### 1

#### Armed forces only includes United States troops – explicitly excludes weapons systems

Lorber explains(Eric, JD U of Penn Law School, Phd Duke U, Journal of Constitutional Law, Vol 15: 3 "Executive Warmaking Authority and Offensive Cyber Operations: Can Existing Legislation Successfully Constrain Presidential Power?")

As is evident from a textual analysis,177 an examination of the legislative history,178 and the broad policy purposes behind the creation of the Act,179 “armed forces” refers to U.S. soldiers and members of the armed forces, not weapon systems or capabilities such as offensive cyber weapons. Section 1547 does not specifically define “armed forces,” but it states that “the term ‘introduction of United States Armed Forces’ includes the assignment of members of such armed forces to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government.”180 While this definition pertains to the broader phrase “introduction of armed forces,” the clear implication is that only members of the armed forces count for the purposes of the definition under the WPR. Though not dispositive, the term “member” connotes a human individual who is part of an organization.181 Thus, it appears that the term “armed forces” means human members of the United States armed forces. However, there exist two potential complications with this reading. First, the language of the statute states that “the term ‘introduction of United States Armed Forces’ includes the assignment of members of such armed forces.”182 By using inclusionary—as opposed to exclusionary— language, one might argue that the term “armed forces” could include more than members. This argument is unconvincing however, given that a core principle of statutory interpretation, expressio unius, suggests that expression of one thing (i.e., members) implies the exclusion of others (such as non- members constituting armed forces).183 Second, the term “member” does not explicitly reference “humans,” and so could arguably refer to individual units and beings that are part of a larger whole (e.g., wolves can be members of a pack). As a result, though a textual analysis suggests that “armed forces” refers to human members of the armed forces, such a conclusion is not determinative.¶ An examination of the legislative history also suggests that Congress clearly conceptualized “armed forces” as human members of the armed forces. For example, disputes over the term “armed forces” revolved around who could be considered members of the armed forces, not what constituted a member. Senator Thomas Eagleton, one of the Resolution’s architects, proposed an amendment during the process providing that the Resolution cover military officers on loan to a civilian agency (such as the Central Intelligence Agency).184 This amendment was dropped after encountering pushback,185 but the debate revolved around whether those military individuals on loan to the civilian agency were still members of the armed forces for the purposes of the WPR, suggesting that Congress considered the term to apply only to soldiers in the armed forces. Further, during the congressional hearings, the question of deployment of “armed forces” centered primarily on past U.S. deployment of troops to combat zones,186 suggesting that Congress conceptualized “armed forces” to mean U.S. combat troops.

#### - Hostilities require troops

Mataconis explains [Doug Mataconis June 15, 2011 “President Obama To Congress: War Powers Act Doesn’t Apply To Libya” http://www.outsidethebeltway.com/president-obama-to-congress-war-powers-act-doesnt-apply-to-libya/]

The question then is whether United States military forces are still involved in “hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances.” There seems to be no real contention by anyone that American forces, or NATO forces for that matter, are actually on Libyan territory or in Libyan territorial waters. The Administration seems to be arguing that since there are no American ground troops and no American fighter planes involved in action over Libya, then the answer to that question is no. As John Cole notes, though, we are using Predator drones to launch missiles at Libyan target on an as-needed basis, so the idea that we’re completely off the grid on this mission isn’t entirely true.¶ However, is an unmanned drone controlled from hundreds, or thousands, miles away really “engaging in hostilities” within the meaning of the War Powers Act? What about launching cruise missiles from a ship in international waters, would that be outside the purview of the WPA as well? Heck, would launching an Intercontinental Ballistic Missile from a silo in North Dakota toward Tripoli be covered by the Act? The answer is unclear:¶ It remains to be seen whether majorities in Congress will accept the administration’s argument, defusing the confrontation, or whether the White House’s response will instead fuel greater criticism. Either way, because the War Powers Resolution does not include a definition of “hostilities” and the Supreme Court has never ruled on the issue, the legal debate is likely to be resolved politically, said Rick Pildes, a New York University law professor.¶ “There is no clear legal answer,” he said. “The president is taking a position, so the question is whether Congress accepts that position, or doesn’t accept that position and wants to insist that the operation can’t continue without affirmative authorization from Congress.”

### 2

#### The plan would crush US-Saudi relations – a hardline stance on remote weapons is critical to Saudi legitimacy

Eakin 12 (Hugh, IRP Gatekeeper Editor, May 21 2012 The New York Review, "Saudi Arabia and the New US War in Yemen"

What seems clear is that Saudi Arabia has become a key backer—and at times coordinator—of the accelerating US drone war and special operations offensive in Yemen, partly for its own security interests. Interior Ministry officials in Riyadh speak enthusiastically about the US **drone** program, and on May 12, drone strikes allegedly killed some eleven AQAP suspects, [two of them Saudi nationals](http://www.voanews.com/content/drones_in_yemen_kill_11_militants/566327.html). (It is worth noting, following the controversial killing of US citizen Anwar al-Awlaki, that Saudi Arabia does not appear to have many qualms about killing its own citizens in Yemen.)¶ Perhaps most important for the Saudi government, a successful counterterrorism policy carries enormous political value amid the upheavals of the Arab Spring. Even more than democratization or regime change in the region, the Saudi rulers seem to fear instability and unpredictability: though they have reluctantly supported the transition of power in Yemen, they are particularly nervous about the kind of extremism that has emerged in neighboring countries like Iraq, Yemen, and now Syria, when uprisings turn into violent conflict or authority breaks down entirely—places where Saudi jihadists have often found new causes. “Syria will be tempting to al-Qaeda,” Abdulrahman Alhadaq, a Saudi counter terrorism official, said in a briefing in Riyadh. “We need to avoid another Iraq.”¶ But Saudi counterterrorism efforts are also an important element in achieving consensus and legitimacy for the Saudi regime itself. Many young Saudis are growing increasingly impatient with their government’s oppressive status quo, and not a little of their ire is directed against the Interior Ministry, which has been blamed for arbitrary arrests of activists and human rights lawyers. Yet many I spoke to also seem to fear the chaos and violence that has engulfed so many of the country’s neighbors. In the early 2000s, when the Saudi government sponsored national dialogues to bring together activists, reformers, conservatives, and Islamists from across the ideological spectrum to suggest avenues of change, the country’s counterterrorism approach was one issue on which there was near universal agreement. (Participants in one of these dialogues explicitly endorsed a strategy of repentence and reconciliation for extremists.)¶ Turning Saudi Arabia into the US’s indispensable ally in Yemen—while making Yemen the central conflict in the US-led war against terrorism—has considerable strategic value for Crown Prince Nayef, who was named the heir apparent to King Abdullah last fall. As US-Saudi collaboration on security and counterterrorism has increased, the regime has largely avoided US pressure on human rights and domestic reforms. And while it keeps the terror threat at bay, at least within its own borders, the Interior Ministry can hold up Yemen as the example of what might happen at home if its broad powers were curbed. Whether that argument will continue to assuage the country’s youth remains an open question.

#### That causes Saudi nuclearization

Rozen ‘11 [Laura, the chief foreign policy reporter for Politico, quoting Patrick Clawson, a Persian Gulf expert at the Washington Institute for Near East Policy and Marc Lynch, a Middle East expert at George Washington University, Arab spring setbacks in the shadow of complicated U.S.-Saudi alliance, 4/18/11, <http://news.yahoo.com/s/yblog_theenvoy/20110418/ts_yblog_theenvoy/optimism-for-arab-spring-fades-in-face-of-complicated-u-s-saudi-alliance>]

**Riyadh, alarmed by** the **Obama** administration's failure to prop up its ally of three decades Egyptian President Hosni Mubarak, **is sending signs of its displeasure and interest in exploring alternative security arrangements**. Last month, former Saudi envoy to Washington now Saudi national security chief Prince **Bandar** **went to Pakistan, ostensibly to discuss the possibility of recruiting Pakistani troops** to help Sunni Gulf allies suppress Bahraini unrest. But some Washington **Middle East analysts interpreted the visit as a signal of possible Saudi interest in exploring being protected by a Pakistani nuclear security umbrella, or acquiring Pakistani nuclear weapons, if Washington doesn't sufficiently assure Riyadh that it will protect it from a nuclear Iran**. "The big problem we face is that at the very least the **Saudis** and [United Arab Emirates] **wonder to what extent we are committed to their most vital interests**," said Patrick Clawson, a Persian Gulf expert at the Washington Institute for Near East Policy. "Prince Bandar's visit to Pakistan is a shot across our bow of what the Saudis may feel is necessary if the U.S. is not providing an effective security guarantee.... The rumors in the region have long been that the Saudis paid a fair chunk of the bill" for Pakistan's nuclear program. "The momentum of the Arab revolutions has stalled, and the old Middle East is reasserting itself," said Marc Lynch, a Middle East expert at George Washington University who frequently consults with the Obama administration. In the current strategic malaise, Lynch said, "the Israelis and Palestinians are saying, 'what about us?' **The 'contain Iran' crowd is saying, 'don't forget about Iran.'" And the Saudis are playing up rising Sunni-Shiite tensions in the region, which "gives them an excuse," he added, to push their contain-Iran agenda, as well as to "equate Iranian subversion for use against their own Shia population**. Any time Saudi Shia make demands for political rights, they are accused of being Iranian agents."

#### Causes nuclear war and turns terrorism

Edelman ‘11 [Fellow at the Center for Strategic and Budgetary Assessments. Former Undersecretary for Defense—AND—Andrew Krepinevich—President of the Center for Strategic and Budgetary Assessments—AND—Evan Montgomery—Research Fellow at the Center for Strategic and Budgetary Assessments (Eric, The dangers of a nuclear Iran, FA 90;1, <http://www.csbaonline.org/wp-content/uploads/2010/12/2010.12.27-The-Dangers-of-a-Nuclear-Iran.pdf>]

