten you or friendly forces, you are prohibited from engaging this enemy.” Just attempting to articulate (let alone implement) the limitation vis-à-vis an enemy force in a medium or high-intensity conflict reveals how inconsistent it would be with the art of war. Any individual who has trained or been trained on ROE can see imme-diately how dangerous this qualifier would be. First, how does a soldier make this assessment? What is the standard of certainty? What happens when two soldiers disagree on this assessment? At what point would a subordinate be obligated to disobey an order to attack a declared hostile enemy in order to comply with a least harmful means obligation? Ultimate-ly, all of these implementation complexities translate into **tactical hesitation**. Soldiers would be subjected to the constant risk that their decisions to at-tack an enemy, even after being positively identified, would be investigated and potentially condemned. Thus, deviating from the existing bright-line standard for determining when attack authority terminates will inevitably subject every use of force decision to an implied conduct based analysis, thereby diluting critical battlefield aggressiveness and initiative. The arguments for a least harmful means rule have developed most re-cently in the context of COIN operations or attacks conducted during a sophisticated deliberate targeting process (such as air attacks). This focus, which severely oversimplifies the issue, highlights multiple reasons why such a rule is inconsistent with the LOAC and operationally unworkable. First, even these environments, in which the ROE often do include re-straints akin to a least harmful means rule (leading proponents of such a rule to argue that it is indeed workable and obligatory236), demonstrate the complete disconnect from operational realities. Second, attempting to translate a least harmful means rule into a legal obligation in international armed conflicts is proof positive that such a rule simply cannot be recon-ciled with the LOAC’s purposes or application. As a starting point, consider that if a least harmful means rule were law, every use of deadly force against an enemy belligerent would need to be justified by the individual threat that enemy operative was posing at the time. Attempting to discern which soldier fired which rounds, even in a discrete engagement in a COIN environment, is incredibly difficult.237 Moreover, even in COIN combat rarely occurs as discrete events. Consider incidents in Afghanistan where insurgents attempted to overrun U.S. Army positions. Engagements at Combat Outpost Keating238 or the Wanat Val- ley239 involved sustained engagements lasting hours. Thousands of small arms rounds fired, machine guns, grenades, mortar and artillery rounds and both rotary and fixed wing close air support, resulting in scores of insur-gents killed and many more wounded. Proponents of a least harmful means rule tend to utilize sui generis and unrealistic hypotheticals to illustrate the rule’s application. Unfortunately, such methodology offers little opportuni-ty to examine whether such a rule is actually feasible or desirable. Even when proposed in the context of imaginary situations, ones that are exceed-ingly unlikely to arise, the rule’s application must still be contemplated in all types of combat engagements that will occur and where such a rule would be debilitating to combat initiative. What proponents of a least harmful means rule must (but cannot) do is explain how such a rule applies not only to engagements like COP Keating, or the Battle for Wanat Valley, but to close combat in the Ia Drang valley of Vietnam,240 the deliberate attack on the Panamanian Defense Forces Commandancia, or the potential battles of mass scale that will occur if war were to break out again in Korea.241 What then is the utility of a rule with no practical application?

Extinction

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(Yoram, “Concluding Remarks: LOAC and Attempts to Abuse or Subvert It,” *International Law Studies* Vol. 87)

On the other side, you have civilized nations. Generally speaking, civilized nations abide by LOAC. They do so notwithstanding the complications resulting from the diametrically opposite conduct of the enemy. Indeed, despite many temptations, LOAC has not been relaxed to allow civilized nations more elbow room when confronting the barbarians. If anything, in the last few decades LOAC—as accepted and practiced by civilized nations—has become more rigorous than ever. It goes almost without saying that instances of breaches of LOAC do occur even where civilized armed forces are concerned. However, (i) relatively speaking, these instances are few and far between (although they are usually well-publicized in the media); and (ii) there is in place a highly developed military justice system that is entrusted with the strict enforcement of LOAC and the winnowing out of offenders (many participants in the present conference represent that system). We also spend enormous human and financial resources in disseminating LOAC and instilling its directives into the troops through constant training at all command levels. The long and the short of it is that the civilized armed forces—on the whole— have a laudable record of implementation of LOAC, whereas the barbarians have an appalling one. This is where the true “asymmetry of warfare” is manifested in modern times. But here is the puzzling aspect of that asymmetry. One would have expected that the civilized side would go on the legal offensive, charging the enemy with recourse to methods of barbarism that contravene every cardinal principle of LOAC. Instead, while we keep relatively silent, the barbarians mount a legal offensive against us through lawfare. Unfazed by their own show of open disdain for LOAC, they dare to accuse us of contravening it. They behave as free riders, and yet they literally get away with murder—indeed, mass murder of civilians. How do we respond? Not with the outrage that might have been expected. The prevailing tone in the present conference—as in similar gatherings—has been defensive and even apologetic. It appears that the barbarians have managed to get under our skin, and we suffer from irrational pangs of a guilty conscience. As a consequence, command echelons on our side often bend over backward in the application of LOAC. What has come to light in the course of the conference is that, in Afghanistan, airstrikes essential to mission accomplishment—and legally unimpeachable—have been scrapped, so as to avoid altogether lawful collateral damage to civilians. We have also heard about the Israeli army resorting to the baffling practice of issuing, prior to attacks against lawful targets, many thousands of individual warnings to enemy civilians on their cellular phones. Just think of the logistical effort invested, undertaken without any legal rhyme or reason, in such an operation. As we have repeatedly been told in the present conference, “this is not about them, it’s about us.” But what does our odd defensive behavior truly show about us? If we sound as if we were in the wrong in circumstances where we are actually in the right, this is not due to any intrinsic societal values. It is due to an uncalled-for guilt complex, based on a specious sense that perhaps our technological superiority has led us to conduct hostilities in a manner that is incompatible with LOAC. In reality, technological superiority (epitomized by precision-guided munitions, unmanned aerial vehicles (UAVs) and a host of other sophisticated tools of warfare) has led civilized armed forces to pay greater—rather than lesser—attention to the detailed constraints of LOAC. Attacks are now more surgical than in the past, information about what is going on “on the other side of the hill” is increasingly collated in real time, and so forth. Yet, we are simply not giving ourselves a break. One can sincerely say that “we have met the enemy and it is us.” As far as I am concerned, the moral of the story is that we should undergo some sort of mental therapy. Otherwise, civilization may not outlast the modern barbarians.

## 5

Geography restrictions limit out affiliates and create safe havens—destroys the campaign against AQ—adhering to LOAC solves better

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(Peter, “Networks in Non-International Armed Conflicts: Crossing Borders and Defining ‘Organized Armed Group’,” 89 INT’L L. STUD. 54)

Al Qaeda displays this mix of organizational forms in its relationships with affiliated groups.88 While Al Qaeda’s core remains in Pakistan, its lack of geographic proximity to other groups is not necessarily a weakness. Net-work theory teaches us that physical proximity is less important when knowledge and values can be shared in other ways.89 Links between Al Qaeda and regional groups are synergistic along a number of axes. The Taliban/Al Qaeda link has been durable and effec-tive because it combined the embedded localism of the Afghan Taliban with the extreme Islamist network of schools and camps based in Paki-stan.90 In other situations, regional organizations seek out Al Qaeda when State pressure has weakened the organization.91 Allied with Al Qaeda, groups can share information on effective strategies and learn from their mistakes.92 Al Qaeda has historically welcomed such overtures, since they assist the global group in extending its brand.93 More sophisticated tech-nology, including improvement in transportation and communications, has made it far easier to coordinate activities across regions. Examples of this synergy abound. For example, Al Qaeda in the Arabi-an Peninsula (AQAP), which operates primarily in Yemen, began as a result of “direct orders” from Osama bin Laden to Al Qaeda members on the ground in that region.95 Today, AQAP is both more “professional” in its operations and more linked to the Al Qaeda “core.”96 In North Africa, Al Qaeda of the Islamic Maghreb (AQIM) enjoys a partnership with Al Qaeda.97 Al Qaeda’s current leader, Dr. Ayman al-Zawahiri, announced a “blessed union” with AQIM, leading both groups to focus on attacking French interests.98 In Somalia, the terrorist group al Shabab publicly pledged its loyalty to Al Qaeda.99 Operatives trained in Afghanistan camps transferred to Somalia to provide training to Shabab members.100 The two organizations now cooperate on a host of matters, from ideological instruc-tion to advanced tactics.101 Zarqawi’s AQI “willingly merged” with bin Laden’s group, although the latter had been weakened by the erosion of its base in Afghanistan after September 11.102 Credible evidence indicates that members of Al Qaeda in Iraq have been assigned to “establish cells in oth-er countries.”103 Al Qaeda provides training for operations elsewhere. For example, the perpetrators of the London subway suicide attacks obtained training from Al Qaeda branches in Pakistan.104 Indeed, Al Qaeda provided training in Afghanistan, Pakistan and Yemen to as many as three thousand violent ex-tremists from the United Kingdom, who subsequently returned, “em-bedd[ed] themselves” in communities and developed plans for further at-tacks.105 While discrimination and alienation from the mainstream in the United Kingdom and elsewhere may have facilitated additional recruitment, “much of the terrorist threat in the United Kingdom today stems from de-liberate, long-standing subversion by al Qaeda.”106 Al Qaeda–linked net-works released videotaped martyrs’ wills.107 Other plots, such as the con-spiracy to target transatlantic passenger aircraft in 2006, also have ties to Al Qaeda networks in Pakistan or Yemen.108 Groups such as Hezbollah have global networks that attract financing and recruit new members.109 Moreo-ver, some terrorist groups have strong links to transnational criminal enter-prises that share the proceeds of drug trafficking, kidnapping and prostitu-tion.110 Groups partnering with Al Qaeda buy into a distinctive operational fo-cus. While many groups have local agendas, groups under the Al Qaeda umbrella must agree to pursue attacks on Western interests.111 The attacks on Western interests are a signature element of Al Qaeda; perpetuating these attacks allows groups under the Al Qaeda umbrella to “stay on mes- sage.”112 Moreover, Al Qaeda insists on specific approval for attacks out-side a subsidiary’s regional base.113 For example, when a Danish newspaper published caricatures of the Prophet Muhammad, Al Qaeda asked its Iraqi branch to carry out attacks on Danish interests.114 U.S. officials believe that Hezbollah operatives played a significant role in the July 2012 attack in Bulgaria on a bus carrying Israeli tourists.115 In addition, Al Qaeda requires certain operational modalities for attacks outside a branch’s region. Al Qaeda pushes suicide attacks and patterned attacks on particular kinds of targets, such as public transportation, government structures and infra-structure.116 This layer of specific operational control demonstrates Al Qaeda’s organizational contours and confirms its existence and functioning as a “united front.”117 Al Qaeda also has structural mechanisms that ensure communication and guidance. It uses information committees that are tied to senior leadership and operational planners.118 A networked approach driven by an anti-Western strategic focus has many advantages for Al Qaeda. Shared ideology lessens the likelihood of deterring the group through ordinary law enforcement or negotiation. Sui-cide bombers will not blink at the prospect of arrest and trial. Rather, in-volvement with the legal system confers another opportunity for the at-tackers to brand themselves as martyrs.119 In addition, networks such as Al Qaeda and its affiliates are far less amenable to negotiation than territory-based groups. Groups that control territory within a single State may on occasion be a party to successful negotiations, as the IRA demonstrated.120 Such movements may gain a stake in negotiations, as they seek to ease State pressure on their territorial base.121 In contrast, the disaggregation of terri- tory and operations in transnational networks mean that those groups lack a “return address.” Since transnational groups can readily shift their opera-tions,122 State pressure is not an effective deterrent. The absence of a gen-eral deterrent only exacerbates the risk of armed conflict from transnational groups, and makes specific deterrence or incapacitation of the group’s op-eratives all the more imperative.123 On the basis of this analysis of terrorist and network organization, tar-geting of an Al Qaeda affiliate is permissible on a showing that Al Qaeda exerts a strategic influence on the targeted group. A State considering tar-geting members of the Al Qaeda subsidiary should have a reasonable basis for believing that Al Qaeda guides some or all of the group’s choice of tar-gets. Mere subscription to an ideology is not enough—nor is financing, although financing can be one factor contributing to an inference of strate-gic influence. Policymakers should have a reasonable belief that Al Qaeda has leveraged money, recruits, training or expertise to encourage the affili-ate’s targeting of Western interests or moderation in the targeting of Mus-lim civilians. Ongoing correspondence or exchanges of information about targeting or operations should give rise to an inference that such influence is present. Al Qaeda’s role in the training of an affiliate’s recruits should also have evidentiary significance.124 No rigid hierarchy need be shown—indeed, as we have seen, the case law from transnational tribunals has often required less hierarchy than meets the eye.125 IV. CONCLUSION One need not read the modern jurisprudence defining an OAG as being limited to groups with headquarters, fully functioning logistics or ironclad discipline. While the ICTY decisions include language setting out these criteria, the facts of the cases are actually far more ambiguous. In judgments such as Limaj, the ICTY found organization when traditional elements were equivocal. The ICTY jurisprudence and the analysis of many com-mentators point toward a more pragmatic approach. That said, terrorist organizations often reveal surprisingly strong elements of organization. Like other entities, terrorist groups devise mecha-nisms to deal with the problem of agency costs. They monitor, assess and document performance of their personnel, and make appropriate changes when needed. These measures exist even when they appear to endanger the groups’ security. The versatile approach to organization that marks terrorist groups within a State also holds true for transnational networks such as Al Qaeda. Al Qaeda operates in a synergistic fashion with regional groups. Many groups have received training from Al Qaeda’s core feeder sources of schools and camps, and have sworn allegiance to Al Qaeda to enhance their appeal and access to resources. Direct operational control is rarely present. However, strategic influence, including a focus on targeting West-ern interests, is common. When such strategic influence can be shown, the definition of an OAG is sufficiently flexible to permit targeting across borders.

Nuclear terrorism causes extinction

Hellman 8 (Martin E. Hellman, emeritus prof of engineering @ Stanford, “Risk Analysis of Nuclear Deterrence” SPRING 2008 THE BENT OF TAU BETA PI, <http://www.nuclearrisk.org/paper.pdf>)

The threat of nuclear terrorism looms much larger in the public’s mind than the threat of a full-scale nuclear war, yet this article focuses primarily on the latter. An explanation is therefore in order before proceeding. A terrorist attack involving a nuclear weapon would be a catastrophe of immense proportions: “A 10-kiloton bomb detonated at Grand Central Station on a typical work day would likely kill some half a million people, and inflict over a trillion dollars in direct economic damage. America and its way of life would be changed forever.” [Bunn 2003, pages viii-ix]. The likelihood of such an attack is also significant. Former Secretary of Defense William Perry has estimated the chance of a nuclear terrorist incident within the next decade to be roughly 50 percent [Bunn 2007, page 15]. David Albright, a former weapons inspector in Iraq, estimates those odds at less than one percent, but notes, “We would never accept a situation where the chance of a major nuclear accident like Chernobyl would be anywhere near 1% .... A nuclear terrorism attack is a low-probability event, but we can’t live in a world where it’s anything but extremely low-probability.” [Hegland 2005]. In a survey of 85 national security experts, Senator Richard Lugar found a median estimate of 20 percent for the “probability of an attack involving a nuclear explosion occurring somewhere in the world in the next 10 years,” with 79 percent of the respondents believing “it more likely to be carried out by terrorists” than by a government [Lugar 2005, pp. 14-15]. I support increased efforts to reduce the threat of nuclear terrorism, but that is not inconsistent with the approach of this article. Because terrorism is one of the potential trigger mechanisms for a full-scale nuclear war, the risk analyses proposed herein will include estimating the risk of nuclear terrorism as one component of the overall risk. If that risk, the overall risk, or both are found to be unacceptable, then the proposed remedies would be directed to reduce which- ever risk(s) warrant attention. Similar remarks apply to a number of other threats (e.g., nuclear war between the U.S. and China over Taiwan). his article would be incomplete if it only dealt with the threat of nuclear terrorism and neglected the threat of full- scale nuclear war. If both risks are unacceptable, an effort to reduce only the terrorist component would leave humanity in great peril. In fact, society’s almost total neglect of the threat of full-scale nuclear war makes studying that risk all the more important. The cosT of World War iii The danger associated with nuclear deterrence depends on both the cost of a failure and the failure rate.3 This section explores the cost of a failure of nuclear deterrence, and the next section is concerned with the failure rate. While other definitions are possible, this article defines a failure of deterrence to mean a full-scale exchange of all nuclear weapons available to the U.S. and Russia, an event that will be termed World War III. Approximately 20 million people died as a result of the first World War. World War II’s fatalities were double or triple that number—chaos prevented a more precise deter- mination. In both cases humanity recovered, and the world today bears few scars that attest to the horror of those two wars. Many people therefore implicitly believe that a third World War would be horrible but survivable, an extrapola- tion of the effects of the first two global wars. In that view, World War III, while horrible, is something that humanity may just have to face and from which it will then have to recover. In contrast, some of those most qualified to assess the situation hold a very different view. In a 1961 speech to a joint session of the Philippine Con- gress, General Douglas MacArthur, stated, “Global war has become a Frankenstein to destroy both sides. … If you lose, you are annihilated. If you win, you stand only to lose. No longer does it possess even the chance of the winner of a duel. It contains now only the germs of double suicide.” Former Secretary of Defense Robert McNamara ex- pressed a similar view: “If deterrence fails and conflict develops, the present U.S. and NATO strategy carries with it a high risk that Western civilization will be destroyed” [McNamara 1986, page 6]. More recently, George Shultz, William Perry, Henry Kissinger, and Sam Nunn4 echoed those concerns when they quoted President Reagan’s belief that nuclear weapons were “totally irrational, totally inhu- mane, good for nothing but killing, possibly destructive of life on earth and civilization.” [Shultz 2007] Official studies, while couched in less emotional terms, still convey the horrendous toll that World War III would exact: “The resulting deaths would be far beyond any precedent. Executive branch calculations show a range of U.S. deaths from 35 to 77 percent (i.e., 79-160 million dead) … a change in targeting could kill somewhere between 20 million and 30 million additional people on each side .... These calculations reflect only deaths during the first 30 days. Additional millions would be injured, and many would eventually die from lack of adequate medical care … millions of people might starve or freeze during the follow- ing winter, but it is not possible to estimate how many. … further millions … might eventually die of latent radiation effects.” [OTA 1979, page 8] This OTA report also noted the possibility of serious ecological damage [OTA 1979, page 9], a concern that as- sumed a new potentiality when the TTAPS report [TTAPS 1983] proposed that the ash and dust from so many nearly simultaneous nuclear explosions and their resultant fire- storms could usher in a nuclear winter that might erase homo sapiens from the face of the earth, much as many scientists now believe the K-T Extinction that wiped out the dinosaurs resulted from an impact winter caused by ash and dust from a large asteroid or comet striking Earth. The TTAPS report produced a heated debate, and there is still no scientific consensus on whether a nuclear winter would follow a full-scale nuclear war. Recent work [Robock 2007, Toon 2007] suggests that even a limited nuclear exchange or one between newer nuclear-weapon states, such as India and Pakistan, could have devastating long-lasting climatic consequences due to the large volumes of smoke that would be generated by fires in modern megacities. While it is uncertain how destructive World War III would be, prudence dictates that we apply the same engi- neering conservatism that saved the Golden Gate Bridge from collapsing on its 50th anniversary and assume that preventing World War III is a necessity—not an option.

