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United States Federal Government should statutorily restrict the 2001 Authorization for Use of Military Force.

## 1

Legal challenges to the AUMF will collapse the entire detention and targeted killing architecture – scrapping it results in statutory clarifications that restore sustainability

Robert Chesney 13, law prof at Texas, beyond the battlefield, beyond al qaeda: the destabilizing legal architecture of counterterrorism, Michigan Law Review, Vol. 112:163

The drawdown in Afghanistan, combined with the expansion of the shadow war model, **ensures that the legal architecture of counterterrorism will be far more contested—and hence** less stable**—going forward** than it was during the first post-9/11 decade. When U.S. involvement in overt armed conflict in Afghanistan comes to an end, so too will the other key stabilizing factor identified in Part II: the existence of at least one location as to which LOAC indisputably applies and as to which many cases could be linked.'\*'2 The fact patterns that will matter most in the future—the instances in which the U.S. government will most likely wish to use lethal force or military detention—will instead increasingly be rooted in other locations, such as Yemen and Somalia.

It does not follow that LOAC will be irrelevant to future uses of detention or lethal force. To the extent that the government continues to invoke LOAC, the persuasiveness of its arguments will vary from case to case. **In some contexts**, for example, the government can make relatively conventional arguments that the level of violence in a given state has risen to a level constituting a noninternational armed conflict, quite apart from whether there also exists a borderless armed conflict with al Qaeda or its successors. Where that is the case, and where the level of U.S. participation in those hostilities warrants the conclusion that it is a party to such a conflict, **LOAC arguments may prove persuasive** after all. **Yemen currently provides a good example** of an area ripe for such an analysis.193

But even in those cases, the very nature of the shadow war approach is such that **there can be no guarantees** that such arguments will be accepted, certainly not as they were during the first post-9/11 decade vis-a-vis Afghanistan. And since not all shadow war contexts will match Yemen in supporting such a conventional analysis, **attempts to invoke LOAC** in some cases **will have to stand or fall** instead **on the far broader argument that the U**nited **S**tates **is engaged in a borderless armed conflict** governed by LOAC wherever the parties may be found.

**The borderless-conflict position** at first blush appears nicely entrenched in the status quo legal architecture. It is supported, after all, by a substantial degree of cross-party consensus (it was endorsed most recently in a series of speeches by Obama Administration officials).194 But it **has always been fiercely disputed**, including by the International Committee of the Red Cross ("ICRC") and many of America's allies. **That dispute was** not so much resolved over the past decade as it was persistently **avoided**; the case law of that era almost always involved persons who could be linked in some way **back to** the undisputed combat zone of **Afghanistan**. Thanks to the U.S. government's shift toward shadow war, however, **this will not be the situation when new cases arise, as they** surely will.195

Making matters worse, **the U.S. government's position** on the relevance of LOAC to its use of detention and lethal force **may become harder to maintain going forward** even without a drawdown in Afghanistan due to the aforementioned decline and fragmentation of al Qaeda. The borderless-conflict position does require, after all, identifiable parties on both sides. Even if one accepts that the United States and al Qaeda are engaged in a borderless armed conflict, organizational ambiguity of the sort described above will increasingly call into question whether specific cases are sufficiently linked to that conflict (or to any other that might be said to exist with respect to specific al Qaeda—linked groups, such as AQAP). Again Warsame's situation provides a useful illustration, or perhaps more accurately, a cautionary tale.

Though widely perceived at the time as a period of great legal controversy and uncertainty, the first post-9/II decade will in retrospect be perceived as a comparatively simple state of affairs during which it was largely undisputed that LOAC applied somewhere and that the central objects of the U.S. government's use of detention and lethal force were entities one could coherently describe as al Qaeda and the Afghan Taliban. But that period is ending, and it may be that the second post-9/11 decade will witness far more serious legal disputes as a result.

IV. Shifting the Legal Framework onto Firmer Footing

What if anything ought to be done in response to this looming legal instability? One possibility is to attempt to avoid the difficulty altogether by changing policy. That is, the government could abandon the use of military detention (at least in its long-term form) and limit the use of lethal force to circumstances compatible with a human rights law framework (i.e., circumstances involving a strictly imminent threat to human life with no plausible prospect for arrest). In a speech on May 23, 2013, Obama gestured strongly in this direction.196 Echoing the observations made above, he pointed out that the armed conflict with al Qaeda might well draw to a close in the near future.197 And in the meantime, he explained, the United States would continue to prefer criminal prosecution to military detention, while limiting its use of force outside Afghanistan to circumstances involving an array of factors, including a continuing, imminent threat to American lives and no feasible opportunity for capturing rather than killing the target.198

At first blush these pronouncements give the impression that the legal issues identified above might cease to matter. On closer inspection, however, that is far from certain. First, the president's speech by no means promised to end the use of long-term military detention, either for the Guantanamo detainees or for those non-Afghan detainees still in U.S. custody in Afghanistan.199 The size of those populations will likely shrink, but some number of them will remain, along with the legal dilemmas they present. Second, it remains far from certain just how restrictive the use of force will be under color of the president's newly articulated framework. **The president was quite clear that** when **force** was used, it **would continue to be under** color of **the** 2001 **AUMF** subject to the law of armed conflict, at least for the near future.200 The **legal questions** raised by that model accordingly **will remain**, even if the number of new instances implicating them shrinks going forward.

With or without these changes, of course, **the government might** simply choose to do nothing in response to the legal uncertainties described above.201 That is, it might **conclude that it can ride out the** increasing **legal friction** without encountering resistance of a kind that actually upends policy or practice. Such hopes would likely be dashed, however. I explain why below and then conclude with a brief discussion of proactive, realistic steps that the government might take instead.

A. The Coming Wave of Judicial Intervention

**The government will not be able to** simply **ride out the legal friction** generated by the fragmentation of al Qaeda and the shift toward shadow war. Those **trends** do not merely shift unsettled questions of substantive law to the forefront of the debate; they also **greatly increase the prospects for a new round of judicial intervention** focusing on those substantive questions.

1. Military Detention

Consider military detention first. Fresh judicial intervention regarding the substantive law of detention is a virtual certainty. It will come in connection with the lingering Guantanamo population, and it will come as well in connection with any future detainees taken into custody on a long-term basis, regardless of where they might be held.

a. Existing Guantanamo Detainees

Most of the **existing Guantanamo detainees** have already had a shot at habeas relief, and many lost on both the facts and the law. But some of them can and **will pursue a second shot**, should changing conditions call into question the legal foundation for the earlier rulings against them.202

The first round of Guantanamo **habeas decisions depended** in almost every instance **on the existence of** a meaningful tie to ongoing hostilities in **Afghanistan**, as did the Supreme Court's 2004 decision in Hamdi. Indeed, Justice O'Connor in Hamdi was at pains to caution that at some point in the future this baseline condition making LOAC relevant could unravel.203 **The declining U.S. role in combat operations in Afghanistan** goes directly to that point.

This decline **will open the door to a second wave of Guantanamo litigation**, with detainees arguing that neither LOAC nor the relevant statutory authorities continues to apply. This argument may or may not succeed on the merits. At first blush, the NDAA FY 12 would seem to present a substantial obstacle to the detainees. That statute expressly codifies detention authority as to members (and supporters) of al Qaeda, the Afghan Taliban, and "associated forces,"201 thus grounding detention authority directly in domestic law rather than requiring courts to impute such authority into the 2001 AUMF by implication from LOAC (as the Supreme Court had to do in Hamdi itself). But it is not quite so simple. The same section of **the NDAA** FY12 relinks the question of detention authority to LOAC after all. It specifies that statutory detention authority as an initial matter exists solely "pending disposition under the law of war."2"5 And although it then lists long-term military detention as a possible disposition option, the statute specifically **defines** this **authority as** "[djetention under the law of war without trial until the end of the hostilities **authorized by the [AUMF**]."206

A court confronted with this language might interpret it in a manner consistent with the government's borderless-conflict position, such that the drawdown in Afghanistan would not matter. But it might not. The repeated references to the "law of war" in the statute—that is to LOAC—might lead at least some judges to conduct a fresh field-of-application analysis regarding the extent to which LOAC remains applicable in light of the drawdown, and judges might then read the results back into the NDAA FY12. 1 am not saying that this is the likely outcome or that any such analysis would necessarily reject the government's borderless-conflict position. I am just saying that **judges** eventually **will decide these matters without** real **guidance from Congress** (unless Congress clarifies its intentions in the interim). Note, too, that **any** such **judicial interpretations** may well have far broader implications than just the fate of the particular detainee in question; a ruling that LOAC has no application in a given situation **would cast a long shadow over** any other LOAC-based actions the U.S. government might undertake in the same or similar contexts (including **targeting** measures).

Regardless of what occurs in Afghanistan, the existing Guantanamo detainee population might also find occasion to come back to court should the decline of the core al Qaeda organization continue to the point where it can plausibly be described as defunct. In such a case, it is likely that at least some current al Qaeda detainees would revive their habeas petitions in order to contend that the demise of the organization also means the demise of detention authority over members of the defunct group. This argument would be particularly likely to come from those who were held on the ground of membership in al Qaeda but who the government had not shown to have been otherwise involved in hostile acts. This would be a challenging argument to make; the government would surely respond that al Qaeda would no longer be defunct if some of its members were set free. But setting that possible response aside, such a petition could compel the government to litigate the question of whether the continuing existence of various "franchises," like AQAP or al-Shabaab, suffices to preserve detention authority over al Qaeda members. That is, such a challenge could lead a judge to weigh in on the organizational boundary question.

b. New Detainees

The existing Guantanamo detainees are not the only ones who might require judges to address the increasingly difficult LOAC and organizational boundary issues. New detainees might do so as well.

As the Warsame situation illustrated, the Obama Administration remains loath to bring new detainees into military custody at Guantanamo. But Congress could force its hand, should Congress further extend its growing array of statutory constraints against bringing certain individuals within the United States for purposes of criminal trial, foreclosing the disposition option ultimately employed with Warsame. A future Republican administration, meanwhile, may or may not be so reluctant to make use of Guantanamo in the event that it encounters a Warsame-like scenario outside of Afghanistan. Should any new detainees be taken to Guantanamo, they will automatically have access to judicial review in accordance with Boumediene. And in light of the trends described above, it seems quite likely that such review would turn in no small part on LOAC and organizational boundary issues.

Might detainees be taken somewhere besides Guantanamo (or U.S. territory proper), where habeas jurisdiction is not yet established? The only other detention facility currently associated with U.S. forces overseas is the Detention Facility in Parwan, Afghanistan ("DFIP"). But the DFIP is no alternative to Guantanamo, at least not for persons captured outside of Afghanistan. First, although it appears that a small number of detainees were imported into Afghanistan from elsewhere relatively early in the first post9/11 decade, officials have more recently made clear that the Afghan government has long since forbidden the practice.207 Second, **the U**nited **S**tates in any event **has agreed to transfer control of the DFIP to the Afghan government**.208 And though there is lingering debate as to the functional extent of this transfer, that debate will likely not survive the completion of the drawdown in Afghanistan any more than the identical debate survived completion of the drawdown a few years before in Iraq.209

Even if the DFIP did remain available, or if some other facility somehow could be made available abroad, placing new detainees there (other than persons captured and held in Afghanistan while conflict there continues) would almost certainly precipitate an extension of Boumediene to those detainees too, resulting in judicial review. True, the D.C. Circuit Court of Appeals in al Maqaleh v. Gates rejected an attempt to invoke habeas jurisdiction by a group of DFIP detainees who had been captured abroad and brought into Afghanistan years ago.210 The court was careful in its opinion, however, to emphasize that those transfers occurred prior to Boumediene and that there was no other basis for believing that the transfers reflected an attempt to avoid habeas jurisdiction.211 Similar **transfers** occurring **in 2012 or thereafter would** quite likely **produce a very different outcome**.212

2. Lethal Force

Lethal force is a different kettle of fish when it comes to the possibility of judicial review. In theory, there are two ways the courts could become involved in assessing the legality of the use of lethal force in the counterterrorism setting. First, **there could be a criminal investigation resulting in a civilian prosecution or a court-martial proceeding turning on the legality of** a particular use of **force**. Incidents in Iraq and Afghanistan involving members of the armed forces and private contractors illustrate how this can occur from time to time, as individuals are prosecuted for allegedly killing civilians or prisoners.213 The typical case of this kind, however, never turns on or otherwise raises questions regarding the relevance of LOAC or the organizational boundaries of the enemy. And there is no prospect that criminal investigators and prosecutors in the United States, whether civilian or military, will take steps to change that by opening an investigation into, say, drone strikes in Yemen. If American courts ever do become involved, then, it will be pursuant to the second possibility: civil litigation.

In 2010, the ACLU and the Center for Constitutional Rights ("CCR") attempted to persuade a federal court to intervene prospectively with respect to Anwar al-Awlaki, an American citizen and member of AQAP who had become notorious for his role in encouraging others to carry out attacks on the United States. Media reports had indicated that the U.S. government had tried unsuccessfully to kill al-Awlaki in Yemen through a drone strike and that al-Awlaki had been placed on a specific list of persons as to whom lethal force was pre-authorized.2M On behalf of al-Awlaki's father, the ACLU and CCR filed a civil suit seeking declaratory and injunctive relief, arguing that killing al-Awlaki without judicial process, "far from any field of armed conflict," and without the presence of exigent circumstances involving a strictly imminent threat to life would violate both international law and the Constitution.215

Ultimately, the district judge dismissed the suit on two primary grounds.216 First, he concluded that al-Awlaki's father had no standing to act on his behalf in this ex ante setting.217 Second, he concluded that the issues presented constituted a political question as to which courts should not exercise jurisdiction.218 He also nodded favorably in the direction of a third argument—that the state-secrets privilege would ultimately preclude litigation of the claims—without actually relying on it.219

The ACLU and CCR did not appeal, perhaps mindful that doing so might simply result in a more authoritative and influential but equally hostile ruling from the court of appeals. And so the issue appeared to come to rest, with no realistic prospect that judges would ever engage the LOAC and organizational boundary issues in a use-of-force setting. It would not be prudent, however, to assume that this was the last word.

In July 2012, the ACLU and CCR filed a new suit, this time in the form of a wrongful death action in the wake of drone strikes that killed al-Awlaki, his teenage son, and another American citizen involved in AQAP, Samir Khan.220 The standing issue is no longer a serious obstacle in light of the relatively clear capacity of the decedent's relatives to act in this wrongful death—style setting, thus removing one linchpin of the earlier ruling. The political question and state-secrets obstacles remain as before, though, and hence the prospects for the suit making it to the merits are not strong. But pause to consider what effect might follow from increasing awareness of the destabilizing trends described above in Part III, including both the uncertainties associated with the enemy's organizational boundaries and the larger embrace of the shadow war model. These developments do not directly undermine the doctrinal foundations of the political question analysis in the prior suit, nor do they chip away at the state-secrets considerations lurking as the next obstacle for the plaintiffs. And yet it is not so difficult to imagine that when these issues eventually come before a court of appeals or the Supreme Court several years from now, the unfolding of these trends will have had a sufficiently unsettling impact **so as to give considerable pause to some judges or justices**—potentially enough to tip the scales against continued application of those threshold avoidance doctrines.221

That is, of course, a speculative leap of some distance. But it would be foolish to dismiss the prospect out of hand; similar skepticism once surrounded the efforts of Guantanamo detainees to establish habeas jurisdiction after all. As we progress toward the shadow war model, it takes us ever further from the paradigmatic conventional-war model with which maximized judicial deference has traditionally been associated. **Insofar as courts grow increasingly attracted to the notion that the legal framework for targeting** can and **should be closely linked to that for detention**, the existing judicial **beachheads** relating to the latter **could have the effect of making a breakout into targeting jurisdiction** conceptually less shocking and more **plausible**.

B. Options for Refining the Legal Architecture

Are there realistic yet useful steps the government could take now, bearing in mind both the legal instability described above and the likelihood that those issues will be litigated? Or would it be wiser to simply stay the course, while continuing to defend the legal merits of current policy through public statements and preparing to do the same if and when litigation requires it? The Obama Administration has been focused on the latter approach.

Building on the precedent of public engagement set by State Department Legal Adviser John Bellinger during the Bush Administration's second term,222 it has been commendably active in dispatching senior officials to give public speeches defending the legality of its detention and lethal force practices, with at least some emphasis on the elements of geographic and organizational uncertainty described above.223 The Obama Administration has resisted, in contrast, taking affirmative steps to alter the legal status quo in a direction that might reduce that uncertainty.

To be sure, the Obama Administration did ultimately sign into law the NDAA FY12, but it did so quite reluctantly insofar as its detention-related measures were concerned. And its reluctance was directly connected to a mistaken sense that the legal architecture had already reached a point of stable equilibrium. The evidence for this can be found in a statement of administration policy ("SAP") the White House issued in late 2011 while the NDAA FY12 was still pending. In reference to the bill's detention-related provisions, the SAP stated.

Because the authorities codified in this section already exist, **the Administration does not believe codification is necessary** and poses some risk. After a decade of settled jurisprudence on detention authority. Congress must be careful not to open a whole new series of legal questions that will distract from our efforts to protect the country. While the current language minimizes many of those risks, future legislative action must ensure that the codification in statute of express military detention authority does not carry unintended consequences that could compromise our ability to protect the American people.22-1

The SAP quite properly observes that affirmative steps to alter the status quo would carry risks in the nature of unintended consequences (not coincidentally, the NDAA FY12 was in fact stuffed with problematic collateral measures designed to micromanage and constrain the president's ability to make decisions regarding the disposition of military detainees).225 That is a point well taken, raising the question of whether there is enough to be gained by change to offset such risks. The SAP's negative answer, alas, depended explicitly on the assumption that the relevant law has already been "settled" thanks to years of detention case law and that there was thus nothing to be gained by revisiting the issue in legislation. This is, however, precisely the settlement that is unraveling due to the ongoing fragmentation of al Qaeda, the drawdown in Afghanistan, and the shift toward shadow war. As we have seen, **the NDAA** FY 12 ultimately did become law, yet it **did little** to amend the legal architecture for detention—let alone for lethal force—**to account for looming instability**. Could more have been done? I close with a handful of preliminary suggestions, in hopes of informing further debate226

1. Clarifying the Enemy

There are two legal dimensions to the problem of increasing organizational uncertainty: disagreement as to the boundaries of al Qaeda as such and disagreement as to whether the use of force or detention in any event should extend to other groups. The NDAA FY 12 did nothing to address the first issue, as it made no attempt to define al Qaeda. As for the second issue, the NDAA FY 12 did formally recognize a category of "associated forces," but it did not actually define that phrase and hence did nothing to advance understanding of its content. The Obama Administration, for its part, has indicated that we may flesh out **the "associated force" concept** by reference to the international law concept of cobelligerency. Unfortunately, this approach on close inspection **does not actually yield** particularly **helpful yardsticks** when mapped onto the context of clandestine nonstate actors. **Nor does it speak at all to the initial question of how to determine whether a particular group is part of al Qaeda to begin with**, bearing in mind the fragmentation trend. And it also will be of little use if and when we reach the point that al Qaeda itself is effectively destroyed, thus removing the predicate for a cobelligerency type of analysis.

**More could be done**. First, with respect to the problem of al Qaeda's increasingly uncertain organizational boundaries, Congress could specify a statutory standard that the executive branch could then bring to bear in light of the latest intelligence, with frequent reporting to Congress as to the results of its determinations. The trick, of course, is in specifying the proper standard: A functional test turning on whether al Qaeda's senior leadership in fact exercises direction and control over another group's activities, at least at a high level of generality? A formal test turning on whether the other group has formally proclaimed obedience to al Qaeda's senior leaders? It may be that the best approach is to specify both tests as alternative sufficient conditions. In any event, periodic decisions by the executive branch regarding the application of these tests to particular groups should then be reported in a timely fashion to Congress (something the NDAA FY12 already requires vis-a-vis "associated forces" determinations), along with both detailed classified explanations of the underlying analysis and a corresponding unclassified statement informing the public of the determination and as much of the underlying rationale as is consistent with proper protection of sources and methods.

Second, with respect to the problem of identifying separate organizations (beyond al Qaeda) against whom force or detention might be directed. **Congress** could abandon the "associated forces" concept altogether in favor of an alternative approach. It **could**, for example, **explicitly name the additional entities against which force is authorized**,227 much as the NDAA FY 12 names al Qaeda and the Afghan Taliban. This approach has the virtue of maximum clarity and hence improved democratic accountability**. It also has the virtue of not artificially attempting to tie all threats back to al Qaeda, the AUMF, and the** ever-receding **9/11 attacks** themselves. Of course, some might object to this approach on the ground that fast-paced changes in the field could require Congress to repeatedly return to the task of making such designations, possibly at the cost of slowing or disrupting the executive branch's willingness to act in the interim. One might respond, however, that **the executive branch may always fall back on its inherent Article II authority** to act in defense of the nation when circumstances truly warrant it, at least when it comes to the use of force. Moreover, if instead the matter is a question of long-term detention authority, then **there will be**, by definition, **ample time for Congress to act** after all.228

2. Sidestepping the LOAC Dilemma

Can Congress also make a useful contribution in terms of reducing uncertainty regarding the relevance of LOAC? This is a more complicated matter.

The answer is probably no if we are speaking of Congress literally overriding the field-of-application debate by simply asserting that LOAC by its own terms applies across the board in the shadow war context. It is doubtful that a federal court in some future habeas case or other proceeding would feel bound by such a determination (and it certainly would do nothing to quell criticisms from allies and others who take a more restrictive view of LOAC's field of application). That said, there are other ways in which Congress might usefully speak to LOAC-related questions.

**Congress could require**, as a matter of domestic law, **that all relevant uses of force or military detention be subject to LOAC rules**, even if LOAC is not applicable of its own force. **And Congress could clarify that it intends to authorize all actions** that can be taken **compatible with that rubric**. **This would** substantially reduce, if not eliminate, **the possibility that a judge** at some point **would conclude that detention or lethal force was not authorized** in a given context solely on the ground that LOAC's field-of-application test was not satisfied after all. **And in doing so. Congress might specifically state that** the resulting availability of **detention authority does not depend on** the continuation of U.S. involvement in conflict in **Afghanistan** but rather depends on the continued hostilities between the United States and the statutorily identified group as to which a given detainee is linked.229

Of course, none of that would appeal at all to those who object to the U.S. government's existing practice of claiming LOAC authority to justify detention or lethal force beyond the political borders of specific areas of high-intensity conflict such as Afghanistan; on the contrary, those critics would surely object fiercely, no doubt arguing that such actions by Congress would place the United States in violation of international law. One might reply that **the uncertain status quo is** actually **worse, in that it** arguably **incentivizes reliance on rendition, detention by other governments, and the use of lethal force in lieu of detention**.230 One might add, moreover, that **resistance to** application of **LOAC** norms, if successful, **will not automatically produce** a situation in which the U.S. government accepts that its **actions** instead are **subject to** international **human rights law** instruments such as the International Covenant on Civil and Political Rights ('TCCPR"). After all, the U.S. government currently takes the position that the ICCPR does not apply outside U.S. sovereign territory.231 **Successful resistance to** the **LOAC** model, from this perspective, **might leave international law** entirely on the sidelines, except perhaps for constraints of necessity and proportionality that might follow should the U.S. government be acting under the rubric of self-defense.232

There are additional steps, however, that Congress might take to address rights-oriented concerns. As an initial matter. **Congress could clarify that the LOAC rules are binding on all U.S. government entities**, including the CIA. Supporters of the status quo should not object to **this specification**, for if the recent spate of speeches by Obama Administration officials is an accurate guide, it **would not actually alter current U.S. government practices**.233 Additionally, **Congress might entrench in statute** the proposition that lethal force will not be used in a given location without the consent of the host government except in circumstances where the host government is **unable or unwilling** to take reasonable steps to suppress a threat.231 **This too would reflect existing U.S. government practice**,235 yet the absence of a more formal expression of the policy creates space for critics to argue that the United States might soon conduct drone strikes on the streets of Paris.

Congress might also consider embracing rather than fleeing from the involvement of the judiciary. I have in mind two steps. First, **Congress could** expressly **extend** Guantanamo-style **habeas** jurisdiction to all persons held under color of the authorization described above—no matter where they are held—with the sole exception being persons captured and held in Afghanistan prior to the end of the drawdown process.236 As noted above, this is the result that will likely attach in any event by the extension of Boumediene. And one should not forget that after years of government resistance to judicial involvement at Guantanamo, the net result of the habeas process has done more than a little to quell concerns about the legitimacy and legality of detention there (notwithstanding that some critics remain). Second, Congress might also consider judicial involvement at the back end, making periodic determinations of whether specific individuals ought to be released notwithstanding their initial eligibility for detention—something that under the NDAA FY12 and executive branch practice has thus far been a purely executive branch affair.237

This brings us to a particularly vexing question: What, if anything, should Congress say regarding Americans and actions undertaken in U.S. territory? The interaction of these questions with constitutional rights is a large topic, well beyond the scope of this Article. At a minimum, however, it would be sound for Congress to specify that any force it has authorized does not extend to the use of lethal force within the United States barring exigent circumstances.