There is, however, at least one state that could receive significant outside support: Saudi Arabia. And if it did, proliferation could accelerate throughout the region. Iran and Saudi Arabia have long been geopolitical and ideological rivals. Riyadh would face tremendous pressure to respond in some form to a nuclear-armed Iran, not only to deter Iranian coercion and subversion but also to preserve its sense that Saudi Arabia is the leading nation in the Muslim world. The Saudi government is already pursuing a nuclear power capability, which could be the first step along a slow road to nuclear weapons development. And concerns persist that it might be able to accelerate its progress by exploiting its close ties to Pakistan. During the 1980s, in response to the use of missiles during the Iran-Iraq War and their growing proliferation throughout the region, Saudi Arabia acquired several dozen CSS-2 intermediate-range ballistic missiles from China. The Pakistani government reportedly brokered the deal, and it may have also offered to sell Saudi Arabia nuclear warheads for the CSS-2S, which are not accurate enough to deliver conventional warheads effectively. There are still rumors that Riyadh and Islamabad have had discussions involving nuclear weapons, nuclear technology, or security guarantees. This "Islamabad option" could develop in one of several different ways. Pakistan could sell operational nuclear weapons and delivery systems to Saudi Arabia, or it could provide the Saudis with the infrastructure, material, and technical support they need to produce nuclear weapons themselves within a matter of years, as opposed to a decade or longer. Not only has Pakistan provided such support in the past, but it is currently building two more heavy-water reactors for plutonium production and a second chemical reprocessing facility to extract plutonium from spent nuclear fuel. In other words, it might accumulate more fissile material than it needs to maintain even a substantially expanded arsenal of its own. Alternatively, Pakistan might offer an extended deterrent guarantee to Saudi Arabia and deploy nuclear weapons, delivery systems, and troops on Saudi territory, a practice that the United States has employed for decades with its allies. This arrangement could be particularly appealing to both Saudi Arabia and Pakistan. It would allow the Saudis to argue that they are not violating the NPT since they would not be acquiring their own nuclear weapons. And an extended deterrent from Pakistan might be preferable to one from the United States because stationing foreign Muslim forces on Saudi territory would not trigger the kind of popular opposition that would accompany the deployment of U.S. troops. Pakistan, for its part, would gain financial benefits and international clout by deploying nuclear weapons in Saudi Arabia, as well as strategic depth against its chief rival, India. The Islamabad option raises a host of difficult issues, perhaps the most worrisome being how India would respond. Would it target Pakistan's weapons in Saudi Arabia with its own conventional or nuclear weapons? How would this expanded nuclear competition influence stability during a crisis in either the Middle East or South Asia? Regardless of India's reaction, any decision by the Saudi government to seek out nuclear weapons, by whatever means, would be highly destabilizing. It would increase the incentives of other nations in the Middle East to pursue nuclear weapons of their own. And it could increase their ability to do so by eroding the remaining barriers to nuclear proliferation: each additional state that acquires nuclear weapons weakens the nonproliferation regime, even if its particular method of acquisition only circumvents, rather than violates, the NPT. N-PLAYER COMPETITION Were Saudi Arabia to acquire nuclear weapons, the Middle East would count three nuclear-armed states, and perhaps more before long. It is unclear how such an n-player competition would unfold because most analyses of nuclear deterrence are based on the U.S.-Soviet rivalry during the Cold War. It seems likely, however, that the interaction among three or more nuclear-armed powers would be more prone to miscalculation and escalation than a bipolar competition. During the Cold War, the United States and the Soviet Union only needed to concern themselves with an attack from the other. Multi-polar systems are generally considered to be less stable than bipolar systems because coalitions can shift quickly, upsetting the balance of power and creating incentives for an attack. More important, emerging nuclear powers in the Middle East might not take the costly steps necessary to preserve regional stability and avoid a nuclear exchange. For nuclear-armed states, the bedrock of deterrence is the knowledge that each side has a secure second-strike capability, so that no state can launch an attack with the expectation that it can wipe out its opponents' forces and avoid a devastating retaliation. However, emerging nuclear powers might not invest in expensive but survivable capabilities such as hardened missile silos or submarine-based nuclear forces. Given this likely vulnerability, the close proximity of states in the Middle East, and the very short flight times of ballistic missiles in the region, any new nuclear powers might be compelled to "launch on warning" of an attack or even, during a crisis, to use their nuclear forces preemptively. Their governments might also delegate launch authority to lower-level commanders, heightening the possibility of miscalculation and escalation. Moreover, if early warning systems were not integrated into robust command-and-control systems, the risk of an unauthorized or accidental launch would increase further still. And without sophisticated early warning systems, a nuclear attack might be unattributable or attributed incorrectly. That is, assuming that the leadership of a targeted state survived a first strike, it might not be able to accurately determine which nation was responsible. And this uncertainty, when combined with the pressure to respond quickly, would create a significant risk that it would retaliate against the wrong party, potentially triggering a regional nuclear war. Most existing nuclear powers have taken steps to protect their nuclear weapons from unauthorized use: from closely screening key personnel to developing technical safety measures, such as permissive action links, which require special codes before the weapons can be armed. Yet there is no guarantee that emerging nuclear powers would be willing or able to implement these measures, creating a significant risk that their governments might lose control over the weapons or nuclear material and that nonstate actors could gain access to these items. Some states might seek to mitigate threats to their nuclear arsenals; for instance, they might hide their weapons. In that case, however, a single intelligence compromise could leave their weapons vulnerable to attack or theft.

### 3

#### The President of the United States should issue an Executive Order committing the executive branch to Solicitor General representation and advance consultation with the Office of Legal Counsel over decisions regarding introduction of U.S. Armed Forces into hostilities. The Department of Justice officials involved should counsel should amend the 1973 WPR to specify that using remotely deployed weapons constitutes an introduction of U.S. Armed Forces into hostilities .The Executive Order should also require written publication of Office of Legal Counsel opinions.

#### Executive pre-commitment to DOJ advice solves the aff

**Pillard 2005** – JD from Harvard, Faculty Director of Supreme Court Institute at Georgetown University Law Center, former Deputy Assistant Attorney General in the DOJ (February, Cornelia T., Michigan Law Review, 103.4, “The Unfulfilled Promise of the Constitution in Executive Hands”, 103 Mich. L. Rev. 676-758, http://scholarship.law.georgetown.edu/facpub/189/)

V. ENABLING EXECUTIVE CONSTITUTIONALISM

The courts indisputably do not and cannot fully assure our enjoyment of our constitutional rights, and it is equally clear that the federal executive has an independent constitutional duty to fulfill the Constitution's promise. Executive constitutionalism seems ripe with promise. Yet, it is striking how limited and court-centered the executive's normative and institutional approaches to constitutional questions remain. One conceivable way to avoid the pitfalls of court-centric executive lawyering on one hand and constitutional decisions warped by political expedience on the other would be to make the Solicitor General and Office of Legal Counsel - or perhaps the entire Department of Justice - as structurally independent as an independent counsel or independent agency.207 Making the SG and OLC independent in order to insulate them from politics presumably would alleviate the "majoritarian difficulty" resulting from their service to elected clients. Promoting fuller independence in that sense does not, however, appear to be clearly normatively attractive, constitutionally permissible, nor particularly feasible. In all the criticism of our current constitutionalism, there is little call for an SG or OLC that would act, in effect, as a fully insulated and jurisprudentially autonomous constitutional court within the executive branch, operating with even less transparency and accountability than the Supreme Court. Moreover, as a practical matter it would be complex and problematic to increase the independence of the SG and OLC. The federal government faces Article II obstacles to formally insulating executive lawyers from politics and institutional pressures, and the president and his administration likely would be less amenable to guidance from such unaccountable lawyers.208 The challenge, rather, is to draw forth from the executive a constitutional consciousness and practice that helps the government actively to seek to fulfill the commitments of the Constitution and its Bill of Rights, interpreted by the executive as guiding principles for government. Adjustments to executive branch constitutional process and culture should be favored if they encourage the executive to use its experience and capacities to fulfill its distinctive role in effectuating constitutional guarantees. There is transformative potential in measures that break ingrained executive branch habits of looking to the Constitution only as it is mediated through the courts, and of reflexively seeking, where there is no clear doctrinal answer, to minimize constitutional constraint. It is difficult fully to imagine what kinds of changes would best prompt executive lawyers and officials to pick up constitutional analysis where the courts leave off, and to rely on the Constitution as an affirmative, guiding mandate for government action; what follows are not worked-out proposals, but are meant to be merely suggestive. A. Correcting the Bias Against Constitutional Constraint As we have seen, the SG's and OLC's default interpretive approach to individual rights and other forms of constitutional constraints on government is to follow what clear judicial precedents there are and, where precedents are not squarely to the contrary, to favor interpretations that minimize constitutional rights or other constitutional obligations on federal actors. Those court-centered and narrowly self-serving executive traditions produce a systematic skew against individual rights. 1. Encourage Express Presidential Articulation of Commitment to Constitutional Rights To the extent that a president articulates his own rights-protective constitutional vision with any specificity, he ameliorates the tension his constitutional lawyers otherwise face between advancing individual rights and serving their boss's presumed interest in maximum governing flexibility. Case or controversy requirements and restrictions against courts issuing advisory opinions do not, of course, apply to the executive's internal constitutional decisionmaking, and presidents can better serve individual rights to the extent that they expressly stake out their constitutional commitments in general and in advance of any concrete controversy."° When the president takes a stand for advancing abortion rights, property rights, disability rights, "charitable choice," a right to bear arms, or full remediation of race and sex discrimination, he signals to his lawyers that they should, in those areas, set aside their default bias in favor of preserving executive prerogative, even if it requires extra executive effort or restraint to do so. If presented in a concrete setting with a choice between interpreting and applying the Constitution in fully rights-protective ways or sparing themselves the effort where Supreme Court precedent can be read not to require it, government officials typically default to the latter course without considering whether they might thereby be giving short shrift to a constitutional duty. A president's stated commitment to protection of particular rights, however, flips the default position with respect to those rights, acting as a spur to executive-branch lawyers and other personnel to work to give effect to constitutional rights even where, for a range of institutional reasons, the courts would not. A president is thus uniquely situated to facilitate full executive-branch constitutional compliance by precommitting himself to a rights-protective constitutional vision, and thereby making clear that respect for constitutional rights is part of the executive's interest, not counter to it.

### 4

#### Patent reform will pass- its top of the docket and PC is key

Hattern, 3-5 – The Hill Correspondent

[Julian, "Congress gets out club for patent ‘trolls’," The Hill, 3-5-14, thehill.com/blogs/hillicon-valley/technology/199954-lawmakers-look-to-push-patent-troll-bill, 13-14]

Proponents of a bill to prevent patent “trolls” from harassing businesses are increasingly optimistic their legislation will become law this year. Lawmakers and a wide swath of different industries have aligned behind the push for a crackdown on the so-called trolls, which sue companies for patent license violations. Supporters of the reform effort claim the lawsuits are often frivolous, but nonetheless force businesses into settlements to avoid lengthy and costly court cases. Plaintiffs in the suits argue they are merely trying to protect their intellectual property and preserve inventors’ ability to innovate. With campaign politics gumming up the works on Capitol Hill, the patent crackdown could be one of the few bills to make it to President Obama’s desk before November, supporters say. “I think that members on both sides of the aisle recognize that this is a big problem affecting people being employed in their district, investments in their district,” said Beth Provenzano, a senior director for government relations at the National Retail Federation. “I think that this does stand a good chance, even in the election year.” The Senate Judiciary Committee, the focus of the patent reform fight, will look to take action on legislation this month, Chairman Patrick Leahy (D-Vt.) said on Tuesday. Sen. Mike Lee (R-Utah) on Wednesday said he hoped the full chamber would vote on the bill in the coming months. In addition to the retailers trade group, associations for restaurants, financial institutions and major tech companies such as Google have pushed for the chamber to approve legislation. The troublesome lawsuits can cost millions, they say, and need to be stopped immediately. Patent-rights holders skeptical of reform claim that bill goes too far and warn it could make it difficult for inventors and universities to profit from their creations. In December, the House overwhelmingly passed the Innovation Act, which would reform much of the patent lawsuit process. Lee and Leahy are pushing a companion bill, the Patent Transparency and Improvements Act, in the Senate. Obama backed the House bill and called for action in his State of the Union address. Supporters hope the president’s backing will help push legislation across the finish line in the Senate. “It meant a lot in the Senate to have the president weigh in like that,” Lee said at an event Tuesday in Washington. “To have it brought up by the president in some very public settings has been very helpful to help focus the public attention on the fact that this is hurting a lot of people.” Obama’s support also created momentum in the House, and convinced Democratic lawmakers who might not have been focused on the issue to hop on board, according to Rep. Jared Polis (D-Colo.).

#### Bipartisan opposition to reducing the security state

Antle, 13 -- Daily Caller News Foundation editor [James, "Congress Goes Bipartisan—Against Civil Liberties," American Conservative, 3-4-13, www.theamericanconservative.com/articles/the-drone-consensus313/, accessed 5-23-13, mss]

Congress Goes Bipartisan—Against Civil Liberties The parties collude to defeat accountability for the national-security state. Civil liberties are theoretically a bipartisan concern. Conservative Republicans who don’t like Obamacare’s “death panels” should be outraged by presidential kill lists. Liberal Democrats who defend due process ought to be offended by secret surveillance law. Protectors of the First and Second Amendments should have a high regard for the Fourth, Fifth, and Sixth. Yet restricting civil liberties is what actually commands bipartisan support in Washington. The same Congress that barely averted the fiscal cliff swiftly passed extensions of warrantless wiretapping and indefinite detention, assuring Americans that only the bad guys will be affected but evincing little interest in establishing whether this is really the case. The same Congress that failed to come up with an agreement to avoid sequestration appears to have bipartisan majorities in favor of profligate drone use at home and abroad. Lawmakers are generally less exercised about the confirmation of likely CIA chief John Brennan than Defense Secretary Chuck Hagel. At the very time it appears Washington is so dysfunctional that the two parties cannot get anything done, Democrats and Republicans cooperate regularly—when it it comes to jailing, spying on, and meting out extrajudicial punishments in ways that on their face contradict the Bill of Rights. Senate Majority Leader Harry Reid argued that preserving the Bush administration’s national surveillance program—now for the benefit of the Obama administration—was more important than Christmas. Republican Sen. Saxby Chambliss didn’t even want any amendments. The Senate overwhelmingly rejected an amendment that would apply the same protections against unlawful search and seizure to emails and text messages that already exist for letters, phone calls, and presumably the carrier pigeon. Despite deep divisions over taxes and domestic spending, members of both parties tend to sing from the same song sheet about the Patriot Act, the National Defense Authorization Act, and the Foreign Intelligence Surveillance Act amendments. So much for the Democrats’ bedrock belief in the right to privacy or Republicans’ convictions about limited government.