## 6

#### Immigration reform is up—Obama has leverage—that’s key to overcome GOP obstructionism

Jeff Mason, Reuters, 10/19/13, Analysis: Despite budget win, Obama has weak hand with Congress , health.yahoo.net/news/s/nm/analysis-despite-budget-win-obama-has-weak-hand-with-congress

Democrats believe, however, that Obama's bargaining hand may be strengthened by the thrashing Republicans took in opinion polls over their handling of the shutdown.

"This shutdown re-emphasized the overwhelming public demand for compromise and negotiation. And that may open up a window," said Ben LaBolt, Obama's 2012 campaign spokesman and a former White House aide.

"There's no doubt that some Republican members (of Congress) are going to oppose policies just because the president's for it. But the hand of those members was significantly weakened."

If he does have an upper hand, Obama is likely to apply it to immigration reform. The White House had hoped to have a bill concluded by the end of the summer. A Senate version passed with bipartisan support earlier this year but has languished in the Republican-controlled House.

"It will be hard to move anything forward, unless the Republicans find the political pain of obstructionism too much to bear," said Doug Hattaway, a Democratic strategist and an adviser to Hillary Clinton's 2008 presidential campaign.

"That may be the case with immigration - they'll face pressure from business and Latinos to advance immigration reform," he said.

#### The plan reverses these dynamics—sparks an inter-branch fight derailing the agenda

Douglas Kriner, Assistant Profess of Political Science at Boston University, 2010, After the Rubicon: Congress, Presidents, and the Politics of Waging War, p. 67-69

Raising or Lowering Political Costs by Affecting Presidential Political Capital

Shaping both real and anticipated public opinion are two important ways in which Congress can raise or lower the political costs of a military action for the president. However, focusing exclusively on opinion dynamics threatens to obscure the much broader political consequences of domestic reaction—particularly congressional opposition—to presidential foreign policies. At least since Richard Neustadt's seminal work Presidential Power, presidency scholars have warned that costly political battles in one policy arena frequently have significant ramifications for presidential power in other realms. Indeed, two of Neustadt's three "cases of command"—Truman's seizure of the steel mills and firing of General Douglas MacArthur—explicitly discussed the broader political consequences of stiff domestic resistance to presidential assertions of commander-in-chief powers. In both cases, Truman emerged victorious in the case at hand—yet, Neustadt argues, each victory cost Truman dearly in terms of his future power prospects and leeway in other policy areas, many of which were more important to the president than achieving unconditional victory over North Korea."

While congressional support leaves the president's reserve of political capital intact, congressional criticism saps energy from other initiatives on the home front by forcing the president to expend energy and effort defending his international agenda. Political capital spent shoring up support for a president's foreign policies is capital that is unavailable for his future policy initiatives. Moreover, any weakening in the president's political clout may have immediate ramifications for his reelection prospects, as well as indirect consequences for congressional races." Indeed, Democratic efforts to tie congressional Republican incumbents to President George W. Bush and his war policies paid immediate political dividends in the 2006 midterms, particularly in states, districts, and counties that had suffered the highest casualty rates in the Iraq War.6°

In addition to boding ill for the president's perceived political capital and reputation, such partisan losses in Congress only further imperil his programmatic agenda, both international and domestic. Scholars have long noted that President Lyndon Johnson's dream of a Great Society also perished in the rice paddies of Vietnam. Lacking both the requisite funds in a war-depleted treasury and the political capital needed to sustain his legislative vision, Johnson gradually let his domestic goals slip away as he hunkered down in an effort first to win and then to end the Vietnam War. In the same way, many of President Bush's highest second-term domestic priorities, such as Social Security and immigration reform, failedperhaps in large part because the administration had to expend so much energy and effort waging a rear-guard action against congressional critics of the war in Iraq.

When making their cost-benefit calculations, presidents surely consider these wider political costs of congressional opposition to their military policies. If congressional opposition in the military arena stands to derail other elements of his agenda, all else being equal, the president will be more likely to judge the benefits of military action insufficient to its costs than if Congress stood behind him in the international arena

#### Reform key to biotech leadership

Schuster 2/17

(Dr. Sheldon – President @ Keck Graduate Institute, “Immigration Reform Could Lead to Great Things, Including Better Science and Better Science Education” 02/17/2013, http://www.huffingtonpost.com/dr-sheldon-schuster/immigration-reform-could-\_b\_2706832.html)

These students and young researchers not only do amazing things while they're here but their ideas and their drive enhances the quality of education for all of our students and the quality of life for all of our citizens. There can be a multiplying effect to innovation when international knowledge and ideas gain their own traction in homegrown academic institutions and industries. German rocket scientists who came to work in the U.S. in the wake of World War II were not solely responsible for landing Neil Armstrong on the moon. But they were the core from which a great international community of scholars and engineers were able to take NASA to astounding heights. The input of international students teaches all of our students how to integrate ideas that may vary greatly from their own and how to approach problems from a global perspective -- two skills that are required for success in the life science industry and that we need if we are to continue to remain the world leader in the rapidly advancing biotechnologies, such as individualized human genome sequencing. Reforming our immigration system so that more young professionals like these have the option to work in the United States not only boosts the national economy and strengthens the biotech hubs here in Southern California, which are so important to my state's economy, it also improves the quality of U.S. academic institutions, and, ultimately, is likely to hasten the pace of scientific discovery and innovation. It will certainly go a long way toward keeping the U.S. and its academic institutions at the center of such discovery and innovation.

**Breakthroughs in biotechnology key to rapid global expansion of GM agriculture**

**Martino-Catt and Sachs, 8**

[Susan J. Martino-Catt, Monsanto Company Member of Plant Physiology Editorial Board, Eric S. Sachs Monsanto Company Member of ASPB Education Foundation Board of Directors, “ Editor's Choice Series: The Next Generation of Biotech Crops,” Plant Physiology 147:3-5 (2008)]

 **Crop genetic modification** using traditional methods **has been essential for improving food quality and abundance**; however, f**armers** globally **are steadily increasing the area planted to crops improved with modern biotechnology**. **Breakthroughs in science and genetics have expanded the toolbox of genes available** for reducing biotic stressors, such as weeds, pests, and disease, which reduce agricultural productivity. Today, plant scientists are leveraging traditional and modern approaches in tandem to increase crop yields, quality, and economic returns, while reducing the environmental consequences associated with the consumption of natural resources, such as water, land, and fertilizer, for agriculture.

**The current need to accelerate agricultural productivity on a global scale has never been greater or more urgent.** At the same time, **the need to implement more sustainable approaches to conserve natural resources and preserve native habitats is also of paramount importance**. **The challenge** for the agricultural sector **is to:** (1) **deliver twice as much food in 2050 as is produced today** (Food and Agricultural Organization of the World Health Organization, 2002Go); (2) **reduce environmental impacts by producing more from each unit of land, water, and energy invested in crop production** (Raven, 2008Go); (3) **adapt cropping systems to climate changes that threaten crop productivity and food security on local and global levels**; and (4) encourage the development of new technologies that deliver economic returns for all farmers, small and large. **These are important and challenging goals, and are much more so when real or perceived risks lead to regulatory and policy actions that may slow the adoption of new technology**. Optimistically, **the adoption of rational approaches for introducing new agricultural and food technologies should lead to more widespread use that in turn will help address the agricultural challenges and also increase the acceptance of modern agricultural biotechnology** (Raven, 2008Go).

In the 12 years since commercialization of the first genetically modified (GM) crop in 1996, farmers have planted more than 690 million hectares (1.7 billion acres; James, 2007Go) without a single confirmed incidence of health or environmental harm (Food and Agricultural Organization of the World Health Organization, 2004Go; National Academy of Sciences, 2004Go). In the latest International Service for the Acquisition of Agri-biotech Applications report, planting of biotech crops in 2007 reached a new record of 114.3 million hectares (282.4 million acres) planted in 23 countries, representing a 12.3% increase in acreage from the previous year (James, 2007Go). Farmer benefits associated with planting of GM crops include reduced use of pesticides and insecticides (Brookes and Barfoot, 2007Go), increased safety for nontarget species (Marvier et al., 2007Go; Organisation for Economic Co-operation and Development, 2007Go), increased adoption of reduced/conservation tillage and soil conservation practices (Fawcett and Towry, 2002Go), reduced greenhouse gas emissions from agricultural practices (Brookes and Barfoot, 2007Go), as well as increased yields (Brookes and Barfoot, 2007Go).

**The first generation of biotech crops focused primarily on the single gene traits of herbicide tolerance and insect resistance**. These traits were accomplished by the expression of a given bacterial gene in the crops. In the case of herbicide tolerance, expression of a glyphosate-resistant form of the gene CP4 EPSPS resulted in plants being tolerant to glyphosate (Padgette et al., 1995Go). Similarly, expression of an insecticidal protein from Bacillus thuringiensis in plants resulted in protection of the plants from damage due to insect feeding (Perlak et al., 1991Go). Both of these early biotech products had well-defined mechanisms of action that led to the desired phenotypes. Additional products soon came to market that coupled both herbicide tolerance and insect resistance in the same plants. As farmers adopt new products to maximize productivity and profitability on the farm, they are increasingly planting crops with "stacked traits" for management of insects and weeds and "pyramided traits" for management of insect resistance. The actual growth in combined trait products was 22% between 2006 and 2007, which is nearly twice the growth rate of overall planting of GM crops (James, 2007Go).

**The next generation of biotech crops promises to include a broad range of products that will provide benefits to both farmers and consumers,** **and continue to meet the global agricultural challenges.** These products will most likely involve regulation of key endogenous plant pathways resulting in improved quantitative traits, such as yield, nitrogen use efficiency, and abiotic stress tolerance (e.g. drought, cold). These quantitative traits are known to typically be multigenic in nature, adding a new level of complexity in describing the mechanisms of action that underlie these phenotypes**. In addition to these types of traits, the first traits aimed at consumer benefits, such as healthier oils and enhanced nutritional content, will also be developed for commercialization**.

As with the first generation, successful delivery of the next generation of biotech crops to market will depend on establishing their food, feed, and environmental safety. Scientific and regulatory authorities have acknowledged the potential risks associated with genetic modification of all kinds, including traditional cross-breeding, biotechnology, chemical mutagenesis, and seed radiation, yet have established a safety assessment framework only for biotechnology-derived crops designed to identify any potential food, feed, and environmental safety risks prior to commercial use. Importantly, it has been concluded that **crops developed through modern biotechnology do not pose significant risks over and above those associated with conventional plant breeding** (National Academy of Sciences, 2004Go). The European Commission (2001)Go acknowledged that **the greater regulatory scrutiny given to biotech crops and foods probably make them even safer than conventional plants and foods**. The current comparative safety assessment process has been repeatedly endorsed as providing assurance of safety and nutritional quality by identifying similarities and differences between the new food or feed crop and a conventional counterpart with a history of safe use (Food and Drug Administration, 1992Go; Food and Agricultural Organization of the World Health Organization, 2002Go; Codex Alimentarius, 2003Go; Organisation for Economic Co-operation and Development, 2003Go; European Food Safety Authority, 2004Go; International Life Sciences Institute, 2004Go). Any differences are subjected to an extensive evaluation to determine whether there are any associated health or environmental risks, and, if so, whether the identified risks can be mitigated though preventative management.

**Biotech crops undergo detaile**d phenotypic, agronomic, morphological, and compositional **analyses to identify potential harmful effects that could affect product safety.** This process is a rigorous and robust assessment that is applicable to the next generation of biotech crops that potentially could include genetic changes that modulate the expression of one gene, several genes, or entire pathways. The safety assessment will characterize the nature of the inserted molecules, as well as their function and effect within the plant and the overall safety of the resulting crop. **This well-established and proven process will provide assurance of the safety of the next generation of biotech crops and help to reinforce rational approaches that enable the development and commercial use of new products that are critical to meeting agriculture's challenges.**

**Only way to Solve Extinction**

**Trewavas 2k** (Anthony, Institute of Cell and Molecular Biology – University of Edinburgh, “GM Is the Best Option We Have”, AgBioWorld, 6-5, <http://www.agbioworld.org/biotech-info/articles/biotech-art/best_option.html>)

There are some Western critics who oppose any solution to world problems involving technological progress. They denigrate this remarkable achievement. These luddite individuals found in some Aid organisations instead attempt to impose their primitivist western views on those countries where blindness and child death are common. This new form of Western cultural domination or neo-colonialism, because such it is, should be repelled by all those of good will. Those who stand to benefit in the third world will then be enabled to make their own choice freely about what they want for their own children. But these are foreign examples; **global warming is the problem that requires the** UK to **develop GM technology**. 1998 was the warmest year in the last one thousand years. Many think global warming will simply lead to a wetter climate and be benign. I do not. Excess rainfall in northern seas has been predicted to halt the Gulf Stream. In this situation, average UK temperatures would fall by 5 degrees centigrade and give us Moscow-like winters. **There are already worrying signs of salinity changes in the deep oceans. Agriculture would be seriously damaged and necessitate the rapid development of new crop varieties to secure our food supply. We would not have much warning.** Recent detailed analyses of arctic ice cores has shown that the climate can switch between stable states in fractions of a decade. **Even if the climate is only wetter and warmer new crop pests and rampant disease will be the consequence. GM technology can enable new crops to be constructed in months and to be in the fields within a few years. This is the unique benefit GM offers**. The UK populace needs to much more positive about GM or we may pay a very heavy price. In 535A.D. **a volcano near the present Krakatoa exploded with the force of 200 million Hiroshima A bombs**. **The dense cloud of dust so reduced the intensity of the sun that for at least two years thereafter, summer turned to winter and crops** here and elsewhere **in the Northern hemisphere failed completely.** **The population survived by hunting a rapidly vanishing population of edible animals**. The after-effects continued for a decade and human history was changed irreversibly. But **the planet recovered**. **Such examples of benign nature's wisdom**, in full flood as it were**, dwarf and make miniscule the tiny modifications we make upon our environment**. **There are** apparently **100 such volcanoes round the world that could at any time unleash forces as great.** And **even smaller volcanic explosions change our climate and can easily threaten the security of our food supply**. Our hold on this planet is tenuous. In the present day an equivalent 535A.D. explosion would destroy much of our civilisation. **Only those with agricultural technology sufficiently advanced would have a chance at survival.** **Colliding asteroids are another problem that requires us to be forward-looking accepting that technological advance may be the only buffer between us and annihilation**. When people say to me they do not need GM, I am astonished at their prescience, their ability to read a benign future in a crystal ball that I cannot. Now is the time to experiment; not when a holocaust is upon us and it is too late. **GM is a technology whose time has come and just in the nick of time.** **With each billion that mankind has added to the planet have come technological advances to increase food supply**. In the 18th century, the start of agricultural mechanisation; in the 19th century knowledge of crop mineral requirements, the eventual Haber Bosch process for nitrogen reduction. In the 20th century plant genetics and breeding, and later the green revolution. Each time population growth has been sustained without enormous loss of life through starvation even though crisis often beckoned. For the 21st century, **genetic manipulation is our primary hope to maintain developing and complex technological civilisations**. **When the climate is changing in unpredictable ways, diversity in agricultural technology is a strength and a necessity not a luxury**. Diversity helps secure our food supply. We have heard much of the precautionary principle in recent years; my version of it is "be prepared".

## Allies

#### Self-interest overwhelms legal disputes

Kristin Archick, Congressional Research Service Specialist in European Affairs, 9/4/13, U.S.-EU Cooperation Against Terrorism, http://www.fas.org/sgp/crs/row/RS22030.pdf

The September 11, 2001, terrorist attacks on the United States and the subsequent revelation of Al Qaeda cells in Europe gave new momentum to European Union (EU) initiatives to combat terrorism and improve police, judicial, and intelligence cooperation among its member states. Other deadly incidents in Europe, such as the Madrid and London bombings in 2004 and 2005 respectively, injected further urgency into strengthening EU counterterrorism capabilities and reducing barriers among national law enforcement authorities so that information could be meaningfully shared and suspects apprehended expeditiously. Among other steps, the EU has established a common definition of terrorism and a common list of terrorist groups, an EU arrest warrant, enhanced tools to stem terrorist financing, and new measures to strengthen external EU border controls and improve aviation security.

As part of its drive to bolster its counterterrorism capabilities, the EU has also made promoting law enforcement and intelligence cooperation with the United States a top priority. Washington has largely welcomed these efforts, recognizing that they may help root out terrorist cells both in Europe and elsewhere, and prevent future attacks against the United States or its interests abroad. U.S.-EU cooperation against terrorism has led to a new dynamic in U.S.-EU relations by fostering dialogue on law enforcement and homeland security issues previously reserved for bilateral discussions. Contacts between U.S. and EU officials on police, judicial, and border control policy matters have increased substantially since 2001. A number of new U.S.-EU agreements have also been reached; these include information-sharing arrangements between the United States and EU police and judicial bodies, two new U.S.-EU treaties on extradition and mutual legal assistance, and accords on container security and airline passenger data. In addition, the United States and the EU have been working together to curb terrorist financing and to strengthen transport security.

