## 1AC – KY Round 4

### Plan

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

### 1AC – Executive Overreach

#### CONTENTION 1: OVERREACH

#### *Scenario A: Targeted Strikes*

#### US policy creates a borderless global war---the lack of statutory limits triggers unnecessary attacks

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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

Recent statements by administration officials suggest that while, as a matter of law, the United States continues to press a broad definition of the enemy force, its actions, as a matter of policy, are more restrained. Specifically, it focuses its targeted-killing operations on those who pose a "significant threat" n57 and only as a matter of last resort. In the words of John Brennan, the United States does not seek to kill every al Qaeda member, but instead focuses its efforts on "disrupting ... plans and ... plots before they come to fruition," n58 and limits lethal strikes to situations in which it is the "only recourse" against the threat. n59 Brennan cites operational leaders, [\*1186] operatives in the midst of training for an attack, and persons who possess unique operational skills that are being leveraged for an attack. n60 But no binding limits have yet been articulated, and it is not clear that they exist. n61 Are the examples of possible targets exclusive or merely illustrative? How far along does the attack planning need to be? Is mere agreement to plot or plan enough? In what situations is lethal targeting considered the "only recourse"?¶ Of note, recent reporting suggests that the United States has launched at least one drone strike near Sana'a, the capital of Yemen, in a region readily accessible to law enforcement officials, thereby casting doubt on official assertions that lethal targeting is used as a measure of last resort, when capture is not feasible. n62 Moreover, "signature strikes" reportedly were approved for use in Yemen in 2012, allowing the targeting of individuals or groups based on their pattern of activities without knowing the specific targets' identities or roles in the organization - a practice that seems to belie a policy of individualized assessments of "significant threat." n63

#### 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.

#### That lowers the threshold for use for US policymakers

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

But the advantages of drones are as overstated and misunderstood as the problems they pose — and in some ways, their very perceived advantages cause new problems. Drone technologies temptingly lower or disguise the costs of lethal force, but their availability can blind us to the potentially dangerous longer - term costs and consequences of our strategic choices. Armed drones lower the perceived costs of using lethal force in at least three ways. First, drones reduce the dollar cost of using lethal force inside foreign countries. 13 Most drones are economical compared with the available alternatives. 14 Manned aircraft, for instance, are quite expensive: 15 Lockheed Martin's F - 22 fighter jets cost about $150 million each; F - 35s are $90 million; and F - 16s are $55 million. But the 2011 price of a Reaper drone was approximately $28.4 million, while Predator drones cost only about $5 million to make. 16 As with so many things, putting a dollar figure on drones is difficult; it depends what costs are counted, and what time frame is used. Nevertheless, drones continue to be perceived as cheaper by government decision - makers. Second, relying on drone strikes rather than alternative means reduces the domestic political costs of using lethal force. Sending manned aircraft or special operations forces after a suspected terrorist places the lives of U.S. personnel at risk, and full - scale invasions and occupations endanger even more American lives. In contrast, using armed drones eliminates all short - term risks to the lives of U.S. personnel involved in the operations. Third, by reducing accidental civilian casualties, 17 precision drone technologies reduce the perceived moral and reputational costs of using lethal force. The US government is extraordinarily concerned about avoiding unnecessary civilian casualties, and rightly so. There are moral and legal reasons for this concern, and there are also pragmatic reasons: civilian casualties cause pain and resentment within local populations and host - country governments and alienate the international community It is of course not a bad thing to possess military technologies that are cost little, protect American lives and enable us to minimize civilian casualties. When new technologies appear to reduce the costs of using lethal force, however, the threshold for deciding to use lethal force correspondingly drops, and officials will be tempted to use lethal force with greater frequency and less wisdom.¶ Over the last decade, we have seen US drone strikes evolve from a tool used in extremely limited circumstances to go after specifically identified high - ranking al Qaeda officials to a tool relied on in an increasing number of countries to go after an eternally lengthening list of putative bad actors, with increasingly tenuous links to grave or imminent threats to the United States. Some of these suspected terrorists have been identified by name and specifically targeted, while others are increasingly targeted on the basis of suspicious behavior patterns. Increasingly, drones strikes have targeted militants who are lower and lower down the terrorist food chain, 18 rather than terrorist masterminds. 19 Although drone strikes are believed to have killed more than 3,000 people since 2004, 20 analysis by the New America Foundation and more recently by a the McClatchy newspaper s suggests that only a small fraction of the dead appear to have been so - called "high - value targets." 21 What’s more, drone strikes have spread ever further from "hot" battlefields, migrating from Pakistan to Yemen to Somalia (and perhaps to Mali 22 and the Philippines as well). 23

#### That makes great power war inevitable---causes escalation as traditional checks don’t apply

Eric Posner 13, a professor at the University of Chicago Law School, May 15th, 2013, "The Killer Robot War is Coming," Slate, www.slate.com/articles/news\_and\_politics/view\_from\_chicago/2013/05/drone\_warfare\_and\_spying\_we\_need\_new\_laws.html

Drones have existed for decades, but in recent years they have become ubiquitous. Some people celebrate drones as an effective and humane weapon because they can be used with precision to slay enemies and spare civilians, and argue that they pose no special risks that cannot be handled by existing law. Indeed, drones, far more than any other weapon, enable governments to comply with international humanitarian law by avoiding civilian casualties when attacking enemies. Drone defenders also mocked Rand Paul for demanding that the Obama administration declare whether it believed that it could kill people with drones on American territory. Existing law permits the police to shoot criminals who pose an imminent threat to others; if police can gun down hostage takers and rampaging shooters, why can’t they drone them down too?¶ While there is much to be said in favor of these arguments, drone technology poses a paradox that its defenders have not confronted. Because drones are cheap, effective, riskless for their operators, and adept at minimizing civilian casualties, governments may be tempted to use them too frequently.¶ Indeed, a panic has already arisen that the government will use drones to place the public under surveillance. Many municipalities have passed laws prohibiting such spying even though it has not yet taken place. Why can’t we just assume that existing privacy laws and constitutional rights are sufficient to prevent abuses?¶ To see why, consider U.S. v. Jones, a 2012 case in which the Supreme Court held that the police must get a search warrant before attaching a GPS tracking device to a car, because the physical attachment of the device trespassed on property rights. Justice Samuel Alito argued that this protection was insufficient, because the government could still spy on people from the air. While piloted aircraft are too expensive to use routinely, drones are not, or will not be. One might argue that if the police can observe and follow you in public without obtaining a search warrant, they should be able to do the same thing with drones. But when the cost of surveillance declines, more surveillance takes place. If police face manpower limits, then they will spy only when strong suspicions justify the intrusion on targets’ privacy. If police can launch limitless drones, then we may fear that police will be tempted to shadow ordinary people without good reason.¶ Similarly, we may be comfortable with giving the president authority to use military force on his own when he must put soldiers into harm’s way, knowing that he will not risk lives lightly. Presidents have learned through hard experience that the public will not tolerate even a handful of casualties if it does not believe that the mission is justified. But when drones eliminate the risk of casualties, the president is more likely to launch wars too often.¶ The same problem arises internationally. The international laws that predate drones assume that military intervention across borders risks significant casualties. Since that check normally kept the peace, international law could give a lot of leeway for using military force to chase down terrorists. But if the risk of casualties disappears, then nations might too eagerly attack, resulting in blowback and retaliation. Ironically, the reduced threat to civilians in tactical operations could wind up destabilizing relationships between countries, including even major powers like the United States and China, making the long-term threat to human life much greater.¶ These three scenarios illustrate the same lesson: that law and technology work in tandem. When technological barriers limit the risk of government abuse, legal restrictions on governmental action can be looser. When those technological barriers fall, legal restrictions may need to be tightened.

#### These conflicts go nuclear --- wrecks global stability

Michael J Boyle 13, Assistant Professor of Political Science at La Salle University, former Lecturer in International Relations and Research Fellow at the Centre for the Study of Terrorism and Political Violence at the University of St Andrews, PhD from Cambridge University, January 2013, “The costs and consequences of drone warfare,” International Affairs 89: 1 (2013) 1–29, http://www.chathamhouse.org/sites/default/files/public/International%20Affairs/2013/89\_1/89\_1Boyle.pdf

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

#### *Scenario B – Detention*

**Lack of limits on the executive detention make overreach inevitable--- radicalizes foreign populations---codification is critical to set the precedent**

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.

**Current detention wrecks** **US rule of law legitimization**

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 – Allied Coop

#### CONTENTION 2: Allied Coop

**European allies will insist on a policy that limits operations to declared zones of conflict with criminal prosecutions elsewhere---failure to codify US policy risks executive overreach**

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.

**Alignment with allies brings detention policy into compliance with laws--- makes criminal prosecutions effective outside zones of conflict**

**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. n262

**That solves safe havens and extradition to the US court system**

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Finally, the **c**riminal **j**ustice **s**ystem may help us **obtain important cooperation from other countries**. That **cooperation may be necessary** if we want to detain suspected terrorists¶ or otherwise accomplish our national¶security objectives. Our federal courts are well-respected internationally.¶ They are well-established, formal legal mechanisms that allow the transfer of terrorism suspects to the United States¶ for trial in federal court, and for¶ the provision of information to assist¶ in law enforcement investigations –¶ i.e., extradition and mutual legal assistance treaties (MLATs). **Our allies around the world are comfortable with these mechanisms**, as well as with more informal procedures that are often used to provide assistance to the United States in law enforcement matters, whether relating to terrorism or¶ other types of cases. Such cooperation can be critical to the success of a prosecution, and in some cases can be **the only way in which we will gain** **custody of a suspected terrorist** who has broken our laws.¶ 184¶ In contrast, many of our **key** **allies around the world** are **not willing to cooperate** with or support our efforts to hold suspected terrorists in **law of war detention** or to **prosecute them in military commissions**. While we hope that over time they will grow more supportive of these legal¶ mechanisms, at present many countries would not extradite individuals to the United States for military commission proceedings or law of war¶ detention. Indeed, some of our extradition treaties explicitly forbid extradition to the United States where the person will be tried in a forum other than a criminal court. For example, our treaties with Germany¶ (Article 13)¶ 185¶ and with Sweden (Article V(3))¶ 186¶ expressly forbid extradition¶ when the defendant will be tried in¶ an “extraordinary” court, and the¶ understanding of the Indian government pursuant to its treaty with the¶ United States is that extradition is available only for proceedings under the¶ ordinary criminal laws of the requesting state.¶ 187¶ More generally, the¶ doctrine of dual criminality – under which extradition is available only for¶ offenses made criminal in both countries – and the relatively common¶ exclusion of extradition for military offenses not also punishable in civilian¶ court may also limit extradition outside the criminal justice system.¶ 188¶ Apart¶ from extradition, even where we already have the terrorist in custody, many countries will not provide testimony, other information, or assistance in support of law of war detention or a military prosecution, either as a matter¶ of national public policy or under other provisions of some of our MLATs.¶ 189¶ These concerns are not hypothetical. During the last Administration,¶ the United States was obliged to give¶ assurances against the use of military¶ commissions in order to obtain extradition of several terrorism suspects to¶ the United States.¶ 190¶ There are a number of terror suspects currently in foreign custody who **likely would not be extradited** to the United States by¶ foreign nations if they faced military tribunals.¶ 191¶ In some of these cases, it might be necessary for the foreign nation **to release these suspects** if they cannot be extradited because they do¶ not face charges pending in the¶ foreign nation.

**Obama overreach triggers end of allied intel cooperation and dooms 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**.

**Effective intel sharing is key to NATO effectiveness and Special Ops**

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\*Note: SOF = Special Operation Forces

NATO’s essential purpose is to safeguard the freedom and security of all its members via political and military means in accordance with the North Atlantic Treaty and the principles of the United Nations Charter.3 “There is a common perspective among a variety of defense and security establishments around the world that the nature of the current and future security environment we face presents complex and irregular challenges that are not readily apparent and are difficult to anticipate.”4 SOF is being singled out and recognized as a key component of the North Atlantic Treaty Organization (NATO) alliance in the fight against contemporary and future threats, because SOF is “ideally suited to [the] ambiguous and dynamic irregular environment” facing NATO.5¶ SOF has traditionally been considered a national asset. NATO had no history of utilizing SOF in the Alliance when NATO nations first assumed responsibility for the conflicts in the Balkans. However the lessons learned during those conflicts were not applied due to a lack of a central NATO SOF entity until the NATO Riga summit of 2006. On December 22, 2006, Admiral William McRaven was appointed Director of the NATO SOF Coordination Center (NSCC) and ordered to start the transformation process. Three years later, on March 1, 2010, the NATO SOF Headquarters (NSHQ) was formally established as a three-star headquarters within the Alliance in Mons, Belgium.6¶ According to its mission statement, the purpose of NSHQ is twofold. First, it must optimize the employment of SOF by the Alliance. NSHQ further describes this as “the intention to make the employment of SOF as perfect, efficient, and effective as possible, so as to deliver to the Alliance a highly agile Special Operations capability across the range of military operations.”7 Second, it must provide a command capability when so directed by Supreme Allied Commander Europe (SACEUR). NSHQ further describes this as “the ability to deploy a robust C4I capability and enablers for the support and employment of SOF in NATO operations.”8 To be able to carry out successful special operations in support of the current and future operating environments, the Alliance needs adequate interoperability, command and control, and intelligence structures. ¶ Even **amongst the closest** **allies**, **challenges in intelligence sharing remain**. During the early years of Operation Iraqi Freedom, British operators were denied access to intelligence fused by the U.S. that the British had gathered themselves. The issue became so contentious that it had to be raised by British and Australian Prime Ministers with the U.S. President to be resolved.9 Having realized that intelligence sharing is always a compromise between the need to share and the need to protect (even with the best-designed organizations, much less a large, multinational, bureaucratic organization), the NSHQ has developed an innovative approach to solving its intelligence deficiencies. It has created its own organic intelligence collection, analysis, and exploitation capability. It has also acquired its own equipment and created a robust NATO SOF training facility and training program to supplement intelligence flow to NATO SOF forces.!¶ B. BACKGROUND ¶ Special operations often test the limits of both equipment and personnel. This extremity introduces a significant degree of uncertainty or “fog of war.” Success in special operations dictates that the **uncertainty** associated with the enemy, weather, and terrain **must be minimized** through access to **best available intelligence**.10 Most special operations conducted nationally benefit from access to the best national intelligence available. However, because of classification issues, special operations by international coalitions often lack access to the best available intelligence. This absence increases the likelihood of operational failure and further risks the personal safety of the operators. ¶ NATO (and many of the individual member states) foresees a future threat environment shaped by unconventional threats such as transnational crime, terrorist attacks, and the proliferation of **w**eapons of **m**ass **d**estruction.11 There are so many similarities in threats projected by the NATO member states and by official NATO strategy it is easy to conclude that a common enemy exists: transnational problems require transnational solutions. The complexities in the international order and the “significant challenges to the intelligence system [that] arise in targeting groups such as al-Qaeda due to their networked and volatile structure”12 make multinational intelligence sharing requisite. There is much to gain from multinational cooperation. The expected continued decline in military budgets and limited SOF human resources make burden-sharing and proper division of labor even more appropriate. ¶ C. PURPOSE AND SCOPE ¶ Intelligence is a decisive factor, sometimes **the decisive factor**, in special operations. As such, the NSHQ’s ultimate success will rely on its ability to solve some of the perennial problems related to intelligence sharing within coalitions. The newly established NSHQ in Mons, Belgium serves as an excellent testing ground to analyze SOF intelligence sharing issues within a coalition. NSHQ is attempting to streamline and optimize the intelligence available to NATO SOF units.

#### NATO prevents global nuclear war

Brzezinski 9 (Zbigniew, 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.

### 1AC – Solvency

#### CONTENTION 3: SOLVENCY

**Failure to codify existing policy into law risks spreading executive targeted killings and indefinite detention---plan’s key**

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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, 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**.