It is tempting to continue in this vein, advocating additional measures such as the removal of the draconian constraints on detainee transfers and criminal prosecution that have made Guantanamo an undesirable destination even if one is not opposed to using the facility in principle. But my aim in this Section is not to provide a comprehensive solution. Rather, I hope to spark a larger conversation that I believe must occur in light of the unfolding dynamics of the second post-9/11 decade. I therefore will end here simply by noting that if Congress were to adopt the arrangements I have described or something like them, it would be well advised to sunset the whole thing— and to do so at a time designed not to fall directly into the teeth of some future election campaign season.

Conclusion

I intend this Article as a wake-up call. At first blush, **the legal architecture** relating to detention and lethal force in the counterterrorism setting today **appears stable**, the beneficiary of a remarkable amount of crossbranch and cross-party consensus. This pleases some and enrages others. For better or worse, however, the underpinnings of this stability are rapidly eroding in the face of long-term trends involving the strategic posture of both al Qaeda and the United States. Change looms—indeed, the effects can already be felt—and it is past time to recognize precisely how that change will disrupt the status quo and to grapple seriously with the options for refining the legal architecture in response.

Otherwise Obama shifts to self-defense as the sole justification for TK, which sets a global norm

Beau Barnes 12, J.D. from BU and M.A. in Law and Diplomacy from Tufts, reauthorizing the “war on terror”: the legal and policy implications of the aumf’s coming obsolescence, Military Law Review, Vol. 211

The AUMF must inevitably expire because it is expressly linked to the September 11, 2001, attacks against the United States. Moreover, **because of the impending downfall of Al Qaeda as we know it, the statute’s demise will come more quickly than most assume**. Although the United States still faces myriad terrorist threats, the threat from Al Qaeda itself—the “core” group actually responsible for 9/11—is dissipating. So long as a substantial terrorist threat continues, however, the United States will require a framework within which to combat terrorist organizations and activities. Consequently, Congress should enact a new statute **that supersedes the AUMF** and addresses the major legal and constitutional issues relating to the use of force by the President that have arisen since the September 11 attacks and will persist in the foreseeable future.

A. The AUMF’s Inevitable Expiration

Although it is difficult to determine exactly when the AUMF will become obsolete, the mere fact that a precise date is unclear should not lead to the conclusion that the AUMF will be perpetually valid. Al Qaeda, the organization responsible for the September 11, 2001, attacks is considered by some to have been already rendered “operationally ineffective”102 and “crumpled at its core.”103 Moreover, even if Al Qaeda continues to possess the ability to threaten the United States,104 **not all terrorist organizations** currently **possess a meaningful link to Al Qaeda, rendering the AUMF** already **insufficient** in certain circumstances. Indeed, individuals from across the political spectrum have recognized that **the AUMF’s focus on** those involved in “the terrorist attacks that occurred on **September 11**, 2001” **is outdated** and no longer addresses the breadth of threats facing the United States.105 At a certain point, the terrorist groups that threaten the United States targets will no longer have a plausible or sufficiently direct link to the September 11, 2001, attacks.106

**This shift has** likely **already occurred**. Former Attorney General Michael Mukasey, writing recently in support of efforts to reaffirm the original AUMF, noted that currently “there are organizations, including the Pakistani Taliban, that are arguably not within its reach.”107 It is similarly unclear if the AUMF extends to organizations like Al Qaeda in the Arabian Penninsula, whose formation as a group—and connection to Al Qaeda’s “core”—postdates 9/11 and is indirect at best.108 Former State Department Legal Adviser John Bellinger has argued that **the Obama Administration’s reliance on the AUMF for its targeted killing and detention operations is “**legally risky” because “[s]hould our military or intelligence agencies wish to target or detain a terrorist who is not part of al-Qaeda, they would lack the legal authority to do so, unless the administration expands (and the federal courts uphold) its legal justification.”109 Indeed, “[c]ircumstances alone **. . .** will put enormous pressure on—and ultimately render obsolete—the legal framework **we currently employ to justify** these **operations**.”110

While the court of public opinion seems to have accepted the AUMF’s inevitable expiration, courts of law appear poised to accept this argument as well. Justice O’Connor’s plurality opinion in Hamdi admitted that the AUMF granted “the authority to detain for the duration of the relevant conflict.”111 She also suggested, however, that that authority would terminate at some point, based on “the practical circumstances of [this] conflict,” which may be “entirely unlike those of the conflicts that informed the development of the law of war.”112 Justice Kennedy’s opinion in Boumediene also hinted that the future contours of the war on terror might force the Court to revisit the extent of the conflict.113 **Lower federal courts have already started to ask** some of the **questions about the duration of the AUMF’s authority**, which the Supreme Court has left unaddressed to date.114 The Obama Administration has notably disagreed with these assessments, arguing that the AUMF “is still a viable authorization today.”115 The administration’s position, however, appears contradictory, as it has simultaneously described the limited reach of the AUMF as “encompass[ing] only those groups or people with a link to the terrorist attacks on 9/11, or associated forces”116 and celebrated the functional neutralization of Al Qaeda as a continuing threat to U.S. national security.117 The administration’s position, however, remains in the minority. Notwithstanding the administration’s continuing fealty to the 2001 statute, as pressures build to address these issues, the “temporal vitality”118 of the AUMF will continue to be challenged. The successful targeting of those responsible for the attacks of September 11, 2001, will ensure that the AUMF’s vitality will not be indefinite.

Moreover, even if one rejects as overly optimistic the position that Al Qaeda is currently or will soon be incapable of threatening the United States, **the AUMF is already insufficient to reach many terrorist organizations**. Assuming a robust Al Qaeda for the indefinite future does not change the disconnected status of certain terrorist groups; as much as it might wish to the contrary, **Al Qaeda does not control all Islamist terrorism**.119 B. The Consequences of Failing to Reauthorize

The AUMF’s inevitable expiration, brought about by the increasingly tenuous link between current U.S. military and covert operations and those who perpetrated the September 11 attacks, leaves few good options for the Obama Administration. Unless Congress soon reauthorizes military force in the struggle against international terrorists, the administration will face difficult policy decisions. Congress, however, shows no signs of recognizing the AUMF’s limited lifespan or a willingness to meaningfully re-write the statute. In light of this reticence, one choice would be for the Obama Administration to acknowledge the AUMF’s limited scope and, on that basis, forego detention operations and targeted killings against non-Al Qaeda-related terrorists. For both strategic and political reasons, this is extremely unlikely, especially with a president in office who has already shown a willingness to defy legal criticism and aggressively target terrorists around the globe.120 Another option would be for the Executive Branch to acknowledge the absence of legal authority, but continue targeted killings nonetheless. For obvious reasons, this option is problematic and unlikely to occur. Therefore, the more likely result is that the Executive Branch, grappling with the absence of explicit legal authority for a critical policy, would need to make increasingly strained legal arguments to support its actions.121 Thus, the **Obama** Administration **will** soon **be forced to rationalize ongoing operations** **under existing legal authorities**, which, I argue below, will have significant harmful consequences for the United States. Indeed, the administration faces a Catch-22—its efforts to destroy Al Qaeda as a functioning organization will lead directly to the vitiation of the AUMF. The administration is “starting with a result and finding the legal and policy justifications for it,” which often leads to poor policy formulation.122 Potential legal rationales would perforce rest on exceedingly strained legal arguments **based on** the AUMF itself, the President’s **Commander in Chief powers, or** the international law of **self defense**.123 Besides the inherent damage to U.S. credibility attendant to unconvincing legal rationales, each alternative option would prove legally fragile, destabilizing to the international political order, or both. 1. Effect on Domestic Law and Policy

Congress’s failure to reauthorize military force would lead to bad domestic law and even worse national security policy. First, a legal rationale based on the AUMF itself will increasingly be difficult to sustain. Fewer and fewer terrorists will have any plausible connection to the September 11 attacks or Al Qaeda, and arguments for finding those connections are already logically attenuated. The definition of those individuals who may lawfully be targeted and detained could be expanded incrementally from the current definition, defining more and more groups as Al Qaeda’s “co-belligerents” and “associated forces.”124 But this approach, apart from its obvious logical weakness, would likely be rejected by the courts at some point.125 **The policy of the U**nited **S**tates **should not** be to **continue to rely on the** September 18, 2001, **AUMF**.

Second, **basing** U.S. **counterterrorism** efforts **on** the President’s constitutional authority as **Commander in Chief is legally unstable**, and therefore unsound national security policy, because a combination of legal difficulties and political considerations make it unlikely that such a rationale could be sustained. **This** type of **strategy would** likely **run afoul of the courts** and risk destabilizing judicial intervention,126 because the Supreme Court has shown a willingness to step in and assert a more proactive role to strike down excessive claims of presidential authority.127 **Politically, using** an overly robust theory of the **Commander in Chief**’s **powers** to justify counterterrorism efforts **would**, ultimately, **be difficult to sustain**. President **Obama**, who ran for office in large part on the promise of repudiating the excesses of the Bush Administration, and indeed any president, **would** likely **face political pressure to reject** the **claims** of executive authority **made “politically toxic” by** the writings of **John Yoo**.128 Because of the likely judicial resistance and political difficulties, claiming increased executive authority to prosecute the armed conflict against Al Qaeda would prove a specious and ultimately futile legal strategy. Simply put, **forcing the Supreme Court to intervene and overrule the Executive’s** national security **policy is anathema to** good public policy. In such a world, U.S. national security policy would lack **stability**—**confounding cooperation with allies and hindering negotiations with adversaries**.

There are, of course, many situations where the president’s position as Commander in Chief provides entirely uncontroversial authority for military actions against terrorists. In 1998, President Clinton ordered cruise missile strikes against Al Qaeda-related targets in Afghanistan and Sudan in response to the embassy bombings in Kenya and Tanzania. In 1986, President Reagan ordered air strikes against Libyan targets after U.S. intelligence linked the bombing of a Berlin discotheque to Libyan operatives.129 Executive authority to launch these operations without congressional approval was not seriously questioned, and no congressional approval was sought.130 To be sure, many of the targeted killing operations carried out today fall squarely within the precedent of past practice supplied by these and other valid exercises of presidential authority. Notwithstanding disagreement about the scope of Congress's and the president's "war powers," few would disagree with the proposition that the president needs no authorization to act in self defense on behalf of the country. However, it is equally clear that not all terrorists pose such a threat to the United States, and thus **the Commander in Chief cannot justify all counterterrorism operations as “self-defense**.”

A third option would be to conduct all counterterrorism operations as covert operations under the aegis of Title 50.131 Although the CIA typically carries out such “Title 50 operations,” the separate roles of the military and intelligence community have become blurred in recent years.132 The president must make a “finding” to authorize such operations,133 which are conducted in secret to provide deniability for the U.S. Government.134

**Relying entirely on covert counterterrorism** operations, however, **would suffer from** several **critical deficiencies**. First, **even invoking** the cloak of “Title 50,” **it is “far from obvious” that covert operations are legal without supporting authority**.135 In other words, Title 50 operations, mostly carried out by the CIA, likely also require “sufficient domestic law foundation in terms of either an AUMF or a legitimate claim of inherent constitutional authority for the use of force under Article II.”136 Second, **covert operations are** by definition **kept out of public view**, making it difficult to subject them to typical democratic review. In light of “the democratic deficit that already plagues the nation in the legal war on terror,”137 further **distancing counterterrorism operations from democratic oversight would exacerbate this problem**.138 Indeed, congressional oversight of covert operations—which, presumably, operates with full information—is already considered insufficient by many.139 By operating entirely on a covert basis, “the Executive can initiate more conflict than the public might otherwise [be] willing to support.”140

In a world **without a valid AUMF**, the United States could base its continued worldwide counterterrorism operations on various **alternative domestic legal authorities**. All of these alternative bases, however, **carry** with them **significant costs**—detrimental to U.S. security and democracy. The foreign and national security policy of the United States should rest on “a **comprehensive** legal regime to support its actions, one that [has] the blessings of Congress and to which a court would defer as the collective judgment of the American political system about a novel set of problems.' Only then can the President's efforts be sustained and legitimate.

2. Effect on the International Law of Self-Defense

A failure to reauthorize military force would lead to significant negative consequences on the international level as well. Denying the Executive Branch the authority to carry out military operations in the armed conflict against Al Qaeda would force the President to find authorization elsewhere, most likely in the international law of self defense—the jus ad helium.141 Finding sufficient legal authority for the United States's ongoing counterterrorism operations in the international law of self-defense, however, is problematic for several reasons. As a preliminary matter, relying on this rationale usurps Congress's role in regulating the contours of U.S. foreign and national security policy. **If the Executive Branch can assert "**self-defense against a continuing threat" to target and detain terrorists worldwide, **it will** almost **always be able to find** such **a threat**.143 Indeed, the Obama Administration's broad understanding of the concept of "imminence" illustrates the danger of allowing the executive to rely on a self-defense authorization alone.144

**This approach** also would inevitably lead to dangerous “slippery slopes.” Once the President authorizes a targeted killing of an individual who does not pose an imminent threat in the strict law enforcement sense of “imminence,”145 **there are few** potential **targets that would be off-limits** to the Executive Branch. Overly malleable concepts are not the proper bases for the consistent use of military force in a democracy. Although the Obama Administration has disclaimed this manner of broad authority because the AUMF “does not authorize military force against anyone the Executive labels a ‘terrorist,’”146 relying solely on the international law of self defense would likely lead to precisely such a result.

The slippery slope problem, however, is not just limited to the United States’s military actions and the issue of domestic control. **The creation of international norms is an iterative process**, one **to which the U**nited **S**tates **makes significant contributions**. **Because of this outsized influence, the U**nited **S**tates **should not claim international legal rights that it is not prepared to see proliferate around the globe**. Scholars have observed that **the Obama Administration’s “expansive and open-ended interpretation of** the right to **self-defence threatens to destroy the prohibition on the use of armed force** . . . .”147 Indeed, “[i]f other states were to claim the broad-based authority that the United States does, to kill people anywhere, anytime, the result would be chaos.”148

Encouraging the proliferation of an **expansive** law of international **self-defense would** not only be harmful to U.S. national security and global stability, but it would also **directly contravene** the Obama Administration’s national security **policy, sapping U.S. credibility**. The Administration’s National Security Strategy emphasizes U.S. “moral leadership,” basing its approach to U.S. security in large part on “pursu[ing] a rules-based international system that can advance our own interests by serving mutual interests.”149 Defense Department General Counsel Jeh Johnson has argued that “[a]gainst an unconventional enemy that observes no borders and does not play by the rules, we must guard against aggressive interpretations of our authorities that will discredit our efforts, provoke controversy and invite challenge.”150 Cognizant of the risk of establishing unwise international legal norms, Johnson argued that the United States “must not make [legal authority] up to suit the moment.”151 The Obama Administration’s global counterterrorism strategy is to “adher[e] to a stricter interpretation of the rule of law as an essential part of the wider strategy” of “turning the page on the past [and rooting] counterterrorism efforts within a more durable, legal foundation.”152

Widely accepted **legal arguments** also **facilitate cooperation from** U.S. **allies**, especially from the United States’ European allies, who have been wary of expansive U.S. legal interpretations.153 Moreover, **U.S. strategy vis-à-vis China focuses on binding that nation to international norms** as it gains power in East Asia.154 The United States is an international “standard-bearer” that “sets norms that are mimicked by others,”155 and the Obama Administration acknowledges that its **drone strikes act in a quasi-precedential fashion**.156 Risking the obsolescence of the AUMF would force the United States into an “aggressive interpretation” of international legal authority,157 **not just discrediting its** own **rationale, but facilitating that rationale’s destabilizing adoption** by nations **around the world**.158

**U**nited **S**tates **efforts to entrench stabilizing global norms** and oppose destabilizing international legal interpretations—a core tenet of U.S. foreign and national security policy159—**would** undoubtedly **be hampered** by continued reliance on self defense under the jus ad bellum to authorize military operations against international terrorists. Given the presumption that the United States’s armed conflict with these terrorists will continue in its current form for at least the near term, ongoing authorization at the congressional level is a far better choice than continued reliance on the jus ad bellum. Congress should reauthorize the use of force in a manner tailored to the global conflict the United States is fighting today. **Otherwise, the U**nited **S**tates **will be forced to** continue to **rely on a statute anchored only to** the continued presence of those responsible for **9/11**, a group that was small in 2001 and, due to the continued successful targeting of Al Qaeda members, is rapidly approaching zero.

Yes modeling – the status quo is a test case for norm diffusion

Fisk & Ramos 13 (Kerstin Fisk --- PhD in Political Science focusing on interstate war @ Claremont Graduate University, Jennifer M. Ramos PhD in Polisci and Professor @ Loyola Marymount focusing on norms and foreign policy, including drone warfare and preventative use of force, “Actions Speak Louder Than Words: Preventive Self-Defense as a Cascading Norm” 15 APR 2013, International Studies Perspectives (2013), 1–23)

The Process of Norm Development

Foundational work on how norms change and evolve can be traced back to Martha Finnemore and Kathryn Sikkink, who developed a theory of the norm “life cycle,” in which three stages are identified: norm emergence, the norm cascade, and norm internalization. In the norm emergence stage, a norm relies on a norm entrepreneur and encounters “a highly contested normative space where [it] must compete with other norms and perceptions of interest” (Finnemore and Sikkink 1998:897; also see Sandholtz 2007, 2008 for more recent work). If successful, a norm cascade follows, in which the norm diffuses to other states through socialization, institutionalization, and demonstration. The rationale of the norm entrepreneur is adopted and its actions emulated because other states are concerned about their legitimacy, reputation, and esteem (Finnemore and Sikkink 1998:898, 902–904; also Zartner and Ramos 2011). In the final stage, the norm is internalized by actors in the international system and essentially becomes taken for granted, integrated into practice without a second thought.

We adopt this basic framework in our analysis, but build on it to account for norm entrepreneurs that do not set out to create a new norm. That is, a state's actions can have unintended consequences for the international normative structure. For instance, we agree that “Norm entrepreneurs are critical for norm emergence because they call attention to issues or even ‘create’ issues by using language that names, interprets, and dramatizes them” (Finnemore and Sikkink 1998:897). Yet we recognize that a norm entrepreneur can engage in this behavior for the purpose of furthering its own self-interest, for instance, justifying its actions to the international community in order to build a “permissive normative order” (Kegley and Raymond 2003:390–391). If a powerful actor such as the United States promotes a new norm in this contested space, the end goal is not always to define a new “standard of appropriateness” (in contrast to the Finnemore and Sikkink model) for the international community at large. **The effort can be targeted toward a limited end goal that will benefit the U**nited **S**tates, **but without immediate reference to how it might impact other states’ behavior**. It is unlikely that the United States advances or “builds” a preventive use of force norm for the purpose of communicating its “notions about appropriate or desirable behavior in their community” (Finnemore and Sikkink 1998:896).

However, other actors in the international system are critical observers of the United States (but not only the US), as they learn what rules are considered to be legitimate by this powerful player, and how they might benefit or use this information to their advantage. Scholars have identified at least two mechanisms through which these norms spread: “moral cosmopolitanism” and domestic factors.4 Moral cosmopolitanism usually focuses on transnational actors that seek to convert other actors to their way of thinking, especially to those ideas that relate to universal norms such as human rights (Nadelmann 1990; Keck and Sikkink 1998). The Finnemore and Sikkink model fits into this category. The other major school of thought focuses on domestic factors that make a norm more or less likely to stick (Cortell and Davis 1996; Legro 1997; Checkel 2001). These can be political, cultural, or organizational conditions that foster or inhibit the spread of an international norm within a state (Acharya 2004). For example, the international norm of women's rights would be more difficult to spread in a society that is highly patriarchal. Or, an international norm may be more likely to be internalized by elite learning (Checkel 1997).

With regard to the norm of preventive self-defense, we argue that the United States has acted as norm entrepreneur, albeit reluctantly.5 Over the last decade, the United States has demonstrated in both rhetoric and action the legitimacy of preventive self-defense. Much of the argumentation and debate on this subject arose just prior to and during the US conflict in Iraq. Some argued that under current international law, states have the right to self-defense, but do not have right of preventive self-defense unless the action is sanctioned by the United Nations Security Council (Kaufman 2006). Others debated the “slippery slope” between preemptive and preventive war (Crawford 2003).6

While the debate focused mainly on preventive war, the underlying idea about the preventive use of force in self-defense can be applied more broadly. Indeed, **this idea is not limited to war, but also** to smaller-scale military engagements as reflected in **drone strikes**, for example. We therefore focus on preventive self-defense as a strategy, deployed by a range of tactics, in this paper.7 We assert that **the norm of preventive self-defense** has not only emerged, but **has** also **begun to diffuse to other countries.** Why? First, it is possible that conforming to norms is related to a state's reputation—one's “international image” (Finnemore and Sikkink 1998:904). States may believe that adopting the norm of preventive self-defense may act as a deterrent to their enemies such that they develop a reputation for “toughness.” Second, **the norm stems from a powerful, successful state:**

**How the U**nited **S**tates **acts is an** enormous influence **on the behavior of others**. When the reigning hegemon promotes a new code of conduct, it alters the normative frame of reference for virtually everyone else. In anarchical systems, what the strongest do eventually shapes what others do, and when that practice becomes common, it tends to take on an aura of obligation. As Stanley Hoffman (1971) has put it, rules of behavior become rules for behavior. (Kegley and Raymond 2003:391)

Third, the norm of preventive self-defense exists within a normative structure that supports it. The erosion of traditional sovereignty norms, brought on by a rise in human rights norms and globalization, among others, allows for the further redefinition of states’ rights and obligations.

Fourth, the post-9/11 context provides an environment with heightened security concerns, particularly from nonstate actors and high-tech weaponry, which compels state actors to reconsider their defense strategies. Many **states**, well over 50, **are investing in weaponized** unmanned aerial vehicles, or **drones, capable of precision strikes and real-time surveillance that further support the move to the preventive use of force**. While drones are not inherently designed for preventive self-defense, states’ cost–benefit calculations regarding the options available for this purpose certainly lean toward drones as the weapon of choice, as they offer a trifecta of capabilities: precision, reconnaissance, and surveillance.8

That lowers the threshold for pre-emption

Fisk & Ramos 13 (Kerstin Fisk --- PhD in Political Science focusing on interstate war @ Claremont Graduate University, Jennifer M. Ramos-- PhD in Polisci and Professor @ Loyola Marymount focusing on norms and foreign policy, including drone warfare and preventative use of force, “Actions Speak Louder Than Words: Preventive Self-Defense as a Cascading Norm” 15 APR 2013, International Studies Perspectives (2013), 1–23)

Conclusion

Preventive self-defense entails waging a war or an attack by choice, in order to prevent a suspected enemy from changing the status quo in an unfavorable direction. Prevention is acting in anticipation of a suspected latent threat that might fully emerge someday. One might rightfully point out that preventive strikes are nothing new—the Iraq War is simply a more recent example in a long history of the preventive use of force. The strategic theorist Colin Gray (2007:27), for example, argues that “far from being a rare and awful crime against an historical norm, preventive war is, and has always been, so common, that its occurrence seems remarkable only to those who do not know their history.” Prevention may be common throughout history, but this does not change the fact that it became increasingly difficult to justify after World War II, as the international community developed a core set of normative principles to guide state behavior, including war as a last resort. The threshold for war was set high, imposing a stringent standard for states acting in self-defense. Gray concedes that there has been a “slow and erratic, but nevertheless genuine, growth of a global norm that regards the resort to war as an extraordinary and even desperate measure” and that the Iraq war set a “dangerous precedent” (44). Although our cases do not provide a definitive answer for whether a preventive self-defense norm is diffusing, they do provide some initial evidence that states are re-orienting their military and strategic doctrines toward offense. In addition, these states have all either acquired or developed unmanned aerial vehicles for the purposes of reconnaissance, surveillance, and/or precision targeting.

Thus, the results of our plausibility probe provide some evidence that the global norm regarding the use of force as a last resort is waning, and that **a preventive self-defense norm is emerging and cascading following the example set by the U**nited **S**tates. At the same time, there is variation among our cases in the extent to which they apply the strategy of self-defense. China, for example, has limited their adaption of this strategy to targeted killings, while Russia has declared their strategy to include the possibility of a preventive nuclear war. Yet, the preventive self-defense strategy is not just for powerful actors. Lesser powers may choose to adopt it as well, though perhaps only implementing the strategy against actors with equal or lesser power. Research in this vein would compliment our analyses herein.

