# \*\*\*aff – app state – rd 6\*\*\*

# 1ac

Same as round 3

# 2ac

## 2ac safe havens

5) First resort/second resort distinction solves safe havens and turns legal uncertainty

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

It remains somewhat arbitrary, of course, to link the zone of hostilities to nation-state boundaries or administrative regions within a state when neither the state itself nor the region is a party to the conflict and when the non-state party lacks explicit ties to the state or region at issue. This proposed framework inevitably will incorporate some areas into the zone of active hostilities in which the key triggering factors - sustained, overt hostilities - are not present. But such boundaries, even if overinclusive or artificial, provide the most accurate means available of identifying the zone of active hostilities, at least over the short term.

Over the long term, it would be preferable for the belligerent state to declare particular areas to be within the zone of active hostilities, either through an official pronouncement by the state party to the conflict or via a resolution by the Security Council or a regional security body. A public declaration would provide explicit notice as to the existence and parameters of the zone of active hostilities, thereby reducing uncertainty as to which legal rules apply. Such declarations would allow for public debate and diplomatic pressure in the event of disagreement. Furthermore, the belligerent states could then define the zone with greater nuance, which would **better** [\*1209] **reflect the actual fighting than** would **preexisting** state or **administrative boundaries**. n138

Some likely will object that such an official designation would recreate the same safe havens that this proposal seeks to avoid. But a critical difference exists **between a territorially restricted framework that** effectively **prohibits reliance on law-of-war tools outside of specific zones of active hostilities and a zone approach that merely imposes heightened procedural and substantive standards on the use of such tools**. Under the zone approach, the non-state enemy is not free from attack or capture; rather, the belligerent state simply must take greater care to ensure that the target meets the enhanced criteria described in Section III.B.

6) Least necessary means is sufficient to solve

Ryan Goodman 13, New York University School of Law Professor, 2/26/13, What the Critics of the “Lesser Evil” Rule (Still) Get Wrong: A Rejoinder to Corn, Blank, Jenks, and Jensen, www.lawfareblog.com/2013/02/goodman-responds-to-corn-blank-jenks-and-jensen-on-capture-instead-of-kill/

Finally, I must address CBJJ’s contention that my position would be impractical if applied in military operations. This is an odd contention for a few reasons. First, as CBJJ admit, the US government already adopts the standard as a matter of policy preference in our armed conflict with Al Qaeda and associated forces. Second, as they admit, the US government adopts a “feasibility of capture” standard as a legal constraint in targeting members of Al Qaeda and associated forces who are US citizens. Third, as CBJJ acknowledge, other states’ armed forces (e.g., Israel) operate with a lesser evil rule in their asymmetric wars with terrorists groups. Colombia is a prominent example of a state that has, in fact, directly incorporated the ICRC Guidance in their asymmetric armed conflict with a terrorist group. Perhaps CBJJ conclude that my position is impractical because they misconstrue what it is (see Part I above).

8) Prefer specifics - our legal constraint is just not operationally constraining

Robert Chesney, 10/4/13, Would Abandoning the War Model of Counterterrorism Make a Difference from a Legal Perspective?, www.newrepublic.com/article/114995/would-abandoning-war-model-counterterrorism-make-difference

What’s more, the convergence of current targeting policies and the pre-9/11 model is a two-way street. Though the government continues to maintain the relevance of the war model to this day, it has made clear that it now embraces—as a matter of policy discretion—constraints on the use of lethal force outside the Afghan combat zone that replicate the elements of the continuing-and-imminent threat model (of course, even Afghanistan may soon be categorized as something other than a zone of combat, given the accelerating momentum toward the withdrawal of most if not all American combat forces). Not that this means that the constraints are all that restrictive; one must bear in mind that the continuing-and-imminent model does not require the sort of literal-immediacy one might associate with police uses of force during, say, a hostage crisis. The model instead treats the imminence element as satisfied on an ongoing basis when a fleeting window of opportunity emerges to carry out an attack against a group or individual that already has demonstrated the capacity and will to kill Americans, at least where a capture mission is not feasible in the circumstances. This helps explain why the government, though still maintaining the relevance of the armed-conflict model as a formal matter, already was willing to return to the continuing-and-imminent threat model as a matter of policy: There just isn’t much cost to doing so in terms of lost operational flexibility. The same will be true postwar, at least insofar as the legal architecture is concerned.

9) First resort solves – it is the middle ground between a complete ban or failing to codify sovereignty

Laurie Blank 10, Director, International Humanitarian Law Clinic, Emory Law School, 1 DEFINING THE BATTLEFIELD IN CONTEMPORARY CONFLICT AND COUNTERTERRORISM: UNDERSTANDING THE PARAMETERS OF THE ZONE OF COMBAT, papers.ssrn.com/sol3/papers.cfm?abstract\_id=1677965‎

The ramifications of including areas within the zone of combat, such as the accompanying authority to use lethal force as a first resort, raise a variety of policy considerations. The two primary considerations weigh directly against each other and perhaps, as a result, lend credence to the need for a middle ground in defining the zone of combat. First, some argue that creating geographic limits to the battlefield has the problematic effect of granting terrorists a safe haven. For example, a member of al Qaeda can be a legitimate target as a result of continuous participation in hostilities, thus losing any immunity from attack he might have had by dint of being a civilian. [FN105] If the zone of combat is limited geographically to certain areas, then this member of al Qaeda can avoid being targeted--and thus regain civilian immunity, in essence--simply by crossing an international border even while remaining active in a terrorist organization engaged in a conflict with the U.S. [FN106] Geographic limits designed to curtail the use of governmental military force thus effectively grant terrorists a safe haven and extend the conflict by enabling them to regroup and continue their attacks.

Alternatively, others argue that the **lack of geographic limitations on the zone of combat has grave consequences**, both locally and **globally**. In particular, “[t]he implications of allowing the use of armed force to capture or kill enemies outside a country's own territory, and outside a theater of traditional armed conflict, may **include spiraling violence, the erosion of territorial sovereignty, and a weakening of international cooperation**.” [FN107] Use of military force to target a person inside the territory of another state without its consent inherently violates that state's sovereignty. A conception of the battlefield enabling regular incursions into another state's territory will, over time, have the effect of weakening the importance of state sovereignty as a defining part of the international legal order. It also increases the likelihood of violence on a more regular and more widespread basis, as more and more locations fall within the arena of military operations.

Targeted killings are key to Afghan stability post-withdrawal

Byman 13 (Daniel, Professor in the Security Studies Program at the Edmund A. Walsh School of Foreign Service at Georgetown University and a Senior Fellow at the Saban Center for Middle East Policy at the Brookings Institution, July/August 2013, “Why Drones Work,” Foreign Affairs, Vol. 92, No. 4)

In places where terrorists are actively plotting against the United States, however, drones give Washington the ability to limit its military commitments abroad while keeping Americans safe. Afghanistan, for example, could again become a Taliban-run haven for terrorists after U.S. forces depart next year. Drones can greatly reduce the risk of this happening. Hovering in the skies above, they can keep Taliban leaders on the run and hinder al Qaeda's ability to plot another 9/11.

## 2ac loac turn

3) Only plan solves LOAC collapse

Sasha Radin, Visiting Research Scholar at the Naval War College, Newport Rhode Island; PhD candidate, Asia Pacific Centre for Military Law, University of Melbourne Law School, 2013, Global Armed Conflict? The Threshold of Extraterritorial Non-International Armed Conflicts, www.usnwc.edu/getattachment/311c6f17-ee69-4870-a00d-b7d845e4387c/Global-Armed-Conflict---The-Threshold-of-Extraterri.aspx

State sovereignty was another impetus for creating the requirement that the hostilities reach a certain level of intensity before LOAC could apply. States wanted to limit the involvement of outside States in their domestic affairs. This objective must, therefore, be seen in light of the fact that the types of conflicts envisioned were mainly internal armed conflicts. In an extraterritorial NIAC context, the reluctance of the State party to the conflict to be subject to interference from other States in its internal affairs largely disappears.150 Neither internal disturbances nor the conflict itself takes place in their own territory.

Does it matter in terms of what LOAC requires for its application that it is the State not party to the conflict whose territorial integrity is infringed? In other words, could this geographic shift in where the hostilities occur affect one of the original underlying reasons for the existence of the threshold? In contrast to the previous two points (whether the violence undertaken by various armed groups may be conglomerated and whether the distribution of violence over space means that it does not reach the sufficient level of intensity), this point questions whether the level of intensity customarily required for internal armed conflicts is the same for extraterritorial conflicts.

It may be argued that the territorial State (i.e., the State in which an extraterritorial NIAC physically takes place) has an interest in trying to prevent incursions into its sovereignty, even though it may not be a party to that NIAC. An incursion by an outside State in order to fight an armed group would likely have implications for the “uninvolved” territorial State. For instance, such an action could be an indication that the territorial State is not able to maintain its own security—an image that States usually take pains to avoid. Or, the territorial State may be concerned that the outside State might gain control or influence within their State.

The implications this shift might have on establishing the threshold of an extraterritorial armed conflict are not clear. At the very least, the reassignment of which State’s sovereignty is affected indicates that issues arising from the shifted location of the conflict warrant further examination. Therefore, even if one accepts the premise that NIACs may exist extraterritorially, the fact that the law was designed for a different context presents challenges in determining the existence of an armed conflict.

VI. GEOGRAPHIC BOUNDARIES OF EXISTING ARMED CONFLICTS

The removal of territorial boundaries from a system based on these physical limits raises the related question of where LOAC may be applied once the law of armed conflict has been triggered. Limited discussion has arisen previously on this issue in the context of purely internal conflicts. However, the main controversy surfaces today specifically with regard to individuals affiliated with an organized armed group located in a second State (“outside of an active battlefield”151). The unease of some commentators that the world could become a battlefield reappears here.