#### US-EU intel legal confrontation now

Henry Farrell, WaPo, 10/23/13, The Merkel phone tap scandal paves the way toward E.U.-U.S. confrontation, www.washingtonpost.com/blogs/monkey-cage/wp/2013/10/23/the-merkel-phone-tap-scandal-paves-the-way-toward-e-u-u-s-confrontation/?wprss=rss\_politics&clsrd

According to German news magazine, Spiegel, there is some evidence that the United States has tried to tap German Chancellor Angela Merkel’s cellphone. The evidence seems strong enough to have caused Merkel to make an angry phone call to Obama to complain. The administration, in response, has said that the United States “is not monitoring and will not monitor the communications of Chancellor Merkel.” It has declined to comment on whether it has monitored her phone communications in the past.

It’s likely that Germany is being hypocritical in complaining about the phone tap. The transcripts of the Wikileaks diplomatic cables reveal that Merkel has been privately very sympathetic to U.S. surveillance in the past. Almost certainly, Merkel would not be making angry and well publicized phone calls if the scandal hadn’t already become public. Now that it is public, she has to. The scandal is equivalent to the scandal that would erupt in the United States, if it was discovered that France had been tapping into President Obama’s blackberry.

Yet as Martha Finnemore and my arguments about hypocrisy suggest, the interesting question isn’t whether the German government is entirely sincere. It’s whether these revelations are making it tougher for the United States to have its cake and eat it too. And there is good reason to believe that they will make direct confrontation between Europe and the United States more likely.

On Monday, the European Parliament agreed on new privacy legislation, which included a provision that forbade businesses from giving personal information to U.S. authorities without informing European authorities, and the European citizen affected. The United States had previously successfully lobbied to get this provision deleted; it was reinstated as a result of the Snowden scandal. The European Parliament doesn’t get sole final say on this legislation — it now has to negotiate with Europe’s member states. U.S. politicians and lobbyists have been hoping that they can persuade enough member states to quietly delete the provision yet again.

This has suddenly become a lot harder. Merkel would probably personally like to see the provision deleted. Yet it is going to be very hard for her to push that argument, without looking like a sellout to the German public. The French wiretapping scandal is similarly going to harden public opposition in France. Disagreements over spying are usually handled discreetly through back channels. Not this time.

Thus — even if Merkel doesn’t want it (and she has done her best in her public statement to limit the controversy by only demanding that U.S. spying stops) — this latest scandal is plausibly going to lead to a major confrontation between the European Union and the United States over NSA spying, in which the two sides make incompatible legal demands. If this happens, Google, Facebook, and other companies that operate across both jurisdictions will be caught in the crossfire. It’s possible that Europe and the United States will find some way to fudge this and avoid confrontation, but it’s hard for me to see how.

Alliance collapse inevitable but no impact

Brown ‘12

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THE WEST AT BAY

The air is now filled with tough talk about NATO. Former NATO Secretary General Lord Robertson recently declared that we can no longer be satisfied with reassuring language enshrined after lengthy consultations and painful negotiations in periodic announcements of ‘‘strategic concepts’’ concerning such problems as missile defense, nuclear deterrence, relations with Russia, and global partnership. ‘‘I am not one to be mesmerized by fine words about underlying bonds of common values,’’ he declared. ‘‘They don’t provide helicopters and precision bombs.’’ The question is: What works and what does not work? Several different responses have been made to the present difficulties of the transatlantic relationship. Some observers are **deeply pessimistic.** Their arguments: Europe no longer matters. With the disappearance of the Soviet threat, Europeans do not have the **will or the means** to defend themselves, as shown by their reluctance to pay for their own defense. All their talk about creating a viable Common Foreign and Security Policy, comments Richard Haass, is just that—talk. Global power is shifting away from Europe toward Asia and other rising powers elsewhere, particularly the BRIC nations (Brazil, Russia, India, and, above all, China). Inevitably the United States will turn away from Europe and NATO and toward other parts of the world. Secretary of Defense Robert Gates contributed to this atmosphere of gloom and doom in his farewell appearance at NATO headquarters in June 2011 when he warned that the U.S. Congress would not be willing to pay for the defense of people who are not willing to defend themselves. There is a real possibility, he said, **of a ‘‘dim if not dismal future for the transatlantic alliance.**’’2 Others believe that American rather than European power is in decline. Among the frequently sounded themes: The United States is no longer the dominant superpower that it was in the past. Confidence in the quality of American leadership has been weakened, perhaps fatally, by the launching of a ‘‘war of choice’’ in Iraq. The rise of China and the other BRIC nations inevitably will create a multipolar world in which China may well become the dominant superpower. These structural trends will lead to the lessening importance and perhaps the disappearance of NATO. Many Europeans believe or hope that an increasingly united and selfconfident EU can fill the vacuum created by American decline. The EU in the past has always come out of crises stronger than before. Europeans are being urged to rise to the occasion and take steps to create true economic governance and an effective foreign and defense policy. Were this to happen, many hope the United States and the EU would then march ‘‘shoulder to shoulder’’ as equals within a revitalized transatlantic relationship and in NATO.

#### Cyberattacks impossible – empirics and defenses solve

**Rid 12** (Thomas Rid, reader in war studies at King's College London, is author of "Cyber War Will Not Take Place" and co-author of "Cyber-Weapons.", March/April 2012, “Think Again: Cyberwar”, http://www.foreignpolicy.com/articles/2012/02/27/cyberwar?page=full)

"Cyberwar Is Already Upon Us." No way. "Cyberwar is coming!" John Arquilla and David Ronfeldt predicted in a celebrated Rand paper back in 1993. Since then, it seems to have arrived -- at least by the account of the U.S. military establishment, which is busy competing over who should get what share of the fight. Cyberspace is "a domain in which the Air Force flies and fights," Air Force Secretary Michael Wynne claimed in 2006. By 2012, William J. Lynn III, the deputy defense secretary at the time, was writing that cyberwar is "just as critical to military operations as land, sea, air, and space." In January, the Defense Department vowed to equip the U.S. armed forces for "conducting a combined arms campaign across all domains -- land, air, maritime, space, and cyberspace." Meanwhile, growing piles of books and articles explore the threats of cyberwarfare, cyberterrorism, and how to survive them. Time for a reality check: Cyberwar is still more hype than hazard. Consider the definition of an act of war: It has to be potentially violent, it has to be purposeful, and it has to be political. The cyberattacks we've seen so far, from Estonia to the Stuxnet virus, simply don't meet these criteria. Take the dubious story of a Soviet pipeline explosion back in 1982, much cited by cyberwar's true believers as the most destructive cyberattack ever. The account goes like this: In June 1982, a Siberian pipeline that the CIA had virtually booby-trapped with a so-called "logic bomb" exploded in a monumental fireball that could be seen from space. The U.S. Air Force estimated the explosion at 3 kilotons, equivalent to a small nuclear device. Targeting a Soviet pipeline linking gas fields in Siberia to European markets, the operation sabotaged the pipeline's control systems with software from a Canadian firm that the CIA had doctored with malicious code. No one died, according to Thomas Reed, a U.S. National Security Council aide at the time who revealed the incident in his 2004 book, At the Abyss; the only harm came to the Soviet economy. But did it really happen? After Reed's account came out, Vasily Pchelintsev, a former KGB head of the Tyumen region, where the alleged explosion supposedly took place, denied the story. There are also no media reports from 1982 that confirm such an explosion, though accidents and pipeline explosions in the Soviet Union were regularly reported in the early 1980s. Something likely did happen, but Reed's book is the only public mention of the incident and his account relied on a single document. Even after the CIA declassified a redacted version of Reed's source, a note on the so-called Farewell Dossier that describes the effort to provide the Soviet Union with defective technology, the agency did not confirm that such an explosion occurred. The available evidence on the Siberian pipeline blast is so thin that it shouldn't be counted as a proven case of a successful cyberattack. Most other commonly cited cases of cyberwar are even less remarkable. Take the attacks on Estonia in April 2007, which came in response to the controversial relocation of a Soviet war memorial, the Bronze Soldier. The well-wired country found itself at the receiving end of a massive distributed denial-of-service attack that emanated from up to 85,000 hijacked computers and lasted three weeks. The attacks reached a peak on May 9, when 58 Estonian websites were attacked at once and the online services of Estonia's largest bank were taken down. "What's the difference between a blockade of harbors or airports of sovereign states and the blockade of government institutions and newspaper websites?" asked Estonian Prime Minister Andrus Ansip. Despite his analogies, the attack was no act of war. It was certainly a nuisance and an emotional strike on the country, but the bank's actual network was not even penetrated; it went down for 90 minutes one day and two hours the next. The attack was not violent, it wasn't purposefully aimed at changing Estonia's behavior, and no political entity took credit for it. The same is true for the vast majority of cyberattacks on record. Indeed, there is no known cyberattack that has caused the loss of human life. No cyberoffense has ever injured a person or damaged a building. And if an act is not at least potentially violent, it's not an act of war. Separating war from physical violence makes it a metaphorical notion; it would mean that there is no way to distinguish between World War II, say, and the "wars" on obesity and cancer. Yet those ailments, unlike past examples of cyber "war," actually do kill people. "A Digital Pearl Harbor Is Only a Matter of Time." Keep waiting. U.S. Defense Secretary Leon Panetta delivered a stark warning last summer: "We could face a cyberattack that could be the equivalent of Pearl Harbor." Such alarmist predictions have been ricocheting inside the Beltway for the past two decades, and some scaremongers have even upped the ante by raising the alarm about a cyber 9/11. In his 2010 book, Cyber War, former White House counterterrorism czar Richard Clarke invokes the specter of nationwide power blackouts, planes falling out of the sky, trains derailing, refineries burning, pipelines exploding, poisonous gas clouds wafting, and satellites spinning out of orbit -- events that would make the 2001 attacks pale in comparison. But the empirical record is less hair-raising, even by the standards of the most drastic example available. Gen. Keith Alexander, head of U.S. Cyber Command (established in 2010 and now boasting a budget of more than $3 billion), shared his worst fears in an April 2011 speech at the University of Rhode Island: "What I'm concerned about are destructive attacks," Alexander said, "those that are coming." He then invoked a remarkable accident at Russia's Sayano-Shushenskaya hydroelectric plant to highlight the kind of damage a cyberattack might be able to cause. Shortly after midnight on Aug. 17, 2009, a 900-ton turbine was ripped out of its seat by a so-called "water hammer," a sudden surge in water pressure that then caused a transformer explosion. The turbine's unusually high vibrations had worn down the bolts that kept its cover in place, and an offline sensor failed to detect the malfunction. Seventy-five people died in the accident, energy prices in Russia rose, and rebuilding the plant is slated to cost $1.3 billion. Tough luck for the Russians, but here's what the head of Cyber Command didn't say: The ill-fated turbine had been malfunctioning for some time, and the plant's management was notoriously poor. On top of that, the key event that ultimately triggered the catastrophe seems to have been a fire at Bratsk power station, about 500 miles away. Because the energy supply from Bratsk dropped, authorities remotely increased the burden on the Sayano-Shushenskaya plant. The sudden spike overwhelmed the turbine, which was two months shy of reaching the end of its 30-year life cycle, sparking the catastrophe. If anything, the Sayano-Shushenskaya incident highlights how difficult a devastating attack would be to mount. The plant's washout was an accident at the end of a complicated and unique chain of events. Anticipating such vulnerabilities in advance is extraordinarily difficult even for insiders; creating comparable coincidences from cyberspace would be a daunting challenge at best for outsiders. If this is the most drastic incident Cyber Command can conjure up, perhaps it's time for everyone to take a deep breath. "Cyberattacks Are Becoming Easier." Just the opposite. U.S. Director of National Intelligence James R. Clapper warned last year that the volume of malicious software on American networks had more than tripled since 2009 and that more than 60,000 pieces of malware are now discovered every day. The United States, he said, is undergoing "a phenomenon known as 'convergence,' which amplifies the opportunity for disruptive cyberattacks, including against physical infrastructures." ("Digital convergence" is a snazzy term for a simple thing: more and more devices able to talk to each other, and formerly separate industries and activities able to work together.) Just because there's more malware, however, doesn't mean that attacks are becoming easier. In fact, potentially damaging or life-threatening cyberattacks should be more difficult to pull off. Why? Sensitive systems generally have built-in redundancy and safety systems, meaning an attacker's likely objective will not be to shut down a system, since merely forcing the shutdown of one control system, say a power plant, could trigger a backup and cause operators to start looking for the bug. To work as an effective weapon, malware would have to influence an active process -- but not bring it to a screeching halt. If the malicious activity extends over a lengthy period, it has to remain stealthy. That's a more difficult trick than hitting the virtual off-button. Take Stuxnet, the worm that sabotaged Iran's nuclear program in 2010. It didn't just crudely shut down the centrifuges at the Natanz nuclear facility; rather, the worm subtly manipulated the system. Stuxnet stealthily infiltrated the plant's networks, then hopped onto the protected control systems, intercepted input values from sensors, recorded these data, and then provided the legitimate controller code with pre-recorded fake input signals, according to researchers who have studied the worm. Its objective was not just to fool operators in a control room, but also to circumvent digital safety and monitoring systems so it could secretly manipulate the actual processes. Building and deploying Stuxnet required extremely detailed intelligence about the systems it was supposed to compromise, and the same will be true for other dangerous cyberweapons. Yes, "convergence," standardization, and sloppy defense of control-systems software could increase the risk of generic attacks, but the same trend has also caused defenses against the most coveted targets to improve steadily and has made reprogramming highly specific installations on legacy systems more complex, not less.

#### Trade doesn’t solve war

Martin et. al. 8(Phillipe, University of Paris 1 Pantheon—Sorbonne, Paris School of Economics, and Centre for Economic Policy Research; Thierry MAYER, University of Paris 1 Pantheon—Sorbonne, Paris School of Economics, CEPII, and Centre for Economic Policy Research, Mathias THOENIG, University of Geneva and Paris School of Economics, The Review of Economic Studies 75)

Does globalization pacify international relations? The “liberal” view in political science argues that increasing trade flows and the spread of free markets and democracy should limit the incentive to use military force in interstate relations. This vision, which can partly be traced back to Kant’s Essay on Perpetual Peace (1795), has been very influential: The main objective of the European trade integration process was to prevent the killing and destruction of the two World Wars from ever happening again.1 Figure 1 suggests2 however, that during the 1870–2001 period, the correlation between trade openness and military conflicts is not a clear cut one. The first era of globalization, at the end of the 19th century, was a period of rising trade openness and multiple military conflicts, culminating with World War I. Then, the interwar period was characterized by a simultaneous collapse of world trade and conflicts. After World War II, world trade increased rapidly, while the number of conflicts decreased (although the risk of a global conflict was obviously high). There is no clear evidence that the 1990s, during which trade flows increased dramatically, was a period of lower prevalence of military conflicts, even taking into account the increase in the number of sovereign states.

## Overreach

No impact—drones make wars less intense

McGinnis, senior professor – Northwestern Law, ‘10

(John O., 104 Nw. U. L. Rev. Colloquy 366)

It is not as if in the absence of AI wars or weapons will cease to exist. The way to think about the effects of AI on war is to think of the consequences of substituting technologically advanced robots for humans on the battlefield. In at least three ways, that substitution is likely to be beneficial to humans. First, robots make conventional forces more effective and less vulnerable to certain weapons of mass destruction, like chemical and biological weapons. Rebalancing the world to make such weapons **less effective**, even if marginally so, must be counted as a benefit. Second, one of the reasons that conventional armies deploy lethal force is to protect the human soldiers against death or serious injury. If only robots are at stake in a battle, a nation is more likely to use non-lethal force, such as stun guns and the like. The United States is in fact considering outfitting some of its robotic forces with non-lethal weapon-ry. Third, AI-driven weaponry gives an advantage to the developed world and particularly to the United States, be-cause of its advanced capability in technological innovation. Robotic weapons have been among the most successful in the fight against Al-Qaeda and other groups waging asymmetrical warfare against the United States. The Predator, a robotic airplane, has been successfully targeting terrorists throughout Afghanistan and Pakistan, and more technologi-cally advanced versions are being rapidly developed. Moreover, it does so in a targeted manner without the need to launch large-scale wars to hold territory--a process that would almost certainly result in more collateral damage. n61 If one believes that the United States is on the whole the best enforcer of rules of conduct that make for a peaceful and prosperous world, this development must also be counted as a benefit.

Existing norms solve and precedent isn’t key

Anderson, professor of international law – American University, ‘13

(Kenneth, "The Case for Drones", https://www.commentarymagazine.com/articles/the-case-for-drones/)

The objection to civilian deaths draws out a related criticism: Why should the United States be able to conduct these drone strikes in Pakistan or in Yemen, countries that are not at war with America? What gives the United States the moral right to take its troubles to other places and inflict damage by waging war? Why should innocent Pakistanis suffer because the United States has trouble with terrorists? The answer is simply that like it or not, the terrorists are in these parts of Pakistan, and it is the terrorists that have brought trouble to the country. The U.S. has adopted a moral and legal standard with regard to where it will conduct drone strikes against terrorist groups. It will seek consent of the government, as it has long done with Pakistan, even if that is contested and much less certain than it once was. But there will be no safe havens. If al-Qaeda or its affiliated groups take haven somewhere and the government is unwilling or unable to address that threat, America’s very long-standing view of international law permits it to take forcible action against the threat, sovereignty and territorial integrity notwithstanding. This is not to say that the United States could or would use drones anywhere it wished. Places that have the rule of law and the ability to respond to terrorists on their territory are different from weakly governed or ungoverned places. There won’t be drones over Paris or London—this canard is popular among campaigners and the media but ought to be put to rest. But the vast, weakly governed spaces, where states are often threatened by Islamist insurgency, such as Mali or Yemen, are a different case altogether. This critique often leads, however, to the further objection that the American use of drones is essentially laying the groundwork for others to do the same. Steve Coll wrote in the New Yorker: “America’s drone campaign is also creating an ominous global precedent. Ten years or less from now, China will likely be able to field armed drones. How might its Politburo apply Obama’s doctrines to Tibetan activists holding meetings in Nepal?” The United States, it is claimed, is arrogantly exerting its momentary technological advantage to do what it likes. It will be sorry when other states follow suit. But the United States does not use drones in this fashion and has claimed no special status for drones. The U.S. government uses drone warfare in a far more limited way, legally and morally, and **entirely within the bounds of** international law. The problem with China (or Russia) using drones is that they might not use them in the same way as the United States. The drone itself is a tool. How it is used and against whom—these are moral questions. If China behaves malignantly, drones will not be responsible. Its leaders will be.

