# 1AC – Fullerton Octas

### 1AC – Executive Overreach

#### CONTENTION 1: OVERREACH

#### *Scenario A: Targeted Strikes*

#### Global prolif of drones is inevitable---the plan establishes norms for restrained use that prevents Mid-East and Indo-Pak war

Kristen Roberts 13, news editor for the National Journal, master in security studies from Georgetown, “When the Whole World Has Drones”, 3/22, <http://www.nationaljournal.com/magazine/when-the-whole-world-has-drones-20130321>

The proliferation of drone technology has moved well beyond the control of the United States government and its closest allies. The aircraft are too easy to obtain, with barriers to entry on the production side crumbling too quickly to place limits on the spread of a technology that promises to transform warfare on a global scale. Already, more than 75 countries have remote piloted aircraft. More than 50 nations are building a total of nearly a thousand types. At its last display at a trade show in Beijing, China showed off 25 different unmanned aerial vehicles. Not toys or models, but real flying machines. It’s a classic and common phase in the life cycle of a military innovation: An advanced country and its weapons developers create a tool, and then others learn how to make their own. But what makes this case rare, and dangerous, is the powerful combination of efficiency and lethality spreading in an environment lacking internationally accepted guidelines on legitimate use. This technology is snowballing through a global arena where the main precedent for its application is the one set by the United States; it’s a precedent Washington does not want anyone following. America, the world’s leading democracy and a country built on a legal and moral framework unlike any other, has adopted a war-making process that too often bypasses its traditional, regimented, and rigorously overseen military in favor of a secret program never publicly discussed, based on legal advice never properly vetted. The Obama administration has used its executive power to refuse or outright ignore requests by congressional overseers, and it has resisted monitoring by federal courts. To implement this covert program, the administration has adopted a tool that lowers the threshold for lethal force by reducing the cost and risk of combat. This still-expanding counterterrorism use of drones to kill people, including its own citizens, outside of traditionally defined battlefields and established protocols for warfare, has given friends and foes a green light to employ these aircraft in extraterritorial operations that could not only affect relations between the nation-states involved but also destabilize entire regions and potentially upset geopolitical order. Hyperbole? Consider this: Iran, with the approval of Damascus, carries out a lethal strike on anti-Syrian forces inside Syria; Russia picks off militants tampering with oil and gas lines in Ukraine or Georgia; Turkey arms a U.S.-provided Predator to kill Kurdish militants in northern Iraq who it believes are planning attacks along the border. Label the targets as terrorists, and in each case, Tehran, Moscow, and Ankara may point toward Washington and say, we learned it by watching you. In Pakistan, Yemen, and Afghanistan. This is the unintended consequence of American drone warfare. For all of the attention paid to the drone program in recent weeks—about Americans on the target list (there are none at this writing) and the executive branch’s legal authority to kill by drone outside war zones (thin, by officials’ own private admission)—what goes undiscussed is Washington’s deliberate failure to establish clear and demonstrable rules for itself that would at minimum create a globally relevant standard for delineating between legitimate and rogue uses of one of the most awesome military robotics capabilities of this generation. THE WRONG QUESTION The United States is the indisputable leader in drone technology and long-range strike. Remote-piloted aircraft have given Washington an extraordinary ability to wage war with far greater precision, improved effect, and fewer unintended casualties than conventional warfare. The drones allow U.S. forces to establish ever greater control over combat areas, and the Pentagon sees the technology as an efficient and judicious force of the future. And it should, given the billions of dollars that have gone into establishing and maintaining such a capability. That level of superiority leads some national security officials to downplay concerns about other nations’ unmanned systems and to too narrowly define potential threats to the homeland. As proof, they argue that American dominance in drone warfare is due only in part to the aircraft itself, which offers the ability to travel great distances and loiter for long periods, not to mention carry and launch Hellfire missiles. The drone itself, they argue, is just a tool and, yes, one that is being copied aggressively by allies and adversaries alike. The real edge, they say, is in the unparalleled intelligence-collection and data-analysis underpinning the aircraft’s mission. “There is what I think is just an unconstrained focus on a tool as opposed to the subject of the issue, the tool of remotely piloted aircraft that in fact provide for greater degrees of surety before you employ force than anything else we use,” said retired Lt. Gen. David Deptula, the Air Force’s first deputy chief of staff for intelligence, surveillance, and reconnaissance. “I think people don’t realize that for the medium altitude aircraft—the MQ-1 [Predator] and MQ-9 [Reaper] that are generally written about in the press—there are over 200 people involved in just one orbit of those aircraft.… The majority of those people are analysts who are interpreting the information that’s coming off the sensors on the aircraft.” The analysts are part of the global architecture that makes precision strikes, and targeted killing, possible. At the front end, obviously, intelligence—military, CIA, and local—inform target decisions. But in as near-real time as technologically possible, intel analysts in Nevada, Texas, Virginia, and other locations watch the data flood in from the aircraft and make calls on what’s happening on target. They monitor the footage, listen to audio, and analyze signals, giving decision-makers time to adjust an operation if the risks (often counted in potential civilian deaths) outweigh the reward (judged by the value of the threat eliminated). “Is that a shovel or a rifle? Is that a Taliban member or is this a farmer? The way that warfare has advanced is that we are much more exquisite in our ability to discern,” Maj. Gen. Robert Otto, commander of the Air Force Intelligence, Surveillance, and Reconnaissance Agency, told National Journal at Nellis Air Force Base in Nevada. “We’re not overhead for 15 minutes with a fighter that’s about to run out of gas, and we have to make a decision. We can orbit long enough to be pretty sure about our target.” Other countries, groups, and even individuals can and do fly drones. But no state or group has nearly the sophisticated network of intelligence and data analysis that gives the United States its strategic advantage. Although it would be foolish to dismiss the notion that potential U.S. adversaries aspire to attain that type of war-from-afar, pinpoint-strike capability, they have neither the income nor the perceived need to do so. That’s true, at least today. It’s also irrelevant. Others who employ drones are likely to carry a different agenda, one more concerned with employing a relatively inexpensive and ruthlessly efficient tool to dispatch an enemy close at hand. “It would be very difficult for them to create the global-strike architecture we have, to have a control cell in Nevada flying a plane over Afghanistan. The reality is that most nations don’t want or need that,” said Peter Singer, director of the Brookings Institution’s Center for 21st Century Security and Intelligence and one of the foremost experts in advanced military technology. “Turkey’s not looking to conduct strikes into the Philippines.... But Turkey is looking to be able to carry out long-duration surveillance and potentially strike inside and right on its border.” And that’s a NATO ally seeking the capability to conduct missions that would run afoul of U.S. interests in Iraq and the broader Middle East. Already, Beijing says it considered a strike in Myanmar to kill a drug lord wanted in the deaths of Chinese sailors. What happens if China arms one of its remote-piloted planes and strikes Philippine or Indian trawlers in the South China Sea? Or if India uses the aircraft to strike Lashkar-e-Taiba militants near Kashmir? “We don’t like other states using lethal force outside their borders. It’s destabilizing. It can lead to a sort of wider escalation of violence between two states,” said Micah Zenko, a security policy and drone expert at the Council on Foreign Relations. “So the proliferation of drones is not just about the protection of the United States. It’s primarily about the likelihood that other states will increasingly use lethal force outside of their borders.” LOWERING THE BAR Governments have covertly killed for ages, whether they maintained an official hit list or not. Before the Obama administration’s “disposition matrix,” Israel was among the best-known examples of a state that engaged, and continues to engage, in strikes to eliminate people identified by its intelligence as plotting attacks against it. But Israel certainly is not alone. Turkey has killed Kurds in Northern Iraq. Some American security experts point to Russia as well, although Moscow disputes this. In the 1960s, the U.S. government was involved to differing levels in plots to assassinate leaders in Congo and the Dominican Republic, and, famously, Fidel Castro in Cuba. The Church Committee’s investigation and subsequent 1975 report on those and other suspected plots led to the standing U.S. ban on assassination. So, from 1976 until the start of President George W. Bush’s “war on terror,” the United States did not conduct targeted killings, because it was considered anathema to American foreign policy. (In fact, until as late as 2001, Washington’s stated policy was to oppose Israel’s targeted killings.) When America adopted targeted killing again—first under the Bush administration after the September 11 attacks and then expanded by President Obama—the tools of the trade had changed. No longer was the CIA sending poison, pistols, and toxic cigars to assets overseas to kill enemy leaders. Now it could target people throughout al-Qaida’s hierarchy with accuracy, deliver lethal ordnance literally around the world, and watch the mission’s completion in real time. The United States is smartly using technology to improve combat efficacy, and to make war-fighting more efficient, both in money and manpower. It has been able to conduct more than 400 lethal strikes, killing more than 3,500 people, in Afghanistan, Pakistan, Yemen, Somalia, and North Africa using drones; reducing risk to U.S. personnel; and giving the Pentagon flexibility to use special-forces units elsewhere. And, no matter what human-rights groups say, it’s clear that drone use has reduced the number of civilians killed in combat relative to earlier conflicts. Washington would be foolish not to exploit unmanned aircraft in its long fight against terrorism. In fact, defense hawks and spendthrifts alike would criticize it if it did not. “If you believe that these folks are legitimate terrorists who are committing acts of aggressive, potential violent acts against the United States or our allies or our citizens overseas, should it matter how we choose to engage in the self-defense of the United States?” asked Rep. Mike Rogers, R-Mich., chairman of the House Intelligence Committee. “Do we have that debate when a special-forces team goes in? Do we have that debate if a tank round does it? Do we have the debate if an aircraft pilot drops a particular bomb?” But defense analysts argue—and military officials concede—there is a qualitative difference between dropping a team of men into Yemen and green-lighting a Predator flight from Nevada. Drones lower the threshold for military action. That’s why, according to the Council on Foreign Relations, unmanned aircraft have conducted 95 percent of all U.S. targeted killings. Almost certainly, if drones were unavailable, the United States would not have pursued an equivalent number of manned strikes in Pakistan. And what’s true for the United States will be true as well for other countries that own and arm remote piloted aircraft. “The drones—the responsiveness, the persistence, and without putting your personnel at risk—is what makes it a different technology,” Zenko said. “When other states have this technology, if they follow U.S. practice, it will lower the threshold for their uses of lethal force outside their borders. So they will be more likely to conduct targeted killings than they have in the past.” The Obama administration appears to be aware of and concerned about setting precedents through its targeted-strike program. When the development of a disposition matrix to catalog both targets and resources marshaled against the United States was first reported in 2012, officials spoke about it in part as an effort to create a standardized process that would live beyond the current administration, underscoring the long duration of the counterterrorism challenge. Indeed, the president’s legal and security advisers have put considerable effort into establishing rules to govern the program. Most members of the House and Senate Intelligence committees say they are confident the defense and intelligence communities have set an adequate evidentiary bar for determining when a member of al-Qaida or an affiliated group may be added to the target list, for example, and say that the rigor of the process gives them comfort in the level of program oversight within the executive branch. “They’re not drawing names out of a hat here,” Rogers said. “It is very specific intel-gathering and other things that would lead somebody to be subject for an engagement by the United States government.” BEHIND CLOSED DOORS The argument against public debate is easy enough to understand: Operational secrecy is necessary, and total opacity is easier. “I don’t think there is enough transparency and justification so that we remove not the secrecy, but the mystery of these things,” said Dennis Blair, Obama’s former director of national intelligence. “The reason it’s not been undertaken by the administration is that they just make a cold-blooded calculation that it’s better to hunker down and take the criticism than it is to get into the public debate, which is going to be a hard one to win.” But by keeping legal and policy positions secret, only partially sharing information even with congressional oversight committees, and declining to open a public discussion about drone use, the president and his team are asking the world to just trust that America is getting this right. While some will, many people, especially outside the United States, will see that approach as hypocritical, coming from a government that calls for transparency and the rule of law elsewhere. “I know these people, and I know how much they really, really attend to the most important details of the job,” said Barry Pavel, a former defense and security official in the Bush and Obama administrations who is director of the Brent Scowcroft Center on International Security at the Atlantic Council. “If I didn’t have that personal knowledge and because there isn’t that much really in the press, then I would be giving you a different rendering, and much more uncertain rendering.” That’s only part of the problem with the White House’s trust-us approach. The other resides in the vast distance between the criteria and authorization the administration says it uses in the combat drone program and the reality on the ground. For example, according to administration officials, before a person is added to the targeted strike list, specific criteria should be met. The target should be a 1) senior, 2) operational 3) leader of al-Qaida or an affiliated group who presents 4) an imminent threat of violent attack 5) against the United States. But that’s not who is being targeted. Setting aside the administration’s redefining of “imminence” beyond all recognition, the majority of the 3,500-plus people killed by U.S. drones worldwide were not leaders of al-Qaida or the Taliban; they were low- or mid-level foot soldiers. Most were not plotting attacks against the United States. In Yemen and North Africa, the Obama administration is deploying weaponized drones to take out targets who are more of a threat to local governments than to Washington, according to defense and regional security experts who closely track unrest in those areas. In some cases, Washington appears to be in the business of using its drone capabilities mostly to assist other countries, not to deter strikes against the United States (another precedent that might be eagerly seized upon in the future). U.S. defense and intelligence officials reject any suggestion that the targets are not legitimate. One thing they do not contest, however, is that the administration’s reliance on the post-9/11 Authorization for Use of Military Force as legal cover for a drone-strike program that has extended well beyond al-Qaida in Afghanistan or Pakistan is dodgy. The threat that the United States is trying to deal with today has an ever more tenuous connection to Sept. 11. (None of the intelligence officials reached for this article would speak on the record.) But instead of asking Congress to consider extending its authorization, as some officials have mulled, the administration’s legal counsel has chosen instead to rely on Nixon administration adviser John Stevenson’s 1970 justification of the bombing of Cambodia during the Vietnam War, an action new Secretary of State John Kerry criticized during his confirmation hearing this year. Human-rights groups might be loudest in their criticism of both the program and the opaque policy surrounding it, but even the few lawmakers who have access to the intelligence the administration shares have a hard time coping with the dearth of information. “We can’t always assume we’re going to have responsible people with whom we agree and trust in these positions,” said Sen. Angus King, I-Maine, who sits on the Senate Intelligence Committee. “The essence of the Constitution is, it shouldn’t matter who is in charge; they’re still constrained by principles and rules of the Constitution and of the Bill of Rights.” PEER PRESSURE Obama promised in his 2013 State of the Union to increase the drone program’s transparency. “In the months ahead, I will continue to engage Congress to ensure not only that our targeting, detention, and prosecution of terrorists remains consistent with our laws and system of checks and balances, but that our efforts are even more transparent to the American people and to the world,” the president said on Feb. 12. Since then, the administration, under pressure from allies on Senate Intelligence, agreed to release all of the legal memos the Justice Department drafted in support of targeted killing. But, beyond that, it’s not certain Obama will do anything more to shine light on this program. Except in situations where leaks help it tell a politically expedient story of its skill at killing bad guys, the administration has done little to make a case to the public and the world at large for its use of armed drones. Already, what’s become apparent is that the White House is not interested in changing much about the way it communicates strike policy. (It took Sen. Rand Paul’s 13-hour filibuster of CIA Director John Brennan’s nomination to force the administration to concede that it doesn’t have the right to use drones to kill noncombatant Americans on U.S. soil.) And government officials, as well as their surrogates on security issues, are actively trying to squash expectations that the administration would agree to bring the judicial branch into the oversight mix. Indeed, judicial review of any piece of the program is largely off the table now, according to intelligence officials and committee members. Under discussion within the administration and on Capitol Hill is a potential program takeover by the Pentagon, removing the CIA from its post-9/11 role of executing military-like strikes. Ostensibly, that shift could help lift the secret-by-association-with-CIA attribute of the program that some officials say has kept them from more freely talking about the legitimate military use of drones for counterterrorism operations. But such a fix would provide no guarantee of greater transparency for the public, or even Congress. And if the administration is not willing to share with lawmakers who are security-cleared to know, it certainly is not prepared to engage in a sensitive discussion, even among allies, that might begin to set the rules on use for a technology that could upend stability in already fragile and strategically significant places around the globe. Time is running out to do so. “The history of technology development like this is, you never maintain your lead very long. Somebody always gets it,” said David Berteau, director of the International Security Program at the Center for Strategic and International Studies. “They’re going to become cheaper. They’re going to become easier. They’re going to become interoperable,” he said. “The destabilizing effects are very, very serious.” Berteau is not alone. Zenko, of the Council on Foreign Relations, has urged officials to quickly establish norms. Singer, at Brookings, argues that the window of opportunity for the United States to create stability-supporting precedent is quickly closing. The problem is, the administration is not thinking far enough down the line, according to a Senate Intelligence aide. Administration officials “are thinking about the next four years, and we’re thinking about the next 40 years. And those two different angles on this question are why you see them in conflict right now.” That’s in part a symptom of the “technological optimism” that often plagues the U.S. security community when it establishes a lead over its competitors, noted Georgetown University’s Kai-Henrik Barth. After the 1945 bombing of Hiroshima and Nagasaki, the United States was sure it would be decades before the Soviets developed a nuclear-weapon capability. It took four years. With drones, the question is how long before the dozens of states with the aircraft can arm and then operate a weaponized version. “Pretty much every nation has gone down the pathway of, ‘This is science fiction; we don’t want this stuff,’ to, ‘OK, we want them, but we’ll just use them for surveillance,’ to, ‘Hmm, they’re really useful when you see the bad guy and can do something about it, so we’ll arm them,’ ” Singer said. He listed the countries that have gone that route: the United States, Britain, Italy, Germany, China. “Consistently, nations have gone down the pathway of first only surveillance and then arming.” The opportunity to write rules that might at least guide, if not restrain, the world’s view of acceptable drone use remains, not least because this is in essence a conventional arms-control issue. The international Missile Technology Control Regime attempts to restrict exports of unmanned vehicles capable of carrying weapons of mass destruction, but it is voluntary and nonbinding, and it’s under attack by the drone industry as a drag on business. Further, the technology itself, especially when coupled with data and real-time analytics, offers the luxury of time and distance that could allow officials to raise the evidentiary bar for strikes—to be closer to certain that their target is the right one. But even without raising standards, tightening up drone-specific restrictions in the standing control regime, or creating a new control agreement (which is never easy to pull off absent a bad-state actor threatening attack), just the process of lining up U.S. policy with U.S. practice would go a long way toward establishing the kind of precedent on use of this technology that America—in five, 10, or 15 years—might find helpful in arguing against another’s actions. A not-insignificant faction of U.S. defense and intelligence experts, Dennis Blair among them, thinks norms play little to no role in global security. And they have evidence in support. The missile-technology regime, for example, might be credited with slowing some program development, but it certainly has not stopped non-signatories—North Korea and Iran—from buying, building, and selling missile systems. But norms established by technology-leading countries, even when not written into legal agreements among nations, have shown success in containing the use and spread of some weapons, including land mines, blinding lasers, and nuclear bombs. Arguably more significant than spotty legal regimes, however, is the behavior of the United States. “History shows that how states adopt and use new military capabilities is often influenced by how other states have—or have not—used them in the past,” Zenko argued. Despite the legal and policy complexity of this issue, it is something the American people have, if slowly, come to care about. Given the attention that Rand Paul’s filibuster garnered, it is not inconceivable that public pressure on drone operations could force the kind of unforeseen change to U.S. policy that it did most recently on “enhanced interrogation” of terrorists. The case against open, transparent rule-making is that it might only hamstring American options while doing little good elsewhere—as if other countries aren’t closely watching this debate and taking notes for their own future policymaking. But the White House’s refusal to answer questions about its drone use with anything but “no comment” ensures that the rest of the world is free to fill in the blanks where and when it chooses. And the United States will have already surrendered the moment in which it could have provided not just a technical operations manual for other nations but a legal and moral one as well.

#### Mid-East conflict causes extinction

Russell 9 James, Senior Lecturer Department of National Security Affairs, Spring, “Strategic Stability Reconsidered: Prospects for Escalation and Nuclear War in the Middle East” Security Studies Center Proliferation Papers, http://www.analyst-network.com/articles/141/StrategicStabilityReconsideredProspectsforEscalationandNuclearWarintheMiddleEast.pdf

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

#### Indo-pak causes extinction

Greg Chaffin 11, Research Assistant at Foreign Policy in Focus, July 8, 2011, “Reorienting U.S. Security Strategy in South Asia,” online: http://www.fpif.org/articles/reorienting\_us\_security\_strategy\_in\_south\_asia

The greatest threat to regional security (although curiously not at the top of most lists of U.S. regional concerns) is the possibility that increased India-Pakistan tension will erupt into all-out warthat could quickly escalate into a nuclear exchange. Indeed, in just the past two decades, the two neighbors have come perilously close to war on several occasions. India and Pakistan remain the most likely belligerents in the world to engage in nuclear war. Due to an Indian preponderance of conventional forces, Pakistan would have a strong incentive to use its nuclear arsenal very early on before a routing of its military installations and weaker conventional forces. In the event of conflict, Pakistan’s only chance of survival would be the early use of its nuclear arsenal to inflict unacceptable damage to Indian military and (much more likely) civilian targets. By raising the stakes to unacceptable levels, Pakistan would hope that India would step away from the brink. However, it is equally likely that India would respond in kind, with escalation ensuing. Neither state possesses tactical nuclear weapons, but both possess scores of city-sized bombs like those used on Hiroshima and Nagasaki. Furthermore, as more damage was inflicted (or as the result of a decapitating strike), command and control elements would be disabled, leaving individual commanders to respondin an environment increasingly clouded by the fog of war and decreasing the likelihood that either government (what would be left of them) would be able to guarantee that their forces would follow a negotiated settlement or phased reduction in hostilities. As a result any suchconflict would likely continue to escalateuntil one side incurred an unacceptable or wholly debilitating level of injury or exhausted its nuclear arsenal. A nuclear conflict in the subcontinentwould havedisastrous effects on the world as a whole. In a January 2010 paper published in Scientific American, climatology professors Alan Robock and Owen Brian Toon forecast the global repercussionsof a regional nuclear war. Their results are strikingly similar to those of studies conducted in 1980 that conclude that a nuclear war between the United States and the Soviet Union wouldresult in acatastrophic and prolonged nuclear winter,which could very well place the survival of the human race in jeopardy. In their study, Robock and Toon use computer models to simulate the effect of a nuclear exchange between India and Pakistan in which each were to use roughly half their existing arsenals (50 apiece). Since Indian and Pakistani nuclear devices are strategic rather than tactical, the likely targets would be major population centers. Owing to the population densities of urban centers in both nations, the number of direct casualties could climb as high as 20 million. The fallout of such an exchange would not merely be limited to the immediate area. First, the detonation of a large number of nuclear devices would propel as much as seven million metric tons of ash, soot, smoke, and debris as high as the lower stratosphere. Owing to their small size (less than a tenth of a micron) and a lack of precipitation at this altitude, ash particles would remain aloft for as long as a decade, during which time the world would remain perpetually overcast. Furthermore, these particles would soak up heat from the sun, generating intense heat in the upper atmosphere that would severely damage the earth’s ozone layer. The inability of sunlight to penetrate through the smoke and dust would lead toglobal cooling by as much as 2.3 degrees Fahrenheit. This shift in global temperature would lead to more drought, worldwide food shortages, and widespread political upheaval. Although the likelihood of this doomsday scenario remains relatively low, the consequences are dire enough to warrant greater U.S. and international attention. Furthermore, due to the ongoing conflict over Kashmir and the deep animus held between India and Pakistan, it might not take much to set them off. Indeed, following the successful U.S. raid on bin Laden’s compound, several members of India’s security apparatus along with conservative politicians have argued that India should emulate the SEAL Team Six raid and launch their own cross-border incursions to nab or kill anti-Indian terrorists, either preemptively or after the fact. Such provocative action could very well lead to all-out war between the two that couldquickly escalate.

#### Congressional inaction has made this a defining policy doctrine---expansive executive authority triggers overreach

Maxwell 12 - Colonel and Judge Advocate, U.S. Army, 1st Quarter 2012, “TARGETED KILLING, THE LAW, AND TERRORISTS: FEELING SAFE?,” Joint Force Quarterly, p. 123-130, Mark David Maxwell.

In the wake of the attacks by al Qaeda on September 11, 2001, an analogous phenomenon of feeling safe has occurred in a recent U.S. national security policy: America’s explicit use of targeted killings to eliminate terrorists, under the legal doctrines of self-defense and the law of war. Legal scholars define targeted killing as the use of lethal force by a state4 or its agents with the intent, premeditation, and deliberation to kill individually selected persons who are not in the physical custody of those targeting them.5 In layman’s terms, targeted killing is used by the United States to eliminate individuals it views as a threat.6 Targeted killings, for better or for worse, have become “a defining doctrine of American strategic policy.”7 Although many U.S. Presidents have reserved the right to use targeted killings in unique circumstances, making this option a formal part of American foreign policy incurs risks that, unless adroitly controlled and defined in concert with Congress, could drive our practices in the use of force in a direction that is not wise for the long-term health of the rule of law. This article traces the history of targeted killing from a U.S. perspective. It next explains how terrorism has traditionally been handled as a domestic law enforcement action within the United States and why this departure in policy to handle terrorists like al Qaeda under the law of war—that is, declaring war against a terrorist organization—is novel. While this policy is not an ill-conceived course of action given the global nature of al Qaeda, there are practical limitations on how this war against terrorism can be conducted under the orders of the President. Within the authority to target individuals who are terrorists, there are two facets of Presidential power that the United States must grapple with: first, how narrow and tailored the President’s authority should be when ordering a targeted killing under the rubric of self-defense; and second, whether the President must adhere to concepts within the law of war, specifically the targeting of individuals who do not don a uniform. The gatekeeper of these Presidential powers and the prevention of their overreach is Congress. The Constitution demands nothing less, but thus far, Congress’s silence is deafening.