With the proliferation of technology in a globalized world, it seems only a matter of time before countries that do not have drone technology are in the minority. While preventive self-defense strategies and drones are not inherently linked, current rhetoric and practice do tie them together. Though it is likely far into the future**, it is all the more important to consider the final stage of norm evolution—internalization—for this particular norm**. While scholars tend to think of norms as “good,” this one is not so clear-cut. If the preventive self-defense norm is taken for granted, integrated into practice without further consideration, it inherently changes the functioning of international relations. And unmanned aerial vehicles, by reducing the costs of war, make claims of preventive self-defense more palatable to the public. Yet **a global norm of preventive self-defense is likely to be** destabilizing**,** leading to more war **in the international system**, not less. It clearly violates notions of just war principles—jus ad bellum. **The U**nited **S**tates **has set a dangerous precedent, and by continuing its preventive strike policy it continues to provide other states with the justification to do the same.**

Global nuclear war

William Bradford, Assistant Professor of Law, Indiana University School of Law, July 2004, SYMPOSIUM: THE CHANGING LAWS OF WAR: DO WE NEED A NEW LEGAL REGIME AFTER SEPTEMBER 11?: "THE DUTY TO DEFEND THEM": n1 A NATURAL LAW JUSTIFICATION FOR THE BUSH DOCTRINE OF PREVENTIVE WAR, 79 Notre Dame L. Rev. 1365

For restrictivists, n67 anticipatory self-defense, despite its pedigree, is "fertile ground for torturing the self-defense concept" n68 and a dangerous warrant for manipulative, self-serving states to engage in prima facie illegal aggression while cloaking their actions under the guise of anticipatory self-defense and claiming legal legitimacy. n69 Analysis of the legitimacy of an act of anticipatory self-defense requires replacing the objectively verifiable prerequisite of an "armed attack" under Article 51 with the subjective perception of a "threat" of such an attack as perceived by the state believing itself a target, and thus determination of whether a state has demonstrated imminence before engaging in anticipatory self-defense lends itself to post hoc judgments of an infinite number of potential scenarios, spanning a continuum from the most innocuous of putatively civilian acts, including building roads and performing scientific research, to the most threatening, including the overt marshaling of thousands of combat troops in offensive dispositions along a contested border. Establishing the necessity of anticipatory self-defense in response to a pattern of isolated incidents over a period of time is an equally subjective task susceptible to multiple determinations and without empirical standards to guide judgment. n70 History is replete with examples of aggression masquerading as anticipatory self-defense, n71 including the Japanese invasion of Manchuria in [\*1385] 1931 n72 and the German invasion of Poland in 1939, n73 and by simply recharacterizing their actions as anticipatory self-defense rather than aggression dedicated to territorial revanchism or fulfillment of religious obligations, **self-interested states such as China, North Korea, Pakistan, or members of the Arab League,** restrictivists warn, **might claim the legal entitlement to attack**, respectively, **Taiwan, South Korea, India, and Israel**. n74 Moreover, taken to its logical extreme the doctrine of anticipatory self-defense might be interpreted as authorizing a state under the leadership of a paranoid decisionmaker to attack the entire world on the false suspicion of threats emanating from every corner. n75

## 2

Ending the AUMF’s global war on Al-Qaeda is key to overall counterterrorism – it fuels recruitment and short-circuits long-term strategy

Christopher McIntosh, Visiting Assistant Professor, Political Studies, at Bard College and has a Ph.D. in political science from the University of Chicago, Winter 2014, Ending the War with Al Qaeda, Orbis, 58.1

Some might object that a shift in policy would constitute surrender, an admission of defeat, or some other formulation of American weakness—certainly political opponents would characterize it as such. Senator Saxby Chambliss wasted no time in arguing this after Obama’s NDU address, calling the limitations on targetedkillinga“victory”forthe“terrorists.”28 But **dropping the framework does not eliminate force as an available option in addressing Al Qaeda**. As one expert stated to the Senate Armed Services Committee in May 2013, “**With or without the AUMF, no one disputes** [emphasis added] that the president has **the constitutional authority** (and the international law authority) **to use military force** if necessary **to defend** the United States **from** an **imminent attack**, regardless of whether the threat emanates from al Qaeda or from some as yet unimagined terrorist organization.”29 **Dropping the framework would only return us to the pre-2001 status quo (legally speaking), which treated terrorism as an ongoing legal and intelligence issue, rather than primarily a military one. Shifting away from war as the framework also doesn’t preclude the possibility of moving back to a state of war should events require it**. A strategic shift along these lines is not a commitment to never use force again; it simply removes it as the presumed appropriate response and baseline for U.S. action. Certainly it is possible that in the future that the threat could change in such a way that war is the appropriate and necessary response—much as it was in late 2001.

Strategically speaking, dropping the war framework offers a middle ground. On the one hand, **it removes the blank check** offered to the executive to engage U.S. forces abroad whenever the president sees fit. Currently, the way **the AUMF** is interpreted **provides** little to **no restraint** on the United States’ use of force abroad. **Dropping the framework is not merely a rhetorical move** on the part of the U.S. government to end the war on terror—the legal status has been invoked continually by the past two administrations to silence any opposition to decisions they make in pursuit of al Qaeda. The issue is political and legal, not simply rhetorical.

Simultaneously, **shifting away from a state of war does not take the use of force off the table** as an option; **it simply removes it as the baseline or presumed appropriate response**. **The likely effect on** the rate of **strikes** conducted abroad **would** certainly **be** one of **restraint, but it would not end strikes**, nor should it. There has always been a presumption that the executive can use force to preemptively strike those who attempt to attack the United States. Dropping the framework would not alter that—we saw this prior to 2001. **It would**, however, **alter the presumption** introduced by the Bush Administration’s first National Security Strategy **that preventive war**—using force against those who have the capacity, but do not pose a specific, credible threat—**is acceptable**.

**Shifting policy away from war and armed conflict to legal enforcement** also **opens up** other **alternative strategies** for addressing the AQ threat. In particular, efforts to address the long-term trends that enable terrorism and terrorist campaigns are foreclosed by a strategy of war because the process of fighting is at odds with their mission. Alternative frameworks and strategies for countering terrorism such as using a metaphor of social epidemic—seeking to eliminate the spread of radicalism utilizing lessons from public health approaches—or prejudice reduction, undermining the viewpoints that enable individuals to view terrorist campaigns as attractive options, offer different ways of framing the threat in a manner that is **more comprehensive and long-term**.30 Regardless of the particular approach taken and its potential effectiveness, options attempting to deal with **the underlying issues that enable the threat to continue such as ideology**, factors enhancing individual susceptibility to **radicalism and** creating **at-risk individuals are de-emphasized in a war**. **Addressing long-term factors is not** particularly **important during a conflict**— converting the enemy and eliminating the reasons for the dispute in the first place aren’t typical concerns during wartime.

Most importantly, history demonstrates that these conflicts rarely end in a state of war. As Audrey Cronin reminds us, “terrorism is like war, it never ends; **however, individual terrorist campaigns and** the **groups** that wage them **always do**.”31 Military repression alone is rarely the means by which these campaigns end. In most cases there is a shift to an alternate strategy such as law enforcement, political cooption, or even amnesty or there is a larger societal trend such as the loss of popular support. While debate exists regarding the effectiveness of the particular measures chosen, **non-military measures have seen significant success** in places as diverse as Ireland, the Philippines, and Sri Lanka.32 **There is little reason to imagine that al Qaeda is** sufficiently **different** that we should expect a different outcome relying solely on a military strategy throughout the entirety of this conflict. The United States has relied upon leadership targeting and military strikes for over 12 years. Given the history of terrorist campaigns—as well as the U.S. experience— these **soft measures offer the potential of** being a successful means of building upon these gains and achieving **victory**.

**Ending the strategy of war could have a direct effect on** these softer measures by eliminating a crucial means of support for **al Qaeda’s ideology**. **Ending the war**—and the continuing military strikes it requires—**removes a primary means of recruitment and propaganda**. While military strikes have eliminated key members, the effect these strikes offer in generating support for terrorists is well- worn territory. Regardless of whether the actual numbers of civilian casualties are closer to United States estimates, or in the thousands as independent organizations argue, **U.S. attacks inevitably risk** these **civilian casualties and make it** incrementally **easier for al Qaeda to justify their** choice of terrorist **tactics**. In addition, psychological studies of terrorist attackers themselves cite a positive relationship between the suffering of direct trauma—such as the loss of a family member at the hands of the perceived enemy—and those willing to engage in suicide attacks.33

**Al Qaeda** also **benefits from** the increasing expansion of **U.S. intervention abroad in the form of drone strikes, bases, and troop deployments** as it provides tangible evidence for their claims of U.S. imperialism. **And** the longer the war **on terrorism** continues, the harder it will be **in the court of international public opinion** to credibly dispute AQ’s vision **of the United States as a militaristic nation with an imperialist bent**. This is not to say that al Qaeda’s reading of U.S. foreign policy over the last half century is correct—it is not—but as 9/11 recedes further into the past and the length of time without a similar scale attack on the U.S. homeland begins to measure in the decades, the vision of America pushed by al Qaeda may have increasing credibility.

The United States could remain at war with al Qaeda for an indefinite period of time winning tactical battles and preventing major attacks, but all that may be seen publicly are continuing U.S. military interventions into foreign countries killing those they deem enemies. **The longer this goes on, the less credibility the United States will enjoy internationally**, and that loss of credibility is directly at odds with some of the longer term, “soft” measures necessary to end the conflict successfully. Without **this** credibility, it will be difficult to conduct the efforts to undermine the individual, public, and political support that historically has been crucial to ending **terrorist** campaigns.

Conclusion

A war that does not end cannot be won. The United States is at the point of envisioning victory, yet the actions taken by the last two administrations provide little hope that America is currently on a path to a successful conclusion. **Continuing a strategy of indefinite conflict and perpetual stalemate works to the advantage of al Qaeda, not the U**nited **S**tates. Although many have compared the war on terror to the Cold War, we seem to resist applying its lessons.34 Deterrence precluded either side from engaging in direct conflict with the other and the Cold War never actually devolved into direct superpower conflict and outright war. Military strategy revolved around preventing war, rather than fighting and winning a protracted conflict, and the conflict only ended with a collapse from within.35 The United States is in a similar paradox as the nation is faced with a situation where **direct attacks are costly**, potentially **counterproductive, and unable to achieve** the ultimate **defeat of the enemy**. Continuing to prosecute a war with al Qaeda serves their interests, not ours. The United States has reached a point in the war with al Qaeda where the winning move is simply not to play.

Only the plan ends our exclusive focus on AQ – that’s key

Christopher McIntosh, Visiting Assistant Professor, Political Studies, at Bard College and has a Ph.D. in political science from the University of Chicago, Winter 2014, Ending the War with Al Qaeda, Orbis, 58.1

After 12 years, the United States is facing a dramatically different and eroded enemy and the possible legitimizing effect of a state of war is worth revisiting—as was made clear in Obama’s address. **As long as the U**nited **S**tates **remains at war with al Qaeda, the latter remains a meaningful political actor**. Recognizing al Qaeda as an enemy made sense in 2001—the horrific acts they committed meant the enemy was a serious threat regardless of what we did in response. However, the al Qaeda of the recent past is vastly different—their operational capability within U.S. borders has receded drastically and declaring this particular terrorist group to be the one organization worthy of an **indefinite** state of **war elevates their stature** in ways that no longer serve our interests.

This elevation of stature is not without its pitfalls. **U.S. foreign policy has** almost **singularly focused on the elimination** and “effective destruction” **of al Qaeda for well over a decade, yet it continues to exist**. The obvious question is, “**why**”? The usual answer focuses on al Qaeda’s decentralized structure, the difficulty of attacking transnational actors in sovereign states, recruitment, and the like. Each of these is potentially resolvable (in theory, if not in practice). But what these discussions often ignore is that the process of war **itself—identifying targets, prosecuting supporters, continually labeling and identifying an enemy—all help to** continue **the notion of “**al Qaeda” as a meaningful political actor. The Benghazi attacks are perpetrated by “al Qaeda,” not Ansar al-Sharia, terrorists in Yemen are “al Qaeda in the Arabian Peninsula,” and **even the attacks in Boston are considered “al Qaeda-inspired**.”

The point is that **while these groups may be connected, so long as they are all subsumed under the same name**, as the actions of “the enemy” with whom we are at war, rather than treated as individual groups or even radicalized individuals, **the stature of these groups or individuals is enhanced, and the ideological claim that the U**nited **S**tates **is at war with Islam is** seemingly **validated**. Much like Zeno’s paradox of the arrow in flight, the United States keeps getting closer to the target, yet the target ultimately remains out of reach.

**Prosecuting a war with al Qaeda** also **sends a mixed message internationally**. If the United States refuses to acknowledge al Qaeda as a political actor—legitimate or otherwise—continuing a war with this entity is at cross-purposes. The war on terrorism is already one of the longest wars in U.S. history. After 12 years of shaping U.S. foreign policy and national security strategy, it is increasingly difficult for us to assert that al Qaeda is an illegitimate actor whom we claim not to recognize when our actions—specifically designating them as the enemy with whom we are most concerned and potentially justifying boots on the ground anywhere in the world—are directly at odds with this stance.

**Continuing** the fight only communicates to the world at large that al Qaeda is important **enough to occupy the bulk of American attention internationally**. Foreign governments, terrorist organizations, and individuals around the globe who are predisposed toward opposing the United States see al Qaeda almost as the global “brand” for armed anti-Americanism. **As long as the U**nited **S**tates **remains at war**, similarly motivated **individuals and groups will see al Qaeda as an entity worth supporting**. Since there are countless groups—both domestic and foreign—who oppose the United States and are willing to match those ideas with terrorist violence; singling out al Qaeda elevates the stature of these groups. In addition, as long as al Qaeda poses enough of a threat to warrant a war, **those interested in drawing the U**nited **S**tates **into conflict** (in the hopes of creating an overreach and eventual rollback of U.S. presence) **have an incentive to affiliate with al Qaeda because it guarantees** an expanded state of **war in response**.

According to the U.S. National Security Strategy, terrorist organizations pose a threat merely by their very existence, just as states do.19 Al Qaeda may not be a state with territory, a capital, or established diplomats, but it is a transnational organization with tangible assets, such as leaders, supporters, financiers, weapons, de facto territorial control, and money. An organization’s intangible elements are equally important, however, and al Qaeda is as much an idea as it is an organization. **Ideas**—like states—**are** nearly **impossible to** “effectively **destroy” through combat**.

One of the important shifts from the Bush to the Obama Administrations was to narrow the war on terrorism to al Qaeda and its affiliates. President Obama went to great lengths early on in his administration to argue the United States was not at war with an idea. His National Security Strategy spelled this out directly, stating that we are not at war with a “tactic or a religion ... we are at war with a specific network—al Qaida, and its affiliates.”20 While it has been successful in some ways—we are no longer at war with the idea of terrorism—the United States is just as much at war with the idea of al Qaeda as it is the individuals and the material (weapons, explosives, communications) that makes al Qaeda an entity. The problem facing the United States is that even when an enemy is defeated, wars rarely eliminate the idea of the defeated state or group. Regimes may change, cities may be leveled, but the idea of the state remains. Even wars of annexation rarely eradicate the idea of the entity annexed and, in some cases, can ignite further nationalist sentiment among the annexed population. **Continuing the war** also **risks perpetuating a group that may not even exist still**. The al Qaeda that conducted the “act of war,” that Bush described is not the same al Qaeda facing the United States today. Like any loosely networked organization, al Qaeda has undergone significant changes over the past 12 years, largely the result of successful U.S. operations. **Al Qaeda’s lack of status, recognized institutions, and territorial control** complicates the issue further as it **makes identifying al Qaeda itself increasingly difficult**. Unlike most wars, it’s not as if there is an embassy or political group to engage. Affiliates such as al Qaeda in the Islamic Maghreb (AQIM) and al Qaeda in the Arabian Peninsula (AQAP), as well as other **splinter groups** in Somalia, Yemen, and elsewhere, **have all emerged as increasingly relevant** as the war has continued.21

When evaluating successful destruction of “al Qaeda,” the United States must first carefully assess which individuals are actually the “al Qaeda” we are at war with. Yet the answer to that question—unlike a uniformed military adversary—is not immediately apparent nor is it even a question that can be answered. What criteria do we use? Is it all who fight under the al Qaeda banner or just AQIM or AQAP? The January 2013 hostage crisis in Algeria, overseen by Mokhtar Belmokhtar, amply demonstrated potential fissures in the groups that operate under the al-Qaeda name, as well as the difficulty in precisely addressing who was responsible and what organization authorized it.22 **These** questions must be answered operationally because without a change the executive will retain unilateral control over **the definition of “al Qaeda” leaving** the war’s scope **as narrow or as wide as the president sees fit**.

Continuing to treat the current confrontation with al Qaeda as a war also shapes policies in ways that may not be appreciated fully by those responsible for prosecuting it. Legal debates about the definition of war aside, **all wars require** armed conflict and this necessitates **targets, operations, and** most fundamentally, the use of **force**.23 In the case of a state-less enemy like al Qaeda that force cannot be used on territory, military targets, capitals, or even populations. The only tangible target for U.S. force is al Qaeda’s personnel. By the standards of the U.S. military, even AQ’s weaponry is too insignificant to target directly. **Fighting a war necessitates targets**—**maintaining a state of war creates a perverse incentive for** the continued **targeting** of individuals as long as the conflict continues—**regardless of the** added **utility of killing** each additional targeted individual because individuals are the only thing al Qaeda has that we can target.

Real evidence is beginning to mount that targeting AQ’s personnel has successfully weakened al Qaeda in tangible ways.24 While these policies undoubtedly have eroded the central structure of al Qaeda, **continuing to target individual AQ members excludes options that historically have been successful at ending terrorist campaigns**. The Obama Administration claims it uses attacks only when it cannot capture, but this is not the only option being foreclosed. Governments have used successfully strategies of cooption—including amnesty programs and political cooption to end terrorist campaigns.25 While direct political cooption is not a particularly realistic option with al Qaeda, amnesty programs for members offer some attraction not least because they may lead to intelligence gains.

Perhaps most importantly, governments have utilized policies aimed at exploitinginternaldivisionswithintheseorganizationstosubstantialeffect.26 Given the global nature of the organization and differences in regional interests, one could argue that this option could be very fruitful. Regardless of its ultimate effectiveness, it is off the table so long as all al Qaeda members, sub-groups, and affiliates are singularly treated as the enemy.

AQ affiliates are getting stronger

Sam Jones 14, FT, Al-Qaeda: on the march, January 19, <http://www.ft.com/cms/s/2/d8662d86-8124-11e3-95aa-00144feab7de.html#slide0>

At its peak, the US drone programme – with Hellfire missiles picking off al-Qaeda leaders seemingly at will in the remote mountains of Yemen and the tribal borderlands of Pakistan – meant becoming number three was as good as being dead.

But **al-Qaeda has proved** to have a **Hydra-like** quality. **Far from withering, it has proliferated**. **The group and its affiliates have never controlled more land, had as many recruits** in their ranks **or been as well financially resourced as now**.

In recent months, al-Qaeda franchises have scored successes or near-victories in an arc stretching from the Sahel in east Africa through to the Levant via the Horn of Africa, Yemen and Iraq.

In 2012, al-Qaeda forces came within hours of seizing control of Bamako, the capital of Mali. In 2013, its militants radicalised the conflict in Syria. This year has begun with fighters storming the city of Fallujah in Iraq, just 70km from Baghdad. They still control it.

Last Wednesday, the US House Intelligence committee opened an inquiry to investigate the resurgence of the group. Mike Rogers, the Republican congressman who chairs the committee, called the demise of al-Qaeda a “false narrative” and warned against complacency in Washington. He cautioned: “**The defeat of an ideology requires more than just drone strikes**.”

Three fundamental questions are of concern to the west in its handling of the group’s rebound. How resilient is the resurgence, how centralised is its structure and how much of a threat does it still pose internationally?

The hope among its opponents is that al-Qaeda’s renaissance belies a still dangerous but fatally weakened foe. Many see the group as a disparate set of franchises that have fed off disenchantment caused by the Arab Spring, but which ultimately are either locally focused and pragmatic. Or they believe it will burn itself out through its own brutality, alienating local Muslim populations by persecuting them as much as waging jihad against the west and its regional allies.

They point to the situation in Syria, where jihadis fighting for the Islamic State of Iraq and al-Sham are committing atrocities against civilians, turning other Islamist groups against them.

But Isis’s brutality – and the “seeds of its own destruction” narrative of al-Qaeda that is perpetuated by such actions in the west – is far from the complete picture.

**Al-Qaeda** is certainly disparate and no longer controlled to the same degree by a central authority. But it **has proved very adaptable**, and very aware of the mistakes it made in the past.

Afghanistan and Pakistan

In Afghanistan, the rout of al-Qaeda has been extensive. Intelligence analysts put the number of al-Qaeda operatives functioning in the country as low as 200, although many fear a rebound if aid to the fragile Afghan government dries up.

For now, al-Qaeda’s core presence in the area – and the world – remains in Pakistan, where Ayman al-Zawahiri, the successor to Osama bin Laden, is based.

Its links in Pakistan run deep. It is telling that it took the US a decade to find the whereabouts of bin Laden, who turned out to be living in a compound in urban Abbottabad. While al-Qaeda is known to have a significant presence in the Federally Administered Tribal Areas of the country, many analysts believe **its core leadership operates comfortably** – or could even be based **in** – its most populated, **metropolitan areas**.

**The US drone campaign explains why**. “You can’t just go and bomb an urban area,” says Shashank Joshi, research fellow at the Royal United Services Institute, a UK think-tank. “**Al-Qaeda has adapted to our counterterrorism measures and it has become more resilient**. [While] its leadership has been shattered at various points, **it is clearly not** any longer an organisation **dependent on a small coterie of individuals for its survival**.”

Syria and Iraq

It is now difficult to imagine that before the 2003 US invasion of Iraq, al-Qaeda and affiliated groups had almost no presence in the Levant. The ill-fated **US occupation created** both **a lawless environment for radical jihadi governments to take root and fomented an ideologically potent cause for them to pursue**.

Al-Qaeda’s early success in Iraq under Jordanian Abu Musab al-Zarqawi was unwound from 2006, thanks to the US-funded sahwa (awakening) of local Sunni tribes in Iraq’s Anbar province, who revolted against al-Qaeda’s excesses. It has since been resurgent. In Syria, the relentless and brutal assault on mostly peaceful Sunni protesters by Bashar al-Assad, the country’s Alawite president, has provided al-Qaeda with an expansive presence in the region. In Iraq, political mismanagement on the part of President Nouri al-Maliki and the spillover from Syria have contributed to the group’s renewed presence in Anbar province.

Both Jahbat Al-Nusra, led by Abu Mohammed al-Joulani, and the Islamic State of Iraq and al-Sham, led by Abu Bakr al-Baghdadi, claim affiliation to al-Qaeda in the region.

But in Syria, it is Al-Nusra – Syrian- led and more tolerant – that has the support of Mr Zawahiri, and not the more brutal Iraqi-dominated Isis, which has already alienated swaths of the indigenous Syrian population with its ruthlessness.

Yemen

The remote mountains of southern Yemen gave birth to al-Qaeda and to this day remain one of the group’s most cohesive strongholds in the world. The group has found solace among the mountains and fiercely independent tribes of the south, tapping into the deep pool of resentment born of grinding poverty, anti-northern sentiment and, more recently, **US drone strikes** that **have** all too often **hit innocent targets**.

The Yemeni and Saudi branches of the group merged in 2009 to form al-Qaeda in the Arabian Peninsula, led by Nasir al-Wuhaishi, Osama bin Laden’s former secretary and one of Mr Zawahiri’s closest allies. **AQAP** is considered by western intelligence agencies the most dangerous branch of al-Qaeda, and it **has proved resilient**: a government campaign in 2012 to expel the group from Abyan and Sabwah provinces is still continuing.

AQAP has more recently adapted its method of exporting jihad by using other militant groups around the world as proxies.

“This may be the kind of relationship that we increasingly see between AQAP and other groups with the promotion of Mr Wuhaishi – loose operational guidance with seed funding and, where possible, the provision of fighters to participate in high-profile plots, especially in the fluid security environments of north Africa,” says John Nugent, terrorism analyst at Control Risks, a security consultancy.

Horn of Africa

In the Horn, al-Qaeda’s current largest affiliate is **al-Shabaab** (the Boys), the former youth movement of the Islamic Courts Union (ICU), the radical Islamist group that once controlled most of Somalia.

While it has been forced to cede huge swaths of territory in the past 18 months, it **remains** a **well-resourced** organisation, and embedded throughout Somalia.

The UN estimated it earned $50m a year when it controlled the port of Kismayo. It has also exploited the illegal ivory trade, killing hundreds of elephants in the region, according to environmental campaigners.

As al-Shabaab has been pushed back, it has sought to export violence to the home soil of those fighting it, such as Kenya. The group orchestrated the deadly Westgate shopping mall attack in Nairobi last September, in which more than 60 people died.

The ICU itself had strong ties with al-Qaeda core, with many of its founding leaders trained in Afghanistan, but al-Shabaab has often chosen to follow its own path.

In 2010 Mr Zawahiri sought to replace al-Shabaab’s leader, Ahmed Godane, but his ruling was ignored. Mr Godane swore allegiance to Mr Zawahiri again in 2012.