Because NIAC law was designed for internal application, its extraterritorial parameters are not clear. Two main options have been discussed for how to deal with this challenge. One proposes that the geographic application of LOAC is limited to the area of hostilities. The other maintains that once an armed conflict exists the law may extend beyond the immediate zone of hostilities. This latter approach has been interpreted by some to suggest that the law applies to the parties to the conflict wherever they may be located.

The first proposal, suggesting that LOAC would not apply at a distance from wherever the hostilities were taking place,152 may seem logical on its face, but lacks a legal basis. Jurisprudence from the ICTY dealing with the geographic scope of Common Article 3 within a State contradicts this interpretation, providing that “international humanitarian law continues to apply . . . in the case of internal conflicts . . . [to] the whole territory under the control of a party, whether or not actual combat takes place there.”153 The ICTY case law has generally been interpreted by other bodies to mean that Common Article 3 applies to the entire country in which a conflict is taking place, regardless of where hostilities occur.154 This language has been repeatedly upheld by subsequent ICTY and ICTR judgments.155 In the absence of explicit treaty law or customary international law, this jurisprudence could be said to have relevance when it comes to interpreting the geographic contours of internal conflicts.

Resort to the object and purpose of the law also supports application of the law beyond areas of hostilities. One of the law’s fundamental purposes is to ensure protection of individuals once in the hands of the enemy. To interpret the law as only applying to areas of combat would reduce the protection afforded to some of the most vulnerable, who may be located at a distance from active hostilities.

Finally, the text of AP II can be turned to for some guidance, even though the types of conflicts under discussion here are those with a lower threshold. AP II explicitly provides that it applies to “to all persons affected by an armed conflict.”156 This indicates that although AP II limits its applicability to the State in which the conflict is taking place,157 its application is not restricted to areas of active hostilities.158

The second approach considers that once an armed conflict exists LOAC applies beyond the area of active hostilities.159 It is argued that this is the more defensible position of the two. Although this view does not find an explicit basis in treaty law, it is difficult to find justification within the existing law for restricting the application of LOAC to a certain region once an armed conflict exists. In addition, the ICTY and ICTR case law just noted could be said to indirectly support this position in that it interprets the application of the law as extending beyond the combat zones. However, too much reliance on this jurisprudence is misguided as it still depends on State boundaries. For example, if one accepts that the armed conflict in Afghanistan has spilled over into Pakistan, does Common Article 3 then apply throughout the country of Pakistan?

The view that LOAC applies beyond the area of active hostilities leads to the question of whether anything restricts the geographic application of LOAC. One approach is to interpret the ICTY case law as literally referring to the areas where the parties to the conflict have control.160 Under such a view, NIAC law would only apply to the territory under control of the Pakistani Taliban (and other armed groups) in the North-West Frontier Province. This construction, however, presents hurdles.161 First, what is meant by control?162 Second, if it is territorial control that is envisioned, the majority of commentators and jurisprudence view the control of territory by an armed group as an indicator for the applicability of Common Article 3, rather than an obligation.163 It would not make sense to require territorial control by an armed group in order to determine the reach of an armed conflict within a country, but not to require territorial control for the existence of an armed conflict.164 Third, taken to its extreme this interpretation illogically suggests that if neither party controls territory, then LOAC does not apply,165 leading to the possibility that LOAC would not apply precisely where the battle rages.

The U.S. government position that LOAC is not geographically constrained with regard to individual members of a party to a conflict166 has engendered criticism.167 However, it is a defensible stance if one has already accepted that the territorial boundaries of States do not limit LOAC’s application. The bigger issue seems to be that the law was not designed for extraterritorial application. As such, should the view that territorial boundaries are not relevant to LOAC’s application gain force, it may be that the law will develop in a clearer and more nuanced manner.168 Notwithstanding the lack of clarity with regard to this issue, significant restrictions on the use of force against an individual located at a distance from hostilities in a second country already exist. Perhaps most importantly, the question only arises in the first place if an armed conflict exists between the State using force and the armed group against which the force is directed (which includes establishing that the group to which the individual belongs is an identifiable party). Second, and crucially, the separate question then arises of whether an individual is targetable (either by virtue of the membership approach or because s/he is directly participating in hostilities).169 This includes determining that the individual in question has a sufficient nexus to the ongoing armed conflict.170

Should those conditions be fulfilled, then the constraints within LOAC still apply (such as all of the rules pertaining to the principles of distinction and proportionality), as would the country’s domestic law and human rights law to the degree that it interacts with LOAC. It is likely that if the occurrence were far from active hostilities the latter two bodies of law would play a greater role. Issues of State sovereignty could, and often do, present one of the greatest limitations on action. Therefore, it is not the case that force may be used anywhere in the world at any time against parties to the conflict once an armed conflict exists.

VII. CONCLUSION

In conclusion, the general trend today is that some extraterritorial conflicts may qualify as NIACs, despite the fact that they are not geographically confined to a single State. This interpretation recognizes that to artificially restrict the law in a way that does not reflect either the realities on the ground or the purpose of the law itself is counterproductive. However, because the existing law was not designed for extraterritorial conflicts, challenges arise in its application.

The issue of links between armed groups in NIACs is an area where the law may need reinterpretation or development. Analogies with other areas of the law do not lead to more clarity. The tenuous suggestion that in order to fulfill the intensity requirement not only should the affiliated armed group be organized and part of an identifiable party, but also that the group’s actions and goals should constitute a threat to the opposing party carries with it practical problems. Specifically, it could be difficult to ascertain both the threat and which members of an armed group are actually participating in actions that are part of the global conflict, as opposed to part of a separate internal conflict.

Determining whether amassing violence that is diffused over distances may fulfill the intensity requirement is another example of how the geographic extension of the law’s application may present difficulties. It has been argued here that taking into account the underlying purpose of the law, the violence must reach a certain level of intensity within a geographic region for an armed conflict to exist. When the violence is spread out geographically, such that in an individual country the law enforcement regimes may function, it is difficult to view the intensity requirement as being met. However, as with links, this issue is far from resolved.

The third principal challenge resulting from the extraterritorial application of NIAC law is that a reassignment of sovereignty occurs. It is unclear if this shift might impact on how States perceive the threshold of the existence of an armed conflict.

Once the existence of an armed conflict has been established, a separate issue arises as to the geographic boundaries of that conflict. This impacts the controversial question of when an individual may be targeted or detained if located in another country away from the main battlefield. Here too, because the law was originally intended to apply within State boundaries, very little guidance exists. It is argued that as the law currently stands, once an armed conflict exists LOAC applies to the parties to the conflict wherever they may be located, but that other restraints within LOAC and jus ad bellum limit its application. In particular, the question of whether an armed conflict exists in the first place is not self-evident. The debate on who can be targeted and when applies both to internal NIACs and extraterritorial NIACs. It may be that additional stipulations will be considered necessary as the law develops given the lack of State boundaries and the distance from an active battlefield. However, currently the law does not require this. Finally, the restrictions found in jus ad bellum curtail action that may be taken.

Therefore, to erase territorial boundaries from the equation entirely when establishing the existence of an armed conflict raises challenges to the structure of the law and some of its underlying purposes. Certain obstacles may prompt clarification in the law; others may remain as limitations on the law’s application. As a consequence, it is not clear where the bar for the application of Common Article 3, and thus LOAC, lies, particularly when applied to conflicts that spread across multiple countries. Some States want to ensure that they have sufficient flexibility to deal with these circumstances. Other States (as well as organizations and commentators) are concerned that the law may be interpreted too permissively and ultimately be abused. A balance must be found in the solution to these issues.

## 2ac flex

2. The hot battlefield standard’s already in use it’s just a matter of codifying that standard for future conflicts

Robert Chesney, U-Texas School of Law Professor, 5/24/13, Does the Armed-Conflict Model Matter in Practice Anymore?, www.lawfareblog.com/2013/05/does-the-armed-conflict-model-matter-in-practice-anymore/

The post-9/11 claim that we are in an “armed conflict” with al Qaeda and its associated forces has long since ceased to matter in strict legal terms, other than in connection with the lingering detention of the legacy populations at GTMO and (for non-Afghan detainees) at Parwan. We have not taken new detainees into long-term military custody in many years, and there is no prospect that we will do so for years to come. **What we do still do is use lethal force, but on close inspection, our uses of force outside of Afghanistan** arguably **do not depend on the existence of an armed conflict after all**. As the Brennan speeches underscored, the government as a matter of policy has adopted constraints that limit the use of force outside the “hot battlefield” to scenarios involving an “imminent threat” to life in circumstances where capture is not feasible (albeit subject to an understanding of that phrase that would better be described as a “continuous threat” standard). This is far more restrictive than the status-based targeting model associated with armed conflict. Indeed, it is at least as restrictive as the boundaries of the self-defense model developed during the Reagan and Clinton years, discussed earlier.

To be sure, that model was acted upon only rarely in the pre-9/11 era. There were many reasons for this, but a major one was sheer lack of practical capacity: we had little relevant intelligence when it came to tracking individual terrorist threats, and even when we obtained actionable intelligence our capacity to strike normally was limited by the multi-hour process associated with cruise missiles.

Today things are quite different. The capacity for collecting the requisite intelligence has expanded by leaps and bounds thanks to sweeping institutional and technological changes over the past dozen years, and in the same period we have acquired an extraordinary capacity to strike quickly and precisely thanks to armed drones. In short, the practical constraints on using force in self-defense have been removed, and if we find ourselves once more without a claim of armed conflict to support uses of force, we may well discover as a result that the pre-9/11 legal model is much less constraining than commonly assumed. Indeed, one might conclude that there is nothing currently done outside of Afghanistan by way of targeting under the color of the law of armed conflict that could not be done under color of the pre-9/11 self-defense model. Combined with the abandonment of detention as an option, in fact, it makes no sense to talk of a return to the pre-9/11 framework; we already are there in practice.