#### Debates about drone policy split the base – democrats are massively fractured

Hirschfield 3/8/13 (Juie, Bloomberg News Staff Writer, "Obama Faces Bipartisan Pressure on Drone Big Brother Fear")

“The president is facing more political pressure on the war on terror in his second term, and it’s coming from the flanks -- the left flank and human rights community and from the right,” said Peter Feaver, who advised former President [George W. Bush](http://topics.bloomberg.com/george-w.-bush/) on national security and now teaches politics at [Duke University](http://topics.bloomberg.com/duke-university/) in Durham, [North Carolina](http://topics.bloomberg.com/north-carolina/).¶ The questions have sharpened amid public fears about “persistent ubiquitous surveillance,” Feaver added, “something that resonates especially strongly on the libertarian right that would say, ‘I don’t want Big Brother to be watching me,’ but also on the left, with people saying, ‘Do I want the FBI to be reading my e-mail?”¶ Paul, a first-term senator from [Kentucky](http://topics.bloomberg.com/kentucky/), cheered his letter from Holder and claimed credit for having elicited a rare unambiguous answer from Obama’s team on drone policy. To Paul’s question about the president’s authority to kill an American not engaged in combat on American soil, the attorney general wrote: “The answer to that question is no.”¶ ‘Under Duress’¶ “Hooray!” Paul said on Fox News, calling the missive “a result and a victory” from his filibuster delaying the Senate confirmation of [John Brennan](http://topics.bloomberg.com/john-brennan/) for CIA director -- ultimately approved. “Under duress, and under public humiliation, the White House will respond and do the right thing.”¶ Senator [Ron Wyden](http://topics.bloomberg.com/ron-wyden/) of [Oregon](http://topics.bloomberg.com/oregon/), the only Democrat to join Paul and other Republicans in the talk-a-thon, said it’s clear that a turning point occurred in the debate over drone policy in the last week -- not solely because of the filibuster.¶ “You’re going to start to see the emergence of a checks- and-balances caucus, and that there will be a lot of Democrats in it,” Wyden said.¶ Earlier in the week, he and others on the Senate intelligence committee forced the administration to allow panel members to review legal opinions underpinning its drone policy. That was after he and a handful of others withheld support for Brennan’s nomination until they saw the opinions.

#### Key to innovation and American economic security

Goodlatte, 3-12 -- House Judiciary Committee chair, Rep

[Robert (R-VA), "Bipartisan Road Map for Protecting and Encouraging American Innovation," Roll Call 3-12-14, www.rollcall.com/news/bipartisan\_road\_map\_for\_protecting\_and\_encouraging\_american\_innovation-231413-1.html?pg=2, accessed 3-12-14]

Throughout our nation’s history, great ideas have powered our economic prosperity and security, from the Industrial Revolution to the Internet age. Safeguarding those great ideas were so important to our Founding Fathers that they included patent protection in the U.S. Constitution. Article I, Section 8, Clause 8 of the Constitution charges Congress with overseeing a patent system to “promote the progress of science and useful arts.” As chairman of the House Judiciary Committee, which has oversight of our patent system, I take the charge to uphold our Constitution seriously. In recent years, we have seen an exponential increase in the use of weak or poorly granted patents by “patent trolls” to file numerous patent infringement lawsuits against American businesses with the hopes of securing a quick payday. This abuse of the patent system is not what our Founding Fathers provided for in our Constitution. At its core, abusive patent litigation is a drag on our economy and stifles innovation. Everyone from independent inventors to startups to mid- and large-sized businesses face this constant threat. The tens of billions of dollars spent on settlements and litigation expenses associated with abusive patent suits represent truly wasted capital — wasted capital that could have been used to create new jobs, fund research and development, and create new innovations and technologies. Bad actors who abuse the patent system devalue American intellectual property and are a direct threat to American innovation. Abusive patent litigation is also a drain on consumers. We will never know what lifesaving invention or next-generation smartphone could have been created because a business went bankrupt after prolonged frivolous litigation or paying off a patent troll. When a firm spends more on patent litigation than on research, money is being diverted from real innovation. The patent system was designed to reward inventors and incentivize innovation, bringing new products and technologies to consumers. Last year, I introduced the Innovation Act (HR 3309), legislation designed to eliminate the abuses of our patent system, discourage frivolous patent litigation and keep U.S. patent laws up to date. In December, the House of Representatives, with overwhelming bipartisan support and the support of the White House, passed the Innovation Act. This important bill will help fuel the engine of American innovation and creativity, creating new jobs and growing our economy. Effective patent reform legislation requires the careful balance that was achieved in the Innovation Act. Senate Judiciary Chairman Patrick J. Leahy, D-Vt., ranking member Charles E. Grassley, R-Iowa., and committee members John Cornyn, R-Texas, Orrin G. Hatch, R-Utah, and Mike Lee, R-Utah, among others, are leading efforts in the Senate to combat abusive practices within our patent system that inhibit innovation. I am optimistic that as the Senate moves toward consideration of legislation they will act just as the House did and pass comprehensive patent litigation reform that includes all of the necessary reforms made in the Innovation Act, including heightened pleading standards and fee shifting. In 2011, Republicans and Democrats came together to pass the America Invents Act (PL 112-29), which brought the most comprehensive change to our nation’s patent laws since the 1836 Patent Act. We are continuing to work again in a collaborative, bipartisan way to end abusive patent litigation to help the American economy and American people. I am optimistic that these important reforms will be enacted to stop the abuse of our patent system and restore the central role patents play in our economy. Half measures and inaction are not viable options. The time is now, and the Innovation Act has helped set a clear bipartisan road map toward eliminating the abuses of our patent system, discouraging frivolous patent litigation and keeping U.S. patent laws up to date.

#### Ensures conflict suppression- no alt causes

Hubbard ’10 (Hegemonic Stability Theory: An Empirical Analysis By: Jesse Hubbard Jesse Hubbard Program Assistant at Open Society Foundations Washington, District Of Columbia International Affairs Previous National Democratic Institute (NDI), National Defense University, Office of Congressman Jim Himes Education PPE at University of Oxford, 2010

**Regression analysis of this data shows** that Pearson’s r-value is -.836. **In the case of American hegemony, economic strength is a better predictor of violent conflict than even overall national power**, which had an r-value of -.819. The data is also well within the realm of statistical significance, with a p-value of .0014. While the data for British hegemony was not as striking, the same overall pattern holds true in both cases. During both periods of hegemony, hegemonic strength was negatively related with violent conflict, and yet use of force by the hegemon was positively correlated with violent conflict in both cases. Finally, in both cases, economic power was more closely associated with conflict levels than military power. Statistical analysis created a more complicated picture of the hegemon’s role in fostering stability than initially anticipated. VI. Conclusions and Implications for Theory and Policy To elucidate some answers regarding the complexities my analysis unearthed, I turned first to the existing theoretical literature on hegemonic stability theory. The existing literature provides some potential frameworks for understanding these results. Since economic strength proved to be of such crucial importance, reexamining the literature that focuses on hegemonic stability theory’s economic implications was the logical first step. As explained above, the literature on hegemonic stability theory can be broadly divided into two camps – that which focuses on the international economic system, and that which focuses on armed conflict and instability. This research falls squarely into the second camp, but insights from the first camp are still of relevance. Even Kindleberger’s early work on this question is of relevance. Kindleberger posited that the economic **instability** between the First and Second World Wars **could be attributed to the lack of an economic hegemon** (Kindleberger 1973). But economic instability obviously has spillover effects into the international political arena. Keynes, writing after WWI, warned in his seminal tract The Economic Consequences of the Peace that Germany’s economic humiliation could have a radicalizing effect on the nation’s political culture (Keynes 1919). Given later events, his warning seems prescient. In the years since the Second World War, however, the European continent has not relapsed into armed conflict. What was different after the second global conflagration? Crucially, the United States was in a far more powerful position than Britain was after WWI. As the tables above show, Britain’s economic strength after the First World War was about 13% of the total in strength in the international system. In contrast, the United States possessed about 53% of relative economic power in the international system in the years immediately following WWII. The U.S. helped rebuild Europe’s economic strength with billions of dollars in investment through the Marshall Plan, assistance that was never available to the defeated powers after the First World War (Kindleberger 1973). Theinterwar years were also marked by a series of debilitating trade wars that likely worsened the Great Depression (Ibid.). In contrast, when Britain was more powerful, it was able to facilitate greater free trade, and after World War II, **the United States played a leading role in creating institutions like the GATT that had an essential role in facilitating global trade** (Organski 1958). The possibility that economic stability is an important factor in the overall security environment should not be discounted, especially given the results of my statistical analysis. Another theory that could provide insight into the patterns observed in this research is that of preponderance of power. Gilpin theorized that **when a state has the preponderance of power in the international system, rivals are more likely to resolve their disagreements without resorting to armed conflict** (Gilpin 1983). The logic behind this claim is simple – it makes more sense to challenge a weaker hegemon than a stronger one. This simple yet powerful theory can help explain the puzzlingly strong positive correlation between military conflicts engaged in by the hegemon and conflict overall. It is not necessarily that military involvement by the hegemon instigates further conflict in the international system. Rather, this military involvement could be a function of the hegemon’s weaker position, which is the true cause of the higher levels of conflict in the international system. Additionally, it is important to note that **military power is,** in the long run, **dependent on economic strength**. Thus, it is possible that **as hegemons lose relative economic power, other nations are tempted to challenge them even if their short-term military capabilities are still strong**. This would help explain some of the variation found between the economic and military data. The results of this analysis are of clear importance beyond the realm of theory. As the debate rages over the role of the United States in the world, hegemonic stability theory has some useful insights to bring to the table. What this research makes clear is that a strong hegemon can exert a positive influence on stability in the international system. However, this should not give policymakers a justification to engage in conflict or escalate military budgets purely for the sake of international stability. If anything, **this research points to the central importance of economic influence in fostering international stability**. To misconstrue these findings to justify anything else would be a grave error indeed. Hegemons may play a stabilizing role in the international system, but this role is complicated. **It is economic strength, not military dominance that is the true test of hegemony**. **A weak state with a strong military is a paper tiger** – it may appear fearsome, but it is vulnerable to even a short blast of wind.