**Drone prolif is inevitable but US action creates credibility necessary to build strong norms against reckless use---preserves basing access and precedent**

Micah **Zenko 13**, Douglas Dillon fellow in the Center for Preventive Action @ C.F.R., Council Special Report No. 65, January, 2013, Reforming U.S. Drone Strike Policies, Douglas Dillon fellow in the Center for Preventive Action at the Council on Foreign Relations (CFR). Previously, he worked for five years at the Harvard Kennedy School, i.cfr.org/content/publications/attachments/Drones\_CSR65.pdf

The second major risk is that of proliferation. Over the next decade, the U.S. near-monopoly on drone strikes will erode as more countries develop and hone this capability. The advantages and effectiveness of drones in attacking hard-to-reach and time-sensitive targets are compelling many countries to indigenously develop or explore purchasing unmanned aerial systems. In this uncharted territory, U.S. policy provides a **powerful precedent** for other states and nonstate actors that will increasingly deploy drones with potentially dangerous ramifications. Reforming its practices could allow the **U**nited **S**tates to regain moral authority in dealings with other states and **credibly engage** with the international community to shape norms for responsible drone use.¶ The current trajectory of U.S. drone strike policies is unsustainable. **Without reform from within**, drones risk **becom**ing an unregulated, unaccountable vehicle for states to deploy lethal force with impunity. Consequently, the **U**nited **S**tates should more fully explain and reform aspects of its policies on drone strikes in nonbattlefield settings by ending the controversial practice of “signature strikes”; limiting targeted killings to leaders of transnational terrorist organizations and individuals with direct involvement in past or ongoing plots against the United States and its allies; and clarifying rules of the road for drone strikes in nonbattlefield settings. Given that **the U**nited **S**tates is currently the only country—other than the United Kingdom in the traditional battlefield of Afghanistan and perhaps Israel—to use drones to attack the sovereign territory of another country, it has a **unique opportunity** and responsibility to engage relevant international actors and **shape development of a normative framework for acceptable use of drones.** ¶ Although reforming U.S. drone strike policies will be difficult and will require sustained high-level attention to balance transparency with the need to protect sensitive intelligence sources and methods, it would serve U.S. national interests by ¶ - allowing policymakers and diplomats to paint a more accurate portrayal of drones to counter the myths and misperceptions that currently remain unaddressed due to secrecy concerns;¶ - placing the use of drones as a counterterrorism tactic on a more **legitimate and defensible footing with domestic and international audiences**;¶ - increasing the likelihood that the United States will sustain the international tolerance and cooperation **required to carry out future drone strikes**, such as **intelligence support** and **host-state basing rights**;¶ - **exerting a normative influence on the policies** and actions **of other states**; and¶ - providing current and future U.S. administrations with the **requisite political leverage** to **shape and promote responsible use of drones** by other states and nonstate actors.¶ As Obama administration officials have warned about the proliferation of drones, “If we want other nations to use these technologies responsibly, we must use them responsibly.”4

**A flexible zone of conflict regime enhances legitimacy, solves criminal justice prosecution outside zones and preserves the use of emergency measures as a last resort against imminent threats**

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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

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 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¶ Legal scholars, policymakers, and state actors are embroiled in a heated debate about whether the conflict with al Qaeda is concentrated within specific geographic boundaries or extends to wherever al Qaeda members and associated forces may go. The United States' **expansive view of** the **conflict**, coupled with its broad definition of the enemy, has led to a legitimate concern about the **creep of war**. Conversely, the European and human rights view, which confines the conflict to a limited geographic region, ignores the potentially global nature of the threat and unduly constrains the state's ability to respond. Neither the law of international armed conflict (governing conflicts between states) nor the law of noninternational armed conflict (traditionally understood to govern intrastate conflicts) provides the answers that are so desperately needed.¶ The zone approach proposed by this Article **fills the** international **law gap**, effectively mediating the multifaceted liberty and security interests at stake. It recognizes the broad sweep of the conflict, but distinguishes between zones of active hostilities and other areas in determining which rules apply. Specifically, it offers a set of standards that would both **limit and legitimize** the use of out-of-battlefield targeted killings and law of war-based detentions, subjecting their use to an individualized threat assessment, a least-harmful-means test, and significant procedural safeguards. This [\*1234] approach **confines** the use of out-of-battlefield targeted killings and detention without charge **to extraordinary situations** in which the security of the state so demands. It thus limits the use of force as a first resort, protects against the unnecessary erosion of peacetime norms and institutions, and safeguards individual liberty. At the same time, the zone approach ensures that the state can effectively respond to grave threats to its security, wherever those threats are based.¶ The **U**nited **S**tates has already adopted a number of policies that distinguish between zones of active hostilities and elsewhere, implicitly recognizing the importance of this distinction. By adopting the proposed framework **as a matter of law**, the United States can begin to **set the standards** and build an **international consensus** as to the rules that ought to apply, not only to this conflict, but **to future conflicts**. The likely reputational, security, and foreign policy gains make acceptance of this framework a worthy endeavor.

**Declaration of the territorial limits of detention and targeted strikes triggers US restraint and solves safe havens**

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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 **L**aw-**o**f-**w**ar 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 **info**rmation 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.

**Failure to codify limits sets precedent for strikes and the erosion of rule of law---Congress key**

**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**.

**Implementation of existing system of executive policy solves legitimacy---no DA’s since its US policy now**

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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

One might be skeptical that a nation like the United States would ever accept such constraints on the exercise of its authority. There are, however, several reasons why doing so would be in the United States' best interest.¶ First, as described in Section II.B, the general **framework is** largely **consistent with current U.S. practice** since 2006. The **U**nited **S**tates has, as a matter of policy, **adopted important limits** on its use of **out-of-battlefield** **targeting** and **law-of-war detention** - suggesting an implicit recognition of the value and benefits of restraint.¶ Second, while the proposed substantive and procedural safeguards are more stringent than those that are currently being employed, their **implementation will lead to increased restraint and enhanced legitimacy**, which in turn inure to the state. As the U.S. Counterinsurgency Manual explains, it is impossible and self-defeating to attempt to capture or kill every potential insurgent: "Dynamic insurgencies can replace losses quickly. Skillful counterinsurgents must thus cut off the sources of that recuperative power" by **increasing their own legitimacy** at the **expense of the insurgent's legitimacy**. n215 The Counterinsurgency Manual further notes, "Excessive use of force, unlawful detention ... and punishment without trial" comprise "illegitimate actions" that are ultimately "self-defeating." n216 In this vein, the Manual advocates moving "from combat operations to law enforcement as [\*1232] quickly as feasible." n217 In other words, the high profile and controversial nature of **killings outside conflict zones** and **detention without charge** can work to the advantage of terrorist groups and to the detriment of the state. Self-imposed **limits** on the use of detention without charge and targeted killing can **yield legitimacy and security benefits**. n218

#### Simulated national security law debates preserve agency and enhance decision-making---avoids cooption

Laura K. Donohue 13, Associate Professor of Law, Georgetown Law, 4/11, “National Security Law Pedagogy and the Role of Simulations”, http://jnslp.com/wp-content/uploads/2013/04/National-Security-Law-Pedagogy-and-the-Role-of-Simulations.pdf

The concept of simulations as an aspect of higher education, or in the law school environment, is not new.164 Moot court, after all, is a form of simulation and one of the oldest teaching devices in the law. What is new, however, is the idea of designing a civilian national security course that takes advantage of the doctrinal and experiential components of law school education and integrates the experience through a multi-day simulation. In 2009, I taught the first module based on this design at Stanford Law, which I developed the following year into a full course at Georgetown Law. It has since gone through multiple iterations. The initial concept followed on the federal full-scale Top Official (“TopOff”) exercises, used to train government officials to respond to domestic crises.165 It adapted a Tabletop Exercise, designed with the help of exercise officials at DHS and FEMA, to the law school environment. The Tabletop used one storyline to push on specific legal questions, as students, assigned roles in the discussion, sat around a table and for six hours engaged with the material. The problem with the Tabletop Exercise was that it was too static, and the rigidity of the format left little room, or time, for student agency. Unlike the government’s TopOff exercises, which gave officials the opportunity to fully engage with the many different concerns that arise in the course of a national security crisis as well as the chance to deal with externalities, the Tabletop focused on specific legal issues, even as it controlled for external chaos. The opportunity to provide a more full experience for the students came with the creation of first a one-day, and then a multi-day simulation. The course design and simulation continues to evolve. It offers a model for achieving the pedagogical goals outlined above, in the process developing a rigorous training ground for the next generation of national security lawyers.166 A. Course Design The central idea in structuring the NSL Sim 2.0 course was to bridge the gap between theory and practice by conveying doctrinal material and creating an alternative reality in which students would be forced to act upon legal concerns.167 The exercise itself is a form of problem-based learning, wherein students are given both agency and responsibility for the results. Towards this end, the structure must be at once bounded (directed and focused on certain areas of the law and legal education) and flexible (responsive to student input and decisionmaking). Perhaps the most significant weakness in the use of any constructed universe is the problem of authenticity. Efforts to replicate reality will inevitably fall short. There is simply too much uncertainty, randomness, and complexity in the real world. One way to address this shortcoming, however, is through design and agency. The scenarios with which students grapple and the structural design of the simulation must reflect the national security realm, even as students themselves must make choices that carry consequences. Indeed, to some extent, student decisions themselves must drive the evolution of events within the simulation.168 Additionally, while authenticity matters, it is worth noting that at some level the fact that the incident does not take place in a real-world setting can be a great advantage. That is, the simulation creates an environment where students can make mistakes and learn from these mistakes – without what might otherwise be devastating consequences. It also allows instructors to develop multiple points of feedback to enrich student learning in a way that would be much more difficult to do in a regular practice setting. NSL Sim 2.0 takes as its starting point the national security pedagogical goals discussed above. It works backwards to then engineer a classroom, cyber, and physical/simulation experience to delve into each of these areas. As a substantive matter, the course focuses on the constitutional, statutory, and regulatory authorities in national security law, placing particular focus on the interstices between black letter law and areas where the field is either unsettled or in flux. A key aspect of the course design is that it retains both the doctrinal and experiential components of legal education. Divorcing simulations from the doctrinal environment risks falling short on the first and third national security pedagogical goals: (1) analytical skills and substantive knowledge, and (3) critical thought. A certain amount of both can be learned in the course of a simulation; however, the national security crisis environment is not well-suited to the more thoughtful and careful analytical discussion. What I am thus proposing is a course design in which doctrine is paired with the type of experiential learning more common in a clinical realm. The former precedes the latter, giving students the opportunity to develop depth and breadth prior to the exercise. In order to capture problems related to adaptation and evolution, addressing goal [1(d)], the simulation itself takes place over a multi-day period. Because of the intensity involved in national security matters (and conflicting demands on student time), the model makes use of a multi-user virtual environment. The use of such technology is critical to creating more powerful, immersive simulations.169 It also allows for continual interaction between the players. Multi-user virtual environments have the further advantage of helping to transform the traditional teaching culture, predominantly concerned with manipulating textual and symbolic knowledge, into a culture where students learn and can then be assessed on the basis of their participation in changing practices.170 I thus worked with the Information Technology group at Georgetown Law to build the cyber portal used for NSL Sim 2.0. The twin goals of adaptation and evolution require that students be given a significant amount of agency and responsibility for decisions taken in the course of the simulation. To further this aim, I constituted a Control Team, with six professors, four attorneys from practice, a media expert, six to eight former simulation students, and a number of technology experts. Four of the professors specialize in different areas of national security law and assume roles in the course of the exercise, with the aim of pushing students towards a deeper doctrinal understanding of shifting national security law authorities. One professor plays the role of President of the United States. The sixth professor focuses on questions of professional responsibility. The attorneys from practice help to build the simulation and then, along with all the professors, assume active roles during the simulation itself. Returning students assist in the execution of the play, further developing their understanding of national security law. Throughout the simulation, the Control Team is constantly reacting to student choices. When unexpected decisions are made, professors may choose to pursue the evolution of the story to accomplish the pedagogical aims, or they may choose to cut off play in that area (there are various devices for doing so, such as denying requests, sending materials to labs to be analyzed, drawing the players back into the main storylines, and leaking information to the media). A total immersion simulation involves a number of scenarios, as well as systemic noise, to give students experience in dealing with the second pedagogical goal: factual chaos and information overload. The driving aim here is to teach students how to manage information more effectively. Five to six storylines are thus developed, each with its own arc and evolution. To this are added multiple alterations of the situation, relating to background noise. Thus, unlike hypotheticals, doctrinal problems, single-experience exercises, or even Tabletop exercises, the goal is not to eliminate external conditions, but to embrace them as part of the challenge facing national security lawyers. The simulation itself is problem-based, giving players agency in driving the evolution of the experience – thus addressing goal [2(c)]. This requires a realtime response from the professor(s) overseeing the simulation, pairing bounded storylines with flexibility to emphasize different areas of the law and the students’ practical skills. Indeed, each storyline is based on a problem facing the government, to which players must then respond, generating in turn a set of new issues that must be addressed. The written and oral components of the simulation conform to the fourth pedagogical goal – the types of situations in which national security lawyers will find themselves. Particular emphasis is placed on nontraditional modes of communication, such as legal documents in advance of the crisis itself, meetings in the midst of breaking national security concerns, multiple informal interactions, media exchanges, telephone calls, Congressional testimony, and formal briefings to senior level officials in the course of the simulation as well as during the last class session. These oral components are paired with the preparation of formal legal instruments, such as applications to the Foreign Intelligence Surveillance Court, legal memos, applications for search warrants under Title III, and administrative subpoenas for NSLs. In addition, students are required to prepare a paper outlining their legal authorities prior to the simulation – and to deliver a 90 second oral briefing after the session. To replicate the high-stakes political environment at issue in goals (1) and (5), students are divided into political and legal roles and assigned to different (and competing) institutions: the White House, DoD, DHS, HHS, DOJ, DOS, Congress, state offices, nongovernmental organizations, and the media. This requires students to acknowledge and work within the broader Washington context, even as they are cognizant of the policy implications of their decisions. They must get used to working with policymakers and to representing one of many different considerations that decisionmakers take into account in the national security domain. Scenarios are selected with high consequence events in mind, to ensure that students recognize both the domestic and international dimensions of national security law. Further alterations to the simulation provide for the broader political context – for instance, whether it is an election year, which parties control different branches, and state and local issues in related but distinct areas. The media is given a particularly prominent role. One member of the Control Team runs an AP wire service, while two student players represent print and broadcast media, respectively. The Virtual News Network (“VNN”), which performs in the second capacity, runs continuously during the exercise, in the course of which players may at times be required to appear before the camera. This media component helps to emphasize the broader political context within which national security law is practiced. Both anticipated and unanticipated decisions give rise to ethical questions and matters related to the fifth goal: professional responsibility. The way in which such issues arise stems from simulation design as well as spontaneous interjections from both the Control Team and the participants in the simulation itself. As aforementioned, professors on the Control Team, and practicing attorneys who have previously gone through a simulation, focus on raising decision points that encourage students to consider ethical and professional considerations. Throughout the simulation good judgment and leadership play a key role, determining the players’ effectiveness, with the exercise itself hitting the aim of the integration of the various pedagogical goals. Finally, there are multiple layers of feedback that players receive prior to, during, and following the simulation to help them to gauge their effectiveness. The Socratic method in the course of doctrinal studies provides immediate assessment of the students’ grasp of the law. Written assignments focused on the contours of individual players’ authorities give professors an opportunity to assess students’ level of understanding prior to the simulation. And the simulation itself provides real-time feedback from both peers and professors. The Control Team provides data points for player reflection – for instance, the Control Team member playing President may make decisions based on player input, giving students an immediate impression of their level of persuasiveness, while another Control Team member may reject a FISC application as insufficient. The simulation goes beyond this, however, focusing on teaching students how to develop (6) opportunities for learning in the future. Student meetings with mentors in the field, which take place before the simulation, allow students to work out the institutional and political relationships and the manner in which law operates in practice, even as they learn how to develop mentoring relationships. (Prior to these meetings we have a class discussion about mentoring, professionalism, and feedback). Students, assigned to simulation teams about one quarter of the way through the course, receive peer feedback in the lead-up to the simulation and during the exercise itself. Following the simulation the Control Team and observers provide comments. Judges, who are senior members of the bar in the field of national security law, observe player interactions and provide additional debriefing. The simulation, moreover, is recorded through both the cyber portal and through VNN, allowing students to go back to assess their performance. Individual meetings with the professors teaching the course similarly follow the event. Finally, students end the course with a paper reflecting on their performance and the issues that arose in the course of the simulation, develop frameworks for analyzing uncertainty, tension with colleagues, mistakes, and successes in the future. B. Substantive Areas: Interstices and Threats As a substantive matter, NSL Sim 2.0 is designed to take account of areas of the law central to national security. It focuses on specific authorities that may be brought to bear in the course of a crisis. The decision of which areas to explore is made well in advance of the course. It is particularly helpful here to think about national security authorities on a continuum, as a way to impress upon students that there are shifting standards depending upon the type of threat faced. One course, for instance, might center on the interstices between crime, drugs, terrorism and war. Another might address the intersection of pandemic disease and biological weapons. A third could examine cybercrime and cyberterrorism. This is the most important determination, because the substance of the doctrinal portion of the course and the simulation follows from this decision. For a course focused on the interstices between pandemic disease and biological weapons, for instance, preliminary inquiry would lay out which authorities apply, where the courts have weighed in on the question, and what matters are unsettled. Relevant areas might include public health law, biological weapons provisions, federal quarantine and isolation authorities, habeas corpus and due process, military enforcement and posse comitatus, eminent domain and appropriation of land/property, takings, contact tracing, thermal imaging and surveillance, electronic tagging, vaccination, and intelligence-gathering. The critical areas can then be divided according to the dominant constitutional authority, statutory authorities, regulations, key cases, general rules, and constitutional questions. This, then, becomes a guide for the doctrinal part of the course, as well as the grounds on which the specific scenarios developed for the simulation are based. The authorities, simultaneously, are included in an electronic resource library and embedded in the cyber portal (the Digital Archives) to act as a closed universe of the legal authorities needed by the students in the course of the simulation. Professional responsibility in the national security realm and the institutional relationships of those tasked with responding to biological weapons and pandemic disease also come within the doctrinal part of the course. The simulation itself is based on five to six storylines reflecting the interstices between different areas of the law. The storylines are used to present a coherent, non-linear scenario that can adapt to student responses. Each scenario is mapped out in a three to seven page document, which is then checked with scientists, government officials, and area experts for consistency with how the scenario would likely unfold in real life. For the biological weapons and pandemic disease emphasis, for example, one narrative might relate to the presentation of a patient suspected of carrying yersinia pestis at a hospital in the United States. The document would map out a daily progression of the disease consistent with epidemiological patterns and the central actors in the story: perhaps a U.S. citizen, potential connections to an international terrorist organization, intelligence on the individual’s actions overseas, etc. The scenario would be designed specifically to stress the intersection of public health and counterterrorism/biological weapons threats, and the associated (shifting) authorities, thus requiring the disease initially to look like an innocent presentation (for example, by someone who has traveled from overseas), but then for the storyline to move into the second realm (awareness that this was in fact a concerted attack). A second storyline might relate to a different disease outbreak in another part of the country, with the aim of introducing the Stafford Act/Insurrection Act line and raising federalism concerns. The role of the military here and Title 10/Title 32 questions would similarly arise – with the storyline designed to raise these questions. A third storyline might simply be well developed noise in the system: reports of suspicious activity potentially linked to radioactive material, with the actors linked to nuclear material. A fourth storyline would focus perhaps on container security concerns overseas, progressing through newspaper reports, about containers showing up in local police precincts. State politics would constitute the fifth storyline, raising question of the political pressures on the state officials in the exercise. Here, ethnic concerns, student issues, economic conditions, and community policing concerns might become the focus. The sixth storyline could be further noise in the system – loosely based on current events at the time. In addition to the storylines, a certain amount of noise is injected into the system through press releases, weather updates, private communications, and the like. The five to six storylines, prepared by the Control Team in consultation with experts, become the basis for the preparation of scenario “injects:” i.e., newspaper articles, VNN broadcasts, reports from NGOs, private communications between officials, classified information, government leaks, etc., which, when put together, constitute a linear progression. These are all written and/or filmed prior to the exercise. The progression is then mapped in an hourly chart for the unfolding events over a multi-day period. All six scenarios are placed on the same chart, in six columns, giving the Control Team a birds-eye view of the progression. C. How It Works As for the nuts and bolts of the simulation itself, it traditionally begins outside of class, in the evening, on the grounds that national security crises often occur at inconvenient times and may well involve limited sleep and competing demands.171 Typically, a phone call from a Control Team member posing in a role integral to one of the main storylines, initiates play. Students at this point have been assigned dedicated simulation email addresses and provided access to the cyber portal. The portal itself gives each team the opportunity to converse in a “classified” domain with other team members, as well as access to a public AP wire and broadcast channel, carrying the latest news and on which press releases or (for the media roles) news stories can be posted. The complete universe of legal authorities required for the simulation is located on the cyber portal in the Digital Archives, as are forms required for some of the legal instruments (saving students the time of developing these from scratch in the course of play). Additional “classified” material – both general and SCI – has been provided to the relevant student teams. The Control Team has access to the complete site. For the next two (or three) days, outside of student initiatives (which, at their prompting, may include face-to-face meetings between the players), the entire simulation takes place through the cyber portal. The Control Team, immediately active, begins responding to player decisions as they become public (and occasionally, through monitoring the “classified” communications, before they are released). This time period provides a ramp-up to the third (or fourth) day of play, allowing for the adjustment of any substantive, student, or technology concerns, while setting the stage for the breaking crisis. The third (or fourth) day of play takes place entirely at Georgetown Law. A special room is constructed for meetings between the President and principals, in the form of either the National Security Council or the Homeland Security Council, with breakout rooms assigned to each of the agencies involved in the NSC process. Congress is provided with its own physical space, in which meetings, committee hearings and legislative drafting can take place. State government officials are allotted their own area, separate from the federal domain, with the Media placed between the three major interests. The Control Team is sequestered in a different area, to which students are not admitted. At each of the major areas, the cyber portal is publicly displayed on large flat panel screens, allowing for the streaming of video updates from the media, AP wire injects, articles from the students assigned to represent leading newspapers, and press releases. Students use their own laptop computers for team decisions and communication. As the storylines unfold, the Control Team takes on a variety of roles, such as that of the President, Vice President, President’s chief of staff, governor of a state, public health officials, and foreign dignitaries. Some of the roles are adopted on the fly, depending upon player responses and queries as the storylines progress. Judges, given full access to each player domain, determine how effectively the students accomplish the national security goals. The judges are themselves well-experienced in the practice of national security law, as well as in legal education. They thus can offer a unique perspective on the scenarios confronted by the students, the manner in which the simulation unfolded, and how the students performed in their various capacities. At the end of the day, the exercise terminates and an immediate hotwash is held, in which players are first debriefed on what occurred during the simulation. Because of the players’ divergent experiences and the different roles assigned to them, the students at this point are often unaware of the complete picture. The judges and formal observers then offer reflections on the simulation and determine which teams performed most effectively. Over the next few classes, more details about the simulation emerge, as students discuss it in more depth and consider limitations created by their knowledge or institutional position, questions that arose in regard to their grasp of the law, the types of decision-making processes that occurred, and the effectiveness of their – and other students’ – performances. Reflection papers, paired with oral briefings, focus on the substantive issues raised by the simulation and introduce the opportunity for students to reflect on how to create opportunities for learning in the future. The course then formally ends.172 Learning, however, continues beyond the temporal confines of the semester. Students who perform well and who would like to continue to participate in the simulations are invited back as members of the control team, giving them a chance to deepen their understanding of national security law. Following graduation, a few students who go in to the field are then invited to continue their affiliation as National Security Law fellows, becoming increasingly involved in the evolution of the exercise itself. This system of vertical integration helps to build a mentoring environment for the students while they are enrolled in law school and to create opportunities for learning and mentorship post-graduation. It helps to keep the exercise current and reflective of emerging national security concerns. And it builds a strong community of individuals with common interests. CONCLUSION The legal academy has, of late, been swept up in concern about the economic conditions that affect the placement of law school graduates. The image being conveyed, however, does not resonate in every legal field. It is particularly inapposite to the burgeoning opportunities presented to students in national security. That the conversation about legal education is taking place now should come as little surprise. Quite apart from economic concern is the traditional introspection that follows American military engagement. It makes sense: law overlaps substantially with political power, being at once both the expression of government authority and the effort to limit the same. The one-size fits all approach currently dominating the conversation in legal education, however, appears ill-suited to address the concerns raised in the current conversation. Instead of looking at law across the board, greater insight can be gleaned by looking at the specific demands of the different fields themselves. This does not mean that the goals identified will be exclusive to, for instance, national security law, but it does suggest there will be greater nuance in the discussion of the adequacy of the current pedagogical approach. With this approach in mind, I have here suggested six pedagogical goals for national security. For following graduation, students must be able to perform in each of the areas identified – (1) understanding the law as applied, (2) dealing with factual chaos and uncertainty, (3) obtaining critical distance, (4) developing nontraditional written and oral communication skills, (5) exhibiting leadership, integrity, and good judgment in a high-stakes, highly-charged environment, and (6) creating continued opportunities for self-learning. They also must learn how to integrate these different skills into one experience, to ensure that they will be most effective when they enter the field. The problem with the current structures in legal education is that they fall short, in important ways, from helping students to meet these goals. Doctrinal courses may incorporate a range of experiential learning components, such as hypotheticals, doctrinal problems, single exercises, extended or continuing exercises, and tabletop exercises. These are important classroom devices. The amount of time required for each varies, as does the object of the exercise itself. But where they fall short is in providing a more holistic approach to national security law which will allow for the maximum conveyance of required skills. Total immersion simulations, which have not yet been addressed in the secondary literature for civilian education in national security law, may provide an important way forward. Such simulations also cure shortcomings in other areas of experiential education, such as clinics and moot court. It is in an effort to address these concerns that I developed the simulation model above. NSL Sim 2.0 certainly is not the only solution, but it does provide a starting point for moving forward. The approach draws on the strengths of doctrinal courses and embeds a total immersion simulation within a course. It makes use of technology and physical space to engage students in a multi-day exercise, in which they are given agency and responsibility for their decision making, resulting in a steep learning curve. While further adaptation of this model is undoubtedly necessary, it suggests one potential direction for the years to come.