Yesterday’s speech reinforces my conclusion, as it clarifies both that the long-term detention option is defunct and that **we are using force within boundaries that will be no different postwar thanks to the flexibility of the pre-9/11 self-defense model**. Put another way, it seems to me ever clearer that the current shadow war approach to counterterrorism doesn’t really require an armed-conflict predicate–or an AUMF, for that matter. If that is correct, it will please some and horrify others. At any rate, I’d appreciate hearing from readers as to whether they think this is in fact correct.

3. History disproves their impact

Bradley et al ‘12

Curtis A. Bradley, Sarah H. Cleveland, The Honorable Brett M. Kavanaugh, Martin S. Lederman, Judith Resnik and Stephen I. Vladeck, “WAR, TERROR, AND THE FEDERAL COURTS, TEN YEARS AFTER 9/11: CONFERENCE\*: ASSOCIATION OF AMERICAN LAW SCHOOLS' SECTION ON FEDERAL COURTS PROGRAM AT THE 2012 AALS ANNUAL MEETING IN WASHINGTON, D.C.,” 61 Am. U.L. Rev. 1253

So where are we? Marty mentioned a word that had not been mentioned before, which was "Congress." What's the big picture of where we are right now in terms of federal courts, separation of powers, war powers? I would start with, in the wake of September 11th, Congress authorizing two wars: it authorized the war against Al-Qaeda and the Taliban, and authorized the war in Iraq. That itself is a significant precedent. When you ask, twenty years from now, thirty years from now, what's the most significant precedent arising out of the post-9/11 years? I think one of them, if not the most important, will be that those were congressionally authorized wars. **A President, who in the future tries to engage in an unauthorized ground war of any significance,** will be faced with those precedents used against them. President Bush obtained authorization for those two wars. Second. As Marty's article with David Barron points out so well, Congress has regulated the Executive's conduct of war in many respects, both before and after September 11th. We tend to forget that and sometimes think, well this is all just the Executive Branch operating in kind of a free zone, free from congressional restraint. And in fact, whether it's interrogation or detention, surveillance, a number of particulars of how the **Executive goes about the war effort**, Congress has been deeply involved, including in the wake of September 11th. I think it's very important to remember Congress's role there. And then third - and this was not self-evident on September 12th - the courts have played a significant role, as Sarah mentioned, in enforcing restrictions on the Executive's conduct of war. Where was the political question doctrine in Hamdi or Hamdan? Nowhere to be found. Nowhere to be found. What about the President's exclusive, preclusive Article II power, to ignore congressional restrictions or disregard congressional restrictions, depending on - what's the scope of that? Not a single Justice in Hamdi or Hamdan suggested that detention or activities related to detainees were within the exclusive, preclusive power of the President. Hamdan, footnote twenty-three, I think, pointedly ends with, "The government does not argue otherwise." Which was a recognition that not even the Executive Branch was asserting in that case, an exclusive, preclusive power. So the political question doctrine has not played a major role. The exclusive, preclusive power of the President was the big issue raised by some of the OLC opinions [\*1268] in 2002/2003, but the Bush Administration later backed away from it, culminating in the January 15, 2009 OLC memo for the file essentially but publicly retracting or distancing itself from a number of prior OLC memos. So the courts are playing a role in enforcing congressional restrictions.

4. No slippery slope – if things get out of hand the executive can reassert its power in critical areas

Barron ‘8 David, Professor of Law, Harvard Law School, and Martin Lederman, Visiting Professor of Law, Georgetown University Law Center, THE COMMANDER IN CHIEF AT THE LOWEST EBB -- A CONSTITUTIONAL HISTORY, 121 Harv. L. Rev. 941

But that dramatic deviation did not come from nowhere. Rarely does our constitutional framework admit of such sudden creations. Instead, the new claims have drawn upon those elements in prior presidential practice most favorable to them. That does not mean our constitutional tradition is foreordained to develop so as to embrace unchecked executive authority over the conduct of military campaigns. At the same time, **it would be wrong to assume**, as some have suggested, that **the emergence of such claims will be necessarily self-defeating**, inevitably **inspiring a popular and legislative reaction that will leave the presidency especially weakened**. In light of the unique public fears that terrorism engenders, the more substantial concern is an opposite one. It is entirely possible that the emergence of these claims of preclusive power will subtly but increasingly influence future Executives to eschew the harder work of accepting legislative constraints as legitimate and actively working to make them tolerable by building public support for modifications. The temptation to argue that the President has an obligation to protect the prerogatives of the office asserted by his or her predecessors will be great. **Congress's capacity to effectively check such defiance will be comparatively weak. After all, the President can veto any effort to legislatively respond to defiant actions,** **and impeachment is neither an easy nor an attractive remedy.**

6. The internal link story is incoherent – increases or decreases in power are always counterbalanced until they reach a stable equilibrium

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Rather than viewing one institution (presidential branch) dominating the other (congressional branch) as implied by the opportunistic Presidency perspective, the "iron law of emulation" (ILE) thesis views each branch as being responsive to the other's attempts at enhancing or reducing institutional resources. Daniel Patrick Moynihan (1980: 117-18) asserts: ". whenever a branch of government acquires a new technique which enhances its power in relation to the other branches, that technique will soon be adopted by other branches" (Wilson 1989: 259). This differs from the OP thesis in two important ways. First, at the heart of the ILE is the notion that the expansion of the presidential and congressional branches will move in tandem. The system of shared and separated powers in the U.S. case implies that each institution will be viable in enhancing its organizational apparatus. This is, a reasonable view given that Congress has responsibility for overseeing the operation of the presidential branch, including the appropriations the latter receives. Presidents, on the other hand, possess veto authority over congressional appropriation bills, including those for legislative branch operations, and also play an active role in agenda setting for branch resources via OMB requests.'0 Although, since the creation of the EOP in 1939, strife and drastic action concerning these bills have been fairly minimal save for some recent exceptions over the prior decade noted in the preceding section (Kellam 1992; Salant 1995a, 1995b). These enumerated shared and separated powers held by the President and Congress generally result in policy congruence on such matters. Thus, each institution finds it in its best interest to respond in a reciprocal fashion since each possesses constitutionally based means to check the other. Moreover, the ILE thesis does not necessarily suggest a causal direction in that the presidential branch must serve as the "initiator"" and the congressional branch as the "emulator.""1 The ILE thesis implies that Presidents and Congress cannot exploit one another with respect to branch building.

## 2ac iran

No spillover

Walt 11/30 (Stephen M. Walt is the Robert and Renée Belfer professor of international relations at Harvard University., 11/30/12, “The mother of all worst-case assumptions about Iran”, http://walt.foreignpolicy.com/posts/2012/11/30/the\_mother\_of\_all\_worst\_case\_assumptions\_about\_iran)