### 5

#### Pariah weapons regulation backfires- normalizes militarism and leads to worse forms of violence

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[Neil, PhD from University of Kent at Canterbury, University of Bradford Associate Dean for Research for the School of Social and International Studies, "Humanitarian Arms Control and Processes of Securitization: Moving Weapons along the Security Continuum," Contemporary Security Policy, Vol 32, Issue 1, 2011, tandfonline, accessed 9-5-13]

In this account of contemporary HAC, powerful actors who aim to uphold the status quo principally have a role as agents of resistance to control agendas, not as actors in the production of control regimes. This certainly reﬂects important aspects of contemporary campaigns to regulate pariah weapons but, as I suggest below, it offers a rather incomplete account. Moreover, if such accounts did indeed provide a complete understanding of the dynamics underpinning these control agendas it would certainly represent a novel development, not least because the long history of pariah weapons regulation illustrates the way that weapons taboos frequently reﬂect the interests of the powerful. For example, one factor in the virtual eradication of the gun in 17th and 18th century Japan was that it represented a threat to the warrior class when in the hands of the lower classes.48 The same was true of the rather less successful attempt of the Second Lateran Council to ban the crossbow – a ban partly motivated by the fact that crossbows could pierce the armour of the knight – and a ban that was notably not extended to use against non-Christians.49Similarly, whilst the restrictions on the slave, arms, and liquor trade to Africa embodied in the 1890 Brussels Act were certainly grounded in an ethical discourse, the restrictions imposed on the trade in ﬁrearms were primarily rooted in concerns about the impact of the trade on colonial order. As one British colonial ofﬁcial noted at the time, the restrictions on the small arms trade to Africa reﬂected imperial concern to ‘avoid the development and paciﬁcation of this great continent ... [being] carried out in the face of an enormous population, the majority of whom will probably be armed with ﬁrst-class breechloading riﬂes’.50 The history of pariah weapons regulation would therefore appear to demonstrate a persistent link between the material and political interests of states and / or powerful elites and the emergence of pariah weapons regulation. To be sure, the material and political interests of the same, or other, powerful actors also provide countervailing pressures – the immediate interests of nobles in winnings wars with crossbows mostly won out over their broader class interests,51 whilst colonial competition to secure arms proﬁts and local allies mitigated the impact of the various restrictions on the ﬁrearms trade in the late 19th century.52 But the point is that whilst the genesis of earlier attempts at pariah regulation may, in part, be explained by reference to particular securitizing moments of intervention, the impact of such interventions can only be understood by locating them in particular political economies of power. What is surprising therefore about accounts of post-Cold War humanitarian arms control is that this long history has largely failed to prompt consideration of the way in which contemporary regulation might also reﬂect the interests of powerful states and other actors, albeit in ways that are subject to similar countervailing pressures – an issue that will be taken up below. Pariah Weapons, Heroic Weapons, and Legitimized Military Technology A further recurring theme in the history of pariah regulation is the way in which **restrictions on pariah weapons are** often **related** in some way **to the construction of a broad arena of legitimized military tech**nology**.** A particularly extreme example of this is the way in which pariah weapons are sometimes constructed as the antithesis of the ‘heroic weapon’ – a weapon deemed to embody positive values such as honour and / or which is deemed central to national defence. Thus, the series of relatively successful Acts implemented in England between 1508 and 1542 banning crossbows were largely rooted in a concern to preserve the use of the heroic longbow, deemed central to a long line of English military successes.53 The Japanese ban on the gun was similarly connected to the romanticization of the heroic samurai sword as the visible form of one’s honour, as associated with grace of movement in battle and even its status as a work of art.54 In effect both the crossbow in 16th century England and the gun in 17th and 18th century Japan became the ‘other’ which deﬁned legitimized military technologies and militarism. Redford makes much the same point about English attitudes to the submarine, which was constructed as an ‘other’ partly because of the British romanticization of the battleship (‘the upper class or aristocracy of warships’)55 as central to British security and linked to British notions of valour and honour in the conduct of war. This highlights the ways in which the security meaning associated with particular sets of weapons technology are not just a function of the framings speciﬁc to that technology but are also relational, with the representation of one weapon playing an important role in constituting the meaning of another (albeit in sometimes unexpected ways), and vice versa. Not surprisingly perhaps, similar themes also help explain the contemporary taboos constructed around particular sets of military technology such as cluster munitions. Cluster Munitions What is particularly striking about the campaign against cluster munitions is not its success in banning an inhumane weapon but the fact that this success was achieved at a moment in history when, in absolute terms at least, cluster munitions use had fallen from the peak years of use during the Vietnam era (see Table 2). In the latter period cluster bombs such as the CBU-24 represented a ‘major increase in battleﬁeld lethality’ yet its development and deployment was ‘accomplished with no public debate and relatively little subsequent protest’.56 Indeed, for the American military, ‘CBUs were categorised as a standard weapon, to be taken off the shelf – “conventional ironmongery”.57 This is not to suggest that American use of cluster munitions in this period went unremarked. There were certainly some critics at the time who argued that such weapons were inhumane.58 There were also attempts, sponsored by the International Committee of the Red Cross (ICRC) and Sweden in particular, to promote restrictions on cluster munitions in negotiations in the 1970s on the Additional Protocols to the 1949 Geneva Conventions.59 The point is however, that these efforts never achieved traction either with diplomats or with a wider public in the way that the issue would 30 years later. The labels attached to cluster munitions and also landmines only changed dramatically as the move into the post-Cold War era occurred when they moved from being treated as unproblematic elements in global military arsenals to a form of ‘technology non grata’ – weaponry deemed immoral, inhumane, and indiscriminate. Crucially, such a successful process of stigmatization was only made feasible in the context of a post-Cold War widening of the security label to incorporate the notion of human security as a referent object; by the turn to casting security interventions in humanitarian terms; and the representation of modern weaponry as humane because of its perceived capacity to better discriminate between civilians and combatants. The widening and deepening of the security label created the permissive environment necessary for activists to reframe cluster munitions (and APMs) as threats to the human. At the same time, the discussion of intervention in humanitarian terms60 and of precision weapons as instruments of humane warfare61 created a legitimized discursive space into which campaigners could insert a re-representation of landmines and cluster munitions technology as inhumane. Indeed, such a re-representation only exerted a powerful appeal because it was consonant with both the predominant framing of security threats in a postCold War world and a new divide between good and odious military technology. This is not to suggest that such developments reﬂected some teleology in which security and arms control practice progressively evolved to be more humane. As Krause and Latham have noted, for example, whilst the post-Cold War era concern with the impact of ‘inhumane weapons’ represents a notable shift compared with the Cold War arms control agenda, it does have similarities with the late 19th century when a Western discourse of civilized warfare was also prominent. One corollary of this – then as now – was a concern to specify what constituted an ‘inhumane weapon’62 manifest, for example, in the negotiations in the Hague conferences over problem technologies such as the dum dum bullet. As Michael Howard has suggested though, whilst initiatives such as the Hague conferences achieved notable successes, they also reﬂected the fact that liberal internationalists had ‘abandoned their original objects of preventing war and building peace in favour of making war more humane for those actually ﬁghting it’.63 The prohibitions on cluster munitions and also APMs can be understood as similarly ambiguous developments. On the one hand, the legitimizing discourse of Western militaries and arms ﬁrms was turned against them in order to generate powerful taboos against particular categories of weapons – even in the face of opposition from these militaries. The language of state security was coopted to promote human security, to preserve life, and prevent threats to its existence. On the other hand, the same prohibitions can ultimately be understood less as progressive initiatives imposed on foot-dragging states by the bottom-up power of global civil society and more as performative acts that simultaneously function to codify aspects of a new set of criteria for judging international respectability in a post-Cold War era, to reinforce the security framings of the era and to legitimize those categories of weapons successfully constructed as precise, discriminate, and thus humane. Indeed, **to the extent** that states such as **the U**nited **S**tates have been able to **circumscribe their commitments** on landmines etc. **they** have been able to **beneﬁt** **from the** broader **legitimizing effects of** speciﬁc **weapons taboos without being unduly constrained** **by** the **speciﬁc regulatory requirements** they have given rise to. Moreover, as already noted, the presence of pariah weapons regulation is not necessarily a sign of a more general shift to the tighter regulation of the arms trade – quite the reverse in some cases. Thus, any evaluation of the overall impact of such regulation on global and local security also has to take into account the broader system of arms regulation in which it is located, and the relationship that exists between pariah regulation and this broader system. The next two sections will offer some observations on these issues. Models of Economy and Models of Arms Trade Regulation The approach adopted to the regulation of the arms trade in general does not only reﬂect the security labels attached to particular kinds of technology or the direct interests powerful actors may have in constraining such technology. Regulatory approaches to the arms trade are also a function of the particular paradigms of political economy that dominate in speciﬁc era. In part this is because they link into particular understandings of what constitutes economic security. But the link between regulation and the paradigms of political economy go beyond this, reﬂecting a much more fundamental common sense about economy and trade. For example, the rise of mercantilism from about the 1600s meant the previous dominance of private arms traders was replaced by that of government arsenals64 and the emphasis on autarky encouraged a more restrictive approach to the regulation of arms transfers.65 In England for example, Queen Elizabeth I issued an order in 1574 restricting the number of guns to be cast in England to those ‘for the only use of the Realm’66 and further Ordnances restricting the export of arms were passed in 1610 and 1614.67 In contrast, the shift in economic ideology from mercantilism to capitalism led to the more laissez-faire approach to the regulation of arms transfers in the late 19th century already described above. Britain moved to a more laissez-faire basis from 1862 onwards, France passed legislation in 1885 reinstituting the private manufacture of arms and also repealed the law prohibiting exports.68 Indeed, this was an era in which the Prussian government did not even feel able to compel Krupp to abjure exports to Austria on the eve of war with that country in 1866.69 Economic philosophy also shaped both discourse and practice on the regulation of the arms trade in the aftermath of World War I. Against the background of what Buzan and Waever have described as a broader attempt to ‘construct war as a threat to civilisation’ after World War I70 private arms manufacturers were particularly castigated for the role they had supposedly played in fomenting war fever to promote sales, a role facilitated by their alleged control over the press in many countries.71 This partly explained the attempts in 1919 and 1925 to develop international agreements on the regulation of the arms trade, although in reality a broader set of international order and security concerns were also at work (see below). However, the 1919 and 1925 agreements never received the necessary ratiﬁcations to come into force (although they did have important legacy effects) and the laissez faire approach to the arms trade still predominated throughout the 1920s. It was only in the 1930s that concern about the activities of the arms manufacturers gained particular salience in both the media and policy circles. In part this may have been a function of the deteriorating international situation, but as Harkavy has argued, it was also a function of the fact that the Great Depression had prompted widespread doubts about the general viability of the capitalist system.72Consequently, nationalization and greater government oversight of the arms industry was presented by campaigners and, indeed, some governments, as a vehicle to ensure arms proﬁts were not pursued at the expense of either state interests or world peace. Although nationalization was, with the exception of France73 mostly avoided, by the mid-1930s most of the major arms producing states had begun to develop formal defence export licensing systems.74 In other words, this was the moment when the institutions and processes were established that would produce the many thousands of ordinary extraordinary export licensing decisions that now occur on a weekly basis, the point of genesis for a particular habitus of a particular set of security professionals. This shift was not solely a function of debates about the role of arms merchants in World War I, nor was it purely a consequence of the doubts about unmanaged capitalism sowed by the Great Depression. Issues of power and security as well as the moments of intervention represented by successive attempts to agree international arms regulation all played their role in this shift (see below). Nevertheless, attitudes to economy were an important part of the mix. In the Cold War, the regulation of arms transfers was structured so that it was simultaneously permissive vis-a`-vis transfers to allies and highly restrictive vis-a`-vis allies of the Soviet Union. In the West at least, these security rationales overlapped with the dominance of Keynesian approaches to the economy in which the preservation of defence production emerged not only as a strategic imperative but as a form of welfare militarism – aimed at maintaining jobs, stimulating economies in times of recession, and preserving key technology sectors. This implied the further extension of government oversight of arms sales (albeit principally on a national basis rather than through international negotiation) and government’s role in the promotion of arms sales. It also meant that arms sales were pursued primarily (if not exclusively) for political rather than economic reasons. This contrasted sharply with the late 19th century and even inter-war years when private industry and the search for arms proﬁts were the principle factors driving supply. However, the end of the Cold War coincided with (and reinforced) underlying shifts in conceptions of economy and security that inﬂuenced the debate on arms transfer control. In terms of economy, the neoliberal agenda had already been thoroughly mainstreamed in the policy discourse of governments. Greed was good, proﬁt was better and market principles were the order of the day. In terms of domestic defence procurement policies this was reﬂected in a shift to the much wider application of competition policy, particularly in the United States and the United Kingdom.75 In terms of the approach to major arms transfers it underpinned the shift to a more commercial attitude that had been gradually evolving from the 1960s onwards. Already by 1988 one analyst could note that ‘the political factors that dominated the arms trade in the recent past are yielding to market forces... the arms trade is returning to its patterns prior to World War II, when the trade in military equipment was not dramatically different from the trade in many other industrial products’.76The comparison with the pre-World War II era is perhaps exaggerated – not least because the frameworks of national oversight and national export promotion are far more extensive, as are the frameworks of international regulation. Nevertheless, whilst one feature of the post-Cold War era has been the proliferation of international or regional initiatives to ostensibly restrain arms proliferation, an equally notable feature has been the relaxation of restrictions on arms supplies, particularly to allies. Both the Clinton and George W. Bush administrations in the United States have attempted to ease restrictions on exports to key allies, most notably in the form of defence trade cooperation treaties with Australia and the United Kingdom announced in 2007, although these have yet to be ratiﬁed by the Senate.77 The effect of these agreements will be to permit the licence-free transfer of defence goods between the United States and each of the signatories.78 The Obama administration has, in addition, committed itself to a radical overhaul of the American export control system to make it easier to export weapons to American allies and to emerging markets such as China. For example, the administration has claimed that in the case of items related to tanks and military vehicles, the new rules would remove 74 per cent of the items currently on the US Munitions List.79 In other words, the export of brake pads for tanks may no longer be subject to a regime of extraordinary measures. Similar processes have been at work in other countries. For example, in 2002 the United Kingdom announced changes to its methodology for assessing licence applications for components to be incorporated into military equipment for onward export, a reform generally interpreted as opening ‘a signiﬁcant export licensing loophole’,80 whilst in 2007 the French government announced it would ease restrictions on products moving within the European Union.81 At the same time as this occurred NGOs became more focussed on the security outcomes stemming from the trade in small arms and landmines. To the extent that NGOs and academics have engaged with the issue