#### Congressional geographic restrictions are key---prevents global war

Rosa Brooks 13, Professor of Law, Georgetown University Law Center, Bernard L. Schwartz Senior Fellow, New America Foundation, 4/23, The Constitutional and Counterterrorism Implications of Targeted Killing, http://www.judiciary.senate.gov/pdf/04-23-13BrooksTestimony.pdf

Mr. Chairman, I would like to turn now to the legal framework applicable to US drone strikes. Both the United States and the international community have long had rules governing armed conflicts and the use of force in national self-defense. These rules apply whether the lethal force at issue involves knives, handguns, grenades or weaponized drones. When drone technologies are used in traditional armed conflicts—on “hot battlefields” such as those in Afghanistan, Iraq or Libya, for instance – they pose no new legal issues. As Administration officials have stated, their use is subject to the same requirements as the use of other lawful means and methods of warfare.28 But if drones used in traditional armed conflicts or traditional self-defense situations present no “new” legal issues, some of the activities and policies enabled and facilitated by drone technologies pose significant challenges to existing legal frameworks. As I have discussed above, the availability of perceived low cost of drone technologies makes it far easier for the US to “expand the battlefield,” striking targets in places where it would be too dangerous or too politically controversial to send troops. Specifically, drone technologies enable the United States to strike targets deep inside foreign states, and do so quickly, efficiently and deniably. As a result, drones have become the tool of choice for so-called “targeted killing” – the deliberate targeting of an individual or group of individuals, whether known by name or targeted based on patterns of activity, inside the borders of a foreign country. **It is when drones are used in targeted killings outside of traditional or “hot” battlefields that their use challenges existing legal frameworks**. Law is almost always out of date: we make legal rules based on existing conditions and technologies, perhaps with a small nod in the direction of predicted future changes. As societies and technologies change, law increasingly becomes an exercise in jamming square pegs into round holes. Eventually, that process begins to do damage to existing law: it gets stretched out of shape, or broken. Right now, I would argue, US drone policy is on the verge of doing significant damage to the rule of law. A. The Rule of Law At root, the idea of “rule of law” is fairly simple, and well understood by Americans familiar with the foundational documents that established our nation, such as the Declaration of Independence, the Constitution and the Bill of Rights. The rule of law requires that governments follow transparent, clearly defined and universally applicable laws and procedures. The goal of the rule of law is to ensure predictability and stability, and to prevent the arbitrary exercise of power. In a society committed to the rule of law, the government cannot fine you, lock you up, or kill you on a whim -- it can restrict your liberty or take your property or life only in accordance with pre-established processes and rules that reflect basic notions of justice, humanity and fairness. Precisely what constitutes a fair process is debatable, but most would agree that at a minimum, fairness requires that individuals have reasonable notice of what constitutes the applicable law, reasonable notice that they are suspected of violating the law, a reasonable opportunity to rebut any allegations against them, and a reasonable opportunity to have the outcome of any procedures or actions against them reviewed by some objective person or body. These core values are enshrined both in the US Constitution and in international human rights law instruments such as the International Covenant on Civil and Political Rights, to which the United States is a party. In ordinary circumstances, this bundle of universally acknowledged rights (together with international law principles of sovereignty) means it is clearly unlawful for one state to target and kill an individual inside the borders of another state. Recall, for instance, the 1976 killing of Chilean dissident Orlando Letelier in Washington DC. When Chilean government intelligence operatives planted a car bomb in the car used by Letelier, killing him and a US citizen accompanying him, the United States government called this an act of murder—an unlawful political assassination. B. Targeted Killing and the Law of Armed Conflict Of course, sometimes the “ordinary” legal rules do not apply. In war, the willful killing of human beings is permitted, whether the means of killing is a gun, a bomb, or a long-distance drone strike. The law of armed conflict permits a wide range of behaviors that would be unlawful in the absence of an armed conflict. Generally speaking, the intentional destruction of private property and severe restrictions on individual liberties are impermissible in peacetime, but acceptable in wartime, for instance. Even actions that a combatant knows will cause civilian deaths are lawful when consistent with the principles of necessity, humanity, proportionality,29 and distinction.30 It is worth briefly explaining these principles. The principle of necessity requires parties to a conflict to limit their actions to those that are indispensible for securing the complete submission of the enemy as soon as possible (and that are otherwise permitted by international law). The principle of humanity forbids parties to a conflict to inflict gratuitous violence or employ methods calculated to cause unnecessary suffering. The principle of proportionality requires parties to ensure that the anticipated loss of life or property incidental to an attack is not excessive in relation to the concrete and direct military advantage expected to be gained. Finally, the principle of discrimination or distinction requires that parties to a conflict direct their actions only against combatants and military objectives, and take appropriate steps to distinguish between combatants and non-combatants.31 This is a radical oversimplification of a very complex body of law.32 But as with the rule of law, the basic idea is pretty simple. When there is no war -- when ordinary, peacetime law applies -- agents of the state aren't supposed to lock people up, take their property or kill them, unless they have jumped through a whole lot of legal hoops first. When there is an armed conflict, however, everything changes. War is not a legal free-for-all33 -- torture, rape are always crimes under the law of war, as is killing that is willful, wanton and not justified by military necessity34 -- but there are far fewer constraints on state behavior. Technically, the law of war is referred to using the Latin term “lex specialis” – special law. It is applicable in—and only in -- special circumstances (in this case, armed conflict), and in those special circumstances, it supersedes “ordinary law,” or “lex generalis,” the “general law” that prevails in peacetime. We have one set of laws for “normal” situations, and another, more flexible set of laws for “extraordinary” situations, such as armed conflicts. None of this poses any inherent problem for the rule of law. Having one body of rules that tightly restricts the use of force and another body of rules that is far more permissive does not fundamentally undermine the rule of law, as long as we have a reasonable degree of consensus on what circumstances trigger the “special” law, and as long as the “special law” doesn’t end up undermining the general law. To put it a little differently, war, with its very different rules, does not challenge ordinary law as long as war is the exception, not the norm -- as long as we can all agree on what constitutes a war -- as long as we can tell when the war begins and ends -- and as long as we all know how to tell the difference between a combatant and a civilian, and between places where there's war and places where there's no war. Let me return now to the question of drones and targeted killings. When all these distinctions I just mentioned are clear, the use of drones in targeted killings does not necessarily present any great or novel problem. In Libya, for instance, a state of armed conflict clearly existed inside the borders of Libya between Libyan government forces and NATO states. In that context, the use of drones to strike Libyan military targets is no more controversial than the use of manned aircraft. That is because our core rule of law concerns have mostly been satisfied: we know there is an armed conflict, in part because all parties to it agree that there is an armed conflict, in part because observers (such as international journalists) can easily verify the presence of uniformed military personnel engaged in using force, and in part because the violence is, from an objective perspective, widespread and sustained: it is not a mere skirmish or riot or criminal law enforcement situation that got out of control. We know who the “enemy” is: Libyan government forces. We know where the conflict is and is not: the conflict was in Libya, but not in neighboring Algeria or Egypt. We know when the conflict began, we know who authorized the use of force (the UN Security Council) and, just as crucially, we know whom to hold accountable in the event of error or abuse (the various governments involved).35 Once you take targeted killings outside hot battlefields, it’s a different story. The Obama Administration is currently using drones to strike terror suspects in Pakistan, Somalia, Yemen, and –perhaps—Mali and the Philippines as well. Defenders of the administration's increasing reliance on drone strikes in such places assert that the US is in an armed conflict with “al Qaeda and its associates,” and on that basis, they assert that the law of war is applicable -- in any place and at any time -- with regard to any person the administration deems a combatant. The trouble is, no one outside a very small group within the US executive branch has any ability to evaluate who is and who isn’t a combatant. The war against al Qaeda and its associates is not like World War II, or Libya, or even Afghanistan: it is an open-ended conflict with an inchoate, undefined adversary (who exactly are al Qaeda’s “associates”?). What is more, targeting decisions in this nebulous “war” are based largely on classified intelligence reporting. **As a result, Administration assertions** about who is a combatant and what constitutes a threat **are entirely non-falsifiable, because they're based wholly on undisclosed evidence**. Add to this still another problem: most of these strikes are considered covert action, so although the US sometimes takes public credit for the deaths of alleged terrorist leaders, most of the time, the US will not even officially acknowledge targeted killings. This leaves all the key rule-of-law questions related to the ongoing war against al Qaeda and its "associates" unanswered.36 Based on what criteria might someone be considered a combatant or directly participating in hostilities? What constitutes “hostilities” in the context of an armed conflict against a non-state actor, and what does it mean to participate in them? And just where is the war? Does the war (and thus the law of war) somehow "travel" with combatants? Does the US have a “right” to target enemy combatants anywhere on earth, or does it depend on the consent of the state at issue? Who in the United States government is authorized to make such determinations, and what is the precise chain of command for such decisions? I think the rule of law problem here is obvious: when “armed conflict” becomes a term flexible enough to be applied both to World War II and to the relations between the United States and “associates” of al Qaeda such as Somalia’s al Shabaab, the concept of armed conflict is not very useful anymore. And **when we lack clarity and consensus on how to recognize “armed conflict,” we no longer have a clear or principled basis for deciding how to categorize US** t**argeted** k**illing**s. Are they, as the US government argues, legal under the laws of war? Or are they, as some human rights groups have argued, unlawful murder? C. Targeted Killing and the International Law of Self-Defense When faced with criticisms of the law of war framework as a justification for targeted killing, Obama Administration representatives often shift tack, arguing that international law rules on national self-defense provide an alternative or additional legal justification for US targeted killings. Here, the argument is that if a person located in a foreign state poses an "imminent threat of violent attack" against the United States, the US can lawfully use force in self-defense, provided that the defensive force used is otherwise consistent with law of war principles. Like law of war-based arguments, this general principle is superficially uncontroversial: if someone overseas is about to launch a nuclear weapon at New York City, no one can doubt that the United States has a perfect right (and the president has a constitutional duty) to use force if needed to prevent that attack, regardless of the attacker's nationality. But once again, the devil is in the details. To start with, what constitutes an "imminent" threat? Traditionally, both international law and domestic criminal law understand that term narrowly: 37 to be "imminent," a threat cannot be distant or speculative.38 But much like the Bush Administration before it, the Obama Administration has put forward an interpretation of the word “imminent” that bears little relation to traditional legal concepts. According to a leaked 2011 Justice Department white paper39—the most detailed legal justification that has yet become public-- the requirement of imminence "does not require the United States to have clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future." This seems, in itself, like a substantial departure from accepted international law definitions of imminence. But the White Paper goes even further, stating that "certain members of al Qaeda are continually plotting attacks...and would engage in such attacks regularly [if] they were able to do so, [and] the US government may not be aware of all... plots as they are developing and thus cannot be confident that none is about to occur." For this reason, it concludes, anyone deemed to be an operational leader of al Qaeda or its "associated forces" presents, by definition, an imminent threat even in the absence of any evidence whatsoever relating to immediate or future attack plans. In effect, the concept of "imminent threat" (part of the international law relating to self-defense) becomes conflated with identity or status (a familiar part of the law of armed conflict). That concept of imminence has been called Orwellian, and although that is an overused epithet, in this context it seems fairly appropriate. According to the Obama Administration, “imminent” no longer means “immediate,” and in fact the very absence of clear evidence indicating specific present or future attack plans becomes, paradoxically, the basis for assuming that attack may perpetually be “imminent.” The 2011 Justice Department White Paper notes that the use of force in self-defense must comply with general law of war principles of necessity, proportionality, humanity, and distinction. The White Paper offers no guidance on the specific criteria for determining when an individual is a combatant (or a civilian participating directly in hostilities), however. It also offers no guidance on how to determine if a use of force is necessary or proportionate. From a traditional international law perspective, this necessity and proportionality inquiry relates both to imminence and to the gravity of the threat itself, but so far there has been no public Administration statement as to how the administration interprets these requirements. Is any threat of "violent attack" sufficient to justify killing someone in a foreign country, including a U.S. citizen? Is every potential suicide bomber targetable, or does it depend on the gravity of the threat? Are we justified in drone strikes against targets who might, if they get a chance at some unspecified future point, place an IED that might, if successful, kill one person? Ten people? Twenty? 2,000? How grave a threat must there be to justify the use of lethal force against an American citizen abroad -- or against non-citizens, for that matter? As I have noted, it is impossible for outsiders to fully evaluate US drone strikes, since so much vital information remains classified. In most cases, we know little about the identities; activities or future plans of those targeted. Nevertheless, given the increased frequency of US targeted killings in recent years, it seems reasonable to wonder whether the Administration conducts a rigorous necessity or proportionality analysis in all cases. So far, the leaked 2011 Justice Department White Paper represents the most detailed legal analysis of targeted killings available to the public. It is worth noting, incidentally, that this White Paper addresses only the question of whether and when it is lawful for the US government to target US citizens abroad. We do not know what legal standards the Administration believes apply to the targeting of non-citizens. It seems reasonable to assume, however, that the standards applicable to non-citizens are less exacting than those the Administration views as applicable to citizens. Defenders of administration targeted killing policy acknowledge that the criteria for determining how to answer these many questions have not been made public, but insist that this should not be cause for concern. The Administration has reportedly developed a detailed “playbook” outlining the targeting criteria and procedures,40, and insiders insist that executive branch officials go through an elaborate process in which they carefully consider every possible issue before determining that a drone strike is lawful.41 No doubt they do, but this is somewhat cold comfort. Formal processes tend to further normalize once-exceptional activities -- and "trust us" is a rather shaky foundation for the rule of law. Indeed, the whole point of the rule of law is that individual lives and freedom should not depend solely on the good faith and benevolence of government officials. As with law of war arguments, stating that US targeted killings are clearly legal under traditional self-defense principles requires some significant cognitive dissonance. Law exists to restrain untrammeled power. It is no doubt possible to make a plausible legal argument justifying each and every U.S. drone strike -- but this merely suggests that we are working with a legal framework that has begun to outlive its usefulness. The real question isn't whether U.S. drone strikes are "legal." The real question is this: Do we really want to live in a world in which the U.S. government's justification for killing is so malleable? 5. Setting Troubling International Precedents **Here is an a**dditional **reason to worry** about the U.S. overreliance on drone strikes: Other states will follow America's example, and the results are not likely to be pretty. Consider once again the Letelier murder, which was an international scandal in 1976: If the Letelier assassination took place today, the Chilean authorities would presumably insist on their national right to engage in “targeted killings” of individuals deemed to pose imminent threats to Chilean national security -- and they would justify such killings using precisely the same legal theories the US currently uses to justify targeted killings in Yemen or Somalia. We should assume that governments around the world—including those with less than stellar human rights records, such as Russia and China—are taking notice. Right now, the United States has a decided technological advantage when it comes to armed drones, but that will not last long. **We should use this window to advance a robust legal** and normative **framework that will help protect against abuses by those states whose leaders can rarely be trusted**. Unfortunately, we are doing the exact opposite: Instead of articulating norms about transparency and accountability, the United States is effectively handing China, Russia, and every other repressive state a playbook for how to foment instability and –literally -- get away with murder. Take the issue of sovereignty. Sovereignty has long been a core concept of the Westphalian international legal order.42 In the international arena, all sovereign states are formally considered equal and possessed of the right to control their own internal affairs free of interference from other states. That's what we call the principle of non-intervention -- and it means, among other things, that it is generally prohibited for one state to use force inside the borders of another sovereign state. There are some well-established exceptions, but they are few in number. A state can lawfully use force inside another sovereign state with that state's invitation or consent, or when force is authorized by the U.N. Security Council, pursuant to the U.N. Charter,43 or in self-defense "in the event of an armed attack." The 2011 Justice Department White Paper asserts that targeted killings carried out by the United States don't violate another state's sovereignty as long as that state either consents or is "unwilling or unable to suppress the threat posed by the individual being targeted." That sounds superficially plausible, but since the United States views itself as the sole arbiter of whether a state is "unwilling or unable" to suppress that threat, the logic is in fact circular. It goes like this: The United States -- using its own malleable definition of "imminent" -- decides that Person X, residing in sovereign State Y, poses a threat to the United States and requires killing. Once the United States decides that Person X can be targeted, the principle of sovereignty presents no barriers, because either 1) State Y will consent to the U.S. use of force inside its borders, in which case the use of force presents no sovereignty problems or 2) State Y will not consent to the U.S. use of force inside its borders, in which case, by definition, the United States will deem State Y to be "unwilling or unable to suppress the threat" posed by Person X and the use of force again presents no problem. This is a legal theory that more or less eviscerates traditional notions of sovereignty, and has the potential to significantly destabilize the already shaky collective security regime created by the U.N. Charter.44 If the US is the sole arbiter of whether and when it can use force inside the borders of another state, any other state strong enough to get away with it is likely to claim similar prerogatives. And, of course, if the US executive branch is the sole arbiter of what constitutes an imminent threat and who constitutes a targetable enemy combatant in an ill- defined war, why shouldn’t other states make identical arguments—and use them to justify the killing of dissidents, rivals, or unwanted minorities?

#### *Scenario B: Detention*

**Lack of limits on the executive detention make overreach inevitable---codification key**

Matthew C **Waxman 9**, Professor of Law; Faculty Chair, Roger Hertog Program on Law and National Security, Legislating the War on Terror: An Agenda for Reform”, November 3, Book, p. 59-61

Besides posing risks to liberty, administrative detention can also be counterproductive from the security standpoint. Again, the substantive criteria of detention law may help mitigate the risk. Historically, detention policies— especially those viewed as overbroad by the communities in which they were implemented— have sometimes proven ill-suited to combating terrorism and radicalization of individuals or communities. The British government learned painfully that internment of suspected Northern Ireland terrorists was viewed among some communities as a form of collective punishment that fueled violent nationalism and helped dry up the supply of community informants. 54 And in Iraq and Afghanistan, though the circumstances are exceptional because combat still rages there, detention has played an important role in neutralizing threats to coalition forces, but it has also contributed to anticoalition radicalization, especially when it is perceived as being used indiscriminately.¶ One role that well-crafted definitional criteria can play is in **mitigat**ing an **executive’s propensity to overuse the power to detain.** Observers from both the right and the left worry correctly that in the face of terrorist threats the executive is likely to push detention powers to or even past their outer bounds in order to prevent catastrophe as well as to head off any political backlash for having failed to take sufficient action. 56 Such **overbroad use of detention risks** further **radicalizing** and **alienating communities** from which terrorists are **likely to emerge** or whose **assistance is vital** in identifying or penetrating extremist groups. Moreover, several important studies of counterterrorism strategy have emphasized the need to target coercive policies, including **military** **and** **law enforcement efforts**, **narrowly** precisely to avoid playing into al Qaeda propaganda efforts to **aggregate local grievances into a common global movement**. 57 These are fundamentally policy, not legal, problems, and they will require sound executive judgment no matter what the legal regime looks like. But once the role of detention is firmly situated in a broader counterterrorism strategy that seeks to balance the many competing policy priorities, a carefully drawn administrative **detention statute** can help **mitigate long-term strategic damage** from the propensity to **overreach in the short term**. ¶ The danger that administrative detention poses to liberty and security points against emphasizing deterrence or information gathering as its primary strategic purpose. Virtually any very dangerous terrorist or supporter of terrorism that the government could hope to deter through detention would be deterred already by the threat of criminal prosecution or military attack or would be sufficiently committed to violent extremism to render the marginal deterrent threat of administrative detention negligible. 58 As for information gathering, an administrative detention law premised on detaining individuals with valuable knowledge regardless of whether they have engaged in nefarious activities sets a precedent that is too easily abused or overused **at home or abroad.** Information gathering, including through lawful interrogation, will undoubtedly be a strong motive for almost any administrative detention scheme, and an individual’s knowledge of terrorist planning or operations could be a reason not to release the person if he or she has been validly detained on other grounds. 59 But using a person’s suspected knowledge alone as the basis for detention, completely delinking detention from the individual’s voluntary and purposeful actions, cuts even deeper into traditional civil liberties principles and safeguards than most other reasons for administrative detention. 60 A detention law that allows incarceration based on knowledge could also perversely deter individuals with important information from coming forward voluntarily to the government.

#### US legitimacy is collapsing due to detention policy---plan reverses that

David Welsh 11, J.D. from the University of Utah, “Procedural Justice Post-9/11: The Effects of Procedurally Unfair Treatment of Detainees on Perceptions of Global Legitimacy”, http://law.unh.edu/assets/images/uploads/publications/unh-law-review-vol-09-no2-welsh.pdf

The Global War on Terror 1 has been ideologically framed as a struggle between the principles of freedom and democracy on the one hand and tyranny and extremism on the other. 2 Although this war has arguably led to a short-term disruption of terrorist threats such as al-Qaeda, it has also damaged America’s image both at home and abroad. 3 Throughout the world, there is a growing consensus that America has “a lack of credibility as a fair and just world leader.” 4 The perceived legitimacy of the United States in the War on Terror is critical because terrorism is not a conventional threat that can surrender or can be defeated in the traditional sense. Instead, this battle can only be won through legitimizing the rule of law and undermining the use of terror as a means of political influence. 5 ¶ Although a variety of political, economic, and security policies have negatively impacted the perceived legitimacy of the United States, one of the most damaging has been the detention, treatment, and trial (or in many cases the lack thereof) of suspected terrorists. While many scholars have raised constitutional questions about the legality of U.S. detention procedures, 6 this article offers a psychological perspective of legitimacy in the context of detention.

**Plan’s key to legitimize the rule of law---uncertainty risks global instability**

Robert **Knowles 9**, Acting Assistant Professor, New York University School of Law, Spring, “Article: American Hegemony and the Foreign Affairs Constitution”, 41 Ariz. St. L.J. 87, Lexis

**The hegemonic model** also **reduces the need for executive branch flexibility**, and the institutional competence terrain shifts toward the courts. The stability of the current U.S.-led international system **depends on the ability of the U.S. to govern effectively**. Effective governance **depends on**, among other things, **predictability**. n422 G. John Ikenberry analogizes America's hegemonic position to that of a "giant corporation" seeking foreign investors: "The rule of law and the institutions of policy making in a democracy are the political equivalent of corporate transparency and [\*155] accountability." n423 **Stable** interpretation of the **law** **bolsters the stability of the system** because other nations will know that they can rely on those interpretations and that there will be at least some degree of enforcement by the United States. At the same time, the separation of powers serves the global-governance function by reducing the ability of the executive branch to make "abrupt or aggressive moves toward other states." n424¶ The Bush Administration's detainee policy, for all of its virtues and faults, was an exceedingly aggressive departure from existing norms, and was therefore bound to generate intense controversy. It was formulated quickly, by a small group of policy-makers and legal advisors without consulting Congress and over the objections of even some within the executive branch. n425 Although the Administration invoked the law of armed conflict to justify its detention of enemy combatants, it did not seem to recognize limits imposed by that law. n426 Most significantly, it designed the detention scheme around interrogation rather than incapacitation and excluded the detainees from all legal protections of the Geneva Conventions. n427 It declared all detainees at Guantanamo to be "enemy combatants" without establishing a regularized process for making an individual determination for each detainee. n428 And when it established the military commissions, also without consulting Congress, the Administration denied defendants important procedural protections. n429¶ In an anarchic world characterized by great power conflict, one could make the argument that the executive branch requires maximum flexibility to defeat the enemy, who may not adhere to international law. Indeed, the precedents relied on most heavily by the Administration in the enemy combatant cases date from the 1930s and 1940s - a period when the international system was radically unstable, and the United States was one of several great powers vying for advantage. n430 But during that time, the executive branch faced much more exogenous pressure from other great powers to comply with international law in the treatment of captured enemies. If the United States strayed too far from established norms, it would risk retaliation upon its own soldiers or other consequences from [\*156] powerful rivals. Today, there are no such constraints: enemies such as al Qaeda are not great powers and are not likely to obey international law anyway. **Instead, the danger is that American rule-breaking will set a pattern** of rule-breaking **for the world, leading to instability**. n431 America's military predominance enables it to set the rules of the game. **When the U.S. breaks its own rules, it loses legitimacy**.

#### Democratic liberalism is backsliding now---the US model of an unrestrained executive causes collapse

Larry **Diamond 9**, Professor of Political Science and Sociology @ Stanford, “The Impact of the Global Financial Crisis on Democracy”, Presented to the SAIS-CGD Conference on New Ideas in Development after the Financial Crisis, Conference Paper that can be found on his Vita

Concern about the future of democracy is further warranted by the gathering signs of a **democratic recession**, even before the onset of the global economic recession. During the past decade, the global expansion of democracy has essentially leveled off and hit an equilibrium While freedom (political rights and civil liberties) continued to expand throughout the post-Cold War era, that progress also halted in 2006, and 2007 and 2008 were the worst consecutive years for freedom since the end of the Cold War, with the number of countries declining in freedom greatly outstripping the number that improved. Two-thirds of all the breakdowns of democracy since the third wave began in 1974 have occurred in the last nine years, and in a number of strategically important states like Russia, Nigeria, Venezuela, Pakistan and Thailand. Many of these countries have not really returned to democracy. And **a number of countries linger in a twilight zone between democracy and authoritarianism**. While normative support for democracy has grown around the world, it remains in many countries, tentative and uneven, or is even eroding under the weight of growing public cynicism about corruption and the self-interested behavior of parties and politicians. Only about half of the public, on average, in Africa and Asia meets a rigorous, multidimensional test of support for democracy. Levels of distrust for political institutions—particularly political parties and legislatures, and politicians in general—are very high in Eastern Europe and Latin America, and in parts of Asia. In many countries, 30-50 percent of the public or more is willing to consider some authoritarian alternative to democracy, such as military or one-man rule. And where governance is bad or elections are rigged and the public cannot rotate leaders out of power, skepticism and defection from democracy grow. Of the roughly 80 new democracies that have emerged during the third wave and are still standing, probably **close to three-quarters are insecure and could run some risk of reversal during adverse** global and domestic **circumstances**. Less at risk—and probably mostly consolidated—are the more established developing country democracies (India, Costa Rica, Botswana, Mauritius), and the more liberal democracies of this group: the ten postcommunist states that have been admitted to the EU; Korea and Taiwan; Chile, Uruguay, Panama, Brazil, probably Argentina; a number of liberal island states in the Caribbean and Pacific. This leaves about 50 democracies and near democracies—including such big and strategically important states as Turkey, Ukraine, Indonesia, the Philippines, South Africa, certainly Pakistan and Bangladesh, and possibly even Mexico—where **the survival of constitutional rule cannot be taken for granted.** In some of these countries, like South Africa, the demise of democracy would probably come, if it happened, not as a result of a blatant overthrow of the current system, **but rather via a gradual executive strangling of** political **pluralism and freedom**, or a steady decline in state capacity and political order due to rising criminal and ethnic violence. Such circumstances would also swallow whatever hopes exist for the emergence of genuine democracy in countries like Iraq and Afghanistan and for the effective restoration of democracy in countries like Thailand and Nepal.