The Sahel and Maghreb

More than a year after staging a spectacular attack on a remote Algerian oil and gas facility, and 18 months after nearly seizing control of Mali, al-Qaeda of the Islamic Maghreb appears on the defensive. French troops have pushed back AQIM, led by Abu Musab Abdel Wadoud, a veteran of Algeria’s 1990s civil war. Algeria’s security forces have cornered extremist groups.

But from Mauritania to Libya, the longstanding ethnic and political grievances still fester. The abuses of the civil war that fed Algerian Islamist anger have never been resolved. The official neglect that led ethnic Tuaregs to seek an autonomous Saharan homeland has worsened.

“**No one should underestimate the narrow margin** that existed **between AQ and their goal** of seeking **to take over** the organs of **a whole state and create a safe haven**,” says Stephen O’Brien, the UK prime minister’s special envoy to the Sahel, referring to AQIM’s near takeover of Bamako, Mali’s capital, in 2012.

“What is clear is that **the franchise’s approach has become** much more about **winning** over the **hearts and minds** of populations by the provision of basic services.”

Drone strikes are structural insufficient to solve

David Gartenstein-Ross 14, senior fellow at the Foundation for Defense of Democracies and a prof at Georgetown, The Arab Spring and Al-Qaeda’s Resurgence, February 4, <http://defenddemocracy.org/stuff/uploads/documents/DGR_Arab_Spring_testimony_final.pdf>

Conventional wisdom holds that al-Qaeda’s senior leadership has been decimated by Osama bin Laden’s death and the drone campaign that the U.S. has been waging. If this is the case, then regardless of the opportunities it perceives from the Arab Spring, perhaps al-Qaeda is unable to execute any of its strategic ideas. However, I would question this conventional wisdom for two reasons. First, the available evidence suggests that **leadership attrition does not degrade groups like al-Qaeda** to the extent that is often believed. Second, there is specific evidence that **AQSL retains capabilities despite** this **attrition**.

Relevant to the question of what impact attrition has had on AQSL is an important monograph published by Lt. Col. Derek Jones entitled Understanding the Form, Function, and Logic of Clandestine Insurgent and Terrorist Networks. 19 Jones notes that, historically, the overt and visible parts of a guerrilla group aren’t the most important components. Instead, look to the clandestine underground. It is a well-worn adage that, by slowly eroding the opponent’s will, **a guerrilla network “wins by not losing**.” Of course, a network doesn’t require mere survival in order to win, but must also maintain the ability to mount attacks.

Unfortunately, al-Qaeda long ago understood how to lessen its organizational signature. Jones argues that **al-Qaeda and similar groups** are clandestine cellular networks: clandestine in that they are designed to be out of sight and cellular in that they **are compartmentalized to minimize damage** when the enemy neutralizes some portion of the network. Compartmentalization takes two forms. First, at a cell level, a minimum of personal information is known about other cell members. Second, there is strategic compartmentalization between different elements within the organization. Counterinsurgents can capture one person in a cell without destroying the cell; and where cell members must interact directly, structural compartmentalization attempts to ensure that the cell cannot be exploited to target other cells or leaders. Jones writes that counterinsurgents routinely mistake the more overt parts of an insurgency—which can be easily replaced—for the clandestine cells that generate them. But some of the seemingly spontaneously generating cells may say less about the supposedly decentralized nature of a network than it does about the clandestine leadership’s ability to hold itself out of view and recover from seemingly fatal reverses. The most troubling implication of Jones’s study is that **al-Qaeda may be well positioned to recover from** the **losses** that so many analysts believe have devastated it. As Jones argues, the form, function, and logic of this organization are designed to maximize its chances of survival, and thus “**the removal of single individuals, regardless of function, is well within the tolerance of** this type of **organizational structure and** thus **has little long-term effect**.”20 Though this point may be overstated as applied to very effective figures like bin Laden or Anwar al-Awlaki, the powerful point remains that the logic of organizations like al-Qaeda is such that **their ability to recover from leadership** and other **losses is maximized**.

Much like today, conventional wisdom a decade ago held that al-Qaeda’s core leadership had been decimated. A 2004 Los Angeles Times article outlines the perceptions counterterrorism experts held at the time: “Osama bin Laden may now serve more as an inspirational figure than a CEO,” and “the al-Qaeda movement now appears to be more of an ideology than an organization.”21

 This conventional wisdom proved to be inaccurate; and indeed, **prevailing views of al-Qaeda** have tended to **underestimate its resilience**. As Bruce Hoffman recently noted in an academic article documenting widely shared perceptions of al-Qaeda dating back to 2003, “Al-Qaeda Core has stubbornly survived despite predictions or conventional wisdom to the contrary.”22 Other **academic work examining the drone campaign** also **undermines the notion that this** attrition-based **strategy is likely to cripple the jihadist group**.23 In addition to the possibility that analysts are overestimating the impact of attrition, there are specific reasons to believe al-Qaeda remains a viable network. At the time of bin Laden’s death, al-Qaeda was anything but a shattered organization: documents captured from his compound in Abbottabad, Pakistan indicated that bin Laden “was a lot more involved in directing al-Qaeda personnel and operations than sometimes thought over the last decade,” and that he had been providing strategic guidance to al-Qaeda affiliates in Yemen and Somalia.24 Press reporting identified a dispersed leadership with named individuals in Pakistan, Afghanistan, Yemen, and East Africa. There have been no reports that the vast majority of leaders identified **in the wake of bin Laden’s death** were killed or that their authority has diminished.

Information that has come out over the past few years further indicates that **the network remains functional**. For example, the Egyptian press has published correspondence from the Jamal Network, which is based in both Egypt and Libya, showing that Al-Qaeda in the Arabian Peninsula (AQAP) served as a conduit between its leader, Muhammad Jamal, and Zawahiri. Other documents show that Muhammad Jamal sent an individual to Mali to serve as his representative there during the country’s period of jihadist rule in the north, thus confirming the overlap between various jihadist groups. Indeed, press reports indicating that AQIM, AST, Ansar al-Sharia in Libya, Boko Haram, and the Malian jihadist groups MUJAO and Ansar al-Din have worked together operationally in Africa. And August press reporting of what was colloquially dubbed an al-Qaeda “conference call” between more than twenty of the network’s far-flung operatives indicates continuing communications capabilities.25

AQSL’s expansion into Yemen provides further reason to believe that **the senior leadership is growing even more connected**. Nasser al-Wuhayshi of AQAP was promoted in 2013 to al-Qaeda’s general manager. **This indicates a geographic broadening of the core leadership**: there is no reason that AQSL can only exist in South Asia, and the general manager position should be considered part of the group’s core. AQSL’s expansion into Yemen means that they now operate from a more central geographic location from which it will be easier to manage operations in Africa, the Middle East, and elsewhere.

Law enforcement counter-terror’s key to prevent WMD lone wolf terrorism.

George Michael 14, Associate Professor of Criminal Justice at Westfield State (and CEO of the Bluth Family Banana Stand)(and 80’s pop legend), Counterinsurgency and Lone Wolf Terrorism, Terrorism and Political Violence, Volume 26, Issue 1

As the history of guerilla warfare has demonstrated, one of the most important objectives of an insurgency is to survive. More often than not, guerilla wars are not won militarily; rather insurgents persist in their struggle until they force a political solution to the conflict. Historically, **the critical factor that enables an insurgency to persist over a long period of time is support from the populace**. **New technology**, however, **allows** for smaller and **smaller groups to remain viable even without a broad base of support**.

Chris Anderson of Wired magazine developed the concept of the “long tail” to explain how in the new business environment with platforms such as Amazon, firms can profit by selling previously hard-to-find items to a larger number of customers instead of selling only a smaller variety of popular items in large quantities. 10 Likewise, as Thomas Rid and Marc Hecker observed in their study War 2.0: Irregular Warfare in the Information Age, a similar logic applies to extremist and terrorist groups in the sense that it no longer requires a large popular following to survive over time. **A** relatively **low number of highly motivated**, partly **self-recruited, and geographically dispersed followers can share a cause without broader popular appeal**, thus **making niche terrorism possible**. As a consequence, **the critical mass of people necessary** to establish a viable terrorist movement **has been drastically lowered**. 11

Various political, social, and technological developments have contributed to the miniaturization of terrorist organizations and the increasing frequency of lone wolf terrorism. Geopolitically, the dissolution of the Soviet Union drastically changed the security environment within which terrorists operate. During the Cold War, several communist states were covert supporters of terrorist groups. At the time, supporting terrorism was viewed as furthering the foreign policy objectives of the Soviet bloc. 12 In her classic study, The Terror Network, Claire Sterling maintained that for much of the period from the late 1960s to the early 1980s, the Soviet Union was at the center of a global terrorist apparatus. 13 Although critics dismissed Sterling's thesis when it was first released, subsequent examinations of the Soviet and East German archives after the collapse of the Red Bloc suggest that she was not far off the mark after all. 14 Initially after the Cold War, terrorism went into steep decline in large part because several leading terrorist groups lost material support from communist states. 15 With the collapse of Soviet Communism, the world entered what Charles Krauthammer referred to as the “unipolar” era in which one sole superpower predominates. 16 In an era of U.S.-dominated globalization, states have more to gain by accommodation with the West rather than confrontation. In many parts of the world, the setting is not conducive to large, clandestine groups insofar as many foreign governments are coordinating their counterterrorism efforts with the U.S. government, as they seek to dismantle terrorist organizations and deny them funding and resources. This trend accelerated after 9/11. 17

Technology has contributed to the miniaturization of terrorism as well. One the one hand, new surveillance technology has enabled governments to better monitor dissident groups and potential terrorists. On the other hand, the emergence of **new tech**nology **has the potential to serve as a force multiplier for terrorists**. For example, **the Internet allows like-minded activists to operate on their own initiative without the direction of a formal organization**. **Enhanced communication capabilities** allow for new flexible models of organization that **eschew traditional leadership structures and enable collaboration by disparate parties that are geographically dispersed**. Furthermore, the rise of the “new media” has led to a diffusion of soft power around the world that has increased access to groups and individuals who have traditionally not had much influence in the marketplace of ideas. The new media developed concomitant with the Web 2.0, which arose after the Dot-com bubble burst in the year 2000. Out of the rubble, a new crop of new Web-based companies and services emerged that offered interactivity and “user-generated content.” The Web 2.0 encompasses an array of interactive communications facilitated by a rapidly expanding set of platforms, including blogs, Web forums, Facebook, Twitter, and YouTube that are linked together in innovative ways. 18 The rise of the new media ushered in a new era of communications, which allowed much greater and broader participation from users, not only in the spheres of commerce and social networking, but in terrorism and insurgency as well. 19

Today, **we are witnessing the age of the “super-empowered individual,” who if** adequately **armed with a** weapon of mass destruction (**WMD**), **could wreak unprecedented havoc**. 20 As the leaderless resistance concept gains popularity in terrorist and extremist subcultures and as our infrastructure becomes more and more interconnected, **just a few** determined **lone wolves have the potential to cause** greater **mayhem**. These developments mark a major departure from previous models of terrorism and insurgency.

Thomas X. Hammes elaborated on Lind's framework in the book The Sling and the Stone: On War in the 21st Century, in which he defined fourth generation warfare as an evolved form of insurgency that endeavors to use all available networks—political, social, and military, to convince the enemy's decision makers that their strategic goals are unattainable or not worth the cost. 21 To be effective, **strategy must evolve to reflect the current operational environment**. Like other previous variants of conflict and warfare that preceded it, the salience of leaderless resistance comes about from a confluence of several political, social, and technological trends. Conceivably, a **fifth-generation warfare could take the form of leaderless resistance** in which individuals and small cells commit **acts of terrorism** on their own initiative **with no traditional command-and-control hierarchy**.

Numerous trends are leading to the miniaturization of terrorism, warfare, and conflict around the world. New Internet platforms allow for faster and more efficient communications of which terrorists can now avail themselves. Greater **interconnectedness** also **makes infrastructure** more **vulnerable to disruption** **as a perturbation could precipitate a cascading effect throughout the system. The availability of** more **lethal weapons and dual use tech**nology **could lead to deadlier attacks**. Finally, although the historical process of globalization has improved the life opportunities of many people, it can be highly disruptive as it upturns relations among citizens, cultures, economies, societies, and governments.

Several factors make leaderless resistance a potentially effective strategy. Although the state's capacity to monitor is substantial, **individuals are** still **able to operate under the radar** screen **and commit violence with little predictability**. For instance, having no criminal record other than minor offenses, Anders Behrig Breivik was able to procure firearms and fertilizer for making his bomb without raising red flags. His **attacks** seemed to **come out of nowhere**. 22 **Leaderless resistance can serve as a catalyst spurring others** to move from thought **to action**. **The tactic can produce a demonstration effect** in **that** violence **spawns copycats**. 23 Extraordinary **examples** of leaderless resistance serve to **recruit new members to the network**. Those actions that are unsuccessful are lost or discarded. 24 **Lone wolves do not require expensive or sophisticated equipment**, as evidenced by the D.C. snipers who used a semi-automatic rifle and a 1990 Chevrolet Caprice to terrorize the area. **Leaderless resistance makes** the **penetration** of terrorist movements **difficult because lone wolves work alone and** they **have no information on other activists**. Further, the mass media can amplify the exploits of lone wolves. Finally, open societies make leaderless resistance easier to carry out because **there are numerous soft targets**. 25 **Nevertheless, there are measures that can be applied to mitigate the risk** of lone wolf terrorism.

Applying Counterinsurgency Methods to Lone Wolf Terrorism

Essentially, counterinsurgency efforts can be conceptualized as a continuum encompassing two disparate approaches. On the one end—the direct approach—is the **annihilation of rebel forces**. However, a strategy based on attrition can be problematical in counterinsurgency insofar as it **runs the risk of** producing **collateral damage and** by doing so, **antagonizing the population**. On the other end—the indirect approach—is **winning the loyalty of the people**. 26 The indirect approach seeks to divide the insurgency from the people. Although this approach can take a long time and requires considerable patience, in the long term it **is usually more effective**. 27 A proven effective method for undermining an insurgency is to split the rank and file away from the leadership through calculated reforms that address the grievances of the people. 28

Some of **these lessons could be applied to lone wolf terrorism**. In order to mitigate the risk of lone wolf terrorism, the U.S. government has explored community engagement programs. Back in the late 1990s, the FBI began an outreach program with “Patriot” style militia organizations to allay suspicion on both sides. 29 In August 2011, the White House released a document entitled “Empowering Local Partners to Prevent Violent Extremism in the United States.” The report warned that political extremism had the potential to divide the nation. To counter this threat, it called for more community engagement. Rather than blame certain communities, it suggested finding ways for them to help themselves. By forging community partnerships, **the threat of terrorism could be reduced**. Information about the threat of radicalization and violence could be provided to a wide range of community groups and organizations. According to the report, the government should be ready to respond to community concerns about government policies and actions. Finally, the report called for more monitoring of the Internet and social network sites to understand their role in advancing violent extremist narratives. 30

**Gaining the trust of the affected communities is vitally important for** several reasons, not the least of which is that they can provide **intelligence, which is critical in** a **counterinsurgency** program. In fact, **information** gathered from informants **has been the most important factor leading to the arrest of terrorists in the U**nited **S**tates. 31 Gaining intelligence on lone wolves, though, can be challenging. With fewer persons involved in a terrorist plot the amount of “chatter”—discussions between conspirators on the phone or the Internet—is reduced. 32 Nevertheless, **even lone wolves must conduct planning** and preparation for their attacks **and** as such, **are vulnerable to detection** as would be a small cell or hierarchical group. 33 And although they act alone or in small groups, lone wolves tend to come out of extremist subcultures. Still, lone wolves often tend to be ideologically idiosyncratic, which often makes them difficult to pigeonhole. 34 Furthermore, though most terrorists are extremists, the vast majority of extremists are not terrorists. Therefore, it is necessary to differentiate persons who express extremist views with those who act upon these ideological impulses. One way to prevent lone wolf attacks is to collect information about people who participate in extremist electronic chat rooms. However, in the United States, this approach has serious civil liberties and civil rights implications due to the country's free speech tradition, which is enshrined in the First Amendment to the Constitution. European nations, by contrast, often subordinate individual liberties for the common good. 35

Understanding the radicalization process can give investigators clues as to who might be susceptible to the blandishments of terrorist movements. 36 Although **lone wolves** are solitary actors, they **do not live in a vacuum**. By cooperating with affected communities, law enforcement authorities can gain insight as to who could be prone to becoming a terrorist. Awareness programs, not unlike those used in schools could be used to engage communities and encourage people to come forward with information on possible terrorist plots. 37 These programs are not without critics in that there is often little oversight in their implementation.

**Disseminating counter narratives** in the affected community **could quell the tensions that give rise to political violence**. Perhaps the most effective approach to countering the threat of lone wolf terrorism would be to use elements of the new media, including YouTube and similar platforms, to post videos and improve public relations. A legal argument has been made that online forums, such as Twitter, could be held culpable for providing “material support of terrorism.” Discussion groups that are forums for radical discourse often display notices that indicate that the material displayed on the sites do not necessarily reflect the views of the administrators, thus suggesting a waiver of liability. In as much as users can have multiple identities, fraudulent identities, and shifting identities, they are hard to trace. And site administrators are often slow to act against threats posted online. 38 To counter these online threats, some persons have recommended the use of various material support statutes to hold ISPs responsible for the content of websites. Others, such as Aaron Weisburd who operates the Internet Hagnah, have sought to “shame” those ISPs that host terrorist-related sites so they will sever their connections. 39 One innovative initiative underway to counter online extremism is a software program that would allow the U.S. military to secretly manipulate social media sites by using fake online identities. In March 2012, it was announced that a California company was awarded a contract by the United States Central Command (CENTCOM) to develop an “online persona management service” that would enable one U.S. serviceman to control up to ten identities based around the world. The operators would seek to influence Internet discussions and spread pro-American propaganda. 40

Despite the Internet, it is unlikely that terrorists will completely self-radicalize. As Burton and Stewart point out, **radicalization tends to occur in a group context** in which individuals receive ideological education and support with like-minded persons. As such, “[i]t is a rare individual who possesses the requisite combination of will, discipline, adaptability, resourcefulness and technical skill to make the leap from theory to practice and become a successful lone wolf.” 41 **Terrorist attacks** often **require careful planning and skills, which few individuals can carry out alone**. **When lone wolves reach out for assistance, they** often **come to the attention of law enforcement**. Jose Pimental, a convert to Islam, was arrested by the New York City Police in November 2011 for allegedly making bombs to be used in a terrorist attack. He sought assistance from someone whom he thought was a fellow jihadist, but was actually an undercover informant working for the police. 42 Finally, in order to survive over a period of time, lone wolves require street skills in order to avoid detection. For example, although Eric Rudolph practiced excellent operational security and had good bomb making and wilderness survival skills, he was ultimately captured for his lack of street skills when his suspicious behavior on a street caused a fellow citizen to follow him back to his truck and report the vehicle's license number to the police. 43

In recent years, the U.S. government has taken notice of the lone wolf trend. In fact, as early as 1998, the FBI publicly announced that small fringe groups could be planning attacks on their own initiative, as the case of Eric Robert Rudolph illustrated. 44 In the summer of 2009, federal authorities announced an effort to detect lone attackers who might be contemplating politically charged assaults. Dubbed the “Lone Wolf Initiative,” it began shortly after the inauguration of President Barack Obama in part because of the rising level of hate speech and increasing gun sales. 45

Policies implemented after 9/11 seek to gather more intelligence on possible lone wolf terrorist plots. For example, the Domestic Security Enhancement Act (DSEA) of 2003 provides law enforcement authorities greater powers beyond those contained in the USA Patriot Act of 2001. Previously, under the Foreign Intelligence Surveillance Act of 1978 (FISA), government authorities were required to show probable cause that an individual was acting on behalf of a foreign power, but the DSEA changes this definition to include all individuals involved in suspected terrorism, regardless of whether they are affiliated with a foreign power or terrorist group. Likewise, the Intelligence Reform and Terrorism Prevention Act of 2004 contains a “lone wolf” provision which makes it easier to conduct surveillance on individuals who either act in sympathy with the aims of international terrorist groups, but are not officially affiliated, or whose link with an international terrorist group can be demonstrated. 46 To enhance information sharing, the U.S. Departments of Justice and Homeland Security established the Building Communities of Trust Initiative to foster greater cooperation among police agencies, fusion centers, and communities. 47 Fusion centers bring representatives from various law enforcement agencies to share information on terrorism and related issues.

“Direct” approaches to counterinsurgency can be applied to lone wolves as well. As Marc Sageman noted, the current wave of leaderless Islamist terrorists is inherently self-limiting insofar as when they gather and train, they make themselves vulnerable to monitoring and arrest. 48 As he points out, the shape and the dynamics of the networks affect their survivability, flexibility, and success. 49 **A small-world network** consists of a hub with many links, which **can resist fragmentation** because of the denseness of its interconnectivity. **Even if a significant fraction of its nodes are removed, it will not have** much of **an impact on its integrity**. At its hub is where the network is most vulnerable. If enough hubs are destroyed, then the network tends to break down into “isolated, noncommunicating islands of nodes.” **Thus, the jihadist networks are resilient** to the random arrest of their members, but are fragile in terms of attacks on their hubs. 50 In as much as the al Qaeda movement is so dispersed, the leadership could find it increasingly difficult to exert control, beyond offering mere inspiration. 51 Moreover, the movement has become a magnet for the world's most backward and frustrated radicals, both in the West and the Middle East, which could limit its appeal to the broader masses. 52

To be sure, government authorities should deal resolutely with lone wolves who commit serious crimes. Blanket repression against extremist and dissident subcultures that hold unpopular beliefs, though, should be avoided. Although state repression can be effective, especially if the targeted group or community has not established deep roots, it can also backfire. Arguably, the 1992 Ruby Ridge 53 and 1993 Waco fiascos were counterproductive. In particular, the siege of the Branch Davidian compound in Waco, Texas, which resulted in the death of 76 persons, was the event that enraged Timothy McVeigh and set him on his course of action, which culminated in the 1995 bombing of the Alfred P. Murrah Federal building in Oklahoma City—the most horrific act of domestic terrorism prior to 9/11. The resentment resulting from the way in which the government handled these two events did much to fuel the militia movement in the mid-1990s. 54

Conclusion

Although state-to-state conflicts are declining in number, a great deal of conflict persists at the intrastate level. Often the most serious threats that governments face today are internal to their borders. In a sense, the current incarnation of leaderless resistance is not unlike the approach used by the anarchist movement around the turn of the nineteenth century, whose members used bombs and assassinations to disrupt governments in the West. **With new tech**nology, however, it is now possible that **terrorist groups** could **evolve into more resilient entities** not unlike transnational criminal syndicates have over the past two decades. 55

A significant strategic drawback to the leaderless resistance approach is that without direction, it is difficult for the scattered terrorists to coalesce into a political organization that is capable of attaining actual political power. 56 Although it is now easier for insurgents and terrorists to enter the game, it is more difficult for them to evolve into a viable global insurgency because they lack broad-based popular support that is necessary for taking over a state. As modern terrorists groups tend to move away from popular appeal, it becomes less likely that they could consolidate and assume political power. Because of their internal weakness, they cannot reasonably be expected to defeat their conventional and democratic opponents who are much stronger, militarily, economically, culturally, and politically, yet, on the other hand, **they** probably **cannot be completely defeated** either. 57

Despite its limitations, **terrorism** in the West **appears to be moving in the direction of leaderless resistance**. Rather than a rigid dichotomy between lone wolves and large, established groups, the trend could be conceptualized as a continuum with more and more terrorist activities committed by those on the lone wolf side of the spectrum. 58 As the frequency of sporadic episodes of lone wolf terrorism in the news headlines suggest, **leaderless resistance has become the** most common **tactical approach** of political violence in the West. Concomitant with this trend, **as new tech**nology **continues to spread** the capabilities for developing **WMD, just a few angry people now have the potential to inflict unprecedented destruction**.

To date, most episodes of leaderless resistance have been ill-planned and haphazard. To be sure, some of the more notable perpetrators of lone wolf violence had histories of mental illness and showed little or no ideological motive. For instance, James Holmes, whose August 20, 2012 mass shooting at a movie theater in Aurora, Colorado, left 12 persons dead, dyed his hair red before the attack and identified himself to the police as “the Joker”—a popular villain from the Batman comic book series. Although a stellar undergraduate student, in recent months Holmes had experienced some problems in his scholastic and personal life. Likewise, Wade Michael Page, the 40-year-old Army veteran who, just two weeks later, killed six worshipers at a Sikh temple in Wisconsin, had a longstanding drinking problem which ended his military career and cost him his job as a trucker. Nevertheless, even persons who are psychologically impaired can commit acts of violence motivated in part by political ideologies. In fact, they may prove to be some of the most susceptible subjects to the blandishments of extremist exhortations to violence. After all, persons with a stake in the system and who have something to lose may be less likely to carry out terrorism, which often results in death or a very long prison sentence. For about a decade, Wade Michael Page was active in the “white power” music subculture where rhetorical calls such as RAHOWA (racial holy war) have broad currency.