#### Prefer specificity—simulation about war powers is uniquely empowering

Laura K. Donohue 13, Associate Professor of Law, Georgetown Law, 4/11, National Security Law Pedagogy and the Role of Simulations, http://jnslp.com/wp-content/uploads/2013/04/National-Security-Law-Pedagogy-and-the-Role-of-Simulations.pdf

2. Factual Chaos and Uncertainty¶ One of the most important skills for students going into national security law is the ability to deal with factual chaos. The presentation of factual chaos significantly differs from the traditional model of legal education, in which students are provided a set of facts which they must analyze. Lawyers working in national security law must figure out what information they need, integrate enormous amounts of data from numerous sources, determine which information is reliable and relevant, and proceed with analysis and recommendations. Their recommendations, moreover, must be based on contingent conditions: facts may be classified and unavailable to the legal analyst, or facts may change as new information emerges. This is as true for government lawyers as it is for those outside of governmental structures. They must be aware of what is known, what is unsure, what is unknown, and the possibility of changing circumstances, and they must advise their clients, from the beginning, how the legal analysis might shift if the factual basis alters. a. Chaos. Concern about information overload in the national security environment is not new: in the 1970s scholars discussed and debated how to handle the sequential phases of intelligence gathering and analysis in a manner that yielded an optimal result.132 But the digital revolution has exponentially transformed the quantitative terms of reference, the technical means of collection and analysis, and the volume of information available. The number of sources of information – not least in the online world – is staggering. Added to this is the rapid expansion in national security law itself: myriad new Executive Orders, Presidential Directives, institutions, programs, statutes, regulations, lawsuits, and judicial decisions mean that national security law itself is rapidly changing. Lawyers inside and outside of government must keep abreast of constantly evolving authorities. The international arena too is in flux, as global entities, such as the United Nations, the European Court of Human Rights, the G-7/G-8, and other countries, introduce new instruments whose reach includes U.S. interests. Rapid geopolitical changes relating to critical national security concerns, such as worldwide financial flows, the Middle East, the Arab Spring, South American drug cartels, North Korea, the former Soviet Union, China, and other issues require lawyers to keep up on what is happening globally as a way of understanding domestic concerns. Further expanding the information overload is the changing nature of what constitutes national security itself.133 In sum, the sheer amount of information the national security lawyer needs to assimilate is significant. The basic skills required in the 1970s thus may be similar – such as the ability (a) to know where to look for relevant and reliable information; (b) to obtain the necessary information in the most efficient manner possible; (c) to quickly discern reliable from unreliable information; (d) to know what data is critical; and (e) to ascertain what is as yet unknown or contingent on other conditions. But the volume of information, the diversity of information sources, and the heavy reliance on technology requires lawyers to develop new skills. They must be able to obtain the right information and to ignore chaos to focus on the critical issues. These features point in opposite directions – i.e., a broadening of knowledge and a narrowing of focus. A law school system built on the gradual and incremental advance of law, bolstered or defeated by judicial decisions and solidified through the adhesive nature of stare decisis appears particularly inapposite for this rapidly-changing environment. An important question that will thus confront students upon leaving the legal academy is how to keep abreast of rapidly changing national security and geopolitical concerns in an information-rich world in a manner that allows for capture of relevant information, while retaining the ability to focus on the immediate task at hand. Staying ahead of the curve requires developing a sense of timing – when to respond to important legal and factual shifts – and identifying the best means of doing so. Again, this applies to government and non-government employees. How should students prioritize certain information and then act upon it? This, too, is an aspect of information overload. b. Uncertainty. National security law proves an information-rich, factuallydriven environment. The ability to deal with such chaos may be hampered by gaps in the information available and the difficulty of engaging in complex fact-finding – a skill often **under-taught** in law school. Investigation of relevant information may need to reach far afield in order to generate careful legal analysis. Uncertainty here plays a key role. In determining, for instance, the contours of quarantine authority, lawyers may need to understand how the pandemic in question works, where there have been outbreaks, how it will spread, what treatments are available, which social distancing measures may prove most effective, what steps are being taken locally, at a state-level, and internationally, and the like. Lawyers in non-profit organizations, legal academics, in-house attorneys, and others, in turn, working in the field, must learn how to find out the relevant information before commenting on new programs and initiatives, agreeing to contractual terms, or advising clients on the best course of action. For both government and non-government lawyers, the secrecy inherent in the field is of great consequence. The key here is learning to ask intelligent questions to generate the best legal analysis possible. It may be the case that national security lawyers are not aware of the facts they are missing – facts that would be central to legal analysis. This phenomenon front-loads the type of advice and discussions in which national security lawyers must engage. It means that analysis must be given in a transparent manner, contingent on a set of facts currently known, with indication given up front as to how that analysis might change, should the factual basis shift. This is particularly true of government attorneys, who may be advising policymakers who may or may not have a background in the law and who may have access to more information than the attorney. Signaling the key facts on which the legal decision rests with the caveat that the legal analysis of the situation might change if the facts change, provides for more robust consideration of critically important issues. c. Creative Problem Solving. Part of dealing with factual uncertainty in a rapidly changing environment is learning how to construct new ways to address emerging issues. Admittedly, much has been made in the academy about the importance of problem-based learning as a method in developing students’ critical thinking skills.134 Problem-solving, however, is not merely a method of teaching. It is itself a goal for the type of activities in which lawyers will be engaged. The means-ends distinction is an important one to make here. Problemsolving in a classroom environment may be merely a conduit for learning a specific area of the law or a limited set of skills. But problem-solving as an end suggests the accumulation of a **broader set of tools,** such as familiarity with multidisciplinary approaches, creativity and originality, sequencing, collaboration, identification of contributors’ expertise, and how to leverage each skill set. This goal presents itself in the context of fact-finding, but it draws equally on strong understanding of legal authorities and practices, the Washington context, and policy considerations. Similarly, like the factors highlighted in the first pedagogical goal, adding to the tensions inherent in factual analysis is the abbreviated timeline in which national security attorneys must operate. Time may not be a commodity in surplus. This means that national security legal education must not only develop students’ complex fact-finding skills and their ability to provide contingent analysis, but it must teach them how to **swiftly and efficiently engage** in these activities. 3. Critical Distance As was recognized more than a century ago, analytical skills by themselves are insufficient training for individuals moving into the legal profession.135 Critical thinking provides the necessary distance from the law that is required in order to move the legal system forward. Critical thought, influenced by the Ancient Greek tradition, finds itself bound up in the Socratic method of dialogue that continues to define the legal academy. But it goes beyond such constructs as well. Scholars and educators disagree, of course, on what exactly critical thinking entails.136 For purposes of our present discussion, I understand it as the metaconversation in the law. Whereas legal analysis and substantive knowledge focus on the law as it is and how to work within the existing structures, critical thought provides distance and allows students to engage in purposeful discussion of theoretical constructs that deepen our understanding of both the actual and potential constructs of law. It is inherently reflective. For the purpose of practicing national security law, critical thought is paramount. This is true partly because of the unique conditions that tend to accompany the introduction of national security provisions: these are often introduced in the midst of an emergency. Their creation of new powers frequently has significant implications for distribution of authority at a federal level, a diminished role for state and local government in the federalism realm, and a direct impact on individual rights.137 Constitutional implications demand careful scrutiny. Yet at the time of an attack, enormous pressure is on officials and legislators to act and to be seen to act to respond.138 With the impact on rights, in particular, foremost in legislators’ minds, the first recourse often is to make any new powers temporary. However, they rarely turn out to be so, instead becoming embedded in the legislative framework and providing a baseline on which further measures are built.139 In order to withdraw them, legislators must demonstrate either that the provisions are not effective or that no violence will ensue upon their withdrawal (either way, a demanding proof). Alternatively, legislators would have to acknowledge that some level of violence may be tolerated – a step no politician is willing to take. Any new powers, introduced in the heat of the moment, may become a permanent part of the statutory and regulatory regime. They may not operate the way in which they were intended. They may impact certain groups in a disparate manner. They may have unintended and detrimental consequences. Therefore, it is necessary for national security lawyers to be able to view such provisions, and related policy decisions, from a distance and to be able to think through them outside of the contemporary context. There are many other reasons such critical analysis matters that reflect in other areas of the law. The ability to recognize problems, articulate underlying assumptions and values, understand how language is being used, assess whether argument is logical, test conclusions, and determine and analyze pertinent information depends on critical thinking skills. Indeed, one could draw argue that it is the goal of higher education to build the capacity to engage in critical thought. **Deeply humanistic theories underlie this approach**. The ability to develop discerning judgment – the very meaning of the Greek term, 􏰀􏰁􏰂􏰃􏰄􏰅􏰆 – provides the basis for advancing the human condition through reason and intellectual engagement. Critical thought as used in practicing national security law may seem somewhat antithetical to the general legal enterprise in certain particulars. For government lawyers and consultants, there may be times in which not providing legal advice, when asked for it, may be as important as providing it. That is, it may be important not to put certain options on the table, with legal justifications behind them. Questions whether to advise or not to advise are bound up in considerations of policy, professional responsibility, and ethics. They may also relate to questions as to who one’s client is in the world of national security law.140 It may be unclear whether and at what point one’s client is a supervisor, the legal (or political) head of an agency, a cross-agency organization, the White House, the Constitution, or the American public. Depending upon this determination, the national security lawyer may or may not want to provide legal advice to one of the potential clients. Alternatively, such a lawyer may want to call attention to certain analyses to other clients. Determining when and how to act in these circumstances requires critical distance. 4. Nontraditional Written and Oral Communication Skills Law schools have long focused on written and oral communication skills that are central to the practice of law. Brief writing, scholarly analysis, criminal complaints, contractual agreements, trial advocacy, and appellate arguments constitute standard fare. What is perhaps unique about the way communication skills are used in the national security world is the importance of non-traditional modes of legal communication such as concise (and precise) oral briefings, email exchanges, private and passing conversations, agenda setting, meeting changed circumstances, and communications built on swiftly evolving and uncertain information. For many of these types of communications speed may be of the essence – and unlike the significant amounts of time that accompany preparation of lengthy legal documents (and the painstaking preparation for oral argument that marks moot court preparations.) Much of the activity that goes on within the Executive Branch occurs within a hierarchical system, wherein those closest to the issues have exceedingly short amounts of time to deliver the key points to those with the authority to exercise government power. Unexpected events, shifting conditions on the ground, and deadlines require immediate input, without the opportunity for lengthy consideration of the different facets of the issue presented. This is a different type of activity from the preparation of an appellate brief, for instance, involving a fuller exposition of the issues involved. It is closer to a blend of Supreme Court oral argument and witness crossexamination – although national security lawyers often may not have the luxury of the months, indeed, years, that cases take to evolve to address the myriad legal questions involved. Facts on which the legal analysis rests, moreover, as discussed above, may not be known. This has substantive implications for written and oral communications. Tension between the level of legal analysis possible and the national security process itself may lead to a different norm than in other areas of the law. Chief Judge Baker explains, If lawyers insist on knowing all the facts all the time, before they are willing to render advice, or, if they insist on preparing a written legal opinion in response to every question, then national security process would become dysfunctional. The delay alone would cause the policymaker to avoid, and perhaps evade, legal review.141 Simultaneously, lawyers cannot function without some opportunity to look carefully at the questions presented and to consult authoritative sources. “The art of lawyering in such context,” Baker explains, “lies in spotting the issue, accurately identifying the timeline for decision, and applying a meaningful degree of formal or informal review in response.”142 The lawyer providing advice must resist the pressure of the moment and yet still be responsive to the demand for swift action. The resulting written and oral communications thus may be shaped in different ways. Unwilling to bind clients’ hands, particularly in light of rapidly-changing facts and conditions, the potential for nuance to be lost is considerable. The political and historical overlay of national security law here matters. In some circumstances, even where written advice is not formally required, it may be in the national security lawyer’s best interests to commit informal advice to paper in the form of an email, notation, or short memo. The process may serve to provide an external check on the pressures that have been internalized, by allowing the lawyer to separate from the material and read it. It may give the lawyer the opportunity to have someone subject it to scrutiny. Baker suggests that “on issues of importance, even where the law is clear, as well as situations where novel positions are taken, lawyers should record their informal advice in a formal manner so that they may be held accountable for what they say, and what they don’t say.”143 Written and oral communication may occur at highly irregular moments – yet it is at these moments (in the elevator, during an email exchange, at a meeting, in the course of a telephone call), that critical legal and constitutional decisions are made. This model departs from the formalized nature of legal writing and research. Yet it is important that students are prepared for these types of written and oral communication as an ends in and of themselves. 5. Leadership, Integrity and Good Judgment National security law often takes place in a high stakes environment. There is tremendous pressure on attorneys operating in the field – not least because of the coercive nature of the authorities in question. The classified environment also plays a key role: many of the decisions made will never be known publicly, nor will they be examined outside of a small group of individuals – much less in a court of law. In this context, leadership, integrity, and good judgment stand paramount. The types of powers at issue in national security law are among the most coercive authorities available to the government. Decisions may result in the death of one or many human beings, the abridgment of rights, and the bypassing of protections otherwise incorporated into the law. The amount of pressure under which this situation places attorneys is of a higher magnitude than many other areas of the law. Added to this pressure is the highly political nature of national security law and the necessity of understanding the broader Washington context, within which individual decision-making, power relations, and institutional authorities compete. Policy concerns similarly dominate the landscape. It is not enough for national security attorneys to claim that they simply deal in legal advice. Their analyses carry consequences for those exercising power, for those who are the targets of such power, and for the public at large. The function of leadership in this context may be more about process than substantive authority. It may be a willingness to act on critical thought and to accept the impact of legal analysis. It is closely bound to integrity and professional responsibility and the ability to retain good judgment in extraordinary circumstances. Equally critical in the national security realm is the classified nature of so much of what is done in national security law. All data, for instance, relating to the design, manufacture, or utilization of atomic weapons, the production of special nuclear material, or the use of nuclear material in the production of energy is classified from birth.144 NSI, the bread and butter of the practice of national security law, is similarly classified. U.S. law defines NSI as “information which pertains to the national defense and foreign relations (National Security) of the United States and is classified in accordance with an Executive Order.” Nine primary Executive Orders and two subsidiary orders have been issued in this realm.145 The sheer amount of information incorporated within the classification scheme is here relevant. While original classification authorities have steadily decreased since 1980, and the number of original classification decisions is beginning to fall, the numbers are still high: in fiscal year 2010, for instance, there were nearly 2,300 original classification authorities and almost 225,000 original classification decisions.146 The classification realm, moreover, in which national security lawyers are most active, is expanding. Derivative classification decisions – classification resulting from the incorporation, paraphrasing, restating, or generation of classified information in some new form – is increasing. In FY 2010, there were more than seventy-six million such decisions made.147 This number is triple what it was in FY 2008. Legal decisions and advice tend to be based on information already classified relating to programs, initiatives, facts, intelligence, and previously classified legal opinions. The key issue here is that with so much of the essential information, decisionmaking, and executive branch jurisprudence necessarily secret, lawyers are limited in their opportunity for outside appraisal and review. Even within the executive branch, stove-piping occurs. The use of secure compartmentalized information (SCI) further compounds this problem as only a limited number of individuals – much less lawyers – may be read into a program. This diminishes the opportunity to identify and correct errors or to engage in debate and discussion over the law. Once a legal opinion is drafted, the opportunity to expose it to other lawyers may be restricted. The effect may be felt for decades, as successive Administrations reference prior legal decisions within certain agencies. The Office of Legal Counsel, for instance, has an entire body of jurisprudence that has never been made public, which continues to inform the legal analysis provided to the President. Only a handful of people at OLC may be aware of the previous decisions. They are prevented by classification authorities from revealing these decisions. This results in a sort of generational secret jurisprudence. Questions related to professional responsibility thus place the national security lawyer in a difficult position: not only may opportunities to check factual data or to consult with other attorneys be limited, but the impact of legal advice rendered may be felt for years to come. The problem extends beyond the executive branch. There are limited opportunities, for instance, for external judicial review. Two elements are at work here: first, very few cases involving national security concerns make it into court. Much of what is happening is simply not known. Even when it is known, it may be impossible to demonstrate standing – a persistent problem with regard to challenging, for instance, surveillance programs. Second, courts have historically proved particularly reluctant to intervene in national security matters. Judicially-created devices such as political question doctrine and state secrets underscore the reluctance of the judiciary to second-guess the executive in this realm. The exercise of these doctrines is increasing in the post-9/11 environment. Consider state secrets. While much was made of some five to seven state secrets cases that came to court during the Bush administration, in more than 100 cases the executive branch formally invoked state secrets, which the courts accepted.148 Many times judges did not even bother to look at the evidence in question before blocking it and/or dismissing the suit. In numerous additional cases, the courts treated the claims as though state secrets had been asserted – even where the doctrine had not been formally invoked.149 In light of these pressures – the profound consequences of many national security decisions, the existence of stovepiping even within the executive branch, and limited opportunity for external review – the practice of national security law requires a particularly rigorous and committed adherence to ethical standards and professional responsibility. This is a unique world in which there are enormous pressures, with potentially few external consequences for not acting in accordance with high standards. **It thus becomes particularly important, from a pedagogical perspective, to think through the types of situations that national security attorneys may face, and to address the types of questions** related to professional responsibility **that will confront them** in the course of their careers. Good judgment and leadership similarly stand paramount. These skills, like many of those discussed, may also be relevant to other areas of the law; however, the way in which they become manifest in national security law may be different in important ways. Good judgment, for instance, may mean any number of things, depending upon the attorney’s position within the political hierarchy. Policymaking positions will be considerably different from the provision of legal advice to policymakers. Leadership, too, may mean something different in this field intimately tied to political circumstance. It may mean breaking ranks with the political hierarchy, visibly adopting unpopular public or private positions, or resigning when faced by unethical situations. It may mean creating new bureaucratic structures to more effectively respond to threats. It may mean holding off clients until the attorneys within one’s group have the opportunity to look at issues while still being sensitive to the political needs of the institution. Recourse in such situations may be political, either through public statements and use of the media, or by going to different branches of government for a solution. 6. Creating Opportunities for Learning In addition to the above skills, national security lawyers must be able to engage in continuous self-learning in order to improve their performance. They must be able to identify new and emerging legal and political authorities and processes, systems for handling factual chaos and uncertainty, mechanisms to ensure critical distance, evaluating written and oral performance, and analyzing leadership skills. Law schools do not traditionally focus on how to teach students to continue their learning beyond the walls of academia. Yet **it is vital for their future success to give students the ability to** create conditions of learning.