The debate on Iran and its nuclear program does little credit to the U.S. foreign policy community, because much of it rests on **dubious assumptions that do not stand up to even casual scrutiny**. Lots of ink, pixels, and air-time has been devoted to discussing whether Iran truly wants a bomb, how close it might be to getting one, how well sanctions are working, whether the mullahs in charge are "rational," and whether a new diplomatic initiative is advisable. Similarly, journalists, politicians and policy wonks spend endless hours asking if and when Israel might attack and whether the United States should help. But we hardly ever ask ourselves if this issue is being blown wildly out of proportion. At bottom, the whole debate on Iran rests on the assumption that Iranian acquisition of a nuclear weapon would be an event of shattering geopolitical significance: On a par with Hitler's rise to power in Germany in 1933, the fall of France in 1940, the Sino-Soviet split, or the breakup of the former Soviet Union. In this spirit, Henry Kissinger recently argued that a latent Iranian capability (that is, the capacity to obtain a bomb fairly quickly) would have fearsome consequences all by itself. Even if Iran stopped short of some red line, Kissinger claims this would: 1) cause "uncontrollable military nuclear proliferation throughout [the] region," 2) "lead many of Iran's neighbors to reorient their political alignment toward Tehran" 3) "submerge the reformist tendencies in the Arab Spring," and 4) deliver a "potentially fatal blow" to hopes for reducing global nuclear arsenals. Wow. And that's just if Iran has nuclear potential and not even an actual weapon! It follows that the United States must either persuade them to give up most of their enrichment capacity or go to war to destroy it. Yet this "mother of all assumptions" is simply asserted and rarely examined. The obvious question to ask is this: did prior acts of nuclear proliferation have the same fearsome consequences that Iran hawks now forecast? **The answer is no**. In fact, **the spread of nuclear weapons has had** remarkably little impact on the basic nature of world politics **and the ranking of major powers**. The main effect of the nuclear revolution has been to induce greater caution in the behavior of both those who possessed the bomb and anyone who had to deal with a nuclear-armed adversary. Proliferation has not transformed weak states into influential global actors, has not given nuclear-armed states the ability to blackmail their neighbors or force them to kowtow, **and it has not triggered far-reaching regional arms races**. In short, fears that an Iranian bomb would transform regional or global politics **have been greatly exaggerated**; one might even say that **they are just a lot of hooey**. Consider the historical record. Did the world turn on its axis when the mighty Soviet Union tested its first bomb in 1949? Although alarmist documents like NSC-68 warned of a vast increase in Soviet influence and aggressiveness, Soviet nuclear development simply reinforced the caution that both superpowers were already displaying towards each other. The United States already saw the USSR as an enemy, and the basic principles of containment were already in place. NATO was being formed before the Soviet test and Soviet dominance of Eastern Europe was already a fait accompli. Having sole possession of the bomb hadn't enabled Truman to simply dictate to Stalin, and getting the bomb didn't enable Stalin or his successors to blackmail any of their neighbors or key U.S. allies. It certainly didn't lead any countries to "reorient their political alignment toward Moscow." Nikita Khrushchev's subsequent missile rattling merely strengthened the cohesion of NATO and other U.S.-led alliances, and we now know that much of his bluster was intended to conceal Soviet strategic inferiority. Having a large nuclear arsenal didn't stop the anti-commnist uprisings in East Germany, Hungary, Czechoslovakia, or Poland, and didn't allow the Soviet Union to win in Afghanistan. Nor did it prevent the USSR from eventually collapsing entirely. Did British and French acquisition of nuclear weapons slow their decline as great powers? Not in the slightest. Having the force de frappe may have made De Gaulle feel better about French prestige and having their own deterrent made both states less dependent on America's security umbrella, but it didn't give either state a louder voice in world affairs or win them new influence anywhere. And you might recall that Britain couldn't get Argentina to give back the Falklands by issuing nuclear threats -- even though Argentina had no bomb of its own and no nuclear guarantee -- they had to go retake the islands with conventional forces. Did China's detonation of a bomb in 1964 suddenly make them a superpower? Hardly. China remained a minor actor on the world stage until it adopted market principles, and its rising global influence is due to three decades of economic growth, not a pile of nukes. And by the way, did getting a bomb enable Mao Zedong--a cruel megalomaniac who launched the disastrous Great Leap Forward in 1957 and the destructive Cultural Revolution in the 1960s -- to start threatening and blackmailing his neighbors? Nope. In fact, China's foreign policy behavior after 1964 was generally quite restrained. What about Israel? Does Israel's nuclear arsenal allow it to coerce its neighbors or impose its will on Hezbollah or the Palestinians? No. Israel uses its conventional military superiority to try to do these things, not its nuclear arsenal. Indeed, Israel's bomb didn't even prevent Egypt and Syria from attacking it in October 1973, although it did help convince them to limit their aims to regaining the territory they had lost in 1967. It is also worth noting that Israel's nuclear program did not trigger a rapid arms race either. Although states like Iraq and Libya did establish their own WMD programs after Israel got the bomb, none of their nuclear efforts moved very rapidly or made it across the finish line. But wait, there's more. The white government in South Africa eventually produced a handful of bombs, but nobody noticed and apartheid ended anyway. Then the new government gave up its nuclear arsenal to much acclaim. If anything, South Africa was more secure without an arsenal than it was before. What about India and Pakistan? India's "peaceful nuclear explosion" in 1974 didn't turn it into a global superpower, and its only real effect was to spur Pakistan -- which was already an avowed rival -- to get one too. And it's worth noting that there hasn't been a large-scale war between the two countries since, despite considerable grievances on both sides and occasional skirmishes and other provocations. Finally, North Korea is as annoying and weird as it has always been, but getting nuclear weapons didn't transform it from an economic basket case into a mighty regional power and didn't make it more inclined to misbehave. In fact, what is most remarkable about North Korea's nuclear program **is how little impact it has had on its neighbors**. States like Japan and South Korea could go nuclear very quickly if they wanted to, but neither has done so in the six years since North Korea's first nuclear test. In short, **both** theory and history teach **us that getting a nuclear weapon has less impact on a country's power and influence than many believe**, **and the slow spread of nuclear weapons has** only modest effects on global and regional politics. Nuclear weapons are good for deterring direct attacks on one's homeland, and they induce greater caution in the minds of national leaders of all kinds. **What they don't do is turn weak states into great powers, they are useless as tools of blackmail, and they cost a lot of money**. They also lead other states to worry more about one's intentions and to band together for self-protection. For these reasons, **most potential nuclear states have concluded that getting the bomb isn't worth it**. But a few states-and usually those who are worried about being attacked-decide to go ahead. The good news is that when they do, it **has** remarkably little impact **on world affairs**. For some strange reason, however, the U.S. national security community seems to think that both logic and all this prior history does not apply to Iran. They forget that similarly dire warnings were uttered before many of these others states got the bomb, **yet none of these fearsome forecasts took place.** Ironically, by repeatedly offering doom-and-gloom scenarios about the vast geopolitical consequences of an Iranian bomb, they may be strengthening the hands of Iranian hardliners who might be interested in actually obtaining a working weapon. After all, if getting a bomb would give Iran all the influence that Kissinger and others fear, why wouldn't Tehran want one?

Not an opportunity cost—a logical policymaker could pass the agenda item and the plan

Iran prolif doesn’t cause extinction

Young 12 (Michael Young is opinion editor of The Daily Star newspaper in Beirut, 8/9/2012, "Misjudging Iran's rationality is a recipe for more calamity", www.thenational.ae/thenationalconversation/comment/misjudging-irans-rationality-is-a-recipe-for-more-calamity#full)

Amid signs that negotiations between the international community and Iran over the Iranian nuclear programme are going nowhere, the debate as to whether the Islamic Republic should actually be permitted to develop nuclear weapons has resurfaced. In a recent article in Foreign Affairs magazine, the American scholar Kenneth Waltz maintained that, far from destabilising the Middle East, an Iran armed with nuclear weapons would do precisely the contrary. Israel's nuclear monopoly in the region, not Iran's pursuit of a nuclear capability, is what has fuelled instability, he writes, because power begs to be balanced. "What is surprising about the Israeli case is that it has taken so long for a potential balancer to emerge," Mr Waltz notes. Many will disagree with Mr Waltz's assessment, and have long provided arguments disputing approaches such as his. And yet most of those opinions are unpersuasive, no matter how distasteful is the prospect of Tehran acquiring nuclear weapons. The first contention, and the one most often echoed by Israeli and American politicians, is that Iran's regime is fundamentally irrational. The premise is that mad mullahs rule in Tehran, and that their religious zeal may push them to press the button if it means that they can destroy Israel. Notions of deterrence, therefore, are irrelevant, because an eschatological ideology has taken over. This line is useful in public statements, but if there is one thing that Israelis and Americans have learnt over the years, it is that Iran's leaders are eminently rational in the pursuit of their interests, and in the protection of their authority. A nuclear attack on Israel would be matched by more severe Israeli, and probably American, nuclear retaliation against Iran. Moreover, hundreds of thousands of Palestinians would be killed in a first strike against Israel. No Iranian leader will sign off on such a scheme, religion or no religion. Iran has also shown exceptional rationality in working through proxies and in building up alliances far and wide to compensate for its shortcomings internationally. The Islamic Republic has, of course, transformed Lebanon's Hizbollah into a powerful military force on Israel's border; it has bolstered Muqtada Al Sadr in Iraq, and even rival groups to his; and it has extended its reach to Latin America and Africa. These patient endeavours are hardly those of a rabid regime hell bent on provoking Armageddon in the Middle East. A second argument is that, while Iran may not deploy nuclear weapons against Israeli directly, it might encourage proxies or terrorist groups to do so. But as Mr Waltz writes, two things work against this: it would be easy to discover Iranian responsibility, and countries that develop nuclear weapons generally retain tight control over their arsenals. "After all, building a bomb is costly and dangerous. It would make little sense to transfer the product of that investment to parties that cannot be trusted or managed," he believes. Iran's intention to closely monitor its weapons was plain during the Lebanon war of 2006, when the Iranians apparently gave final approval for use of, or even operated, Hizbollah's most advanced systems. But that begs another question, namely whether an entirely trusted Hizbollah might receive nuclear weapons from Iran. Such an alternative cannot be discounted, but it is improbable. First, Israel would not hesitate to engage in a ferocious pre-emptive strike against Lebanon, perhaps even initiating a ground war to prevent such an outcome. And Lebanese society, with many Shia among them, recognising the potentially disastrous consequences of a nuclear-armed Hizbollah, would angrily challenge the party, undermining the national unity required to give a nuclear deterrent its value. A third basis for opposing a nuclear Iran is that under a nuclear cover it would become more aggressive throughout the region. That's possible, but it's not clear that there is a correlation between aggressiveness and nuclear weapons. Without such weapons, Iran has already been exceptionally assertive in the region in the past years. But would it be more so with a bomb? Mr Waltz believes that history shows otherwise. "[W]hen countries acquire the bomb, they feel increasingly vulnerable and become acutely aware that their nuclear weapons make them a potential target in the eyes of major powers." The merits of the discussion are imposed by the stark reality that Iran, if it does indeed pursue nuclear weapons, will not be dissuaded from doing so whatever the political and economic pressures, assuming there is no change of regime. Nor will a military attack, Israeli or American, necessarily halt Iran's nuclear programme, even if it delays it for a time. On the other hand, the cost of bombing Iran would be exceptionally high in the region and beyond, dividing the international community more than it already is. Strangely, the United States has not factored Syria into its approach to the Iranian nuclear question. The Iranians will lose a great deal if the regime of President Bashar Al Assad falls. Yet few officials in Washington have asked whether an Iran minus its Syrian partner - with Hizbollah therefore isolated in an increasingly hostile environment and wary of waging war - would still constitute a major threat in the Levant, with or without nuclear weapons. In other words the situation in Syria may prove as decisive, if not more so, in defining Iranian influence than whether it has weapons it can never use. Iran has done enough to worry its neighbours. However, careful and multifaceted political containment is the best way to oppose Tehran, not a military onslaught that will unite Iranians, strengthen their leaders, spawn great and small wars, and ultimately alter little. An Iran with the bomb is thoroughly undesirable, but it is not the existential calamity it has been made out to be.

no deal – GOP, Dems, Israel lobby, and no veto

Weisman 11/12/13

Jonathan, NYT, “Iran Talks Face Resistance in U.S. Congress,” http://www.nytimes.com/2013/11/13/world/middleeast/iran-talks-face-resistance-in-us-congress.html?\_r=0