Proponents of the leaderless resistance concept often assume that lone wolves are calculating and devote careful planning for their operations, but so far, these instances have been the exception and not the rule. But as the concept gains currency, it is conceivable that **a new breed of more dangerous lone wolves could emerge** in the future. The case of Anders Behring Breivik illustrates this danger.

According to his online political manifesto/diary, Breivik spent nine years methodically planning his attacks. A seemingly well-integrated young man in Norwegian society, Breivik was careful not to raise red flags. He maintained no affiliations with hardcore extremists and was not on the authorities' radar screen. For the first part of his attack, he placed a bomb that exploded at the offices of the prime minister. The second part of his attack was a shooting spree at a summer camp where some leaders of the Norwegian Labour Party sent their children. His attacks were intended to wipe out the leaders of the next generation because he disapproved of the party's liberal immigration policies. The result was the greatest loss of life in Norway since World War II and the deadliest carnage ever inflicted by a single gunman in that country. 59

The new media figured prominently in Breivik's campaign of terror. Shortly before he began his attacks, he uploaded his 1,500-page electronic book—2083: A European Declaration of Independence—on the Internet. In it, he counseled his fellow travelers to emulate his terrorism by acting alone on their own initiative. 60 Whereas Ted Kaczynski, the Unabomber, desperately implored major newspapers to publish his manifesto in order to ensure maximum exposure of his ideas, Breivik was able to take advantage of the Internet and post his manifesto online, thus bypassing the major media outlets. The notoriety stemming from his attack, he predicted, would serve as a “marketing” ad for his manifesto, which would assure substantial interest in its contents. 61

Despite episodes of sporadic violence, some observers dismiss the notion of “leaderless resistance” as primarily a nuisance in that it poses no existential threat to the nation. 62 Be that as it may, leaderless resistance could be waged as part of a war of a thousand cuts. Not long after the death of Osama bin Laden, some U.S. officials warned that his demise could speed up the trend over the past few years during which **al Qaeda has become a more decentralized, and therefore more difficult, entity to stop**. 63 Though some observers were quick to declare victory over al Qaeda after the death of bin Laden, the campaign against him and the movement he inspired has come with great costs. **Lone wolf terrorism is now part of al Qaeda's war of attrition against America**. According to some estimates, **the financial cost** of fighting bin Laden's network **has reached $3 trillion** when economic consequences are taken into account. 64 Over time, **these** financial costs **have taken a devastating toll on the American economy and** are unsustainable in the long term. 65 Although it is more difficult for terrorists to mount a spectacular attack in the United States today because security measures have been significantly raised, a number of **smaller, sporadic attacks persist**. Accordingly, **a strategy to meet the lone wolf challenge needs to be an integral part of counterterrorism programs**.

Lone wolf WMD attacks cause extinction

Gary A. Ackerman & Lauren E. Pinson 14, Gary is Director of the Center for Terrorism and Intelligence Studies, Lauren is Senior Researcher and Project Manager for the National Consortium for the Study of Terrorism and Responses of Terrorism, An Army of One: Assessing CBRN Pursuit and Use by Lone Wolves and Autonomous Cells, Terrorism and Political Violence, Volume 26, Issue 1

The first question to answer is whence the concerns about the nexus between CBRN weapons and isolated actors come and whether these are overblown. The general threat of mass violence posed by lone wolves and small autonomous cells has been detailed in accompanying issue contributions, but the potential use of CBRN weapons by such perpetrators presents some singular features that either amplify or supplement the attributes of the more general case and so are deserving of particular attention. Chief among these is the impact of rapid technological development. **Recent and emerging advances in** a variety of **areas, from synthetic biology** 3 **to nanoscale engineering**, 4 **have opened doors** not only to new medicines and materials, but also to new possibilities for malefactors to inflict harm on others. What is **most relevant in the context of lone actors and small autonomous cells is** not so much the pace of new invention, but rather the commercialization and consumerization of **CBRN** weapons-relevant technologies. **This** process often **entails an increase in the availability and safety of the tech**nology, **with a concurrent diminution in** the **cost, volume, and technical knowledge required** to operate it. Thus, for example, whereas fifty years ago **producing large quantities of** certain **chemical weapons might** have been a dangerous and inefficient affair requiring a large plant, expensive equipment, and several chemical engineers, with the advent of chemical microreactors, 5 the same processes might **be accomplished** far more **cheaply and safely on a desktop assemblage**, **purchased commercially and monitored by a single chemistry graduate student**.

**The rapid global spread and increased user-friendliness of many technologies** thus **represents a** potentially **radical shift** from the relatively small scale of harm a single individual or small autonomous group could historically cause. 6 From the limited reach and killing power of the sword, spear, and bow, to the introduction of dynamite and eventually the use of our own infrastructures against us (as on September 11), **the** number of **people** that **an individual who was unsupported by a broader political entity could kill with a single action has increased from single digits to thousands**. Indeed, it has even been asserted that “**over time** … as the leverage provided by technology increases, **this threshold will** finally **reach its culmination**—**with** the ability of one man **to** declare war on the world and win.” 7 Nowhere is this trend more perceptible in the current age than in the area of unconventional weapons.

These new technologies do not simply empower users on a purely technical level. **Globalization and** the expansion of **information networks provide new opportunities for disaffected individuals in the farthest corners of the globe to become familiar with core weapon concepts and to purchase equipment**—online technical courses and eBay are undoubtedly a boon to would-be purveyors of violence. Furthermore, even the most solipsistic misanthropes, people who would never be able to function socially as part of an operational terrorist group, can find radicalizing influences or legitimation for their beliefs in the maelstrom of virtual identities on the Internet.

All of **this can spawn**, it is feared, a more deleterious breed of **lone actors**, what have been referred to in some quarters as “**super-empowered individuals**.” 8 Conceptually, super-empowered individuals are atomistic game-changers, i.e., they constitute a single (and often singular) individual who can shock the entire system (whether national, regional, or global) by relying only on their own resources. Their core characteristics are that they have superior intelligence, the capacity to use complex communications or technology systems, and act as an individual or a “lone-wolf.” 9 The end result, according to the pessimists, is that if one of these individuals chooses to attack the system, “the unprecedented nature of his attack ensures that no counter-measures are in place to prevent it. And when he strikes, his attack will not only kill massive amounts of people, but also profoundly change the financial, political, and social systems that govern modern life.” 10 It almost goes without saying that **the same concerns attach to small autonomous cells**, **whose** members' **capabilities and resources can be combined without** appreciably **increasing the operational footprint** presented to intelligence and law enforcement agencies seeking to detect such behavior.

With the exception of the largest truck or aircraft bombs, the most likely means by which to accomplish this level of system perturbation is through the use of CBRN agents as WMD. On the motivational side, therefore, **lone actors** and small autonomous cells **may** ironically **be more likely to select CBRN weapons than** more **established** terrorist **groups**—**who are** usually **more conservative in their tactical orientation**—**because** the **extreme asymmetry** of these weapons **may provide the only** subjectively **feasible option for** such **actors to achieve** their grandiose aims of **deeply affecting the system**. The inherent technical challenges presented by CBRN weapons may also make them attractive to self-assured individuals who may have a very different risk tolerance than larger, traditional terrorist organizations that might have to be concerned with a variety of constituencies, from state patrons to prospective recruits. 11 Many other factors beyond a “perceived potential to achieve mass casualties” might play into the decision to pursue CBRN weapons in lieu of conventional explosives, 12 including a fetishistic fascination with these weapons or the perception of direct referents in the would-be perpetrator's belief system.

Others are far more sanguine about the capabilities of lone actors (or indeed non-state actors in general) with respect to their potential for using CBRN agents to cause mass fatalities, arguing that the barriers to a successful large-scale CBRN attack remain high, even in today's networked, tech-savvy environment. 13 Dolnik, for example, argues that even though homegrown cells are “less constrained” in motivations, more challenging plots generally have an inverse relationship with capability, 14 while Michael Kenney cautions against making presumptions about the ease with which individuals can learn to produce viable weapons using only the Internet. 15 However, even most of these pundits concede that low-level CBR attacks emanating from this quarter will probably lead to political, social, and economic disruption that extends well beyond the areas immediately affected by the attack. This raises an essential point with respect to CBRN terrorism: irrespective of the harm potential of CBRN weapons or an actor's capability (or lack thereof) to successfully employ them on a catastrophic scale, these weapons invariably exert a stronger psychological impact on audiences—the essence of terrorism—than the traditional gun and bomb. This is surely not lost on those lone actors or autonomous cells who are as interested in getting noticed as in causing casualties.

Proven Capability and Intent

While legitimate debate can be had as to the level of potential threat posed by lone actors or small autonomous cells wielding CBRN weapons, possibly the best argument for engaging in a substantive examination of the issue is the most concrete one of all—that these **actors have already demonstrated the motivation and capability** to pursue and use CBRN weapons, in some cases even **close to the point of constituting a genuine WMD threat**. In the context of bioterrorism, perhaps the most cogent illustration of this is the case of Dr. Bruce Ivins, the perpetrator behind one of the most serious episodes of bioterrorism in living memory, the 2001 “anthrax letters,” which employed a highly virulent and sophisticated form of the agent and not only killed five and seriously sickened 17 people, but led to widespread disruption of the U.S. postal services and key government facilities. 16

Other historical cases of CBRN pursuit and use by lone actors and small autonomous cells highlight the need for further exploration. Among the many extant examples: 17

Thomas Lavy was caught at the Alaska-Canada border in 1993 with 130 grams of 7% pure ricin. It is unclear how Lavy obtained the ricin, what he planned to do with it, and what motivated him.

In 1996, Diane Thompson deliberately infected twelve coworkers with shigella dysenteriae type 2. Her motives were unclear.

In 1998, Larry Wayne Harris, a white supremacist, was charged with producing and stockpiling a biological agent—bacillus anthracis, the causative agent of anthrax.

In 1999, the Justice Department (an autonomous cell sympathetic to the Animal Liberation Front) mailed over 100 razor blades dipped in rat poison to individuals involved in the fur industry.

In 2000, Tsiugio Uchinshi was arrested for mailing samples of the mineral monazite with trace amounts of radioactive thorium to several Japanese government agencies to persuade authorities to look into potential uranium being smuggled to North Korea.

In 2002, Chen Zhengping put rat poison in a rival snack shop's products and killed 42 people.

In 2005, 10 letters containing a radioactive substance were mailed to major organizations in Belgium including the Royal Palace, NATO headquarters, and the U.S. embassy in Brussels. No injuries were reported.

In 2011, federal agents arrested four elderly men in Georgia who were plotting to use ricin and explosives to target federal buildings, Justice Department officials, federal judges, and Internal Revenue Service agents.

Two recent events may signal an even greater interest in CBRN by lone malefactors. First, based on one assessment of Norway's Anders Breivik's treatise, his references to CBRN weapons a) suggest that CBRN weapons could be used on a tactical level and b) reveal (to perhaps previously uninformed audiences) that even low-level CBRN weapons could achieve far-reaching impacts driven by fear. 18 Whether or not Breivik would actually have sought or been able to pursue CBRN, he has garnered a following in several (often far-right) extremist circles and his treatise might inspire other lone actors. Second, Al-Qaeda in the Arabian Peninsula (**AQAP**) released two issues of Inspire magazine in 2012. **Articles**, on the one hand, **call for lone wolf jihad attacks to target non-combatant populations and**, on the other, **permit the use of chemical and biological weapons**. The combination of **such directives may** very well **influence the weapon selection of lone actor jihadists in Western nations**. 19

## 3

The plan re-establishes Obama’s authority against groups other than al-Qaeda and the Taliban

Graham Cronogue 12, J.D. from Duke, a new aumf: defining combatants in the war on terror, 22 Duke J. Comp. & Int'l L. 377

**The AUMF must be updated**. In 2001, the AUMF authorized force to fight against America's most pressing threat, the architects of 9/11. [\*402] However, much has changed since 2001. Bin Laden is dead, the Taliban has been deposed, and it is extremist organizations other than al-Qaeda and the Taliban who are launching many of the attacks against Americans and coalition partners. n124 In many ways, **the greatest threat is coming from** groups not even around in 2001, groups such as **AQAP and al Shabaab**. n125 **Yet these groups do not fall under the AUMF**'s authorization of force. These groups are not based in the same country that launched the attacks, have different leaders, and were not involved in planning or coordinating 9/11. Thus, under a strict interpretation of the AUMF, the President is not authorized to use force against these groups.

Congress needs to specifically authorize force **against groups outside of al-Qaeda and the Taliban**. Our security concerns demand that the President can act quickly and decisively when facing threats. **The current authorization does not cover** many of **these threats**, yet it is much more difficult to achieve this decisiveness if the President is forced to rely solely on his inherent powers. **A clear congressional authorization would clear up** much of **this problem**. Under Justice Jackson's framework, granting or denying congressional authorization ensures that President does not operate in the "zone of twilight." n126 Therefore, **if Congress lays out the exact scope of the President's power**, naming or clearly defining the targeted actors, **the constitutionality** or unconstitutionality **of presidential actions will become much clearer**. n127

**Removing the 9/11 nexus** to reflect the current reality of war without writing a carte blanche is the most important form of congressional guidance regarding target authorization. In order for the President to operate under the current AUMF, he must find a strong nexus between the target and the attacks on September 11. As I have shown in this paper, this nexus is simply non-existent for many groups fighting the United States today. Yet, the President should want to operate pursuant to congressional authorization, Justice Jackson's strongest zone of presidential authority. In order to achieve this goal, the administration has begun to stretch the statutory language to include groups whose connection to the 9/11 attacks, if any, is extraordinarily limited. The current **presidential practice only nominally follows the AUMF**, a practice Congress has seemingly consented to by failing to amend the statute for over ten years. **This** [\*403] "**stretching" is dangerous** as Congress is no longer truly behind the authorization and has simply acquiesced to the President's exercise of broad authority.

The overarching purpose of the **new authorization should** be to **make it clear that** the domestic legal foundation for using **military force is not limited to al-Qaeda and the Taliban** but also extends to the many other organizations fighting the United States. The language in Representative McKeon's bill does a fairly good job of achieving this goal by specifically naming al-Qaeda and the Taliban along with the term "associated force." This provision makes it clear the President is still authorized to use force against those responsible for 9/11 and those that harbored them by specifically mentioning al-Qaeda and the Taliban. However, the additional term "associated force" makes it clear that the authorization is not limited to these two groups and that the President can use force against the allies and separate branches of al-Qaeda and the Taliban. This creates a very flexible authorization.

Despite the significant flexibility of the phrase "associated force engaged in hostilities", I would propose defining the term or substituting a more easily understood and limited term. Associated force could mean many things and apply to groups with varying levels of involvement. Arguably any group that strongly identifies with or funds al-Qaeda or the Taliban could be an associated force. Thus, we could end up in the previously describe situation where group "I" who is in conflict with the United States or a coalition partner in Indonesia over a completely different issue becomes a target for its support of an associated force of al-Qaeda. Beyond that, the United States is authorized to use all necessary force against any groups that directly aid group "I" in its struggle.

My proposal for the new AUMF would appear as follows:

AFFIRMATION OF ARMED CONFLICT WITH AL-QAEDA, THE TALIBAN, AND ASSOCIATED FORCES

Congress affirms that -

(1) the United States is engaged in an armed conflict with al-Qaeda, the Taliban, and associated forces and that those entities continue to pose a threat to the United States and its citizens, both domestically and abroad;

a. for the purposes of this statute, an associated force is a nation, organization, or person who enjoys close and well-established collaboration with al-Qaeda or the Taliban and as part of this relationship has either engaged in or has intentionally provided direct tactical or logistical support for armed conflict against the United States or coalition partners.

 [\*404]

(2) the President has the authority to use all necessary and appropriate force during the current armed conflict with al-Qaeda, the Taliban, and associated forces pursuant to the Authorization for Use of Military Force (Public Law 107-40; 50 U.S.C. 1541);

(3) the current armed conflict includes nations, organization, and persons who -

a. are part of al-Qaeda, the Taliban, or associated forces; or

b. engaged in hostilities or have directly supported hostilities in aid of a nation, organization or person described in subparagraph (A);

c. or harbored a nation, organization, or person described in subparagraph (A); and

(4) the President's authority pursuant to the Authorization for Use of Military Force includes the authority to detain belligerents, including persons described in paragraph (3), until the termination of hostilities.

(5) Nothing in this authorization should be construed to limit the President's ability to respond to new and emerging threats or engage in appropriate and calculated actions of self-defense.

The definition of "associated forces" will add much needed clarity and provide congressional guidance in determining what groups actually fall under this provision. Rather than putting faith in the President not to abuse his discretion, **Congress should** simply **clarify** what it means and limit his discretion to acceptable amounts. The "close and well-established collaboration" ensures that only groups with very close and observable ties to al-Qaeda and the Taliban are designated as "associated forces." While the requirement that part of their collaboration involve some kind of tactical or logistical support ensures that those classified as enemy combatants are actually engaged, or part of an organization that is engaged, in violence against the United States. Also, requiring that the associated force's violence be directed at the United States or a coalition partner and that this violence is part of its relationship with al-Qaeda or the Taliban is another important limitation.

First, requiring the associated force to engage in violence that is directed at these nations ensures that "associated force" does not include countries such as Iran that might have a relationship with al-Qaeda and give it financial support but are not actually in violent conflict with the United States. Second, requiring that this violence is made in furtherance of its relationship with al-Qaeda and the Taliban ensures that the violence that makes a group an "associated force" is actually related to its collaboration with al-Qaeda and the Taliban. Without this second provision, a group that [\*405] supports al-Qaeda would be elevated to an "associated force" if it engaged in violence with, for instance, Australia over a completely unrelated issue.

While some groups that work closely with and support al-Qaeda would not be considered associated forces, it is important to limit the scope of this term. This label effectively elevates the group to the same status as al-Qaeda and the Taliban and attaches authorization for force against any group that supports or harbors it. Furthermore, there is little real harm by narrowly defining associated forces because the groups that do support al-Qaeda will still be subject to the authorization under the "support" or "harbor" prongs. Narrowly defining "associated forces" simply prevents the problem of authorization spreading to supporters of those who are merely supporters of al-Qaeda.

Compared to Representative McKeon's proposal, these **new provisions would** narrow the scope **of authorization**. The President would not be able to use this authorization to attack new groups that both spring up outside our current theater and have no relation to al-Qaeda, the Taliban or the newly defined associated forces. However, part (5) of my authorization would ensure that the President is not unnecessarily restricted in responding to new and emergent threats from organizations that do not collaborate and support al-Qaeda. In this way, the proposal incorporates Robert Chesney's suggestion, "**it may be** that it [is] **better to draw the statutory circle narrowly**, with language making clear that the narrow framing does not signify an intent to try and restrict the President's authority to act when necessary against other groups in the exercise of lawful self-defense." n128 The purpose of the new AUMF should not be to give the President a carte blanche to attack any terrorist or extremist group all over the world. **The purpose of this authorization is to provide clear authorization for the use of force against al-Qaeda and its allies**. Moreover, **if a new group is created** that has no relation to any of the relevant actors defined in this statute, **Congress can pass another authorization** that addresses this reality. The purpose of congressional authorization should not be to authorize the President to act against every conceivable threat to American interests. In fact, such an authorization would effectively strip Congress of its constitutional war making powers. Instead, the new proposal should provide clear domestic authorization for the use of force [\*406] against those nations that present the greatest threat to the United States today.

CONCLUSION

The original AUMF was hastily passed during a time of crisis to address America's most pressing security threats and concerns. Over time these threats and concerns have changed and grown. Our law on conflict should evolve with these changes. The best way to bring about this change is to update the AUMF. This update should reflect the present reality of the conflict **by expanding the authorization** to use force **beyond** simply **those involved in 9/11**. This authorization should expand **to include groups such as AQAP** who work closely with and fight alongside al-Qaeda. However, we should not expand the scope of the statute as far as Congress has proposed. Representative McKeon's legislation would effectively give the President a carte blanche to decide who and what to attack and detain. Such a broad grant of authority would effectively allow the President to use force whenever and wherever he wanted. Instead, the new legislation should balance the need for decisive presidential action against the very real concern of adding too much gloss to the Executive power. My proposal attempts to find such a balance by clearly defining the groups of combatants, **ensuring that the President has clear and significant authority** to act against those organizations. It also limits his discretion in deciding what groups fit this description and **prevents him from starting a global and perpetual war on terror**, while ensuring that he is not completely barred from responding to new threats as they arise. Undoubtedly, my proposal has flaws and loopholes and cannot be used to authorize force against all future threats, but it does a better job than Representative McKeon's of heeding President Lincoln's warning.

Congress is key

Kenneth Wainstein 13, partner at cadwalader, wickersham & taft llp, statement before the committee on foreign relations united states senate concerning counterterrorism policies and priorities: addressing the evolving threat, March 20, <http://www.foreign.senate.gov/imo/media/doc/Wainstein_Testimony.pdf>

It has recently become clear, however, that the Al Qaeda threat that occupied our attention after 9/11 is no longer the threat that we will need to defend against in the future. Due largely to the effectiveness of our counterterrorism efforts, the centralized leadership that had directed Al Qaeda operations from its sanctuary in Afghanistan and Pakistan -- known as “**Al Qaeda Core**” -- **is now just a shadow** of what it once was. While still somewhat relevant as an inspirational force, Zawahiri and his surviving lieutenants are reeling from our aerial strikes and no longer have the operational stability to manage an effective global terrorism campaign. **The result has been a migration of operational authority and control** from Al Qaeda Core **to its affiliates** in other regions of the world, such as Al Qaeda in the Arabian Peninsula, Al Qaeda in Iraq and Al Qaeda in the Islamic Maghreb.

 As Andy Liepman of the RAND Corporation cogently explained in a recent article, this development is subject to two different interpretations. While some commentators diagnose Al Qaeda as being in its final death throes, others see this franchising process as evidence that Al Qaeda is “coming back with a vengeance as the new jihadi hydra.” As is often the case, the truth likely falls somewhere between these polar prognostications. Al Qaeda Core is surely weakened, but its **nodes** around the world have picked up the terrorist mantle and **continue to pose a threat to America and its allies** -- as tragically evidenced by the recent violent takeover of the gas facility in Algeria and the American deaths at the U.S. Mission in Benghazi last September. **This threat has been compounded by** a number of other variables, including the opportunities created for Al Qaeda by the events following **the Arab Spring**; the ongoing threat posed by **Hizballah**, its confederates in **Iran** and other terrorist groups; **and** the growing incidence over the past few years of **home-grown violent extremism** within the United States, such as the unsuccessful plots targeting Times Square and the New York subway.

We are now at a pivot point where we need to reevaluate the means and objectives of our counterterrorism program in light of the evolving threat. The Executive Branch is currently engaged in that process and has undertaken a number of policy shifts to reflect the altered threat landscape. First, it is working to develop stronger cooperative relationships with governments in countries like Yemen where the Al Qaeda franchises are operating. Second, they are coordinating with other foreign partners -- like the French in Mali and the African Union Mission in Somalia -- who are actively working to suppress these new movements. Finally, they are building infrastructure -- like the reported construction of a drone base in Niger -- that will facilitate counterterrorism operations in the regions where these franchises operate.

While it is important that the Administration is undergoing this strategic reevaluation, **it is** also **important that Congress participate** in that process. Over the past twelve years, Congress has made significant contributions to the post-9/11 reorientation of our counterterrorism program. First, it has been instrumental in strengthening our counterterrorism capabilities. From the Authorization for Use of Military Force passed within days of 9/11 to the Patriot Act and its reauthorization to the critical 2008 amendments to the Foreign Intelligence Surveillance Act, Congress has repeatedly answered the government’s call for strong but measured authorities to fight the terrorist adversary.

Second, **Congressional action has gone a long way toward institutionalizing measures that were hastily adopted after 9/11 and creating a lasting framework** for what will be a “long war” against international terrorism. Some argue against such legislative permanence, citing the hope that today’s terrorists will go the way of the radical terrorists of the 1970’s and largely fade from the scene over time. That, I’m afraid, is a pipe dream. The reality is that **international terrorism will remain a potent force** for years and possibly generations to come. Recognizing this reality, both Presidents Bush and Obama have made a concerted effort to look beyond the threats of the day and to focus on regularizing and institutionalizing our counterterrorism measures for the future -- as most recently evidenced by the Administration’s effort to develop lasting procedures and rules of engagement for the use of drone strikes. Finally, **Congressional action has provided** one other very important element to our counterterrorism initiatives -- a measure of **political legitimacy that could** never be achieved **through unilateral executive action**. At several important junctures since 9/11, Congress has undertaken to carefully consider and pass legislation in sensitive areas of executive action, such as the legislation authorizing and governing the Military Commissions and the amendments to our Foreign Intelligence Surveillance Act. **On each** such **occasion, Congress’ action had the effect of calming public concerns and providing** a level of **political legitimacy to the Executive Branch’s counterterrorism efforts. That legitimizing effect** -- and its continuation through meaningful oversight -- **is critical to maintaining the public’s confidence** in the means and methods our government uses in its fight against international terrorism. **It also provides assurance to our foreign partners and** thereby **encourages them to engage in the operational cooperation** that is so **critical to** the **success** of our combined efforts against international terrorism.