The US can’t set drone norms

Wright, Pulitzer-winning journalist, former writer and editor – The Atlantic, 11/14/’12

(Robert, citing Max Boot, senior fellow @ CFR, “The Incoherence of a Drone-Strike Advocate,” http://www.theatlantic.com/international/archive/2012/11/the-incoherence-of-a-drone-strike-advocate/265256/)

Naureen Shah of Columbia Law School, a guest on the show, had raised the possibility that America is setting a dangerous precedent with drone strikes. If other people start doing what America does--fire drones into nations that house somebody they want dead--couldn't this come back to haunt us? And haunt the whole world? Shouldn't the U.S. be helping to establish a global norm against this sort of thing? Host Warren Olney asked Boot to respond. Boot started out with this observation: I think the precedent setting argument is overblown, because I don't think other countries act based necessarily on what we do and in fact we've seen lots of Americans be killed by acts of terrorism over the last several decades, none of them by drones but they've certainly been killed with car bombs and other means. That's true--no deaths by terrorist drone strike so far. But I think a fairly undeniable premise of the question was that the arsenal of terrorists and other nations may change as time passes. So answering it by reference to their current arsenal isn't very illuminating. In 1945, if I had raised the possibility that the Soviet Union might one day have nuclear weapons, it wouldn't have made sense for you to dismiss that possibility by noting that none of the Soviet bombs dropped during World War II were nuclear, right? As if he was reading my mind, Boot immediately went on to address the prospect of drone technology spreading. Here's what he said: You know, drones are a pretty high tech instrument to employ and they're going to be outside the reach of most terrorist groups and even most countries. But whether we use them or not, the technology is propagating out there. We're seeing Hezbollah operate Iranian supplied drones over Israel, for example, and our giving up our use of drones is not going to prevent Iran or others from using drones on their own. So I wouldn't worry too much about the so called precedent it sets..."

The impact of escalating litigation is wrong – it has no impact

Benjamin Wittes, editor in chief of Lawfare and a Senior Fellow in Governance Studies at the Brookings Institution. He is the author of several books and a member of the Hoover Institution's Task Force on National Security and Law, 2/27/13, In Defense of the Administration on Targeted Killing of Americans, www.lawfareblog.com/2013/02/in-defense-of-the-administration-on-targeted-killing-of-americans/

This view has currency among European allies, among advocacy groups, and in the legal academy. **Unfortunately for its proponents, it has no currency among the three branches of government** of the United States. The courts and the executive branch have both taken the opposite view, and the Congress passed a broad authorization for the use of force and despite many opportunities, has never revisited that document to impose limitations by geography or to preclude force on the basis of co-belligerency—much less to clarify that the AUMF does not, any longer, authorize the use of military force at all. Congress has been repeatedly briefed on U.S. targeting decisions, including those involving U.S. persons.[5] It was therefore surely empowered to either use the power of the purse to prohibit such action or to modify the AUMF in a way that undermined the President’s legal reasoning. Not only has it taken neither of these steps, but Congress has also funded the relevant programs. Moreover, as I noted above, Congress’s recent reaffirmation of the AUMF in the 2012 NDAA with respect to detention, once again contains no geographical limitation. There is, in other words, a consensus among the branches of government on the point that the United States is engaged in an armed conflict that involves co-belligerent forces and follows the enemy to the new territorial ground it stakes out. It is a consensus that rejects the particular view of the law advanced by numerous critics. And it is a consensus on which the executive branch is entitled to rely in formulating its legal views.

Backlash is inevitable – i-law, secrecy, habeas

Groves, senior research fellow – Institute for International Studies @ Heritage, 1/25/’13

(Steven, “The U.S. Should Ignore U.N. Inquiry Into Drone Strikes,” http://blog.heritage.org/2013/01/25/the-u-s-should-ignore-u-n-inquiry-into-drone-strikes/)

Various international legal academics and human rights activists have regularly made these and other similar allegations ever since the Obama Administration stepped up the drone program in 2009. While drone strikes cannot be viewed alone as an effective counterterrorism strategy, the Administration has repeatedly defended the legality of the program. Emmerson and his fellow U.N. special rapporteurs Philip Alston and Christof Heyns have repeatedly demanded that the U.S. provide more information on drone strikes—and the U.S. has repeatedly complied, issuing public statement after public statement defending every aspect of the drone program. Public statements detailing the legality and propriety of the drone program have been made by top Administration officials, including State Department Legal Adviser Harold Koh, Attorney General Eric Holder, Deputy National Security Advisor John Brennan, General Counsel for the Department of Defense Jeh Johnson, and CIA General Counsel Stephen Preston. Increased transparency will, of course, be deemed by human rights activists as insufficient where their true goal is to stop the U.S. drone program in its entirety. Unless and until the U.S. can somehow promise that no civilian casualties will result from drone strikes, such strikes will be considered violations of international law. Ignoring the U.N. probe will not make it go away, but the Obama Administration should not be so naive as to expect that its cooperation will substantively alter the investigation’s findings and conclusions.

# 2NC

## LRM

## Ischaroff

Squo rules of engagement solve the aff without legal mandates that wreck clarity—that’s Reeves. Rules of engagement are the best middle ground that maintain flexibility and abide by LOAC.

Corn, Presidential Research Professor – South Texas College of Law, Blank, director – International Humanitarian Law Clinic @ Emory Law, Jenks, Assistant Professor of Law and Criminal Justice Clinic Director – SMU Dedman School of Law, and Jensen, Associate Professor – Brigham Young Law School, ‘13

(Geoffrey, Laurie, Chris, and Eric, “Belligerent Targeting and the Invalidity of a Least Harmful Means Rule,” 89 INT’L L. STUD. 536)

Appreciating this interrelationship is therefore vital to understanding why the violation of a constraint imposed by a mission-specific ROE, or even customarily imposed by ROE, does not ipso facto establish a LOAC violation. To assess that apparent discrepancy, it is necessary to determine whether the ROE constraint was coterminous with the LOAC, or more restrictive than the scope of permissible authority derived from the LOAC. In contemporary military operations, including armed conflict, it is common for ROE to be more restrictive than the LOAC in order to satisfy policy considerations related to the application of combat power.229 Ac-cordingly, identifying a common ROE constraint is simply not probative to the analysis of the existence of a *legal* rule imposing a similar constraint. In the context of a least harmful means rule, this distinction and interaction between the LOAC and ROE is therefore essential to understanding the content of the LOAC’s obligations with regard to belligerent attack authority and when that authority terminates as a matter of law. Although ROE have and will likely continue to periodically impose a least harmful means restraint on operations directed against enemy bellig-erents, military operational art provides many logical explanations for imposing, on a contextual basis, such a limitation. These range from the de-sire to capture the enemy as a means of obtaining intelligence to the effort to demonstrate to other enemy personnel the wisdom of submission. It is critical to recognize, however, that such restraints derive from operational motivations, and not humanitarian concern for the enemy belligerent oper-ative. This indicates the fallacy in invoking such practices as evidence of a least harmful means obligation that limits the scope of attack authority. In-deed, the history of armed conflict and tactical realities indicate that there are many situations where commanders choose to employ the full force of their combat capability with clear knowledge that many of the enemy oper-atives subject to attack might be inclined to surrender, or pose no immedi-ate significant threat to friendly forces. Attacking enemy forces in such sit-uations confirms that the LOAC does not mandate a least harmful means consideration when engaging in operations to disable enemy belligerent operatives.

Promoting capture now solves the aff, but doesn’t link to the DA

Ulrich, JD – UVA, associate – International Arbitration @ White & Case, LLP, ‘5

(Jonathan, 45 Va. J. Int'l L. 1029)

The fact that military and intelligence officials together consider targeted killing as a last resort, when terrorist capture is too dangerous or logistically impossible, 19 further indicates that the conflict has not been conducted as a purely military endeavor. Counterterrorism officials, who recognize that a terrorist's intelligence value may far exceed his worth as a military target, prefer to capture al Qaeda leaders • ,- 120 for interrogation. Operations to capture, rather than kill, the enemy reflect the truly multi-dimensional nature of the war, linking the CIA, FBI, military, and foreign governments in a collective effort to bring terrorists to justice. 121 The dual nature of the terrorist enemy as combatant and criminal, and the different aims of the fight against it-making arrests, preventing future attacks, and destroying network infrastructure-demand, and have received, a flexible response from U.S. law enforcement, intelligence and military officials. Although treating the global war on terror as one large armed conflict is convenient for targeting purposes, the manner in which it has actually been conducted undermines the notion that the fight is a military endeavor governed **solely** by the laws of war. This fact alone, however, does not render the practice of targeted killing illegal.

## Daskal

#### Least Harmful means key to detention

Daskal 13 - Fellow and Adjunct Professor, Georgetown Center on National Security and the Law

University of Penn L. Rev., THE GEOGRAPHY OF THE BATTLEFIELD: A FRAMEWORK FOR DETENTION AND TARGETING OUTSIDE THE "HOT" CONFLICT ZONE, April, 2013, 161 U. Pa. L. Rev. 1165, Lexis

A least-harmful-means test should also inform long-term detention operations. Thus, even in cases where law-of-war detention is permitted (in that the individual meets the substantive standard for detention), long-term law-of-war detention should be limited to instances in which prosecution is infeasible. Efforts should be made to gather admissible evidence in order to develop a prosecutable case against the individual. In fact, the United States took this approach in the Warsame case, albeit as a matter of policy. Initially held in law-of-war detention, Warsame was, after approximately sixty days, moved to federal court for civilian trial. n161 Such a requirement protects against states selectively bypassing functioning domestic criminal justice institutions that can effectively address the threat. Such an approach also helps to legitimize the state's detention practices and delegitimize the enemy. n162

## 2nc at lrm key—legitimacy

Ex post and ex ante review solves all their internal links

Daskal ‘13

Jennifer, 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,” SSRN

Enhanced ex ante and ex post procedural protections for both detention and targeting, coupled with transparency as to the standards and processes employed, serve several important functions: they can minimize error and abuse by creating time for advance reflection, correct erroneous deprivations of liberty, create endogenous incentives to avoid mistake or abuse, **and increase the legitimacy of state action.**

Ex post review mandate and damages payments solve legitimacy concerns

Daskal ‘13

Jennifer, 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,” SSRN

For targeted-killing operations, ex post reviews serve only limited purposes. They obviously cannot restore the target’s life. But retrospective review either by a FISC-like court or review board can serve to identify errors or overreaching and thereby help **avoid future mistakes**. This can, and ideally would, be supplemented by the adoption of an additional Article III damages mechanism.197 At a minimum, the relevant Inspectors General should engage in regular—and extensive—reviews of targeted-killing operations. Such post hoc analysis helps to **set standards** **and controls** that then get incorporated into ex ante decisionmaking. In fact, post hoc review can often serve as a more meaningful—and often more searching—inquiry into the legitimacy of targeting decisions. Even the mere knowledge that an ex post review will occur can help to protect against rash ex ante decisionmaking, thereby **providing a self-correcting mechanism.** Ex post review should also be accompanied by the establishment of a solatia and condolence payment system for activities that occur outside the active zone of hostilities. Extension of such a system beyond Afghanistan and Iraq would help mitigate resentment caused by civilian deaths or injuries and would promote better accounting of the civilian costs of targeting operations.198 As for detention operations, detainees captured outside a zone of active hostilities should, at a minimum, be entitled to judicial habeas review, regardless of where they are detained. There should be a searching inquiry into the basis for detention, conducted, of course, in a way that protects sources and methods.199 Use of hearsay should be permitted, consistent with the basic requirement that the detainee be provided sufficient information about the source of relevant information to be able to respond effectively.200 The detaining state should also provide additional periodic reviews to protect against the continued detention of individuals who no longer pose a threat—a procedure that the Obama Administration has announced, but not yet instituted, with respect to the Guantanamo detainees.201 As suggested by Professors Matthew Waxman and Monica Hakimi, these review procedures should be amended to apply “increasingly stringent evidentiary standards” over time.202 Such a requirement recognizes that the security benefits of detention often diminish over time (particularly if based on an individual’s involvement with a specific, lapsed—or foiled—plot), while the costs to personal liberty increase.203 Thus, while the initial review might employ a reasonable belief or probable cause standard, subsequent reviews might employ a preponderance-of-evidence or clear-and-convincing standard. Moreover, at some point, continued detention arguably crosses from preventive to punitive; when that point is reached, there should be a requirement of either prosecution or release.

Clarifying current executive practices solves legitimacy

Daskal ‘13

Jennifer, 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,” SSRN

In the absence of such a system, the President ought to, at a minimum, issue an executive order establishing a transparent set of standards and procedures for identifying targets of lethal killing and detention operations outside a zone of active hostilities.192 To enhance legitimacy, the procedures should include target list reviews and disposition plans by the top official in each of the agencies with a stake in the outcome—the Secretary of Defense, the Director of the CIA, the Secretary of State, the Director of Homeland Security, and the Director of National Intelligence, with either the Secretary of Defense, Director of National Intelligence, or President himself, responsible for final sign-off.193 In all cases, decisions should be unanimous, or, in the absence of consensus, elevated to the President of the United States.194 Additional details will need to be worked out, including critical questions about the standard of proof that applies. Given the stakes, a clear and convincing evidentiary standard is warranted.195 While this proposal is obviously geared toward the United States, the same principles should apply for all states engaged in targeting operations.196 States would ideally subject such determinations to independent review or, alternatively, clearly articulate the standards and procedures for their decisionmaking, thus enhancing accountability.

## 2nc at lrm key—blowback

Ex ante review solves blowback from allies

Daskal ‘13

Jennifer, 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,” SSRN

That said, there is a reasonable fear that any such court or review board will simply defer. In this vein, FISC’s high approval rate is cited as evidence that reviewing courts or review boards will do little more than rubber-stamp the Executive’s targeting decisions.180 But the high approval rates only tell part of the story. In many cases, **the mere requirement of justifying an application before a court or other independent review board can serve as an internal check,** creating endogenous incentives to comply with the statutory requirements and limit the breadth of executive action.181 Even if this system does little more than increase the attention paid to the stated requirements and expand the circle of persons reviewing the factual basis for the application, those features in and of themselves can lead to **increased reflection and restraint**. Additional accountability mechanisms, such as civil or criminal sanctions in the event of material misrepresentations or omissions, the granting of far-reaching authority to the relevant Inspectors General, and meaningful ex post review by Article III courts,182 are also needed to help further minimize abuse.

## backlash

Transparency solves backlash to the drone program

Washington Post, 3/24/’12

(“Additional review for drone killings,” Editorial Board)

DOMESTIC AND international strictures empower the president to use lethal force, including targeted drone strikes, to protect the country against attack. That is so whether the target is a foreign national or a U.S. citizen; and it is true whether the target is located on a traditional battlefield or ensconced in a foreign country that is unwilling or unable to assist in capture.

President Obama was on solid ground in relying on such authorities when he reportedly ordered a drone strike in Yemen last fall that took the life of Anwar al-Aulaqi. Mr. Aulaqi was a U.S. citizen, a radical cleric and, according to the administration, an operational leader of al-Qaeda in the Arab Peninsula. We supported dismissal of a lawsuit brought by Mr. Aulaqi’s father that sought to force the administration to disclose the criteria for placing someone on the “kill list” — a legal gambit that would have invited unprecedented judicial intervention into battlefield decisions in the absence of congressional or legal authorization.

But the legitimacy of such targeted strikes against U.S. citizens would be bolstered by additional review. That’s especially so when the government decides, not in a moment of urgency but with due deliberation, essentially to sentence an American to death. Most Americans may well feel there is something odd about insisting that America’s enemies have rights the instant they are detained, while targets of assassination have no protections at all.

## 2nc at lrm key—allies

Daskal is the only card that says LRM—it would be nice, not necessary—Geographical limits in general are key

Daskal ‘13

Jennifer, 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,” SSRN

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.

## allies

Transparency on drones solves allies

Bellinger III, partner – Arnold & Porter LLP, adjunct senior fellow in international and national security law – CFR, 10/2/’11

(John B., http://articles.washingtonpost.com/2011-10-02/opinions/35279231\_1\_drone-strikes-anwar-al-awlaki-drone-program)

The killing of the U.S.-born al-Qaeda cleric Anwar Al-Awlaki on Friday along with another U.S. citizen and two other al-Qaeda operatives in Yemen is likely to fuel the international controversy over the legality and wisdom of the Obama administration’s dramatically increased use of drone attacks. For several years, U.S. allies have made no public comment even as U.S. drone strikes have killed twice as many suspected al-Qaeda and Taliban members than were ever imprisoned in Guantanamo Bay. But that acquiescence may change, as human rights groups and the media focus more attention on the legality and collateral damage of drone attacks. The U.S. drone program has been highly effective in killing senior al-Qaeda leaders, but the administration needs to work harder to explain and defend its use of drones as lawful and appropriate — to allies and critics — if it wants to avoid losing international support and potentially exposing administration officials to legal liability.

The U.S. position, under the George W. Bush and Obama administrations, has been that drone strikes against al-Qaeda and Taliban leaders are lawful under U.S. and international law. They are permitted by the September 2001 Authorization to Use Military Force Act, which empowered the president to “all necessary and appropriate force” against nations, organizations or persons who planned, committed or aided the Sept. 11 attacks.

The United States also believes that drone strikes are permitted under international law and the United Nations Charter as actions in self-defense, either with the consent of the country where the strike takes place or because that country is unwilling or unable to act against an imminent threat to the United States. U.S. officials have been understandably reluctant to confirm whether consent has been given by particular countries.

Obama administration officials have explained in the past that strikes against particular militant leaders are permissible, either because the individuals are part of the overall U.S. conflict with al-Qaeda or because they pose imminent threats to the United States. President Obama emphasized Awlaki’s operational role on Friday, stating that he was the “leader of external operations for al-Qaeda in the Arabian Peninsula.”

The killing of Awlaki raises additional legal concerns because U.S. citizens have certain constitutional rights wherever they are in the world. Some human rights groups have asserted that due process requires prior judicial review before killing an American, but it is unlikely that the Constitution requires judicial involvement in the case of a U.S. citizen engaged in terrorist activity outside this country. Administration lawyers undoubtedly reviewed the targeting of Awlaki even more carefully than of a non-American, and the Justice Department reportedly prepared an opinion concluding that his killing would comply with domestic and international law. This is likely to be considered sufficient due process under U.S. constitutional standards.