of major conventional arms transfers, they have tended to follow the lead set by government and industry by engaging with the economic rationale for defence exports – albeit in an attempt to debunk them.82The combined effect of this has been to give a more central place to a technocratic discourse on major weapons transfers focussed on their economic costs and beneﬁts to suppliers. This is not to suggest that strategic rationales for arms transfers have disappeared completely – they still remain important factors in speciﬁc cases, particularly post-9/11. Nevertheless, as Hartung has noted, with the end of the Cold War, the economic rationales for arms sales ‘moved to the forefront’.83One corollary of this greater emphasis on the economics of arms sales has been the post-Cold War deproblematization of major arms transfers84 at least in terms of debates about their security outcomes. Today, such sales are primarily discussed (by exporters at least, if not by recipients and their neighbours) in the language of the technocrat and the banker - the language of jobs, ﬁnancing terms, market share, and performance evaluation. Indeed, both government and NGO security concerns about the negative effects of the arms trade have bifurcated – with concern focussed either on the problem of weapons of mass destruction (WMD) (problematized primarily in terms of their potential acquisition by rogues) or, at the other end of the scale, on issues such as small arms (primarily problematized in terms of the illicit rather than the legal trade in such weapons). Arms Trade Regulation and the Security Problematique If neoliberalism has facilitated a more permissive approach to arms transfer regulation then this raises the question of why any limits have been introduced at all? As already noted above, one part of the answer is rooted in the relationship between legitimized and heroic weapons and those military technologies that lie outside the boundaries of the heroic and the legitimized. Being the ‘other’ of legitimized military technology facilitates successful problematization and indeed ‘extra-securitisation’. Additionally however, the architecture of global arms trade regulation has been transformed in the post-Cold War era along with the transformation in the objects of security that accompanied the end of the Cold War. During the Cold War, the global architecture of conventional arms trade regulation, like arms control more generally, was principally focussed on managing East –West tensions. One consequence was a substantial extension of the range of dual-use goods invested with security labels in relation to trade with Eastern Europe, most manifest in debates in the early 1950s between the United States and European states over the operation of CoCoM (Coordinating Committee for Multilateral Export Controls).85 In contrast, the developing world was merely an object of security competition between the superpowers and therefore a site for the supply of arms to allies. With the dissolution of the Soviet threat the focus has turned more to the management of North–South relations as the developing world has been reconstructed as the source of diverse security threats86 and as humanitarian intervention has resurrected similar concerns with the maintenance of order in the developing world that animated the arms restrictions in the Brussels Act. One manifestation of this has been in the reframing of small arms as instruments of disorder rather than the means to shore up Cold War allies. A further example is the replacement of the CoCom regime with the Wasennaar Arrangement, focussed particularly on restricting transfers to pariah regimes in the global South. This shift in focus is also manifest in the signiﬁcant rise in the use of arms embargoes in the post-Cold War era. For example, between 1945 and 1990 only two mandatory embargoes were imposed globally, on Rhodesia and Africa, respectively. Since the 1990s there have been two voluntary and 27 mandatory cases of sanctions, the vast majority of which have been aimed at actors in Africa.87 Sanctions, just like the efforts to control arms to Africa in the late 19th century have not been hugely successful in reducing the supply of weapons to combatants. Nevertheless, they can be understood as animated by much the same desire to maintain order in the peripheries of the world, particularly in a context where Western powers have once again taken on a greater responsibility for policing and managing instability in the developing world. Thus, the post-Cold War regulation of the conventional arms trade is simultaneously characterized by a relatively more permissive approach to arms transfers in general but also a redirection of controls away from the governance of East – West relations and towards the governance of North –South relations and particularly the disciplining of those actors framed as rogue or pariah in the security narratives of dominant actors. The campaign to promote an arms trade treaty may yet produce a more meaningful architecture of arms transfer control – the jury is out. However the framing of the Arms Trade Treaty to the defence industry is perhaps instructive. For example, the UK’s Ambassador for Multilateral Arms Control has noted, the ATT ‘... is about ... export controls that will stop weapons ending up in the hands of terrorists, insurgents, violent criminal gangs, or in the hands of dictators’.88 It should also be noted that current efforts to develop a global agreement on the arms trade echo late 19thth and early 20thth century initiatives to govern the international arms trade, most notably: the Brussels Act, the 1919 St Germain Convention for the Control of the Trade in Arms and Ammunition, and the 1925 Arms Trafﬁc Convention. Although the latter two never received the necessary ratiﬁcations to come into force both were animated by the same imperial concern to prevent disorder in the colonies that had underpinned the Brussels Act. As Stone has noted with regards to the St Germain convention for example, ‘there was little doubt among representatives in Paris [where the Convention was signed] that keeping arms out of African and Asian hands was St Germain’s chief task’.89Accordingly, the convention imposed far stricter restrictions on sales to these areas as well as a ban on arms shipments to ‘any country which refuses to accept the tutelage under which it has been placed’.90 Indeed, although the convention never came into being, European powers nevertheless agreed informally to carry out its provisions in Africa and the Middle East.91 The 1925 convention similarly imposed more severe restrictions on exports to special zones that covered most of Africa and parts of what had been the Ottoman Empire.92 Thus, viewed against this broader history of arms regulation, negotiations on a putative Arms Trade Treaty (rather like action on APMs or cluster munitions) do not represent a novel post-Cold War development that symbolizes progress on an emancipatory human security agenda consonant with the promotion of local and global peace. Instead, it reﬂects the emergence of particular sets of relationships between power, interest, economy, security, and legitimized military technologies that in turn create the conditions of emergence for historically contingent architectures of global regulation. Conclusion The preceding analysis has a number of implications for campaigners, but also speaks to the debates about the utility of the securitization framework outlined at the start of this article. First, it provides support for Abrahamson’s notion of the security spectrum. Viewed in a more historical perspective, what is notable about the post-Cold War emergence of a humanitarian arms control agenda is the way in which action on landmines, cluster munitions, and even small arms have been made possible by a quite dramatic transformation in the way such technology is represented. They have, in Abrahamson’s formulation, been moved along the ‘spectrum of security’ from normal, run-of-the mill, unproblematic technologies of killing, to ones of extra special concern. Conversely, one of the features of the post-Cold War era is the way in which the security labels attached to major weapons transfers have, in general, actually moved in the other direction. Whilst such transfers still remain clearly within the domain of security it is, nevertheless, possible to conceive the post-Cold War trade in major weapons as having been relatively desecuritized. Second, the analysis highlights the relational elements that can be involved in processes of securitization and desecuritization. In the case of the landmines ban this manifested itself in the way campaigners engaged in simultaneous processes of securitization of APMs (with respect to the human as referent object) and (relative) desecuritization (with respect to the state as referent object) that worked to mutually reinforce the case for a ban. In the case of pariah weapons generally, whilst there are a number of factors that explain their stigmatization, one factor can be the way their particular qualities are depicted as the antithesis of those possessed by legitimized and particularly heroic weapons. Conversely, the stigmatization of pariah weapons works to delineate other weapons as normal and legitimate. There is therefore a process of mutual constitution that is at work in the way different sets of weapons technology are framed and understood. Third, the preceding analysis illustrates the relevance of Floyd’s argument that processes of securitization or desecuritization can be positive and negative, particularly when considered in terms of their emancipatory effects. As noted above, in the case of landmines a process of relative desecuritization vis-a`-vis the state combined with a process of extra-securitization vis-a`-vis the human to bring about the production of a ban widely considered to have produced positive security outcomes for individuals, communities, and the human as a collective. In contrast, the relative desecuritization of major weapons transfers represents a much more ambiguous development. It could, of course, be argued that such a change in the security labels attached to the weapons holdings of neighbouring states would not only reﬂect but reinforce a move to more peaceable relations. In addition, the relative deproblematization of defence transfers might be conceived as a positive development, particularly for states that possess minimal domestic defence industrial capacity, and are threatened by hostile neighbours. At the same time however, such a shift along the spectrum of security arguably represents a quite regressive development when applied to the issue of arms transfers. This is particularly the case given that, irrespective of the powerful ways in which the security labels attached to major weapons are shaped by discourse and other forms of representation, they still possess a residual materiality, however thin, that is characterized by their capacity to facilitate the organized prosecution of violence. More generally, the transfer of such technologies can also be viewed as symptomatic of a world characterized by deeply problematic higher order paradigms of security and economy. At the very least then, the relative (if not complete) desecuritization of major arms transfers would appear to raise further questions about the Copenhagen School’s normative commitment to desecuritization. Although more accurately, it highlights the effects that come from ratcheting down the security labels attached to ‘normal’ arms transfers and subjecting them to the kind of standard bureaucratic routines highlighted by Bigo, albeit the routines of the export licencing process in this case. One consequence, is that the many thousands of export licences granted for the transfer of weapons other than landmines, cluster munitions, and small arms are far less likely to become the object of public scrutiny or become subject to intense public and political contestation about the security effects of such exports. In this sense at least, the switch from a Cold War arms transfer system where security motivations for exports often predominated to one where economic motivations are more to the fore, has also been accompanied by a corresponding depoliticization of contemporary transfers, a phenomenon that highlights the problematic nature of the neat division between politicized and securitized issues outlined in the CS conception of securitization and one that highlights the downside of even partial moves towards the desecuritization end of the security spectrum. Fourth, the success of campaigns on landmines and cluster munitions demonstrates how ‘moments of intervention’ undertaken on behalf of the voiceless by supposedly weak securitizing actors such as NGOs can, nevertheless, produce quite effective securitizations – in this case, the hyper-securitization of particular weapons technologies. Both campaigns also highlighted the ways in which actors can utilize media images and, through survivor activism that extended to the conference room, provide a context for the body to speak security. Moreover, the success of these campaigns highlights the ways in which the language of threat, survival, and security can be deployed to achieve positive security outcomes. At the same time however, the success of the humanitarian arms control agenda around landmines and cluster munitions in particular was only achieved because NGOs adopted exactly the same discourse around humanitarianism, human security and weapons precision that has been deployed to legitimize post-Cold War liberal peace interventionism and in the marketing of new weapons developments. On one reading, this might point to the potential for actors to deploy dominant forms of security speech in order to achieve progressive ends. On a more pessimistic reading however, it also highlights the profound limits involved in such approaches. To the extent that the extra-securitization of pariah technologies such as landmines has facilitated the relative desecuritization of major conventional weapons transfers it has also made the current framework of control look like an example of ethical advance at the same time as creating space for the deproblematization of arms transfers in general. Ultimately then, the moments of intervention represented by the campaigns on landmines and cluster munitions were successful because they did not threaten, and in many ways were quite consistent with, the dominant security paradigm and security narratives of the post-Cold War era. Equally, whilst the regularized routines and working practices of the security professionals of the export licensing process are certainly important in understanding the treatment of defence transfers, this body of professionals were themselves, brought into being as a result of historical changes in the fundamental assumptions about security and economy. Moreover, their very working practices and modes of behaviour are currently being altered as a result of similar fundamental shifts in the paradigms of security and economy which, in turn, are a function of particular combinations of power and interest. Although these shifts certainly predated the post-Cold War era, they have become particularly concretized in this era. One consequence of all this is that a loud ethical discourse around the restriction of landmines, cluster munitions, and small arms has gone hand in hand with recent rises in both global military expenditure and arms transfers. For example, overall, world defence expenditure in 2008 was estimated to be $1,464 billion (of which NATO countries accounted for 60 per cent and OECD countries 72 per cent) representing a 45 per cent increase in real terms since 1999,93whilst global arms sales were 22 per cent higher in real terms for the period 2005– 2009 than for the preceding period 2000– 2004.94 Moreover, largely because of the dominance of American and European defence spending, the defence trade is increasingly concentrated in the hands of the United States and to a lesser extent, European companies. For example, in 2006 American and European companies accounted for an estimated 92.7 per cent of the arms sales of the world’s 100 largest defence companies.95 Most arms trade NGOs have largely neglected issues such as the rises in defence expenditure in major weapons states such as the United States, intra-northern trade in arms, and the dominant role played by Western companies in the arms trade, in favour of an agenda that conceives the South – and in particular pariah actors in sub-Saharan Africa – as the primary object of conventional arms trade regulation.96With regard to transfers of small arms and major conventional weapons it might be argued that this, at least, also requires impressive self-abnegation from arms trade proﬁts on the part of powerful states in the international system. In practice however, international initiatives such as the EU Code or the Wassennaar Arrangement, national export regulations of the major weapons states and the local initiatives of client states mostly combine to produce a cartography of prohibition that corresponds more closely with the disciplinary geographies advocated by the powerful rather than any global map of militarism and injustice. One illustration of this is the way in which a recent review of British defence export legislation downgraded long-range missiles and the ‘heroic’ Unmanned Aerial Vehicle (UAV – the Maxim gun of modern imperial wars) from a category A classiﬁcation (goods such as cluster munitions whose supply is prohibited) to the less restrictive category B,97 whilst in 2010, the Afghan government proscribed the import, use, and sale of Ammonium Nitrate Fertilizer because it is one of the elements used in the making of IEDs.98 More generally, as one recent econometric analysis of major weapons transfers from the Britain, France, Germany, and the United States concluded, despite much rhetoric about the need for a more ethical approach to arms sales from governments in all these countries: Neither human rights abuses nor autocratic polity would appear to reduce the likelihood of countries receiving Western arms, or reduce the relative share of a particular exporter’s weapons they receive. In fact, human rights abusing countries are actually more likely to receive weapons from the US, while autocratic regimes emerge as more likely recipients of weaponry from France and the UK.99 Of course, arms trade NGOs have often been the ﬁrst to highlight such hypocrisies and the work of most organizations include, to a greater or lesser extent, elements of critique or advocacy that might be considered transformational. However, one of the principle features of arms trade activism in the post-Cold War era is the extent to which many NGOs have downgraded radical critique in exchange for insider inﬂuence and government funding.100 Instead, activism has largely been aimed at promoting tactical reform within an overarching economic and security paradigm that justiﬁes intervention, regulation, and transformation of the South whilst (with the exception of token action on landmines, etc.) leaving the vast accumulation of Western armaments largely unproblematized. The logic of this analysis then, is that there needs to be a far greater problematization of military expenditure by the major powers, of the so-called ‘legitimate’ trade in defence goods, including intraNorthern trade, and a problematization of the predominance of Western defence companies in global arms markets. In short, campaigners needs to return to a strategic contestation of global militarism rather than searching for tactical campaign victories dependent on accommodation with the language and economic and security paradigms of contemporary military humanism.