These post-9/11 examples speak to the value that Congressional involvement can bring both to the national dialogue about counterterrorism matters and specifically to the current reassessment of our strategies and policies in light of the evolving threat. It is heartening to see that Congress is starting to ratchet up its engagement in this area. For example, certain Members are expressing views about our existing targeting and detention authorities and whether they should be revised in light of the new threat picture. Some have asked whether Congress should pass legislation governing the Executive Branch’s selection of targets for its drone program. Some have suggested that Congress establish a judicial process by which a court reviews and approves any plan for a lethal strike against a U.S. citizen before that plan is put into action. Some have proposed legislation more clearly directing the Executive Branch to send terrorist suspects to military custody, as opposed to the criminal justice system. Others have argued more generally that the AUMF should be amended to account for the new threat **emanating from** Ansar al Sharia, Boko Haram and the other dangerous **groups that have little direct connection to Al Qaeda and its affiliates** or to anyone who “planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001.” While these ideas have varying strengths and weaknesses, they are a welcome sign that Congress is poised to get substantially engaged in counterterrorism matters once again.

In assessing these and other proposals for national security legislation, Congress should be guided by a pair of principles that their legislative efforts have largely followed over the past twelve years. First, it is important to remember the practical concern that time is of the essence in counterterrorism operations and that **legal authorities must be crafted in a way that permits** operators and **decision makers in the Executive Branch to react** to circumstances **without undue delay**. That concern was not sufficiently appreciated prior to 9/11, and as a result many of our counterterrorism tools were burdened with unnecessary limitations and a stifling amount of process. In fact, the tools used by our national security investigators who were trying to prevent terrorist attacks were much less user-friendly than those available to criminal investigators who were investigating completed criminal acts. The result was slowed investigations and an inability to develop real-time intelligence about terrorist threats, like the one that hit home on 9/11.

The Patriot Act and subsequent national security legislation helped to rectify that imbalance and to make our counterterrorism tools and investigations more nimble and effective, while at the same time providing for sufficient safeguards and oversight to ensure that they are used responsibly and consistent with our respect for privacy and civil liberties. Any future legislation should follow that model. For instance, any scheme for regulating the use of targeted drone strikes -- which may well raise myriad practical and constitutional issues beyond the concern with operational delay -- should be designed with an appreciation for the need for quick decision making and action in the context of war and targeting.

Second and more generally, Congress should maintain its record of largely resisting legislation that unduly restricts the government’s flexibility in the fight against international terrorism. For example, there have been occasional efforts to categorically limit the Executive Branch’s options in its detention and prosecution of terrorist suspects. While there may well be good principled arguments behind these efforts, pragmatism dictates that we should not start taking options off the table. We should instead maximize the range of available options and allow our counterterrorism professionals to select the mode of detention or prosecution that best serves the objectives for each particular suspect -- development of intelligence, certainty of successful prosecution, etc.

**Flexibility should** also **be the watchword when approaching any effort to amend the A**uthorization for **U**se of **M**ilitary **F**orce. The diffusion of terrorist threats that has led to the call for amending the AUMF is bound to continue, and **new groups will** likely **be forming and mounting a threat** to the U.S. **in the years to come**. Any amended AUMF must be crafted with language that clearly defines the target of our military force, but that also encompasses all such groups that pose a serious threat to our national security.

# 2ac

## 2AC Circumvention

#### It guides all administration policy

Elizabeth Beavers 14, J.D., program assistant for foreign policy at Friends Committee on National Legislation, It's Time to Repeal the AUMF, February 18, <http://fcnl.org/blog/of_peace_and_politics/time_to_repeal_aumf/>

The Obama administration has been notoriously secretive about its drones policy and the legal framework used to justify it. However, one thing is certain: the AUMF is the centerpiece. Officials state that, before targeting anyone, the first question is always: “are they AUMF-able?” Meaning, of course, does the AUMF allow us to target and kill this person? So far the answer usually seems to be a resounding yes.

#### Obama vetoes anything broader

Ari Shapiro 13, NPR correspondent, Why Obama Wants To Change The Key Law In The Terrorism Fight, May 29, <http://www.npr.org/blogs/itsallpolitics/2013/05/29/187059276/why-obama-wants-to-change-the-key-law-in-the-terrorism-fight>

Obama promised to work with Congress to refine, and ultimately repeal, the AUMF's mandate.

"And I will not sign laws designed to expand this mandate further," he said.

## 2AC AQ Weak

#### Yes terrorism – most qualified evidence

Sara Carter 14, senior editor at The Blaze, Intel Chief Has a Warning About Al Qaeda Splinter Groups, January 30, <http://www.theblaze.com/stories/2014/01/30/intel-chief-has-a-warning-about-al-qaeda-splinter-groups/>

Director of National Intelligence James Clapper warned Wednesday that **Al Qaeda is still** as **dangerous** as it was in the past and the its use of splinter groups pose a significant danger to U.S. assets — both at home and overseas as their operations are difficult to detect and monitor.

Clapper, who spoke to the Senate Intelligence Committee, noted that **terrorist organizations** “have **expressed interest in** developing **offensive cyber capabilities**.” He told lawmakers that **they use educated recruits** who employ “cyberspace for propaganda and influence operations, financial activities and personnel recruitment.”

He noted that instability the Middle East and North Africa “has accelerated the decentralization of the movement, which is increasingly influenced by local and regional issues,” but the “**diffusion has led to** the emergence of new power centers and **an increase in threats** by networks of like-minded extremists with allegiances to multiple groups.”

“The potential of global events to instantaneously spark grievances around the world hinders advance warning, disruption and attribution of plots,” he warned in the intelligence community’s annual Worldwide Threat Assessment, where the intelligence community presents its analysis and assessment of threats to the U.S.

“Terrorist threats emanate from a diverse array of terrorist actors, ranging from formal groups to homegrown violent extremists (HVEs) and ad hoc, foreign-based actors,” the report states. “The threat environment continues to transition to a more diverse array of actors, reinforcing the positive developments of previous years.”

He said large scale Al Qaeda attacks have been significantly degraded but that the **splinter groups** still **present direct threats to U.S. assets**.

The report stated that “U.S.-based extremists will likely continue to pose the most frequent threat to the U.S. Homeland.”

It noted the “tragic attack in Boston in April 2013″ and said that indicates that insular ‘Home Violent Extremists’ who act alone or in small groups and mask the extent of their ideological radicalization can represent challenging and lethal threats.”

As for Al-Qaeda in the Arabian Peninsula (**AQAP**), which operates from its safe haven in Yemen, “has attempted several times to attack the US Homeland. We judge that the group **poses a significant threat and remains intent on targeting the U**nited **S**tates and US interests overseas.”

Although, core Al Qaeda had major setbacks “it probably hopes for a resurgence following the drawdown of US troops in Afghanistan in 2014.”

The report noted that the U.S. faces an “enduring” and persistent threat to U.S. interests overseas from extremist groups looking to attack “US embassies, military facilities and individuals will be at particular risk in parts of South Asia, the Middle East and Africa.”

## 2ac – restrict wpa

We restrict the AUMF – that’s war powers authority

Seth Weinberger 6, Associate Professor of Politics and Government at the University of Puget Sound, Presidential War Powers in a Never-Ending War, <http://www.academia.edu/174818/Presidential_War_Powers_in_a_Never-Ending_War>

However, all of these critiques, while certainly trenchant and possibly correct, fail to engage the more fundamental constitutional questions of war powers that are posed by the dispute. What are the powers contained within a formal '"declaration of war" and how do those powers fit into the balance between congressional and executive war powers? How does the authority and scope of Presidential power depend on whether a formal declaration has been made? Is the AUMF passed by Congress in the wake of the September ll"1 attacks tantamount to a declaration of war?

These are some of the questions that will be considered herein.

Specifically, this paper will first examine the essential nature of a formally declared ■"war." and will argue that the difference between "war" and '"not war" is the degree to which the executive branch is given power by Congress to control the domestic arena with acts of an essentially legislative nature as a means of prosecuting a conflict Thus, the President has wide latitude in the deployment of troops and the use of force, but lacking explicit Congressional approval, is heavily restricted in the ability to mobilize or transform the home front, as when President Truman's seizure of steel mills during the Korean War was rejected by the Supreme Court Second, this paper will consider whether Senate Joint Resolution 23 (the AUMF of September 18. 2001) is a declaration of war. arguing that it is not and consequently the power of the President to affect the domestic sphere is limited. Therefore, authorizing the XSA domestic surveillance program, as well as attempts to replace civilian courts with military tribunals or indefinitely detain suspected terrorists without allowing for writs of habeas corpus, is beyond the scope of executive power in peacetime. Finally, this paper will conclude that in an undefined war with little prospects of ever being '"won" in a traditional sense, extreme caution should be exercised when handing the legislative reins to the executive branch in pursuit of '"victory."

II. The Meaning of "War" .and Executive War Powers

The first question to be considered is whether the AUMF passed by Congress, on which the President is basing much of his authorization for the XSA program, is the legal and constitutional equivalent of a declaration of war. and what difference the distinction of whether the country is '"at war" makes, especially in the powers of the President. This is an offshoot of the more fundamental question of Presidential war powers which is broached in the Constitution itself. So. before considering what is meant by the constitutional authority to declare war. we shall first examine how the war powers are delegated.

The Constitution is actually quite specific in spelling out which branch has which power, though it fails to define exactly what certain powers entail. Article I. Section 8 gives Congress the power to declare war. but does not describe what a state of war is. nor whether there can be hostilities without a formal declaration of war.5 Congress is also given the power to raise and support armies with appropriations for no longer than two years, to provide and maintain a navy, and to make rules for the government and regulation of the land and naval forces.' The Presidential war powers are summed up in Article II. Section 2. in the line. '"The President shall be Commander-in-Chief of the Army and Navy of the United States." a power also left undefined.:t Thus, the delineation, at least at a very basic level, seems to be that Congress has the power to provide the President with military force that is to be commanded at the discretion of the executive. Declaring war is clearly and solely within congressional purview, but what is meant by declaring war is unexplained.

#### overlimit – there are only two sources of authority – the AUMF and commander in chief powers

Colby P. Horowitz 13 “CREATING A MORE MEANINGFUL ¶ DETENTION STATUTE: LESSONS LEARNED ¶ FROM HEDGES V. OBAMA,” FORDHAM L.R. Vol. 81, <http://fordhamlawreview.org/assets/pdfs/Vol_81/Horowitz_April.pdf>

Justice Black’s majority opinion in Youngstown expressed a limited view of presidential war powers. This view has also been called a “formalist approach.”115 Justice Black stated that “[t]he President’s power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself.” Justice Black held that the seizure of the steel mills lacked express statutory authority, and there was no "act of Congress ... from which such a power [could] fairly be implied." 117

Justice Black also determined that the President had exceeded his constitutional powers. He explained that the President's Commander-in-Chief power was limited to the "theater of war," which did not include domestic production facilities.118 Additionally, the seizure did not fall under the Presiden't power to execute the laws, because Justice Black saw it as lawmaking and not execution.

## 2AC CP

#### Executive consultation means Congress says no

Ezra Klein, Washington Post, 4/19/13, Obama’s second term is upending what we think we know about Washington, www.washingtonpost.com/blogs/wonkblog/wp/2013/04/19/obamas-second-term-is-upending-what-we-think-we-know-about-washington/?print=1

So the White House is running an outside game on gun control and an inside game on the budget. But there’s a third and more provocative theory of presidential power. Widely subscribed to by political scientists, this theory makes people in Washington very uncomfortable because it upends cherished assumptions about how politics in general — and the presidency in particular — functions.

Under this theory, and the data that supports it, the president isn’t a unifying figure, or even a particularly persuasive one, when government is divided. Decades of polls show little evidence that presidential speeches move voters. They can draw attention to issues, but they rarely change attitudes — and they occasionally backfire.

Worse, because the president is an intrinsically polarizing figure, anything he endorses becomes instantly less appealing to the minority party. In eras of divided government, that can make it impossible to pass legislation. If this theory of presidential power is correct, the best thing a president can do is often nothing — at least in public.

#### Congress won’t repeal even if the CP resolves controversy

Michael Sant'Ambrogio, Assistant Professor of Law, Michigan State University College of Law, January 2014, ARTICLE: The Extra-legislative Veto, 102 Geo. L.J. 351

Unfortunately, there are difficulties with relying on legislative repeal to eliminate bad laws. As with all legislation, any one of the three political institutions can block repeal. Either the House or Senate alone can kill the bill, and the President can force Congress to muster a larger political coalition to override his objections. In addition to these constitutional hurdles, bills must also negotiate a plethora of congressionally created veto gates in each house. n171 Bills introduced into either house are generally referred to a committee from whence the bill might never emerge without the support of the committee chair and a majority of the committee members. n172 This is where most legislation dies. n173 Bills that do make it out of committee need the support of the leadership, most importantly the Speaker of the House and the Majority Leader in the Senate, to get to the floor of the chamber. n174 Indeed, the agenda control exercised by the leadership of each house allows a small number of senators or representatives to block repeal. n175 But even a bill with the support of the leadership might not receive a vote due to the increasingly ubiquitous filibuster in the Senate or the Hastert Rule in the House. n176 Moreover, due to increased gerrymandering, the majority in control of the House may not have garnered the majority of the votes cast in House races nationally. Therefore, a minority party in control of the House through gerrymandering may prevent legislative action. n177

Consequently, even the loss of support by a majority of both houses of Congress and the President does not ensure that a law will be repealed. Put differently, laws that could never be enacted by the present Congress can endure because of legislative roadblocks designed by the Founders and subsequent procedural innovations in the rules of each house. n178

#### Congress won’t pass anything

Alexander Bolton, The Hill, 3/10/14, Worst Congress ever?, thehill.com/homenews/senate/200295-worst-congress-ever

Democrats and Republicans alike say the 113th Congress is shaping up to be the worst ever.

Veteran lawmakers are used to partisanship and stalemate, but they say Capitol Hill has sunk to a new dysfunctional low.

Congress has in some ways already closed for business until after the mid-term election. Any laws made between now and November will be minor.

President Obama’s “year of action” has started slowly and could end up as a punchline. Congressional approval ratings have hit all-time lows.

The relationships between congressional Republicans and Obama as well as between Democratic and GOP leaders on Capitol Hill lack the indispensable element of trust.

The most memorable action taken by this Congress was last year’s shutdown.

It is not that passing lots of laws necessarily makes a “good Congress,” and many people would argue that the opposite is true. But even measures that both parties’ leaders want to get done, such as immigration reform, tax reform and transportation legislation have scant chance of reaching Obama’s desk.

House Democrats and Senate Republicans are both using this inaction to persuade voters to give them control of their respective chambers.

“It’s certainly the worst Congress since I’ve been in Congress,” said Rep. Henry Waxman (D-Calif.), who was first elected in 1972 and is retiring at year’s end. “We’ve gotten very little done.”

Waxman said Congress is the most partisan it has been during his 40-year tenure.

“It would be hard to find a worse one, for sure,” said Richard Baker, the Senate’s first historian.

Some Republicans say the lack of action in Congress is a positive because it has slowed federal spending growth.

## Net-Benefit – 2AC

#### No impact

Ganesh Sitaraman, Assistant Professor of Law, Vanderbilt Law School, January 2014, Credibility and War Powers, www.harvardlawreview.org/issues/127/january14/forum\_1024.php#\_ftnref19

For all the talk of credibility, political scientists have offered devastating critiques of credibility arguments in the context of military threats. They have demonstrated not only that the concept is often deployed in incomplete and illogical ways but also that as a historical matter, a country’s “credibility” based on its reputation and past actions has little or no effect on the behavior of opponents in high-stakes international crises. In the crises in the run-up to World War I, in the Berlin crises of the late 1950s and early 1960s, and even in the crises leading to World War II, threats from countries that had previously backed down were not seen as less credible by their opponents. In some cases, the threats were even thought to be more credible.

For constitutional lawyers, this research should be particularly troubling because credibility has migrated from foreign policy into the constitutional law of war powers. In a series of opinions, including on Somalia (1992), Haiti (2004), and Libya (2011), the Justice Department’s Office of Legal Counsel (OLC) has argued that the credibility of the United Nations Security Council is a “national interest” that can justify presidential authority to use military force without prior congressional authorization.4 This Essay argues that the credibility justification for the use of force should be removed from the constitutional law of presidential war powers. Incorporating credibility as one of the “national interests” that justify presidential use of force expands the President’s war powers significantly without a legitimate policy justification.

I. Understanding Credibility As a justification for the use of military force, the preservation of credibility is ubiquitous in foreign policy. President Clinton thought that if the United States failed to uphold its commitments in Somalia after the Black Hawk Down incident, then “[o]ur own credibility with friends and allies would be severely damaged. Our leadership in world affairs would be undermined . . . .”5 President Reagan argued that if the United States failed to confront guerrillas in Central America, “our credibility would collapse.”6 Years earlier, President Truman said that defeat in Korea “would be an open invitation to new acts of aggression elsewhere.”7 For decades during the Cold War, credibility arguments were prominent in game theory analyses of deterrence, arms control, and U.S.-Soviet relations.8 Despite the importance of these theories, political scientists at the time acknowledged that they “know remarkably little” about credibility9 and had “neither theoretically grounded expectations nor solid evidence” of how behavior affects expectations of future action.10 More recently, political scientists have turned to serious study of credibility. These studies call into question the use of credibility arguments in the context of military threats. A. Theories of Credibility The credibility of a threat is “the perceived likelihood that the threat will be carried out if the conditions that are supposed to trigger it are met.”11 When people believe a threat will be carried out, it is credible; when they believe it is a bluff, the threat is not credible. Credibility is an audience’s perception. If the United States thinks its threats are credible, but opponents do not, then the threats are not credible. Credibility is also not universal. Different actors might assess the credibility of a threat differently — and different individuals within the same government might debate the credibility of a threat.12 Political scientists have identified five different theories by which people perceive threats as credible. The most prominent — and the one consistently invoked as “credibility” in foreign policy debates from Vietnam to Syria — is the past actions theory.13 The past actions theory links credibility to a country’s historical record of fulfilling its threats. It has two central claims: First, credibility is determined by the historical evidence of a country’s actions. Second, there is a direct relationship between the perception that a country historically follows through on its commitments and the country’s credibility. The theory’s rationale is that past actions might illustrate something important about the adversary’s character, interests, or capacity to act. But the core of the theory is narrower: the likelihood of a country following through on a threat today is dependent on whether the country followed through on its threats in the past. Commentators have also frequently offered a variation of the past actions theory of credibility that focuses on reputation arguments.14 A reputation is a “judgment of someone’s character (or disposition) that is then used to predict or explain future behavior.”15 Reputation arguments in international politics assume that decisionmakers attribute behavior to character or dispositional traits, rather than to situational factors (such as national interests, public pressure, or military capabilities). When decisions are attributed to situation, the assumption is that most people in the same situation would act the same way. When decisions are attributed to disposition, it means that this individual actor will behave a certain way, independent of the situation. Note that the reputation and past actions theories are not exactly the same: A nation’s past actions may lead to a reputation if others interpret its behavior in dispositional rather than situational terms and then use that past conduct to predict similar behavior in the future. A nation’s reputation, however, might also be ascribed to other dispositional traits (such as ideological commitments or inherent characteristics). The leading alternative to the past actions and reputation theories of credibility is the current calculus theory.16 Current calculus theory holds that credibility is not a function of past actions or reputation, but rather a function of a country’s present capabilities and interests in a particular situation. On this theory, an adversary assesses credibility based on the country’s ability to effectuate its threat and the costs and benefits to that country in enforcing its threat. Two other theories are worth noting. The ingrained lessons theory holds that decisionmakers do not look to the threatening country’s history, but instead to their own history. For example, they will expect today’s adversary to back down if their previous adversaries also backed down. The never again theory holds that breaking a commitment actually increases credibility of future threats because decisionmakers will understand that backing down a second time is too costly. This Essay focuses on the past actions and reputation theories, and given their dominance in foreign policy, refers to them together as “credibility arguments.” B. The Logical Limits of Credibility Arguments

In the context of military threats and the use of force, credibility arguments suffer from some important limitations. First, because both past actions and reputation are based on audience interpretations, a country can have multiple reputations and a single action can create different reputations among different audiences.17 To some, following through on a threat demonstrates resolve; to others, foolishness. Second, action in one context might not migrate into reputation in another.18 If the United States sets a “red line” on a fishing issue for Micronesia and then backs down, it is unlikely to send a signal to Iran that all American “red lines” are bluffs. The Iranians may ignore the Micronesian case because it is fundamentally different from their own.

Third, if we assume that credibility matters, then both sides know that it matters, and both sides can take it into account. Social scientists call the resulting problem recursion,19 but we generally know it as the “if she knows that I know that she knows . . .” problem. Take Syria.20 If we assume Assad is simpleminded, and the United States backs down, then Assad will think he can use chemical weapons again. But if Assad also knows that credibility is important, and the United States backs down, then Assad knows President Obama has paid a reputation cost in bluffing. Perhaps some in the United States will even say “never again!” If Assad then uses chemical weapons again, it will be harder for Obama to bluff a second time. As a result, backing down the first time actually makes any future threat by Obama more credible. And Assad knows this. Now take it one step further. If Assad knows that Obama knows this, then Assad will reason that Obama’s threat is a bluff because Obama knows Assad will think Obama’s action is more credible. “Keeping the logic straight is difficult,” as Jonathan Mercer puts it, “but it is also irrelevant: no one knows how many rounds the game will go on, for there is no logical place to stop.”21 Credibility arguments are self-defeating because if we assume they matter, everyone else knows they matter too — and can account for them. Because the recursion game goes on ad infinitum, it is impossible to determine what policy to pursue.

C. Evidence from History

Credibility arguments could also be justified with real world evidence. For example, data could shed light on the manner of leaders’ credibility determinations: Do they actually pay attention to the disposition of the opponent based on their past actions? Or do they undertake a current calculus and focus on interests, capabilities, and the immediate situational context?

In a series of qualitative studies, political scientists have shown that past actions and reputation theories of credibility have little historical basis for support.22 When leaders evaluate their opponents, they assess threats based on current calculations, not on past actions. And when leaders have justified conflicts based on preserving a reputation for resolve, others have not always interpreted their actions as was intended. Note that these studies are limited to the context of military threats and international crises. Scholars hypothesize that military threats might differ from other contexts because the stakes are so high that leaders analyze the situation instead of using heuristics like reputation.23 These findings therefore do not extend to all international issues.24

In the most extensive research on credibility theories, Professor Daryl Press reviewed thousands of pages of archival documents and found that the current calculus theory, not the past action theory, best explains decisionmaking in the “appeasement crises” of the 1930s, the Berlin crises of the late 1950s and early 1960s, and the deliberations during the Cuban Missile Crisis. On the past actions theory, the Nazis should have interpreted British and French threats as not credible because the Allies repeatedly backed down when Germany took aggressive steps in the 1930s. The historical evidence, however, shows that German leaders believed British and French threats were credible — even after the Allies backed down. For the German leaders, credibility was a function of the Allies’ power, not their reputation. Indeed, Press finds that German leaders almost never referenced past actions by the British and French. Accordingly, he concludes that appeasement was poor strategy not because the Allies undermined their credibility, but because it allowed Germany to increase its power.25

From 1958 to 1961, the world watched a number of Berlin crises unfold between the Soviets and the West. Soviet Premier Nikita Khrushchev set six-month deadlines for the Allies to withdraw from West Berlin, and he threatened to cut off access to the city. Yet every time, Khrushchev backed down. On the past actions theory, British and American leaders should have interpreted each successive threat as less credible. However, Press found that Soviet threats actually became more credible, not less credible.26 During this same period, the Soviets expanded their nuclear arsenal; as their nuclear prowess grew, so did their credibility. Indeed, by the time of the Cuban Missile Crisis, American leaders strongly believed that Khrushchev would not back down if the United States acted in Cuba. Here too Press finds that British and American leaders almost never mentioned Khrushchev’s record of bluffing.27

In an important book on reputation, Mercer analyzed the crises leading up to World War I.28 He finds that decisionmakers interpreted their adversaries’ backing down based more on the specific situational context, rather than on the disposition of the actors.29 Thus, when the Germans backed down, the Triple Entente of Britain, France, and Russia attributed those defeats to situational factors. To the extent they considered past actions, the Entente believed Germany would be more likely to follow through on its threats in the future because it had previously been defeated. Note also that both Press’s and Mercer’s cases stack the deck in favor of past actions theory: the players were the same, there were repeated crises in a short period of time, and the crises involved the same issues. These are precisely the situations in which we would expect past action theories of credibility to be most powerful at explaining behavior.