# 2AC

### AT: Fear Bad

#### Threats real and not constructed – haven’t contested specificity of our aff internals

**Knudsen 1**– PoliSci Professor at Sodertorn (Olav, Post-Copenhagen Security Studies, Security Dialogue 32:3)

Moreover, I have a problem with the underlying implication that it is unimportant whether states 'really' face dangers from other states or groups. In the Copenhagen school, threats are seen as coming mainly from the actors' own fears, or from what happens when the fears of individuals turn into paranoid political action. In my view, this emphasis on the subjective is a **misleading conception of threat**, in that it discounts an independent existence for what- ever is perceived as a threat. Granted, political life is often marked by misperceptions, mistakes, pure imaginations, ghosts, or mirages, but such phenomena **do not occur simultaneously** to large numbers of politicians, and **hardly most of the time**. During the Cold War, threats - in the sense of plausible possibilities of danger - referred to 'real' phenomena, and they **refer to 'real' phenomena** now. The objects referred to are often not the same, but that is a different matter. Threats have to be dealt with both ín terms of perceptions and in terms of the phenomena which are perceived to be threatening. The point of Waever’s concept of security is not the potential existence of danger somewhere but the use of the word itself by political elites. In his 1997 PhD dissertation, he writes, ’One can View “security” as that which is in language theory called a speech act: it is not interesting as a sign referring to something more real - it is the utterance itself that is the act.’24 The deliberate disregard of objective factors is even more explicitly stated in Buzan & WaeVer’s joint article of the same year.” As a consequence, the phenomenon of threat is reduced to a matter of pure domestic politics.” It seems to me that the security dilemma, as a central notion in security studies, then loses its foundation. Yet I see that Waever himself has no compunction about referring to the security dilemma in a recent article." This discounting of the objective aspect of threats shifts security studies to insignificant concerns. What has long made 'threats' and ’threat perceptions’ important phenomena in the study of IR is the implication that **urgent action may be required**. Urgency, of course, is where Waever first began his argument in favor of an alternative security conception, because a convincing sense of urgency has been the chief culprit behind the abuse of 'security' and the consequent ’politics of panic', as Waever aptly calls it.” Now, here - in the case of urgency - another baby is thrown out with the Waeverian bathwater. When real situations of urgency arise, those situations are challenges to democracy; they are actually at the core of the problematic arising with the process of making security policy in parliamentary democracy. But in Waever’s world, threats are merely more or less persuasive, and the claim of urgency is just another argument. I hold that instead of 'abolishing' threatening phenomena ’out there’ by reconceptualizing them, as Waever does, we should continue paying attention to them, because **situations with a credible claim to urgency will keep coming back** and then we need to know more about how they work in the interrelations of groups and states (such as civil wars, for instance), not least to find adequate democratic procedures for dealing with them.

#### Apocalypticism is good---causes productive change

Bruce Tonn 6 – Department of Political Science, University of Tennessee, and Jenna Tonn, Department of the History of Science, Harvard University – Futures 41 (2009) 760–765 – obtained via Science Direct

This discussion has largely been focused on the historical precedents for a secular tradition of writing about human extinction. Although literary studies may seem outside of the scope of futures studies, authors like Mary Wollstonecraft Shelley, H.G. Wells, Aldous Huxley, and Margaret Atwood present compelling visions of the future and generate discussions about the imagination of human extinction and the art of writing its scenarios. Furthermore a literary analysis of the apocalyptic mode of writing offers new insights into the reasons why the narrative of human extinction is so powerful and provides background texts that might help shape and inspire future extinction scenarios. D.H. Lawrence once asked: ‘‘What does the Apocalypse matter, unless in so far as it gives us imaginative release into another vital world? After all, what meaning has the Apocalypse? For the ordinary reader, not much’’ [28]. The goal of this edition is to address D.H. Lawrence’s questions and to prove to the ordinary reader that **thinking about human extinction an integral step toward changing the present state of the world.**

## K – Top Shelf

### Simulation Good

#### Simulated national security law debates preserve agency and enhance decision-making---avoids cooption

Laura K. Donohue 13, Associate Professor of Law, Georgetown Law, 4/11, “National Security Law Pedagogy and the Role of Simulations”, http://jnslp.com/wp-content/uploads/2013/04/National-Security-Law-Pedagogy-and-the-Role-of-Simulations.pdf