After having come tantalizingly close over the weekend to an agreement to freeze Iran’s nuclear program, the Obama administration is gingerly weighing a threat to the talks potentially more troublesome than the opaque leadership in Tehran: Congress. Secretary of State John Kerry will meet behind closed doors on Wednesday afternoon with members of the Senate Banking, Housing and Urban Affairs Committee to try to head off a new round of stiff sanctions on Iran that administration officials fear could derail the talks in Geneva. In addition, Vice President Joseph R. Biden Jr.; Mr. Kerry; Wendy R. Sherman, the administration’s chief negotiator; and David S. Cohen, under secretary of the Treasury for terrorism and financial intelligence, are scheduled to brief Senate Democratic leaders that day in a full-court press to win backing of the diplomatic initiative. But the **administration is running headlong into** Prime Minister Benjamin **Netanyahu** of Israel **and pro-Israel lobbyists** pressing their case that the deal taking shape would be a major blunder. Diplomats from the United States and five other countries are pursuing an accord that would cause Iran to freeze its nuclear program in exchange for the loosening of some of the sanctions that have crippled the Iranian economy. Talks broke off this weekend but are scheduled to resume on Nov. 20. But they are facing bipartisan doubt about their course. “I understand what they’re saying about destroying a chance for a peaceful outcome here with new sanctions, but I really do believe if the new sanctions were crafted in the right way, they would be more helpful than harmful,” said Senator Lindsey Graham, Republican of South Carolina. Senator Charles E. Schumer of New York, the third-ranking Democrat, was briefed Monday on the negotiations by Mr. Biden and has met with the White House chief of staff, Denis R. McDonough, as well as with cabinet officials. Yet he still proclaimed himself “dubious” of the possible agreement because of concerns that the administration might be willing to give too much away while getting too little in return. In a letter to the editor in The New York Times last week and an opinion article in USA Today, Senator Robert Menendez of New Jersey, the Democratic chairman of the Foreign Relations Committee, indicated he would press forward against the administration’s wishes on the sanctions legislation. “Iran is on the ropes because of its intransigent policies and our collective will, and it would be imprudent to want an agreement more than the Iranians do,” he wrote in USA Today on Monday. “Tougher sanctions will serve as an incentive for Iran to verifiably dismantle its nuclear weapons program.” A powerful lobbying group, the American Israel Public Affairs Committee, issued its own broadside. “Aipac continues to support congressional action to adopt legislation to further strengthen sanctions, and there will absolutely be no pause, delay or moratorium in our efforts,” the group’s president, Michael Kassen, said in a statement this month. But the group’s officials are taking a wait-and-see stance for now. If the talks collapse on their own, the group can avoid wading into a political donnybrook, but if a diplomatic breakthrough is achieved, Aipac is ready to mount an aggressive campaign to stop it, according to one person familiar with its thinking. Senator Tim Johnson, Democrat of South Dakota, the chairman of the Banking Committee, has said he will not move forward with sanctions legislation until he has consulted with committee members after the Wednesday briefing from Mr. Kerry. But Republicans are threatening to move on their own, possibly by attaching the sanctions to a defense policy bill that will reach the Senate floor **this week**. “I understand the problem that this creates at the negotiating table,” said Senator Bob Corker of Tennessee, the top Republican on the Foreign Relations Committee and a member of the Banking Committee, which has jurisdiction over economic sanctions. But, he added, the administration’s fears are misplaced: “New sanctions wouldn’t kick in for three to six months. The important period of time for this country, candidly for the world community, on this issue is over the next two to three weeks.” Sanctions legislation would require the president’s signature, **but even its introduction** could upset the talks. Administration officials fear that congressional action would raise questions in Tehran about the value of Western promises while potentially angering some negotiating team members, especially China and Russia, whose companies would be hit especially hard by the tightening economic noose.

Obama popularity collapse kills the agenda

Jonathan Bernstein, 11/8/13, What matters, and what doesn’t, with Obama’s sliding approval numbers, www.washingtonpost.com/blogs/plum-line/wp/2013/11/08/what-matters-and-what-doesnt-with-obamas-sliding-approval-numbers/

Everyone is talking about Barack Obama’s falling numbers this week, with a new Pew Poll out today showing him at 41 percent approval, and a slide in Gallup to a post-election low earlier this week. Any careful look should go to the aggregators; the latest HuffPollster average has Obama’s approval at 43%, with a steady slide since a post-election peak back in late December. Of course, Obama is never going to appear on a ballot again. But **his popularity still matters**. In some ways, and not in others. What’s hurting the president? A week of high-coverage negative publicity on the Obamacare rollout can’t help, and in fact his approval rating from Pew on health care is down to 37 percent. On the other hand, that’s only down eight points since January, compared with an 11 point overall drop. It’s not likely Obama is getting dragged down just by health care. It’s probably a combination of things — a large part of it likely from the dramatic drop in Gallup’s economic confidence index since May, which is about when sequestration started kicking in and the deficit started shrinking rapidly. Here’s where Obama’s approval numbers do not matter: The future of the health law. There will be a lot of talk that Dems are running away from the health law because of his drop. But on health care, Democrats pretty much are all in the same boat: They want the law to work. After all, what other choice is there? Dems are not going to support repeal — they voted for the bill. So they’re stuck hoping the administration can get everything running as painlessly as possible. Democrats probably are open to small fixes to immediate problems, but even there it’s not clear how much can be done legislatively — and no fixes that would help Obamacare run better can pass the GOP-controlled House. Here’s where Obama’s approval does matter. Presidential approval has real effects on midterm elections. Right now, what matters is perceptions among elites, and potential candidates, about those elections. There’s some evidence Dems benefited from the shutdown, with a small wave of successful recruitment. If the conventional wisdom shifts to a sense that Obama (and Democrats) are doomed, it’s unlikely Democrats could build on those successes. We might see some Republican recruiting coups. Separate from that is the direct effect of presidential popularity; the better Obama is doing in November 2014, the better Dems can expect to do. **The other reason presidential approval matters is that it should**, on the margins, help or **hurt his ability to influence people**, whether Members of **Congress** or people in executive branch **agencies** **or** any of those **Washingtonians** (in Richard Neustadt’s language) **a president seeks to influence.** Low presidential approval now could also matter to Obama’s long term success. If he remains unpopular, he might have more trouble getting judges confirmed, perhaps leading to more court decisions against his programs. Another area: the more popular Obama is, the more pressure there would probably be on states to join the Medicaid expansion.

Plan is Congressional legal affirmation of executive operational policy—that disproves the logic of the inter-branch fight link – That’s Daskal and Dworkin

Even if Obama had any political capital – it would be less than useless

Reid Epstein, Politico, 11/10/13, White House seeks Republican immigration help, www.politico.com/story/2013/11/white-house-seeks-gop-immigration-help-99640.html

The government shutdown fight and Obama’s failure to establish relationships with Republicans haven’t helped either. “This whole fight we had in the … past few weeks over Obamacare and the government shutdown and everything really affected relationships with members and the White House,” Valadao said. “That, I think, had a huge impact on members who were on the fence on immigration.” Meanwhile, the conservative groups working to pass immigration reform are happy working without substantial coordination from the White House. Being seen as too close to Obama would sap their credibility with House Republicans, even as they parrot the White House talking points. “We’re keeping the White House at arms length and the White House is not really engaging with folks directly and they’re really paying heed to the reality that this has to be owned lock, stock and barrel by the House Republicans,” said Ali Noorani, executive director of the National Immigration Forum. Tamar Jacoby, president and CEO of the pro-reform business group ImmigrationWorks USA, said the biggest current obstacle of immigration reform in the House is that Republicans “don’t want to do Obama any favors” after the toxic shutdown and debt limit battles. “When Obama’s out there saying, ‘I just won a big battle … and I’m demanding you do this,’ no one’s going to want to do it on those terms,” Jacoby said. “My fear is that Obama’s not really helping [reform] when he’s sort of scolding them about it all the time.”

Democratic infighting blocks

Jonathan Allen, Politico, 11/14/13, Trust frays between Obama, Democrats, www.politico.com/story/2013/11/trust-frayed-between-obama-dems-99897.html?hp=t1\_3

President Barack Obama’s credibility may have taken a big hit with voters, but he’s also in serious danger of permanently losing the trust of Democrats in Congress. The Obamacare debacle has been bad enough that it’s tough for Democrats to take on faith that the president can fix the problems. **His one-time allies are no longer sure that it’s wise to follow him into battle, leaving Obama and his law not only vulnerable to existing critics, but open to new attacks from his own party**.

“I don’t know how he f—-ed this up so badly,” said one House Democrat who has been very supportive of Obama in the past.

## 2ac cp

5) Hard law is key to legal certainty—accesses all of the reasons congress is key

Gregory Shaffer 11, Professor of Law, University of Minnesota Law School, and Mark Pollack, Professor of Political Science and Jean Monnet Chair, Temple University., Sept 2011, ARTICLE: HARD VERSUS SOFT LAW IN INTERNATIONAL SECURITY, 52 B.C. L. Rev 1147

To effect specific policy goals, state and private actors increasingly turn to legal instruments that are harder or softer in manners that best align with such proposals. n79 These variations in precision, obligation, and third-party delegation can be used strategically to advance both international and domestic policy goals. Much of the existing literature examines the relative strengths and weaknesses of hard and soft law for the states that make it. It is important, for our purposes, to address these purported advantages in order to assess the implications of the interaction of hard and soft law on each other.