#### Sanitization of US policy leads to endless violence and imperialism – turns case

Bacevich, 5 -- Boston University international relations professor

[A. J., retired career officer in the United States Army, former director of Boston University's Center for International Relations (from 1998 to 2005), The New American Militarism: How Americans Are Seduced by War, 2005 accessed 9-4-13]

Today as never before in their history Americans are enthralled with military power. The global military supremacy that the United States presently enjoys--and is bent on perpetuating-has become central to our national identity. More than America's matchless material abundance or even the effusions of its pop culture, the nation's arsenal of high-tech weaponry and the soldiers who employ that arsenal have come to signify who we are and what we stand for. When it comes to war, Americans have persuaded themselves that the United States possesses a peculiar genius. Writing in the spring of 2003, the journalist Gregg Easterbrook observed that "the extent of American military superiority has become almost impossible to overstate." During Operation Iraqi Freedom, U.S. forces had shown beyond the shadow of a doubt that they were "the strongest the world has ever known, . . . stronger than the Wehrmacht in r94o, stronger than the legions at the height of Roman power." Other nations trailed "so far behind they have no chance of catching up. ""˜ The commentator Max Boot scoffed at comparisons with the German army of World War II, hitherto "the gold standard of operational excellence." In Iraq, American military performance had been such as to make "fabled generals such as Erwin Rommel and Heinz Guderian seem positively incompetent by comparison." Easterbrook and Booz concurred on the central point: on the modern battlefield Americans had located an arena of human endeavor in which their flair for organizing and deploying technology offered an apparently decisive edge. As a consequence, the United States had (as many Americans have come to believe) become masters of all things military. Further, American political leaders have demonstrated their intention of tapping that mastery to reshape the world in accordance with American interests and American values. That the two are so closely intertwined as to be indistinguishable is, of course, a proposition to which the vast majority of Americans subscribe. Uniquely among the great powers in all of world history, ours (we insist) is an inherently values-based approach to policy. Furthermore, we have it on good authority that the ideals we espouse represent universal truths, valid for all times. American statesmen past and present have regularly affirmed that judgment. In doing so, they validate it and render it all but impervious to doubt. Whatever momentary setbacks the United States might encounter, whether a generation ago in Vietnam or more recently in Iraq, this certainty that American values are destined to prevail imbues U.S. policy with a distinctive grandeur. The preferred language of American statecraft is bold, ambitious, and confident. Reflecting such convictions, policymakers in Washington nurse (and the majority of citizens tacitly endorse) ever more grandiose expectations for how armed might can facilitate the inevitable triumph of those values. In that regard, George W. Bush's vow that the United States will "rid the world of evil" both echoes and amplifies the large claims of his predecessors going at least as far back as Woodrow Wilson. Coming from Bush the war- rior-president, the promise to make an end to evil is a promise to destroy, to demolish, and to obliterate it. One result of this belief that the fulfillment of America's historic mission begins with America's destruction of the old order has been to revive a phenomenon that C. Wright Mills in the early days of the Cold War described as a "military metaphysics"-a tendency to see international problems as military problems and to discount the likelihood of finding a solution except through military means. To state the matter bluntly, Americans in our own time have fallen prey to militarism, manifesting itself in a romanticized view of soldiers, a tendency to see military power as the truest measure of national greatness, and outsized expectations regarding the efficacy of force. To a degree without precedent in U.S. history, Americans have come to define the nation's strength and well-being in terms of military preparedness, military action, and the fostering of (or nostalgia for) military ideals? Already in the 19905 America's marriage of a militaristic cast of mind with utopian ends had established itself as the distinguishing element of contemporary U.S. policy. The Bush administrations response to the hor- rors of 9/11 served to reaffirm that marriage, as it committed the United States to waging an open-ended war on a global scale. Events since, notably the alarms, excursions, and full-fledged campaigns comprising the Global War on Terror, have fortified and perhaps even sanctified this marriage. Regrettably, those events, in particular the successive invasions of Afghanistan and Iraq, advertised as important milestones along the road to ultimate victory have further dulled the average Americans ability to grasp the significance of this union, which does not serve our interests and may yet prove our undoing. The New American Militarism examines the origins and implications of this union and proposes its annulment. Although by no means the first book to undertake such an examination, The New American Militarism does so from a distinctive perspective. The bellicose character of U.S. policy after 9/11, culminating with the American-led invasion of Iraq in March 2003, has, in fact, evoked charges of militarism from across the political spectrum. Prominent among the accounts advancing that charge are books such as The Sorrows of Empire: Militarism, Secrecy, and the End of the Republic, by Chalmers Johnson; Hegemony or Survival: Americas Quest for Global Dominance, by Noam Chomsky; Masters of War; Militarism and Blowback in the Era of American Empire, edited by Carl Boggs; Rogue Nation: American Unilateralism and the Failure of Good Intentions, by Clyde Prestowitz; and Incoherent Empire, by Michael Mann, with its concluding chapter called "The New Militarism." Each of these books appeared in 2003 or 2004. Each was not only writ- ten in the aftermath of 9/11 but responded specifically to the policies of the Bush administration, above all to its determined efforts to promote and justify a war to overthrow Saddam Hussein. As the titles alone suggest and the contents amply demonstrate, they are for the most part angry books. They indict more than explain, and what- ever explanations they offer tend to be ad hominem. The authors of these books unite in heaping abuse on the head of George W Bush, said to combine in a single individual intractable provincialism, religious zealotry, and the reckless temperament of a gunslinger. Or if not Bush himself, they fin- ger his lieutenants, the cabal of warmongers, led by Vice President Dick Cheney and senior Defense Department officials, who whispered persua- sively in the president's ear and used him to do their bidding. Thus, accord- ing to Chalmers Johnson, ever since the Persian Gulf War of 1990-1991, Cheney and other key figures from that war had "Wanted to go back and finish what they started." Having lobbied unsuccessfully throughout the Clinton era "for aggression against Iraq and the remaking of the Middle East," they had returned to power on Bush's coattails. After they had "bided their time for nine months," they had seized upon the crisis of 9/1 1 "to put their theories and plans into action," pressing Bush to make Saddam Hussein number one on his hit list." By implication, militarism becomes something of a conspiracy foisted on a malleable president and an unsuspecting people by a handful of wild-eyed ideologues. By further implication, the remedy for American militarism is self-evi- dent: "Throw the new militarists out of office," as Michael Mann urges, and a more balanced attitude toward military power will presumably reassert itself? As a contribution to the ongoing debate about U.S. policy, The New American Militarism rejects such notions as simplistic. It refuses to lay the responsibility for American militarism at the feet of a particular president or a particular set of advisers and argues that no particular presidential election holds the promise of radically changing it. Charging George W. Bush with responsibility for the militaristic tendencies of present-day U.S. for- eign policy makes as much sense as holding Herbert Hoover culpable for the Great Depression: Whatever its psychic satisfactions, it is an exercise in scapegoating that lets too many others off the hook and allows society at large to abdicate responsibility for what has come to pass. The point is not to deprive George W. Bush or his advisers of whatever credit or blame they may deserve for conjuring up the several large-scale campaigns and myriad lesser military actions comprising their war on ter- ror. They have certainly taken up the mantle of this militarism with a verve not seen in years. Rather it is to suggest that well before September 11, 2001 , and before the younger Bush's ascent to the presidency a militaristic predisposition was already in place both in official circles and among Americans more generally. In this regard, 9/11 deserves to be seen as an event that gave added impetus to already existing tendencies rather than as a turning point. For his part, President Bush himself ought to be seen as a player reciting his lines rather than as a playwright drafting an entirely new script. In short, the argument offered here asserts that present-day American militarism has deep roots in the American past. It represents a bipartisan project. As a result, it is unlikely to disappear anytime soon, a point obscured by the myopia and personal animus tainting most accounts of how we have arrived at this point. The New American Militarism was conceived not only as a corrective to what has become the conventional critique of U.S. policies since 9/11 but as a challenge to the orthodox historical context employed to justify those policies. In this regard, although by no means comparable in scope and in richness of detail, it continues the story begun in Michael Sherry's masterful 1995 hook, In the Shadow of War an interpretive history of the United States in our times. In a narrative that begins with the Great Depression and spans six decades, Sherry reveals a pervasive American sense of anxiety and vulnerability. In an age during which War, actual as well as metaphorical, was a constant, either as ongoing reality or frightening prospect, national security became the axis around which the American enterprise turned. As a consequence, a relentless process of militarization "reshaped every realm of American life-politics and foreign policy, economics and technology, culture and social relations-making America a profoundly different nation." Yet Sherry concludes his account on a hopeful note. Surveying conditions midway through the post-Cold War era's first decade, he suggests in a chapter entitled "A Farewell to Militarization?" that America's preoccupation with War and military matters might at long last be waning. In the mid- 1995, a return to something resembling pre-1930s military normalcy, involving at least a partial liquidation of the national security state, appeared to be at hand. Events since In the Shadow of War appear to have swept away these expectations. The New American Militarism tries to explain why and by extension offers a different interpretation of America's immediate past. The upshot of that interpretation is that far from bidding farewell to militariza- tion, the United States has nestled more deeply into its embrace. f ~ Briefly told, the story that follows goes like this. The new American militarism made its appearance in reaction to the I96os and especially to Vietnam. It evolved over a period of decades, rather than being sponta- neously induced by a particular event such as the terrorist attack of Septem- ber 11, 2001. Nor, as mentioned above, is present-day American militarism the product of a conspiracy hatched by a small group of fanatics when the American people were distracted or otherwise engaged. Rather, it devel- oped in full view and with considerable popular approval. The new American militarism is the handiwork of several disparate groups that shared little in common apart from being intent on undoing the purportedly nefarious effects of the I96OS. Military officers intent on reha- bilitating their profession; intellectuals fearing that the loss of confidence at home was paving the way for the triumph of totalitarianism abroad; reli- gious leaders dismayed by the collapse of traditional moral standards; strategists wrestling with the implications of a humiliating defeat that had undermined their credibility; politicians on the make; purveyors of pop cul- turc looking to make a buck: as early as 1980, each saw military power as the apparent answer to any number of problems. The process giving rise to the new American militarism was not a neat one. Where collaboration made sense, the forces of reaction found the means to cooperate. But on many occasions-for example, on questions relating to women or to grand strategy-nominally "pro-military" groups worked at cross purposes. Confronting the thicket of unexpected developments that marked the decades after Vietnam, each tended to chart its own course. In many respects, the forces of reaction failed to achieve the specific objectives that first roused them to act. To the extent that the 19603 upended long-standing conventions relating to race, gender, and sexuality, efforts to mount a cultural counterrevolution failed miserably. Where the forces of reaction did achieve a modicum of success, moreover, their achievements often proved empty or gave rise to unintended and unwelcome conse- quences. Thus, as we shall see, military professionals did regain something approximating the standing that they had enjoyed in American society prior to Vietnam. But their efforts to reassert the autonomy of that profession backfired and left the military in the present century bereft of meaningful influence on basic questions relating to the uses of U.S. military power. Yet the reaction against the 1960s did give rise to one important by-prod: uct, namely, the militaristic tendencies that have of late come into full flower. In short, the story that follows consists of several narrative threads. No single thread can account for our current outsized ambitions and infatua- tion with military power. Together, however, they created conditions per- mitting a peculiarly American variant of militarism to emerge. As an antidote, the story concludes by offering specific remedies aimed at restor- ing a sense of realism and a sense of proportion to U.S. policy. It proposes thereby to bring American purposes and American methods-especially with regard to the role of military power-into closer harmony with the nation's founding ideals. The marriage of military metaphysics with eschatological ambition is a misbegotten one, contrary to the long-term interests of either the American people or the world beyond our borders. It invites endless war and the ever-deepening militarization of U.S. policy. As it subordinates concern for the common good to the paramount value of military effectiveness, it promises not to perfect but to distort American ideals. As it concentrates ever more authority in the hands of a few more concerned with order abroad rather than with justice at home, it will accelerate the hollowing out of American democracy. As it alienates peoples and nations around the world, it will leave the United States increasingly isolated. If history is any guide, it will end in bankruptcy, moral as well as economic, and in abject failure. "Of all the enemies of public liberty," wrote James Madison in 1795, "war is perhaps the most to be dreaded, because it comprises and develops the germ of every other. War is the parent of armies. From these proceed debts and taxes. And armies, debts and taxes are the known instruments for bringing the many under the domination of the few .... No nation could preserve its freedom in the midst of continual Warfare." The purpose of this book is to invite Americans to consider the continued relevance of Madison's warning to our own time and circumstances.