Looking specifically at military actions justified by credibility arguments, political scientists have also provided historical evidence that allies and adversaries do not necessarily interpret these actions as enhancing America’s reputation or credibility. In a study of the Korean War, Mercer recounts how Secretary of State Dean Acheson believed that Western European allies were at “near-panic” over whether the United States would act.30 They were not. When the British Cabinet met to discuss the issue, Korea was fourth on their agenda and some of the ministers could not locate Korea on the map.31 Meanwhile, the French were concerned that the Americans would be too resolute. They worried that the United States would start a world war over what they saw as an area that was strategically unimportant.32 In another study, Professor Ted Hopf analyzed the Soviet reaction to the United States’s withdrawal from Vietnam. Hopf found that the Soviets did not see United States withdrawal as decreasing American credibility in the Cold War.33

#### Interbranch conflict now

Francis Fukuyama, Olivier Nomellini Senior Fellow at Stanford’s Freeman Spogli Institute for International Studies, and a member of the Hoover Foreign Policy Working Group on Grand Strategy, 3/10/14, American Power Is Waning Because Washington Won't Stop Quarreling, www.newrepublic.com/article/116953/american-power-decline-due-partisanship-washington

However, I do believe that the political discount rate that translates economic strength into internationally usable power has increased for the United States as a result of the political polarization in Washington. Here the problem lies more with **the** political elite and less with society. I am not sure whether there are significantly deeper polarizations in American society than previously on foreign policy issues the way there are on domestic economic and cultural issues. After two expensive wars in the Middle East, both parties have become more cautious in their support for intervention and a muscular foreign policy. The Republican Party for the first time in two generations has seen the appearance of a significant isolationist wing under the leadership of politicians like Senator Rand Paul. Even on a sensitive issue like National Security Agency (NSA) surveillance there is no Republican-Democrat polarization; rather, the cleavages run through both parties.

What is different now is a much more poisonous partisan atmosphere in Washington, which sees virtually any policy issue as an arena for political combat and point-scoring. This means **that** Congress is much less willing to delegate discretion to the executive branch on foreign policy, and makes the president in turn preemptively cautious in exercising power.

There are two recent cases of this: the murder of Ambassador Stevens in Benghazi and the current negotiations on a nuclear deal with Iran. As suggested by the recent Senate report, the Obama administration made numerous mistakes in the actions leading up to Ambassador Stevens’s death, but these tended to be errors of judgment by middle-ranking officials (including perhaps the ambassador himself), and not by Hillary Clinton or President Obama. The administration was guilty not of a cover-up, but of trying to spin the incident to minimize damage in an election campaign. Nonetheless, politicization of this event has consumed Washington for half a year, discouraged any risk-taking with regard to Middle East policy, and reinforced the already excessive emphasis on self-protection and diplomatic security as the first priority of U.S. regional policy.

Similarly, the bill currently before the Senate setting forth in great detail the terms that any final nuclear agreement with Iran would have to meet is an unhelpful infringement on the executive branch’s discretionary powers. It is hard to see how any complex negotiation could ever be completed when Congress lays down so stringent a bottom line. This of course does not mean that the administration should be given a blank check; Congress will have to approve any agreement that eventually emerges, since many of the existing sanctions are legislatively imposed. But this is a very poor way to proceed in a negotiation.

The net effect of political polarization has been to shift control over foreign policy back from the president to Congress in much the same manner as in arguments over Vietnam in the 1970s and Central America in the 1980s. This reduces executive discretion and increases the effective political discount rate.

## Extraterritoriality

#### Obama’s already abandoned the armed conflict model as a matter of policy

Robert Chesney 14, law prof at UT, “Postwar”, <http://harvardnsj.org/wp-content/uploads/2014/01/Chesney-Final.pdf>

Does it really matter, from a legal perspective, whether the U.S. government continues to maintain that it is in an armed conflict with al Qaeda? Critics of the status quo regarding the use of lethal force and military detention tend to assume that it matters a great deal and that shifting to a postwar framework will result in significant practical change. Supporters of the status quo tend to share that assumption and oppose abandoning the armedconflict model for that reason. But both camps are mistaken about this common premise. For better or worse, shifting from the armed-conflict model to a postwar framework would have far less of a practical impact than both assume.

First, consider lethal force. The Obama Administration has made clear that lethal force would remain on the table even under a postwar model, and more specifically that it would remain an option against “continuous” terrorist threats. This in itself is not surprising; the U.S. government took a similar position for decades preceding 9/11. What is surprising is the capaciousness of the continuous-threat framework and the extent to which it turns out to be consistent with the government’s existing approach to targeting even while the United States remains within the armed-conflict model. The capaciousness is not new. It was built into the continuous-threat model all along, in fact, as a review of key events in the 1980s and 1990s reveals. But the flexibility of the continuous-threat model was thoroughly obscured in the pre-9/11 period thanks to certain non-legal constraints, including, especially, the limited technology then available to carry out airstrikes in denied areas and the paucity of actionable intelligence. A variety of technological and institutional changes over the past dozen years —particularly the emergence of armed drones and the expansion of Central Intelligence Agency (“CIA”) and Joint Special Operations Command (“JSOC”) capabilities—have sharply eroded those constraints, altering what it would mean in practice to operate under the continuous-threat model once more. This helps explain why the government, though still maintaining the relevance of the armed-conflict model as a formal matter, has in fact already returned to the continuous-threat model as a matter of policy for operations outside of Afghanistan. There was relatively little cost to doing so in terms of operational flexibility, and by the same token there would be surprisingly little loss of operational flexibility should the underlying armed-conflict framework be abandoned.

The situation with respect to military detention is different, but only marginally so. The demise of the armed-conflict model will certainly matter for the dwindling legacy population at Guantánamo (and, perhaps, for a handful of legacy detainees in Afghanistan). It will not matter nearly so much for potential future detainees, however, for the simple reason that the United States long ago abandoned the business of taking on new detainees outside of Afghanistan. There are several reasons for the demise of longterm military detention as a policy option, including the fact that it has become unattractive compared to alternatives such as prosecution, the use of lethal force, and encouraging detention in the hands of other countries. The theoretical loss of legal authority to detain in the postwar period will have comparatively little real consequence in light of this larger dynamic.

None of this is an argument for or against declaring an end to the conflict with al Qaeda. The debate over that issue is badly distorted, however, by the shared and mistaken assumption that status quo targeting and detention policies depend on the armed-conflict model. Moving to postwar would not generate the sea change that advocates seek and opponents fear.

#### No enviro impact

Brook 13

Barry Brook, Professor at the University of Adelaide, leading environmental scientist, holding the Sir Hubert Wilkins Chair of Climate Change at the School of Earth and Environmental Sciences, and is also Director of Climate Science at the University of Adelaide’s Environment Institute, author of 3 books and over 250 scholarly articles, Corey Bradshaw is an Associate Professor at the University of Adelaide and a joint appointee at the South Australian Research and Development Institute, Brave New Climate, March 4, 2013, "Worrying about global tipping points distracts from real planetary threats", http://bravenewclimate.com/2013/03/04/ecological-tipping-points/

Barry Brook

We argue that at the global-scale, ecological “tipping points” and threshold-like “planetary boundaries” are improbable. Instead, shifts in the Earth’s biosphere follow a gradual, smooth pattern. This means that it might be impossible to define scientifically specific, critical levels of biodiversity loss or land-use change. This has important consequences for both science and policy.

Humans are causing changes in ecosystems across Earth to such a degree that there is now broad agreement that we live in an epoch of our own making: the Anthropocene. But the question of just how these changes will play out — and especially whether we might be approaching a planetary tipping point with abrupt, global-scale consequences — has remained unsettled.

A tipping point occurs when an ecosystem attribute, such as species abundance or carbon sequestration, responds abruptly and possibly irreversibly to a human pressure, such as land-use or climate change. Many local- and regional-level ecosystems, such as lakes,forests and grasslands, behave this way. Recently however, there have been several efforts to define ecological tipping points at the global scale.

At a local scale, there are definitely warning signs that an ecosystem is about to “tip”. For the terrestrial biosphere, tipping points might be expected if ecosystems across Earth respond in similar ways to human pressures and these pressures are uniform, or if there are strong connections between continents that allow for rapid diffusion of impacts across the planet.

These criteria are, however, unlikely to be met in the real world.

First, ecosystems on different continents are not strongly connected. Organisms are limited in their movement by oceans and mountain ranges, as well as by climatic factors, and while ecosystem change in one region can affect the global circulation of, for example, greenhouse gases, this signal is likely to be weak in comparison with inputs from fossil fuel combustion and deforestation.

Second, the responses of ecosystems to human pressures like climate change or land-use change depend on local circumstances and will therefore differ between locations. From a planetary perspective, this diversity in ecosystem responses creates an essentially gradual pattern of change, without any identifiable tipping points.

This puts into question attempts to define critical levels of land-use change or biodiversity loss scientifically.

Why does this matter? Well, one concern we have is that an undue focus on planetary tipping points may distract from the vast ecological transformations that have already occurred.

After all, as much as four-fifths of the biosphere is today characterised by ecosystems that locally, over the span of centuries and millennia, have undergone human-driven regime shifts of one or more kinds.

Recognising this reality and seeking appropriate conservation efforts at local and regional levels might be a more fruitful way forward for ecology and global change science.

Corey Bradshaw

(see also notes published here on ConservationBytes.com)

Let’s not get too distracted by the title of the this article – Does the terrestrial biosphere have planetary tipping points? – or the potential for a false controversy. It’s important to be clear that the planet is indeed ill, and it’s largely due to us. Species are going extinct faster than they would have otherwise. The planet’s climate system is being severely disrupted; so is the carbon cycle. Ecosystem services are on the decline.

But – and it’s a big “but” – we have to be wary of claiming the end of the world as we know it, or people will shut down and continue blindly with their growth and consumption obsession. We as scientists also have to be extremely careful not to pull concepts and numbers out of thin air without empirical support.

Specifically, I’m referring to the latest “craze” in environmental science writing – the idea of “planetary tipping points” and the related “planetary boundaries”.

It’s really the stuff of Hollywood disaster blockbusters – the world suddenly shifts into a new “state” where some major aspect of how the world functions does an immediate about-face.

Don’t get me wrong: there are plenty of localised examples of such tipping points, often characterised by something we call “hysteresis”. Brook defines hysterisis as:

a situation where the current state of an ecosystem is dependent not only on its environment but also on its history, with the return path to the original state being very different from the original development that led to the altered state. Also, at some range of the driver, there can exist two or more alternative states

and “tipping point” as:

the critical point at which strong nonlinearities appear in the relationship between ecosystem attributes and drivers; once a tipping point threshold is crossed, the change to a new state is typically rapid and might be irreversible or exhibit hysteresis.

Some of these examples include state shifts that have happened (or mostly likely will) to the cryosphere, ocean thermohaline circulation, atmospheric circulation, and marine ecosystems, and there are many other fine-scale examples of ecological systems shifting to new (apparently) stable states.

However, claiming that we are approaching a major planetary boundary for our ecosystems (including human society), where we witness such transitions simultaneously across the globe, is simply not upheld by evidence.

Regional tipping points are unlikely to translate into planet-wide state shifts. The main reason is that our ecosystems aren’t that connected at global scales.

The paper provides a framework against which one can test the existence or probability of a planetary tipping point for any particular ecosystem function or state. To date, the application of the idea has floundered because of a lack of specified criteria that would allow the terrestrial biosphere to “tip”. From a more sociological viewpoint, the claim of imminent shift to some worse state also risks alienating people from addressing the real problems (foxes), or as Brook and colleagues summarise:

framing global change in the dichotomous terms implied by the notion of a global tipping point could lead to complacency on the “safe” side of the point and fatalism about catastrophic or irrevocable effects on the other.

In other words, let’s be empirical about these sorts of politically charged statements instead of crying “Wolf!” while the hordes of foxes steal most of the flock.

## 2AC Legalism

#### Terrorism studies are epistemologically and methodologically valid---our authors are self-reflexive

Michael J. Boyle '8, School of International Relations, University of St. Andrews, and John Horgan, International Center for the Study of Terrorism, Department of Psychology, Pennsylvania State University, April 2008, “A Case Against Critical Terrorism Studies,” Critical Studies On Terrorism, Vol. 1, No. 1, p. 51-64

 Jackson (2007c) calls for the development of an explicitly CTS on the basis of what he argues preceded it, dubbed ‘Orthodox Terrorism Studies’. The latter, he suggests, is characterized by: (1) its poor methods and theories, (2) its state centricity, (3) its problemsolving orientation, and (4) its institutional and intellectual links to state security projects. Jackson argues that the major defining characteristic of CTS, on the other hand, should be ‘a skeptical attitude towards accepted terrorism “knowledge”’. **An implicit presumption from this is that terrorism scholars have laboured for all of these years without being aware that their area of study has an implicit bias, as well as definitional and methodological** **problems**. In fact**, terrorism scholars are not only well aware of these problems, but also have provided their own** searching **critiques** of the field at various points during the last few decades (e.g. Silke 1996, Crenshaw 1998, Gordon 1999, Horgan 2005, esp. ch. 2, ‘Understanding Terrorism’). **Some of those scholars** most associated with the critique of empiricismimplied in ‘Orthodox Terrorism Studies’ **have also engaged in deeply critical examinations of the nature of sources, methods, and data in the study of terrorism**. For example, Jackson (2007a) regularly cites the handbook produced by **Schmid and Jongman** (1988) to support his claims that theoretical progress has been limited. But this fact was well recognized by the authors; indeed, in the introduction of the second edition they **point out** that they have not revised their chapter on theories of terrorism from the first edition, because the **failure to address** persistent conceptual and **data problems** has undermined progress in the field. The point of their handbook was to sharpen and make more comprehensive the result of research on terrorism, not to glide over its methodological and definitional failings (Schmid and Jongman 1988, p. xiv). Similarly, **Silke’s** (2004) **volume on the state of the field of terrorism research performed a similar function**, highlighting the shortcomings of the field, in particular the lack of rigorous primary data collection. **A non-reflective community of scholars does not produce such scathing indictments of its own work.**

#### The theory of the exception is self-serving and wrong

William E. Scheuerman 6, Professor of Political Science at Indiana University, Carl Schmitt and the Road to Abu Ghraib, Constellations, Volume 13, Issue 1

Yet this argument relies on Schmitt’s controversial model of politics, as outlined eloquently but unconvincingly in his famous Concept of the Political. To be sure, there are intense conflicts in which it is naïve to expect an easy resolution by legal or juridical means. But the argument suffers from a troubling circularity: Schmitt occasionally wants to define “political” conflicts as those irresolvable by legal or juridical devices in order then to argue against legal or juridical solutions to them. The claim also suffers from a certain vagueness and lack of conceptual precision. At times, it seems to be directed against trying to resolve conflicts in the courts or juridical system narrowly understood; at other times it is directed against any legal regulation of intense conflict. The former argument is surely stronger than the latter. After all, legal devices have undoubtedly played a positive role in taming or at least minimizing the potential dangers of harsh political antagonisms. In the Cold War, for example, international law contributed to the peaceful resolution of conflicts which otherwise might have exploded into horrific violence, even if attempts to bring such conflicts before an international court or tribunal probably would have failed.22

Second, Schmitt dwells on the legal inconsistencies that result from modifying the traditional state-centered system of international law by expanding protections to non-state fighters. His view is that irregular combatants logically enjoyed no protections in the state-centered Westphalian model. By broadening protections to include them, international law helps undermine the traditional state system and its accompanying legal framework. Why is this troubling? The most obvious answer is that Schmitt believes that the traditional state system is normatively superior to recent attempts to modify it by, for example, extending international human rights protections to individuals against states. 23 But what if we refuse to endorse his nostalgic preference for the traditional state system? Then a sympathetic reading of the argument would take the form of suggesting that the project of regulating irregular combatants by ordinary law must fail for another reason: it rests on a misguided quest to integrate incongruent models of interstate relations and international law. We cannot, in short, maintain core features of the (state-centered) Westphalian system while extending ambitious new protections to non-state actors.

This is a powerful argument, but it remains flawed. Every modern legal order rests on diverse and even conflicting normative elements and ideals, in part because human existence itself is always “in transition.” When one examines the so-called classical liberal legal systems of nineteenth-century England or the United States, for example, one quickly identifies liberal elements coexisting uneasily alongside paternalistic and authoritarian (e.g., the law of slavery in the United States), monarchist, as well as republican and communitarian moments. The same may be said of the legal moorings of the modern welfare state, which arguably rest on a hodgepodge of socialist, liberal, and Christian and even Catholic (for example, in some European maternity policies) programmatic sources. In short, it is by no means self-evident that trying to give coherent legal form to a transitional political and social moment is always doomed to fail. Moreover, there may be sound reasons for claiming that the contemporary transitional juncture in the rules of war is by no means as incongruent as Schmitt asserts. In some recent accounts, the general trend towards extending basic protections to non-state actors is plausibly interpreted in a more positive – and by no means incoherent – light.24

Third, Schmitt identifies a deep tension between the classical quest for codified and stable law and the empirical reality of a social world subject to permanent change: “The tendency to modify or even dissolve classical [legal] concepts…is general, and in view of the rapid change of the world it is entirely understandable” (12). Schmitt’s postwar writings include many provocative comments about what contemporary legal scholars describe as the dilemma of legal obsolescence. 25 In The Partisan, he suggests that the “great transformations and modifications” in the technological apparatus of modern warfare place strains on the aspiration for cogent legal norms capable of regulating human affairs (17; see also 48–50). Given the ever-changing character of warfare and the fast pace of change in military technology, it inevitably proves difficult to codify a set of cogent and stable rules of war. The Geneva Convention proviso that legal combatants must bear their weapons openly, for example, seems poorly attuned to a world where military might ultimately depends on nuclear silos buried deep beneath the surface of the earth, and not the success of traditional standing armies massed in battle on the open field. “Or what does the requirement mean of an insignia visible from afar in night battle, or in battle with the long-range weapons of modern technology of war?” (17).

As I have tried to show elsewhere, these are powerful considerations deserving of close scrutiny; Schmitt is probably right to argue that the enigma of legal obsolescence takes on special significance in the context of rapid-fire social change.26 Unfortunately, he seems uninterested in the slightest possibility that we might successfully adapt the process of lawmaking to our dynamic social universe. To be sure, he discusses the “motorization of lawmaking” in a fascinating 1950 publication, but only in order to underscore its pathological core.27 Yet one possible resolution of the dilemma he describes would be to figure how to reform the process whereby rules of war are adapted to novel changes in military affairs in order to minimize the danger of anachronistic or out-of-date law. Instead, Schmitt simply employs the dilemma of legal obsolescence as a battering ram against the rule of law and the quest to develop a legal apparatus suited to the special problem of irregular combatants.

#### Legal norms don’t cause wars and the alt can’t effect liberalism

David Luban 10, law prof at Georgetown, Beyond Traditional Concepts of Lawfare: Carl Schmitt and the Critique of Lawfare, 43 Case W. Res. J. Int'l L. 457

Among these associations is the positive, constructive side of politics, the very foundation of Aristotle's conception of politics, which Schmitt completely ignores. Politics, we often say, is the art of the possible. It is the medium for organizing all human cooperation. Peaceable civilization, civil institutions, and elemental tasks such as collecting the garbage and delivering food to hungry mouths all depend on politics. Of course, peering into the sausage factory of even such mundane municipal institutions as the town mayor's office will reveal plenty of nasty politicking, jockeying for position and patronage, and downright corruption. Schmitt sneers at these as "banal forms of politics, . . . all sorts of tactics and practices, competitions and intrigues" and dismisses them contemptuously as "parasite- and caricature-like formations." n55 The fact is that Schmitt has nothing whatever to say about the constructive side of politics, and his entire theory focuses on enemies, not friends. In my small community, political meetings debate issues as trivial as whether to close a street and divert the traffic to another street. It is hard to see mortal combat as even a remote possibility in such disputes, and so, in Schmitt's view, they would not count as politics, but merely administration. Yet issues like these are the stuff of peaceable human politics.

Schmitt, I have said, uses the word "political" polemically--in his sense, politically. I have suggested that his very choice of the word "political" to describe mortal enmity is tendentious, attaching to mortal enmity Aristotelian and republican associations quite foreign to it. But the more basic point is that Schmitt's critique of humanitarianism as political and polemical is itself political and polemical. In a word, the critique of lawfare is itself lawfare. It is self-undermining because to the extent that it succeeds in showing that lawfare is illegitimate, it de-legitimizes itself.

What about the merits of Schmitt's critique of humanitarianism? His argument is straightforward: either humanitarianism is toothless and [\*471] apolitical, in which case ruthless political actors will destroy the humanitarians; or else humanitarianism is a fighting faith, in which case it has succumbed to the political but made matters worse, because wars on behalf of humanity are the most inhuman wars of all. Liberal humanitarianism is either too weak or too savage.

The argument has obvious merit. When Schmitt wrote in 1932 that wars against "outlaws of humanity" would be the most horrible of all, it is hard not to salute him as a prophet of Hiroshima. The same is true when Schmitt writes about the League of Nations' resolution to use "economic sanctions and severance of the food supply," n56 which he calls "imperialism based on pure economic power." n57 Schmitt is no warmonger--he calls the killing of human beings for any reason other than warding off an existential threat "sinister and crazy" n58 --nor is he indifferent to human suffering.

But international humanitarian law and criminal law are not the same thing as wars to end all war or humanitarian military interventions, so Schmitt's important moral warning against ultimate military self-righteousness does not really apply. n59 Nor does "bracketing" war by humanitarian constraints on war-fighting presuppose a vanished order of European public law. The fact is that in nine years of conventional war, the United States has significantly bracketed war-fighting, even against enemies who do not recognize duties of reciprocity. n60 This may frustrate current lawfare critics who complain that American soldiers in Afghanistan are being forced to put down their guns. Bracketing warfare is a decision--Schmitt might call it an existential decision--that rests in part on values that transcend the friend-enemy distinction. Liberal values are not alien extrusions into politics or evasions of politics; they are part of politics, and, as Stephen Holmes argued against Schmitt, liberalism has proven remarkably strong, not weak. n61 We could choose to abandon liberal humanitarianism, and that would be a political decision. It would simply be a bad one.

#### Quality of life is skyrocketing worldwide by all measures

Ridley, visiting professor at Cold Spring Harbor Laboratory, former science editor of *The Economist*, and award-winning science writer, 2010

(Matt, *The Rational Optimist*, pg. 13-15)

If my fictional family is not to your taste, perhaps you prefer statistics. Since 1800, the population of the world has multiplied six times, yet **average life expectancy has more than doubled and real income has risen more than nine times**. Taking a shorter perspective, in 2005, compared with 1955, the average human being on Planet Earth earned nearly three times as much money (corrected for inflation), ate one-third more calories of food, buried one-third as many of her children and could expect to live one-third longer. She was less likely to die as a result of war, murder, childbirth, accidents, tornadoes, flooding, famine, whooping cough, tuberculosis, malaria, diphtheria, typhus, typhoid, measles, smallpox, scurvy or polio. She was less likely, at any given age, to get cancer, heart disease or stroke. She was more likely to be literate and to have finished school. She was more likely to own a telephone, a flush toilet, a refrigerator and a bicycle. All this during a half-century when the world population has more than doubled, so that far from being rationed by population pressure, the goods and services available to the people of the world have expanded. It is, by any standard, an astonishing human achievement. Averages conceal a lot. **But even if you break down the world into bits**, **it is hard to find any region that was worse off in 2005 than it was in 1955**. Over that half-century, real income per head ended a little lower in only six countries (Afghanistan, Haiti, Congo, Liberia, Sierra Leone and Somalia), life expectancy in three (Russia, Swaziland and Zimbabwe), and infant survival in none. In the rest they have rocketed upward. Africa’s rate of improvement has been distressingly slow and patchy compared with the rest of the world, and many southern African countries saw life expectancy plunge in the 1990s as the AIDS epidemic took hold (before recovering in recent years). There were also moments in the half-century when you could have caught countries in episodes of dreadful deterioration of living standards or life chances – China in the 1960s, Cambodia in the 1970s, Ethiopia in the 1980s, Rwanda in the 1990s, Congo in the 2000s, North Korea throughout. Argentina had a disappointingly stagnant twentieth century. But overall, after fifty years, **the outcome for the world is** remarkably, astonishingly, **dramatically positive**. The average South Korean lives twenty-six more years and earns fifteen times as much income each year as he did in 1955 (and earns fifteen times as much as his North Korean counter part). The average Mexican lives longer now than the average Briton did in 1955. The average Botswanan earns more than the average Finn did in 1955. **Infant mortality is lower today in Nepal than it was in Italy in 1951**. The proportion of Vietnamese living on less than $2 a day has dropped from 90 per cent to 30 per cent in twenty years. The rich have got richer, but the poor have done even better. **The poor in the developing world grew their consumption twice as fast as the world as a whole between 1980 and 2000**. The Chinese are ten times as rich, one-third as fecund and twenty-eight years longer-lived than they were fifty years ago. Even Nigerians are twice as rich, 25 per cent less fecund and nine years longer-lived than they were in 1955. **Despite a doubling of the world population**, even **the raw number of people living in absolute poverty** (defined as less than a 1985 dollar a day) **has fallen since the 1950s**. The percentage living in such absolute poverty has dropped by more than half – to less than 18 per cent. That number is, of course, still all too horribly high, but the trend is hardly a cause for despair: at the current rate of decline, it would hit zero around 2035 – though it probably won’t. The United Nations estimates that poverty was reduced more in the last fifty years than in the previous 500.