Hard law as an institutional form features a number of advantages. n80 Hard law instruments, for example, allow states to commit themselves more credibly to international agreements by increasing the costs of reneging. They do so by imposing legal sanctions or by raising the costs to a state's reputation where the state has acted in violation of its legal commitments. n81 In addition, hard law treaties may have the advantage of creating direct legal effects in national jurisdictions, again increasing the incentives for compliance. n82 They may solve problems of incomplete contracting by creating mechanisms for the interpretation and elaboration of legal commitments over time, n83 including through the use of dispute settlement bodies such as courts. n84 In different ways, they thus permit states to monitor, clarify, and enforce their commitments. Hard law, as a result, can create more legal certainty. States, as well as private actors working with and through state representatives, [\*1163] should use hard law where "the benefits of cooperation are great but the potential for opportunism and its costs are high." n85

7) Even if the cp signals congressional preference, it doesn’t access legal clarity or certainty

Jacob Gerson, U. Chicago Ast. Professor Law, Eric Posner, U. Chicago Law Professor, December 2008, Article: Soft Law: Lessons from Congressional Practice, 61 Stan. L. Rev. 573

The binding effect of hard law is its straightforward advantage over soft law, and we need not dwell on this issue. A more interesting possibility is that hard law better satisfies rule-of-law values such as publicity than soft law does. The main distinction between hard law and soft law is that hard law complies with formalities that clearly distinguish binding law. **A central tenet of the rule of law is that law be public**, so that people may debate it, object to it, and plan their lives around it. Secret law is anathema and perhaps soft law resembles secret law. This concern can be easily overstated, however. If soft law is secret, then it cannot regulate, in which case it cannot serve any useful purpose. Congressional resolutions themselves also comply with publicity formalities that distinguish them from unenacted bills. Nonetheless, one might worry that unsophisticated people, or people who cannot get legal advice, are likely to misunderstand the importance of soft law, putting them at a disadvantage with respect to savvier fellow citizens. Consider, for example, Susan Rose-Ackerman's critique of the Supreme Court's interpretation of The Developmentally Disabled Assistance and Bill of Rights Act in Pennhurst State School v. Halderman. n95 The Court rejected the plaintiffs' argument that the statute created judicially enforceable rights for the developmentally disabled, arguing instead that the weak language in the Act indicated that Congress intended to announce a policy in the hope of eliciting a favorable response from states. n96 Rose-Ackerman argues that the Court's holding permitted Congress to earn public credit by enacting a statute that expressed popular aspirations but did not have any effect. Perhaps the Court should have "repealed" the statute, which would have embarrassed Congress and forced it to enact clearer legislation. n97 Importantly, the Act was not a soft statute but rather was a hortatory hard statute. It was duly enacted but had no formal legal effect. n98 Nonetheless, one concern is that such a statute would deceive the public, leading it to extend credit to a Congress that accomplished nothing at all. The problem with this view is that Congress did, in fact, do something: it announced a policy on the treatment of developmentally disabled people, a policy that was consistent with other hard-statute rules and could well have anticipated further legislative developments. n99 Announcing the policy in advance might well have encouraged states and private actors to adjust their behavior in advance of hard legislation. It is possible therefore to view soft law as facilitating rule-of-law values rather than undermining them. However, rule-of-law values might require that courts strike down statutes that are ambiguous and confusing, at least in certain conditions. The rule of lenity in criminal law reflects this idea: people should not go to jail because they violate criminal statutes that they cannot understand. If this concern is valid for hard law, it is even stronger for soft law, where people might not understand that a soft statute may affect behavior. If only sophisticated people can anticipate Congress's changing views about the treatment of developmentally disabled people on the basis of hortatory statutes or concurrent resolutions, then unsophisticated people are put at a disadvantage. By the same token, if the public typically associates hard statutes with binding obligations, then using the hortatory statute with only precatory language creates confusion and ambiguity. If the public associates soft statutes with nonbinding obligations, then the soft statute will be superior to the hard hortatory statute because it will accomplish the same communicative ends, but avoid the confusion produced by using a hard statute. In terms of public knowledge of and reaction to soft law, rule-of-law problems are certainly not inevitable. A different rule-of-law objection concerns the enactment of law without the consent of the President. If Congress can regulate with soft statutes, then the constitutional requirement of presentment is rendered void and the President's role in producing legislation is eliminated. **The procedural formalities of legislation do not just clarify congressional action; they** also **ensure that Congress does not cut the President out of the picture**. Just such a concern lay behind the Supreme Court's rejection of the legislative veto. The analogous concern can be found in the literature on international soft law. If international law obtains its legitimacy from the consent of states, as is often argued, n100 how can international soft law that is, international law that lacks [\*599] the consent of at least some states have any legitimacy? n101 We address the constitutional question in Part IV.C. For now, consider two points.

9) That delegitimizes the plan’s norm

Gregory Shaffer, Professor of Law, University of Minnesota Law School, and Mark Pollack, Professor of Political Science and Jean Monnet Chair, Temple University., Sept 2011, ARTICLE: HARD VERSUS SOFT LAW IN INTERNATIONAL SECURITY, 52 B.C. L. Rev 1147

As we have observed in our previous scholarship, the existing analyses of hard and soft law tend to begin by assuming that mutual gains from cooperation among states are achievable. n109 These analyses then proceed to explore the advantages and disadvantages, the choice, and the effectiveness of hardand softlaw approaches to achieve these gains. Some of this literature certainly recognizes that soft law can be used in an antagonistic fashion. n110 For example, in an early article on soft law, Christine Chinkin acknowledges that soft law "has both a legitimising and delegitimising direct effect. . . . While there is no doctrine of desuetude in international law, the legitimacy of a previously existing norm of international law may be undermined by emerging principles of soft law." n111 Similarly, Michael Reisman of the New Haven School early noted the challenge of the rise of soft law in terms of generating an "inconsistent normativity to the point where, in critical matters, international **law has become like a camera whose every shot is a double exposure**.

# 1ar

## Counterplan

## --- hard law key

Finishing the second Shaffer card

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Yet the literature has yet to assess systematically the conditions under which actors are likely to deploy hard and soft law as antagonists [\*1167] instead of complements. What we need, in this respect, is to build a conditional theory of international law. n113

The perception of mutual gain is certainly an important prerequisite for international cooperation. Yet the harmonious, complementary interaction of hardand soft-law approaches to international cooperation relies on a hitherto unspecified set of scope conditions. By scope conditions, we refer to the conditions under which a particular event or class of events is likely to occur. n114 In the case of the interaction of hard and soft law as complements, the primary scope condition is a low level of distributive conflict among states, and in particular among powerful states. Second, the proliferation of international organizations in distinct functional areas of international law gives rise to legal fragmentation and "regime complexes." n115 Existing accounts of complementary interaction of hard and soft law appear to implicitly assume that distributive conflict among states, and hence the incentive to engage in forum shopping and strategic inconsistency, are low. n116 These conditions may hold in certain areas, but variation in distributive conflict and the opportunities offered by regimes and fora with overlapping jurisdiction should result in actors using hardand soft-law instruments in different ways, including sometimes as antagonists. Under conditions of high distributive conflict and high regime complexity, we are likely to see hard and soft law often interacting as antagonists.

Even if the cp signals congressional preference, it doesn’t access legal clarity or certainty

Jacob Gerson, U. Chicago Ast. Professor Law, Eric Posner, U. Chicago Law Professor, December 2008, Article: Soft Law: Lessons from Congressional Practice, 61 Stan. L. Rev. 573

The binding effect of hard law is its straightforward advantage over soft law, and we need not dwell on this issue. A more interesting possibility is that hard law better satisfies rule-of-law values such as publicity than soft law does. The main distinction between hard law and soft law is that hard law complies with formalities that clearly distinguish binding law. **A central tenet of the rule of law is that law be public**, so that people may debate it, object to it, and plan their lives around it. Secret law is anathema and perhaps soft law resembles secret law. This concern can be easily overstated, however. If soft law is secret, then it cannot regulate, in which case it cannot serve any useful purpose. Congressional resolutions themselves also comply with publicity formalities that distinguish them from unenacted bills. Nonetheless, one might worry that unsophisticated people, or people who cannot get legal advice, are likely to misunderstand the importance of soft law, putting them at a disadvantage with respect to savvier fellow citizens. Consider, for example, Susan Rose-Ackerman's critique of the Supreme Court's interpretation of The Developmentally Disabled Assistance and Bill of Rights Act in Pennhurst State School v. Halderman. n95 The Court rejected the plaintiffs' argument that the statute created judicially enforceable rights for the developmentally disabled, arguing instead that the weak language in the Act indicated that Congress intended to announce a policy in the hope of eliciting a favorable response from states. n96 Rose-Ackerman argues that the Court's holding permitted Congress to earn public credit by enacting a statute that expressed popular aspirations but did not have any effect. Perhaps the Court should have "repealed" the statute, which would have embarrassed Congress and forced it to enact clearer legislation. n97 Importantly, the Act was not a soft statute but rather was a hortatory hard statute. It was duly enacted but had no formal legal effect. n98 Nonetheless, one concern is that such a statute would deceive the public, leading it to extend credit to a Congress that accomplished nothing at all. The problem with this view is that Congress did, in fact, do something: it announced a policy on the treatment of developmentally disabled people, a policy that was consistent with other hard-statute rules and could well have anticipated further legislative developments. n99 Announcing the policy in advance might well have encouraged states and private actors to adjust their behavior in advance of hard legislation. It is possible therefore to view soft law as facilitating rule-of-law values rather than undermining them. However, rule-of-law values might require that courts strike down statutes that are ambiguous and confusing, at least in certain conditions. The rule of lenity in criminal law reflects this idea: people should not go to jail because they violate criminal statutes that they cannot understand. If this concern is valid for hard law, it is even stronger for soft law, where people might not understand that a soft statute may affect behavior. If only sophisticated people can anticipate Congress's changing views about the treatment of developmentally disabled people on the basis of hortatory statutes or concurrent resolutions, then unsophisticated people are put at a disadvantage. By the same token, if the public typically associates hard statutes with binding obligations, then using the hortatory statute with only precatory language creates confusion and ambiguity. If the public associates soft statutes with nonbinding obligations, then the soft statute will be superior to the hard hortatory statute because it will accomplish the same communicative ends, but avoid the confusion produced by using a hard statute. In terms of public knowledge of and reaction to soft law, rule-of-law problems are certainly not inevitable. A different rule-of-law objection concerns the enactment of law without the consent of the President. If Congress can regulate with soft statutes, then the constitutional requirement of presentment is rendered void and the President's role in producing legislation is eliminated. **The procedural formalities of legislation do not just clarify congressional action; they** also **ensure that Congress does not cut the President out of the picture**. Just such a concern lay behind the Supreme Court's rejection of the legislative veto. The analogous concern can be found in the literature on international soft law. If international law obtains its legitimacy from the consent of states, as is often argued, n100 how can international soft law that is, international law that lacks [\*599] the consent of at least some states have any legitimacy? n101 We address the constitutional question in Part IV.C. For now, consider two points.