But the U.S. legal position may not satisfy the rest of the world. No other government has said publicly that it agrees with the U.S. policy or legal rationale for drones. European allies, who vigorously criticized the Bush administration for asserting the unilateral right to use force against terrorists in countries outside Afghanistan, have neither supported nor criticized reported U.S. drone strikes in Pakistan, Yemen and Somalia. Instead, they have largely looked the other way, as they did with the killing of Osama bin Laden.

Human rights advocates, on the other hand, while quiet for several years (perhaps to avoid criticizing the new administration), have grown increasingly uncomfortable with drone attacks. Last year, the U.N. rapporteur for summary executions and extrajudicial killings said that drone strikes may violate international humanitarian and human rights law and could constitute war crimes. U.S. human rights groups, which stirred up international opposition to Bush administration counterterrorism policies, have been quick to condemn the Awlaki killing.

Even if Obama administration officials are satisfied that drone strikes comply with domestic and international law, they would still be wise to try to build a broader international consensus. The administration should provide more information about the strict limits it applies to targeting and about who has been targeted. One of the mistakes the Bush administration made in its first term was adopting novel counterterrorism policies without attempting to explain and secure international support for them.

White House counterterrorism adviser John Brennan rightly acknowledged in a recent speech that “the effectiveness of our counterterrorism activities depends on the assistance and cooperation of our allies.” If the Obama administration wants to avoid losing the tacit support (and potentially the operational and intelligence assistance) of its allies for drone strikes and its other counterterrorism policies, it should try to ensure that they understand and agree with the U.S. policy and legal justification. Otherwise, the administration risks having its largely successful drone program become as internationally maligned as Guantanamo.

## norms

#### Their 2AC norms author

Zenko, Douglas Dillon fellow in the Center for Preventive Action at the Council on Foreign Relations, January 2013

(Micah, “Reforming U.S. Drone Strike Policies,” CFR Special Report #65, i.cfr.org/content/publications/attachments/Drones\_CSR65.pdf‎)

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 prolifera- tion 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 norma- tive framework, and U.S. compliance with that framework, would pre- serve 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 under- mine 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.

Much like policies governing the use of nuclear weapons, offensive cyber capabilities, and space, developing rules and frameworks for innovative weapons systems, much less reaching a consensus within the U.S. government, is a long and arduous process. In its second term, the Obama administration has a narrow policy window of opportunity to pursue reforms of the targeted killings program. The Obama admin- istration can proactively shape U.S. and international use of armed drones in nonbattlefield settings through transparency, self-restraint, and engagement, or it can continue with its current policies and risk the consequences. To better secure the ability to conduct drone strikes, and potentially influence how others will use armed drones in the future, the United States should undertake the following specific policy recommendations.

Executive Branch

The president of the United States should

■■ limit targeted killings to individuals who U.S. officials claim are being targeted—the leadership of al-Qaeda and affiliated forces or individ- uals with a direct operational role in past or ongoing terrorist plots against the United States and its allies—and bring drone strike prac- tices in line with stated policies;

■■ either end the practice of signature strikes or provide a public account- ing of how it meets the principles of distinction and proportionality that the Obama administration claims;

■■ review its current policy whereby the executive authority for drone strikes is split between the CIA and JSOC, as each has vastly different legal authorities, degrees of permissible transparency, and oversight;

■■ provide information to the public, Congress, and UN special rappor- teurs—without disclosing classified information—on what proce- dures exist to prevent harm to civilians, including collateral damage mitigation, investigations into collateral damage, corrective actions based on those investigations, and amends for civilian losses; and

■■ never conduct nonbattlefield targeted killings without an account- able human being authorizing the strike (while retaining the poten- tial necessity of autonomous decisions to use lethal force in warfare in response to ground-based antiaircraft fire or aerial combat).

Solves drone modeling

Twomey, JD candidate – Trinity College Dublin, 3/14/’13

(Laura, “Setting a Global Precedent: President Obama's Codification of Drone Warfare,” Cambridge Journal of International and Comparative Law Blog)

It is clear that, as the first State to deploy remote targeting technology in a non international armed conflict, the legal framework forged by the US during President Obama's second term will set significant precedent for the future practice of the estimated 40 States developing their own drone technology.

On 7 March 2013, members of the European Parliament expressed deep concern about the “unwelcome precedent” the programme sets, citing its “destabilising effect on the international legal framework” that “destroys ... our common legal heritage.” This 'destabilising effect' arises from the classified and seemingly amorphous substantive legal basis for the programme and the apparent lack of procedural standards in place. It remains to be seen if the classified 'rulebook' will be released for public scrutiny, and allay these concerns.

Reliance on international law in world order is based on consent, consensus, good faith and, crucially in this instance, reciprocity. The US programme may harbour short term gains in the pursuit of al-Qaeda operatives, however, if the aforementioned substantive legal justifications continue to be invoked, it risks engendering long term disadvantages. Pursuing this policy encourages other States to adopt similar policies. Administration officials have cited particular concern about setting precedent for Russia, Iran and China, all of which are developing their own remote targeting technology.

It is therefore suggested that the Administration should take this opportunity to codify the rules, clarify terms where ambiguity may currently allow for broader interpretations, and to bring its regulations in line with the existing framework of international law. This legal framework should then be made available to the public, with covert operational necessities redacted. This could set a valuable legal precedent, of particular importance at this turning point wherein international law must adapt to the 21st century model of warfare, a model which lacks a clear enemy and a demarcated battlefield.

## AT: Object Fiat

1. No link—the objects of the resolution are statutory and judicial restrictions and the war powers authority of the President—the CP does neither

2. Counter-interpretation—CP’s must test opportunity costs to the plan. Plan-focused debates are more detailed and ensure division of ground.

3. Their interpretation destroys neg ground--all counterplans address the aff harms—solvency becomes theoretically illegitimate.

4. The core controversy is restrictions on authority. The resolution explicitly denies the aff this ground. Their theory argument rewrites the topic -- uneducational and unpredictable.

5. Interpretation: neg fiat extends only to the resolutional actor.\* This follows from the logic of debating about policies. Any other distinction is arbitrary.

6. The counterplan doesn't fiat away the impacts -- it takes the proactive step of a commission and relies on solvency arguments and evidence.

7. They have plenty of ground (and certainly saw this CP coming): \_\_\_\_\_\_\_\_\_\_\_\_\_

8. Blame the topic -- rejecting counterplans is a bad corrective for a difficult aff year. Enforcing "fairness" through theory is ad hoc, erratic, and leaves the ground of each debate uncertain until the end.

#### Internal constraints are key neg ground – it matches the academic debate

Sinnar, assistant professor of law at Stanford Law School, May 2013

(Shirin, “Protecting Rights from Within? Inspectors General and National Security Oversight,” 65 Stan. L. Rev. 1027, Lexis)

More than a decade after September 11, 2001, the debate over which institutions of government are best suited to resolve competing liberty and national security concerns continues unabated. While the Bush Administration's unilateralism in detaining suspected terrorists and authorizing secret surveillance initially raised separation of powers concerns, the Obama Administration's aggressive use of drone strikes to target suspected terrorists, with little oversight, demonstrates how salient these questions remain. Congress frequently lacks the [\*1029] information or incentive to oversee executive national security actions that implicate individual rights. Meanwhile, courts often decline to review counterterrorism practices challenged as violations of constitutional rights out of concern for state secrets or institutional competence. n1

These limitations on traditional external checks on the executive - Congress and the courts - have led to increased academic interest in potential checks within the executive branch. Many legal scholars have argued that executive branch institutions supply, or ought to supply, an alternative constraint on executive national security power. Some argue that these institutions have comparative advantages over courts or Congress in addressing rights concerns; others characterize them as a second-best option necessitated by congressional enfeeblement and judicial abdication.

#### CP focuses the debate on policy specifics – that’s key

Bradley, professor of law at Duke, and Morrison, professor of law at Columbia, May 2013

(Curtis A. and Trevor W., PRESIDENTIAL POWER, HISTORICAL PRACTICE, AND LEGAL CONSTRAINT, 113 Colum. L. Rev. 1097, Lexis)

**The relationship between law and presidential power is** **not merely a matter of academic debate**. **Whether**, **how**, **and to what extent presidential decisionmaking is subject to legal constraint is a central issue in the practice of modern government**, as illustrated by two recent episodes. First, in March 2011, the Obama Administration initiated military operations against Libya without congressional authorization, and then continued them past the statutory sixty-day limit set forth in the War Powers Resolution. Critics treated this episode as evidence that the executive branch did not take seriously constitutional and statutory limits [\*1100] on the use of military force. n8 Despite a low likelihood that courts would resolve the dispute, however, the Obama Administration offered public legal justifications, based heavily on arguments from historical practice, for both the initial deployment of military force in Libya and its continuation past the sixty-day point. n9 The felt need of the executive branch to justify itself in legal terms might be puzzling if the law were not playing any constraining role, but it is difficult to discern precisely what that role might have been.

Second, in the summer of 2011, a confrontation developed between the Obama Administration and Republican leaders in Congress over whether to raise the statutory debt ceiling to accommodate the government's increased borrowing. When a legislative extension of the ceiling appeared unlikely, some commentators suggested, based on either novel constitutional arguments or pure policy grounds, that the President could and should unilaterally exceed the debt ceiling. n10 Others insisted that such unilateral action would be unconstitutional because it would usurp Congress's constitutional authority "to borrow money on the credit of the United States." n11 President Obama did not attempt to address the issue unilaterally and instead continued to seek a legislative extension of the ceiling, which he ultimately obtained. Nor did the President attempt or even threaten a unilateral extension when the issue resurfaced in late 2012 and early 2013 in connection with the so-called "fiscal cliff," by which time such an action appeared to be off the table altogether. It might be that the President felt constrained not to pursue a unilateral extension by legal concerns about such a course of action, but it is also possible that political considerations would have driven the President to a similar decision. n12 In this context too, then, the role of law is unclear.

Episodes like these underscore the importance of thinking carefully not just about the general question whether the President is constrained by law, but **more particularly about what it means to say that the President is so constrained**, **and how such constraints operate**. On issues of executive power unlikely to come before the courts, one familiar idea - espoused by James Madison in The Federalist Papers - is that members of Congress have sufficient personal motivations and professional resources to protect Congress's institutional prerogatives [\*1101] from executive incursions. n13 A number of scholars have concluded, however, that such checking is not as consistent or robust as is often assumed, and that whether Congress curbs presidential power depends more often on partisan political considerations or situation-specific policy objections than on any systematic effort to protect institutional prerogatives. n14 If Congress is not as reliable a check on presidential power as Madison and others envisioned, there is arguably a greater need for other mechanisms of constraint in this area, including legal constraints. In the absence of judicial review, however, it is fair to ask how the legal constraints might operate.

## Allies

## 2nc NSA

#### Dispute is escalating—it collapses relations and overwhelms any increased trust from the plan

EuroNews, staff writer, 10/26/13, Europe-US trust, shattered by NSA spying, could take decades to rebuild, www.euronews.com/2013/10/26/europe-us-trust-shattered-by-nsa-spying-could-take-decades-to-rebuild/

The document, from 2006, does not give names but says the NSA encourages senior officials of the administration and government to share their contact details with the agency. One unnamed official alone is said to have passed on 200 numbers. It has set another cat among the pigeons, **sparking** a **fresh escalation in the simmering diplomatic crisis between Washington and its allies**. It is becoming increasingly difficult for Barack Obama to limit the consequences of this incessant flow of revelations and counter the lingering Cold War atmosphere it has created. The bugging of Chancellor Angela Merkel’s mobile phone is particularly embarrassing. Friends don’t do this sort of thing, Berlin says, while the US has been desperately emphasising the importance of its friendship with Germany, insisting that a few lines in the press are not going to undermine that. Our Washington correspondent Stefan Grobe asked the head of one of Germany’s largest private non-profit organisations, the Bertelsmann Foundation, to help gauge the potential for worsening relations between that country and the United States. Legal specialist and political analyst Annette Heuser responded on the transatlantic NSA spying scandal. The foundation’s executive director in the US capital, Heuser said: “The question is not only whether the Chancellor’s cell phone has been bugged or whether the German government has been bugged. The general question is whether friends can put up with operations like these. The answer is: definitely not. The Obama administration is not doing itself any favours by downplaying the whole affair and saying: ‘We won’t do it any more’ and that is it. We are witnessing the beginning of a foreign policy tsunami that is going to bother American and European transatlantic policy for quite some time.” And this is the president whom many in Europe wanted for the US; so their feelings were hurt when, swiftly following his 2008 election victory, Obama immediately showed the Europeans that he just was not that into them. He was more attentive to Asia – perhaps taking Europe’s good nature for granted. Our Bertelsmann expert said: “I believe that there is a tendency here in the US and in this administration not to take relations with Europeans seriously, and to believe that scandals and problems can easily be brushed away**. This is a fundamental mistake**. We have also noticed that the Obama administration, like no other US administration in post-war history, has lost the ability to understand the Europeans and to read them accurately. This is a huge problem for transatlantic relations. Until now, there has been a deep-rooted trust between Europeans and Americans – especially between Germans and Americans – but this scandal now contributes to a situation in which this trust is being eroded and is no longer an essential part of these relations.” In 2011, Chancellor Merkel was the first European leader Obama invited to dinner at the White House. It served a double function, to honour her and to somewhat wash away the bitterness in many people’s mouths that the Bush administration had left. According to Annette Heuser: “This scandal will have very important consequences for the future of transatlantic relations. Until now, we have always said that the lowest point in these relations, especially between Germany and the US, was the struggle over the Iraq war in 2003. It was the question of whether to intervene militarily in Iraq. The German government at the time, under Gerhard Schroeder, clearly opted against it. But that was merely a question of military strategy. What we are seeing right now is much more fundamental; we are dealing with trust. This **trust is disappearing from transatlantic relations and will take decades to rebuild.”**

#### Triggers the adv.

Ingrid Wuerth, Vanderbilt Law School Professor, 10/25/13, Dispatch from Berlin on a Diplomatic Disaster, www.lawfareblog.com/2013/10/dispatch-from-berlin-on-a-diplomatic-disaster/

A diplomatic disaster for the United States is currently unfolding in Berlin. The revelation that the NSA may have monitored cell phone conversations and text messages of Chancellor Angela Merkel has led to popular outrage in Germany, as well as unusually pointed language from the Chancellor and other government officials. The U.S. Ambassador was not merely asked but summoned (“einbestellt”) to the German foreign office—a strong verb used until now (if at all) only for the Syrian and Iranian ambassadors. The Chancellor’s phone conversation with President Obama did nothing to ease the tension. Merkel declared such practices totally unacceptable: Between friends and partners such as the United States and Germany, the monitoring of communications by government leaders is a grave breach of trust, her press secretary emphasized. The Obama administration, other than saying the Chancellor’s phone is not now and will not in the future be monitored, has offered nothing: neither apology, nor explanation of what happened in the past, nor any sort of suggestion for future cooperation or discussion of a collective solution.

Maybe all of this will blow over quickly—just a headline-grabbing news story, made even better by the emerging details of the Chancellor’s two very different cellphones (one secure, one not) and questions about German helicopters flown over the U.S. consulate in Frankfurt in September. But it may not. Chancellor Merkel’s tone is sharp and that of minority parties in Parliament is even sharper. Those parties have been critical of Merkel for failing to react more strongly to prior revelations about the NSA. Mostly, however, the two center parties (Merkel’s CDU and the SPD) are united, rather than divided by their criticism of the United States. **The current dispute goes may have deep roots** as well. Roger Cohen has a nice piece up at the New York Times, detailing the German (and European) perception that the Obama administration has been dismissive, including with respect to possible military intervention in Syria.

The Federal Republic of Germany has traditionally been more willing than the United States to sacrifice some civil liberties in order to protect democratic values—their “streitbare” or “aggressive” democracy prohibits, for example, certain political parties that lean extremely far right or left. But totalitarian East Germany—in which spying on and on behalf of the government was very widespread—has left its mark on the popular culture. Listening in on other people’s private phone conversations brings to mind an immediate past of repression and brutality for the Germans. And today the United States is seen as presenting a serious threat to the civil liberties of all Germans, not just Chancellor Merkel. The comparison of Obama to East German state security is explicit. Although U.S.-German relations suffered during the invasion of Iraq, that was widely blamed on the Republican presidency of George W. Bush. With the Democrat Obama at the helm, however, localizing the blame is no longer so easy. U.S.-German relations may be at their lowest point since the end of World War II. Even if the German government wanted to overlook U.S. snooping (to avoid too much scrutiny of their own activities), the domestic political costs of looking the other way now have increased here as they have in France and Brazil.

What are the potential costs for U.S. foreign policy? In the short term, there is discussion in Europe of conditioning further European-U.S. bilateral trade negotiations upon a satisfactory solution to the problem of U.S. government data collection from Europe. Moreover, **data sharing** of various sorts **could be limited**; German or **European laws could substantially ramp up data privacy protection**, at potential cost to U.S. businesses; German prosecutors and the German Parliament may take up the issue. And, finally of course, **there is a cost to U.S. soft power.**

#### Outweighs the aff

Josh Gerstein, Politico, 10/26/13, NSA disclosures put U.S. on defense, dyn.politico.com/printstory.cfm?uuid=0A829B73-DCF3-4A66-9221-C8EEDDEE02F7

**The NSA spying controversy is quickly transforming from a** domestic **headache** for the Obama administration **into a global public relations fiasco** for the United States government.

After months of public and congressional debate over the National Security Agency’s collection of details on U.S. telephone calls, a series of **reports** about alleged spying on foreign countries and their leaders **has unleashed an** angry global reaction **that appears likely to** swamp the debate about gathering of metadata within American borders.

While prospects for a legislative or judicial curtailment of the U.S. call-tracking program are doubtful, damage from public revelations about NSA’s global surveillance is already evident and seems to be growing.

Citing the snooping disclosed by former NSA contractor Edward Snowden, Brazil’s president canceled a state visit to the U.S. set for this week. Leaders in France and Italy and Germany have lodged heated protests with Washington, with the Germans announcing plans to dispatch a delegation to Washington to discuss the issue. Boeing airplane sales are in jeopardy. And the European Union is threatening to slap restrictions on U.S. technology firms that profit from tens of millions of users on the Continent.