#### The Alternative is to reject the 1AC and imagine Whatever Being-- rejection of the state creates a whatever life imagining a political body outside sovereignty

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(Anne, “Bio-Sovereignty and the Emergence of Humanity,” Theory & Event, Volume 7, Issue 2, Project Muse)

Can we imagine another form of humanity, and another form of power? The bio-sovereignty described by Agamben is so fluid as to appear irresistible. Yet Agamben never suggests this order is necessary. Bio-sovereignty results from a particular and contingent history, and it requires certain conditions. Sovereign power, as Agamben describes it, finds its grounds in specific coordinates of life, which it then places in a relation of indeterminacy. What defies sovereign power is a life that cannot be reduced to those determinations: a life "that can never be separated from its form, a life in which it is never possible to isolate something such as naked life. " (2.3). In his earlier Coming Community, Agamben describes this alternative life as "whatever being." More recently he has used the term "forms-of-life." These concepts come from the figure Benjamin proposed as a counter to homo sacer: the "total condition that is 'man'." For Benjamin and Agamben, mere life is the life which unites law and life. That tie permits law, in its endless cycle of violence, to reduce life an instrument of its own power. The total condition that is man refers to an alternative life incapable of serving as the ground of law. Such a life would exist outside sovereignty. Agamben's own concept of whatever being is extraordinarily dense. It is made up of varied concepts, including language and potentiality; it is also shaped by several particular dense thinkers, including Benjamin and Heidegger. What follows is only a brief consideration of whatever being, in its relation to sovereign power. / "Whatever being," as described by Agamben, lacks the features permitting the sovereign capture and regulation of life in our tradition. Sovereignty's capture of life has been conditional upon the separation of natural and political life. That separation has permitted the emergence of a sovereign power grounded in this distinction, and empowered to decide on the value, and non-value of life (1998: 142). Since then, every further politicization of life, in turn, calls for "a new decision concerning the threshold beyond which life ceases to be politically relevant, becomes only 'sacred life,' and can as such be eliminated without punishment" (p. 139). / This expansion of the range of life meriting protection does not limit sovereignty, but provides sites for its expansion. In recent decades, factors that once might have been indifferent to sovereignty become a field for its exercise. Attributes such as national status, economic status, color, race, sex, religion, geo-political position have become the subjects of rights declarations. From a liberal or cosmopolitan perspective, such enumerations expand the range of life protected from and serving as a limit upon sovereignty. Agamben's analysis suggests the contrary. If indeed sovereignty is bio-political before it is juridical, then juridical rights come into being only where life is incorporated within the field of bio-sovereignty. The language of rights, in other words, calls up and depends upon the life caught within sovereignty: homo sacer. / Agamben's alternative is therefore radical. He does not contest particular aspects of the tradition. He does not suggest we expand the range of rights available to life. He does not call us to deconstruct a tradition whose power lies in its indeterminate status.21 Instead, he suggests we take leave of the tradition and all its terms. Whatever being is a life that defies the classifications of the tradition, and its reduction of all forms of life to homo sacer. Whatever being therefore has no common ground, no presuppositions, and no particular attributes. It cannot be broken into discrete parts; it has no essence to be separated from its attributes; and it has no common substrate of existence defining its relation to others. Whatever being cannot then be broken down into some common element of life to which additive series of rights would then be attached. Whatever being retains all its properties, without any of them constituting a different valuation of life (1993: 18.9). As a result, whatever being is "reclaimed from its having this or that property, which identifies it as belonging to this or that set, to this or that class (the reds, the French, the Muslims) -- and it is reclaimed not for another class nor for the simple generic absence of any belonging, but for its being-such, for belonging itself." (0.1-1.2). / Indifferent to any distinction between a ground and added determinations of its essence, whatever being cannot be grasped by a power built upon the separation of a common natural life, and its political specification. Whatever being dissolves the material ground of the sovereign exception and cancels its terms. This form of life is less post-metaphysical or anti-sovereign, than a-metaphysical and a-sovereign. Whatever is indifferent not because its status does not matter, but because it has no particular attribute which gives it more value than another whatever being. As Agamben suggests, whatever being is akin to Heidegger's Dasein. Dasein, as Heidegger describes it, is that life which always has its own being as its concern -- regardless of the way any other power might determine its status. Whatever being, in the manner of Dasein, takes the form of an "indissoluble cohesion in which it is impossible to isolate something like a bare life. In the state of exception become the rule, the life of homo sacer, which was the correlate of sovereign power, turns into existence over which power no longer seems to have any hold" (Agamben 1998: 153). / We should pay attention to this comparison. For what Agamben suggests is that whatever being is not any abstract, inaccessible life, perhaps promised to us in the future. Whatever being, should we care to see it, is all around us, wherever we reject the criteria sovereign power would use to classify and value life. "In the final instance the State can recognize any claim for identity -- even that of a State identity within the State . . . What the State cannot tolerate in any way, however, is that the singularities form a community without affirming an identity, that humans co-belong without a representable condition of belonging" (Agamben 1993:85.6). At every point where we refuse the distinctions sovereignty and the state would demand of us, the possibility of a non-state world, made up of whatever life, appears.

## CASE

### FINALS

#### Obama ignores restrictions- tons of loopholes

**Kumar 3-19**-13 [Anita, White House correspondent for McClatchy Newspapers, former writer for The Washington Post, covering Virginia politics and government, and spent a decade at the St. Petersburg Times, writing about local, state and federal government both in Florida and Washington, “Obama turning to executive power to get what he wants,” <http://www.mcclatchydc.com/2013/03/19/186309/obama-turning-to-executive-power.html#.Ue18CdK1FSE>]

President Barack Obama came into office four years ago skeptical of pushing the power of the White House to the limit, especially if it appeared to be circumventing Congress.¶ Now, as he launches his second term, Obama has grown more comfortable wielding power to try to move his own agenda forward, particularly when a deeply fractured, often-hostile Congress gets in his way.¶ He’s done it with a package of tools, some of which date to George Washington and some invented in the modern era of an increasingly powerful presidency. And he’s done it with a frequency that belies his original campaign criticisms of predecessor George W. Bush, invites criticisms that he’s bypassing the checks and balances of Congress and the courts, and whets the appetite of liberal activists who want him to do even more to advance their goals.¶ While his decision to send drones to kill U.S. citizens suspected of terrorism has garnered a torrent of criticism, his use of executive orders and other powers at home is deeper and wider.¶ He delayed the deportation of young illegal immigrants when Congress wouldn’t agree. He ordered the Centers for Disease Control and Prevention to research gun violence, which Congress halted nearly 15 years ago. He told the Justice Department to stop defending the Defense of Marriage Act, deciding that the 1996 law defining marriage as between a man and a woman was unconstitutional. He’s vowed to act on his own if Congress didn’t pass policies to prepare for climate change.¶ Arguably more than any other president in modern history, he’s using executive actions, primarily orders, to bypass or pressure a Congress where the opposition Republicans can block any proposal.¶ “It’s gridlocked and dysfunctional. The place is a mess,” said Rena Steinzor, a law professor at the University of Maryland. “I think (executive action) is an inevitable tool given what’s happened.”¶ Now that Obama has showed a willingness to use those tactics, advocacy groups, supporters and even members of Congress are lobbying him to do so more and more.¶ The Center for Progressive Reform, a liberal advocacy group composed of law professors, including Steinzor, has pressed Obama to sign seven executive orders on health, safety and the environment during his second term.¶ Seventy environmental groups wrote a letter urging the president to restrict emissions at existing power plants.¶ Sen. Barbara Mikulski, D-Md., the chairwoman of the Appropriations Committee, sent a letter to the White House asking Obama to ban federal contractors from retaliating against employees who share salary information.¶ Gay rights organizations recently demonstrated in front of the White House to encourage the president to sign an executive order to bar discrimination based on sexual orientation or gender identity by companies that have federal contracts, eager for Obama to act after nearly two decades of failed attempts to get Congress to pass a similar bill.¶ “It’s ridiculous that we’re having to push this hard for the president to simply pick up a pen,” said Heather Cronk, the managing director of the gay rights group GetEQUAL. “It’s reprehensible that, after signing orders on gun control, cybersecurity and all manner of other topics, the president is still laboring over this decision.”¶ The White House didn’t respond to repeated requests for comment.¶ In January, Obama said he continued to believe that legislation was “sturdier and more stable” than executive actions, but that sometimes they were necessary, such as his January directive for the federal government to research gun violence.¶ “There are certain issues where a judicious use of executive power can move the argument forward or solve problems that are of immediate-enough import that we can’t afford not to do it,” the former constitutional professor told The New Republic magazine.¶ Presidents since George Washington have signed executive orders, an oft-overlooked power not explicitly defined in the Constitution. More than half of all executive orders in the nation’s history – nearly 14,000 – have been issued since 1933.