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Data disproves hegemony impacts

Fettweis, 11

Christopher J. Fettweis, Department of Political Science, Tulane University, 9/26/11, Free Riding or Restraint? Examining European Grand Strategy, Comparative Strategy, 30:316–332, EBSCO

It is perhaps worth noting that there is no evidence to support a direct relationship between the relative level of U.S. activism and international stability. In fact, the limited data we do have suggest the opposite may be true. During the 1990s, the United States cut back on its defense spending fairly substantially. By 1998, the United States was spending $100 billion less on defense in real terms than it had in 1990.51 To internationalists, defense hawks and believers in hegemonic stability, this irresponsible “peace dividend” endangered both national and global security. “No serious analyst of American military capabilities,” argued Kristol and Kagan, “doubts that the defense budget has been cut much too far to meet America’s responsibilities to itself and to world peace.”52 On the other hand, if the pacific trends were not based upon U.S. hegemony but a strengthening norm against interstate war, one would not have expected an increase in global instability and violence.

The verdict from the past two decades is fairly plain: The world grew more peaceful while the United States cut its forces. No state seemed to believe that its security was endangered by a less-capable United States military, or at least none took any action that would suggest such a belief. No militaries were enhanced to address power vacuums, no security dilemmas drove insecurity or arms races, and no regional balancing occurred once the stabilizing presence of the U.S. military was diminished. The rest of the world acted as if the threat of international war was not a pressing concern, despite the reduction in U.S. capabilities. Most of all, the United States and its allies were no less safe. The incidence and magnitude of global conflict declined while the United States cut its military spending under President Clinton, and kept declining as the Bush Administration ramped the spending back up. No complex statistical analysis should be necessary to reach the conclusion that the two are unrelated.

Military spending figures by themselves are insufficient to disprove a connection between overall U.S. actions and international stability. Once again, one could presumably argue that spending is not the only or even the best indication of hegemony, and that it is instead U.S. foreign political and security commitments that maintain stability. Since neither was significantly altered during this period, instability should not have been expected. Alternately, advocates of hegemonic stability could believe that relative rather than absolute spending is decisive in bringing peace. Although the United States cut back on its spending during the 1990s, its relative advantage never wavered.

However, even if it is true that either U.S. commitments or relative spending account for global pacific trends, then at the very least stability can evidently be maintained at drastically lower levels of both. In other words, even if one can be allowed to argue in the alternative for a moment and suppose that there is in fact a level of engagement below which the United States cannot drop without increasing international disorder, a rational grand strategist would still recommend cutting back on engagement and spending until that level is determined. Grand strategic decisions are never final; continual adjustments can and must be made as time goes on. Basic logic suggests that the United States ought to spend the minimum amount of its blood and treasure while seeking the maximum return on its investment. And if the current era of stability is as stable as many believe it to be, no increase in conflict would ever occur irrespective of U.S. spending, which would save untold trillions for an increasingly debt-ridden nation.

It is also perhaps worth noting that if opposite trends had unfolded, if other states had reacted to news of cuts in U.S. defense spending with more aggressive or insecure behavior, then internationalists would surely argue that their expectations had been fulfilled. If increases in conflict would have been interpreted as proof of the wisdom of internationalist strategies, then logical consistency demands that the lack thereof should at least pose a problem. As it stands, the only evidence we have regarding the likely systemic reaction to a more restrained United States suggests that the current peaceful trends are unrelated to U.S. military spending. Evidently the rest of the world can operate quite effectively without the presence of a global policeman. Those who think otherwise base their view on faith alone.

Retrenchment sustains leadership and solves conflict

**Parent and MacDonald 11** (Joseph M. Parent is Assistant Professor of Political Science at the University of Miami. Paul K. MacDonald is Assistant Professor of Political Science at Wellesley College., November/December 2011, "The Wisdom of Retrenchment: America Must Cut Back to Move Forward, www.ihavenet.com/World-United-States-The-Wisdom-of-Retrenchment-America-Must-Cut-Back-to-Move-Forward-Foreign-Affairs.html)

Even if a policy of retrenchment were possible to implement, would it work? The historical record suggests it would. Since 1870, there have been 18 cases in which a great power slipped in the rankings, as measured by its GDP relative to those of other great powers. Fifteen of those declining powers implemented some form of retrenchment. Far from inviting aggression, this policy resulted in those states' being more likely to avoid militarized disputes and to recover their former rank than the three declining great powers that did not adopt retrenchment: France in the 1880s, Germany in the 1930s, and Japan in the 1990s. Those states never recovered their former positions, unlike almost half of the 15 states that did retrench, including, for example, Russia in the 1880s and the United Kingdom in the first decade of the twentieth century. Retrenchment works in several ways. One is by shifting commitments and resources from peripheral to core interests and preserving investments in the most valuable geographic and functional areas. This can help pare back the number of potential flashpoints with emerging adversaries by decreasing the odds of accidental clashes, as well as reducing the incentives of regional powers to respond confrontationally. Whereas primacy forces a state to defend a vast and brittle perimeter, a policy of retrenchment allows it to respond to significant threats at the times and in the places of its choosing. Conflict does not become entirely elective, as threats to core interests still must be met. But for the United States, retrenchment would reduce the overall burden of defense, as well as the danger of becoming bogged down in a marginal morass. It would also encourage U.S. allies to assume more responsibility for collective security. Such burden sharing would be more equitable for U.S. taxpayers, who today shoulder a disproportionate load in securing the world. Every year, according to Christopher Preble of the Cato Institute, they pay an average of $2,065 each in taxes to cover the cost of national defense, compared with $1,000 for Britons, $430 for Germans, and $340 for Japanese. Despite spending far less on defense, the United States' traditional allies have little trouble protecting their vital interests. No state credibly threatens the territorial integrity of either western European countries or Japan, and U.S. allies do not need independent power- projection capabilities to protect their homelands. NATO's intervention in Libya has been flawed in many respects, but it has demonstrated that European member states are capable of conducting complex military operations with the United States playing a secondary role. Going forward, U.S. retrenchment would compel U.S. allies to improve their existing capabilities and bear the costs of their altruistic impulses. The United States and its allies have basically the same goals: democracy, stability, and trade. But the United States is in the awkward position of both being spread too thin around the globe and irritating many states by its presence on, or near, their soil. Delegating some of its responsibilities to allies would permit the U.S. government to focus more on critical objectives, such as ensuring a stable and prosperous economy. Regional partners, who have a greater stake in and knowledge of local challenges, can take on more responsibility. With increased input from others and a less invasive presence, retrenchment would also allow the United States to restore some luster to its leadership.

## --- squo triggers

## --- noo link

Obama complies with war power statutes – disproves link.

Beau Barnes, J.D., Boston University School of Law, Spring 2012, REAUTHORIZING THE “WAR ON TERROR”: THE LEGAL AND POLICY IMPLICATIONS OF THE AUMF’S COMING OBSOLESCENCE, https://www.jagcnet.army.mil/DOCLIBS/MILITARYLAWREVIEW.NSF/20a66345129fe3d885256e5b00571830/b7396120928e9d5e85257a700042abb5/$FILE/By%20Beau%20D.%20Barnes.pdf

Unsurprisingly, this article embraces an interpretation of the Constitution that is at odds with the Vesting Clause thesis, and instead hews closer to the view expressed in Justice Robert Jackson’s concurrence in the 1952 Steel Seizure case.13 The Constitution explicitly empowers Congress in the area of foreign affairs to, among other actions, approve treaties,14 declare war,15 and regulate the armed forces.16 These textual grants of authority would be vitiated if Congress were unable, in the exercise of these powers, to “wage a limited war; limited in place, in objects, and in time.”17 A full exposition of this oft-addressed topic is beyond the scope of this article, however, and it suffices for present purposes to merely align it with the overwhelming majority of scholars who conceive of a Constitution where Congress may authorize limited military force in a manner which is binding on the Executive Branch.18

Furthermore, the Vesting Clause thesis and all-powerful views of the Commander in Chief Clause have been rejected in large part by the judiciary and the current administration.20 Indeed, **one significant reason for considering the AUMF to be an actual limit on Presidential power, and a relevant subject for legal analysis, is because that is how the Obama Administration understands the statute**. State Department Legal Adviser Harold Koh, in his March 25, 2010, speech to the American Society of International Law, clarified that “as a matter of domestic law” the Obama Administration relies on the AUMF for its authority to detain and use force against terrorist organizations.21 Furthermore, Koh specifically disclaimed the previous administration’s reliance on an expansive reading of the Constitution’s Commander in Chief Clause.22 Roughly stated, the AUMF matters, at least in part, because the Obama Administration says it matters.