#### US detention policy is key---it has justified democratic backsliding globally

CJA 4 The Center for Justice and Accountability, Amici Curiae in support of petitioners in Al Odah et al. v USA, "Brief of the Center for Justice and Accountability, the International League for Human Rights, and Individual Advocates for the Independence of the Judiciary in Emerging Democracies," 3-10, Lexis

While much of the world is moving to adopt the institutions necessary to secure individual rights, many still regularly abuse these rights. One of the hallmarks of tyranny is the lack of a strong and independent judiciary. Not surprisingly, where countries make the sad transition to tyranny, one of the first victims is the judiciary. Many of the rulers that go down that road justify their actions on the basis of national security and the fight against terrorism, and, disturbingly, many claim to be modeling their actions on the United States. Again, a few examples illustrate this trend. In Peru, one of former President Alberto Fujimori’s first acts in seizing control was to assume direct executive control of the judiciary, claiming that it was justified by the threat of domestic terrorism. He then imprisoned thousands, refusing the right of the judiciary to intervene. International Commission of Jurists, Attacks on Justice 2000-Peru, August 13, 2001, available at ttp://www.icj.org/news.php3?id\_article=2587&lang=en (last visited Jan. 8, 2004). In Zimbabwe, President Mugabe’s rise to dictatorship has been punctuated by threats of violence to and the co-opting of the judiciary. He now enjoys virtually total control over Zimbabweans' individual rights and the entire political system. R.W. Johnson, Mugabe’s Agents in Plot to Kill Opposition Chief, Sunday Times (London), June 10, 2001; International Commission of Jurists, Attacks on Justice 2002— Zimbabwe, August 27, 2002, available at http://www.icj.org/news.php3?id\_article=2695〈=en (last visited Jan. 8, 2004). While Peru and Zimbabwe represent an extreme, the independence of the judiciary is under assault in less brazen ways in a variety of countries today. A highly troubling aspect of this trend is the fact that in many of these instances those perpetuating the assaults on the judiciary have pointed to the United States’ model to justify their actions. Indeed, many have specifically referenced the United States’ actions in detaining persons in Guantánamo Bay. For example, Rais Yatim, Malaysia's "de facto law minister" explicitly relied on the detentions at Guantánamo to justify Malaysia's detention of more than 70 suspected Islamic militants for over two years. Rais stated that Malyasia's detentions were "just like the process in Guantánamo," adding, "I put the equation with Guantánamo just to make it graphic to you that this is not simply a Malaysian style of doing things." Sean Yoong, "Malaysia Slams Criticism of Security Law Allowing Detention Without Trial," Associated Press, September 9, 2003 (available from Westlaw at 9/9/03 APWIRES 09 :34:00). Similarly, when responding to a United States Government human rights report that listed rights violations in Namibia, Namibia's Information Permanent Secretary Mocks Shivute cited the Guantánamo Bay detentions, claiming that "the US government was the worst human rights violator in the world." BBC Monitoring, March 8, 2002, available at 2002 WL 15938703. Nor is this disturbing trend limited to these specific examples. At a recent conference held at the Carter Center in Atlanta, President Carter, specifically citing the Guantánamo Bay detentions, noted that the erosion of civil liberties in the United States has "given a blank check to nations who are inclined to violate human rights already." Doug Gross, "Carter: U.S. human rights missteps embolden foreign dictators," Associated Press Newswires, November 12, 2003 (available from Westlaw at 11/12/03 APWIRES 00:30:26). At the same conference, Professor Saad Ibrahim of the American University in Cairo (who was jailed for seven years after exposing fraud in the Egyptian election process) said, "Every dictator in the world is using what the United States has done under the Patriot Act . . . to justify their past violations of human rights and to declare a license to continue to violate human rights." Id. Likewise, Shehu Sani, president of the Kaduna, Nigeriabased Civil Rights Congress, wrote in the International Herald Tribune on September 15, 2003 that "[t]he insistence by the Bush administration on keeping Taliban and Al Quaeda captives in indefinite detention in Guantánamo Bay, Cuba, instead of in jails in the United States — and the White House's preference for military tribunals over regular courts — helps create a free license for tyranny in Africa. It helps justify Egypt's move to detain human rights campaigners as threats to national security and does the same for similar measures by the governments of Ivory Coast, Cameroon and Burkina Faso." Available at http://www.iht.com/ihtsearch.php?id=109927&owner=(IHT)&dat e=20030121123259. In our uni-polar world, the United States obviously sets an important example on these issues. As reflected in the foundational documents of the United Nations and many other such agreements, the international community has consistently affirmed the value of an independent judiciary to the defense of universally recognized human rights. In the crucible of actual practice within nations, many have looked to the United States model when developing independent judiciaries with the ability to check executive power in the defense of individual rights. Yet others have justified abuses by reference to the conduct of the United States. Far more influential than the words of Montesquieu and Madison are the actions of the United States. This case starkly presents the question of which model this Court will set for the world.

**Democratic backsliding causes great power war**

Azar **Gat 11**, the Ezer Weizman Professor of National Security at Tel Aviv University, 2011, “The Changing Character of War,” in The Changing Character of War, ed. Hew Strachan and Sibylle Scheipers, p. 30-32

Since 1945, the decline of major great power war has deepened further. Nuclear weapons have concentrated the minds of all concerned wonderfully, but no less important have been the institutionalization of free trade and the closely related process of rapid and sustained economic growth throughout the capitalist world. The communist bloc did not participate in the system of free trade, but at least initially it too experienced substantial growth, and, unlike Germany and Japan, it was always sufﬁciently large and rich in natural resources to maintain an autarky of sorts. With the Soviet collapse and with the integration of the former communist powers into the global capitalist economy, the prospect of a major war within the developed world seems to have become very remote indeed. This is one of the main sources for the feeling that war has been transformed: its geopolitical centre of gravity has shifted radically. The modernized, economically developed parts of the world constitute a ‘zone of peace’. War now seems to be conﬁned to the less-developed parts of the globe, the world’s ‘zone of war’, where countries that have so far failed to embrace modernization and its pacifying spin-off effects continue to be engaged in wars among themselves, as well as with developed countries.¶ While the trend is very real, one wonders if the near disappearance of armed conﬂict within the developed world is likely to **remain as stark** as it has been since the collapse of communism. The post-Cold War moment may turn out to be a **ﬂeeting** one. The probability of major wars within the developed world remains low—because of the factors already mentioned: increasing wealth, economic openness and interdependence, and nuclear deterrence. But the deep sense of change prevailing since 1989 has been based on the far more radical notion that the triumph of capitalism also spelled the irresistible ultimate victory of democracy; and that in an afﬂuent and democratic world, major conﬂict no longer needs to be feared or seriously prepared for. This notion, however, is **fast eroding** with the return of capitalist non-democratic great powers that have been absent from the international system since 1945. Above all, there is the formerly communist and fast industrializing authoritarian-capitalist China, whose massive growth represents the greatest change in the global balance of power. Russia, too, is retreating from its postcommunist liberalism and assuming an increasingly authoritarian character.¶ Authoritarian capitalism may be **more viable than people tend to assume**. 8 The communist great powers failed even though they were potentially larger than the democracies, because their economic systems failed them. By contrast, the capitalist authoritarian/totalitarian powers during the ﬁrst half of the twentieth century, Germany and Japan, particularly the former, were as efﬁcient economically as, and if anything more successful militarily than, their democratic counterparts. They were defeated in war mainly because they were too small and ultimately succumbed to the exceptional continental size of the United States (in alliance with the communist Soviet Union during the Second World War). However, the new non-democratic powers are both large and capitalist. China in particular is the largest player in the international system in terms of population and is showing spectacular economic growth that within a generation or two is likely to make it a true non-democratic superpower.¶ Although the return of capitalist non-democratic great powers does not necessarily imply open conﬂict or war, it might indicate that the democratic hegemony since the Soviet Union’s collapse could be **short-lived** and that **a universal ‘democratic peace’ may still be far off**. The new capitalist authoritarian powers are deeply integrated into the world economy. They partake of the development-open-trade-capitalist cause of peace, but not of the liberal democratic cause. Thus, it is crucially important that any protectionist turn in the system is avoided so as to prevent a grab for markets and raw materials such as that which followed the disastrous slide into imperial protectionism and conﬂict during the ﬁrst part of the twentieth century. Of course, the openness of the world economy does not depend exclusively on the democracies. In time, China itself might become more protectionist, as it grows wealthier, its labour costs rise, and its current competitive edge diminishes.¶ With the possible exception of the sore Taiwan problem, China is likely to be less restless and revisionist than the territorially conﬁned Germany and Japan were. Russia, which is still reeling from having lost an empire, may be more problematic. However, as China grows in power, it is likely to become more assertive, ﬂex its muscles, and behave like a superpower, even if it does not become particularly aggressive. The democratic and non-democratic powers may coexist more or less peacefully, albeit warily, side by side, armed because of mutual fear and suspicion, as a result of the so-called ‘security dilemma’, and against worst-case scenarios. But there is also the prospect of more antagonistic relations, accentuated ideological rivalry, **potential and actual conﬂict,** intensiﬁed arms races, and even new cold wars, with spheres of inﬂuence and opposing coalitions. Although great power relations will probably vary from those that prevailed during any of the great twentieth-century conﬂicts, as conditions are never quite the same, they may vary less than seemed likely only a short while ago.

### 1AC – NEW

#### CONTENTION 2: EUROPE

**Allies will insist on a policy that limits operations to zones of active hostilities with criminal prosecutions elsewhere---codification key**

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

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

The debate has largely devolved into an either-or dichotomy, even while security and practical considerations demand more nuanced practices. Thus, the **U**nited **S**tates, supported by a vocal group of scholars, including Professors Jack Goldsmith, Curtis Bradley, and Robert Chesney, has long asserted that it is at war with al Qaeda and associated groups. Therefore, it can legitimately detain without charge - and kill - al Qaeda members and their associates **wherever they are** found, subject of course to additional law-of-war, constitutional, and sovereignty constraints. n9 Conversely, European [\*1170] allies, supported by an equally vocal group of scholars and human rights advocates, assert that the **U**nited **S**tates is engaged in a conflict with al Qaeda only in specified regions, and that the United States' authority to employ law-of-war detention and lethal force extends only to **those particular zones**. n10 In all other places, al Qaeda and its associates should be subject to [\*1171] law enforcement measures, as governed by international human rights law and the domestic laws of the relevant states. n11 Recent statements by **U**nited **S**tates officials suggest an attempt to mediate between these two extremes, at least for purposes of targeted killing, and **as a matter of policy, not law**. While continuing to assert a global conflict with al Qaeda, official statements have limited the defense of out-of-conflict zone targeting operations to high-level leaders and others who pose a "significant" threat. n12 In the words of President Obama's then-Assistant for Homeland Security and Counterterrorism, John O. Brennan, the United States does not seek to "eliminate every single member of al-Qaida in the world," but instead conducts targeted strikes to mitigate "actual[,] ongoing threats." n13 That said, the **U**nited **S**tates continues to suggest that it can, as a matter of law, "take action" against anyone who is "part of" al Qaeda or associated forces - a very broad category of persons - **without any explicit geographic limits.** n14 The stakes are high. If the United States were permitted to launch a drone strike against an alleged al Qaeda operative in Yemen, why not in London - so long as the United States had the United Kingdom's consent and was confident that collateral damage to nearby civilians would be minimal (thereby addressing sovereignty and proportionality concerns)? There are many reasons why such a scenario is unlikely, but the **U**nited [\*1172] **S**tates has yet to assert **any limiting principle** that would, as a matter of law, prohibit such actions. And in fact, the United States did rely on the laws of war to detain a U.S. citizen picked up in a Chicago airport for almost four years. n15 Even if one accepts the idea that the United States now exercises its asserted authority with appropriate restraint, what is to prevent **Russia**, for example, from asserting that it is engaged in an armed conflict with Chechens and that it can target or detain, without charge, an alleged member of a Chechen rebel group wherever he or she is found, including possibly in the United States? Conversely, it cannot be the case - as the extreme version of the territorially restricted view of the conflict suggests - that an enemy with whom a state is at war can merely cross a territorial boundary in order to plan or plot, free from the threat of being captured or killed. In the London example, law enforcement can and should respond effectively to the threat. n16 But there also will be instances in which the enemy escapes to an effective safe haven because the host state is unable or unwilling to respond to the threat (think Yemen and Somalia in the current conflict), capture operations are infeasible because of conditions on the ground (think parts of Yemen and Somalia again), or criminal prosecution is not possible, at least in the short run. This Article proposes a way forward - offering a new legal framework for thinking about the geography of the conflict in a way that better mediates the multifaceted liberty, security, and foreign policy interests at stake. It argues that the jus ad bellum questions about the geographic borders of the conflict that have dominated much of the literature are the wrong questions to focus on. Rather, it focuses on jus in bello questions about the conduct of hostilities. This Article assumes that the conflict extends to **wherever the enemy threat is found**, but argues for **more stringent rules of conduct outside zones of active hostilities**. Specifically, it proposes a series of substantive and procedural rules designed to limit the use of lethal targeting [\*1173] and detention outside zones of active hostilities - subjecting their use to an **individualized threat finding**, a least-harmful-means test, and **meaningful procedural safeguards**. n17 The Article does not claim that existing law, which is uncertain and contested, dictates this approach. (Nor does it preclude this approach.) Rather, the Article explicitly recognizes that the set of current rules, developed mostly in response to state-on-state conflicts in a world without drones, fails to address adequately the complicated security and liberty issues presented by conflicts between a state and mobile non-state actors in a world where technological advances allow the state to track and attack the enemy wherever he is found. New rules are needed. Drawing on evolving state practice, underlying principles of the law of war, and prudential policy considerations, the Article proposes a set of such rules for conflicts between states and transnational non-state actors - rules designed both to promote the state's security and legitimacy and to protect against the erosion of individual liberty and the rule of law. The Article proceeds in four parts. Part I describes how the legal framework under which the United States is currently operating has generated legitimate concerns about the creep of war. This Part outlines how the U.S. approach over the past several years has led to a polarized debate between opposing visions of a territorially broad and territorially restricted conflict, and how both sides of the debate have failed to [\*1174] acknowledge the legitimate substantive concerns of the other. Part II explains why a territorially broad conflict can and should distinguish between zones of active hostilities and elsewhere, thus laying out the broad framework under which the Article's proposal rests. Part III details the proposed zone approach. It distinguishes zones of active hostilities from both peacetime and lawless zones, and outlines the enhanced substantive and procedural standards that ought to apply in the latter two zones. Specifically, Part III argues that outside zones of active hostilities, law-of-war detention and use of force should be employed **only in exceptional situations,** subject to an individualized threat finding, least-harmful-means test, and meaningful procedural safeguards. n18 This Part also describes how such an approach maps onto the conflict with al Qaeda, and is, at least in several key ways, **consistent with the approach** **already taken** by the **U**nited **S**tates as a matter of policy. Finally, Part IV explains how such an approach ought to apply not just to the current conflict with al Qaeda but to other conflicts with transnational non-state actors in the future, as well as self-defense actions that take place outside the scope of armed conflict. It concludes by making several recommendations as to how this approach should be incorporated into U.S. and, ultimately, international law. The Article is United States-focused, and is so for a reason. To be sure, other states, most notably Israel, have engaged in armed conflicts with non-state actors that are dispersed across several states or territories. n19 But the **U**nited **S**tates is the first state to self-consciously declare itself at war with a non-state terrorist organization that **potentially spans the globe**. Its **actions and asserted authorities** in response to this threat **establish a reference point** for state practice that will **likely be mimicked by others** and inform the development of **c**ustomary **i**nternational **l**aw.

#### CT cooperation wrecks EU legitimacy if it’s not within a stable geographic rule of law framework---legal grey areas are key

Annegret Bendiek 11, Stiftung Wissenschaft und Politik German Institute for International and Security Affairs, At the Limits of the Rule of Law: EU-US Counter- Terrorism Cooperation, http://www.swp-berlin.org/fileadmin/contents/products/research\_papers/2011\_RP05\_bdk\_ks.pdf

4. The relationship between security and the rule of law will remain precarious as long as the EU cooperates with a partner that fights a non-state actor by military means. In the medium term, the constant manoeuvring at the limits of the rule of law is bound to impact the credibility of European Justice and Home Affairs policy. For this reason, it is important to clarify the status of the principles of the rule of law in transatlantic counter-terrorism cooperation. Three options for determining the relationship between international and transnational cooperation, on the one hand, and the rule of law, on the other, are conceivable. The first one consists in focussing strictly on security and strengthening the executive actors in Europe. The second option emphasises adherence to the principles of the rule of law, accompanied by a full parliamentarisation of this policy area. However, considering the fact that close cooperation with the United States is a cornerstone of both German and European policy, a third option – sensitive management of the emerging legal grey areas – seems most likely to be chosen. A first step in this direction would be for the member state to openly name the grey areas and publicly thematise the impact these have on transatlantic counter-terrorism cooperation. ¶ New Legal and Political Framework¶ The political and institutional framework for transatlantic cooperation has, contrary to expectations, changed for the worse since the beginning of 2009.1 Although President Obama’s White House is marked by a new style of policy-making, this has had no substantial impact on practical policy. The United States still sees itself at war against al-Qaeda and its terrorist affiliates. The EU and its member states, on the other hand, combat international terrorism above all with policing measures. In addition, on the legislative level, the transatlantic partners have moved even further from one another. In Europe, the Lisbon Treaty strengthened the European Parliament and, consequently, brought questions of data protection and civil rights to the fore. In the United States, in comparison, the Republican Party won the majority of seats during elections for the House of Representatives in November 2010, meaning that security will again be given priority over civil rights.

#### Absent the plan, individual CT violations spill over to end EU relations

Thorsten Wetzling 11, non-resident fellow at the Center for Transatlantic Relations at the Paul H. Nitze School of Advanced International Studies (SAIS), PhD in Political Science, “What role for what rule of law in EU-US counterterrorism cooperation?”, <http://transatlantic.sais-jhu.edu/publications/articles/Chapter1_EUISS_ChaillotPaper127_WETZLING.pdf>

Having said this, it is instructive to recall David Cole’s observation that ‘the rule of law may be tenacious when it is supported, but violations of it that go unaccounted corrode its very foundation’.17 Thus, while a more balanced depiction of ‘compatible’ and ‘incompatible’ counterterrorism practices may be required to substantiate broader claims, it is also true that a few severely misguided counterterrorism practices sufﬁce to discredit the ever-present promise of ‘full respect for our obligations under applicable international and domestic constitutional law’.18 In the light of the potentially contagious effect of individual rule-of-law deviations on the entire collaborative effort, the actual percentage of incompatible practices among the grand total of transatlantic counterterrorism activities appears secondary.

**EU leadership stops power competition between the US, Russia, and China and solves global climate coordination**

Patrick R. **Hugg 11**, the John J. McAulay Professor of Law, Loyola University New Orleans College of Law, Winter 2011, “Redefining the European Union's Position in the Emerging Multipolar World: Strong Global Leadership Potential, Restrained by Asymmetry of Power and Dissonant Voices,” Tulane Journal of International and Comparative Law, 20 Tul. J. Int'l & Comp. L. 145, p. lexis

The unprecedented pace of change unfolding in today's **multipolar world** is producing a new global order in which all participants are forced to redefine their economic and political positions. n2 As many emerging economies **promote** growing **nationalism** across the globe, traditional Western powers - including both the United States and the European Union - must face the reality of a world in which the West is no longer solely ascendant. n3 As the Treaty on European Union (TEU) twenty years ago marked a bold redefinition of the European integration project, so the recent Treaty of Lisbon has reformed institutions, streamlined processes, and elevated the European Union (EU) on the global stage n4 as it again faces existential opportunities and internal and external conflict.¶ The EU itself is in motion within a global order that is also in motion. This atomic relationship is more radically multipolar than is readily apparent: "Few in the West have grasped the full implications of the two most salient features of our historical epoch. First, we have reached the end of the era of Western domination of world history ... . [\*147] Second, we will see an enormous renaissance of Asian societies." n5 The media are replete with references to the emerging BRIC (Brazil, Russia, India, and China) n6 economies and their international influence. Industry analysts proffer, "In less than forty years, the BRICs economies together could be larger than the G6 in US dollar terms." n7 Other experts observe the significant economic growth of additional countries - such as Indonesia, South Africa, South Korea, Turkey, and others - as dynamic centers of economic growth. n8¶ But the coming power structure is broader than merely emerging economies: ¶ Imagine a world with a **strong China reshaping Asia**; India confidently extending its reach from Africa to Indonesia; Islam spreading its influence; a Europe replete with crises of legitimacy; sovereign city-states holding wealth and driving innovation; and private mercenary armies, religious radicals and humanitarian bodies playing by their own rules as they compete for hearts, minds and wallets. It sounds familiar today. But it was just as true slightly less than a millennium ago at the height of the Middle Ages. n9 ¶ Further motion is seen in the Middle East as the "Arab Spring" uproots many long-standing autocratic governments. n10 Likewise, uncertain **energy supplies** worldwide distort power, depending on the markets and the climate. n11 **Currency manipulation** by numerous governments [\*148] contributes to instability as governments react to economic and political pressures. n12¶ Also, many countries in the EU are in political and economic turmoil as national budgets - in response to fiscal woes - are reducing resources available for jobs and services to citizens, which has altered the generous social contract of the previous fifty years in Europe. n13 Due to the extreme financial positions in Greece, Ireland, Portugal, and Spain, governments are pressured to enact hugely unpopular legislation, further destabilizing their ability to govern. n14 With national elections on the horizon in some Member States, the political rhetoric becomes acerbic. n15¶ Massive "irregular" immigration from the Arab world rouses populist nationalism as well. n16 For example, in the traditionally tolerant Netherlands, a law banning religious slaughter was recently proposed, causing alarm in Muslim and Jewish communities. n17¶ Many Jews and Muslims see the ban as part of a growing European hostility to immigration and diversity. Geert Wilders, the far-right Dutch politician, has called for the Netherlands to ban the burka after France curbed the public wearing of the Islamic face veil; politicians including Britain's David Cameron have proclaimed the failure of multiculturalism; and anti-immigration parties such as Finland's True Finns have been increasingly successful at the polls. n18 ¶ With the French presidential election nearing in 2012, President Sarkozy is likely to continue a discourse focused on immigration, fear, and xenophobia. n19 Such negative, insensitive rhetoric does not promote stability in the EU or promote acceptance in the Islamic world.¶ Finally, change can be found in the fundamental ethos of the EU itself. The original reasons justifying incremental pooling of aspects of [\*149] sovereignty for the original supranational Communities - the need for internal peace and economic rebuilding mixed with fear of external military aggression n20 - are now mainly obsolescent. A unitary core motivation is less apparent in today's European citizen and politician.¶ B. What Form of Polity Will the EU Assume in the Next Twenty Years? What Relative Position in the World? What Leadership Will It Exercise? ¶ The EU's famous common market will continue, and the Union - especially if it can further deepen its integration - could grow to much more. The single market remains the EU's "biggest competitive advantage": n21 Five hundred million relatively prosperous inhabitants make any such trading bloc significant. n22 Every Member State's "commercial interests are force-multiplied by 27 member states' weight." n23 The EU and the United States have the largest bilateral trading and investment relationships, and their transactions together account for nearly forty percent of world trade. n24¶ Significant to political and legal science, the EU will continue to present the most distinctly advanced model of peaceful cross-border cooperation of any type, n25 the elements of which include: supranational authority, n26 post-Lisbon "legal personality," n27 reasonably effective democratic institutions, high standards of human rights, and rule-of-law [\*150] enforcement. n28 Moreover, as discussed infra, recent events and EU decision making have further advanced the depth of European integration, yielding a more complex, flexible, and integrated quasi-federal polity.¶ Further, **the EU is especially well-situated** for **future** regional and **international leadership** in multiple sectors of international relations and policy, thereby fostering more enlightened policies and improved practices **across the world**, **despite** its inherent difficulties in speaking with "one voice." As a leader on the world stage, this quasi-federation is generally unencumbered by the past half-century of international interventions or domestic suppressions that have so pointedly discredited, in many minds, the United States, China, and Russia. Thus, the EU stands in perhaps **the most advantageous position** of all nations or regional/international organizations for principled leadership today.¶ Viewed from another perspective, EU leadership is **essential to preventing this new multipolar world** from **degenerating** into another **contentious bipolar world**, possibly with the Western democracies **opposing** the autocracies of **Russia and China**, or perhaps with the traditionally Western cultures opposing Islam. n29 The EU may be the **most important player** in determining this future character of the world's power structure because China, Russia, and the United States all are "capable of both multilateral and unilateral behaviour." n30¶ The specific areas in which the EU enjoys advantageous leadership potential are several and could yield hugely significant results **if the EU is able to exercise that leadership** - for example, Europe's unique position as the world's foremost advocate of human rights protection, especially following the Treaty of Lisbon's amendments to the TEU's article 6. This article authorizes the EU to give legal effect to the EU's Charter of Fundamental Rights and more significantly mandates that the Union accede to the Council of Europe's monolithic Convention for the Protection of Human Rights and Fundamental Freedoms. n31 The EU's windward tacking toward authentic human rights protection at last nears its destination. n32¶ [\*151] In 1992, the TEU substantiated the principle developed by the European Court of Justice by confirming in article F that the "Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms ... and as they result from the constitutional traditions common to the Member States as general principles of Community law." n33 The European Council decision at Cologne in 1999 authorized the "expansive, innovative provisions" n34 of the Charter of Fundamental Rights. n35 The EU required the Charter to broaden overall protection because the European Convention on Human Rights spoke mainly to civil and political rights and did not address social and economic rights. n36¶ In spite of many criticisms that the Charter was unenforceable, it became enforceable with the Treaty of Lisbon. n37 That treaty crowned the long procession by commanding the EU to accede to the European Convention on Human Rights, n38 with enforcement authorized by two prestigious organizations, the EU and the Council of Europe. n39 Europe today stands in the most prestigious pulpit of global human rights leadership.¶ Moreover, the EU's accomplishments in promoting environmental protection, including its 20-20-20 energy and climate package, n40 give the EU **special standing to campaign for international cooperation**. The EU has the opportunity to **advance** both international **climate change cooperation** and greener, more secure energy policies. n41 A collateral benefit of these initiatives would potentially encourage further integration of energy-rich Russia into mainstream Europe in areas ranging from economic and energy markets to improved cooperation in [\*152] human rights. n42 The EU's Third Energy Package will also help reduce Russia's current leverage over EU energy supplies by making it harder for a company, such as the Russian Gazprom, to be both a supplier and transit provider. n43

**Unchecked Chinese rise causes global nuclear great-power war**

C. Dale Walton 7, Lecturer in International Relations and Strategic Studies at the University of Reading, Geopolitics and the Great Powers in the 21st Century, p. 49

Obviously, it is of vital importance to the United States that the PRC does not become the hegemon of Eastern Eurasia. As noted above, however, regardless of what Washington does, China's success in such an endeavor is not as easily attainable as pessimists might assume. The PRC appears to be on track to be a very great power indeed, but geopolitical conditions are not favorable for any Chinese effort to establish sole hegemony; a robust multipolar system should suffice to keep China in check, even with only minimal American intervention in local squabbles. The more worrisome danger is that Beijing will cooperate with a great power partner, establishing a very muscular axis. Such an entity would present a critical danger to the balance of power, thus both necessitating very **active American intervention** in Eastern Eurasia and **creating the** underlying **conditions for a massive**, and probably **nuclear, great power war**. Absent such a "super-threat," however, the demands on American leaders will be far more subtle: creating the conditions for Washington's gentle decline from playing the role of unipolar quasi-hegemon to being "merely" the greatest of the world's powers, while aiding in the creation of a healthy multipolar system that is not marked by close great power alliances.