The concept of simulations as an aspect of higher education, or in the law school environment, is not new.164 Moot court, after all, is a form of simulation and one of the oldest teaching devices in the law. What is new, however, is the idea of designing a civilian national security course that takes advantage of the doctrinal and experiential components of law school education and integrates the experience through a multi-day simulation. In 2009, I taught the first module based on this design at Stanford Law, which I developed the following year into a full course at Georgetown Law. It has since gone through multiple iterations. The initial concept followed on the federal full-scale Top Official (“TopOff”) exercises, used to train government officials to respond to domestic crises.165 It adapted a Tabletop Exercise, designed with the help of exercise officials at DHS and FEMA, to the law school environment. The Tabletop used one storyline to push on specific legal questions, as students, assigned roles in the discussion, sat around a table and for six hours engaged with the material. The problem with the Tabletop Exercise was that it was too static, and the rigidity of the format left little room, or time, for student agency. Unlike the government’s TopOff exercises, which gave officials the opportunity to fully engage with the many different concerns that arise in the course of a national security crisis as well as the chance to deal with externalities, the Tabletop focused on specific legal issues, even as it controlled for external chaos. The opportunity to provide a more full experience for the students came with the creation of first a one-day, and then a multi-day simulation. The course design and simulation continues to evolve. It offers a model for achieving the pedagogical goals outlined above, in the process developing a rigorous training ground for the next generation of national security lawyers.166 A. Course Design The central idea in structuring the NSL Sim 2.0 course was to bridge the gap between theory and practice by conveying doctrinal material and creating an alternative reality in which students would be forced to act upon legal concerns.167 The exercise itself is a form of problem-based learning, wherein students are given both agency and responsibility for the results. Towards this end, the structure must be at once bounded (directed and focused on certain areas of the law and legal education) and flexible (responsive to student input and decisionmaking). Perhaps the most significant weakness in the use of any constructed universe is the problem of authenticity. Efforts to replicate reality will inevitably fall short. There is simply too much uncertainty, randomness, and complexity in the real world. One way to address this shortcoming, however, is through design and agency. The scenarios with which students grapple and the structural design of the simulation must reflect the national security realm, even as students themselves must make choices that carry consequences. Indeed, to some extent, student decisions themselves must drive the evolution of events within the simulation.168 Additionally, while authenticity matters, it is worth noting that at some level the fact that the incident does not take place in a real-world setting can be a great advantage. That is, the simulation creates an environment where students can make mistakes and learn from these mistakes – without what might otherwise be devastating consequences. It also allows instructors to develop multiple points of feedback to enrich student learning in a way that would be much more difficult to do in a regular practice setting. NSL Sim 2.0 takes as its starting point the national security pedagogical goals discussed above. It works backwards to then engineer a classroom, cyber, and physical/simulation experience to delve into each of these areas. As a substantive matter, the course focuses on the constitutional, statutory, and regulatory authorities in national security law, placing particular focus on the interstices between black letter law and areas where the field is either unsettled or in flux. A key aspect of the course design is that it retains both the doctrinal and experiential components of legal education. Divorcing simulations from the doctrinal environment risks falling short on the first and third national security pedagogical goals: (1) analytical skills and substantive knowledge, and (3) critical thought. A certain amount of both can be learned in the course of a simulation; however, the national security crisis environment is not well-suited to the more thoughtful and careful analytical discussion. What I am thus proposing is a course design in which doctrine is paired with the type of experiential learning more common in a clinical realm. The former precedes the latter, giving students the opportunity to develop depth and breadth prior to the exercise. In order to capture problems related to adaptation and evolution, addressing goal [1(d)], the simulation itself takes place over a multi-day period. Because of the intensity involved in national security matters (and conflicting demands on student time), the model makes use of a multi-user virtual environment. The use of such technology is critical to creating more powerful, immersive simulations.169 It also allows for continual interaction between the players. Multi-user virtual environments have the further advantage of helping to transform the traditional teaching culture, predominantly concerned with manipulating textual and symbolic knowledge, into a culture where students learn and can then be assessed on the basis of their participation in changing practices.170 I thus worked with the Information Technology group at Georgetown Law to build the cyber portal used for NSL Sim 2.0. The twin goals of adaptation and evolution require that students be given a significant amount of agency and responsibility for decisions taken in the course of the simulation. To further this aim, I constituted a Control Team, with six professors, four attorneys from practice, a media expert, six to eight former simulation students, and a number of technology experts. Four of the professors specialize in different areas of national security law and assume roles in the course of the exercise, with the aim of pushing students towards a deeper doctrinal understanding of shifting national security law authorities. One professor plays the role of President of the United States. The sixth professor focuses on questions of professional responsibility. The attorneys from practice help to build the simulation and then, along with all the professors, assume active roles during the simulation itself. Returning students assist in the execution of the play, further developing their understanding of national security law. Throughout the simulation, the Control Team is constantly reacting to student choices. When unexpected decisions are made, professors may choose to pursue the evolution of the story to accomplish the pedagogical aims, or they may choose to cut off play in that area (there are various devices for doing so, such as denying requests, sending materials to labs to be analyzed, drawing the players back into the main storylines, and leaking information to the media). A total immersion simulation involves a number of scenarios, as well as systemic noise, to give students experience in dealing with the second pedagogical goal: factual chaos and information overload. The driving aim here is to teach students how to manage information more effectively. Five to six storylines are thus developed, each with its own arc and evolution. To this are added multiple alterations of the situation, relating to background noise. Thus, unlike hypotheticals, doctrinal problems, single-experience exercises, or even Tabletop exercises, the goal is not to eliminate external conditions, but to embrace them as part of the challenge facing national security lawyers. The simulation itself is problem-based, giving players agency in driving the evolution of the experience – thus addressing goal [2(c)]. This requires a realtime response from the professor(s) overseeing the simulation, pairing bounded storylines with flexibility to emphasize different areas of the law and the students’ practical skills. Indeed, each storyline is based on a problem facing the government, to which players must then respond, generating in turn a set of new issues that must be addressed. The written and oral components of the simulation conform to the fourth pedagogical goal – the types of situations in which national security lawyers will find themselves. Particular emphasis is placed on nontraditional modes of communication, such as legal documents in advance of the crisis itself, meetings in the midst of breaking national security concerns, multiple informal interactions, media exchanges, telephone calls, Congressional testimony, and formal briefings to senior level officials in the course of the simulation as well as during the last class session. These oral components are paired with the preparation of formal legal instruments, such as applications to the Foreign Intelligence Surveillance Court, legal memos, applications for search warrants under Title III, and administrative subpoenas for NSLs. In addition, students are required to prepare a paper outlining their legal authorities prior to the simulation – and to deliver a 90 second oral briefing after the session. To replicate the high-stakes political environment at issue in goals (1) and (5), students are divided into political and legal roles and assigned to different (and competing) institutions: the White House, DoD, DHS, HHS, DOJ, DOS, Congress, state offices, nongovernmental organizations, and the media. This requires students to acknowledge and work within the broader Washington context, even as they are cognizant of the policy implications of their decisions. They must get used to working with policymakers and to representing one of many different considerations that decisionmakers take into account in the national security domain. Scenarios are selected with high consequence events in mind, to ensure that students recognize both the domestic and international dimensions of national security law. Further alterations to the simulation provide for the broader political context – for instance, whether it is an election year, which parties control different branches, and state and local issues in related but distinct areas. The media is given a particularly prominent role. One member of the Control Team runs an AP wire service, while two student players represent print and broadcast media, respectively. The Virtual News Network (“VNN”), which performs in the second capacity, runs continuously during the exercise, in the course of which players may at times be required to appear before the camera. This media component helps to emphasize the broader political context within which national security law is practiced. Both anticipated and unanticipated decisions give rise to ethical questions and matters related to the fifth goal: professional responsibility. The way in which such issues arise stems from simulation design as well as spontaneous interjections from both the Control Team and the participants in the simulation itself. As aforementioned, professors on the Control Team, and practicing attorneys who have previously gone through a simulation, focus on raising decision points that encourage students to consider ethical and professional considerations. Throughout the simulation good judgment and leadership play a key role, determining the players’ effectiveness, with the exercise itself hitting the aim of the integration of the various pedagogical goals. Finally, there are multiple layers of feedback that players receive prior to, during, and following the simulation to help them to gauge their effectiveness. The Socratic method in the course of doctrinal studies provides immediate assessment of the students’ grasp of the law. Written assignments focused on the contours of individual players’ authorities give professors an opportunity to assess students’ level of understanding prior to the simulation. And the simulation itself provides real-time feedback from both peers and professors. The Control Team provides data points for player reflection – for instance, the Control Team member playing President may make decisions based on player input, giving students an immediate impression of their level of persuasiveness, while another Control Team member may reject a FISC application as insufficient. The simulation goes beyond this, however, focusing on teaching students how to develop (6) opportunities for learning in the future. Student meetings with mentors in the field, which take place before the simulation, allow students to work out the institutional and political relationships and the manner in which law operates in practice, even as they learn how to develop mentoring relationships. (Prior to these meetings we have a class discussion about mentoring, professionalism, and feedback). Students, assigned to simulation teams about one quarter of the way through the course, receive peer feedback in the lead-up to the simulation and during the exercise itself. Following the simulation the Control Team and observers provide comments. Judges, who are senior members of the bar in the field of national security law, observe player interactions and provide additional debriefing. The simulation, moreover, is recorded through both the cyber portal and through VNN, allowing students to go back to assess their performance. Individual meetings with the professors teaching the course similarly follow the event. Finally, students end the course with a paper reflecting on their performance and the issues that arose in the course of the simulation, develop frameworks for analyzing uncertainty, tension with colleagues, mistakes, and successes in the future. B. Substantive Areas: Interstices and Threats As a substantive matter, NSL Sim 2.0 is designed to take account of areas of the law central to national security. It focuses on specific authorities that may be brought to bear in the course of a crisis. The decision of which areas to explore is made well in advance of the course. It is particularly helpful here to think about national security authorities on a continuum, as a way to impress upon students that there are shifting standards depending upon the type of threat faced. One course, for instance, might center on the interstices between crime, drugs, terrorism and war. Another might address the intersection of pandemic disease and biological weapons. A third could examine cybercrime and cyberterrorism. This is the most important determination, because the substance of the doctrinal portion of the course and the simulation follows from this decision. For a course focused on the interstices between pandemic disease and biological weapons, for instance, preliminary inquiry would lay out which authorities apply, where the courts have weighed in on the question, and what matters are unsettled. Relevant areas might include public health law, biological weapons provisions, federal quarantine and isolation authorities, habeas corpus and due process, military enforcement and posse comitatus, eminent domain and appropriation of land/property, takings, contact tracing, thermal imaging and surveillance, electronic tagging, vaccination, and intelligence-gathering. The critical areas can then be divided according to the dominant constitutional authority, statutory authorities, regulations, key cases, general rules, and constitutional questions. This, then, becomes a guide for the doctrinal part of the course, as well as the grounds on which the specific scenarios developed for the simulation are based. The authorities, simultaneously, are included in an electronic resource library and embedded in the cyber portal (the Digital Archives) to act as a closed universe of the legal authorities needed by the students in the course of the simulation. Professional responsibility in the national security realm and the institutional relationships of those tasked with responding to biological weapons and pandemic disease also come within the doctrinal part of the course. The simulation itself is based on five to six storylines reflecting the interstices between different areas of the law. The storylines are used to present a coherent, non-linear scenario that can adapt to student responses. Each scenario is mapped out in a three to seven page document, which is then checked with scientists, government officials, and area experts for consistency with how the scenario would likely unfold in real life. For the biological weapons and pandemic disease emphasis, for example, one narrative might relate to the presentation of a patient suspected of carrying yersinia pestis at a hospital in the United States. The document would map out a daily progression of the disease consistent with epidemiological patterns and the central actors in the story: perhaps a U.S. citizen, potential connections to an international terrorist organization, intelligence on the individual’s actions overseas, etc. The scenario would be designed specifically to stress the intersection of public health and counterterrorism/biological weapons threats, and the associated (shifting) authorities, thus requiring the disease initially to look like an innocent presentation (for example, by someone who has traveled from overseas), but then for the storyline to move into the second realm (awareness that this was in fact a concerted attack). A second storyline might relate to a different disease outbreak in another part of the country, with the aim of introducing the Stafford Act/Insurrection Act line and raising federalism concerns. The role of the military here and Title 10/Title 32 questions would similarly arise – with the storyline designed to raise these questions. A third storyline might simply be well developed noise in the system: reports of suspicious activity potentially linked to radioactive material, with the actors linked to nuclear material. A fourth storyline would focus perhaps on container security concerns overseas, progressing through newspaper reports, about containers showing up in local police precincts. State politics would constitute the fifth storyline, raising question of the political pressures on the state officials in the exercise. Here, ethnic concerns, student issues, economic conditions, and community policing concerns might become the focus. The sixth storyline could be further noise in the system – loosely based on current events at the time. In addition to the storylines, a certain amount of noise is injected into the system through press releases, weather updates, private communications, and the like. The five to six storylines, prepared by the Control Team in consultation with experts, become the basis for the preparation of scenario “injects:” i.e., newspaper articles, VNN broadcasts, reports from NGOs, private communications between officials, classified information, government leaks, etc., which, when put together, constitute a linear progression. These are all written and/or filmed prior to the exercise. The progression is then mapped in an hourly chart for the unfolding events over a multi-day period. All six scenarios are placed on the same chart, in six columns, giving the Control Team a birds-eye view of the progression. C. How It Works As for the nuts and bolts of the simulation itself, it traditionally begins outside of class, in the evening, on the grounds that national security crises often occur at inconvenient times and may well involve limited sleep and competing demands.171 Typically, a phone call from a Control Team member posing in a role integral to one of the main storylines, initiates play. Students at this point have been assigned dedicated simulation email addresses and provided access to the cyber portal. The portal itself gives each team the opportunity to converse in a “classified” domain with other team members, as well as access to a public AP wire and broadcast channel, carrying the latest news and on which press releases or (for the media roles) news stories can be posted. The complete universe of legal authorities required for the simulation is located on the cyber portal in the Digital Archives, as are forms required for some of the legal instruments (saving students the time of developing these from scratch in the course of play). Additional “classified” material – both general and SCI – has been provided to the relevant student teams. The Control Team has access to the complete site. For the next two (or three) days, outside of student initiatives (which, at their prompting, may include face-to-face meetings between the players), the entire simulation takes place through the cyber portal. The Control Team, immediately active, begins responding to player decisions as they become public (and occasionally, through monitoring the “classified” communications, before they are released). This time period provides a ramp-up to the third (or fourth) day of play, allowing for the adjustment of any substantive, student, or technology concerns, while setting the stage for the breaking crisis. The third (or fourth) day of play takes place entirely at Georgetown Law. A special room is constructed for meetings between the President and principals, in the form of either the National Security Council or the Homeland Security Council, with breakout rooms assigned to each of the agencies involved in the NSC process. Congress is provided with its own physical space, in which meetings, committee hearings and legislative drafting can take place. State government officials are allotted their own area, separate from the federal domain, with the Media placed between the three major interests. The Control Team is sequestered in a different area, to which students are not admitted. At each of the major areas, the cyber portal is publicly displayed on large flat panel screens, allowing for the streaming of video updates from the media, AP wire injects, articles from the students assigned to represent leading newspapers, and press releases. Students use their own laptop computers for team decisions and communication. As the storylines unfold, the Control Team takes on a variety of roles, such as that of the President, Vice President, President’s chief of staff, governor of a state, public health officials, and foreign dignitaries. Some of the roles are adopted on the fly, depending upon player responses and queries as the storylines progress. Judges, given full access to each player domain, determine how effectively the students accomplish the national security goals. The judges are themselves well-experienced in the practice of national security law, as well as in legal education. They thus can offer a unique perspective on the scenarios confronted by the students, the manner in which the simulation unfolded, and how the students performed in their various capacities. At the end of the day, the exercise terminates and an immediate hotwash is held, in which players are first debriefed on what occurred during the simulation. Because of the players’ divergent experiences and the different roles assigned to them, the students at this point are often unaware of the complete picture. The judges and formal observers then offer reflections on the simulation and determine which teams performed most effectively. Over the next few classes, more details about the simulation emerge, as students discuss it in more depth and consider limitations created by their knowledge or institutional position, questions that arose in regard to their grasp of the law, the types of decision-making processes that occurred, and the effectiveness of their – and other students’ – performances. Reflection papers, paired with oral briefings, focus on the substantive issues raised by the simulation and introduce the opportunity for students to reflect on how to create opportunities for learning in the future. The course then formally ends.172 Learning, however, continues beyond the temporal confines of the semester. Students who perform well and who would like to continue to participate in the simulations are invited back as members of the control team, giving them a chance to deepen their understanding of national security law. Following graduation, a few students who go in to the field are then invited to continue their affiliation as National Security Law fellows, becoming increasingly involved in the evolution of the exercise itself. This system of vertical integration helps to build a mentoring environment for the students while they are enrolled in law school and to create opportunities for learning and mentorship post-graduation. It helps to keep the exercise current and reflective of emerging national security concerns. And it builds a strong community of individuals with common interests. CONCLUSION The legal academy has, of late, been swept up in concern about the economic conditions that affect the placement of law school graduates. The image being conveyed, however, does not resonate in every legal field. It is particularly inapposite to the burgeoning opportunities presented to students in national security. That the conversation about legal education is taking place now should come as little surprise. Quite apart from economic concern is the traditional introspection that follows American military engagement. It makes sense: law overlaps substantially with political power, being at once both the expression of government authority and the effort to limit the same. The one-size fits all approach currently dominating the conversation in legal education, however, appears ill-suited to address the concerns raised in the current conversation. Instead of looking at law across the board, greater insight can be gleaned by looking at the specific demands of the different fields themselves. This does not mean that the goals identified will be exclusive to, for instance, national security law, but it does suggest there will be greater nuance in the discussion of the adequacy of the current pedagogical approach. With this approach in mind, I have here suggested six pedagogical goals for national security. For following graduation, students must be able to perform in each of the areas identified – (1) understanding the law as applied, (2) dealing with factual chaos and uncertainty, (3) obtaining critical distance, (4) developing nontraditional written and oral communication skills, (5) exhibiting leadership, integrity, and good judgment in a high-stakes, highly-charged environment, and (6) creating continued opportunities for self-learning. They also must learn how to integrate these different skills into one experience, to ensure that they will be most effective when they enter the field. The problem with the current structures in legal education is that they fall short, in important ways, from helping students to meet these goals. Doctrinal courses may incorporate a range of experiential learning components, such as hypotheticals, doctrinal problems, single exercises, extended or continuing exercises, and tabletop exercises. These are important classroom devices. The amount of time required for each varies, as does the object of the exercise itself. But where they fall short is in providing a more holistic approach to national security law which will allow for the maximum conveyance of required skills. Total immersion simulations, which have not yet been addressed in the secondary literature for civilian education in national security law, may provide an important way forward. Such simulations also cure shortcomings in other areas of experiential education, such as clinics and moot court. It is in an effort to address these concerns that I developed the simulation model above. NSL Sim 2.0 certainly is not the only solution, but it does provide a starting point for moving forward. The approach draws on the strengths of doctrinal courses and embeds a total immersion simulation within a course. It makes use of technology and physical space to engage students in a multi-day exercise, in which they are given agency and responsibility for their decision making, resulting in a steep learning curve. While further adaptation of this model is undoubtedly necessary, it suggests one potential direction for the years to come.

### AT: FW = Exclusionary

#### Our framework arguments just outline the benefits of normative debate --- they aren’t exclusive their argument complements ours rather than supplementing it

Donohue, 13 [2013 Nation al Security Pedagogy: The Role of Simulations, Associate Professor of Law, Georgetown Law, <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2172&context=facpub>]

I. I NTRODUC TION Much has been made as of late about the impact of the retracting economy on law students. 1 The loss of big firm jobs and the breakdown of the traditional apprenticeship 2 structure has reverberated in law schools, as they struggle to address the consequences, not least of which has been a renewed public debate about the value of legal education. 2 The uneasy compromise forged in the 1870s by Harvard President Eliot and law school Dean Christopher Columbus Langdell now stands in question. 3 On the one hand, the practice of law itself, for which judgment, public responsibility, and e xercise of legal doctrine prove paramount, define the profession — skills taught in some form through the Socratic and case - based method. On the other hand, the research strand of the modern university emphasizes critical thought and scholarly independence, essentially driving the engine of normative debate. The public discourse of late has eschewed the latter as unnecessary, superfluous in the context of the making of lawyers, suggesting that law schools should instead narrowly emphasize lawyering skills i n new, more efficient ways, so as to reduce the costs of legal education and more adequately prepare students to become members of the trade. 4 **There is much to lament about the current state of affairs**. P erhaps the most unfortunate aspect of the current d ebate is the anti - intellectual nature of the Sirens’ song, which calls for the academy to abandon the pursuit of scholarship in favor of the assembly line model. But e qually regrettable is the assumption that one size fits all when it comes to different a reas of the law. T he demands placed on lawyers in specialized fields cry out for more careful consideration. Three points here with respect to national security law deserve notice. First, the generalizations made about diminishing job prospects for stude nts following graduation generally do not apply. 5 To the contrary, job opportunities in the field are expanding. There is a demand for talented and well - trained national security lawyers in the federal government, law firms, private industry, consultanci es, think tanks, advocacy groups, special interest organizations, journalism, international organizations, state and local government, and the legal academy. Second, while an important part of the picture, economic considerations may be only partially rele vant to understanding what is driving this debate. I t is remarkable how frequently , throughout U.S. history, major conflicts have been followed by legal ref orm movements. The present may be no different. Perhaps the reason that war gives rise to such de bate stems in part from the deeply political and policy - oriented role that lawyers serve. Law is a public function and lawyering not merely a service rendered, but an action that at once both reflects and shapes government power. It is thus sensitive to the political environment and forced to conform to the changing conditions occasioned by war. It is worth noting here that t he War of 1812 and the U.S. Civil War were both followed by periods of innovation in legal education. 6 World War I gave birth to new ideas, as a generation of soldiers returned. Little disposed to blindly accept inherited formulas, they critically scrutinized legal education, adjusting it to suit an altered worldview. 7 It was with this in mind that the 1921 Reed Report issued — an effort to consider the function of lawyers, in light of rapidly changing circumstances. Jerome Frank’s widely cited article on the importance of clinical education came in the wake of World War II, 8 while the ABA at the close o f the conflict in Vietnam commissioned a report to consider the appropriate role of law schools. 9 T his point is not to be over - emphasized, as numerous other factors contribute to the need for the legal profession to re - evaluate its position. But it is wo rth recognizing that t he end of the Cold War saw a 4 similar phenomenon, with the release of the ABA’s now famous MacCrate Report. 10 And s ince 9/11 the country has been engaged in military conflict. Domestic and international threats faced by the country ha ve morphed and federal institutions and powers have radically altered. The question that now faces law schools is how to conform legal education to changing realities. Economic downturn thus may be an important consideration, but it is not the only driv ing force. With this in mind, it is particularly important to look carefully at national security law, which is playing such a pivotal role in the formation of new institutions, new social arrangements, and the evolution of U.S. Constitutional, statutory, and regulatory law. Third, looking more carefully at national security law in the contemporary context, there are features unique to its practice that sit uneasily in the traditional pedagogical approach. It is one thing to question the function of legal education writ large, within society, in light of swiftly changing social, political, and economic conditions. It is another thing entirely to look specifically at one sub - field — indeed, an area that has profound influence on the broader dialogue — and to question how this particular area should adapt. New and innovative thinking is required. This does not mean that law schools should abandon the enterprise embraced by Eliot and Langdell in the wake of the Civil War — that of critical distance and thoughtfu l scholarly debate. 11 If ever such a conversation were needed, it is now. Yet it does raise the question of whether law schools could do a better job of preparing students for the types of challenges they will be facing in the years to come, specifically in relation to national security. This Article challenges the dominant pedagogical assumptions in the legal academy. It begins by briefly considering the state of the field of national security , noting the rapid expansion in employment and the breadth o f related positions that have been created post - 9/11. It considers , in the process, how the legal academy has, as an institutional matter, responded to the demand. Part III examines traditional legal pedagogy, grounding the discussion in studies initiat ed by the American Bar Association, the Carnegie Foundation, and others. It suggests that using the law - writ - large as a starting point for those interested in nation al security law is a mistake. Instead, it makes more sense to work backwards from the ski lls most essential in this area of the law. The Article then proposes six pedagogical goals that serve to distinguish national security law : (1) understanding the law as applied , (2) dealing with factual chaos and uncertainty, (3) obtaining critical distance — including, inter alia , when not to give legal advice, (4) developing nontraditional written and oral communication skills, (5) exhibiting leadership, integrity, and good judgment in a high - stakes, highly - charged environment, and (6) creating continued opportunities for self - learning. Equally important to the exercise of each of these skills is the ability to integrate them in the course of performance. These goals , and the su bsidiary points they cover, are neither conclusive nor exclusive . Many of them incorporate skills that all lawyers should have — such as the ability to handle pressure, knowing how to modulate the mode and content of communications depending upon the circum stances, and managing ego, personality, and subordination. T o the extent that they are overlooked by mainstream legal education, 5 however, and present in a unique manner in national security law, they underscore the importance of more careful consideration of the skills required in this particular field. Having proposed a pedagogical approach, the Article turns in Part IV to the question of how effective traditional law school teaching is in helping to students reach these goals. Doctrinal and experiential courses both prove important. T he problem is that in national security law, the way in which these have become manifest often falls short of accomplishing the six pedagogical aim s . G aps left in doctrinal course are not adequately covered by devices typically adopted in the experiential realm , even as c linics, externships, and moot court competitions are in many ways ill - suited to national security. The Article thus proposes in Part V a new model for national security legal education, based on innovat ions currently underway at Georgetown Law. NSL Sim 2.0 adapts a doctrinal course to the special needs of national security. Course design is preceded by careful regulatory, statutory, and Constitutional analysis, paired with policy considerations. The c ourse takes advantage of new and emerging technologies to immerse students in a multi - day, real - world exercise, which forces students to deal with an information - rich environment, rapidly changing facts, and abbreviated timelines. It points to a new model of legal education that advances students in the pedagogical goals identified above, while complementing, rather than supplanting, the critical intellectual discourse that underlies the value of higher legal education.