“Europe is talking about this. Some people in Europe are upset and may take steps to block us,” former Rep. Jane Harman (D-Calif.) said in a telephone interview from Rome on Friday. “The reaction of retail politicians is to mirror the upset of the people who elected them.”

“Confidence between countries and confidence between governments are important and sometime decisive and there’s almost no confidence between the United States of America and Europe” now, former German intelligence chief Hansjörg Geiger said. “I’m quite convinced there will be an impact…. It will be a real impact and not only the [intelligence] services will have some turbulence.”

Some analysts see immediate trouble for U.S.-European arrangements to share information about airline passengers, financial transactions and more.

“The bigger problems are not in Berlin or Paris, but in the future out of Brussels,” said Michael Leiter, former head of the National Counterterrorism Center. “At the EU, I expect them to be very, very resistant to any increase — and to have problems even with maintenance—of some of the information sharing we have now…..All of this complicates those discussions exponentially.”

## 2nc coop resilient

Especially for intelligence

Aldrich 09

Richard J. Aldrich is a Professor of International Security at the University of Warwick, British Journal of Politics and International Relations, February 2009, "US–European Intelligence Co-operation on Counter-Terrorism: Low Politics and Compulsion", Vol. 11, Issue 1, pgs. 122-139

Since 9/11, intelligence has been viewed as an integral part of a controversial ‘war on terror’. The acrimonious public arguments over subjects such as Iraqi WMD assessments, secret prisons and the interrogation of detainees suggest intense transatlantic discord. Yet improbably, some of those countries that have expressed strident disagreement in public are privately the closest intelligence partners. It is argued here that we can explain this seeming paradox by viewing intelligence co-operation as a rather specialist kind of ‘low politics’ that is focused on practical arrangements. Intelligence is also a fissiparous activity, allowing countries to work together in one area even while they disagree about something else. Meanwhile, the pressing need to deal with a range of increasingly elusive transnational opponents—including organised crime—compels intelligence agencies to work more closely together, despite their instinctive dislike of multilateral sharing. Therefore, transatlantic intelligence co-operation will continue to deepen, despite the complex problems that it entails.

## Ext. No Impact

NATO is irrelevant and no impact to collapse.

Walt 10 (Stephen, Robert and Renée Belfer professor of international relations at Harvard University., 9/24, “Is NATO irrelevant?”, <http://walt.foreignpolicy.com/posts/2010/09/24/is_nato_irrelevant>)

Nonetheless, I share William Pfaff's view that NATO doesn't have much of a future. First, Europe's economic woes are forcing key NATO members (and especially the U.K.) to adopt draconian cuts in defense spending. NATO's European members already devote a much smaller percentage of GDP to defense than the United States does, and they are notoriously bad at translating even that modest amount into effective military power. The latest round of defense cuts means that Europe will be even less able to make a meaningful contribution to out-of-area missions in the future, and those are the only serious military missions NATO is likely to have. Second, the ill-fated Afghan adventure will have divisive long-term effects on alliance solidarity. If the United States and its ISAF allies do not win a clear and decisive victory (a prospect that seems increasingly remote), there will be a lot of bitter finger-pointing afterwards. U.S. leaders will complain about the restrictions and conditions that some NATO allies (e.g., Germany) placed on their participation, while European publics will wonder why they let the United States get them bogged down there for over a decade. It won't really matter who is really responsible for the failure; the key point is that NATO is unlikely to take on another mission like this one anytime soon (if ever). And given that Europe itself is supposedly stable, reliably democratic, and further pacified by the EU, what other serious missions is NATO supposed to perform? The third potential schism is Turkey, which has been a full NATO member since 1950. I'm not as concerned about Turkey's recent foreign policy initiatives as some people are, but there's little doubt that Ankara's diplomatic path is diverging on a number of key issues. The United States, United Kingdom, France, and Germany have been steadily ratcheting up pressure on Iran, while Turkey has moved closer to Tehran both diplomatically and economically. Turkey is increasingly at odds with Washington on Israel-Palestine issues, which is bound to have negative repercussions in the U.S. Congress. Rising Islamophobia in both the United States and Europe could easily reinforce these frictions. And given that Turkey has NATO's largest military forces (after the United States) and that NATO operates largely by consensus, a major rift could have paralyzing effects on the alliance as a whole. Put all this together, and NATO's future as a meaningful force in world affairs doesn't look too bright. Of course, the usual response to such gloomy prognostications is to point out that NATO has experienced crises throughout its history (Suez, anyone?), and to remind people that it has always managed to weather them in the past. True enough, but most of these rifts occurred within the context of the Cold War, when there was an obvious reason for leaders in Europe and America to keep disputes within bounds. Of course, given NATO's status as a symbol of transatlantic solidarity, no American president or European leader will want to preside over its demise. Plus, you've got all those bureaucrats in Brussels and Atlantophiles in Europe and America who regard NATO as their life's work. For all these reasons, I don't expect NATO to lose members or dissolve. I'll even be somewhat surprised if foreign policy elites even admit that it has serious problems. Instead, NATO is simply going to be increasingly irrelevant. As I wrote more than a decade ago: . . .the Atlantic Alliance is beginning to resemble Oscar Wilde's Dorian Gray, appearing youthful and robust as it grows older -- but becoming ever more infirm. The Washington Treaty may remain in force, the various ministerial meetings may continue to issue earnest and upbeat communiques, and the Brussels bureaucracy may keep NATO's web page up and running-all these superficial routines will go on, provided the alliance isn't asked to actually do anything else. The danger is that NATO will be dead before anyone notices, and we will only discover the corpse the moment we want it to rise and respond." Looking back, I'd say I underestimated NATO's ability to rise from its sickbed. Specifically, it did manage to stagger through the Kosovo War in 1999 and even invoked Article V guarantees for the first time after 9/11. NATO members have sent mostly token forces to Afghanistan (though the United States, as usual, has done most of the heavy lifting). But even that rather modest effort has been exhausting, and isn't likely to be repeated. A continent that is shrinking, aging, and that faces no serious threat of foreign invasion isn't going to be an enthusiastic partner for future adventures in nation-building, and it certainly isn't likely to participate in any future U.S. effort to build a balancing coalition against a rising China. The bad news, in short, is that one of the cornerstones of the global security architecture is likely to erode in the years ahead. The good news, however, is that it won't matter very much if it does.

# 1NR

## ov

LOAC is the lycnhpin of deterrence—collapse causes nuclear adventurism globally

Delahunty, associate prof – U St. Thomas Law, and Yoo, law prof – UC Berkeley, ‘10

(Robert and John, 59 DePaul L. Rev. 803)

Finally, the extension of IHRL to armed conflict may have significant consequences for the success of international law in advancing global welfare. Rules of the LOAC represent the delicate balancing between the imperatives of combat and the humanitarian goals in wartime. The LOAC has been remarkably successful in achieving compliance from warring nations in obeying these rules. This is most likely due to the reciprocal nature of the obligations involved. Nations treat prisoners of war well in order to guarantee that their own captive soldiers will be treated well by the enemy; **nations will refrain from using** weapons of mass destruction because they are deterred by their enemy's possession of the same weapons. It has been one of the triumphs of international law to increase the restrictions on the use of unnecessarily destructive and cruel weapons, and to advance the norms of distinction and the humane treatment of combatants and civilians in wartime. IHRL norms, on the other hand, may suffer from much lower rates of compliance. This may be due, in part, to the non-reciprocal nature of the obligations. One nation's refusal to observe freedom of speech, for example, will not cause another country to respond by depriving its own citizens of their rights. If IHRL norms--which were developed without much, if any, consideration of the imperatives of combat--merge into the LOAC, it will be likely that compliance with international law will decline. If nations must balance their security [\*849] needs against ever more restrictive and out-of-place international rules supplied by IHRL, we hazard to guess that the latter will give way. Rather than attempt to superimpose rules for peacetime civilian affairs on the unique circumstances of the "war on terror," a better strategy for encouraging compliance with international law would be to adapt the legal system already specifically designed for armed conflict.

LOAC key to regulate cyber development—prevents spillover of the Stuxnet precedent

Jeremy Richmond, J.D., March 2012, NOTE: EVOLVING BATTLEFIELDS DOES STUXNET DEMONSTRATE A NEED FOR MODIFICATIONS TO THE LAW OF ARMED CONFLICT?, 35 Fordham Int'l L.J. 842

Stuxnet almost certainly foreshadows a fundamental change in modern warfare. It demonstrates that a well-orchestrated CNA can strike a target with greater precision, greater damage to the enemy, and less collateral loss of life and property than a kinetic weapon. Will the change in warfare, [\*894] however, be so drastic that it also necessitates a change in the LOAC? The answer appears to be both "yes" and "no." The principles of distinction, discrimination, and proportionality, when applied to Stuxnet, further the LOAC policy goals of reducing overall destruction in warfare and reducing unnecessary harm to civilians and civilian property. Further, evidence that Stuxnet's programmers may have designed it to conform with the LOAC, and **the subsequent benefits that that conformity brought, demonstrates that compliance with the LOAC is possible, practical, and beneficial**. In this respect, the LOAC seems to adequately regulate Stuxnet. Stuxnet therefore should be considered a piece of evidence that fundamental alterations to the LOAC are not necessary to regulate cyber weapons.

It also turns solvency – no one knows how to use drones OR not use drones using their framework

Corn et al 13 -Geoff Corn, South Texas College of Law, Professor of Law and Presidential Research Professor, J.D., Laurie Blank, Director, International Humanitarian Law Clinic, Emory Law School, Christopher Jenks, SMU Director of the Criminal Justice Clinic and Assistant Professor of Law, and Eric Talbot Jensen, BYU Law Professor, LOAC Expert, 3/1/13, The Capture-vs-Kill Debate #6: Rejoinder to Goodman from Corn, Blank, Jenks, and Jensen, www.lawfareblog.com/2013/03/the-capture-vs-kill-debate-6-rejoinder-to-goodman-from-corn-blank-jenks-and-jensen/

A third overarching issue is the aggregation of law and command discretion. Professor Goodman’s response to and characterization of our argument highlights what appears to be a conflation of the lines between law and policy and an inappropriate willingness to interpret policy choices as binding legal obligation. Emphasizing that the fact that we agree that as a matter of policy a “capture instead of kill” constraint is often imposed on operations undermines our objection to the impracticability of his proposed legal rule **reveals a misunderstanding of operational art**. It is important to remember that LOAC forms the outer boundaries of lawful conduct during armed conflict; commanders and national policy decision-makers may always choose to employ a more narrow authority for strategic, operational or tactical benefit in a given situation. Imposing a capture instead of kill constraint as a policy limitation is similarly always based on the assessment that restricting otherwise lawful conduct contributes to a tactical, operational, or strategic objective. It is, in essence, a cost/benefit tradeoff that subjects friendly forces to increased risk in order to enhance the likelihood of mission accomplishment. Commanders always have the prerogative to make such judgments and often do so. The accordant assumption of risk is an inherent aspect of achieving a collective operational objective, and accepting that risk is the very nature of military service. One need only consider lying in an ambush position with orders not to fire until the enemy has fully entered the kill zone. Individual soldiers are constrained at their own personal peril from engaging enemy operatives as they walk right past, but this constraint is imposed to achieve the overall collective objective. A more common example in the context of counter-insurgency operations is the use of ROE to limit tactical and operational lethality in favor of strategic restraint, such as limiting the use of indirect fires or the conduct of night raids in Afghanistan. Like all such constraints on otherwise lawful authority, these are imposed to enhance the likelihood of mission accomplishment. Professor Goodman asserts, however, that this practice indicates the existence of a **legal obligation** to utilize the least injurious means to disable an enemy, deriving this rule from what he asserts is the obligation to refrain from inflicting unnecessary suffering. Although this may be appealing from a humanitarian and/or moral perspective, that is a fundamentally different objective than that which motivates the practice he asserts as evidence of his rule. These inapposite motivations indicate that the operational practice cannot properly be invoked as evidence of a humanitarian obligation. Even in the context of the DOJ White Paper (which was the focus of and impetus for Professor Goodman’s op-ed), the imposition of a “no feasible alternative” limitation on the use of deadly force against U.S. citizens is nested in strategic policy considerations. The fourth and final overarching concern Professor Goodman’s proposal raises is the impracticability of implementation. Neither in his op-ed nor his article does Professor Goodman offer any insight into when his proposed rule would be triggered. In what tactical situations would a soldier be obligated to refrain from engaging an enemy who was not yet hors de combat? How could commanders assess when engaging enemy personal who pose no genuine risk is permissible (for example, during a demonstration or feint, where the robust employment of combat power is utilized for deception or distraction purposes) or is a violation of this obligation? Under Professor Goodman’s view, wouldn’t every use of force on the battlefield require an inquiry into whether those killed should have been only wounded? What would be the standard for assessing criminal accountability for a violation? Continuing with the practical issues Professor Goodman’s proposal raises, when is an enemy protected by a LRM rule? How would soldiers be trained to apply such a rule with regard to both knowing when it is triggered and how to put it into practice (i.e., would they need to train to wound rather than kill)? **While the authority to use force** triggered by status determinations and the accordant presumption of hostility **may at times be** factually **overbroad, it serves the interests of all armed forces by** providing a modicum of clarity in the midst of the chaos of armed hostilities.

## link

It spills over to collapse the regime

Corn, Presidential Research Professor – South Texas College of Law, ‘9

(Geoffrey S., “Mixing Apples and Hand Grenades: The Logical Limit of Applying Human Rights Norms to Armed Conflict,” http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=1511954)

It is noteworthy that although this assertion appears in the Direct Participation in Hostilities study, it is not confined to civilians who lose their immunity from being made the objects of attack as the result of such direct participation (a qualifier which would have arguably limited the potential significance of the interpretation). To be clear, what is proposed is that when engaging an enemy combatant during armed conflict – an individual who by virtue of his or her status qualifies as a lawful military objective – the engaging force bears an obligation to refrain from the use of deadly force if some lesser degree of violence would produce submission.103 That the ICRC would have an interest in advancing an interpretation of the law that operates to protect combatants from death when injury or capture is a possible alternative is unsurprising considering the historic mandate of that organization.104 It is also undoubtedly in the eyes of some admirable. Nonetheless, the suggested interpretation of the law represents a dangerous confusion between law and policy. Even the ICRC acknowledges the lack of consensus on this interpretation: It is in this sense that Pictet‘s famous statement should be understood that ―[i]f we can put a soldier out of action by capturing him, we should not wound him; if we can obtain the same result by wounding him, we must not kill him. If there are two means to achieve the same military advantage, we must choose the one which causes the lesser evil‖. During the expert meetings, it was generally recognized that the approach proposed by Pictet is unlikely to be operable in classic battlefield situations involving large scale confrontations and that armed forces operating in situations of armed conflict, even if equipped with sophisticated weaponry and means of observation, may not always have the means or opportunity to capture rather than kill.105 This acknowledgment reveals that the LOAC establishes the outer limits of permissible conduct; it has never established a mandate that combatants employ the full scope of authority granted by the law to subdue an enemy. Put more simply, authority is not synonymous with obligation. As a result, how commanders choose to exercise the authority they are granted by the LOAC is and has always been a choice dictated by operational considerations. Thus, it is certainly true that there have been and will undoubtedly continue to be many instances where a commander who could employ deadly force against an enemy chooses not to do so, but to instead employ a lesser degree of force to bring the enemy into submission. However, by characterizing the exercise of such operational restraint as a LOAC requirement, the ICRC is transforming an exercise of command discretion into a legal obligation that is unsupported by treaty law, custom, or historic operational practice. There are countless logical operational explanations for exercising such restraint, from the desire to capture the enemy as a means of obtaining intelligence to the effort to demonstrate to other enemy personnel the wisdom of submission. However, it is critical to understand is that contrary to the ICRC suggestion, such restraint is not legally mandated. On the contrary, the only pre-submission protection afforded to enemy personnel by the LOAC is the prohibition against the infliction of unnecessary suffering.106 Even here, there is controversy related to the extent of the constraint.107 As a matter of sheer military logic, it is difficult to contest the proposition that the deliberate infliction of death on an enemy operative when some lesser degree of force might produce submission is generally not considered sufficient to run afoul of this very limited protective rule, because attacking the enemy with deadly combat power is customarily considered necessary to force an opponent into submission.108 Instead, the prohibition against inflicting unnecessary suffering requires the use of a method or means of warfare that is so attenuated from the goal of achieving this submission that it cannot rationally be considered necessary (which in effect produces and inference of genuine malice).109 Ironically, based on this customary understanding of the prohibition, there may be situations when causing death might actually be considered more humane than causing an injury that is particularly painful or difficult to heal, particularly where the infliction of injury is motivated by a calculation to impose a greater logistical burden on the enemy force. The ICRC interpretation of this prohibition distorts what a commander may do with what he must. Nothing in the LOAC obligates foregoing resort to deadly force as a measure of first resort vis à vis an enemy when injury and/or capture would subdue that enemy.110 If such a rule were to gain momentum, it would fundamentally alter the presumptions of permissible conduct that have guided combatant behavior since the inception of organized warfare. What is most troubling about this distortion is that it reflects a fundamental shift from a LOAC based analysis of authority to a human rights based analysis. Underlying the proposal is a rejection of the consequence of identifying an enemy as a ―military objective‖: the conclusive presumption that until rendered hors de combat the threat inherent in that designation/determination justifies immediate resort to deadly force. In contrast, the ICRC interpretation makes the authority to employ deadly force contingent on assessment of actual threat, and thereby denies such authority when that actual threat is insufficient to justify the use of that level of force.