#### Russia war causes extinction

Ira Helfand 9, M.D., and John O. Pastore, M.D., are past presidents of Physicians for Social Responsibility. March 31, “U.S.-Russia nuclear war still a threat”, http://www.projo.com/opinion/contributors/content/CT\_pastoreline\_03-31-09\_EODSCAO\_v15.bbdf23.html

President Obama and Russian President Dimitri Medvedev are scheduled to Wednesday in London during the G-20 summit. They must not let the current economic crisis keep them from focusing on one of the greatest threats confronting humanity: the danger of nuclear war. Since the end of the Cold War, many have acted as though the danger of nuclear war has ended. It has not. There remain in the world more than 20,000 nuclear weapons. Alarmingly, more than 2,000 of these weapons in the U.S. and Russian arsenals remain on ready-alert status, commonly known as hair-trigger alert. They can be fired within five minutes and reach targets in the other country 30 minutes later. Just one of these weapons can destroy a city. A war involving a substantial number would cause devastation on a scale unprecedented in human history. A study conducted by Physicians for Social Responsibility in 2002 showed that if only 500 of the Russian weapons on high alert exploded over our cities, 100 million Americans would die in the first 30 minutes. An attack of this magnitude also would destroy the entire economic, communications and transportation infrastructure on which we all depend. Those who survived the initial attack would inhabit a nightmare landscape with huge swaths of the country blanketed with radioactive fallout and epidemic diseases rampant. They would have no food, no fuel, no electricity, no medicine, and certainly no organized health care. In the following months it is likely the vast majority of the U.S. population would die. Recent studies by the eminent climatologists Toon and Robock have shown that such a war would have a huge and immediate impact on climate world wide. If all of the warheads in the U.S. and Russian strategic arsenals were drawn into the conflict, the firestorms they caused would loft 180 million tons of soot and debris into the upper atmosphere — blotting out the sun. Temperatures across the globe would fall an average of 18 degrees Fahrenheit to levels not seen on earth since the depth of the last ice age, 18,000 years ago. Agriculture would stop, eco-systems would collapse, and many species, including perhaps our own, would become extinct. It is common to discuss nuclear war as a low-probabillity event. But is this true? We know of five occcasions during the last 30 years when either the U.S. or Russia believed it was under attack and prepared a counter-attack. The most recent of these near misses occurred after the end of the Cold War on Jan. 25, 1995, when the Russians mistook a U.S. weather rocket launched from Norway for a possible attack. Jan. 25, 1995, was an ordinary day with no major crisis involving the U.S. and Russia. But, unknown to almost every inhabitant on the planet, a misunderstanding led to the potential for a nuclear war. The ready alert status of nuclear weapons that existed in 1995 remains in place today.

#### Warming is real, anthropogenic, and causes extinction

Richard Schiffman 9/27/13, environmental writer @ The Atlantic citing the Fifth Intergovernmental Panel on Climate Change, “What Leading Scientists Want You to Know About Today's Frightening Climate Report,” The Atlantic, http://www.theatlantic.com/technology/archive/2013/09/leading-scientists-weigh-in-on-the-mother-of-all-climate-reports/280045/

The polar icecaps are melting faster than we thought they would; seas are rising faster than we thought they would; extreme weather events are increasing. Have a nice day! That’s a less than scientifically rigorous summary of the findings of the Fifth Intergovernmental Panel on Climate Change (IPCC) report released this morning in Stockholm.¶ Appearing exhausted after a nearly two sleepless days fine-tuning the language of the report, co-chair Thomas Stocker called climate change “the greatest challenge of our time," adding that “each of the last three decades has been successively warmer than the past,” and that this trend is likely to continue into the foreseeable future.¶ Pledging further action to cut carbon dioxide (CO2) emissions, U.S. Secretary of State John Kerry said, "This isn’t a run of the mill report to be dumped in a filing cabinet. This isn’t a political document produced by politicians... It’s science."¶ And that science needs to be communicated to the public, loudly and clearly. I canvassed leading climate researchers for their take on the findings of the vastly influential IPCC report. What headline would they put on the news? What do they hope people hear about this report?¶ When I asked him for his headline, Michael Mann, the Director of the Earth Systems Science Center at Penn State (a former IPCC author himself) suggested: "Jury In: Climate Change Real, Caused by Us, and a Threat We Must Deal With."¶ Ted Scambos, a glaciologist and head scientist of the National Snow and Ice Data Center (NSIDC) based in Boulder would lead with: "IPCC 2013, Similar Forecasts, Better Certainty." While the report, which is issued every six to seven years, offers no radically new or alarming news, Scambos told me, it puts an exclamation point on what we already know, and refines our evolving understanding of global warming.¶ The IPCC, the indisputable rock star of UN documents, serves as the basis for global climate negotiations, like the ones that took place in Kyoto, Rio, and, more recently, Copenhagen. (The next big international climate meeting is scheduled for 2015 in Paris.) It is also arguably the most elaborately vetted and exhaustively researched scientific paper in existence. Founded in 1988 by the United Nations and the World Meteorological Organization, the IPCC represents the distilled wisdom of over 600 climate researchers in 32 countries on changes in the Earth’s atmosphere, ice and seas. It endeavors to answer the late New York mayor Ed Koch’s famous question “How am I doing?” for all of us. The answer, which won’t surprise anyone who has been following the climate change story, is not very well at all. ¶ It is now 95 percent likely that human spewed heat-trapping gases — rather than natural variability — are the main cause of climate change, according to today’s report. In 2007 the IPCC’s confidence level was 90 percent, and in 2001 it was 66 percent, and just over 50 percent in 1995. ¶ What’s more, things are getting worse more quickly than almost anyone thought would happen a few years back.¶ “If you look at the early IPCC predictions back from 1990 and what has taken place since, climate change is proceeding faster than we expected,” Mann told me by email. Mann helped develop the famous hockey-stick graph, which Al Gore used in his film “An Inconvenient Truth” to dramatize the sharp rise in temperatures in recent times. ¶ Mann cites the decline of Arctic sea ice to explain : “Given the current trajectory, we're on track for ice-free summer conditions in the Arctic in a matter of a decade or two... There is a similar story with the continental ice sheets, which are losing ice — and contributing to sea level rise — at a faster rate than the [earlier IPCC] models had predicted.”¶ But there is a lot that we still don’t understand. Reuters noted in a sneak preview of IPCC draft which was leaked in August that, while the broad global trends are clear, climate scientists were “finding it harder than expected to predict the impact in specific regions in coming decades.”¶ From year to year, the world’s hotspots are not consistent, but move erratically around the globe. The same has been true of heat waves, mega-storms and catastrophic floods, like the recent ones that ravaged the Colorado Front Range. There is broad agreement that climate change is increasing the severity of extreme weather events, but we’re not yet able to predict where and when these will show up. ¶ “It is like watching a pot boil,” Danish astrophysicist and climate scientist Peter Thejll told me. “We understand why it boils but cannot predict where the next bubble will be.”¶ There is also uncertainty about an apparent slowdown over the last decade in the rate of air temperature increase. While some critics claim that global warming has “stalled,” others point out that, when rising ocean temperatures are factored in, the Earth is actually gaining heat faster than previously anticipated.¶ “Temperatures measured over the short term are just one parameter,” said Dr Tim Barnett of the Scripps Institute of Oceanography in an interview. “There are far more critical things going on; the acidification of the ocean is happening a lot faster than anybody thought that it would, it’s sucking up more CO2, plankton, the basic food chain of the planet, are dying, it’s such a hugely important signal. Why aren’t people using that as a measure of what is going on?”¶ Barnett thinks that recent increases in volcanic activity, which spews smog-forming aerosols into the air that deflect solar radiation and cool the atmosphere, might help account for the temporary slowing of global temperature rise. But he says we shouldn’t let short term fluctuations cause us to lose sight of the big picture.¶ The dispute over temperatures underscores just how formidable the IPCC’s task of modeling the complexity of climate change is. Issued in three parts (the next two installments are due out in the spring), the full version of the IPCC will end up several times the length of Leo Tolstoy’s epic War and Peace. Yet every last word of the U.N. document needs to be signed off on by all of the nations on earth. ¶ “I do not know of any other area of any complexity and importance at all where there is unanimous agreement... and the statements so strong,” Mike MacCracken, Chief Scientist for Climate Change Programs, Climate Institute in Washington, D.C. told me in an email. “What IPCC has achieved is remarkable (and why it merited the Nobel Peace Prize granted in 2007).”¶ Not surprisingly, the IPCC’s conclusions tend to be “conservative by design,” Ken Caldeira, an atmospheric scientist with the Carnegie Institution’s Department of Global Ecology told me: “The IPCC is not supposed to represent the controversial forefront of climate science. It is supposed to represents what nearly all scientists agree on, and it does that quite effectively.”¶ Nevertheless, even these understated findings are inevitably controversial. Roger Pielke Jr., the Director of the Center for Science and Technology Policy Research at the University of Colorado, Boulder suggested a headline that focuses on the cat fight that today’s report is sure to revive: "Fresh Red Meat Offered Up in the Climate Debate, Activists and Skeptics Continue Fighting Over It." Pielke should know. A critic of Al Gore, who has called his own detractors "climate McCarthyists," Pielke has been a lightning rod for the political controversy which continues to swirl around the question of global warming, and what, if anything, we should do about it. ¶ The public’s skepticism of climate change took a dive after Hurricane Sandy. Fifty-four percent of Americans are now saying that the effects of global warming have already begun. But 41 percent surveyed in the same Gallup poll believe news about global warming is generally exaggerated, and there is a smaller but highly passionate minority that continues to believe the whole thing is a hoax. ¶ For most climate experts, however, the battle is long over — at least when it comes to the science. What remains in dispute is not whether climate change is happening, but how fast things are going to get worse.¶ There are some possibilities that are deliberately left out of the IPCC projections, because we simply don’t have enough data yet to model them. Jason Box, a visiting scholar at the Byrd Polar Research Center told me in an email interview that: “The scary elephant in the closet is terrestrial and oceanic methane release triggered by warming.” The IPCC projections don’t include the possibility — some scientists say likelihood — that huge quantities of methane (a greenhouse gas thirty times as potent as CO2) will eventually be released from thawing permafrost and undersea methane hydrate reserves. Box said that the threshhold “when humans lose control of potential management of the problem, may be sooner than expected.”¶ Box, whose work has been instrumental in documenting the rapid deterioration of the Greenland ice sheet, also believes that the latest IPCC predictions (of a maximum just under three foot ocean rise by the end of the century) may turn out to be wildly optimistic, if the Greenland ice sheet breaks up. “We are heading into uncharted territory” he said. “We are creating a different climate than the Earth has ever seen.” ¶ The head of the IPCC, Rajendra Pachauri, speaks for the scientific consensus when he says that time is fast running out to avoid the catastrophic collapse of the natural systems on which human life depends. What he recently told a group of climate scientist could be the most chilling headline of all for the U.N. report: ¶ "We have five minutes before midnight."

#### EU credibility independently prevents extinction

John Bruton 2, Deputy, Joint Committee on European Affairs, January 31, The Irish Times, A Report For The Joint Oireachtas Committee On European Affairs

As the Laeken Declaration put it, "Europe needs to shoulder its responsibilities in the governance of globalisation" adding that Europe must exercise its power in order "to set globalisation within a moral framework, in other words to anchor it in solidarity and sustainable development". Only a strong European Union is big enough to create a space, and a stable set of rules, within which all Europeans can live securely, move freely, and provide for themselves, for their families and for their old age. Individual states are too small to do that on their own. Only a strong European Union is big enough to deal with the globalised human diseases, such as AIDS and tuberculosis. Only a strong European Union is big enough to deal with globalised criminal conspiracies, like the Mafia, that threaten the security of all Europeans. Only a strong European Union is big enough to deal with globalised environmental threats, such as global warming, which threaten our continent and generations of its future inhabitants. Only a strong European Union is big enough to deal with globalised economic forces, which could spread recession from one country to another and destroy millions of jobs. Only a strong European Union is big enough to regulate, in the interests of society as a whole, the activities of profit seeking private corporations, some of which now have more spending power than many individual states. These tasks are too large for individual states. Only by coming together in the European Union can we ensure that humanity, and the values which make us, as individuals, truly human, prevail over blind global forces that will otherwise overwhelm us.

#### Independently, failure to align with EU legal codes and the rule of law destroys European SSR

Thorsten Wetzling 11, non-resident fellow at the Center for Transatlantic Relations at the Paul H. Nitze School of Advanced International Studies (SAIS), PhD in Political Science, “What role for what rule of law in EU-US counterterrorism cooperation?”, <http://transatlantic.sais-jhu.edu/publications/articles/Chapter1_EUISS_ChaillotPaper127_WETZLING.pdf>

Naturally, this poses a dilemma for the EU and its Member States. On the one hand, the EU benefits tremendously from its extensive counter-terrorism cooperation with the US and wishes to secure the smooth continuation of this cooperation. On the other hand, it has committed itself to a robust defence of the rule of law and knows that its power stems largely from the credibility of this defence. The latter is not a mere legal obligation, it also ensures vital support from domestic and international partners and helps to erode the ideological foundation of terrorist networks.¶ The dilemma is, of course, not entirely new but honest discussions about the conflicting interests and how to best address them in concrete political practice are rare." The seventy of rule-of-law violations that some transatlantic counterterrorism practices entail are seldom the subject of formal discussions, let alone official policy documents. ¶ As the EU and the US move into another decade of intense counterterrorism cooperation, they are well advised to pay greater attention to the potentially grave negative ramifications that some of their misguided policies might have. For example, the current JSOC/C1A night raids and drone strike campaign outside of declared zones of conflict defies hard- earned provisions of international law and may thus cause a universal regression of this important international tool of conflict resolution. A thin-skinned or lukewarm defence of the rule of law by European national parliaments and courts can also have grave negative ramifications for the credibility of European Security Sector assistance in other parts of the world. Rather than apologising for the more assertive oversight role of the European parliament, the European partners should value the fact that this important layer of rule of law defence has not become entirely dysfunctional.

#### Effective EU SSR key to Afghan stability

Nicholas J. Armstrong 11, "Afghan Security Force Assistance or Security Sector Reform? Despite Recent Improvements in the Afghan Security Forces, More Emphasis on Ministerial Development and Police Reform is Needed", INSCT on Security, Institute for National Security and Counterterrorism Syracuse University, December 21, insct.org/commentary-analysis/2011/12/21/afghan-security-force-assistance-or-security-sector-reform-despite-recent-improvements-in-the-afghan-security-forces-more-emphasis-on-ministerial-development-and-police-reform-is-needed/

Security force assistance is the next logical step in the triage of armed statebuilding in Afghanistan. But the **‘train and equip’ model** of security assistance **runs against the grain** of long term SSR goals. SSR involves the cultural and structural transformation – and construction where absent – of a state’s core security actors into effective, professional, and accountable agents under civilian control. Training security forces (e.g., SFA) is a core element of SSR, but doing it without an equal emphasis on developing civilian capacity and control and oversight mechanisms in the ministries of defense and interior and in the judicial system may be dangerous. It may, in fact, militarize the security sector to the point of entrenching an imbalance in civil-military relations that would make the challenges of fighting corruption and preventing human rights abuses, or worse, coup attempts all the more difficult.¶ NTM-A has made [significant progress](http://ntm-a.com/wordpress2/wp-content/uploads/2011/10/111016-ANSF-Fact-Sheet.pdf) in building the size and capabilities of the ANSF since its inception in 2009, increasing the Afghan National Army and Police by roughly 75,000 and 40,000, respectively. Likewise, NTM-A is on track to meet its November 2012 ANSF end strength target of 352,000 as well. For now it remains unclear, however, how NATO’s efforts to date, focused mainly on the uniformed services, will influence broader institutional reform across the Afghan security sector.¶ First, the Afghan National Police are currently trained and employed – mostly by U.S. military personnel – to fill a COIN role in local communities, serving essentially as paramilitary forces focused on citizen protection and holding territory cleared by NATO and Afghan Army units. But as Robert Perito of the U.S. Institute of Peace indicates in a [recent interview](http://www.usip.org/publications/value-police-assistance), to be sustainable the Afghan police still needs significant training to provide regular civilian police functions, such as crime prevention, emergency management, and traffic regulation, critical functions for demonstrating the legitimacy of the Afghan state. Additionally, more must be done to bring the Afghan Local Police (ALP) – a community based initiative started in 2010 to increase security by paying armed locals to protect themselves – into the fold under the supervision of the Afghan government and NTM-A. While the ALP has proven valuable in COIN efforts against the Taliban, a recent [Human Right Watch](http://www.hrw.org/sites/default/files/reports/afghanistan0911webwcover.pdf)report recommends improved mechanisms to vet, train and monitor the ALP following reports of abusive and criminal behavior.¶ Second, civilian expertise within the Afghan Ministries of Defense and Interior is sorely lacking. The reality that both ministries are predominantly led and staffed by current and former Afghan Army generals is a major long-term obstacle. Although this reflects a general shortfall of qualified civilian experts to fill key defense and interior positions, it flies in the face of tangible civilian oversight. The new [Ministry of Defense Advisors (MoDA)](http://www.defense.gov/home/features/2011/0211_moda/) program is making some headway, with one recent civilian advisor indicating that his Afghan counterparts are now discussing “how to educate and recruit future Afghan civil servants to join the Ministry of Defense” as a means of improving civilian control of the ANSF. It is difficult to tell, however, whether such talk will translate into a greater civilian role in driving Afghan defense and internal security policy.¶ Achieving anything close to the ideal vision of security sector reform in Afghanistan before 2014, much less in the next decade, is unrealistic. ‘Good enough’ is now the operative threshold to be met. But efforts made today will shape the future development of the ANSF and have consequences for both Afghan security and politics well beyond the 2014 transition. As expert Mark Sedra notes in a recent [book chapter](http://www.ashgate.com/isbn/9781409410287) on Afghanistan, “experience has shown that short-termist approaches to SSR, rather than nurturing democratically accountable and rights respecting security institutions, can breed security force impunity, **corruption** and politicization” (p. 235). Accordingly, regardless of how fast or slow the overarching mission in Afghanistan shifts away from COIN and toward security force assistance in the coming months and years, NATO should look to reprioritize its training and advising emphasis on the Afghan police and developing Afghan civilian capacity at the ministerial level to correct for existing imbalances and to set the Afghan security sector and its civil-military relations on a more sustainable path.

#### Afghan instability causes nuclear war

James Jay Carafano 10 is a senior research fellow for national security at The Heritage Foundation and directs its Allison Center for Foreign Policy Studies, “Con: Obama must win fast in Afghanistan or risk new wars across the globe,” Jan 2 http://gazettextra.com/news/2010/jan/02/con-obama-must-win-fast-afghanistan-or-risk-new-wa/

We can expect similar results if Obama’s Afghan strategy fails and he opts to cut and run. Most forget that throwing South Vietnam to the wolves made the world a far more dangerous place. The Soviets saw it as an unmistakable sign that America was in decline. They abetted military incursions in Africa, the Middle East, southern Asia and Latin America. They went on a conventional- and **nuclear-arms spending spree**. They stockpiled enough smallpox and anthrax to **kill the world several times over**. State-sponsorship of terrorism came into fashion. Osama bin Laden called America a “paper tiger.” If we live down to that moniker in Afghanistan, odds are the world will get a lot less safe. Al-Qaida would be back in the game. Regional terrorists would go after both Pakistan and India—potentially **triggering a nuclear war** between the two countries. Sensing a Washington in retreat, Iran and North Korea could shift their nuclear programs into overdrive, hoping to save their failing economies by selling their nuclear weapons and technologies to all comers. Their nervous neighbors would want nuclear arms of their own. The resulting nuclear arms race could be **far more dangerous than the Cold War’s** two-bloc standoff. With multiple, independent, nuclear powers cautiously eyeing one another, the world would look a lot more like Europe in 1914, when precarious shifting alliances **snowballed into a very big, tragic war**. The list goes on. There is no question that countries such as Russia, China and Venezuela would rethink their strategic calculus as well. That could produce all kinds of serious regional challenges for the United States. Our allies might rethink things as well. Australia has already hiked its defense spending because it can’t be sure the United States will remain a responsible security partner. NATO might well fall apart. Europe could be left with only a puny EU military force incapable of defending the interests of its nations.

### 1AC – Plan

#### The United States Federal Government should restrict the President's war powers authority by

#### - limiting authority for targeted killing and detention without charge in zones of active hostilities to declared areas;

#### - limiting authority for targeted killing and detention without charge outside zones of active hostilities to operations guided by an individualized threat requirement and with procedural safeguards; and

#### - statutory codification of executive branch review policy for these practices.

### 1AC – Solvency

#### CONTENTION 3: SOLVENCY

**Plan’s key to codify existing policy into law---prevents expansive executive targeted killings and indefinite detention**

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

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

Fifth, and critically, while the **U**nited **S**tates might be confident that it will exercise its authorities responsibly, it **cannot assure that other states will** follow suit. What is to prevent Russia, for example, from asserting that [\*1233] it is engaged in an armed conflict with Chechen rebels, and can, consistent with the law of war, **kill** **or** **detain** any person **anywhere** in the world which it deems to be a "functional member" of that rebel group? Or **Turkey** from doing so with respect to alleged "functional members" of **Kurdish rebel groups?** If such a theory ultimately resulted in the targeted killing or detaining without charge of an American citizen, the United States would have few principled grounds for objecting.¶ Capitalizing on **the** strategic **benefits of restraint**, the **U**nited **S**tates should **codify into law** what is **already**, in many key respects, **national policy**. As a first step, the President should sign an Executive order requiring that out-of-battlefield target and capture operations be based on individualized threat assessments and subject to a least-harmful-means test, clearly articulating the standards and procedures that would apply. As a next step, Congress should mandate the creation of a review system, as described in detail in this Article. In doing so, **the U**nited **S**tates will **set an important example**, one that **can become a building block upon which to develop an international consensus** as to **the rules that apply to detention** and **targeted killings** **outside the conflict zone**.

**Congressional codification sets a precedent and the prevents the erosion of rule of law**

**Maxwell 12** - Colonel and Judge Advocate, U.S. Army, 1st Quarter 2012, “TARGETED KILLING, THE LAW, AND TERRORISTS: FEELING SAFE?,” Joint Force Quarterly, p. 123-130, Mark David Maxwell.

Once a state demonstrates membership in an organized armed group, the members can be presumed to be a continuous danger. **Because this danger is worldwide**, the state can now act in areas **outside** the traditional **zones of conflict**. It is the individual’s conduct over time—**regardless of location**— that gives him the status. Once the status attaches, the member of the organized armed group can be targeted. ¶ Enter Congress ¶ The weakness of this theory is that **it is not codified in U.S. law**; it is merely the extrapolation of international theorists and organizations. The **only entity under the Constitution** that can frame and settle Presidential power regarding the enforcement of international norms is **Congress**. As the check on executive power, Congress must amend the AUMF to **give the executive a statutory roadmap that articulates when force is appropriate** and under what circumstances the President can use targeted killing. This would be the needed endorsement from Congress, the other political branch of government, to clarify the U.S. position on its use of force regarding targeted killing. For example, it would spell out the limits of American lethality once an individual takes the status of being a member of an organized group. Additionally, **statutory clarification** will **give other states a roadmap** for the contours of what constitutes anticipatory self-defense and the **proper conduct of the military** under the law of war.¶ Congress should also require that the President brief it on the decision matrix of articulated guidelines before a targeted killing mission is ordered. As Kenneth Anderson notes, “[t]he point about briefings to Congress is partly to allow it to exercise its democratic role as the people’s representative.”74¶ The desire to feel safe is understandable. The consumers who buy SUVs are not buying them to be less safe. Likewise, the champions of targeted killings want the feeling of safety achieved by the elimination of those who would do the United States harm. But allowing the President to order **targeted killing without congressional limits** means the President can manipulate force in the name of national security without **tethering it to** the law advanced by international **norms**. The potential consequence of such **unilateral executive action** is that it gives other states, such as **North Korea** and **Iran**, the **customary precedent to do the same**. Targeted killing **might be required in certain circumstances**, but if the guidelines are debated and understood, the decision can be executed **with** the full faith of the people’s representative, **Congress**. When the decision is made **without Congress**, the result might make the United States feel safer, but the process **eschews** what gives a state its greatest safety: the **rule of law**.