### AT: Roleplaying Bad

#### The aff’s approach is a method for dispute resolution---normative policy prescriptions are educationally valuable and don’t deny agency

Richard Ellis et al 9, Ph.D. University of California, Berkeley, degree completed December 1989, M.A. University of California, Berkeley, Political Science, 1984, B.A. University of California, Santa Cruz, Politics, 1982, Debating the Presidency: Conflicting Perspectives on the American Executive, p. google books

In 1969 the political scientist Aaron Wildavsky published a hefty reader on the American presidency. He prefaced it with the observation that “the presidency is the most important political institution in American life” and then noted the paradox that an institution of such overwhelming importance had been studied so little. “The eminence of the institution,” Wildavsky wrote, “is matched only by the extraordinary neglect shown to it by political scientists. Compared to the hordes of researchers who regularly descend on Congress, local communities, and the most remote foreign principalities, there is an extraordinary dearth of students of the presidency, although scholars ritually swear that the presidency is where the action is before they go somewhere else to do their research.”1 Political scientists have come a long way since 1969. The presidency remains as central to national life as it was then, and perhaps even more so. The state of scholarly research on the presidency today is unrecognizable compared with what it was forty years ago. A rich array of new studies has reshaped our understanding of presidential history, presidential character, the executive office, and the presidency’s relationship with the public, interest groups, parties, Congress, and the executive branch. Neglect is no longer a problem in the study of the presidency. In addition, those who teach about the presidency no longer lack for good textbooks on the subject. A number of terrific books explain how the office has developed and how it works. Although students gain a great deal from reading these texts, even the best of them can inadvertently **promote a passive learning experience.** Textbooks convey what political scientists know, but the balance and impartiality that mark a good text can **obscure the contentious nature** of the scholarly enterprise. Sharp disagreements **are often smoothed over** in the writing. The primary purpose of Debating the Presidency **is to allow students to** participate **directly in the ongoing real-world controversies swirling around the presidency and to judge for themselves which side is right.** It is premised philosophically on our view of students as active learners to be engaged rather than as passive receptacles to be filled. The book is designed to promote a classroom experience in which students debate and discuss issues rather than simply listen to lectures. Some issues, of course, lend themselves more readily to this kind of classroom debate. In our judgment, questions of a normative nature —**asking** not just what is, **but what ought to be**—are likely to foster the most interesting and engaging classroom discussions. So in selecting topics for debate, we generally eschewed narrow but important empirical questions of political science—such as whether the president receives greater support from Congress on foreign policy than on domestic issues—for broader questions that include empirical as well as normative components—such as **whether the president has usurped the war power** that rightfully belongs to Congress. We aim not only to teach students to think like political scientists, **but also to encourage them to think like democratic citizens**. Each of the thirteen issues selected for debate in this book’s second edition poses questions on which thoughtful people differ. These include whether the president should be elected directly by the people, whether the media are too hard on presidents, and whether the president has too much power in the selection of judges. Scholars are trained to see both sides of an argument, but we invited our contributors to choose one side and defend it vigorously. Rather than provide balanced scholarly essays impartially presenting the strengths and weaknesses of each position, Debating the Presidency leaves the balancing and weighing of arguments and evidence to the reader. The essays contained in the first edition of this book were written near the end of President George W. Bush’s fifth year in office; this second edition was assembled during and after Barack Obama’s first loo days as president. The new edition includes four new debate resolutions that should spark spirited classroom discussion about the legitimacy of signing statements, the war on terror, the role of the vice presidency, and the Twenty-second Amendment. Nine debate resolutions have been retained from the first edition and, wherever appropriate, the essays have been revised to reflect recent scholarship or events. For this edition we welcome David Karol, Tom Cronin, John Yoo, Lou Fisher, Peter Shane, Nelson Lund, Doug Kriner, and Joel Goldstein, as well as Fred Greenstein, who joins the debate with Stephen Skowronek over the importance of individual attributes in accounting for presidential success. In deciding which debate resolutions to retain from the first edition and which ones to add, we were greatly assisted by advice we received from many professors who adopted the first edition of this book. Particularly helpful were the reviewers commissioned by CQ Press: Craig Goodman of Texas Tech University, Delbert J. Ringquist of Central Michigan University, Brooks D. Simpson of Arizona State University, and Ronald W. Vardy of the University of Houston. We are also deeply grateful to chief acquisitions editor Charisse Kiino for her continuing encouragement and guidance in developing this volume. Among the others who helped make the project a success were editorial assistants Jason McMann and Christina Mueller, copy editor Mary Marik, and the book’s production editor, Gwenda Larsen. Our deepest thanks go to the contributors, not just for their essays, but also for their excellent scholarship on the presidency.

### Alt Fails – Isaac

#### Must propose alternatives or else they are complicit with the evil they criticize

**Issac 2**—Professor of Political Science at Indiana-Bloomington, Director of the Center for the Study of Democracy and Public Life, PhD from Yale (Jeffery C., Dissent Magazine, Vol. 49, Iss. 2, “Ends, Means, and Politics,” p. Proquest)

As a result, the most important political questions are simply not asked. It is assumed that U.S. military intervention is an act of "aggression," but no consideration is given to the aggression to which intervention is a response. The status quo ante in Afghanistan is not, as peace activists would have it, peace, but rather terrorist violence abetted by a regime--the Taliban--that rose to power through brutality and repression. This requires us to ask a question that most "peace" activists would prefer not to ask: What should be done to respond to the violence of a Saddam Hussein, or a Milosevic, or a Taliban regime? What means are likely to stop violence and bring criminals to justice? Calls for diplomacy and international law are well intended and important; they implicate a decent and civilized ethic of global order. But they are also vague and empty, because they are not accompanied by any account of how diplomacy or international law can work effectively to address the problem at hand. The campus left offers no such account. To do so would require it to contemplate tragic choices in which moral goodness is of limited utility. Here what matters is not purity of intention but the intelligent exercise of power. Power is not a dirty word or an unfortunate feature of the world. It is the core of politics. Power is the ability to effect outcomes in the world. Politics, in large part, involves contests over the distribution and use of power. To accomplish anything in the political world, one must attend to the means that are necessary to bring it about. And to develop such means is to develop, and to exercise, power. To say this is not to say that power is beyond morality. It is to say that power is not reducible to morality. As writers such as Niccolo Machiavelli, Max Weber, Reinhold Niebuhr, and Hannah Arendt have taught, an unyielding concern with moral goodness undercuts political responsibility. The concern may be morally laudable, reflecting a kind of personal integrity, but it suffers from three fatal flaws: (1) It fails to see that the purity of one's intention does not ensure the achievement of what one intends. Abjuring violence or refusing to make common cause with morally compromised parties may seem like the right thing; but if such tactics entail impotence, then it is hard to view them as serving any moral good beyond the clean conscience of their supporters; (2) it fails to see that in a world of real violence and injustice, moral purity is not simply a form of powerlessness; it is often a form of complicity in injustice. This is why, from the standpoint of politics--as opposed to religion--pacifism is always a potentially immoral stand. In categorically repudiating violence, it refuses in principle to oppose certain violent injustices with any effect; and (3) it fails to see that politics is as much about unintended consequences as it is about intentions; it is the effects of action, rather than the motives of action, that is most significant. Just as the alignment with "good" may engender impotence, it is often the pursuit of "good" that generates evil. This is the lesson of communism in the twentieth century: it is not enough that one's goals be sincere or idealistic; it is equally important, always, to ask about the effects of pursuing these goals and to judge these effects in pragmatic and historically contextualized ways. Moral absolutism inhibits this judgment. It alienates those who are not true believers. It promotes arrogance. And it undermines political effectiveness.

### Wright---Small Reforms Key

#### The alt’s all-or-nothing choice fails --- small reforms like the plan are key to institutional change and getting others to sign on to the alt

Erik Olin Wright 7, Vilas Distinguished Professor of Sociology at the University of Wisconsin, “Guidelines for Envisioning Real Utopias”, Soundings, April, www.ssc.wisc.edu/~wright/Published%20writing/Guidelines-soundings.pdf

5. Waystations¶ The final guideline for discussions of envisioning real utopias concerns the importance of waystations. The central problem of envisioning real utopias concerns the **viability of institutional alternatives** that embody emancipatory values, but the practical achievability of such institutional designs often **depends upon the existence of smaller steps**, intermediate institutional innovations **that move us in the right direction but only partially embody these values.** Institutional proposals which have an **all-or-nothing quality** to them are both **less likely to be adopted in the first place, and may pose more difficult transition-cost problems** if implemented. The catastrophic experience of Russia in the “shock therapy” approach to market reform is historical testimony to this problem.¶ Waystations are a difficult theoretical and practical problem because there are many instances in which partial reforms may have very different consequences than full- bodied changes. Consider the example of unconditional basic income. Suppose that a very limited, below-subsistence basic income was instituted: not enough to survive on, but a grant of income unconditionally given to everyone. One possibility is that this kind of basic income would act mainly as a subsidy to employers who pay very low wages, since now they could attract more workers even if they offered below poverty level¶ earnings. There may be good reasons to institute such wage subsidies, but they would not generate the positive effects of a UBI, and therefore might not function as a stepping stone.¶ What we ideally want, therefore, are **intermediate reforms** that have two main properties: first, they concretely **demonstrate the virtues of the fuller program of transformation, so they contribute to the ideological battle of convincing people that the alternative is credible and desirable;** and second, they **enhance the capacity for action of people**, increasing their ability to push further in the future. Waystations that increase popular participation and **bring people together in problem-solving deliberations** for collective purposes are particularly salient in this regard. This is what in the 1970s was called “nonreformist reforms”: reforms that are **possible within existing institutions** and that **pragmatically solve real problems** while at the same time **empowering people in ways which** **enlarge their scope of action in the future.**

## AT: Whiteness K

### AT: Mills

#### Mills votes aff---liberal democratic capitalism key to decrease white supremacy

Stephen C. Ferguson 4, RACIAL CONTRACT THEORY: A CRITICAL INTRODUCTION, Submitted to the Department of Philosophy and the Faculty of the Graduate School of the University of Kansas in partial fulfillment of the requirements for the degree of Doctor of Philosophy

Racial contract theory: A critical introduction, by Ferguson, Stephen C., Ii, Ph.D., UNIVERSITY OF KANSAS, 2004, 210 pages; 3153181

The outcome of The Racial Contract is quite simply what I have termed, Racial Contract Theory (RCT). There are five main components to RCT. First, to subject contractarianism to an ideological critique and expose the racist presuppositions of contract theorists from Thomas Hobbes through John Rawls. Second, to identify the origins of white supremacy as a political system in a Racial Contract between whites against non-whites. The third component, therefore, is an argument to show that being white - under the white supremacist polity - entails being endowed with white privilege, that is, material and psychological benefits. The fourth component of Mills' project is to demonstrate that race is a social construction created for the purpose of political rule over non-whites. And, lastly, Mills argues that the only historically feasible solution to the problem of white supremacy is liberal democratic capitalism.

### AT: State Bad

#### The state must be engaged---action can be reoriented away from past abuses, the alt goes too far

Williams and Krause 97 Michael, assistant professor of political science at the University of Southern Maine and Keith, professor of political science at the Graduate Institute of International Studies, associate professor of political science at York University, Critical Security Studies: Concepts and Cases, edited by Krause and Williams, p. xvi

Many of the chapters in this volume thus retain a concern with the centrality of the state as a locus not only of obligation but of effective political action. In the realm of organized violence, states also remain the preeminent actors. The task of a critical approach is not to deny the centrality of the state in this realm but, rather, to understand more fully its structures, dynamics, and possibilities for reorientation. From a critical perspective, state action is flexible and capable of reorientation, and analyzing state policy need not therefore be tantamount to embracing the statist assumptions of orthodox conceptions. To exclude a focus on state action from a critical perspective on the grounds that it plays inevitably within the rules of existing conceptions simply reverses the error of essentializing the state. Moreover, it loses the possibility of influencing what remains the most structurally capable actor in contemporary world politics.

### Engaging Technocracy Good

#### Engagement with the law is good – technocracy is only bad when we let it out of our control

Orna Ben-Naftali 3, Head of the International Law Division and of the Law and Culture Division, The Law School, The College of Management Academic Studies, Spring, ARTICLE: 'We Must Not Make a Scarecrow of the Law': A Legal Analysis of the Israeli Policy of Targeted Killings, 36 Cornell Int'l L.J. 233

Our analysis concludes that while a specific act of preemptive killing may be legal if it meets the above-specified requirements, the policy of state targeted preemptive killings is not. Furthermore, some specific acts of targeted killings may generate state responsibility, while others may constitute a war crime entailing criminal accountability. These conclusions, emanating from the reading of the three legal texts applicable to the context, and informed by a sensibility that coheres them, do not rest on a negation of the importance of the national interest in security. On the contrary, these conclusions incorporate and express the way it should be balanced with a minimum standard of humanity and against the relevant context.

This delicate, ever precarious balance is at the heart of the democratic discourse. A democratic state is not a meek state. True, it is fighting with "one hand tied behind its back,"n342 as soberly observed by Chief Justice Barak of the Israeli Supreme Court, but democratic sensibilities internalize this limitation on State power, not as a source of weakness but as a sign of strength. Democracies require a public discourse forever alert to the importance of human rights, suspicious of the way power is used, and committed to the rule of law. The legal culture, in turn, while not a substitute for this public discourse, is never absent from it and indeed serves as a catalyst for its development.

We therefore reject the notion that the policy of targeted killings, designed by Israel as a way to combat terrorist attacks, is beyond the purview of the rule of law.n343 **We** also **deny the purist position suggesting that the legalistic nitty-gritty preoccupation with details entailed** in the above discussion **is likely to obscure and legitimize a harrowing policy**; n344 one that, on principle, should be condemned. n345 This position in fact maintains that the legality or illegality of targeted state killings is not a legitimate issue of discussion; that while an emergency situation may exceptionally necessitate the deed, it should never be elevated to the sphere of the Word. n346 We appreciate the sensibility of this position, but, alas, do not find it sensible. Indeed, nor would the people who consider themselves victims of the policy of targeted killings, and appeal to the courts to intervene. n347 Purity belongs to the Platonic world of ideas; it is a necessary ideal to strive for, even if forever unachievable in this all too fallible City of Man. n348 In the best of all possible worlds law would be superfluous; in this world, **it is a necessary, albeit insufficient means to achieve** some possible **betterment**. This article hopes to contribute to this modest goal.