The scope of the AUMF is also important for any future judicial opinion that might rely in part on Justice Jackson’s Steel Seizure concurrence.23 Support from Congress places the President’s actions in Jackson’s first zone, where executive power is at its zenith, because it “includes all that he possesses in his own right plus all that Congress can delegate.”24 Express or implied congressional disapproval, discernible by identifying the outer limits of the AUMF’s authorization, would place the President’s “power . . . at its lowest ebb.”25 In this third zone, executive claims “must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.”26 Indeed, Jackson specifically rejected an overly powerful executive, observing that the Framers did not intend to fashion the President into an American monarch.27

Jackson’s concurrence has become the most significant guidepost in debates over the constitutionality of executive action in the realm of national security and foreign relations.28 Indeed, some have argued that it was given “the status of law”29 by then-Associate Justice William Rehnquist in Dames & Moore v. Regan.30 Speaking for the Court, Rehnquist applied Jackson’s tripartite framework to an executive order settling pending U.S. claims against Iran, noting that “[t]he parties and the lower courts . . . have all agreed that much relevant analysis is contained in [Youngstown].”31 More recently, Chief Justice John Roberts declared that “Justice Jackson’s familiar tripartite scheme provides the accepted framework for evaluating executive action in [the area of foreign relations law].”32 Should a future court adjudicate the nature or extent of the President’s authority to engage in military actions against terrorists, an applicable statute would confer upon such executive action “the strongest of presumptions and the widest latitude of judicial interpretation.”33 The AUMF therefore exercises a profound legal influence on the future of the United States’ struggle against terrorism, and its precise scope, authorization, and continuing vitality matter a great deal.

Conceded the link turn on case – A lack of geographic restrictions now leads to worse congressional restrictions in the future – also no link uniqueness

Barron and Lederman ’08 (David J. Barron, Professor of Law @ Harvard Law School, and Martin S. Lederman, Visiting Professor of Law, Georgetown University Law Center, “THE COMMANDER IN CHIEF AT THE LOWEST EBB — FRAMING THE PROBLEM, DOCTRINE, AND ORIGINAL UNDERSTANDING,” *Harvard Law Review*, Vol.121: 689)

That there is a baseline of regulation in place concerning the war on terrorism, moreover, cannot be denied. The reason preexisting statutory limits figure so prominently in the current conflict is primarily that a central component of the war against terrorism is, by its nature, the collection of intelligence. Although the conflict is being fought in part by traditional armed forces, on a traditional “battlefield” (such as against al Qaeda and the Taliban in certain regions of Afghanistan), the Executive has identified its principal goal in this conflict not as defeating the enemy in battle, but as preventing the enemy from “fighting” in the first instance. Al Qaeda is a largely hidden enemy — often secreted in civilian populations — and can do great damage very suddenly through the use of terrorism against civilian populations. Moreover, because al Qaeda is not a nation state, it has no population to protect, and no territory or homeland — or armed forces — to defend. Ordinary forms of deterrence, then, are arguably less effective than in a traditional war. Therefore, in the war on terrorism, the chief military way to prevent attacks — to win the war in any effective sense — is to interdict terrorist operations, or so the Executive insists.75 And that can be done, the Administration claims, only by acquiring intelligence from within al Qaeda.76 It follows that much of the primary action or “engagement” with the enemy is more likely to occur in interrogation rooms and detention facilities, and across wires, and in vast computer reservoirs of stored data, than in bunkers and on traditional battlefields.

As it happens, however, in recent decades — but well before the war on terrorism began — both intelligence collection and the treatment and interrogation of detained persons have become subject to a **thicket of statutory regulation**, through laws enacted to implement human rights treaties and the laws of war and to respond to the public’s outrage at the abuse of national security powers exposed in the aftermath of Watergate. For that reason, and notwithstanding all the talk of congressional acquiescence to executive discretion when it comes to national security matters, executive actions central to the current military conflict are in fact s**ubject to a substantial body of legislative and treaty-based regulation.**

In addition, in this conflict the battlefield “lacks a precise geographic location and arguably includes the United States.”77 For this reason, too, the freedom that Congress usually has been willing to afford the President in waging war against the enemy is much less likely to result in the President’s being able to operate without concerning himself with statutorily imposed constraints. Matters that arguably concern “battlefield” operations are too likely to overlap with matters that **Congress has long considered to be within its natural purview** as the branch of government chiefly responsible for regulating the nation’s domestic affairs — such as protecting domestic communications from surveillance, and ensuring that residents of the United States are not detained arbitrarily.

## ---1ar still attacks

Official statements prove

Jessica Dorsey and Dr. Christophe Paulussen, International Centre for Counterterrorism—The Hague, Research Fellows, Summary of a two-day conference at The Hague, April 2013, The Boundaries of the Battlefield: A Critical Look at the Legal Paradigms and Rules in Countering Terrorism

Regarding the issue of the “hot battlefield”, John Brennan has addressed the US’ position regarding the geographic scope of armed conflict. He made reference to al-Qaeda’s leadership base as being in Pakistan and that the “affiliated forces” are “in places like Pakistan, Yemen, and countries throughout Africa”.37 This serves to concretise some ideas about how the US perceives the battlefield (i.e., naming particular countries where operations have already happened or may yet occur). Brennan directly addressed the geographic scope by stating that the US was not “restricted solely to ‘hot’ battlefields like Afghanistan” as the armed conflict with al-Qaeda allows the US to use force against these non-state actors under a self-defence regime, but without the requirement to do “a separate self-defence analysis each time”.

## ---1ar self defense solves

Self-defense is a durable legal framework the plan leaves in place

Foust 12 (Joshua Foust is the Fellow for Asymmetric Operations at the American Security Project and a columnist for PBS Need to Know and The Atlantic. Ashley S. Boyle is an Adjunct Junior Fellow at the American Security Project, 8/16/2012, "The Strategic Context of Lethal Drones", www.scribd.com/doc/102744195/The-Strategic-Context-of-Lethal-Drones)

Criticisms of US drone programs frequently center on questions of legality. Despite claiming the strikes are legally permissible, Administration officials have not yet directly cited any law in justifying the use of drones in extraterritorial targeted killings. 12 Critics argue that this failure to provide legal justification implicates the US in violating international legal frameworks on interstate force and national sovereignty.13 Furthermore, critics claim that US drone programs in Pakistan, Somalia, and Yemen set a dangerous precedent that could lead to any nation with strike-capable drones employing similar tactics in a “global drone war. 14 While laws governing the use of interstate force bar the use of force in another nation’s territory during times of peace, under Article 51 of the United Nations Charter, a state has “the inherent right of individual or collective self-defence [sic]” until the UN Security Council takes action.15 3 The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has affirmed that Article 51 applies if either the targeted state agrees to the use of force in its territory by another nation, or the targeted state or a group operating within its territory, was responsible for an act of aggression against the targeting state.16 Only one of these conditions must be satisfied to justify a unilateral extraterritorial use of force by a UN Member. In the cases of Pakistan,17 Somalia,18 and Yemen,19 both conditions are satisfied: all three countries have consented, explicitly or otherwise, to the US operating drones within their territories, and all three are “safe havens” for groups that have launched violent attacks against the US and US interests. Therefore, while the US does not explicitly invoke Article 51, it is operating within its bounds under the international framework established by the UN – making any legal argument against drone programs challenging. In Afghanistan, Iraq, and Libya, the US was already engaged in combat operations. The legal questions regarding the use of lethal drones do not apply to these conflicts.

## ---1ar least required means

Other countries prove Least Required Means works

Ryan Goodman, New York University School of Law Professor, 3/4/13, Ryan Goodman, A Surreply to the Second Critique by Corn, Blank, Jenks, and Jensen, www.lawfareblog.com/2013/03/the-capture-or-kill-debate-7-goodman-responds/

5. Finally, CBJJ 2.0 raise significant questions about whether the rule could be successfully implemented in military operations. These are obviously vitally important considerations. For example, if the rule is the law of the Protocol, it legally binds—as a treaty obligation—the 170-plus state parties to the Protocol which includes 88% of the states of the world and all NATO members except for the United States and Turkey. The entirety of Part II of my EJIL article develops a set of conditions that might qualify the application of the rule. (CBJJ never engage this part of the article.) I explain that the rule might apply, for example, only to military commanders and senior officials planning an operation rather than individual soldiers in the heat of battle. Or a strong presumption favoring killing might apply which could be rebutted only by establishing that an individual purposefully engaged in “manifestly and absolutely unnecessary” violence. These are all sound second-order considerations for the application of the rule, and not reasons to reject the legal status of the rule. Moving forward, we can also learn from Israel’s and Colombia’s incorporation of a lesser evil rule as a binding constraint in their armed conflicts with terrorist groups. And, yes, we can learn from ROEs that already incorporate this rule as a matter of strategy—and from the White Paper’s “feasibility of capture” test which applies as a matter of law. Moreover, we can learn from the application of the hors de combat regime. As I detail in my reply to Henderson, military manuals around the world provide that protective safeguard in the case of defenseless soldiers in the power of the adverse party. In short, there is ample practice and potential conditions on the application of the unnecessary killing rule to suggest that CBJJ’s stated concerns are excessive, if not misplaced.

Lastly, CBJJ 2.0’s analysis exacerbates rather than addresses an internal inconsistency in their analysis which I identified in my first reply. That is, in the discussion of law and policy, CBJJ 2.0 tell us that “a ‘capture instead of kill’ constraint is often imposed on operations” (albeit not due to an international law obligation). And in the discussion of the administrability of the lesser evil rule, they argue its imposition on military operations would be completely unworkable.