#### The aff solves --- a zone approach is the perfect middle ground that resolves their downsides like circumvention and safe-havens

Jennifer Daskal 13, Fellow and Adjunct Professor, Georgetown Center on National Security and the Law, University of Penn L. Rev., THE GEOGRAPHY OF THE BATTLEFIELD: A FRAMEWORK FOR DETENTION AND TARGETING OUTSIDE THE "HOT" CONFLICT ZONE, April, 161 U. Pa. L. Rev. 1165, Lexis

II. A New Approach: Zones of Active Hostilities and Beyond¶ The current debate has resulted in a stalemate, with neither side adequately addressing the legitimate concerns of the other. The notion of an on-off switch, in which the state's ability to go after the enemy is restricted to limited territorial regions, ignores the geographically unbounded nature of a conflict with a transnational non-state actor. Conversely, the notion of an unbounded conflict raises legitimate concerns about the use of force as a first resort and the erosion of peacetime norms in areas far from any recognized "hot" battlefield. What is needed is a new framework of domestic and international law that better balances the multiple security and liberty interests at stake.¶ This Article offers such a framework - one that recognizes the broad scope of the conflict, but distinguishes between zones of active hostilities and elsewhere in setting the procedural and substantive standards for detention and targeting. This framework, which I call the zone approach, accommodates the state's key security interests while also protecting against the erosion of peacetime norms outside zones of active hostilities. It recognizes that rules applicable in wartime - rules that permit killing and [\*1193] detention without charge based on status alone - should be the exception rather than the norm, limited to circumstances in which security so demands.¶ This Part outlines the several normative and practical reasons why the zone approach should be adopted and incorporated into U.S. and, ultimately, international law. Although the analysis focuses primarily on the United States, the arguments as to the benefits of this framework apply equally to any other belligerent state seeking to defeat a transnational non-state enemy.¶ A. Basis for the Distinction¶ There is an intuitive sense that, separate and apart from any sovereignty concerns, the killing or detention of an alleged enemy of the state in a war zone is different from the killing or detention of an alleged enemy in a peaceful zone (think Munich or London), even if the known facts about the enemy's role in the opposing force are the same. Similarly, there is a less intuitive, but equally important, difference between both of those situations and the killing or detention of an alleged enemy in a lawless zone (think Yemen or Somalia). This Section highlights several reasons why these distinctions should be reflected in the law - reasons largely based on the relevant exigency, the importance of notice, and the intrinsic value of cabining war and its permissive use of force and detention without charge.¶ 1. The War Zone Versus the Peaceful Zone¶ The exigencies that justify application of wartime rules simply do not apply outside zones of active hostilities. The Supreme Court recognized this important distinction in Reid v. Covert, n83 in which it ruled that civilians accompanying the armed forces outside a war zone could not be subject to military trial. "The exigencies which have required military rule on the battlefield are not present where no conflict exists. Military trial of civilians "in the field' is an extraordinary jurisdiction and it should not be expanded at the expense of the Bill of Rights." n84 The Reid opinion echoed the reasoning of a case from almost ninety years prior, when the Court ruled that Indiana - which was not the site of any active fighting - could not be subject to martial law during the Civil War: "Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion [\*1194] real, such as effectually closes the courts and deposes the civil administration." n85 Similar reasoning has led courts to conclude that the requisition of property by the United States government is permitted at the "scene of conflict" but not thousands of miles away n86 and that the protections of the Suspension Clause depend to a large extent on whether or not the detainees are held in an "active theater of war." n87¶ As these cases recognize, the existence of warlike conditions in one part of the world should not lead to a relaxation of the substantive and procedural standards embodied in peacetime rules elsewhere. In some areas, intense fighting can create conditions that often make it impracticable, if not impossible, to apply ordinary peacetime rules. Such situations justify resort to more expedient wartime rules. By contrast, in areas where ordinary institutions are functioning, domestic police are effectively maintaining law and order, and communication and transportation networks are undisturbed, the exigent circumstances justifying the reliance on law-of-war tools are typically absent. n88 In those areas, the peacetime standards - which themselves reflect a careful balancing of liberty and security interests - serve the important functions of minimizing error and abuse and enhancing the legitimacy of the state's actions. These standards should be respected absent exigent circumstances that justify an exception.¶ Second, the notion of a global conflict clashes with the legitimate and reasonable expectations of persons residing in a peacetime zone. These expectations matter. The corollary - the requirement of fair notice - is perhaps the primary factor that distinguishes a law-abiding government from a lawless dictatorship. Its importance is emphasized time and time again in both U.S. constitutional law and international law doctrines. It sets boundaries [\*1195] on substantive rights, n89 is key to choice of law questions, n90 and is the core of procedural-rights protections in both domestic and international law. n91¶ In places of intense, obvious, and publicly acknowledged fighting, civilians are on notice that they are residing within a zone of conflict. Those who remain within the conflict zone have implicitly accepted some risk, albeit not voluntarily in most cases. They can, at least in theory, take steps to protect themselves and minimize the likelihood of being caught in the crossfire by, when possible, leaving or avoiding areas with the heaviest concentration of fighters or taking extra precautions in conducting their daily activities. n92 Host states are similarly on notice of the likelihood of ongoing hostilities and can take appropriate steps to move their citizens away from areas of intense fighting.¶ [\*1196] By comparison, civilians sitting at an outdoor cafe in Paris are not on notice that they are within the zone of conflict. As a result, there is something intuitively unsettling about the idea that they could be deemed the legitimate collateral damage of a state-sponsored attack. It is precisely this fear of the unpredictable on which terrorists capitalize when they attack unsuspecting civilians. A legal doctrine that allows the state to engage in attacks that may have a similar consequence - even if civilians are not the intended or expected targets of the attacks - raises legitimate concerns.¶ It is, of course, possible to conceive of a new set of rules for this new type of conflict, under which the procedural and substantive requirements of domestic criminal justice systems and human rights norms give way when the non-state enemy crosses into one's jurisdiction. But the idea that a non-state actor could, through its clandestine behavior, trigger the permissive use of killing and detention without charge runs counter to longstanding conceptions of fairness and justice. n93 It essentially allows the terrorist to erode protections of basic rights simply by crossing state lines.¶ Third, the conditions on the ground affect the assumptions as to who qualifies as the enemy. While it may be valid to presume that individuals who attend a training camp and are found in a zone of active hostilities intend to join the fight, the same presumption does not necessarily hold for individuals who are subsequently located thousands of miles away in a zone of relative peace. n94 Absent additional, specific information suggesting that the individual is actively engaged in attack planning or playing a sufficiently important role in the organization so as to pose a significant ongoing threat, the justifications for law-of-war detention or lethal killing (to prevent the return to the battlefield or otherwise eliminate the threat) are questionable. n95 At a minimum, heightened quantum-of-information standards ought to [\*1197] apply to detention and targeting that take place outside a zone of active hostilities. n96¶ 2. The Lawless Zone¶ In practice, the truly contested areas fall somewhere between the obvious warzone and the peacetime zone. The United States is unlikely to begin launching drone strikes in Paris. It is, however, reportedly doing so with increasing frequency in places like Yemen and possibly Somalia n97 - areas that can be loosely characterized as "lawless zones."¶ In some ways, a lawless zone shares attributes with a zone of active hostilities. Domestic law enforcement tends to be largely ineffective or nonexistent, suggesting the need for alternative mechanisms to deal with threats. In many instances (and certainly in much of Yemen as well as Somalia), civilians are on notice that they are living in a conflict zone, even if the main conflict is distinct from the transnational conflict between the state and a non-state entity (e.g., the internal armed conflict between the government and insurgent forces in southern Yemen, and the internal armed conflict between al Shabaab and the Transitional Federal Government in Somalia).¶ Despite these similarities, the lawless zone where a discrete number of non-state actors find sanctuary is analytically distinct from the hot conflict zone where there is overt, active, ongoing fighting between troops on the ground. This is so for two main reasons.¶ First, the existence of a separate, distinct conflict of the type often found in a lawless zone does not provide notice of a conflict between a belligerent state and transnational non–state enemy. In concrete terms, the existence of a conflict between al Shabaab and the Transitional Federal Government does not provide notice of a conflict between the United States and al Qaeda affiliates reportedly operating in Somalia. This matters for reasons of attribution and accountability. It also affects the degree, if not the fact, of conflict experienced by the civilian population. Imagine if the existence of a lawless zone gave states free rein to unilaterally attack any alleged non–state enemy found therein. Absent any meaningful limits, such a region might be decimated by external attacks. The situation would likely exacerbate the separate conflict, prolong the situation of lawlessness, and make it exceed- ingly difficult for the population properly to identify or take steps to address the source of conflict.98¶ Second, operations in a lawless zone are likely to be limited to targeted and surgical strikes, often with advance planning and little risk to the state's own troops. This is a very different setting than an active battlefield where troops on the ground are exposed to high levels of risk. As is often noted, those engaged in on-the-ground combat should not be required to hold their fire until they conduct a careful evaluation of the threat posed; such a rule would be potentially suicidal. In Yemen and Somalia, by contrast, the United States carefully pinpoints and identifies targets, with little to no danger to its own troops. When engaging in that type of deliberate killing, with negligible risk to one's own forces, there should be a corresponding obligation to take extra precautions to prevent error, overzealousness, and abuse. N99¶ B. Current State Practice¶ Since 2006, the United States has, at least implicitly and as a matter of policy, distinguished between zones of active hostilities and elsewhere. n100 The Bush Administration initially placed a significant number of off-the-battlefield captures into long-term law-of-war detention. Detainees reportedly included persons captured in places as far-flung from the Afghanistan battlefield as Bosnia, Mauritania, and Thailand - as well as the United States. n101 These off-the-battlefield detentions turned out to be highly controversial. They have been the subject of numerous court challenges, [\*1199] international criticism, and endless commentary. n102 Moreover, they raise difficult questions about repatriation - issues with which the United States continues to struggle. n103¶ Beginning in September 2006, the Bush Administration initiated a shift in policy. Largely in response to the Supreme Court's ruling in Hamdan v. Rumsfeld, n104 President Bush announced that he was closing CIA-run black sites, at least temporarily, and ordered the transfer of fourteen long-term CIA detainees to Guantanamo. n105 Subsequently, the number of out-of-battlefield captures transferred to Guantanamo fell to a mere three captures in 2007 n106 and only one capture in 2008. n107 All were described as high-value targets based on alleged links to al Qaeda leadership or involvement in specific terrorist attacks. n108¶ [\*1200] On January 22, 2009, two days after taking office, President Obama declared the permanent shuttering of CIA black sites as well as his plan to close the detention center at Guantanamo Bay. n109 While Guantanamo remains open today, the Obama Administration has committed not to transfer any additional detainees there. n110 Since 2009, Warsame is the only known case of an out-of-battlefield detainee being placed in anything other than very short-term military custody. n111¶ Some have argued that the low number of out-of-battlefield detentions is due in part to the lack of viable locations for holding detainees. But while that may be a factor, it seems that the difficulty of apprehension, the high diplomatic, reputational, and transactional costs of such detentions, and the relative effectiveness of the criminal justice system in responding to threats, are equal - if not more - important factors in limiting the reliance on law-of-war detention. n112¶ As out-of-battlefield detentions have declined, targeted killings reportedly have increased dramatically. n113 The vast majority of these killings appear [\*1201] to have been concentrated in northwest Pakistan - an area that most concede is a spillover of the zone of active hostilities in Afghanistan. n114 A growing number of strikes reportedly have been launched in Yemen as well. n115¶ The Obama Administration also appears to have adopted a distinction between Afghanistan and elsewhere in setting the rules for these strikes. While top administration officials have argued that their military authorities are not restricted to the "hot" battlefield of Afghanistan, they also have argued that "outside of Afghanistan and Iraq" targets are focused on those "who are a threat to the United States, whose removal would cause a significant - even if only temporary - disruption of the plans and capabilities of al-Qa'ida and its associated forces." n116 Whether or not one agrees with the standard employed, it is clear that the administration itself recognizes a distinction between Afghanistan (and, earlier, Iraq) and other areas embroiled in the conflict with al Qaeda. Procedural rules in terms of who must authorize the strike also reportedly vary depending on whether one is operating within Afghanistan and the border regions of Pakistan or elsewhere. n117 While there are good reasons to demand additional safeguards, the [\*1202] United States' own actions already reflect the importance and value of distinguishing between zones of active hostilities and other areas.¶ III. The Specifics: Defining the Zones and Setting the Standards¶ Given the basis for distinguishing between zones of active hostilities and elsewhere, this Part provides the specifics of the proposed approach. It first lays out criteria for distinguishing between a zone of active hostilities and elsewhere by drawing on both existing law and the normative justifications for the distinctions. It then describes the proposed substantive and procedural standards that ought to apply, consistent with the goals of protecting individual liberty, peacetime institutions, and the fundamental security interests of the state.¶ This task is both necessary and inherently difficult. It is an attempt to develop a set of clear standards, or on-off triggers, for a situation in which the gravity, imminence, and likelihood of a threat are dynamic, uncertain, and difficult to categorize. My aim is to propose an initial set of standards that will regulate the use of force and detention without charge outside a zone of active hostilities, consistent with the state's legitimate security needs. The expectation is that debate and discussion will help develop and refine the details over time.¶ A. The Zone of Active Hostilities¶ Commentary, political discourse, court rulings, and academic literature are rife with references to the distinction between the so-called "hot battlefield" and elsewhere. Yet despite the salience of this distinction, there is no commonly understood definition of a "hot battlefield," let alone a common term applied by all. n118 In what follows, I briefly survey the relevant treaty [\*1203] and case law and offer a working definition of what I call the "zone of active hostilities." This definition takes into account such sources of law as well as the normative and practical reasons for this distinction.¶ 1. Treaty and Case Law¶ While not explicitly articulated, the notion of a distinct zone of active hostilities where fighting is underway is implicit in treaty law. The Geneva Conventions, for example, specify that prisoners of war and internees must be moved away from the "combat zone" in order to keep them out of danger, n119 and that belligerent parties must conduct searches for the dead and wounded left on the "battlefield." n120 While there are no explicit definitions provided, the context suggests that these terms refer to those areas where fighting is currently taking place or very likely to occur. The related term "zones of military operations," which is spelled out in a bit more detail in the Commentaries to the Geneva Conventions, is described as covering those areas where there is actual or planned troop movement, even if no active fighting. n121¶ [\*1204] In a variety of contexts, U.S. courts also have opined on whether certain activities fall within or outside of a zone of active hostilities, indicating that the existence and quantity of fighting forces are key. In Hamdi v. Rumsfeld, for example, the Supreme Court observed that the large number of troops on the ground in Afghanistan supported the finding that the United States was involved in "active combat" there. n122 A panel of the D.C. Circuit subsequently noted that the ongoing military campaign by U.S. forces, the attacks against U.S. forces by the Taliban and al Qaeda, the casualties U.S. personnel incurred, and the presence of other non-U.S. troops under NATO command supported its finding that Afghanistan was "a theater of active military combat." n123 Previous cases have similarly used the presence of fighting forces, the actual engagement of opposing forces, and casualty counts to identify a theater of active conflict. n124¶ Conversely, U.S. courts have often assumed that areas in which there is no active fighting between armed entities fall outside of the zone of active hostilities. Thus, the Al-Marri and Padilla litigations were premised on the notion that the two men were outside of the zone of active hostilities when [\*1205] taken into custody in the United States. n125 The central issue in those cases was how much this distinction mattered. n126 The D.C. Circuit in Al Maqaleh similarly distinguished Afghanistan - defined as part of "the theater of active military combat" - from Guantanamo - described as outside of this "theater of war" - presumably because of the absence of active fighting there. n127 In the context of the Guantanamo habeas litigation, D.C. District Court judges have at various times also described Saudi Arabia, Gambia, Zambia, Bosnia, Pakistan, and Thailand as outside an active battle zone. n128¶ In defining what constitutes a conflict in the first place, international courts have similarly looked at the existence, duration, and intensity of the actual fighting. Specifically, in Tadic, the ICTY defined a noninternational armed conflict as involving "protracted armed violence between governmental authorities and organized armed groups." n129 In subsequent cases, the ICTY [\*1206] described the term "protracted armed violence" as turning on the intensity of the violence and encompassing considerations such as "the number, duration, and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of weapons fired; the number of persons and type of forces partaking in the fighting; the number of casualties; [and] the extent of material destruction." n130 Security Council attention is also deemed relevant. n131¶ The International Committee of the Red Cross (ICRC) has similarly defined noninternational armed conflicts as "protracted armed confrontations" that involve a "minimum level of intensity." n132¶ 2. Identifying the Zone¶ Consistent with treaty and case law, overt and sustained fighting are key factors in identifying a zone of active hostilities. Specifically, the fighting must be of sufficient duration and intensity to create the exigent circumstances that justify application of extraordinary war authorities, to put civilians on notice, and to justify permissive evidentiary presumptions regarding the identification of the enemy. n133 The presence of troops on the [\*1207] ground is a significant factor, although neither necessary nor sufficient to constitute a zone of active hostilities. Action by the Security Council or regional security bodies such as NATO, as well as the belligerent parties' express recognition of the existence of a hot conflict zone, are also relevant.¶ Linking the zone of active hostilities primarily to the duration and intensity of the fighting and to states' own proclamations suffers, however, from an inherent circularity. A state can itself create a zone of active hostilities by ratcheting up violence or issuing a declaration of intent, thereby making previously unlawful actions lawful. n134¶ It is impossible to fully address this concern. The problem can, however, be significantly reduced by insisting on strict compliance with the law-of-war principles of distinction and proportionality and by vigorously punishing states for acts of aggression. n135 There will, of course, be disagreement as to whether a state's escalation of a certain conflict constitutes aggression, particularly given underlying disagreements about who qualifies as a lawful target. The zone approach is helpful in this regard as well: it narrows the range of disagreement by demanding heightened substantive standards as to who qualifies as a legitimate target outside the zones of active hostilities. Under the zone approach, the escalation of force must be aimed at a narrower set of possible military targets until the increased use of force is sufficiently intense and pervasive enough to create a new zone of active hostilities.¶ 3. Geographic Scope of the Zone¶ A secondary question relates to the geographic scope of the zone of active hostilities. In answering the related question of the scope of the overarching armed conflict, the Tadic court defined the conflict as extending throughout the state in which hostilities were conducted (in the case of international armed conflict) n136 and the area over which a party had territorial control (in the case of a noninternational armed conflict that did not extend [\*1208] throughout an entire state). n137 Neither approach, however, maps well onto the practical realities of a transnational conflict between a state and a non-state actor. In many cases, the non-state actor and related hostilities will be concentrated in a small pocket of the state. It would be contrary to the justifications of exigency and proper notice to define the zone of active hostilities as extending to the entire state. A territorial control test also does not make sense when dealing with a non-state actor, such as al Qaeda, which does not exercise formal control over any territory and is driven more by ideology than territorial ambition.¶ This Article suggests a more nuanced, albeit still imperfect, approach: If the fighting is sufficiently widespread throughout the state, then the zone of active hostilities extends to the state's borders. If, however, hostilities are concentrated only in certain regions within a state, then the zone will be geographically limited to those administrative areas or provinces in which there is actual fighting, a significant possibility of fighting, or preparation for fighting. This test is fact-intensive and will depend on both the conditions on the ground and preexisting state and administrative boundaries.¶ It remains somewhat arbitrary, of course, to link the zone of hostilities to nation-state boundaries or administrative regions within a state when neither the state itself nor the region is a party to the conflict and when the non-state party lacks explicit ties to the state or region at issue. This proposed framework inevitably will incorporate some areas into the zone of active hostilities in which the key triggering factors - sustained, overt hostilities - are not present. But such boundaries, even if overinclusive or artificial, provide the most accurate means available of identifying the zone of active hostilities, at least over the short term.¶ Over the long term, it would be preferable for the belligerent state to declare particular areas to be within the zone of active hostilities, either through an official pronouncement by the state party to the conflict or via a resolution by the Security Council or a regional security body. A public declaration would provide explicit notice as to the existence and parameters of the zone of active hostilities, thereby reducing uncertainty as to which legal rules apply. Such declarations would allow for public debate and diplomatic pressure in the event of disagreement. Furthermore, the belligerent states could then define the zone with greater nuance, which would better [\*1209] reflect the actual fighting than would preexisting state or administrative boundaries. n138¶ Some likely will object that such an official designation would recreate the same safe havens that this proposal seeks to avoid. But a critical difference exists between a territorially restricted framework that effectively prohibits reliance on law-of-war tools outside of specific zones of active hostilities and a zone approach that merely imposes heightened procedural and substantive standards on the use of such tools. Under the zone approach, the non-state enemy is not free from attack or capture; rather, the belligerent state simply must take greater care to ensure that the target meets the enhanced criteria described in Section III.B.¶ B. Setting the Standards¶ Law-of-war detention and lethal targeting outside a zone of active hostilities should be limited, not categorically prohibited. It should be focused on those threats that are clearly tied to the zone of active hostilities and other significant and ongoing threats that cannot be adequately addressed through other means. Moreover, a heightened quantum of information and other procedural requirements should apply, given the possibility and current practice of ex ante deliberation and review. Pursuant to these guiding principles, this Section proposes the adoption of an individualized threat requirement, a least-harmful-means test, and meaningful procedural safeguards for lethal targeting and law-of-war detention that take place outside zones of active hostilities.

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## Case

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Michael Singh 11, Washington Institute director, 9/22, “What has really changed in the Middle East?”, http://shadow.foreignpolicy.com/posts/2011/09/22/what\_has\_really\_changed\_in\_the\_middle\_east

Third, and most troubling, the Middle East is likely to be a more dangerous and volatile region in the future. For the past several decades, a relatively stable regional order has prevailed, centered around Arab-Israeli peace treaties and close ties between the United States and the major Arab states and Turkey. The region was not conflict-free by any means, and Iran, Iraq, and various transnational groups sought to challenge the status quo, albeit largely unsuccessfully. Now, however, the United States appears less able or willing to exercise influence in the region, and the leaders and regimes who guarded over the regional order are gone or under pressure. Sensing either the need or opportunity to act autonomously, states like Turkey, Saudi Arabia, and Iran are increasingly bold, and all are well-armed and aspire to regional leadership. Egypt, once stabilized, may join this group. While interstate conflict is not inevitable by any means, the risk of it has increased and the potential brakes on it have deteriorated. Looming over all of this is Iran's quest for a nuclear weapon, which would shift any contest for regional primacy into overdrive.

### NATO Add-On

**Plan prevents end of NATO**

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

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

#### Nuclear war

Zbigniew Brzezinski 9, former U.S. National Security Adviser, Sept/Oct 2009, “An Agenda for NATO,” Foreign Affairs, 88.5, EBSCO

NATO's potential is not primarily military. Although NATO is a collective-security alliance, its actual military power comes predominantly from the United States, and that reality is not likely to change anytime soon. NATO's real power derives from the fact that it combines the United States' military capabilities and economic power with Europe's collective political and economic weight (and occasionally some limited European military forces). Together, that combination makes NATO globally significant. It must therefore remain sensitive to the importance of safeguarding the geopolitical bond between the United States and Europe as it addresses new tasks. The basic challenge that NATO now confronts is that there are historically unprecedented risks to global security. Today's world is threatened neither by the militant fanaticism of a territorially rapacious nationalist state nor by the coercive aspiration of a globally pretentious ideology embraced by an expansive imperial power. The paradox of our time is that the world, increasingly connected and economically interdependent for the first time in its entire history, is experiencing intensifying popular unrest made all the more menacing by the growing accessibility of weapons of mass destruction -- not just to states but also, potentially, to extremist religious and political movements. Yet there is no effective global security mechanism for coping with the growing threat of violent political chaos stemming from humanity's recent political awakening. The three great political contests of the twentieth century (the two world wars and the Cold War) accelerated the political awakening of mankind, which was initially unleashed in Europe by the French Revolution. Within a century of that revolution, spontaneous populist political activism had spread from Europe to East Asia. On their return home after World Wars I and II, the South Asians and the North Africans who had been conscripted by the British and French imperial armies propagated a new awareness of anticolonial nationalist and religious political identity among hitherto passive and pliant populations. The spread of literacy during the twentieth century and the wide-ranging impact of radio, television, and the Internet accelerated and intensified this mass global political awakening. In its early stages, such new political awareness tends to be expressed as a fanatical embrace of the most extreme ethnic or fundamentalist religious passions, with beliefs and resentments universalized in Manichaean categories. Unfortunately, in significant parts of the developing world, bitter memories of European colonialism and of more recent U.S. intrusion have given such newly aroused passions a distinctively anti-Western cast. Today, the most acute example of this phenomenon is found in an area that stretches from Egypt to India. This area, inhabited by more than 500 million politically and religiously aroused peoples, is where NATO is becoming more deeply embroiled. Additionally complicating is the fact that the dramatic rise of China and India and the quick recovery of Japan within the last 50 years have signaled that the global center of political and economic gravity is shifting away from the North Atlantic toward Asia and the Pacific. And of the currently leading global powers -- the United States, the EU, China, Japan, Russia, and India -- at least two, or perhaps even three, are revisionist in their orientation. Whether they are "rising peacefully" (a self-confident China), truculently (an imperially nostalgic Russia) or boastfully (an assertive India, despite its internal multiethnic and religious vulnerabilities), they all desire a change in the global pecking order. The future conduct of and relationship among these three still relatively cautious revisionist powers will further intensify the strategic uncertainty. Visible on the horizon but not as powerful are the emerging regional rebels, with some of them defiantly reaching for nuclear weapons. North Korea has openly flouted the international community by producing (apparently successfully) its own nuclear weapons -- and also by profiting from their dissemination. At some point, its unpredictability could precipitate the first use of nuclear weapons in anger since 1945. Iran, in contrast, has proclaimed that its nuclear program is entirely for peaceful purposes but so far has been unwilling to consider consensual arrangements with the international community that would provide credible assurances regarding these intentions. In nuclear-armed Pakistan, an extremist anti-Western religious movement is threatening the country's political stability. These changes together reflect the waning of the post-World War II global hierarchy and the simultaneous dispersal of global power. Unfortunately, U.S. leadership in recent years unintentionally, but most unwisely, contributed to the currently threatening state of affairs. The combination of Washington's arrogant unilateralism in Iraq and its demagogic Islamophobic sloganeering weakened the unity of NATO and focused aroused Muslim resentments on the United States and the West more generally.

## T

### 2AC T – Authority

#### The plan restricts armed conflict authority, which the AUMF is a subset of—we are a specific statute that applies to the AUMF—they are just a bad spec arg

Jack Goldsmith 13, Harvard Law School, 9/1, A Quick Primer on AUMFs, www.lawfareblog.com/2013/09/a-quick-primer-on-aumfs/

Via Ilya Somin at Volokh, I see that the administration has proffered its proposed Authorization for the Use of Military Force (AUMF) for Syria. Now it is Congress’s turn to decide what proposal(s) it wants to debate and possibly approve. And it appears that the scope of the authorization will be an issue in Congress. For example, Senators Graham and McCain have announced that they will not support a narrow AUMF supporting only isolated strikes, and some members of Congress surely will not support one that is that broad.¶ An article that I wrote with Curt Bradley, which examined AUMFs throughout American history, provides a framework for understanding AUMFs. (And the Lawfare Wiki collects many historical AUMFs and declarations of war, here.) AUMFs can (as Bradley and I argued on pp. 2072 ff.) be broken down into five analytical components:¶ (1) the authorized military resources;¶ (2) the authorized methods of force;¶ (3) the authorized targets;¶ (4) the purpose of the use of force; and¶ (5) the timing and procedural restrictions on the use of force¶ Most AUMFs in U.S. History – for example, AUMFs for the Quasi-War with France in the 1790s, for repelling Indian tribes, for occupying Florida, for using force against slave traders and pirates, and many others – narrowly empower the President to use particular armed forces (such as the Navy) in a specified way for limited ends. At the other extreme, AUMFs embedded within declarations of war (here is the one against Germany in World War II) typically authorize the President to employ the entire U.S. armed forces without restriction except for the named enemy. The Gulf of Tonkin Resolution for Vietnam was also famously broad, as was the 2002 AUMF for Iraq, although the latter did require the President to make certain diplomatic and related determinations, and to report to Congress. Narrower AUMFs in the post-World War II era include the one in 1955 for Taiwan (narrow purpose and timing limitations) and the 1991 Iraq AUMF (narrow purpose and many procedural restrictions). Narrower yet were AUMFs for Lebanon in 1983 and Somalia in 1993, both of which had a very narrow and restrictive purpose, and which contained time limits on the use of force. And of course there is the relatively broad AUMF that everyone knows, from September 18, 2001.¶ Bradley and I summarized historical AUMFs as follows:¶ This survey of authorizations to use force shows that Congress has authorized the President to use force in many different situations, with varying resources, an array of goals, and a number of different restrictions. All of the authorizations restrict targets, either expressly (as in the Quasi-War statutes’ restrictions relating to the seizure of certain naval vessels), implicitly (based on the identified enemy and stated purposes of the authorization), or both. Such restrictions may be constitutionally compelled. Congress’s power to authorize the President to use force, whatever its scope, arguably could not be exercised without specifying (at least implicitly) an enemy or a purpose.¶ The primary differences between limited and broad authorizations are as follows: In limited authorizations, Congress restricts the resources and methods of force that the President can employ, sometimes expressly restricts targets, identifies relatively narrow purposes for the use of force, and sometimes imposes time limits or procedural restrictions. In broad authorizations, Congress imposes few if any limits on resources or methods, does not restrict targets other than to identify an enemy, invokes relatively broad purposes, and generally imposes few if any timing or procedural restrictions.