### AT: CLS/CRT Link

#### The American legal system and state are not inherently racist---their overly fatalistic narrative ignores massive progress and incorrectly assumes that the US uniquely represents a site of anti-blackness

Daniel Farber 98, Prof. of the Minnesota School of Law, “Is American Law Inherently Racist”, w/ Prof. Delgado, Berkeley Law Scholarship Repository, http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1211&context=facpubs

Let me begin with the vision of the American legal system that Professor Delgado presented in his first twenty minutes. I do not intend to deny the reality of the dark side of American law in American legal history, and that dark side has indeed been very bad at times. Nevertheless, I think one might equally point to some more positive aspects of American legal society, and that we get only a skewed and incomplete picture if we focus only on one side of the picture: if we ignore the Thirteenth, 5 Fourteenth, 6 and Fifteenth 7 Amendments; if we ignore Brown v. Board of Education8" and the work of the Warren Court; if we ignore the Civil Rights Acts of 1964,' 9 1965,20 and 1990;2" and if we ignore or minimize the commitment to affirmative action that many American institutions, especially educational institutions, have had for the past two decades. I do not think you have to be a triumphalist to think that these are important developments-you only have to be a realist. Similarly, as serious as the problem of racial inequality remains in our society, it is also unrealistic to ignore the considerable amount of progress that has been made. Consider the emergence of the black middle class in the last generation or generation and a half, and the integration of important American institutions such as big-city police forces, which are important in the day-to-day lives of many minority people. The military has sometimes been described as the most successfully integrated institution in American society. We all know, as well, that the number of minority lawyers has risen substantially. In state and federal legislatures, there was no such thing as a black caucus in Congress thirty or forty years ago, because there would not have been enough black people present to call a caucus. And do not forget the considerable evidence of sharp changes in white attitudes over that period in a more favorable and tolerant direction. It is true that there is much in our history that we can only look back on with a feeling of shame, but there is also much to be proud of that we should not forget. I also think that the accusation that the American legal system is inherently racist lacks perspective in the sense that it seems to imply that there is something specifically American about this problem. If you look around the world, societies virtually everywhere are struggling with the problems of ethnic and cultural pluralism, and are trying to find ways to incorporate diverse groups into their governing structures. I think if you look around the world, including even countries like France which Professor Delgado referred to, it is far from clear that we are doing worse than the others. In some ways, I think we are doing considerably better than most.

#### The proper response to recurrent state/legal racism is protective measures--only legal reform can embed bulwarks against historical injustice

Richard Delgado 98, Jean N. Lindsley Professor of Law at the University of Colorado Law School, “Is American Law Inherently Racist”, Debate w/ Prof. Farber, Berkeley Law Scholarship Repository, http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1211&context=facpubs

AUDIENCE: If we accept the premise that American law is inherently racist, what can be done about it? Where do we start? And related to that, how can an inherently racist law be made unracist, or are we just doomed to a perpetual battle to decrease the level of racism in our laws? PROFESSOR DELGADO: No. I don't think that it is a dispiriting or an overly pessimistic view, if one accepts the position-as I do, that American law is recurrently, inherently racist any more than, it is enervating to accept the proposition that the human body, let's say, is inherently frail. From which it follows then that one ought to take reasonable measures. One ought to wear safety belts, one ought tovaccinate children, and one does not simply give up from therecognition that something is inherently a difficulty or a problem. Vigilance is what is called for, not giving up. So no, I do not take the position that the inherent racism that seems to inflict our society requires any sort of surrender. Quite the contrary, it requires all of our efforts if we are to be the society that we can be and that we arein other respects. I will address this point later in my talk.

### 2AC – Perm Solves

#### Non-reformist reforms work in context of abolition

Angela Davis 4, Interview with Dylan Rodriguez, Davis: The Challenges of Prison Abolition, illinoisprisonwatch.blogspot.com/2010/03/davis-challenges-of-prison-abolition.html

Angela: The seemingly unbreakable link between prison reform and prison development -- referred to by Foucault in his analysis of prison history -- has created a situation in which progress in prison reform has tended to render the prison more impermeable to change and has resulted in bigger, and what are considered "better," prisons.

The most difficult question for advocates of prison abolition is how to establish a balance between reforms that are clearly necessary to safeguard the lives of prisoners and those strategies designed to promote the eventual abolition of prisons as the dominant mode of punishment. In other words, I do not think that there is a strict dividing line between reform and abolition.

For example, it would be utterly absurd for a radical prison activist to refuse to support the demand for better health care inside Valley State, California's largest women's prison, under the pretext that such reforms would make the prison a more viable institution. Demands for improved health care, including protection from sexual abuse and challenges to the myriad ways in which prisons violate prisoners' human rights, can be integrated into an abolitionist context that elaborates specific decarceration strategies and helps to develop a popular discourse on the need to shift resources from punishment to education, housing, health care, and other public resources and services.

### AT: Abolition

#### Abolition’s an unrealistic and ineffective strategy---see serial rapists cross-x

Nick Herbert 8, The Guardian, The abolitionists' criminal conspiracy, www.theguardian.com/commentisfree/2008/jul/27/prisonsandprobation.youthjustice

Last week saw an International Conference on Penal Abolition. With such a heady ambition, what can be next? A global conference to abolish crime? The ambition of an eccentric minority to abolish prison isn't just dotty. It's a distraction from a real and pressing agenda, which is to reform prisons which simply aren't working.

A century ago, prisons had hard labour and treadmills. Today, they have colour TVs in cells. Jails may have changed, but the enduring truth that they are necessary has not. We will always have a small minority of offenders who, by their behaviour, pose so great a threat to the lives and property of the law-abiding majority that they must be kept apart from us. Ignoring this reality and arguing for the total abolition of prison is a hopelessly utopian goal that does the credibility of penal reformers no service.

The case for penal abolition rests on a series of tenuous assertions. Let's set aside the obvious, if uncomfortable, fact that part of the purpose of prison is to punish. It's said that short-term prison sentences don't work, because recidivism rates are shockingly high and there is little time for any restorative programmes to work. But since the evidence is that longer sentences have lower recidivism rates, and provide the opportunity to rehabilitate offenders, this might be an argument to lengthen sentences, not abolish them altogether. After all, another purpose of prison is to incapacitate offenders.

Of course, overcrowded prisons that are awash with drugs, and a system which gives short-term prisoners no supervision or support on release, is almost calculated to fail. But this could equally be an argument – the one which the modern Conservative party is making – for a complete transformation of prison regimes and a system of support for offenders when they are released from jail. It's a logical non sequitur on a grand scale to argue that because short-term prison sentences currently aren't working, we should therefore stop using them at all.

Abolitionists say that short-term prison sentences have a poorer recidivism rate than community sentences. In fact, both have a lamentable record – and one that has deteriorated in the last ten years. But the difference is hardly surprising, since the worst recidivists are bound to end up in jail. According to Home Office figures (pdf), only 12% of those sentenced to prison have no previous convictions. Over half have five or more previous convictions, and over a third have ten or more. Those who say that prison should be reserved for serious or serial offenders tend to ignore the fact that it already is.

Serial offenders who end up with custodial sentences have usually run through the gamut of weak community sentences already. If we want to avoid magistrates having little choice but to send them down, the logical thing to do is to make community sentences far more effective. Yet the perverse reaction of the abolitionists is to recommend that the very community disposals that have, by definition, already failed are used again.

Over a third of unpaid work requirements are not completed. Drug rehabilitation requirements have an even worse record – fewer than half are completed. If a fraction of the energy and resources that are being devoted to the cause of penal abolition were directed to thinking seriously about how better to design non-custodial punishments, short-term prison sentences would be less necessary.

What do the abolitionists really want? If it's the end of all custody, including for the most serious and dangerous offenders, then we can dismiss their demands as truly silly. If it's the abolition of short-term custodial sentences, then the effect on the overall prison population will be minimal. Justice ministry tables show (pdf) that over 87% of the current prison population are serving sentences of over 12 months. Abolishing prison for those serving, say, six months or less would mean watering down 60,000 sentences – but it would reduce the prison population by less than 7,000. The more effective and sustainable way to reduce the prison population in the long term is to reduce re-offending, as the Conservative party's radical "rehabilitation revolution" proposes.

It would be nice to live in a society where there were no prisons, just as it would be nice if there were no hospitals because there was no illness. But until someone steps forward with a ten-year plan to Make Crime History, jails are here to stay. The challenge is to create prisons with a purpose – not to hold lazy conferences making futile calls for their abolition.

### AT: DSRB

#### DSRB is wrong---we should not forget the racist past of the state, but fixating on inevitable flaws entrenches hopelessness

Daniel Farber 98, law prof, U Minnesota, Thomas M. Cooley Law Review, 15 T.M. Cooley L. Rev. 361

And finally, what I fear the most is the response that seemed to be implied by one of the audience questions earlier. If it is true that American society is inherently racist, doesn't that mean that it is essentially hopeless? Now this conclusion does not logically follow from that premise, any more than it logically follows that if certain character traits have a genetic basis then it is hopeless to do anything about them. But nevertheless, we all recognize that when we are talking about individuals and biology, these genetic theories tend to discourage the idea of reform, and tend to reinforce, as a matter of social reality, the view that any bad behavior that we see is just inherent. I think we can expect to see the same kind of thing when we are dealing with the sociological equivalent involving the claim that there is this inherent genetic flaw in American society. You can see this most clearly in Derrick Bell's writings, which are redolent of despair and which, in that respect, curiously resemble Robert Bork's writings, who is similarly convinced that the genetic flaws of American society will prevent it from ever achieving his vision of justice. It is true that we cannot afford to forget our history. It is true that much of that history is unfortunate, if not worse. But it is also true that if we remain totally obsessed with the flaws of the past, fixated on their inevitability, we are unlikely to be able to move past them and move forward. And in particular, it seems to me that if we approach today's problems primarily as an issue in finger-pointing, in blaming somebody or another, or in finding the culprit, then we are not likely to be able to unite our society in a quest toward attacking those serious problems.

### AT: Whiteness = Root Cause

#### Their argument elevates whiteness to an all-pervasive force that explains all oppression – that re-inscribes its inevitability---specific analysis of racism is crucial

Margaret L. Andersen 3, Professor of Sociology and Women's Studies and Vice Provost for Academic Affairs at the University of Delaware, 2003, “Whitewashing Race: A Critical Perspective on Whiteness,” in White Out: The Continuing Significance of Racism, ed Doane & Bonilla-Silva, p. 28

Conceptually, one of the major problems in the whiteness literature is the reification of whiteness as a concept, as an experience, and as an identity. This practice not only leads to conceptual obfuscation but also impedes the possibility for empirical analysis. In this literature, "whiteness" comes to mean just about everything associated with racial domination. As such, whiteness becomes a slippery and elusive concept. Whiteness is presented as any or all of the following: identity, self-understanding, social practices, group beliefs, ideology, and a system of domination. As one critic writes, "If historical actors are said to have behaved the way they did mainly because they were white, then there's little room left for more nuanced analysis of their motives and meanings" (Stowe 1996:77). And Alastair Bonnett points out that whiteness "emerges from this critique as an omnipresent and all-powerful historical force. Whiteness is seen to be responsible for the failure of socialism to develop in America, for racism, for the impoverishment of humanity. With the 'blame' comes a new kind of centering: Whiteness, and White people, are turned into the key agents of historical change, the shapers of contemporary America" (1996b:153).¶ Despite noting that there is differentiation among whites and warning against using whiteness as a monolithic category, most of the literature still proceeds to do so, revealing a reductionist tendency. Even claiming to show its multiple forms, most writers essentialize and reify whiteness as something that directs most of Western history (Gallagher 2000). Hence while trying to "deconstruct” whiteness and see the ubiquitousness of whiteness, the literature at the same time reasserts and reinstates it (Stowe 1996:77).¶ For example, Michael Eric Dyson suggests that whiteness is identity, ideology, and institution (Dyson, quoted in Chennault 1998:300). But if it is all these things, it becomes an analytically useless concept. Christine Clark and James O'Donnell write: "to reference it reifies it, to refrain from referencing it obscures the persistent, pervasive, and seemingly permanent reality of racism" (1999:2). Empirical investigation requires being able to identify and measure a concept— or at the very least to have a clear definition—but since whiteness has come to mean just about everything, it ends up meaning hardly anything.

#### Anti-blackness isn’t a monolithic root cause---they shut off productive debate over solutions – means the alt fails

Tommie Shelby 7, Professor of African and African American Studies and of Philosophy at Harvard, 2007, We Who Are Dark: The Philosophical Foundations of Black Solidarity

Others might challenge the distinction between ideological and structural causes of black disadvantage, on the grounds that we are rarely, if ever, able to so neatly separate these factors, an epistemic situation that is only made worse by the fact that these causes interact in complex ways with behavioral factors. These distinctions, while perhaps straightforward in the abstract, are difficult to employ in practice. For example, it would be difficult, if not impossible, for the members of a poor black community to determine with any accuracy whether their impoverished condition is due primarily to institutional racism, the impact of past racial injustice, the increasing technological basis of the economy, shrinking state budgets, the vicissitudes of world trade, the ascendancy of conservative ideology, poorly funded schools, lack of personal initiative, a violent drug trade that deters business investment, some combination of these factors, or some other explanation altogether. Moreover, it is notoriously difficult to determine when the formulation of putatively race-neutral policies has been motivated by racism or when such policies are unfairly applied by racially biased public officials.¶ There are very real empirical difficulties in determining the specific causal significance of the factors that create and perpetuate black disadvantage; nonetheless, it is clear that these factors exist and that justice will demand different practical remedies according to each factor's relative impact on blacks' life chances. We must acknowledge that our social world is complicated and not immediately transparent to common sense, and thus that systematic empirical inquiry, historical studies, and rigorous social analysis are required to reveal its systemic structure and sociocultural dynamics. There is, moreover, no mechanical or infallible procedure for determining which analyses are the soundest ones. In addition, given the inevitable bias that attends social inquiry, legislators and those they represent cannot simply defer to social-scientific experts. We must instead rely on open public debate—among politicians, scholars, policy makers, intellectuals, and ordinary citizens—with the aim of garnering rationally motivated and informed consensus. And even if our practical decision procedures rest on critical deliberative discourse and thus live up to our highest democratic ideals, some trial and error through actual practice is unavoidable.¶ These difficulties and complications notwithstanding, a general recognition of the distinctions among the ideological and structural causes of black disadvantage could help blacks refocus their political energies and self-help strategies. Attention to these distinctions might help expose the superficiality of theories that seek to reduce all the social obstacles that blacks face to contemporary forms of racism or white supremacy. A more penetrating, subtle, and empirically grounded analysis is needed to comprehend the causes of racial inequality and black disadvantage. Indeed, these distinctions highlight the necessity to probe deeper to find the causes of contemporary forms of racism, as some racial conflict may be a symptom of broader problems or recent social developments (such as immigration policy or reduced federal funding for higher education).

### Wounded Attachments DA

**The alt is IDENTITY but not POLITICS---failure to envision a future in which their identity claims will no longer be needed results in a reactionary politics that entrenches the status quo**

**Bhambra 10**—U Warwick—AND—Victoria Margree—School of Humanities, U Brighton (Identity Politics and the Need for a ‘Tomorrow’, http://www.academia.edu/471824/Identity\_Politics\_and\_the\_Need\_for\_a\_Tomorrow\_)

The quotation with which this article begins comes from the end of the novel where the character Paul D is speak-ing to fellow former slave Sethe of the need to move be- yond the terms of **a past disﬁgured by slavery**. We begin with this for two reasons. First, it expresses the central problematic ad-dressed within this article: the question of the place of history in the present, and how this helps or hinders the opening up of future possibilities. Second, the novel addresses how the opening up of a new future can also be achieved by shifts in understand-ing which result from allowing **alternative interpretations of the past**. Speciﬁcally in Beloved , Paul D moves from a condemnation of Sethe for her alleged inhumanity in having killed her own child (“you got two legs, not four, Sethe” ((1987) 1997: 165)), to a new understanding of the “gendered division of labour on which slavery was built” (Mohanty 2000: 61) and thus to acceptance of the validity of her claims to have killed as a human being , and as a mother (to save her own child from becoming a slave like her-self, to refuse to be a reproducer of slaves). As such, Paul D arrives at a fuller understanding of their shared historical experience as slaves, and this new knowledge constitutes the basis for develop-ing the “tomorrow” of which he speaks.¶ In what follows we use the metaphor of “tomorrow” in order to address contemporary debates about “identity politics”. Recent years have witnessed a general backlash against identity politics both in the academy and the public sphere (Bickford 1997, Young1997, Farred 2000, Bramen 2002). Among the various pro-tagonists of this “backlash”, Bramen (2002) gives particular atten-tion to work by Wendy Brown (1995) on “wounded attachments”. This is her term for a condition in which politicised identities, based upon experiences of injustice and discrimination, begin to “fetishise” (Ahmed 2004) their own wounding. For Brown, this results in a **reactionary politics aimed at recrimination**, **instead of action to redress the injustice.** Our intention in the present article is to situate ourselves within this debate about the value of iden-tity politics as well as to engage with the speciﬁc issues raised by Brown’s work. We will argue that the objections to “identity “raised by Brown and others must be taken seriously, but that **this need not lead to a wholesale abandonment of the politics of identity.** Rather, we wish to demonstrate that **the problem with identity politics is the way in which the “identity”** very often **comes to replace the “politics”.** To avoid such a substitution, we argue that “identity” may be re-theorised as that which is continually pro-duced and reproduced by **political projects in the present**, and **on the basis of a shared vision of the future.** The argument of this article is thus that politicised identities might instead be thought of in terms of an explicit afﬁrmation of the **provisionality** **of a political identity** that is **oriented to a “tomorrow**” in which the identity will no longer be required. **In this way, the power of “identity” as a site of resistance is maintained, while ameliorating the conservative effects of the entrenched identities** that Brown criticises. As such, this article also addresses the wider contemporary debate in emancipatory politics, which concerns the proper orientation of radical politics in terms of the tense of political dis-course. The key issue here is that of the extent to which political discourse should be focused around the past – on origins, memory, history, trauma and so forth – or the extent to which it should be **future-oriented**. Critics such as Brown (1995) and Grosz (2000)have expressed a fear that too great a weight upon the past has proved **constraining** for radical movements, and that an emphasis upon the future – **the (more) just future that political action intends to bring about – is required** as a corrective to this (Ahmed2004). However, such a demand brings with it the vexed question of the place of memory, and speciﬁcally, the memorialising of pain and exclusion. As Brown’s own equivocation on the issue suggests, “the counsel of forgetting [...] seems inappropriate if not cruel”(p 74) for many oppressed groups who have yet to have their pain recognised, or to understand themselves the deferred effects of atraumatic past (Kilby 2002). The arguments presented in this paper are threefold. First, we argue for a rethinking of “politicised identities” in terms of a **commitment to a desired future**, as a corrective to the conservative effects that frequently accompany “identity” (here identiﬁed as “exclusionary politics” and “reiﬁcation of identities”). Second, we argue, however, that such an emphasis upon the future need not and should not entail an abandonment of the commitment to address traumatic pasts. Third, we argue that a productive identity politics is one which understands the identity of the political group-ing as **provisional**, since it is based on the need to respond to an existing injustice, and therefore, oriented to a future in which that injustice, and hence, the need for the identity claim, is no longer pre-sent. Central to the development of our thesis will be an engagement with work on experience and identity by Satya Mohanty, and com-munities and knowledge by Lynn Hankinson Nelson.