## 2AC Politics

The impact doesn’t happen for 20 years and the squo solves

David Kravets, Senior Staff Writer, 3/20 [“History Will Remember Obama as the Great Slayer of Patent Trolls,” http://www.wired.com/threatlevel/2014/03/obama-legacy-patent-trolls/]

One of President Barack Obama’s biggest legacies will be his healthcare plan. Another, thanks to the Edward Snowden leaks, is domestic spying.¶ But Obama will leave another gift to posterity, one not so obvious, one that won’t be felt until years after his term ends: The history ebooks will remember the 44th president for setting off a chain of reforms that made predatory patent lawsuits a virtual memory. Obama is the patent troll slayer**.**¶ Even now, a perfect storm of patent reform is brewing in all three branches of government. Over time, it could reshape intellectual property law to turn the sue-and-settle troll mentality into a thing of the past.¶ “If these reforms go into effect, they will be felt only minimally during the Obama administration,” says Joe Gratz, a San Francisco-based patent lawyer who is representing Twitter in a patent dispute. “They will be felt quite strongly well after the Obama administration.”¶ “The president is a strong leader on these issues. We haven’t really seen that before,” says Julie Samuels, the executive director of startup advocacy group Engine. “I do think that this could be one of the legacies of this administration.”¶ A patent troll is generally understood to be a corporation that exists to stockpile patents for litigation purposes, instead of to build products. Often taking advantage of vague patent claims and a legal system slanted in the plaintiff’s favor, the company uses the patents to sue or threaten to sue other companies, with an eye to settling out of court for a fraction of what they were originally seeking.¶ The nation’s legal dockets are littered with patent cases with varying degrees of merit, challenging everything from mobile phone push notifications and podcasting to online payment methods and public Wi-Fi. Some 2,600 companies were targeted in new patent lawsuits last year alone.¶ Against that backdrop, Obama issued five executive orders on patent reform last summer. Among other things, they require the Patent and Trademark Office to stop issuing overly broad patents, and to force patent applicants to provide more details on what invention they are claiming. One of the orders opens up patent applications for public scrutiny — crowdsourcing — while they are in the approval stage, to help examiners locate prior art and assist with analyzing patent claims.¶ Since a patent is binding for 20 years, the impact of the new rules won’t be felt for some time. But they will be felt, says Gratz, a litigator who defends technology-heavy patent lawsuits. “The supply of overly broad, vague patents will start to dry up as new rules get put into place,” he says.¶ In January, Obama became the first president to elevate patent reform to a national meat-and-potatoes issue, when he used the State of the Union address to urge Congress to “pass a patent reform bill that allows our businesses to stay focused on innovation, not costly and needless litigation.”¶ The market is already reacting to the wind change. Shares of patent-litigation firm Acacia dropped sharply following Obama’s State of the Union, and are hovering near 52-week lows. Shares of VirnetX are in a similar tailspin. RPX, another intellectual-property concern, has seen its share prices slashed in half over the past three years.¶ The House passed major patent reform legislation last year, on a 325-91 vote, in a bid to even out the litigation playing field. Among other things, the Innovation Act requires plaintiffs in lawsuits to be more specific about what they believe is being infringed, and to identify the people who have financial interests behind a company. Perhaps most significantly, it requires that plaintiffs pay litigation expenses if they lose at trial.¶ The bill also prohibits patent holders from suing mere users of a technology that allegedly infringes on an invention, like restaurants offering Wi-Fi access to their diners.

The industry is going nowhere – stronger than ever

Vic Shao, Chief Executive Officer of Green Charge Networks, an energy storage startup based in Silicon Valley, 14 [“Vic is Chief Executive Officer of Green Charge Networks, an energy storage startup based in Silicon Valley, jan 11, http://www.care2.com/greenliving/5-reasons-the-cleantech-industry-is-stronger-than-ever.html#ixzz2xN748IW3]

As a cleantech CEO who has received $12M in funding from the US Department of Energy, I feel compelled to assure the American public that your money has not been wasted. The cleantech industry has not crashed, as the recent 60 Minutes piece asserted, but rather is stronger than ever. Here are just a few of the reasons why:¶ 1. More Americans use clean energy than ever before.¶ The infamous crash of Solyndra was actually sign of a positive trend for solar consumers: a dramatic decrease in the cost per kWh. The majority of US solar jobs are concentrated in financing and installation, not manufacturing. Cheaper panels has led to a boom in the US solar industry, making 2013 a record year for solar installations. Wind energy now powers over 15 million American homes. During the first six months of 2013, America bought twice as many plug-in electric vehicles as in the first half of 2012.¶ 2. Cleantech is still a solid investment.¶ Despite the burst of the Silicon Valley cleantech investment bubble following Solyndra, investors have been returning to the industry, lured by the rapid growth of companies like Solar City. The US Department of Energy (DOE) loan program has a whopping 97% success rate with much-publicized failures such as Solyndra and Abound Solar making up just three percent of the portfolio.¶ 3. Greenhouse gas emissions in the United States are falling.¶ Carbon dioxide emissions fell by 13% in the past five years to its lowest level in nearly 20 years. Though part of the savings was due to an increase in natural gas, renewable energy and new energy-saving technologies also played a role. This year, 2014, is predicted to be one of the cleanest years since the early 1990s.¶ 4. The grid is changing.¶ The U.S. electricty utility industry faces a critical juncture as new technology and declining prices allow a more distributed system of energy storage, renewable energy installations and power efficiency strategies. Over $4 billion has been invested in the so-called “smart grid.” New technologies like Opower for residential and Green Charge Networks’ GreenStationTMs have begun to help businesses save money on their utility bills.¶ 5. Cleantech jobs are growing.¶ There are now more solar workers than ranchers in Texas. In California, solar workers outnumber actors. The solar industry in total employs 119,000 workers with the wind industry bringing in another 80,000. Though jobs in cleantech as a whole are difficult to size due to differing definitions, we know that green jobs have seen explosive growth over the past few years, despite the recession. Also, with the recent legislative initiatives, there will be a ton more innovations, businesses, and jobs created out of the emerging energy storage sector in the years to come, fulfilling a very real and necessary gap in California (especially with the recent de-commissioning of San Onofre Generating Station — SONGS).¶ From the rise in clean energy adoption to the replacement of our aging grid infrastructure with new technology, it’s clear that the cleantech industry isn’t going anywhere.

#### Fights over details swamp compromise

Meyers 3/5/14

JESSICA MEYERS, Politico, 3/5/14, "Lawmakers: Patent reform will advance", http://www.politico.com/story/2014/03/patent-reform-104278.html

Lee said he and Leahy want to find a way to incorporate an amendment from Sen. John Cornyn (R-Tex.) that would force the loser to pay the winner’s fees in patent lawsuits. This “could produce something that ends up being pretty close to what passed in the House,” he said.

Not everyone wants it that way. Russ Merbeth, chief policy council for Intellectual Ventures, said such fee shifting could “chill” the ability of businesses to enforce their patent rights. “It’s one of the tougher nuts to crack in this whole debate,” he said. The company, which holds a vast array of patents, is often criticized as one of the biggest trolls.

KAYAK’s Berman, attacked Intellectual Ventures as the real problem. “It’s about him,” he said.

The last patent overhaul, the America Invents Act, took place only three years ago. But supporters of reform don’t believe it resolved the troll issue.

Even if a new bill moves forward in the Senate, the two chambers must settle on a compromise in the midst of an election year. That timing, Berman said, “concerns me greatly.”

#### XOs solve now

David Kravets, Wired, 3/20/14, History Will Remember Obama as the Great Slayer of Patent Trolls, www.wired.com/threatlevel/2014/03/obama-legacy-patent-trolls/

Even now, a perfect storm of patent reform is brewing in all three branches of government. Over time, it could reshape intellectual property law to turn the sue-and-settle troll mentality into a thing of the past.

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The bill also prohibits patent holders from suing mere users of a technology that allegedly infringes on an invention, like restaurants offering Wi-Fi access to their diners.

The Senate is debating similar legislation in a piecemeal manner. Whatever it finally approves, the package will have to go back to the House for final approval before landing on the president’s desk.

And the Supreme Court is mulling a case on whether patent trolls should pay legal fees to the other side if they lose in court and is even considering the hot-button issue of whether software — often at the center of modern patent disputes — is even patentable.

Taken together, Samuels says, the looming changes undermine the “I’m going to sue you unless you pay me to go away” mentality associated with patent trolling.

#### Consensus backing for repeal

Michael McAuliff 13, was a correspondent for the New York Daily News, AUMF Repeal Bill Would End Extraordinary War Powers Granted After 9/11, June 10, <http://www.huffingtonpost.com/2013/06/10/aumf-repeal-bill-war-powers_n_3416689.html>

Two administrations have relied upon the AUMF to use military force in Afghanistan and around the world. They have also used the law to justify practices that lately have become more controversial, including drone strikes that have killed at least four Americans and the indefinite detention of terror suspects at Guantanamo Bay, Cuba, where more than 100 detainees are currently on a hunger strike.

President Barack Obama recently called for the repeal of the authorization, saying it promotes perpetual war and grants presidents **too much power**. Leaders in the Senate have also called for its repeal or revision, noting that while the AUMF is supposed to target al Qaeda, the Taliban and allies who helped carry out the Sept. 11 attacks, it has been interpreted to be used far more broadly.

"The nature of the threat we face is different now," said Schiff. "The authorities that we're using are straining at their legal edges to authorize force against groups that didn't exist on 9/11 or that may be only loosely affiliated with al Qaeda."

"I think the timing is right, particularly given the president's speech 10 days ago," he added, arguing that Congress can no longer afford to "kick the can" down the road on such a vital piece of national security law, one that is now 12 years removed from the event that sparked it.

"Congress has a long history over the last decade of abdicating these tough questions because they're difficult," he said.

The questions around the AUMF are indeed difficult. In addition to being used to answer for indefinite detention and the targeted killings of Americans overseas, Congress has used the measure as a basis to pass laws expressly permitting the military to detain Americans without trial. The Obama administration has declared it will not hold U.S. citizens under that authority, but reserves the right to detain the 166 captives at Guantanamo.

But without the AUMF in force, Congress and the administration would have to decide how to deal with prisoners of war in the absence of a specific war. While dozens of captives at Guantanamo are cleared to be released, many are deemed threats to the United States who cannot be tried or let go.

"That is the most difficult kernel to pop," said Schiff. "There is still a remaining group of people for whom the evidence is either highly classified or highly problematic because it was a product of torture. And that problem remains to be solved."

Simply freeing those Guantanamo detainees is not an option, he said. "There will be a need for continued detention, even after the expiration of the AUMF," Schiff said, citing a World War II precedent for handling prisoners of war.

"I don't know that the authority to detain enemy combatants would end with AUMF. But I do think that Guantanamo ought to come to an end, ideally to match up with the expiration o the AUMF in about 18 months," he said.

Schiff's effort comes amid the recent revelations of the breadth of the National Security Agency's ability to spy on Americans -- an authority that stems from a separate law also inspired by the 2001 terror attacks, the PATRIOT Act. It also comes as observers on both the left and right have expressed greater suspicion of the executive branch's use of power in targeting reporters, whistleblowers and conservative groups.

Schiff, a member of the House Intelligence Committee, said the broader debate provides "context" for his measure, but evaluating the AUMF and the type of force Congress allows the president to use in the war on terror is a separate, if equally difficult, matter.

"There's probably a more **substantial consensus** that the existing AUMF is outdated and probably should be replaced," he said. "There's a lot less consensus about what should come after."

#### Obama’s NSA proposal triggers it

Paul Waldman, WaPo, 3/25/14, NSA may give up on phone records. But they’re still watching., www.washingtonpost.com/blogs/plum-line/wp/2014/03/25/nsa-may-give-up-on-phone-records-but-theyre-still-watching/

At a presser today in the Netherlands, President Obama confirmed reports that his administration is preparing to release a plan to end National Security Agency bulk information collection and leave that information with phone companies instead — albeit not for a longer duration than they are already required to hold the information for. Obama described the plan as “workable,” adding: “This insures that the government is not in possession of that bulk data.” What makes this surprising is that old axiom about presidents: they don’t relinquish power willingly. No matter what they might say about the appropriate limits of executive authority before they take office, once they’re actually in the White House, they want to hold on to every shred they can. Obama is now poised to give up some of his power. But it needs to be restated that this would not have happened without all those revelations from Edward Snowden. What will Obama’s proposal look like? Charlie Savage of the New York Times reported: The Obama administration is preparing to unveil a legislative proposal for a far-reaching overhaul of the National Security Agency’s once-secret bulk phone records program in a way that — if approved by Congress — would end the aspect that has most alarmed privacy advocates since its existence was leaked last year, according to senior administration officials. Under the proposal, they said, N.S.A. would end its systematic collection of data about Americans’ calling habits. The records would be stay in the hands of phone companies, which would not be required to retain the data for any longer than they normally would. And the N.S.A. could obtain specific records only with permission from a judge, using a new kind of court order.

#### Ukraine overshadows everything

Justin Sink, the Hill, 3/20/14, Obama’s bully pulpit struggle, thehill.com/blogs/global-affairs/russia/201333-obamas-bully-pulpit-struggle

President Obama’s reliance on the bully pulpit to bump up ObamaCare’s enrollment and hammer Republicans in an election year is facing a serious challenge with the crisis in Ukraine.

The worst U.S.-Russia crisis since the Cold War is taking up a significant amount of the administration’s oxygen, complicating the president's efforts to get his message out.

On Thursday, Obama sought to put the spotlight on higher pay for women, an election-year issue Democrats believe they can turn to their advantage in November.

But his event in Orlando was largely overshadowed by his announcement earlier in the day of new sanctions on Moscow, part of a showdown with Russian President Vladimir Putin.

The administration isn’t giving up its efforts even as Obama seeks to contain Russia, and the cross-currents have led to some odd juxtapositions.

On Thursday, the day began with the release of a video of Obama joking with talk-show host Ellen DeGeneres over her selfie at the Oscars, which broke Obama’s record for re-tweets. Obama’s appearance on “Ellen” was meant to promote the healthcare law.

Hours later, a somber Obama announced new sanctions on Russia on the White House South Lawn, with the Marine One helicopter as his background shot.

As Obama was speaking, ESPN Radio’s “The Herd with Colin Cowherd” was airing a previously taped interview with the president in which he dug into his March Madness bracket.

In the interview, Obama also defended his appearance with comedian Zach Galifianakis on his “Between two Ferns” Web series, noting Abraham Lincoln famously loved to tell “bawdy jokes.”

The hubbub over that video, released last Tuesday, drowned out a White House event with female lawmakers designed to highlight the president’s election-year focus on women’s issues.

Still later on Thursday, Obama used the event at Valencia College in Florida to scold Republicans for opposing the Paycheck Fairness Act.

The commander in chief was replaced by the campaigner in chief, who called on the GOP to “join us in this century” and pass the legislation meant to ensure women receive equal pay for equal work.

Obama also called on lawmakers to raise the minimum wage.

After concluding his remarks, Obama was rushed back to Air Force One for a short trip to Miami, where he plans to attend a fundraiser Thursday night at the home of former Miami Heat star Alonzo Mourning.

None of this is wildly out of order for a modern presidency in which the leader of the free world must balance state dinners with appearances on “The Tonight Show.”

But recent events have provided an extreme example of the tightrope Obama must walk.

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## solvency

Clean repeal key to transition away from the endless war approach to terrorism

Christopher Preble 13, vice president for Defense and Foreign Policy Studies at the Cato Institute, How to End the War on Terrorism Properly, June 10, <http://www.cato.org/publications/commentary/how-end-war-terrorism-properly?utm_source=Cato+Institute+Emails&utm_campaign=d7856100b8-Cato_Today&utm_medium=email&utm_term=0_395878584c-d7856100b8-141711634&mc_cid=d7856100b8&mc_eid=719812f23e>

In his speech on counterterrorism last month, President Barack Obama said something both profound and overdue — the war underway since 2001 should end, not just factually but also legally. Outlining his views, the president said he wanted to “refine, and ultimately repeal,” the Authorization for Use of Military Force (AUMF), the main legislative vehicle governing U.S. counterterrorism operations around the world. He also pledged not to sign laws designed to expand this mandate further.

“The most successful counterterrorism operations involve timely intelligence collection and analysis, not open-ended military operations involving large deployments of U.S. troops.”

But to make that goal a concrete reality, **the president should have called for legislation** repealing the administration’s authority for war — **sunsetting the AUMF**, which provides the legal authorization for our troops in Afghanistan, once combat operations there conclude at the end of 2014. **Future counterterrorism operations can rely on** the plentiful **authorities the executive branch already has**, including some that have been added since 9/11. **And if this president** — or any other in the future — **needs greater war powers** to deal with a threat, **they can return to Congress and ask for specific, limited authorities** tailored to address the future challenge.

The fact is that while there are other ways the AUMF could be usefully altered, a clean repeal has significant advantages.

From an operational perspective, the AUMF authorizes military force, but we’re winding down our operations in Afghanistan. Our military presence there helped decimate core al Qaeda, leaving them a shadow of their former selves. And this matters, for without the organizational support and training from core al Qaeda’s veteran operational commanders — most of whom are either dead or incarcerated — most self-radicalized terrorists are caught long before their plots are successful. **Military operations should be the mechanism of last resort** to deal with terrorist plots, especially **outside war zones** like Afghanistan.

The most successful counterterrorism operations involve timely intelligence collection and analysis, and cooperation with local officials, not open-ended military operations involving large deployments of U.S. troops. **Law enforcement or intelligence services** identified and disrupted multiple other plans over the years. These mechanisms **do not rely upon the AUMF, so** an eventual **clean repeal won’t affect our ability to disrupt plots**.

Conservatives who revere the Constitution should be most reluctant to hand over unending powers to the president. As James Madison said, granting “such powers [to the President] would have struck, not only at the fabric of our Constitution, but at the foundation of all well organized and well checked governments.”

Madison knew that war tended to enhance executive powers and erode liberties. And that has occurred. With Congressional acquiescence, the last two presidents have interpreted the AUMF as a warrant to attack or detain anyone that they say is a leader of al Qaeda or its associated forces, without geographic limit. The secretive and loose definition of those terms has given the president vast and excessive discretion to identify, target and kill suspected terrorists, or to detain indefinitely those who are captured. **Sunsetting the law prevents** that **growth in executive power from becoming permanent**.

Liberals who might trust this president’s discretion in using these authorities have good reason to be concerned about what future presidents might do with broad and unlimited authority. We have already seen how the passage of time has stretched the AUMF well beyond its original purpose. The list of targets already includes individuals and groups that were not directly involved in the attacks of 9/11. Even President Obama recognizes the risk. “Unless we discipline our thinking and our actions,” the President explained, “**we may be drawn into more wars** we don’t need to fight.”

#### Executive action fails

Christopher McIntosh, Visiting Assistant Professor, Political Studies, at Bard College and has a Ph.D. in political science from the University of Chicago, Winter 2014, Ending the War with Al Qaeda, Orbis, 58.1

Shifting Strategy—Ending the War

Post AUMF, the United States has eliminated much of al Qaeda’s leadership. The Taliban no longer offers the group safe haven in Afghanistan. AQ operations and major attacks have been disrupted dramatically and Osama bin Laden and other leaders have been killed. Although the threat is by no means extinguished, these successes have brought us to a point at which we must think strategically about the end-game. **Without a change, the current path will remain ultimately inconclusive and counterproductive**. The inability to conclude the conflict successfully is not due to the operational capacity of al Qaeda, but largely to the increasing inappropriateness of United States strategy.

Dropping the framework of war will not be simple, but neither is it impossible. Congress already has begun to envision and debate the means of implementation—the Senate Armed Services Committee has begun to examine the scope of the AUMF. Ending the framework requires only an act of Congress: revoking the blank check it wrote to the executive and returning any use of force to pre-2001 limitations. Short of full revocation, **Congress** also **could** act to **impose limits on the use of force**—in terms of geography, temporal duration, or even requiring concurrence with international law, as Rosa Brooks argued in her testimony before the Senate.27 In addition, **Congress could** choose to more effectively **use their oversight capacity** to shape and constrain what the executive can and cannot do in areas such as indefinite detention and the targeted killing program. Despite the beginning of a discussion regarding revising and/or repealing the AUMF, action along any of these lines seems unlikely at this point given the GOP’s support of hardline approaches to dealing with terrorism, as well as the Obama Administration’s reliance on targeted killing as the primary means of countering terror abroad. Although the option is always there, **neither party has shown a** real **willingness to constrain** the executive from operating its **commander-in-chief powers** in any substantive manner.

An effective, yet equally unlikely option also could be for the executive to take the lead. This could be accomplished via the next National Security Strategy that the administration offers. The 2010 NSS shifted the United States from a policy of a Global War on Terrorism to a narrowly focused effort limited to al Qaeda and its affiliates. A similar directive, declaring that the war on al Qaeda is over would make clear that this is not merely a rhetorical exercise but one with deep strategic, legal, and political implications. Unfortunately, **executive action alone would be subject to the political shifts inherent in the office of the president and subject to** no lasting, formal restrictions. Obama’s expansion of the drone program demonstrates that **there will always be an incentive for** the occupant of **the White House to expand his or her efforts in the name of security, regardless of political ideology**.

## tea party

No Tea Party influence – 8 warrants

Newton 3-28 [Jay Newton-Small (congressional correspondent for TIME); “The Tea Party is Running Out of Steam: The movement is struggling as primary races slip away”; 3/28/14; <http://time.com/41581/tea-party-midterm-elections-2014/>]

The Tea Party is Running Out of Steam: The movement is struggling **as primary races slip away**

In past two cycles, the insurgent group claimed the Senate seats of Republicans Bob Bennett of Utah and Dick Lugar of Indiana. **But this year, Texas Sen. John Cornyn sailed through his Tea Party primary challenge and it’s not looking likely that the movement will take down** any **of its top targets**: Senate Minority Leader Mitch McConnell in Kentucky, Thad Cochran of Mississippi, Lamar Alexander of Tennessee, Pat Roberts of Kansas, and Lindsey Graham of South Carolina.

There’s still a crew of Tea Party challengers in open-seat races, but the **“**Tea Party groups aren’tas united as they once were,” says Jennifer Duffy, who tracks the Senate for Cook Political Report, which follows congressional races. “They haven’t united behind candidates in Georgia, North Carolina and South Carolina, for example.”

**It’s looking increasing likely that Republican** incumbents or establishment candidates **will prevail** this year. **Could this be the** beginning of the **end of the Tea Party?**

Not quite.

The Tea Party had a change in strategy this cycle after establishment Republicans blamed activists for Senate losses in 2010 and 2012 that cost the GOP the majority. This year, **Tea Party leaders have looked to** red states **for their main targets in primaries**—states **where it’s harder for the insurgents to win** because the incumbents are inherently more conservative than those in swing states. Plus, “the **national Republicans have been** more aggressive **in pushing back**,” Duffy says. **And**, “as polling has been indicating, **the Tea Party just isn’t as** popular **as it was.”**

**Compounding that,** the issues have gotten away **from the movement. Budgets and deficits are no longer** as **prominent in the headlines.** “**There are Tea Party challenges, but they have** less traction and momentum**,**” says Norm Ornstein, a congressional scholar with the American Enterprise Institute. “One reason is the way the debt limit-shutdown issues played out. It’s not easy to undermine ‘establishment’ candidates who were on the “wrong” side.”

**Not to mention**, Ornstein says, that Obamacare has become “the great unifier**.”** As Democratic pollster [Celinda Lake noted earlier this week](http://time.com/37171/2014-midterm-elections-republicans-democrats-polls/), **with every GOP candidate standing in opposition to the health care reform law, the biggest issue** of the midterm elections so far **this year, the establishment candidates are winning.** There’s little right ground left **for Tea Party candidates to go.**

Of course, election filing deadlines haven’t past in half the states and Tea Party challengers are often late filers, so much could still change. But, Larry Sabato, head of the Center for Politics at the University of Virginia, argues that **the Tea Party is simply growing up. “There are fewer serious Tea Party threats to Senate and House incumbents.** …The learning curve is not flat, even for ideologues,” he says. “**They were convinced they’d win the White House in 2012. They expected to sweep key Senate seats too.** We know what happened**. Some** compromise, or maybe tolerance,has crept in**to** parts of **the Tea Party movement. They want to win** as much as they want their principles embraced.”