#### C/I – “Statutory” means enacted by statute

Merriam Webster No Date

stat·u·to·ry adjective \ˈsta-chə-ˌtȯr-ē\

Definition of STATUTORY¶ 1: of or relating to statutes¶ 2: enacted, created, or regulated by statute <a statutory age limit>

#### That’s a law enacted by Congress

The Oxford Guide to the U.S. Government 12

(Oxford University Press via Oxford Reference, Georgetown Library)

statute¶ A statute is a written law enacted by a legislature. **A federal statute is a law enacted by Congress**. State statutes are enacted by state legislatures; those that violate the U.S. Constitution may be struck down by the Supreme Court if the issue is appealed to the Court.

#### They overlimit – they allow only zone one cases – Congressional silence also creates authority in zone two – and the Constitution does in zone three – their author:

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>

2. The Relational Theory of Presidential War Powers ¶ Justices Jackson and Frankfurter both wrote concurring opinions in Youngstown expressing the idea that presidential powers can change over time based on action or inaction by Congress. Justice Jackson stated, in his famous concurrence, that “[p]residential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.”120 Justice Jackson established a three-category framework for evaluating presidential power in relation to Congress. In the first category, or Zone 1, the President’s authority is the greatest because he is acting “pursuant to an express or implied authorization of Congress . . . .”121 If the President’s action falls within Zone 1, he “personif[ies] the federal sovereignty” and has the full power of the federal government.122 In the second category, called Zone 2 or the “zone of twilight,” the President “acts in absence of either a congressional grant or denial of authority . . . .”123 Here, the President’s power is less, but “congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility.”124 In the third category, the President’s “power is at its lowest ebb” because he is pursuing “measures incompatible with the expressed or implied will of Congress . . . .”125 In Zone 3, the President “can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.”126

#### Authority is what the president may do not what the president can do

Ellen Taylor 96, 21 Del. J. Corp. L. 870 (1996), Hein Online

The term authority is commonly thought of in the context of the law of agency, and the Restatement (Second) of Agency defines both power and authority.'89 Power refers to an agent's ability or capacity to produce a change in a legal relation (whether or not the principal approves of the change), and authority refers to the power given (permission granted) to the agent by the principal to affect the legal relations of the principal; the distinction is between what the agent can do and what the agent may do.

### 2AC LOAC CP

#### Won’t use both---prosecution feasible – procedural safeguards include it

**Hathaway 13**, Gerard C. and Bernice Latrobe Smith Professor of International Law

Yale Law School); Samuel Adelsberg (J.D. candidate at Yale Law School); Spencer Amdur (J.D. candidate at Yale Law School); Freya Pitts (J.D. candidate at Yale Law School); Philip Levitz (J.D. from Yale Law School); and Sirine Shebaya (J.D. from Yale Law School), “The Power To Detain: Detention of Terrorism Suspects After 9/11”, The Yale Journal of International Law, Vol. 38, 2013.

There is clear evidence that other countries **recognize** and respond to **the difference in legitimacy** **between civilian and military courts** and that they are, indeed, more **willing to cooperate with U.S.** **counterterrorism efforts** when terrorism suspects are tried in the **c**riminal **j**ustice **s**ystem. Increased international cooperation is therefore another advantage of criminal prosecution.¶ Many key U.S. allies have been unwilling to cooperate in cases involving **l**aw-**o**f-**w**ar detention or prosecution but have cooperated in criminal [\*166] prosecutions. In fact, many U.S. extradition treaties, including those with allies such as India and Germany, forbid extradition when the defendant will not be tried in a criminal court. n252 This issue has played out in practice several times. An al-Shabaab operative was extradited from the Netherlands only after assurances from the United States that he would be prosecuted in criminal court. n253 Two similar cases arose in 2007. n254 In perhaps the most striking example, five terrorism suspects - including Abu Hamza al-Masr, who is accused of providing material support to al-Qaeda by trying to set up a training camp in Oregon and of organizing support for the Taliban in Afghanistan - were extradited to the United States by the **U**nited **K**ingdom in October 2012. n255 The extradition was made on the express condition that they would be tried in civilian federal criminal courts rather than in the military commissions. n256 And, indeed, both the **E**uropean **C**ourt of **H**uman **R**ights and the British courts allowed the extradition to proceed after assessing the protections offered by the U.S. **federal criminal justice system** and finding they fully met all relevant standards. n257 An insistence on using military commissions may thus **hinder extradition** and other kinds of international prosecutorial cooperation, such as the sharing of testimony and evidence.¶ Finally, the **c**riminal **j**ustice **s**ystem is simply a more agile and versatile prosecution forum. Federal jurisdiction offers an extensive variety of antiterrorism statutes that can be marshaled to prosecute terrorist activity committed outside the United States, and subsequently to detain those who are convicted. n258 This greater variety of offenses - military commissions can only [\*167] punish an increasingly narrow set of traditional offenses against the laws of war n259 - offers prosecutors important flexibility. For instance, it might be very difficult to prove al-Qaeda membership in an MCA prosecution or a law-of-war habeas proceeding; but if the defendant has received training at a terrorist camp or participated in a specific terrorist act, federal prosecutors may convict under various statutes tailored to more specific criminal behavior. n260 In addition, military commissions can no longer hear prosecutions for material support committed before 2006. n261 Due in part to the established track record of the federal courts, the federal criminal justice system also allows for more flexible interactions between prosecutors and defendants. Proffer and plea agreements are **powerful incentives for defendants to cooperate**, and often lead to **valuable intelligence-gathering**, producing more intelligence over the course of prosecution. n26

#### Their NB is inevitable

Issacharoff et.al. 13 - Sudler Family Professor of Constitutional Law, N.Y.U. School of Law

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The morality and legitimacy of the practices of war – or at least, the use of military force – are undergoing a fundamental transformation. This transformation is not yet directly or fully reflected in the formal laws of war, but as these changes embed themselves in the practices of states, especially dominant states, these changes in practice might well eventually come to be embodied in the legal frameworks that regulate the use of force. The fundamental transformation is this: whereas the traditional practices and laws of war defined “the enemy” in terms of categorical, group-based judgments that turned on status – a person was an enemy not because of any specific actions he himself engaged in, but because he was a member of an opposing army – we are instead now moving to a world which implicitly or explicitly requires the individuation of personal responsibility of specific “enemy” persons before the use of military force is considered justified, at least as a moral and political matter. This shift applies not to any one particular type of military force, such as lethal force, but to all exertions of military power over enemies, including the ways in which they are captured, detained, incapacitated, or tried. ¶ To a limited but significant extent thus far, this transformation is reflected in the domestic law, including the constitutional law, of some countries, including in decisions of the United States Supreme Court, as well as in the interpretations of international law that some courts, such as the Israeli Supreme Court, have generated. But this quiet, subtle, and inadequately appreciated transformation has been taking place far more as a matter of slowly accepted practices than as settled legal development. ¶ Accordingly, we proceed in this Article by giving an account of the central manifestations of the transformation in two distinct areas of high-profile debate: the detention of foreign non-state combatants and the targeted killing of leaders of these same forces in the irregular combat that characterizes war against terrorist groups. These are the most visible manifestations of how to create an acceptable legal regime for the modern circumstances of state conflicts with non-state belligerents, but our contention is that these areas are the epicenter of the broader confrontation with the transformation of warfare beyond its conventional state-to-state assumptions. Even within these two areas of high-profile debate, the task that concerns us is not merely giving an integrated descriptive account of how the same departures from conventional war shape the corresponding sense of legality in the pursuit of military objectives. The process of legal transformation in turn shapes the arguments about the proper uses of military force in the context of fighting terrorism, yielding a debate that comes across as polarized or confused or simply unable to engage with the positions of others. Precisely because we are in the midst of this transformation, we do not have clear prior legal frameworks, either domestically or internationally, to draw on to organize the legal framework for addressing the transformed nature of modern warfare.

#### Individuation is necessary---can’t be established which results in global war

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http://lsr.nellco.org/cgi/viewcontent.cgi?article=1408&context=nyu\_plltwp

Terrorism inherently changes all of this. Because terrorists do not wear uniforms, attributions of status based on group membership arc far more uncertain and complex. Terrorists violate the cardinal principle of "distinction" by which combatants can be clearly differentiated from the civilian population. Moreover, even apart from the issue of uniforms, the ability to know that an individual is part of a terrorist organization, based on anything other than his own individual acts of terrorism, is also difficult. Terrorists typically do not "join" the organization in some formally visible way equivalent to the wearing of uniforms.10 While some terrorists do swear oaths of affiliation to signify their membership in the organization, many do not; in addition, even if such an oath has been taken, obtaining proof of it is far more difficult than proof that a solider was wearing a uniform. Indeed, it might be easier to prove that an individual committed a specific act of terrorism than it is to prove that he or she took an oath of affiliation." Attributions of status, through group membership alone, are therefore extremely difficult to establish. Most terrorists against whom military force is used, therefore, are not identified on the basis of membership per se, but because of the specific acts in which they have engaged. Perversely, the act defines the status. As a result of the nature of modern terrorism, therefore, these structural features inevitably and unavoidably propel the use of military force to be directed against specific individuals based on the specific acts those individuals are believed to have committed, as opposed to their status. That is why the use of military force against terrorists necessarily must shift, and has shifted, away from the traditional group-based membership attributions of responsibility to individuated judgments of responsibility. And this individuation applies - or the pressure to maintain this individuation - to every stage of the use of military force.

#### Individuated criteria key outside of zones---CP can’t solve allies

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

The law of international armed conflict permits the detention and killing of members of the enemy force based on a legitimate expectation that individuals who are part of a formal, hierarchical enemy state army will be called upon to fight and thereby pose an ongoing threat. By comparison, the broad definition of "functional membership" put forth by the Executive and endorsed by the courts serves as a poor proxy for assessing threat in a conflict with a non-state actor. n139 Even assuming, arguendo, that the functional membership test provides an appropriate standard for detention and targeting within a zone of active hostilities, it is too permissive a standard outside such zones, for the reasons described in Part II. Outside of a zone of active hostilities, an individualized threat finding is needed to ensure that law-of-war detention and lethal targeting are employed in those situations in which the target actually poses an ongoing threat, consistent with the underlying rationale for the permissive use of force and detention without charge. n140

### AT: Overlap DA

#### Separation principle is unstable---blurring now

Ryan Goodman 10, “CONTROLLING THE RECOURSE TO WAR BY MODIFYING JUS IN BELLO”, http://ssrn.com/abstract=1666198

According to a bedrock principle of international law, the rules regulating the recourse to war (jus contra bellum or jus ad bellum) and the rules regulating conduct during war (jus in bello) must be kept conceptually and legally distinct. The purported independence of the two domains – what I call the ‘separation principle’ – remains unstable despite its historic pedigree. Their separation is predicated on particular normative and empirical foundations. Those foundations involve the capacity and desire of actors to reduce the likelihood and destructiveness of war. However, the reliability of such commitments is doubtful in times of acute stress. Participants in armed conflict frequently believe the separation principle disserves their narrow self-interest, and they often discount downstream effects on future wars. These concerns have generally been anticipated by architects of the global legal order. In their calculus, such pressures simply represent a need for greater resolve in identifying and overcoming threats to the existing design.

#### Humanitarian interventions pound separation principle

Ryan Goodman 10, “CONTROLLING THE RECOURSE TO WAR BY MODIFYING JUS IN BELLO”, http://ssrn.com/abstract=1666198

3.1 Type I erosion: Humanitarian interventions and other wars of choice 3.1.1 Taxing humanitarian intervention: should higher standards apply? Historically, the greatest challenge to the separation principle has been rooted in a normative proposition that parties fighting for a just cause should benefit from a relaxed application of jus in bello rules that might hinder their ability to win the war or repel an attack.10 A new challenge to the separation principle emerges from a different ambition. It suggests in some circumstances heightening jus in bello rules for states fighting for certain just causes. Notably, an erosion of the line in the former case helped set the stage for the latter. That is, the source of a major challenge to the separation of jus ad bellum and jus in bello was, quite surprisingly, the International Court of Justice. And the Court’s position lent support to other threats to the regime.¶ In the Nuclear Weapons Advisory Opinion, the ICJ cast doubt on the separation principle. The Court concluded that the threat or use of nuclear weapons ‘would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law’.11 The Court then stated that it ‘cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake’.12 In other words, the Court left open the possibility that jus in bello rules would be relaxed when a state acts to defend itself from an existential military threat – to protect sovereign interests that the international community accepts as a core foundation of the global legal order. When a state resorts to force for other – less privileged or less valued – purposes, a higher level of jus in bello applies.13

#### Conflation between jus ad bellum and jus in bello is globally inevitable

Robert Sloane 9, Associate Professor of Law, Boston University School of Law, 2009, “The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War,” Yale Journal of International law, http://www.yale.edu/yjil/files\_PDFs/vol34/Sloane

This case reflects, in microcosm, a pressing issue in the contemporary law of war. After 9/11, countless scholars and statesmen have called for changes in the jus ad bellum, the law governing resort to force, or the jus in bello, the law governing the conduct of hostilities.10 These invitations to reform, whatever their merit, raise an equally vital but distinct legal issue that has been largely neglected in recent legal scholarship: the relationship between the traditional branches of the law of war.11 Since the U.N. Charter introduced a positive jus ad bellum into international law, the reigning dogma has been that reflected in the SCSL Appeals Chamber’s opinion: the jus ad bellum and the jus in bello are, and must remain, analytically distinct. In bello rules and principles apply equally to all combatants, whatever each belligerent’s avowed ad bellum rationale for resorting to force: self-defense, the restoration of democratic government, territorial conquest, or the destruction of a national, ethnic, racial, or religious group, as such.12 It is immaterial, on this view, whether the ad bellum intent of the militia leaders indicted by the SCSL had been to restore a democratic government or to topple that government and install a brutal regime in its stead: they must adhere to and be judged by the same in bello rules and principles. ¶ Postwar international law regards this analytic independence as axiomatic,13 as do most just war theorists. They insist that “[i]t is perfectly possible for a just war to be fought unjustly and for an unjust war to be fought in strict accordance with the rules.”14 In theory, then, any use of force may be simultaneously lawful and unlawful: unlawful, because its author had no right to resort to force under the jus ad bellum; lawful, if and to the extent that its author observes “the rules,” that is, the jus in bello. 15 I will refer to this particular rule, which insists on the analytic independence of ad bellum and in bello, as the dualistic axiom. Despite its widespread acceptance,16 the axiom, as we will see, is logically questionable, 17 undertheorized, and at times disregarded or misapplied in practice—with troubling consequences for the policies that underwrite these components of the contemporary law of war. Consider briefly a few examples, which, among others, will be explored in greater detail below: ¶ • In 1999, the North Atlantic Treaty Organization (NATO) carried out a four-month air campaign against Serbia. At the outset, NATO’s leaders made an in bello decision: its pilots would fly at a minimum height of 15,000 feet to reduce their risk from anti-aircraft fire essentially to zero, even though that would increase the risk to Serbian civilians because it often prevented visual confirmation of legitimate military targets. Many would argue that the in bello principle of proportionality obliges combatants to take some risk in an effort to reduce the risk to enemy civilians.18 If so, the perceived legitimacy of NATO’s avowed ad bellum goal, i.e., to halt the incipient ethnic cleansing of ethnic Albanian Kosovars, influenced the international ex post appraisal of NATO’s in bello conduct in the conflict.19 ¶ • After 9/11, the Bush administration launched and prosecuted what it described as a “Global War on Terror.” In this war, if it is a war,20 political elites and their lawyers invoked ad bellum factors—for example, the novel nature of the conflict or the enemy and the imperative to avoid at any cost another catastrophic terrorist attack— to justify or excuse in bello violations.21 Both treaties and custom, for example, categorically prohibit the in bello tactic of torture. It is difficult to dispute that the United States deliberately tortured some detainees in its custody. Alberto R. Gonzales also wrote in what has become an infamous memorandum that “the war against terrorism is a new kind of war,” which “renders obsolete Geneva’s strict limitations on questioning of enemy prisoners and renders quaint some of its provisions.” 22 One might recharacterize this assertion in the framework of this Article as a suggestion that ad bellum considerations may justifiably relax, or even vitiate, what some see as anachronistic in bello constraints.23 ¶ • In 1996, the International Court of Justice (ICJ) considered the legality of the threat or use of nuclear weapons.24 This required it to analyze both the jus ad bellum and the jus in bello. The Court concluded that the jus in bello generally prohibits nuclear weapons— with a curious qualification. It could not say “whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.”25 Again, to recharacterize this statement in the framework of this Article: if the ad bellum consequences for one party to a conflict become bad enough, a weapon otherwise categorically prohibited by the jus in bello might become legal for that party, although presumably it would remain illegal for the other—unless that other party, too, “a State,” faced an “extreme circumstance of self-defence.” ¶ The logic in each of these examples is contrary to the dualistic axiom, which insists that in bello constraints apply equally to all parties to a conflict. They do not vary based on ad bellum appraisals of the justice, legitimacy, or even urgency of one side’s asserted casus belli (cause or justification for resort to force). 26 Yet these examples reflect a trend in contemporary international law to relax or disregard the dualistic axiom, that is, to allow ad bellum considerations to influence and, at times, even to vitiate the jus in bello—an outcome that degrades the efficacy of both components of the law of war. Recent state practice and some jurisprudence also suggest a related, and equally misguided, tendency to collapse the distinct ad bellum and in bello proportionality constraints imposed by the law of war. As explained in greater detail below, today, in contrast to the pre-U.N. Charter era, all force must be doubly proportionate: that is, proportionate relative to both the jus ad bellum and the jus in bello. 27 Yet, at times, the ICJ has confused, neglected, or misapplied the two principles, as have belligerents—again to the detriment of the key values and policies that underwrite the contemporary law of war.

#### Unconstrained geographic war destroys LOAC now, no UQ – plan solves

Sasha Radin 13, Visiting Research Scholar at the Naval War College, Newport Rhode Island; PhD candidate, Asia Pacific Centre for Military Law, University of Melbourne Law School, Global Armed Conflict? The Threshold of Extraterritorial Non-International Armed Conflicts, www.usnwc.edu/getattachment/311c6f17-ee69-4870-a00d-b7d845e4387c/Global-Armed-Conflict--The-Threshold-of-Extraterri.aspx

State sovereignty was another impetus for creating the requirement that the hostilities reach a certain level of intensity before LOAC could apply. States wanted to limit the involvement of outside States in their domestic affairs. This objective must, therefore, be seen in light of the fact that the types of conflicts envisioned were mainly internal armed conflicts. In an extraterritorial NIAC context, the reluctance of the State party to the conflict to be subject to interference from other States in its internal affairs largely disappears.150 Neither internal disturbances nor the conflict itself takes place in their own territory.¶ Does it matter in terms of what LOAC requires for its application that it is the State not party to the conflict whose territorial integrity is infringed? In other words, could this geographic shift in where the hostilities occur affect one of the original underlying reasons for the existence of the threshold? In contrast to the previous two points (whether the violence undertaken by various armed groups may be conglomerated and whether the distribution of violence over space means that it does not reach the sufficient level of intensity), this point questions whether the level of intensity customarily required for internal armed conflicts is the same for extraterritorial conflicts.¶ It may be argued that the territorial State (i.e., the State in which an extraterritorial NIAC physically takes place) has an interest in trying to prevent incursions into its sovereignty, even though it may not be a party to that NIAC. An incursion by an outside State in order to fight an armed group would likely have implications for the “uninvolved” territorial State. For instance, such an action could be an indication that the territorial State is not able to maintain its own security—an image that States usually take pains to avoid. Or, the territorial State may be concerned that the outside State might gain control or influence within their State.¶ The implications this shift might have on establishing the threshold of an extraterritorial armed conflict are not clear. At the very least, the reassignment of which State’s sovereignty is affected indicates that issues arising from the shifted location of the conflict warrant further examination. Therefore, even if one accepts the premise that NIACs may exist extraterritorially, the fact that the law was designed for a different context presents challenges in determining the existence of an armed conflict.¶ VI. GEOGRAPHIC BOUNDARIES OF EXISTING ARMED CONFLICTS¶ The removal of territorial boundaries from a system based on these physical limits raises the related question of where LOAC may be applied once the law of armed conflict has been triggered. Limited discussion has arisen previously on this issue in the context of purely internal conflicts. However, the main controversy surfaces today specifically with regard to individuals affiliated with an organized armed group located in a second State (“outside of an active battlefield”151). The unease of some commentators that the world could become a battlefield reappears here.¶ Because NIAC law was designed for internal application, its extraterritorial parameters are not clear. Two main options have been discussed for how to deal with this challenge. One proposes that the geographic application of LOAC is limited to the area of hostilities. The other maintains that once an armed conflict exists the law may extend beyond the immediate zone of hostilities. This latter approach has been interpreted by some to suggest that the law applies to the parties to the conflict wherever they may be located.¶ The first proposal, suggesting that LOAC would not apply at a distance from wherever the hostilities were taking place,152 may seem logical on its face, but lacks a legal basis. Jurisprudence from the ICTY dealing with the geographic scope of Common Article 3 within a State contradicts this interpretation, providing that “international humanitarian law continues to apply . . . in the case of internal conflicts . . . [to] the whole territory under the control of a party, whether or not actual combat takes place there.”153 The ICTY case law has generally been interpreted by other bodies to mean that Common Article 3 applies to the entire country in which a conflict is taking place, regardless of where hostilities occur.154 This language has been repeatedly upheld by subsequent ICTY and ICTR judgments.155 In the absence of explicit treaty law or customary international law, this jurisprudence could be said to have relevance when it comes to interpreting the geographic contours of internal conflicts.¶ Resort to the object and purpose of the law also supports application of the law beyond areas of hostilities. One of the law’s fundamental purposes is to ensure protection of individuals once in the hands of the enemy. To interpret the law as only applying to areas of combat would reduce the protection afforded to some of the most vulnerable, who may be located at a distance from active hostilities.¶ Finally, the text of AP II can be turned to for some guidance, even though the types of conflicts under discussion here are those with a lower threshold. AP II explicitly provides that it applies to “to all persons affected by an armed conflict.”156 This indicates that although AP II limits its applicability to the State in which the conflict is taking place,157 its application is not restricted to areas of active hostilities.158¶ The second approach considers that once an armed conflict exists LOAC applies beyond the area of active hostilities.159 It is argued that this is the more defensible position of the two. Although this view does not find an explicit basis in treaty law, it is difficult to find justification within the existing law for restricting the application of LOAC to a certain region once an armed conflict exists. In addition, the ICTY and ICTR case law just noted could be said to indirectly support this position in that it interprets the application of the law as extending beyond the combat zones. However, too much reliance on this jurisprudence is misguided as it still depends on State boundaries. For example, if one accepts that the armed conflict in Afghanistan has spilled over into Pakistan, does Common Article 3 then apply throughout the country of Pakistan?¶ The view that LOAC applies beyond the area of active hostilities leads to the question of whether anything restricts the geographic application of LOAC. One approach is to interpret the ICTY case law as literally referring to the areas where the parties to the conflict have control.160 Under such a view, NIAC law would only apply to the territory under control of the Pakistani Taliban (and other armed groups) in the North-West Frontier Province. This construction, however, presents hurdles.161 First, what is meant by control?162 Second, if it is territorial control that is envisioned, the majority of commentators and jurisprudence view the control of territory by an armed group as an indicator for the applicability of Common Article 3, rather than an obligation.163 It would not make sense to require territorial control by an armed group in order to determine the reach of an armed conflict within a country, but not to require territorial control for the existence of an armed conflict.164 Third, taken to its extreme this interpretation illogically suggests that if neither party controls territory, then LOAC does not apply,165 leading to the possibility that LOAC would not apply precisely where the battle rages.¶ The U.S. government position that LOAC is not geographically constrained with regard to individual members of a party to a conflict166 has engendered criticism.167 However, it is a defensible stance if one has already accepted that the territorial boundaries of States do not limit LOAC’s application. The bigger issue seems to be that the law was not designed for extraterritorial application. As such, should the view that territorial boundaries are not relevant to LOAC’s application gain force, it may be that the law will develop in a clearer and more nuanced manner.168 Notwithstanding the lack of clarity with regard to this issue, significant restrictions on the use of force against an individual located at a distance from hostilities in a second country already exist. Perhaps most importantly, the question only arises in the first place if an armed conflict exists between the State using force and the armed group against which the force is directed (which includes establishing that the group to which the individual belongs is an identifiable party). Second, and crucially, the separate question then arises of whether an individual is targetable (either by virtue of the membership approach or because s/he is directly participating in hostilities).169 This includes determining that the individual in question has a sufficient nexus to the ongoing armed conflict.170¶ Should those conditions be fulfilled, then the constraints within LOAC still apply (such as all of the rules pertaining to the principles of distinction and proportionality), as would the country’s domestic law and human rights law to the degree that it interacts with LOAC. It is likely that if the occurrence were far from active hostilities the latter two bodies of law would play a greater role. Issues of State sovereignty could, and often do, present one of the greatest limitations on action. Therefore, it is not the case that force may be used anywhere in the world at any time against parties to the conflict once an armed conflict exists.¶ VII. CONCLUSION¶ In conclusion, the general trend today is that some extraterritorial conflicts may qualify as NIACs, despite the fact that they are not geographically confined to a single State. This interpretation recognizes that to artificially restrict the law in a way that does not reflect either the realities on the ground or the purpose of the law itself is counterproductive. However, because the existing law was not designed for extraterritorial conflicts, challenges arise in its application.¶ The issue of links between armed groups in NIACs is an area where the law may need reinterpretation or development. Analogies with other areas of the law do not lead to more clarity. The tenuous suggestion that in order to fulfill the intensity requirement not only should the affiliated armed group be organized and part of an identifiable party, but also that the group’s actions and goals should constitute a threat to the opposing party carries with it practical problems. Specifically, it could be difficult to ascertain both the threat and which members of an armed group are actually participating in actions that are part of the global conflict, as opposed to part of a separate internal conflict.¶ Determining whether amassing violence that is diffused over distances may fulfill the intensity requirement is another example of how the geographic extension of the law’s application may present difficulties. It has been argued here that taking into account the underlying purpose of the law, the violence must reach a certain level of intensity within a geographic region for an armed conflict to exist. When the violence is spread out geographically, such that in an individual country the law enforcement regimes may function, it is difficult to view the intensity requirement as being met. However, as with links, this issue is far from resolved.¶ The third principal challenge resulting from the extraterritorial application of NIAC law is that a reassignment of sovereignty occurs. It is unclear if this shift might impact on how States perceive the threshold of the existence of an armed conflict.¶ Once the existence of an armed conflict has been established, a separate issue arises as to the geographic boundaries of that conflict. This impacts the controversial question of when an individual may be targeted or detained if located in another country away from the main battlefield. Here too, because the law was originally intended to apply within State boundaries, very little guidance exists. It is argued that as the law currently stands, once an armed conflict exists LOAC applies to the parties to the conflict wherever they may be located, but that other restraints within LOAC and jus ad bellum limit its application. In particular, the question of whether an armed conflict exists in the first place is not self-evident. The debate on who can be targeted and when applies both to internal NIACs and extraterritorial NIACs. It may be that additional stipulations will be considered necessary as the law develops given the lack of State boundaries and the distance from an active battlefield. However, currently the law does not require this. Finally, the restrictions found in jus ad bellum curtail action that may be taken.¶ Therefore, to erase territorial boundaries from the equation entirely when establishing the existence of an armed conflict raises challenges to the structure of the law and some of its underlying purposes. Certain obstacles may prompt clarification in the law; others may remain as limitations on the law’s application. As a consequence, it is not clear where the bar for the application of Common Article 3, and thus LOAC, lies, particularly when applied to conflicts that spread across multiple countries. Some States want to ensure that they have sufficient flexibility to deal with these circumstances. Other States (as well as organizations and commentators) are concerned that the law may be interpreted too permissively and ultimately be abused. A balance must be found in the solution to these issues.