This is a yes/no question – LOAC doesn’t include an LRM requirement

Corn et al 13 -Geoff Corn, South Texas College of Law, Professor of Law and Presidential Research Professor, J.D., Laurie Blank, Director, International Humanitarian Law Clinic, Emory Law School, Christopher Jenks, SMU Director of the Criminal Justice Clinic and Assistant Professor of Law, and Eric Talbot Jensen, BYU Law Professor, LOAC Expert, 2/25/13, Corn, Blank, Jenks, and Jensen Respond to Goodman on Capture-Instead-of-Kill, www.lawfareblog.com/2013/02/corn-blank-jenks-and-jensen-respond-to-goodman-on-capture-instead-of-kill/

In a provocative essay on drone strikes in Slate, Professor Ryan Goodman claims that the Law of Armed Conflict (LOAC) imposes a capture before kill requirement when targeting members of an enemy belligerent group. Goodman writes that “Here’s a fact that you didn’t hear at the confirmation hearings for John Brennan, Obama’s pick for next CIA chief, or from the administration’s white paper on drone killings: The international rules of warfare require nations to capture instead of kill enemy fighters, especially when lethal force is not the only way to take them off the battlefield.” **Not only is this claim flawed, it’s a** dangerous misinterpretation of the legal limitations **applicable to targeting** in armed conflict. It is erroneous to assert a legal obligation to exhaust the option to capture before employing deadly force against enemy belligerent operatives. **Support for imposing this constraint** on belligerent targeting authority **simply does not** exist in LOAC treaties, customary international law, or the actual practice and opinio juris of states. More specifically, his assertion that the general principles of military necessity and humanity impose this least-restrictive-means (LRM) limitation on the targeting of enemy belligerents is a fundamental misrepresentation of LOAC’s principles and foundations, derived from what appears to be a misconception that the objective of employing force is to defeat individuals, as opposed to the enemy in the collective sense. To the contrary, the LOAC, as established, interpreted and implemented by states, has long recognized the authority to lethally target members of an enemy belligerent force based solely on their status as members – an authority unrestricted by an express or implied duty to exclude the feasibility of less-than-lethal means or methods of attack prior to employing lethal force. The LRM assertion seeks, however, to limit this well accepted authority with what is in effect a proportionality constraint applicable not to protected civilians, but to combatants and other belligerents. Nothing in the law supports this approach. The provisions of the 1977 Additional Protocol I (API) to the Geneva Conventions offer the clearest evidence that no such LRM rule applies to belligerents. That treaty, derived from the humanitarian tradition of the Geneva Conventions, established the most comprehensive positive LOAC rules providing both the authority to attack lawful targets and the limitations on that authority. **A LRM requirement is not among those limitations**. Most relevant to the present discussion is Article 52, which defines lawful objects of attack as “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.” It is a LOAC axiom that members of an enemy belligerent force are per se military objectives within the meaning of Article 52. This is reflected not only in the doctrinal publications of most militaries around the world, but also in the International Committee of the Red Cross Commentary to Article 52 itself, which notes “that the definition [of military objective] is limited to objects but it is clear that members of the armed forces are military objectives, for, as the Preamble of the Declaration of St. Petersburg states: ‘the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy; [...] for this purpose it is sufficient to disable the greatest possible number of men.’” State practice validates that the authority to attack members of the armed forces applies with equal force to attacking members of any organized armed group engaged in armed conflict, whether international or non-international in nature; a view supported by a majority of LOAC experts. This LOAC axiom is further reflected in Article 43, which provided the first treaty definition of “combatant”, and as the associated Commentary indicates, “it should be explicitly stated that all members of the armed forces [with the exception of medical and similar non-combatant members] can participate directly in hostilities, i.e., attack and be attacked.” This principle, that “belligerent group membership” triggers lawful attack authority, is extended by custom and practice to other belligerent operatives who do not qualify as combatants within the meaning of Article 43. The LOAC imposes only two limitations on this established authority. First, the prohibition against attacking an individual who “clearly expresses an intention to surrender” or is otherwise rendered hors de combat (placing the obligation to manifest surrender on the potential object of attack, not the attacking force). Second, the prohibition against employing a method or means of warfare calculated to cause unnecessary suffering or superfluous injury (which necessarily implies the authority to inflict necessary suffering and injury on these lawful objects of attack). The assertion that this latter prohibition imposes an LRM obligation is fundamentally inconsistent with the established meaning and understanding of the principle of “unnecessary suffering”, which has never prohibited or limited a party’s authority to lethally target an opponent prior to the opponent becoming hors de combat. Indeed, the very nature of the lethality inherent in the weapons provided to armed forces and the tactics utilized to employ these weapons systems provides an almost irrefutable rebuttal to the LRM theory. Of course AP I also includes a proportionality rule in Article 51. However, civilians are the exclusive beneficiaries of this protection – the potential victims of incidental injury from otherwise lawful attacks against combatants and belligerents. This proportionality protection is simply inapplicable to the intended object of attack, i.e. belligerents. This rule is part of a broader mosaic of rules in AP I that function to limit targeting authority, all of which share a common purpose: protection of civilians. The specific absence of a parallel rule of proportionality applicable to combatants and belligerents is clear indication of the shared view of AP I’s drafters and signatories that no such limitation exists. How this fact can be reconciled with the asserted LRM obligation is simply perplexing. Had states intended to protect belligerents with an analogous proportionality or LRM limitation, AP I would be the logical locus of that rule. It is undisputed that the LOAC reflects a balance between the principles of military necessity and humanity that has evolved over time and is reflected in numerous treaty provisions and state practice. This law establishes that lethal attack against enemy belligerents is lawful when: 1) the target qualifies as a lawful military objective, 2) the expected incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof will not be excessive in relation to the concrete and direct military advantage expected to be gained, and 3) all feasible precautions are taken to spare the civilian population, civilians, and civilian objects from the effects of attacks. These rules incorporate the general principles of military necessity and humanity; the law is clear that the principles in no way superimpose an additional lesser-means exhaustion requirement on the positive rules. Contrary to Professor Goodman’s assertion, it is the capture rather than kill theory that rests on a weak foundation, including the authorities he cites. In fact, the LRM claim is not novel. The International Committee of the Red Cross introduced the very same assertion in Section IX of its 2009 Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Law. The now infamous inclusion of this assertion was a principal motivation for a majority of the participating experts to withdraw publicly from the project, causing the ICRC to take the unusual step of publishing the Interpretive Guidance without identifying participants and with a caveat that the views expressed were solely those of the ICRC. Many of those experts, as well as others, have subsequently published severe criticisms of the Interpretive Guidance’s LRM discussion, **with only the chapter’s author offering a responsive pleading in defense (and himself admitting that the LRM proposal is not reflective of, nor mandated by, governing law**). Nor is the great weight of evidence contradicting the LRM assertion overcome by reference to Jean Pictet’s single aspirational statement, written in his private capacity in 1985 after retiring as head of the ICRC: “If we can put a soldier out of action by capturing him we should not wound him, if we can obtain the same result by wounding him, we must not kill him, if there are two means to achieve the same military advantage we must choose the one which causes the lesser evil.” As a matter of policy, few would disagree with this admonition, which is unsurprising, as there are abundant examples of military commanders imposing policy limitations on the full scope of LOAC authorities. Indeed, **Administration officials have** in fact **consistently articulated a preference for capturing** enemy belligerents **when feasible**. This preference has been correctly stated, even in the context of targeting enemy belligerents who hold US citizenship, as a matter of policy. As a matter of formulating international law, however, Mr. Pictet’s statement lacks constitutive, or even significant interpretive value. States establish international law, not commentators. They do so by negotiating treaties or by establishing custom evidenced by consistent practice motivated by a sense of legal obligation. Even a cursory review of these sources of law demonstrates the fallacy of asserting an LRM principle as a matter of law.

No legal support for LRM

Jens David Ohlin, Cornell Law School Professor, 3/8/13, THE CAPTURE-KILL DEBATE: LOST LEGISLATIVE HISTORY OR REVISIONIST HISTORY?, http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2230486

Goodman suggests that this long catalogue of specific prohibitions provides some evidence for a general IHL principle regarding restrictions on the use of force (RUF), of which the least-restrictive-means test becomes the prime example. The argument here is that the law of armed conflict already engages in restrictions on the use of force.12 While this last statement is undoubtedly true, the question is whether this proposition provides an additional reason to believe in a wholesale principle that requires that the least amount of force be used during a military engagement. Goodman’s argument has the relationship between the parts backward. The reason that the use of force is restricted in these situations is precisely because the relevant treaties codified specific prohibitions against weapons and methods that produced unnecessary suffering and specific actions, like perfidy and treachery, that made the return to peace too difficult. **Goodman** notes that his general principle on the least restrictive means can also be justified because unrestrained force would make the return to peace too difficult.13 But this point **is inapposite**. It does not matter whether both could conceivably be justified by the same type of normative arguments. The important point is that the specific prohibitions and a general restriction on the use of force are operating on different levels. One cannot turn the specific prohibitions on their head; indeed, in Goodman’s approach, the specific prohibitions of jus in bello must become superfluous once they are swamped by the more general principle that Goodman purports to find in their penumbra. With Goodman’s general principle in place, the specific prohibitions would lose their urgency and raison d’être. This signals that something has gone amiss in the argument. Although Goodman engages in a substantial discussion of Grotius,14 his analysis is strangely insensitive to the historical development of the laws of war. He ignores Francis Lieber’s definition of **military necessity** codified in the Lieber Code; this definition was absolutely central to the history and development of jus in bello and it represents the greatest obstacle to the least-restrictive-means approach.15 **Whatever Lieber meant by military necessity, the phrase clearly did not mean the least restrictive means** – a definition of necessity that now reigns in human rights law. As I discussed in The Duty to Capture, **necessity in human rights law is not the same thing as necessity in jus in bello, and one should not be lured into thinking they are the same concepts just because they carry the same label**.16 Although Goodman is not applying human rights law in his analysis, his argument does suffer from the same infirmity that I identified in the human rights “co-application” arguments: they both misunderstand that the concept of necessity in the law of war has a technical meaning that can be traced back to the Lieber Code.17 Although Jean Pictet and others have tried to displace that definition, it must at least be conceded that the historical definition of necessity in the Lieber Code did not mean “least-restrictive means.” The following analysis explains why.

No duty to capture

Jens David Ohlin, Cornell Law School Professor, 8/18/2012, The Duty to Capture, http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2131720

When transposed in legal terms, the criticism implied that the United States had a duty to capture bin Laden and alAwlaki, or at the very least had a duty to attempt capture before resorting to lethal force. Although this “duty to capture” argument is essential to resolving the legality of targeted killings, the legal contours of this duty are often poorly understood, in part because the duty to capture depends entirely on which body of law applies to the situation at hand. For example, the U.S. constitutional norms that attach to domestic criminal-law situations clearly entail a duty to attempt capture.5 In cases of individual self-defense, a citizen may only kill his or her attacker if a non-lethal means—say escape, retreat, or capture—is unavailable, impossible, or impracticable.6 Generally speaking, killings are justified as lawful self-defense only if the action is, in a sense, unavoidable.7 In practical terms, though, the capture requirement will rarely affect the analysis if the attacker is armed with a weapon. In such situations, it is usually assumed that a private citizen could not capture the attacker without unduly risking his own life. If there is a trade-off to be made between protecting the life of the culpable aggressor and the innocent defender, the law comes down on the side of protecting the life of the defender.8 However, the duty to capture is far more relevant in **law enforcement situations**. Police officers have a duty to attempt capture and are only permitted to use lethal force against a fleeing felon if the police have probable cause to believe that the felon constitutes a danger to the public.9 In a recent case, the Supreme Court concluded that a fleeing motorist was driving so recklessly that the police were constitutionally entitled to believe that his reckless driving constituted a danger to the public.10 **But the situation is markedly different in** international humanitarian law (**IHL**), **where there simply is no codified duty to attempt the capture of enemy combatants**.11 Combatants open themselves up to the reciprocal risk of killing, and the lawfulness of killing combatants is based entirely on their status as combatants.12 To suggest that combatants could only be killed if capture was unfeasible would make the modern practice of aerial bombardment per se illegal. Whatever the merits of this as a moral argument, it cannot be taken to represent the current state of codified IHL because **it would require wholesale revision of the very practice of warfare itself,** **and would** therefore **be radically inconsistent with** current and past **state practice** since the advent of aerial warfare.13

## impact

Spills over to international armed conflicts—specifically Korea

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(Geoffrey, Laurie, Chris, and Eric, “Belligerent Targeting and the Invalidity of a Least Harmful Means Rule,” 89 INT’L L. STUD. 536)

Although COIN operations dominate contemporary LOAC discus-sions, the least harmful means rule would also apply in traditional interna-tional armed conflict, where medium or high-intensity conflict involving both deliberate and time-sensitive targeting and service members of all lev-els of expertise make such a rule even harder to reconcile. As much as a least harmful means rule fails to account for COIN combat realities like COP Keating or Wanat, that level of futility pales in comparison when considering high-intensity operations during international armed conflicts. In such conflicts, sustained combat operations are the default setting or norm. Combat engagements flow into other engagements, often involving varying and differing units and modalities of force, leveraging and massing lethal force at the same target. The purpose of combat operations is to mass a range of effects at a decisive point in time and space. And a least harmful means rule would introduce indecision at the moment it can be least tolerated—actions on the objective. As noted earlier, military doctrine details the importance of seizing and maintaining the initiative, interrupting the enemy’s decision cycle and forcing the enemy to react.242 A least harm-ful means rule would cede that initiative. In the process, most perversely, the least harmful means rule, articulated as an expression of humanity, would prove to be anything but and would very likely lead to more, not fewer, casualties on the battlefield. Even when international armed conflicts have been short in duration, such as the 2003 U.S. invasion of Iraq, they nonetheless involve hundreds of thousands of soldiers on both sides employing lethal force. For example, U.S. Army VII Corps, which conducted the main attack of the war, led a coalition of 146,000 soldiers from several different nations,243 including over 1,500 tanks and mechanized assault vehicles, and 800 helicopters. They were involved in almost non-stop combat operations for 100 hours in discrete battles in places like Al Busayyah and Medina Ridge and in rolling engagements without clear beginning and end points.244 The least harmful means rule would require that each of those soldiers assess—before firing each round—whether the enemy belligerent could not be disabled by using less than lethal force.245 Consider also the prospect of ground maneuver warfare in Korea—forces from the United States and Republic of Korea moving cross country, engaging enemy forces, could never even begin to have the time or ability to implement a least harmful means rule. The sight of an enemy who had discarded his weapon with hands held high is the type of clarity, and the only type of clarity, that facilitates the discrimina-tion—mandated by one of the LOAC’s “intransgressible principles”246—between which enemy belligerent is and is not properly an object of lethal attack. Apart from the fact that, as demonstrated in Sections I and II above, the positive LOAC does not include any such least harmful means obliga-tion, these operational inconsistencies and obstacles are telling. In short, any such rule should only be embraced if it is effective and susceptible to implementation in the most difficult of contexts, for if it is indeed a LOAC obligation it must be respected in every operation. Ultimately, we believe the detrimental impact of this rule in the much more common context that has been and will continue to be the primary focus of the LOAC indicates the folly of the least harmful means assertion.

War’s inevitable—US resolve key

Cheng, research fellow – Chinese political and security affairs, and Klingner, senior research fellow for Northeast Asia @ Heritage, 12/6/’11

(Dean and Bruce, “Defense Budget Cuts Will Devastate America’s Commitment to the Asia–Pacific,” <http://www.heritage.org/research/reports/2011/12/defense-budget-cuts-will-devastate-americas-commitment-to-the-asia-pacific>)

The United States has significant interests in East Asia—interests that are, at the moment, being challenged by a number of real threats. And of those threats, North Korea is the most immediate. As the Cold War continues to simmer on the Korean peninsula, **the potential for an inter-Korean conflict remains high**. Such a conflict might be sparked by North Korean aggression against the South, or perhaps by the collapse of North Korea—a scenario that grows increasingly likely as current leader Kim Jong-il strives to effect a second dynastic succession to his son Kim Jong-eun. North Korea is a multifaceted military threat to peace and stability in Asia as well as a global proliferation risk. Pyongyang has developed enough fissile material for six to eight plutonium-based nuclear weapons. North Korea conducted two nuclear tests in 2006 and 2009 and claims to have turned all of its fissile material into nuclear bombs. North Korean officials have repeatedly vowed that the regime has no intention of abandoning its nuclear arsenal. In November 2010, North Korea disclosed a uranium enrichment facility at Yongbyon containing 2,000 operational centrifuges consistent with a parallel uranium-based nuclear weapons program. A visiting U.S. scientist was stunned by the size and sophistication of the facility, which exceeded all predictions of North Korean progress on a uranium program. Furthermore, a South Korean nuclear scientist estimated that Pyongyang could produce one to two uranium weapons per year using 2,000 centrifuges.[8] This capability would be even greater if North Korea has other undetected uranium enrichment facilities. The newly identified uranium facility at Yongbyon not only augments North Korea’s capacity to increase its nuclear weapons arsenal; it also increases the risk of nuclear proliferation. For decades, North Korea has exported missiles to rogue regimes. A U.N. task force concluded that Pyongyang continues to provide missiles, components, and technology to Iran and Syria—despite the imposition of U.N. sanctions. In September 2007, Israel destroyed a Syrian nuclear reactor that was being constructed with covert North Korean assistance. North Korea is also believed to be assisting the regime in Myanmar/Burma in developing nuclear capabilities. The North Korean threat is not restricted to East Asia or concerns over proliferation. In January 2011, Secretary of Defense Robert Gates warned that “North Korea is becoming a direct threat to the United States.”[9] Gates’s comments were sparked by revelations that within five years, North Korea will develop an intercontinental ballistic missile. Pyongyang has already deployed 600 SCUD missiles to target South Korea, 300 No Dong missiles that can reach all of Japan, and the Musudan missile, which is capable of hitting U.S. bases in Guam and Okinawa. Pyongyang’s unprovoked acts of war on a South Korean naval ship and a civilian-inhabited island in 2010 were chilling reminders that North Korean conventional forces remain a direct military threat to South Korea.[10] Pyongyang’s million-man army has 70 percent of its ground forces forward-deployed within 60 miles of South Korea. Weakening U.S. forces in the region will only encourage North Korea to conduct additional provocative acts in order to achieve foreign policy objectives.