### Reform Good (Alt Celebrates Victimhood)

#### The claim that oppression should be the basis for winning a debate round is a pretty good example of our link argument---the ballot is not a tool of emancipation, but rather a tool of revenge---it serves as a palliative that denies their investment in oppression as a means by which to claim the power of victory

Enns 12—Professor of Philosophy at McMaster University (Dianne, The Violence of Victimhood, 28-30)

Guilt and Ressentiment We need to think carefully about what is at stake here. Why is this perspective appealing, and what are its effects? At first glance, the argument appears simple: white, privileged women, in their theoretical and practical interventions, must take into account the experiences and conceptual work of women who are less fortunate and less powerful, have fewer resources, and are therefore more subject to systemic oppression. The lesson of feminism's mistakes in the civil rights era is that this “mainstream” group must not speak for other women. But such a view must be interrogated. Its effects, as I have argued, include a veneration of the other, moral currency for the victim, and an insidious competition for victimhood. We will see in later chapters that these effects are also common in situations of conflict where the stakes are much higher. ¶ We witness here a twofold appeal: otherness discourse in feminism appeals both to the guilt of the privileged and to the resentment, or ressentiment, of the other. Suleri's allusion to “embarrassed privilege” exposes the operation of guilt in the misunderstanding that often divides Western feminists from women in the developing world, or white women from women of color. The guilt of those who feel themselves deeply implicated in and responsible for imperialism merely reinforces an imperialist benevolence, polarizes us unambiguously by locking us into the categories of victim and perpetrator, and blinds us to the power and agency of the other. Many fail to see that it is embarrassing and insulting for those identified as victimized others not to be subjected to the same critical intervention and held to the same demands of moral and political responsibility. Though we are by no means equal in power and ability, wealth and advantage, we are all collectively responsible for the world we inhabit in common. The condition of victimhood does not absolve one of moral responsibility. I will return to this point repeatedly throughout this book.¶ Mohanty's perspective ignores the possibility that one can become attached to one's subordinated status, which introduces the concept of ressentiment, the focus of much recent interest in the injury caused by racism and colonization. Nietzsche describes ressentiment as the overwhelming sentiment of “slave morality,” the revolt that begins when ressentiment itself becomes creative and gives birth to values. 19 The sufferer in this schema seeks out a cause for his suffering—“ a guilty agent who is susceptible to suffering”— someone on whom he can vent his affects and so procure the anesthesia necessary to ease the pain of injury. The motivation behind ressentiment, according to Nietzsche, is the desire “to deaden, by means of a more violent emotion of any kind, a tormenting, secret pain that is becoming unendurable, and to drive it out of consciousness at least for the moment: for that one requires an affect, as savage an affect as possible, and, in order to excite that, any pretext at all.” 20 In its contemporary manifestation, Wendy Brown argues that ressentiment acts as the “righteous critique of power from the perspective of the injured,” which “delimits a specific site of blame for suffering by constituting sovereign subjects and events as responsible for the ‘injury’ of social subordination.” Identities are fixed in an economy of perpetrator and victim, in which revenge, rather than power or emancipation, is sought for the injured, making the perpetrator hurt as the sufferer does. 21¶ 30¶ Such a concept is useful for understanding why an ethics of absolute responsibility to the other appeals to the victimized. Brown remarks that, for Nietzsche, the source of the triumph of a morality rooted in ressentiment is the denial that it has any access to power or contains a will to power. Politicized identities arise as both product of and reaction to this condition; the reaction is a substitute for action— an “imaginary revenge,” Nietzsche calls it. Suffering then becomes a social virtue at the same time that the sufferer attempts to displace his suffering onto another. The identity created by ressentiment, Brown explains, becomes invested in its own subjection not only through its discovery of someone to blame, and a new recognition and revaluation of that subjection, but also through the satisfaction of revenge. 22¶ The outcome of feminism's attraction to theories of difference and otherness is thus deeply contentious. First, we witness the further reification reification of the very oppositions in question and a simple reversal of the focus from the same to the other. This observation is not new and has been made by many critics of feminism, but it seems to have made no serious impact on mainstream feminist scholarship or teaching practices in women's studies programs. Second, in the eagerness to rectify the mistakes of “white, middle-class, liberal, western” feminism, the other has been uncritically exalted, which has led in turn to simplistic designations of marginal, “othered” status and, ultimately, a competition for victimhood. Ultimately, this approach has led to a new moral code in which ethics is equated with the responsibility of the privileged Western woman, while moral immunity is granted to the victimized other. Ranjana Khanna describes this operation aptly when she writes that in the field of transnational feminism, the reification of the other has produced “separate ethical universes” in which the privileged experience paralyzing guilt and the neocolonized, crippling resentment. The only “overarching imperative” is that one does not comment on another's ethical context. An ethical response turns out to be a nonresponse. 23 Let us turn now to an exploration of this third outcome.

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## Case

### AT: Threat Con

#### No risk of endless warfare

Gray 7—Director of the Centre for Strategic Studies and Professor of International Relations and Strategic Studies at the University of Reading, graduate of the Universities of Manchester and Oxford, Founder and Senior Associate to the National Institute for Public Policy, formerly with the International Institute for Strategic Studies and the Hudson Institute (Colin, July, “The Implications of Preemptive and Preventive War Doctrines: A Reconsideration”, <http://www.ciaonet.org/wps/ssi10561/ssi10561.pdf>)

7. A policy that favors preventive warfare expresses a futile quest for absolute security. It could do so. Most controversial policies contain within them the possibility of misuse. In the hands of a paranoid or boundlessly ambitious political leader, prevention could be a policy for endless warfare. However, the American political system, with its checks and balances, was designed explicitly for the purpose of constraining the executive from excessive folly. Both the Vietnam and the contemporary Iraqi experiences reveal clearly that although the conduct of war is an executive prerogative, in practice that authority is disciplined by public attitudes. Clausewitz made this point superbly with his designation of the passion, the sentiments, of the people as a vital component of his trinitarian theory of war. 51 It is true to claim that power can be, and indeed is often, abused, both personally and nationally. It is possible that a state could acquire a taste for the apparent swift decisiveness of preventive warfare and overuse the option. One might argue that the easy success achieved against Taliban Afghanistan in 2001, provided fuel for the urge to seek a similarly rapid success against Saddam Hussein’s Iraq. In other words, the delights of military success can be habit forming. On balance, claim seven is not persuasive, though it certainly contains a germ of truth. A country with unmatched wealth and power, unused to physical insecurity at home—notwithstanding 42 years of nuclear danger, and a high level of gun crime—is vulnerable to demands for policies that supposedly can restore security. But we ought not to endorse the argument that the United States should eschew the preventive war option because it could lead to a futile, endless search for absolute security. One might as well argue that the United States should adopt a defense policy and develop capabilities shaped strictly for homeland security approached in a narrowly geographical sense. Since a president might misuse a military instrument that had a global reach, why not deny the White House even the possibility of such misuse? In other words, constrain policy ends by limiting policy’s military means. This argument has circulated for many decades and, it must be admitted, it does have a certain elementary logic. It is the opinion of this enquiry, however, that the claim that a policy which includes the preventive option might lead to a search for total security is **not at all convincing**. Of course, folly in high places is always possible, which is one of the many reasons why popular democracy is the superior form of government. It would be absurd to permit the fear of a futile and dangerous quest for absolute security to preclude prevention as a policy option. Despite its absurdity, this rhetorical charge against prevention is a stock favorite among prevention’s critics. It should be recognized and dismissed for what it is, a debating point with little pragmatic merit. And strategy, though not always policy, **must be nothing if not pragmatic**.

### AT: State of Exception

#### Aff key to avoid a state of exception

Mitzen 11 Dr. Jennifer, Associate Professor of Political Science at Ohio State University and Michael Newell, PhD student in Political Science at the Maxwell School of Citizenship and Public Affairs, “Crisis Authority, the War on Terror and the Future of Constitutional Democracy,” JUROS Arts & Humanities Vol. 2, http://libeas01.it.ohio-state.edu/ojs/index.php/juros/article/download/1265/1791

As Benjamin Wittes notes, the “presidential power model has failed,” and “Only Congress can ultimately write the law of this long war” (Wittes, 2008). The pursuit of terrorist policies through the exception has not resulted in clear, transparent and legally correct outcomes because the exception has been entirely controlled by “unilateral presidential actions” (Wittes, 2008). Instead, Congress “can build comprehensive legal systems and do so in the name of the political system as a whole” (Wittes, 2008). What this would entail would be a “law of terrorism” that would “at once restrain and empower the executive branch” in its actions in the War on Terror (Wittes, 2008). Simply allowing the executive to continue to unilaterally decide the fate of suspected terrorists and anti-terrorism policy will prove Agamben correct: that the American system of checks on power has been replaced with the primacy of the executive. It should then be Congress’ goal to step forward and outline the exact legal policies in the War on Terror, allowing President Obama this role will only prolong the elements of the exception that Agamben has given such dire warnings about.¶ Conclusion¶ The state of exception has been the standard response to crises for American presidents and other world leaders since the emergence of constitutional law and democratic government. Its creation and longevity as a political and legal tool should not be surprising. Constitutional democracies were not and are not designed to have laws and rules governing every potential complication that the country could face. Instead, it has been consistently argued that exceptional times require exceptional measures. The use of these measures when the public is ready and willing to accept the securitizing speech-act almost invariably lead to breaches of the law, and in Agamben’s opinion the expansion of executive authority. The War on Terror has seemingly reinforced Agamben’s argument, as the breadth and magnitude of legal issues resulting from this war have made the legal recovery extremely complicated.¶ However, some scholars suggest that the War on Terror has actually undermined the ability of the sovereign to invoke the state of exception, stating that instead:¶ In so far as it pursues this end, the effect of such commentary is to compound efforts to curtail the experience of deciding on/in the exception – efforts that are already well under way at Guantánamo Bay. For notwithstanding all the liberal heartache that they provoke, the law and legal institutions of Guantánamo Bay are working to negate the exception (Johns, 2005).¶ Johns suggests that the policies of the War on Terror are leading towards a tendency to condemn the state of exception and crisis authority. Johns bases his argument in the abundance of legal scholarship calling for “a newly fashioned emergency regime” that would “rescue the concept [of emergency power] from fascist thinkers like Carl Schmitt” (Johns, 2005). This logic would suggest that Agamben’s prediction is not coming true, that the executive will now be limited by what actions they can pursue during future crises and that the legal authority acquired by the executive during the War on Terror has been ceded back to its designated proprietors.¶ But for Johns to be proven right, it requires a change in long established habits. Citizens cannot expect the executive to singularly react to any complication the country faces. Indeed, Agamben’s warnings and the results of the War on Terror suggest that doing so will continue to produce dissatisfying results at best, immoral quagmires at worst. For democracy and constitutional governance to survive, it is the responsibility of officials and citizens alike to adapt existing legal structures to novel threats, and to not rely on executive mandate alone.

## K

### Incremental Reform

#### Incremental reform is better than pure rejection---the alternative infinitely replicates the SQ

Pyle 99—Boston College Law School, J.D., magna cum laude (Jefferey, Race, Equality and the Rule of Law: Critical Race Theory's Attack on the Promises of Liberalism, 40 B.C.L. Rev. 787)

"Critique," however, never built anything, and liberalism, for all its shortcomings, is at least constructive. It provides broadly-accepted, reasonably well-defined principles to which political advocates may appeal in ways that transcend sheer power, with at least some hope of incremental success:26' Critical race theory would "deconstruct" this imperfect tradition, but offers nothing in its place.

An apt example of how unconstructive CRT is can be found in its approach to equality. To the extent that race-crits discuss "equality" at all, they do so less to advance tangible goals than to disparage liberalism's different approaches, including the ultimate goal of a society where race does not matter. 265 The race-crits are particularly hostile to the liberal ideal of "color blindness," expressed most eloquently by Martin Luther King's dream that his children "will one day live in a nation where they will not be judged by the color of their skin but by the content of their character."266 To the race-crits, this integrationist goal of color-blind constitutionalism is not just naive or preinature. 2"7 In Neil Gotanda's words, it "supports the supremacy of white interests and must therefore be regarded as racist." !08 Unlike King, who saw affirmative action as a color-conscious means to a more inclusive, integrated nation ,"9 race-crits consider affirmative action an end in itself, more akin to an award of permanent damages than transitional assistance:270 To the race-crits, any doctrine that gets in the way of that end, including egalitarian colorblindness, is ipso facto "racist." 271

<cont>

Critical race theory's failure to address the difficulties of administering a reparations-based, "equality of result!' system leaves one with the impression that either they really are not. serious, or their invocation of "equality" is little more than an assertion of group interests. Indeed, the more pessimistic race-crits, like Derrick Bell, would be happiest if social reformers jettisoned the goal of "equality" altogether, because that goal "merely perpetuates our disempowerment."291 Illegal doctrine is to be judged solely by how it advances the interest of racial minorities, the race-crits implicitly dismiss any vision of equality that could aid other disadvantaged groups, or that could treat disadvantaged members of the racial majority with equal concern and respect.29' To the race-crits, the proper inquiry is not how the law lives up to aspirations or principles, but how it serves the interests of a constituen cy.297

In this respect, the race-crits are more political advocates than legal scholars.2"8 There is, of course, nothing wrong with being an advocate, and disadvantaged people certainly need advocates. But legal theories—the principles and ideas that guide the determination of legal outcomes—must transcend mere factional interests if they are to aid minorities. They must win the majority's acquiescence, if not its active support. So far, race-crits have not provided such a theory. CRT is only "scholarly resistance" that lives within, and indeed depends upon, the liberal legal order. 2"" Without liberalism to "critique," critical race theory would have little meaning. In the end, critical race theory could no more supplant liberalism than the mission statement of a political action committee could replace the Constitution.

### Wounded Attachments

#### resistance/empowerment via the ballot can only instill an adaptive politics of being and effaces the institutional constraints that reproduce structural violence

Brown 95—prof at UC Berkely (Wendy, States of Injury, 21-3)

For some, fueled by opprobrium toward regulatory norms or other mo- dalities of domination, the language of "resistance" has taken up the ground vacated by a more expansive practice of freedom. For others, it is the discourse of “empowerment” that carries the ghost of freedom's valence ¶ 22¶. Yet as many have noted, insofar as resistance is an effect of the regime it opposes on the one hand, and insofar as its practitioners often seek to void it of normativity to differentiate it from the (regulatory) nature of what it opposes on the other, it is at best politically rebellious; at worst, politically amorphous. Resistance stands against, not for; it is re- action to domination, rarely willing to admit to a desire for it, and it is neutral with regard to possible political direction. Resistance is in no way constrained to a radical or emancipatory aim. a fact that emerges clearly as soon as one analogizes Foucault's notion of resistance to its companion terms in Freud or Nietzsche. Yet in some ways this point is less a critique of Foucault, who especially in his later years made clear that his political commitments were not identical with his theoretical ones (and un- apologetically revised the latter), than a sign of his misappropriation. For Foucault, resistance marks the presence of power and expands our under- standing of its mechanics, but it is in this regard an analytical strategy rather than an expressly political one. "Where there is power, there is resistance, and yet. or rather consequently, this resistance is never in a position of exteriority to power. . . . (T]he strictly relational character of power relationships . . . depends upon a multiplicity of points of resis- tance: these play the role of adversary, target, support, or handle in power relations.\*39 This appreciation of the extent to which resistance is by no means inherently subversive of power also reminds us that it is only by recourse to a very non-Foucaultian moral evaluation of power as bad or that which is to be overcome that it is possible to equate resistance with that which is good, progressive, or seeking an end to domination. ¶ If popular and academic notions of resistance attach, however weakly at times, to a tradition of protest, the other contemporary substitute for a discourse of freedom—“empowerment”—would seem to correspond more closely to a tradition of idealist reconciliation. The language of resistance implicitly acknowledges the extent to which protest always transpires inside the regime; “empowerment,” in contrast, registers the possibility of generating one’s capacities, one’s “self-esteem,” one’s life course, without capitulating to constraints by particular regimes of power. But in so doing, contemporary discourses of empowerment too often signal an oddly adaptive and harmonious relationship with domination insofar as they locate an individual’s sense of worth and capacity in the register of individual feelings, a register implicitly located on some- thing of an otherworldly plane vis-a-vis social and political power. In this regard, despite its apparent locution of resistance to subjection, contem- porary discourses of empowerment partake strongly of liberal solipsism—the radical decontextualization of the subject characteristic of¶ 23¶ liberal discourse that is key to the fictional sovereign individualism of liberalism. Moreover, in its almost exclusive focus on subjects’ emotionalbearing and self-regard, empowerment is a formulation that converges with a regime’s own legitimacy needs in masking the power of the regime.¶ This is not to suggest that talk of empowerment is always only illusion or delusion. It is to argue, rather, that while the notion of empowerment articulates that feature of freedom concerned with action, with being more than the consumer subject figured in discourses of rights and eco- nomic democracy, contemporary deployments of that notion also draw so heavily on an undeconstructed subjectivity that they risk establishing a wide chasm between the (experience of) empowerment and an actual capacity to shape the terms of political, social, or economic life. Indeed, the possibility that one can “feel empowered” without being so forms an important element of legitimacy for the antidemocratic dimensions of liberalism.