#### Erosion of separation principle doesn’t cause war

Ryan Goodman 10, “CONTROLLING THE RECOURSE TO WAR BY MODIFYING JUS IN BELLO”, http://ssrn.com/abstract=1666198

Finally, a related consequence of these erosions of the separation principle does not directly implicate the decision whether to wage war but how the objectives of the war are framed. Individual states in their official pronouncements and international bodies (e.g., the Security Council, the African Union, NATO) in their resolutions may be well advised to deemphasize humanitarian objectives. That is, reframing the justifications for war away from humanitarian values can avoid the schemes articulated by the Kosovo Commission, ICISS, and House of Lords. The result may thus steer such uses of force away from goals that serve the public welfare of foreign populations.

### 2AC Procedural Safeguards PIC

#### Procedural safeguards are key

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Currently, officials in the executive branch carry out all such ex ante review of out-of-battlefield targeting and detention decisions, reportedly with the involvement of the President, but without any binding and publicly articulated standards governing the exercise of these authorities. n163 All ex post review of targeting is also done internally within the executive branch. There is no public accounting, or even acknowledgment, of most strikes, their success and error rates, or the extent of any collateral damage. Whereas the Department of Defense provides solatia or condolence payments to Afghan civilians who are killed or injured as a result of military actions in Afghanistan (and formerly did so in Iraq), there is no equivalent effort in areas outside the active conflict zone. n164 Meanwhile, the degree of ex post review of detention decisions depends on the location of detention as opposed to the location of capture. Thus, [\*1219] Guantanamo detainees are entitled to habeas review, but detainees held in Afghanistan are not, even if they were captured far away and brought to Afghanistan to be detained. n165 Enhanced ex ante and ex post procedural protections for both detention and targeting, coupled with transparency as to the standards and processes employed, serve several important functions: they can minimize error and abuse by creating time for advance reflection, correct erroneous deprivations of liberty, create endogenous incentives to avoid mistake or abuse, and increase the legitimacy of state action.

#### The plan only results in a minimal change to the amount of strikes, but averts a wider public and allied backlash that kills the program

Johnson, 13 [Jeh, former Pentagon General Counsel, 3/18/13, “Keynote address at the Center on National Security at Fordham Law School: A “Drone Court”: Some Pros and Cons,” <http://www.lawfareblog.com/2013/03/jeh-johnson-speech-on-a-drone-court-some-pros-and-cons/>]

The problem is that the American public is suspicious of executive power shrouded in secrecy. In the absence of an official picture of what our government is doing, and by what authority, many in the public fill the void **by envisioning the worst**. They see dark images of civilian and military national security personnel in the basement of the White House – acting, as Senator Angus King put it, as “prosecutor, judge, jury and executioner” — going down a list of Americans, deciding for themselves who shall live and who shall die, pursuant to a process and by standards no one understands. Our government, in speeches given by the Attorney General,[2] John Brennan,[3] Harold Koh,[4] and myself,[5] makes official disclosures of large amounts of information about its efforts, and the legal basis for those efforts, but it is never enough, because the public doesn’t know what it doesn’t know, but knows there are things their government is still withholding from them. The revelation 11 days ago that the executive branch does not claim the authority to kill an American non-combatant – something that was not, is not, and should never be an issue – is big news, and trumpeted as a major victory for congressional oversight. A senator who filibusters the government’s secrecy is compared in iconic terms to Jimmy Stewart. At the same time, through continual unauthorized leaks of sensitive information, our government looks to the American public as undisciplined and hypocritical. One federal court has characterized the government’s position in FOIA litigation as “Alice in Wonderland,”[6] while another, this past Friday, referred to it as “neither logical nor plausible.”[7] An anonymous, unclassified white paper leaked to NBC News prompts more questions than it answers. Our government finds itself in a lose-lose proposition: it fails to officially confirm many of its counterterrorism successes, and fails to officially confirm, deny or clarify unsubstantiated reports of civilian casualties. Our government’s good efforts for the safety of the people risks an erosion of support by the people. It is in this atmosphere that the idea of a national security court as a solution to the problem — an idea that for a long time existed only on the margins of the debate about U.S. counterterrorism policy but is now entertained by more mainstream thinkers such as Senator Diane Feinstein and a man I respect greatly, my former client Robert Gates – has gained momentum. To be sure, a national security court composed of a bipartisan group of federal judges with life tenure, to approve targeted lethal force, would bring some added levels of credibility, independence and rigor to the process, and those are worthy goals. In the eyes of the American public, judges are for the most part respected for their independence. In the eyes of the international community, a practice that is becoming increasingly controversial would be placed on a more credible footing. A national security court would also help answer the question many are asking: what do we say to other nations who acquire this capability? A group of judges to approve targeted lethal force would set a standard and an example. Further, as so-called “targeted killings” become more controversial with time, I believe there are some decision-makers within the Executive Branch who actually wouldn’t mind the added comfort of judicial imprimatur on their decisions. But, we must be realistic about the degree of added credibility such a court can provide. Its proceedings would necessarily be ex parte and in secret, and, like a FISA court, I suspect almost all of the government’s applications would be granted, because, like a FISA application, the government would be sure to present a compelling case. So, at the same time the New York Times editorial page promotes a FISA-like court for targeted lethal force, it derides the FISA court as a “rubber stamp” because it almost never rejects an application.[[8]](file:///%5C%5Cfpfgsc01%5Cfiles%5Cusers%5Cbwittes%5CDownloads%5CJohnson%20speech%20at%20Fordham%20LS.docx#_ftn8) How long before a “drone court” operating in secret is criticized in the same way?

### AT: Terror DA

#### Plan preserves flexibility and operational capacity

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

Conversely, some object to the use of courts or court-like review as stymying executive power in wartime, and interfering with the President's Article II powers. n183 According to this view, it is dangerous - and potentially unconstitutional - to require the President's wartime targeting decisions to be subject to additional reviews. These concerns, however, can be dealt with through emergency authorization mechanisms, the possibility of a presidential override, and design details that protect against ex ante review of operational decisionmaking. The adoption of an Article II review board, rather than an Article III-FISC model, further addresses some of the constitutional concerns.¶ Some also have warned that there may be no "case or controversy" for an Article III, FISC-like court to review, further suggesting a preference for an Article II review board. n184 That said, similar concerns have been raised with respect to FISA and rejected. n185 Drawing heavily on an analogy to courts' roles in issuing ordinary warrants, the Justice Department's Office of Legal Counsel concluded at the time of enactment that a case and controversy existed, even though the FISA applications are made ex parte. n186 [\*1224] Here, the judges would be issuing a warrant to kill rather than surveil. While this is significant, it should not fundamentally alter the legal analysis. n187 As the Supreme Court has ruled, killing is a type of seizure. n188 The judges would be issuing a warrant for the most extreme type of seizure. n189¶ It is also important to emphasize that a reviewing court or review board would not be "selecting" targets, but determining whether the targets chosen by executive branch officials met substantive requirements - much as courts do all the time when applying the law to the facts. Press accounts indicate that the United States maintains lists of persons subject to capture or kill operations - lists created in advance of specific targeting operations and reportedly subject to significant internal deliberation, including by the President himself. n190 A court or review board could be incorporated into the existing ex ante decisionmaking process in a manner that would avoid interference with the conduct of specific operations - reviewing the target lists but leaving the operational details to the operators. As suggested above, emergency approval mechanisms could and should be available to deal with exceptional cases where ex ante approval is not possible. n191

#### Civilian trials and interrogation solve terrorism---equally as good

Mary Ellen O'Connell 13, University of Notre Dame, Robert and Marion Short Chair in Law and Research Professor of International Dispute Resolution at the Kroc Institute for International Peace studies, Testimony to the COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES PROTECTING U.S. CITIZENS' CONSTITUTIONAL RIGHTS DURING THE WAR ON TERROR, http://www.gpo.gov/fdsys/pkg/CHRG-113hhrg81173/html/CHRG-113hhrg81173.htm

Ms. O'Connell. Mr. Chairman--Mr. Chairman, my husband was a military interrogator for 11 years, and so I'm very well informed about the difference between FBI interrogations, civilian interrogation and military interrogation, and sad to say, I think this issue has just been overblown and misunderstood by people.¶ Excellent FBI interrogators, as I think Professor Chesney indicated, can do an extremely good job, just as good as military interrogators, within civilian system. It is--I'm not quite sure how we've gotten on this wrong track, but remember when Abdulmutallab was arrested in Detroit, he was interrogated by excellent interrogators who had the training, the skills, the background knowledge, the language, et cetera, to get a great deal of information about the motivations, the connections, et cetera of Mr. Abdulmutallab. So, instead of focusing on, well, shouldn't we do this experimental thing and for people arrested within the United States, where there is no ongoing armed conflict, into the military system, let's focus on doing the best we can to make sure that our civilian law enforcement authorities have the skills and access that they need to have.¶ And in this case, with Mr. Tsarnaev, I really think we should be looking at what happened before the Boston bombing. Why didn't the FBI have good contacts with Russia so that we had better information about these individuals before the tragedy? And that's where I think we should be focusing. Sadly, I believe we've been distracted by thinking about Guantanamo Bay and military custody and so forth. We've taken our eyes off the prize of really doing what will succeed in preventing these kinds of tragedies, and that's good international police cooperation with the best people, best skills, knowledge, language, et cetera

#### No speed link

Jennifer Daskal 13, The Geography of the Battlefield: A Framework for Detention and Targeting Outside the 'Hot' Conflict Zone, American University Washington College of Law, April

Ex Ante Procedures Three key considerations should guide the development of ex ante procedures. First, any procedural requirements must reasonably respond to the need for secrecy in certain operations. Secrecy concerns cannot, for example, justify the lack of transparency as to the substantive targeting standards being employed. There is, however, a legitimate need for the state to protect its sources and methods and to maintain an element of surprise in an attack or capture operation. Second, contrary to oft-repeated rhetoric about the ticking time bomb, few, if any, capture or kill operations outside a zone of active conflict occur in situations of true exigency.166 Rather, there is often the time and need for advance planning. In fact, **advance planning is often necessary to minimize damage to one’s own troops and nearby civilians**.167 Third, the procedures and standards employed must be transparent and sufficiently credible to achieve the desired legitimacy gains.

### AT: Terror Impact

#### SSR solves terror

Mark Sedra 11, November, senior fellow at the Centre for International Governance Innovation in Ontario, Canada. He is also a faculty member of the department of political science at the University of Waterloo and the Balsillie School of International Affairs. He is an expert on security sector reform and has published widely on South Sudan, Afghanistan, the Balkans, and the Middle East, <http://www.usip.org/files/resources/SR_296.pdf>

Move beyond the Rhetoric of the War on Terror¶ A great deal of the security assistance provided to Arab states has been couched in the rhetoric of the war on terror. The United States and its allies supported Mubarak, Ben Ali, and other regional strongmen because they were a bulwark against radical Islamist groups. While containing Islamist terrorism remains a high priority for the United States and its allies, these messages do not resonate with Arab populations and will be associated with past bankrupt regimes. Stable Arab states with security sectors that are effective, democratically accountable, and respecting of rights will provide the best antidote to terrorism. Some infrastructure support may be required to repair damage or modernize facilities, but the main need is software rather than hardware. Most MENA states are seeking to change their existing but broken security systems rather than building new ones from scratch. Thus, among the areas most in need of assistance are training, institutional reform, depoliticization, vetting, and forming systems to promote accountability and transparency. There will always be requests for new weapons systems and the latest kit, but donors must bear in mind the overarching priority of changing the way these security sectors do business.

#### No risk of nuclear terrorism---too many obstacles

John J. Mearsheimer 14, R. Wendell Harrison Distinguished Service Professor of Political Science at the University of Chicago, “America Unhinged”, January 2, nationalinterest.org/article/america-unhinged-9639?page=show

Am I overlooking the obvious threat that strikes fear into the hearts of so many Americans, which is terrorism? Not at all. Sure, the United States has a terrorism problem. But it is a minor threat. There is no question we fell victim to a spectacular attack on September 11, but it did not cripple the United States in any meaningful way and another attack of that magnitude is highly unlikely in the foreseeable future. Indeed, there has not been a single instance over the past twelve years of a terrorist organization exploding a primitive bomb on American soil, much less striking a major blow. Terrorism—most of it arising from domestic groups—was a much bigger problem in the United States during the 1970s than it has been since the Twin Towers were toppled.¶ What about the possibility that a terrorist group might obtain a nuclear weapon? Such an occurrence would be a game changer, but the chances of that happening are virtually nil. No nuclear-armed state is going to supply terrorists with a nuclear weapon because it would have no control over how the recipients might use that weapon. Political turmoil in a nuclear-armed state could in theory allow terrorists to grab a loose nuclear weapon, but the United States already has detailed plans to deal with that highly unlikely contingency.¶ Terrorists might also try to acquire fissile material and build their own bomb. But that scenario is extremely unlikely as well: there are significant obstacles to getting enough material and even bigger obstacles to building a bomb and then delivering it. More generally, virtually every country has a profound interest in making sure no terrorist group acquires a nuclear weapon, because they cannot be sure they will not be the target of a nuclear attack, either by the terrorists or another country the terrorists strike. Nuclear terrorism, in short, is not a serious threat. And to the extent that we should worry about it, the main remedy is to encourage and help other states to place nuclear materials in highly secure custody.

### 2AC Iran DA

#### Sanctions will have a veto-prove majority---vote counts

Bridget Johnson 1/8/14, PJ Media, “Veto-Proof Majority on Iran Sanctions Bill Looking More Likely,” http://pjmedia.com/tatler/2014/01/08/veto-proof-majority-on-iran-sanctions-bill-looking-more-likely/

The number of co-sponsors backing the Iran sanctions bill introduced before the holiday by Senate Foreign Relations Committee Chairman Robert Menendez (D-N.J.) and Sen. Mark Kirk (R-Ill.) has now reached 50, according to the Jerusalem Post.¶ The last recorded number in the Library of Congress database is 47 co-sponsors. The most recent bump shows that not only would the bill that angers the White House pass on a bipartisan basis, but would likely hit a veto-proof majority on a bipartisan basis.¶ At least 14 Democrats have signed on board the bill, including Sens. Mark Begich (D-Alaska), Richard Blumenthal (D-Conn.), Cory Booker (D-N.J.), Ben Cardin (D-Md.), Bob Casey (D-Pa.), Chris Coons (D-Del.), Joe Donnelly (D-Ind.), Kirsten Gillibrand (D-N.Y.), Kay Hagan (D-N.C.), Mary Landrieu (D-La.), Joe Manchin (D-W.Va.), Mark Pryor (D-Ark.), Chuck Schumer (D-N.Y.) and Mark Warner (D-Va.).¶ Supporters need 67 votes for a veto-proof majority. Assuming all Republicans vote for the bill, that leaves 22 Democrats needed come voting time.¶ Both Colorado senators –Mark Udall (D) and Michael Bennet — have previously supported sanctions legislation. Other potential votes could include Dick Durbin (D-Ill.), Tim Kaine (D-Va.), Heidi Heitkamp (D-N.D.), Jon Tester (D-Mont.), Tom Udall (D-N.M.), Martin Heinrich (D-N.M.), Brian Schatz (D-Hawaii), Clarie McCaskill (D-Mo.), Max Baucus (D-Mont.), Debbie Stabenow (D-Mich.) and Bill Nelson (D-Fla.).

#### Talks will fail because of a new dispute over centrifuges---also guarantees sanctions

Jennifer Rubin 1-9, Washington Post columnist, 1/9/14, “Obama Iran gambit is unraveling,” <http://www.washingtonpost.com/blogs/right-turn/wp/2014/01/09/obama-iran-gambit-is-unraveling/>

Some “snag.” That is how a Reuters headline characterizes its report that there is an impasse in talks with Iran over the implementation agreement for an interim deal:¶ Negotiations between Iran and six world powers on implementing a landmark November deal to freeze parts of Tehran’s nuclear program in exchange for easing some sanctions have run into problems over advanced centrifuge research, diplomats said.¶ The dispute over centrifuges highlighted the huge challenges facing Iran and the six powers in negotiating the precise terms of the November 24 interim agreement. If they succeed, they plan to start talks on a long-term deal to resolve a more than decade-long dispute over Tehran’s nuclear ambitions.¶ Among the issues to be resolved in political discussions due to begin in Geneva later this week is that of research and development of a new model of advanced nuclear centrifuge that Iran says it has installed, diplomats said on condition of anonymity.¶ Centrifuges are machines that purify uranium for use as fuel in atomic power plants or, if purified to a high level, weapons.¶ “This issue (centrifuges) was among the main factors in stopping the previous technical discussions on December 19-21,” a Western diplomat told Reuters on condition of anonymity. Other Western diplomats confirmed that centrifuges remained a “sticking point” in the talks with Iran but noted that last month’s discussions were understandably adjourned ahead of the December holidays – not because of the centrifuge issue.¶ The White House will never admit talks have broken off. That would confirm critics’ conclusion that this is all a giant stall by Iran to allow it to progress with its nuclear weapons program while getting sanctions relief. So far, the mullahs are achieving exactly what they want. And the Obama team oversold what it had achieved, a former U.S. official critical of the administration says, giving pro-sanctions lawmakers every reason to pass new legislation.¶ The centrifuge issue is no small matter. Mark Dubowitz, president of the Foundation for Defense of Democracies, has been closely involved in sanctions development and implementation. He tells me, “Permitting Iran to conduct research and development on advanced centrifuges is a dangerous proposition and fundamentally at odds with a peaceful civilian nuclear program. The verification of Iran’s current centrifuge production capabilities is already sufficiently challenging without opening the door to Iranian development of even smaller and more efficient centrifuges that are easier to hide.” He adds, “This is further proof — as if more evidence is needed — that Iran is building an industrial-size nuclear infrastructure that will give it multiple overt and covert pathways to a bomb.”¶ It tells us several other things as well.¶ First, the interim deal is not a deal at all but a unilateral gift of sanctions relief for a deal that is vague and incomplete and that may never be implemented. Either president Obama was snookered or he is snookering us, trying to erect a barrier to military action by Israel and/or further sanctions by Congress.¶ Josh Block, a longtime Democrat and head of the Israel Project, observes via an e-mail to Right Turn, “Clearly there is growing concern and realization that the ‘interim deal’ is actually just another stalling tactic by Iran, but worse, one we are paying Iran billions of dollars to perpetrate. The six month ‘deal’ was announced in November, so either that is the moment the 6 month clock started or there is no ‘deal’ at all.”¶ Second, those demanding a new round of sanctions, including 53 Senate Democrats and Republicans co-sponsoring sanctions legislation, again have been proven to be savvier about the Iranians than the president and his State Department. Without reimposition of sanctions and passage of stringent banking sanctions, Iran will merely continue its pattern of delay, obfuscation and wordsmithing. The number of co-sponsors is up to 51, enough to pass the Senate by a majority; word of this latest Iranian gambit may persuade others to join. (The timing of a vote is still up in the air, although the delay has given pro-sanctions senators time to make their case and gain proof of Iran’s mendacity.) As Block put it, “Congress is not fooled. The American people are not fooled. Iran is playing us for the fool. Only more pressure backed by the credible threat of military force will bring Iran to recognize the costs of keeping their program outweigh any benefit.”¶ Third, the latest news is another blow to an administration already low on credibility. They had an “agreement,” but not really. And the document said Iran’s right to enrich would be the subject of mutual agreement in a final deal. Even this news reveals more spinning, as the State Department briefing yesterday revealed:

**Plan boosts Obama’s capital**

Douglas **Kriner 10**, Assistant Profess of Political Science at Boston University, After the Rubicon: Congress, Presidents, and the Politics of Waging War, p. 59-60

Presidents and politicos alike have long recognized Congress's ability to reduce the political costs that the White House risks incurring by pursuing a major military initiative. While declarations of war are all but extinct in the contemporary period, Congress has repeatedly moved to authorize presidential military deployments and consequently to tie its own institutional prestige to the conduct and ultimate success of a military campaign. Such authorizing legislation, even if it fails to pass both chambers, creates a sense of **shared legislative-executive responsibility** for a military action's success and provides the president with **considerable political support** for his chosen policy course.34 Indeed, the desire for this political cover—and not for the constitutional sanction a congressional authorization affords—has historically motivated presidents to seek Congress's blessing for military endeavors. For example, both the elder and younger Bush requested legislative approval for their wars against Iraq, while assiduously maintaining that they possessed sufficient independent authority as commander in chief to order the invasions unilaterally.35 This fundamental tension is readily apparent in the elder Bush's signing statement to HJ Res 77, which authorized military action against Saddam Hussein in January of 1991. While the president expressed his gratitude for the statement of congressional support, he insisted that the resolution was not needed to authorize military action in Iraq. "As I made clear to congressional leaders at the outset, my request for congressional support did not, and my signing this resolution does not, constitute any change in the long-standing positions of the executive branch on either the President's constitutional authority to use the Armed Forces to defend vital U.S. interests or the constitutionality of the War Powers Resolution."36

#### Waivers solve their impact

Eric Auner 11/15/13, a senior analyst at Guardian Six Consulting, "In Congress, Obama Administration Faces Uphill Battle on Iran Sanctions," World Politics Review,http://www.worldpoliticsreview.com/trend-lines/13386/in-congress-obama-administration-faces-uphill-battle-on-iran-sanctions

Whether or not the Obama administration can convince Congress to hold off on new sanctions, the administration still has room to maneuver in offering some limited short-term relief to ease negotiations forward. Kenneth Katzman of the Congressional Research Service wrote in Al-Monitor in August that there is a “vibrant debate among experts” on whether the administration “has the latitude to ease U.S. sanctions to the point where a nuclear deal with Iran can be concluded.” Many of the sanctions give “substantial waiver authority” to the president, according to Katzman, though the standards for issuing such waivers have been steadily increased by Congress.¶ “In a first-phase agreement, sanctions relief would be limited and unlikely to address the core of the [congressionally mandated] sanctions in place, which are on the banking and oil sectors,” said Kelsey Davenport of the Arms Control Association in an email interview. This could take place “over the six months following a first-phase agreement.” Measures could also be taken to “ease restrictions on precious metals and petrochemicals, as well as parts for the automotive and airline industries,” she said. Waivers on some sanctions “could be implemented almost immediately,” said Ali Vaez of the International Crisis Group in an email interview.

#### Obama will spend PC and lose on unemployment

Bloomberg 1-7, “Six Republicans Help Advance Unemployment Benefits in Senate,” http://go.bloomberg.com/political-capital/2014-01-07/five-republicans-away-from-unemployment-benefits-in-senate/

Even with passage in the Senate, however, prospects remain dim in the House, where Republican leaders oppose the extension.

Democrats are making the case that this is a matter of shoring up an economic recovery that’s been a struggle since 2008. Sen. Sherrod Brown of Ohio likened it to Henry Ford’s commitment to pay his workers $5 a day because he knew it would be good for the economy — his own workers would be able to buy his Model Ts. Brown said so on MSNBC’s “Morning Joe” today, where he said all he needed was five added Republicans voting for the benefits.

After the surprise Senate vote, President Barack Obama held a pre-planned event at the White House to make the case for the extension of the benefits and keep pressure on Senate and House alike.

#### Even if it passes, won’t derail negotiations

Ross Kaminsky 1-2, senior fellow of the Heartland Institute, http://spectator.org/articles/57310/looking-ahead

Iran will move inexorably but slowly (at least as far as inspectors can tell) toward a nuclear weapon but will not do anything that looks like “breakout,” thus keeping Israel from launching a military strike. Israel’s calculation will primarily be based on knowing that President Obama’s middle name is Hussein for a reason. Congress will pass additional sanctions which Obama will veto, but Iran, despite prior threats, will agree to continue with their agreement because European countries will not follow Congress’s suit, too happy to be making money trading with the world’s leading state sponsor of terrorism.