Extinction

Hayes, executive director – Nautilus Institute, and Hamel-Green, dean of the Faculty of Arts, Education, and Human Development – Victoria University, 1/5/’10

(Peter and Michael, “The Path Not Taken, the Way Still Open: Denuclearizing the Korean Peninsula and Northeast Asia,” <http://www.nautilus.org/fora/security/10001HayesHamalGreen.pdf>

At worst, there is the possibility of nuclear attack1, whether by intention, miscalculation, or merely accident, leading to the resumption of Korean War hostilities. On the Korean Peninsula itself, key population centres are well within short or medium range missiles. The whole of Japan is likely to come within North Korean missile range. Pyongyang has a population of over 2 million, Seoul (close to the North Korean border) 11 million, and Tokyo over 20 million. Even a limited nuclear exchange would result in a holocaust of unprecedented proportions. But the catastrophe within the region would not be the only outcome. New research indicates that even a limited nuclear war in the region would rearrange our global climate far more quickly than global warming. Westberg draws attention to new studies modelling the effects of even a limited nuclear exchange involving approximately 100 Hiroshima-sized 15 kt bombs2 (by comparison it should be noted that the United States currently deploys warheads in the range 100 to 477 kt, that is, individual warheads equivalent in yield to a range of 6 to 32 Hiroshimas).The studies indicate that the soot from the fires produced would lead to a decrease in global temperature by 1.25 degrees Celsius for a period of 6-8 years.3 In Westberg’s view: That is not global winter, but the nuclear darkness will cause a deeper drop in temperature than at any time during the last 1000 years. The temperature over the continents would decrease substantially more than the global average. A decrease in rainfall over the continents would also follow…The period of nuclear darkness will cause much greater decrease in grain production than 5% and it will continue for many years...hundreds of millions of people will die from hunger…To make matters even worse, such amounts of smoke injected into the stratosphere would cause a huge reduction in the Earth’s protective ozone.4 These, of course, are not the only consequences. Reactors might also be targeted, causing further mayhem and downwind radiation effects, superimposed on a smoking, radiating ruin left by nuclear next-use. Millions of refugees would flee the affected regions. The direct impacts, and the follow-on impacts on the global economy via ecological and food insecurity, could make the present global financial crisis pale by comparison. How the great powers, especially the nuclear weapons states respond to such a crisis, and in particular, whether nuclear weapons are used in response to nuclear first-use, could make or break the global non proliferation and disarmament regimes. There could be many unanticipated impacts on regional and global security relationships5, with subsequent nuclear breakout and geopolitical turbulence, including possible loss-of-control over fissile material or warheads in the chaos of nuclear war, and aftermath chain-reaction affects involving other potential proliferant states. The Korean nuclear proliferation issue is not just a regional threat but a global one that warrants priority consideration from the international community.

## norms

Even if the US model is lacking, global pressure solves

Beard, professorial lecturer – UCLA Law, ‘9

(Jack M., 103 A.J.I.L. 409)

The implications of the emerging robotic military model for human staffing, recruiting, and training requirements are complex and far-reaching. In shifting from a model in which the primary purpose of technology was to support hu-man combatants to a model in which the role of humans is to support the technology, the robotic military will necessari-ly demand greater levels of technical competence from the human "robotists." As these demands for greater competence proliferate and virtual technologies merge humans and machines even more [\*444] closely, each component of these new virtual weapons systems, along with the sum of their parts, will continue to be scrutinized. It is in this context and on this basis that law-of-war obligations in the virtual era will be assessed. The virtual era is rapidly expanding to encompass the entire international community. The demand for UAVs, for example, is soaring as more and more countries, including many in the developing world, are obtaining and becoming familiar with virtual technologies and their ISR capabilities, in part because UAV systems cost much less than their manned counterparts. n169 The acquisition by many countries of UAVs manufactured in the United States, France, and Germany; by Georgia and India of UAVs manufactured in Israel; and by Pakistan and Egypt of UAVs manufactured in China demonstrates that the implications of the virtual era already extend far beyond U.S. military operations alone. n170 This growing worldwide familiarity with UAVs, even if some countries use them only for basic reconnaissance or artil-lery-spotting missions, will inescapably direct more attention in the future to the improving ability of military forces, especially those belonging to states that can afford to deploy many advanced systems, to verify objectives and take other precautionary measures to **ensure observance of the proportionality principle in attacks.** Virtual technologies are thus on the verge of significantly shaping the views and conduct of all states, even those that do not possess them or cannot afford to deploy them in great numbers. New, extensive virtual surveillance capabili-ties come with new burdens for the states that benefit from them--burdens that are more and more likely to be invoked by poor or other less technologically advanced states in any discussion about the corresponding legal duties. The devel-oped states that seek to avoid these burdens may again find themselves haunted by the new legal content of words such as "available." Once relied upon as permissive terms, these words may now unexpectedly impose constraints. For ex-ample, at the diplomatic conference that ultimately adopted Protocol I, one state observed that the obligation to identify military objectives as targets under Article 57(2) "depended to a large extent on the technical means of detection availa-ble to the belligerents." n171 In its Commentary, the International Committee of the Red Cross agreed, observing that " [s]ome belligerents might have information owing to a modern reconnaissance device, while other belligerents might not have this type of equipment." n172 Drawing on such considerations, less developed states can argue that richer coun-tries with extensive, widely deployed and sophisticated virtual surveillance capabilities and unprecedented access to once-unimaginable levels of ISR information are subject to a higher standard of care in verifying targets as military ob-jectives and taking other precautionary measures. The more exacting legal standards likely to flow from virtual surveillance capabilities will not be diminished by the global newsroom, which increasingly enhances its reporting with video [\*445] footage furnished by virtual platforms overhead. Even the five-day standoff and military action against Somali pirates holding an American hostage on a small lifeboat in a remote corner of the Indian Ocean in April 2009 were not exempt from news reports showing video footage from a UAV used by U.S. forces in the operation. n173 When a military operation is not successful or what actually hap-pened is disputed, no small similarity may be remarked to the instant replay so familiar to American football fans; alt-hough it may lack the assigned referees, the process involves a close examination of digitally recorded facts, subjects disputed calls to wide public debate, prompts a more exacting application of rules, and sometimes leads to the refine-ment of those rules. Similarly, whether the home team likes the call or not, a new era of openness and debate has arrived, and with it new life for some of the rules on the playing field. Virtual weapons systems are poised to transform the conditions of future battlefields for humans and change law, war, and military institutions in profound, far-reaching ways. While military-technological advances have routinely worsened the plight of civilians in war and made law an even more distant concern on the battlefield, virtual technolo-gies are unexpectedly bringing laws that protect civilians closer to war than ever before. These technologies are in fact giving unprecedented traction, transparency, and relevance to venerable jus in bello rules that states have often ignored, manipulated, or consigned only to theoretical applications. At the same time, virtual technologies are refashioning the way military operations are conducted, the way military institutions function, and the way objectives are defined in war itself. The implications of the dawning virtual era deserve to be more carefully studied across a wide spectrum of human behavior. For the military institutions that must address the unfolding consequences of virtual technologies originally designed to help project military power, such a project is in some respects a study in irony.

## detention

The Chesney evidence says habeas is a bigger deal than the aff, but also that LOAC clarity is the key litmus test for whether we’ll be able to resolve new Warsame’s, which the CP does

Chesney 13 - Charles I. Francis Professor in Law @ Texas, BEYOND THE BATTLEFIELD, BEYOND AL QAEDA: THE DESTABILIZING LEGAL ARCHITECTURE OF COUNTERTERRORISM, Public Law and Legal Theory Research Paper No. 227, Robert M. Chesney, Also Michigan Law Review, Forthcoming in vol 112, Fall 2013.

Ultimately, the Obama administration settled on a compromise approach in Warsame’s case. On one hand, he was eventually placed on a “kill/capture” list maintained by Joint Special Operations Command (“JSOC”), and when he attempted to cross the Gulf the decision was made to attempt a capture.7 The operation came off in textbook fashion. JSOC operators were watching closely as Warsame proceeded across the Gulf on April 19th, and eventually they seized the vessel without a shot fired.8 For the next two months, moreover, Warsame languished in the brig of the USS Boxer—which happened to be on station in the region as part of an anti-piracy task force—undergoing interrogation in military custody. Before the detention became known to the public, however, and before any possibility of judicial intervention that might put the government’s claim of authority to the test in a formal manner, the administration switched gears. In a rather bold move, it transferred Warsame to civilian custody, flying him to New York City to face criminal charges. This solution rendered the question of authority academic as to Warsame, but it did not make the underlying issues disappear. On the contrary, the domestic political backlash against Warsame’s transfer to civilian custody in New York may well deter the executive branch from charting that same course, and Congress for its part might eventually act to forbid such transfers by statute in the future (for now it has forbidden such transfers only if the detainee is first held at Guantanamo). Yet the Warsame fact pattern, or something like it, is certain to arise again in the future in light of the strategic trends described below. The ultimate lesson of the Warsame scenario is not that hard questions about the authority to use military detention or lethal force in such settings can be avoided, then, but rather that they deserve sustained public attention. In the pages that follow, I explain that the second post-9/11 decade will be increasingly characterized by a kind of “shadow war,” taking place on an episodic basis in locations far removed from zones of conventional combat operations and involving opponents not readily described as members of al Qaeda as such. The legal architecture that developed to a point of seeming stability over the past decade is not well-adapted to this environment, and as time goes by—as new Warsames emerge—the gaps will become increasingly apparent and problematic. \*\*\*Part I below fleshes out my baseline claim that the status quo legal architecture reached a point of apparent stability by the close of the first post-9/11 decade. Political debates still raged, of course, and legal criticism certainly continued in the pages of law reviews and advocacy group briefs. Yet across a range of issues—including the use of military detention at Guantanamo and in Afghanistan, the use of reformed military commissions to prosecute a narrowed set of offenses, and the use of drones to carry out lethal strikes in remote areas—the most striking fact was the emergence of cross-party and cross-branch consensus. The Obama administration famously continued rather than terminated the core elements of various Bush administration counterterrorism programs (not to mention a dramatic expansion of the drone program), and three years’ worth of habeas litigation following the Supreme Court’s famous decision in Boumediene v. Bush served primarily (and quite surprisingly to many) to validate the legal foundation of the detention system. Congress, for its part, first took the lead in reviving the military commission system, and then in the National Defense Authorization Act for Fiscal Year 2012 reinvigorated the 2001 Authorization for Use of Military Force, providing a fresh statutory foundation at least for detention operations. In Part II I make the case that this consensus depended in significant part upon the presence of two factors. First, throughout the first post-9/11 decade there has always been a “hot battlefield” in Afghanistan, an area involving high-intensity, large-footprint conventional combat operations as to which there is no serious dispute that the law of armed conflict (LOAC) applies. This has long provided a center of gravity for the legal debate surrounding the law of counterterrorism, ensuring that there is at least some setting in which LOAC authorities relating to detention and lethal force apply. Insofar as a given fact pattern could be linked back to Afghanistan, therefore, it has been possible to avoid thorny questions regarding the geographic scope of LOAC principles. Notably, the dozens of habeas cases of the first post-9/11 decade— which collectively have played an outsized role in the process of establishing the appearance that the law has stabilized—almost entirely involve direct links to Afghanistan (the sole exception being an al Qaeda detainee captured in the US, whose case rather tellingly produced badly splintered judicial opinions). Second, throughout the same period there also has been at least a working assumption that we can coherently identify the enemy by referring to al Qaeda and the Taliban (along with glancing-but-unelaborated references to the “associated forces” of such groups). Again, the habeas case law has played a critical role in cementing this impression of clarity. In Part III, I demonstrate that both of these stabilizing factors are rapidly eroding in the face of larger strategic trends concerning both al Qaeda and the United States. First, the United States for a host of reasons (fiscal constraints, diplomatic pressure, and a growing sense of policy futility) is accelerating its withdrawal from Afghanistan. Second, the United States simultaneously is shifting to a low-visibility “shadow war” strategy that will rely on Special Operations Forces, CIA paramilitary forces, drones operated by both, proxy forces, and quiet partnerships with foreign security services. Meanwhile, al Qaeda itself has fractured and diffused, both in pursuit of the security that comes from geographic dispersal of personnel into new regions and also in pursuit of a strategic vision that embraces decentralization in the form of relationships with quasi-independent regional organizations that may have independent origins and agendas. As a result, it grows increasingly difficult to speak coherently of “al Qaeda”; the senior leadership of the original network has been decimated, and so-called franchises with uncertain (or no) ties to that leadership not only are proliferating but are rapidly emerging as more significant threats to U.S. national security. The upshot of all this is that there soon will be no undisputed hot battlefield in existence anywhere, while the center of gravity with respect to the use of lethal force will continue to shift to locations like Yemen, Pakistan, and Somalia. Already these unorthodox scenarios are the primary focus for the use of lethal force, and they will similarly be the focus should the United States resume the practice of long-term military detention for new detainees (a distinct possibility in the event of a Romney presidency). Part III also maps the disruptive legal consequences of these strategic trends. My essential point is that the apparent stability of the post-9/11 legal architecture—the semblance that some sort of sustained institutional settlement has occurred—is an illusion. As the second post-9/11 decade progresses, policies associated with drone strikes and detention unquestionably will face increasing legal friction, casting doubt over the legality of the U.S. government use of detention and lethal force in an array of settings. In Part IV, I take up the question whether we really ought to care about all of this and, if so, what if anything can and should be done. We should care, for it will not be possible to simply ride out the increasing legal friction. The current climate of judicial passivity—reflected in the Supreme Court’s unwillingness to reengage with the Guantanamo habeas cases, the unwillingness of the D.C. Circuit Court of Appeals to adjudicate habeas petitions arising out of Afghanistan, and the unwillingness of a district judge to adjudicate a suit challenging the planned use of lethal force against an American citizen —will not last. For a host of reasons, a fresh wave of detention litigation concentrating on these very issues is all but guaranteed to arise. It is not beyond the realm of possibility that the judiciary will engage as well in connection with the use of lethal force, moreover, though even if it does not its engagement on detention issues will in any event cast a long shadow over practices relating to lethal force. Bearing all this in mind, I conclude by distinguishing those elements of legal uncertainty that are simply unavoidable (given a pluralistic legal environment in which a host of relevant actors simply do not share common ground with respect to which bodies of law are applicable to these questions and what those bodies of law can fairly be said to require) and those that might usefully be addressed by statutory innovation.

Empirics are overwhelming

Chesney ’12

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This multi-year pattern of cross-branch and cross-party consensus gives the impression that the legal architecture of detention has stabilized at last. But the settlement phenomenon is not limited to detention policy. The same thing has happened, albeit to a lesser extent, in other areas. The military commission prosecution system provides a good example. When the Obama administration came into office, it seemed quite possible, indeed likely, that it would shut down the commissions system. Indeed, the new president promptly ordered all commission proceedings suspended pending a policy review.48 In the end, however, the administration worked with the then Democratic-controlled Congress to pursue a **mend-it-don’t-end-it approach** culminating in passage of the Military Commissions Act of 2009, **which addressed a number of key objections** to the statutory framework Congress and the Bush administration had crafted in 2006. In his National Archives address in spring 2009, moreover, President Obama also made clear that he would make use of this system in appropriate cases.49 He has duly done so, notwithstanding his administration’s doomed attempt to prosecute the so-called “9/11 defendants” (especially Khalid Sheikh Mohamed) in civilian courts. Difficult questions continue to surround the commissions system as to particular issues—such as the propriety of charging “material support” offenses for pre-2006 conduct50—but the system as a whole is **far more stable today** than at any point in the past decade.51 There have been strong elements of cross-party continuity between the Bush and Obama administration on an array of other counterterrorism policy questions, including the propriety of using rendition in at least some circumstances and, perhaps most notably, the legality of **using lethal force** not just in contexts of overt combat deployments but also in **areas physically remote from the “hot battlefield.**” Indeed, the Obama administration **quickly outstripped the Bush administration in terms of the quantity and location** of its airstrikes outside of Afghanistan,52 and it also greatly surpassed the Bush administration in its efforts to marshal public defenses of the legality of these actions.53 What’s more, the Obama administration also **succeeded in fending off a lawsuit challenging the legality of the drone strike program** (in the specific context of Anwar al-Awlaki, an American citizen and member of AQAP known to be on a list of approved targets for the use of deadly force in Yemen who was in fact killed in a drone strike some months later).54 The point of all this is not to claim that legal disputes surrounding these counterterrorism policies have effectively ended. Far from it; a steady drumbeat of criticism persists, especially in relation to the use of lethal force via drones. But by the end of the first post-9/11 decade, this criticism no longer seemed likely to spill over **in the form of disruptive judicial rulings, newly restrictive legislation,** or significant spikes in diplomatic or domestic political pressure, as had repeatedly occurred in earlier years. Years of law-conscious policy refinement—and quite possibly some degree of public fatigue or inurement when it comes to legal criticisms—had made possible an extended period of **cross-branch and cross-party consensus**, and this in turn left the impression that the underlying legal architecture had reached a stage of stability that was good enough for the time being.

# 2NR

## Spillover

Restrictions on legal combat lead to cascade to LOAC non-compliance—collapses the regime

Shane Reeves, Major, United States Army, Assistant Professor, Department of Law, United States Military Academy, and Jeffrey Thurnher, Lieutenant Colonel, United States Army, Military Professor, International Law Department, United States Naval War College, 6/24/13, Are we Reaching a Tipping Point? How Contemporary Challenges Are Affecting the Military Necessity-Humanity Balance, harvardnsj.org/2013/06/are-we-reaching-a-tipping-point-how-contemporary-challenges-are-affecting-the-military-necessity-humanity-balance/

Debates concerning “capture or kill,” the legality of autonomous weapon systems, and the targeting of cyber hackers, though seemingly disconnected discussions, act in concert to subvert the principle of military necessity and tip the scale in favor of humanity. **This troubling trend is encouraging a** myopic focus on developing new limitations in armed conflict **without considering “military factors in setting the rules of warfare**.”[73] If the Law of Armed Conflict becomes less about fixing “the technical limits at which the necessities of war yield to the requirements of humanity”[74] and more just about restricting military operations, conflict participants will **increasingly view the law as an unrealistic body of theoretical norms**. If it is dismissed as impractical, the Law of Armed Conflict will greatly diminish in importance, and consequently, becomes a less effective regulatory regime. It is incumbent upon states to maintain the balance between military necessity and humanity, as the primacy of the Law of Armed Conflict is dependent upon this equilibrium. States must give equal consideration to both principles despite the growing pressure to emphasize humanitarian concerns and ignore the military necessities of warfare. Only states can “reject, revise, or supplement” the Law of Armed Conflict or “craft new norms” when “the perceived sufficiency of a particular balancing of military necessity and humanity may come into question.”[75] States must not yield this authority to unaccountable ideologues. It is undeniable that armed conflicts will continue,[76] what is questionable is whether the Law of Armed Conflict can ensure that warfare does not devolve into the brutality and savagery that historically has defined it.[77]