#### EU leadership solves Iran

Arshin Adib-Moghaddam 10, lecturer in the comparative and international politics of western Asia at the School of Oriental and African Studies, University of London, 13 November, “Europe still vital in talks with Iran,” http://www.guardian.co.uk/commentisfree/2010/nov/13/europe-iran-eu-diplomacy

In the meantime, Iran has proposed a new round of talks with the P5+1 (the permanent members of the UN security council, plus Germany) to move the negotiations further. Britain and the EU have a pivotal role to play in these negotiations if they revert to a rather more proactive, positive diplomacy vis-à-vis Iran on the one side and the US on the other.¶ The position of the EU should be mediatory rather than firmly entrenched within any camp. It was former foreign secretary Jack Straw, after all, whose shuttle diplomacy contributed to Iran's voluntary suspension of nuclear enrichment activities in 2003 and the Paris agreement in 2004. With the benefit of hindsight the delayed response of the EU to Iran's goodwill gesture must be considered a missed opportunity, not least because it undermined the negotiating position of then President Khatami who was left with nothing to present to the Iranian right who were starting to gather around Mahmoud Ahmadinejad, who later succeeded him as president.¶ The failure to follow up on some of the promises made to Khatami's administration after Iran suspended nuclear enrichment activities contributed to Iranian suspicions. For the more hawkish elements in the political establishment, this was enough "evidence" for them to dismiss Khatami's efforts. "We suspended the enrichment of uranium once, and none of the sanctions were lifted," some of the Iranians argued.¶ One can always discuss the merits and verity of the Iranian position, but **the success of the proactive EU diplomacy, galvanised by the efforts of Straw and the British foreign office, indicates that positive mediation produces tangible results**. If there is to be a dual track approach, as President Obama himself repeatedly emphasised, then surely Britain and the EU should position themselves at the forefront of the diplomatic track.¶ The more manoeuvring space there is in a negotiation process, research shows, the more likely there will be a solution. In that sense, the inclusion of Turkey (and potentially Brazil) in the new round of talks should be welcomed as an opportunity to open further communication channels and to enable Iranian negotiators to "sell" any viable compromise to a fiercely nationalistic constituency within the country. The nuclear issue is clearly an emblem of national pride and sovereignty in Iran, and any politician negotiating a deal has to take this into account.¶ At present, the odds for a proactive mediatory role for the EU are good. In Iran, the taboo of negotiating with the US directly was broken a long time ago, though it may still be easier for the negotiators to face European delegates. The fact that the Obama administration has made it unmistakably clear to Netanyahu that the US will not tolerate any unilateral Israeli military adventure targeting Iranian nuclear facilities has been noted in Tehran.

# 1AR

## LOAC

### Squo Links

#### US using feasibility test now

Ryan Goodman 13, Professor of Law at NYU, "Goodman Responds to Corn, Blank, Jenks, and Jensen on Capture-Instead-of-Kill", February 26, [www.lawfareblog.com/2013/02/goodman-responds-to-corn-blank-jenks-and-jensen-on-capture-instead-of-kill/](http://www.lawfareblog.com/2013/02/goodman-responds-to-corn-blank-jenks-and-jensen-on-capture-instead-of-kill/)

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

### CP Links to DA

#### CP links to the DA

Geoffrey Corn 11, Professor of Law and Presidential Research Professor, South Texas College of Law, 10/22/11, “Self-Defense Targeting: Blurring the Line between the Jus ad Bellum and the Jus in Bello,” http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=1947838

It did not take long for the Obama administration to demonstrate that it was not about to abandon an armed conflict–based approach to dealing with the al Qaeda threat.58 To this date, the United States continues to employ combat power against al Qaeda operatives in locations both proximate to and far removed from ongoing hostilities in Afghanistan.59 These operations involve the employment of deadly force as a measure of first resort, an unavoidable indicator that the United States continues to rely on an armed conflict–based legal framework.60 The discomfort with such an expansive concept of armed conflict is certainly understandable. What is equally understandable is the pragmatic reality that the nature of these operations makes them inconsistent with peacetime law enforcement legal principles. 61 Nonetheless, the apparent aversion to recognizing some type of “springing” armed conflict paradigm has produced not only opposition, but also a proposal for an alternative legal framework that avoids the need to address the conflict classification dilemma: self-defense targeting.62¶ This alternative methodology is most notably attributed to Professor Kenneth Anderson.63 In a series of essays, Anderson began to proffer the argument that the jus ad bellum provides sufficient—and ostensibly exclusive—legal authority for the regulation of attacks directed against terrorist operatives.64 This theory has also been embraced by Professor Jordan Paust.65 Although Paust has consistently rejected characterizing the response to transnational terrorism as an armed conflict66 (based primarily on a classical interpretation of Common Articles 2 and 3 of the Geneva Conventions),67 his position has evolved to acknowledge the legitimate use of military force in self-defense against external non-State threats.68 That response would not qualify as an armed conflict, because it could not fit within the traditionally understood scope of the Geneva Convention law-triggering framework. Instead, the jus ad bellum right of self-defense would be the exclusive source of legal authority related to the response.¶ Professor Anderson characterizes this theory as “naked self-defense.”69 According to Anderson, this term characterizes the legal basis for drone strikes articulated by State Department Legal Advisor Harold Koh: exercise of jus ad bellum self-defense does not ipso facto trigger the jus in bello. As will be explained more fully below, in the same essay Anderson signals a significant revision of this theory—a retreat motivated by his reflection on the inability to effectively define the geographic scope of a transnational non-international armed conflict. What is significant here, however, is that the theory itself presents a complex question: is it possible to employ military force pursuant to a claim of jus ad bellum national self-defense without triggering the jus in bello? And if the answer is yes, what international legal principles regulate the application of combat power during the execution of such operations?¶ In this essay, I argue that jus ad bellum targeting—or naked self-defense—is a flawed substitute for embracing the alternate (albeit controversial) conclusion that employing combat power in self-defense against transnational non-State operatives must be characterized as armed conflict. In support of this argument, the essay will expose what I believe is the implicit acknowledgment by proponents of self-defense targeting that these operations do indeed trigger the LOAC. I will do this by exploring the nature of two fundamental jus belli principles invoked by these proponents: necessity and proportionality.70 Contrasting the effect of these principles within the self-defense targeting framework with their effect within a jus in bello framework will illustrate that self-defense targeting reflects an implicit acknowledgment of jus in bello applicability during operational mission execution.

#### Legally separating armed conflict from self-defense destroys legal clarity

Geoffrey Corn 11, Professor of Law and Presidential Research Professor, South Texas College of Law, 10/22/11, “Self-Defense Targeting: Blurring the Line between the Jus ad Bellum and the Jus in Bello,” http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=1947838

Koh, however, included one qualifier that suggests possible uncertainty. Rejecting the criticism that attacks such as that on Bin Laden are unlawful extrajudicial killings, Koh noted that “a state that is engaged in an armed conflict or in legitimate self-defense is not required to provide targets with legal process before the state may use lethal force.”180 What is perplexing is the “or” in the statement. Koh preserved a division between armed conflict and other actions in legitimate self-defense. It is significant that he asserts the right to kill as a measure of first resort in either context (which seems to rebut any inference that he is suggesting some actions in self-defense must be exercised pursuant to a law enforcement legal framework). Why was that “or” necessary? What was Koh suggesting if he was not suggesting a law enforcement limitation to some actions in self-defense?¶ One possible answer is that Advisor Koh is simply preserving the authority of the United States to act in limited self-defense against an imminent terrorist threat that is not considered associated with al Qaeda or the Taliban. In such situations, the attack would accordingly be unrelated to the existing armed conflict the United States asserts is ongoing with these enemies. If this was the meaning of his use of the “or,” it produces little confusion: imminent terrorist threats to the United States may justify military action as an exercise of jus ad bellum self-defense, and use of force for such a purpose triggers LOAC applicability. However, distinguishing armed conflict from self-defense with an “or” could also be interpreted as an endorsement of self-defense targeting, suggesting that uses of military force are regulated by the jus in bello or jus ad bellum principles. This is an unnecessary dichotomy, and hopefully one that Advisor Koh did not intend. There is no viable reason to attempt to establish such a distinction; as discussed in this essay, the suggestion that ad bellum principles are interchangeable with their in bello variants is flawed and operationally confusing.181

### Martin

#### Self-defense TKs is not a thing

**Martin, 11 -** Associate Professor of Law at Washburn University School of Law (Craig, “GOING MEDIEVAL: TARGETED KILLING, SELFDEFENSE AND THE JUS AD BELLUM REGIME” SSRN) **NSA = Non State Actors**

We turn next to the second question identified at the outset of this section, namely: in response to which armed attacks are the targeted killings being conducted? First, one has to establish whether the self-defense claimed is in respect of each individual strike, for the policy of strikes as a whole, or separately for the collective strikes against each of the various states. The proposition that each launch of hellfire missiles to implement a kill constitutes a separate act of self-defense is untenable.78 Notwithstanding the lack of evidence from the U.S. government, there is little basis for believing that each act of terrorism that was being contemplated by all the persons so far targeted would by themselves have risen to the level of constituting an armed attack against the United States, had they been launched.79 While the 9/11 attacks clearly reached the level of “armed attack,” most of the other publicly disclosed plots that have been uncovered subsequently would not. Moreover, the killings have apparently taken place before the planned attacks had reached anything close to being imminent. Each use of force would thus have to be characterized as a preventative strike in response to a speculative future threat.

This brings us back to an aspect of self-defense doctrine that, as mentioned earlier, has become controversial in the post 9/11 era, namely the anticipatory and preventative use of force. It has been argued that the killings can be justified on the basis of a “preemptive” or “preventative” conception of self-defense,80 a principle formalized in the so-called “Bush Doctrine.”81 This argument is used both in the context of the theory that each strike constitutes a separate act of self-defense, and arguments that all the targeted killings are part of a response to terrorist attacks generally, so it bears analysis. The claims to a right of “preventative” self-defense are, like the arguments that self-defense is not limited to the use of force against states, grounded in arguments that there are broader customary international law principles that co-exist with Article 51 of the U.N. Charter. These underlying arguments were addressed above.82 In addition, however, these assertions as they relate to preventative use of force are also not consistent with state practice.83 Preventative self-defense as a concept was roundly rejected by the international community when it was floated as a justification for the invasion of Iraq in 2003, and it is not part of established customary international law.84 The claims are inconsistent with the judgments of the ICJ.85 The principle of preventative self-defense goes well beyond an anticipatory use of force against an imminent armed attack, and cannot satisfy the principle of necessity that is one of the foundations of the doctrine of self-defense.86 And while these arguments in support of a preventive use of force have increased in the post 9/11 era, they do not represent the mainstream of scholarly opinion.87 This might lead some to argue that the jus ad bellum regime is an anachronism that must adapt to the new realities of transnational terrorism if it is not to become irrelevant. But as will be argued below, that would be to increase the risk of war simply to address the threat of terrorism.

## Terror

### No Link

#### Aff doesn’t impede operations

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

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

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

#### The link to their NB is small

William Funk 13, Deadly Drones, Due Process, and the Fourth Amendment, Robert E. Jones Professor of Law, Lewis & Clark Law School, SSRN

VI. Conclusion In short, it seems clear that the Due Process Clause and the Fourth Amendment do not pose any significant obstacles to the government’s ability to use lethal force against leaders of al-Qa’ida who are United States citizens. It may be that the government’s program as it currently stands passes constitutional muster, but there are clearly substantial public concerns and possibly significant weaknesses in the government’s justifications that undermine the program’s constitutionality. Nevertheless, those weaknesses could be virtually eliminated by the addition of the use of the Foreign Intelligence Surveillance Court as an additional procedure to further assure the reliability of the government’s determinations, a procedure already in place and functioning with respect to highly classified matters, a procedure that would do nothing to impede the program and would provide it substantial additional constitutional support.

### No Nuke Terror

#### Terrorists don’t want nukes

Wolfe 12 – Alan Wolfe is Professor of Political Science at Boston College. He is also a Senior Fellow with the World Policy Institute at the New School University in New York. A contributing editor of The New Republic, The Wilson Quarterly, Commonwealth Magazine, and In Character, Professor Wolfe writes often for those publications as well as for Commonweal, The New York Times, Harper's, The Atlantic Monthly, The Washington Post, and other magazines and newspapers. March 27, 2012, "Fixated by “Nuclear Terror” or Just Paranoia?" http://www.hlswatch.com/2012/03/27/fixated-by-“nuclear-terror”-or-just-paranoia-2/

If one were to read the most recent unclassified report to Congress on the acquisition of technology relating to weapons of mass destruction and advanced conventional munitions, it does have a section on CBRN terrorism (note, not WMD terrorism). The intelligence community has a very toned down statement that says “several terrorist groups … probably remain interested in [CBRN] capabilities, but not necessarily in all four of those capabilities. … mostly focusing on low-level chemicals and toxins.” They’re talking about terrorists getting industrial chemicals and making ricin toxin, not nuclear weapons. And yes, Ms. Squassoni, it is primarily al Qaeda that the U.S. government worries about, no one else. The trend of worldwide terrorism continues to remain in the realm of conventional attacks. In 2010, there were more than 11,500 terrorist attacks, affecting about 50,000 victims including almost 13,200 deaths. None of them were caused by CBRN hazards. Of the 11,000 terrorist attacks in 2009, none were caused by CBRN hazards. Of the 11,800 terrorist attacks in 2008, none were caused by CBRN hazards.

#### Acquisition impossible – no enrichment

Zero risk of acquisition – miniaturization and enrichment are too difficult – even Al Qaeda sucks at it after years of trying

Adnan Khan 9-13-2013; lecturer on political and Islamic issues. The initial founder and editor-in-chief of The Revolution Observer. Debunking the Myths of Nuclear Terrorism http://www.revolutionobserver.com/2013/09/debunking-myths-of-nuclear-terrorism.html

Contrary to their popular portrayal in Hollywood, nuclear bombs are actually both difficult to manufacture and challenging to effectively deploy, making it virtually impossible for terrorist groups to acquire them. Nuclear devices initiate nuclear chain reactions, and these reactions generate roughly a million times more energy than comparable chemical reactions. The enrichment of Uranium is probably the most complex aspect of building a nuclear device; It presents numerous challenges for any nation in developing a nuclear programme. The concept requires separating a heavier isotope (atoms of the same element having a different number of neutrons) of uranium from a lighter isotope of uranium in order to enrich or purify the stock to higher than 80% of U235 - sufficient for use in weapons. Achieving this separation on a suitably refined level differentiated by only a few subatomic particles is an extremely complicated process. A series of centrifuges carry out the delicate task of separating isotopes, these are finely tuned machine components, able to spin at high speeds while fully containing and separating highly corrosive gas. It is the combination of appropriate calibration and rotational speed that allow for enrichment to take place, low-quality bearings just would not do the job. Thereafter fabricating fissile material and developing either a gun-type device or implosion device is a process only 9-10 nations in the world have accomplished. South Africa has since renounced it, whilst North Korea is still working on it.[2] Today nuclear warheads sit in missiles and this would be another challenge any nation would face, i.e. delivering a bomb to its intended target. The components of the bomb that actually initiate a nuclear explosion must be miniaturized in order to be placed in a missile. Modern missiles are smaller than a human being weighing only a few hundred pounds. Actually getting a warhead down to this size is no simple exercise. It requires, among other things, precision manufacturing, exceptional quality control and a good understanding of nuclear physics. All of this would be after decades of testing to ensure detonation upon delivery. Building a Nuclear weapon requires a comprehensive commitment from any nation for its national resources to be deployed in such a manner. It is not just about one facility, it needs an industrial base. A nuclear program requires long term facilities, which are very energy intensive, years of experimentation, fissionable material and high grade industrial machinery. All of this is beyond most countries let alone terrorist groups. In the case of al Qaeda, even after immense security, sanctuary and financial backing they have been unable to produce a crude nuclear device in any meaningful way.

#### Consensus

Matt Fay ‘13, PhD student in the history department at Temple University, has a Bachelor’s degree in Political Science from St. Xavier University and a Master’s in International Relations and Conflict Resolution with a minor in Transnational Security Studies from American Military University, 7/18/13, “The Ever-Shrinking Odds of Nuclear Terrorism”, webcache.googleusercontent.com/search?q=cache:HoItCUNhbgUJ:hegemonicobsessions.com/%3Fp%3D902+&cd=1&hl=en&ct=clnk&gl=us&client=firefox-a

For over a decade now, one of the most oft-repeated threats raised by policymakers—the one that in many ways justified the invasion of Iraq—has been that of nuclear terrorism. Officials in both the Bush and Obama administrations, including the presidents themselves, have raised the specter of the atomic terrorist. But beyond mere rhetoric, how likely is a nuclear terrorist attack really?¶ While pessimistic estimates about America’s ability to avoid a nuclear terrorist attack became something of a cottage industry following the September 11th attacks, a number of scholars in recent years have pushed back against this trend. Frank Gavin has put post-9/11 fears of nuclear terrorism into historical context (pdf) and argued against the prevailing alarmism. Anne Stenersen of the Norwegian Defence Research Establishment has challenged the idea that al Qaeda was ever bound and determined to acquire a nuclear weapon. John Mueller ridiculed the notion of nuclear terrorism in his book Atomic Obsessions and highlighted the numerous steps a terrorist group would need to take—all of which would have to be successful—in order to procure, deliver, and detonate an atomic weapon. And in his excellent, and exceedingly even-handed, treatment of the subject, On Nuclear Terrorism, Michael Levi outlined the difficulties terrorists would face building their own nuclear weapon and discussed how a “system of systems” could be developed to interdict potential materials smuggled into the United States—citing a “Murphy’s law of nuclear terrorism” that could possibly dissuade terrorists from even trying in the first place.¶ But what about the possibility that a rogue state could transfer a nuclear weapon to a terrorist group? That was ostensibly why the United States deposed Saddam Hussein’s regime: fear he would turnover one of his hypothetical nuclear weapons for al Qaeda to use.¶ Enter into this discussion Keir Lieber and Daryl Press and their article in the most recent edition of International Security, “Why States Won’t Give Nuclear Weapons to Terrorists.” Lieber and Press have been writing on nuclear issues for just shy of a decade—doing innovative, if controversial work on American nuclear strategy. However, I believe this is their first venture into the debate over nuclear terrorism. And while others, such as Mueller, have argued that states are unlikely to transfer nuclear weapons to terrorists, this article is the first to tackle the subject with an empirical analysis.¶ The title of their article nicely sums up their argument: states will not turn over nuclear weapons terrorists. To back up this claim, Lieber and Press attack the idea that states will transfer nuclear weapons to terrorists because terrorists operate of absent a “return address.” Based on an examination of attribution following conventional terrorist attacks, the authors conclude:¶ [N]either a terror group nor a state sponsor would remain anonymous after a nuclear attack. We draw this conclusion on the basis of four main findings. First, data on a decade of terrorist incidents reveal a strong positive relationship between the number of fatalities caused in a terror attack and the likelihood of attribution. Roughly three-quarters of the attacks that kill 100 people or more are traced back to the perpetrators. Second, attribution rates are far higher for attacks on the U.S. homeland or the territory of a major U.S. ally—97 percent (thirty-six of thirty-seven) for incidents that killed ten or more people. Third, tracing culpability from a guilty terrorist group back to its state sponsor is not likely to be difficult: few countries sponsor terrorism; few terrorist groups have state sponsors; each sponsor terrorist group has few sponsors (typically one); and only one country that sponsors terrorism, has nuclear weapons or enough fissile material to manufacture a weapon. In sum, attribution of nuclear terror incidents would be easier than is typically suggested, and passing weapons to terrorists would not offer countries escape from the constraints of deterrence.¶ From this analysis, Lieber and Press draw two major implications for U.S. foreign policy: claims that it is impossible to attribute nuclear terrorism to particular groups or potential states sponsors undermines deterrence; and fear of states transferring nuclear weapons to terrorist groups, by itself, does not justify extreme measures to prevent nuclear proliferation.¶ This is a key point. While there are other reasons nuclear proliferation is undesirable, fears of nuclear terrorism have been used to justify a wide-range of policies—up to, and including, military action. Put in its proper perspective however—given the difficulty in constructing and transporting a nuclear device and the improbability of state transfer—nuclear terrorism hardly warrants the type of exertions many alarmist assessments indicate it should.

#### No chance

Francis J. **Gavin 10**, Professor of International Affairs and Director of the Robert S. Strauss Center for International Security and Law, Lyndon B. Johnson School of Public Affairs, University of Texas at Austin, “Same As It Ever Was,” International Security, Vol. 34, No. 3 (Winter 2009/10), pp. 7–37

A recent study contends that **al-Qaida’s interest in acquiring and using nuclear weapons may be overstated**. Anne Stenersen, a terrorism expert, claims that “looking at statements and activities at various levels within the al-Qaida network, it becomes clear that **the network’s interest in using unconventional means is in fact much lower than commonly thought**.”55 She further states that “**CBRN** [chemical, biological, radiological, and nuclear] **weapons do not play a central part in al-Qaida’s strategy.”**56 In the 1990s, members of al-Qaida debated whether to obtain a nuclear device. Those in favor sought the weapons **primarily to deter** a U.S. attack on al-Qaida’s bases in Afghanistan. This assessment reveals an organization at odds with that laid out by nuclear alarmists of terrorists obsessed with using nuclear weapons against the United States regardless of the consequences. Stenersen asserts, “Although there have been various reports stating that al-Qaida attempted to buy nuclear material in the nineties, and possibly recruited skilled scientists, it appears that **al-Qaida central have not dedicated a lot of time or effort to developing a high-end CBRN capability. . . . Al-Qaida central never had a coherent strategy to obtain CBRN**: instead, its members were divided on the issue, and there was an awareness that militarily effective weapons were extremely difficult to obtain.” 57 Most terrorist groups “assess nuclear terrorism **through the lens of their political goals** and may judge that it does not advance their interests.”58 As Frost has written, “**The risk of nuclear terrorism, especially true nuclear terrorism employing bombs powered by nuclear fission, is overstated, and that popular wisdom on the topic is significantly flawed**.”59

#### their evidence just says al qaeda looked at nukes --- that’s barely true at the margins and is just al qaeda rhetoric

Mueller 10—Professor of Political Science and International Relations @ Ohio State. Widely-recognized expert on terrorism threats in foreign policy. AB from U Chicago, MA in pol sci from UCLA and PhD in pol sci from UCLA (John, “Calming Our Nuclear Jitters”, Issues in Science & Technology, 07485492, Winter 2010, Vol. 26, Issue 2, EBSCO)

The al Qaeda factor The degree to which al Qaeda, the only terrorist group that seems to want to target the United States, has pursued or even has much interest in a nuclear weapon may have been exaggerated. The 9/11 Commission stated that "al Qaeda has tried to acquire or make nuclear weapons for at least ten years," but the only substantial evidence it supplies comes from an episode that is supposed to have taken place about 1993 in Sudan, when al Qaeda members may have sought to purchase some uranium that turned out to be bogus. Information about this supposed venture apparently comes entirely from Jamal al Fadl, who defected from al Qaeda in 1996 after being caught stealing $110,000 from the organization. Others, including the man who allegedly purchased the uranium, assert that although there were various other scams taking place at the time that may have served as grist for Fadl, the uranium episode never happened. As a key indication of al Qaeda's desire to obtain atomic weapons, many have focused on a set of conversations in Afghanistan in August 2001 that two Pakistani nuclear scientists reportedly had with Osama bin Laden and three other al Qaeda officials. Pakistani intelligence officers characterize the discussions as "academic" in nature. It seems that the discussion was wide-ranging and rudimentary and that the scientists provided no material or specific plans. Moreover, the scientists probably were incapable of providing truly helpful information because their expertise was not in bomb design but in the processing of fissile material, which is almost certainly beyond the capacities of a nonstate group. Kalid Sheikh Mohammed, the apparent planner of the 9/11 attacks, reportedly says that al Qaeda's bomb efforts never went beyond searching the Internet. After the fall of the Taliban in 2001, technical experts from the CIA and the Department of Energy examined documents and other information that were uncovered by intelligence agencies and the media in Afghanistan. They uncovered no credible information that al Qaeda had obtained fissile material or acquired a nuclear weapon. Moreover, they found no evidence of any radioactive material suitable for weapons. They did uncover, however, a "nuclear-related" document discussing "openly available concepts about the nuclear fuel cycle and some weapons-related issues." Just a day or two before al Qaeda was to flee from Afghanistan in 2001, bin Laden supposedly told a Pakistani journalist, "If the United States uses chemical or nuclear weapons against us, we might respond with chemical and nuclear weapons. We possess these weapons as a deterrent." Given the military pressure that they were then under and taking into account the evidence of the primitive or more probably nonexistent nature of al Qaedas nuclear program, the reported assertions, although unsettling, appear at best to be a desperate bluff. Bin Laden has made statements about nuclear weapons a few other times. Some of these pronouncements can be seen to be threatening, but they are rather coy and indirect, indicating perhaps something of an interest, but not acknowledging a capability. And as terrorism specialist Louise Richardson observes, "Statements claiming a right to possess nuclear weapons have been misinterpreted as expressing a determination to use them. This in turn has fed the exaggeration of the threat we face." Norwegian researcher Anne Stenersen concluded after an exhaustive study of available materials that, although "it is likely that al Qaeda central has considered the option of using non-conventional weapons," there is "little evidence that such ideas ever developed into actual plans, or that they were given any kind of priority at the expense of more traditional types of terrorist attacks." She also notes that information on an al Qaeda computer left behind in Afghanistan in 2001 indicates that only $2,000 to $4,000 was earmarked for weapons of mass destruction research and that the money was mainly for very crude work on chemical weapons. Today, the key portions of al Qaeda central may well total only a few hundred people, apparently assisting the Taliban's distinctly separate, far larger, and very troublesome insurgency in Afghanistan. Beyond this tiny band, there are thousands of sympathizers and would-be jihadists spread around the globe. They mainly connect in Internet chat rooms, engage in radicalizing conversations, and variously dare each other to actually do something. Any "threat," particularly to the West, appears, then, principally to derive from self-selected people, often isolated from each other, who fantasize about performing dire deeds. From time to time some of these people, or ones closer to al Qaeda central, actually manage to do some harm. And occasionally, they may even be able to pull off something large, such as 9/11. But in most cases, their capacities and schemes, or alleged schemes, seem to be far less dangerous than initial press reports vividly, even hysterically, suggest. Most important for present purposes, however, is that any notion that al Qaeda has the capacity to acquire nuclear weapons, even if it wanted to, looks farfetched in the extreme. It is also noteworthy that, although there have been plenty of terrorist attacks in the world since 2001, all have relied on conventional destructive methods. For the most part, terrorists seem to be heeding the advice found in a memo on an al Qaeda laptop seized in Pakistan in 2004: "Make use of that which is available … rather than waste valuable time becoming despondent over that which is not within your reach." In fact, history consistently demonstrates that terrorists prefer weapons that they know and understand, not new, exotic ones.