#### Obama will use signing statements to circumvent the plan

LLOC 1/31 (1/31/14 updated, accessed 2/28/14. Library Law of Congress. “Presidential Signing Statements” http://www.loc.gov/law/help/statements.php)

All four Presidents since President Reagan have issued signing statements, and increasingly these statements have contained one or more challenges or objections to the laws being signed. President George W. Bush objected to over 700 provisions of law, usually on the grounds that they infringe on the authority granted to the Executive Branch by the Constitution. Some of these objections may imply that the President does not intend to execute these provisions of law. Commentators and journalists, including the American Bar Association, have taken issue with the increasing use of signing statements by Presidents to object to provisions of law, arguing that in effect such statements constitute a veto to which Congress cannot respond, and therefore represent a line item veto. Line item vetoes were ruled unconstitutional by the Supreme Court (Clinton v. City of New York, 524 U.S. 417 (1998). The growing use of signing statements has attracted the attention of Congress: the 110th Congress witnessed the introduction of a House Bill (H.R. 264) intended to restrain the President's use of signing statements in general, as well as a Senate Resolution (S. Res. 22) explicitly rejecting particular interpretations of the President's signing statement for Public Law 109-435. The Law Library of Congress has compiled the following selective bibliography of resources relating to presidential signing statements. The bibliography includes examples of recent laws with signing statements, Congressional Hearings, court cases where the signing statements were discussed, law journal articles, selective press releases, news articles and other secondary materials. New documents and sources will be added to keep the bibliography up to date.

#### Obama can circumvent the plan and decide regulation - covert loopholes are inevitable

**Lohmann 1-28**-13 [Julia, director of the Harvard Law National Security Research Committee, BA in political science from the University of California, Berkeley, “Distinguishing CIA-Led from Military-Led Targeted Killings,” <http://www.lawfareblog.com/wiki/the-lawfare-wiki-document-library/targeted-killing/effects-of-particular-tactic-on-issues-related-to-targeted-killings/>]

The U.S. military—in particular, the Special Operations Command (SOCOM), and its subsidiary entity, the Joint Special Operations Command (JSOC)—is responsible for carrying out military-led targeted killings.¶ Military-led targeted killings are subject to various legal restrictions, including a complex web of statutes and executive orders. For example, because the Covert Action Statute does not distinguish among institutions undertaking covert actions, targeted killings conducted by the military that fall within the definition of “covert action” set forth in 50 U.S.C. § 413(b) are subject to the same statutory constraints as are CIA covert actions. 50 U.S.C. § 413b(e). However, as Robert Chesney explains, many military-led targeted killings may fall into one of the CAS exceptions—for instance, that for traditional military activities—so that the statute’s requirements will not always apply to military-led targetings. Such activities are exempted from the CAS’s presidential finding and authorization requirements, as well as its congressional reporting rules.¶ Because such unacknowledged military operations are, in many respects, indistinguishable from traditional covert actions conducted by the CIA, this exception may provide a “loophole” allowing the President to circumvent existing oversight mechanisms without substantively changing his operational decisions. However, at least some military-led targetings do not fall within the CAS exceptions, and are thus subject to that statute’s oversight requirements. For instance, Chesney and Kenneth Anderson explain, some believe that the traditional military activities exception to the CAS only applies in the context of overt hostilities, yet it is not clear that the world’s tacit awareness that targeted killing operations are conducted (albeit not officially acknowledged) by the U.S. military, such as the drone program in Pakistan, makes those operations sufficiently overt to place them within the traditional military activities exception, and thus outside the constraints of the CAS.¶ Chesney asserts, however, that despite the gaps in the CAS’s applicability to military-led targeted killings, those targetings are nevertheless subject to a web of oversight created by executive orders that, taken together, largely mirrors the presidential authorization requirements of the CAS. But, this process is not enshrined in statute or regulation and arguably could be changed or revoked by the President at any time. Moreover, this internal Executive Branch process does not involve Congress or the Judiciary in either ex ante or ex post oversight of military-led targeted killings, and thus, Philip Alston asserts, it may be insufficient to provide a meaningful check against arbitrary and overzealous Executive actions.

#### Obama can ignore restrictions without consequence

**Druck ‘12** [Judah A. Druck, law associate at Sullivan & Cromwell LLP, Cornell Law School graduate, magna cum laude graduate from Brandeis University, “Droning On: The War Powers Resolution and the Numbing Effect of Technology-Driven Warfare,” <http://www.lawschool.cornell.edu/research/cornell-law-review/upload/Druck-final.pdf>]

Notably, in each of these situations, the serving President did not¶ simply ignore the WPR, despite his general belief that it was unconstitutional.46 Rather, the presidents circumvented the WPR’s application by proffering suspect rationales to avoid compliance. One of the¶ more common methods of achieving this end involves denying the¶ existence of the WPR’s “hostilities”-triggering requirement.47 In those¶ situations, presidents have emphasized the limited nature of the military action, either by focusing on whether there was an actual exchange of fire between the United States and hostile forces,48 whether¶ the United States introduced ground troops into the hostile area,49 or,¶ as seen during the recent actions in Libya, whether the United States¶ had suffered any casualties.50 Despite the often negative treatment of¶ these justifications,51 presidents have nevertheless faced few repercussions from employing them. Given this background, it should be no¶ surprise that President Obama was able to circumvent the WPR in a¶ similar manner without any major political scars to show for it

#### Congressional micromanagement creates confusion – hinders presidential action

**Washington Post 11**, “Congressional meddling on terror cases, to little effect,” December 13th, http://www.washingtonpost.com/opinions/congressional-meddling-on-terror-cases-to-little-effect/2011/12/13/gIQAyBShsO\_story.html

Flexibility is preferable to flat and often unworkable directives, but in this case it also raises questions about why lawmakers insist on codifying these provisions when they have made it relatively easy for the executive to disregard them. In trying to respond to administration concerns, lawmakers have watered down language and introduced confusion in the form of directives that threaten to bollix up law enforcement and military personnel when they most need to be decisive. Congress also would inexcusably prevent the Defense Department from bringing detainees currently at the U.S. naval base at Guantanamo Bay, Cuba, into the country and from adapting U.S. facilities to hold these detainees. Almost from the start of the Obama administration, lawmakers, led by conservatives, have unjustifiably circumscribed presidential authority on many terrorism-related issues. Also from the beginning, President Obama has not fought these congressional incursions with sufficient vigor. Now Congress is once again overstepping its bounds as it attempts to micromanage the president in battlefield and law enforcement operations. Mr. Obama finds himself in an unenviable position because the measures are included in a defense bill, likely to be voted on this week, that includes provisions dealing with military pay and other important issues. But the muddled detainee measures certainly are veto-worthy.

#### Congress would destroy the president

Yoo 2012 served as a political appointee, the Deputy Assistant US Attorney General in the Office of Legal Counsel, Department of Justice (OLC), during the George W. Bush administration (John Yoo. “War Powers Belong to the President” Posted Feb 1, 2012, <http://www.abajournal.com/magazine/article/war_powers_belong_to_the_president>)

For when the framers wrote the Constitution in 1787 they rejected these failed experiments and restored an independent, unified chief executive with its own powers in national security and foreign affairs. The most important of the president’s powers are commander in chief and chief executive. As Alexander Hamilton wrote in Federalist 74, “The direction of war implies the direction of the common strength, and the power of directing and employing the common strength forms a usual and essential part in the definition of the executive authority.” Presidents should conduct war, he wrote, because they could act with “decision, activity, secrecy and dispatch.” In perhaps his most famous words, Hamilton wrote: “Energy in the executive is a leading character in the definition of good government. ... It is essential to the protection of the community against foreign attacks.”

The framers realized the obvious. Foreign affairs are unpredictable and involve the highest of stakes, making them unsuitable to regulation by pre-existing legislation. Instead, they can demand **swift, decisive action**—sometimes under pressured or even emergency circumstances—that is best carried out by a branch of government that does not suffer from multiple vetoes or is delayed by disagreements. Congress is too large and unwieldy to take the swift and decisive action required in wartime. Our framers replaced the Articles of Confederation, which had failed in the management of foreign relations because they had no single executive, with the Constitution’s single president for precisely this reason. Even when it has access to the same intelligence as the executive branch, **Congress’ loose, decentralized structure would [undermine]** ~~paralyze~~ **American policy while foreign threats grow**.

Congress has no political incentive to mount and see through its own wartime policy. Members of Congress, who are interested in keeping their seats at the next election, do not want to take stands on controversial issues where the future is uncertain. They will avoid like the plague any vote that will anger large segments of the electorate. They prefer that the president take the political risks and be held accountable for failure.

#### Makes attack on the US more likely

Zeisberg, ‘4 [Mariah Zeisberg, PhD in Politics from Princeton, Postdoc Research Associate at the Political Theory Project of Brown University; “INTERBRANCH CONFLICT AND CONSTITUTIONAL MAINTENANCE: THE CASE OF WAR POWERS”; June 2004; found in Word document, can be downloaded from www.brown.edu/Research/ppw/files/Zeisberg%20Ch5.doc]

The first significant argument of pro-Presidency insularists is that flexibility is a prime value in the conduct of foreign affairs, and especially war. Implicit in this argument is the recognition that the executive is functionally superior to Congress in achieving flexibility and swiftness in war operations, a recognition I share. The Constitution cannot be meant to curtail the very flexibility that may be necessary to preserve the nation; and yet, according to the insularists, any general norm which would include Congress in decision-making about going to war could only undermine that flexibility. Writing on the War Powers Act, Eugene Rostow predicts that it would, “put the Presidency in a straightjacket of a rigid code, and prevent new categories of action from emerging, in response to the necessities of a tense and unstable world.” In fact, Rostow believes, “[t]he centralization of authority in the president is particularly crucial in matters of national defense, war, and foreign policy, where a unitary executive can evaluate threats, consider policy choices, and mobilize national resources with a speed and energy that is far superior to any other branch.” Pro-presidency insularists are fond of quoting Hamilton, who argued that “[o]f all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand.” This need for flexibility, some insularists argue, is especially acute given modern conditions, where devastating wars can develop quickly. Today, “many foreign states have the power to attack U.S. forces - and some even the U.S. mainland - almost instantly,” and in such a world it is impracticable to require the President to seek advance authorization for hostilities. Such a requirement would simply be too risky to U.S. security. We furthermore face a nuclear age, and the system of deterrence that operates to contain that threat requires that a single person be capable of responding to nuclear attack with nuclear weapons immediately. Rostow writes, “the requirement for advance authorization would collapse the system of deterrence, making preemptive strikes by our enemies more likely.” Hence, “modern conditions” require the President to “act quickly, and often alone.” While this does not mean that Congress has no role to play in moments of crisis, it does mean that Congress should understand its role largely in terms of cooperating with the President to support his negotiations and decisions regarding relationships with foreign powers. Rostow writes, “Congress should be able to act effectively both before and after moments of crisis or potential crisis. It may join the President in seeking to deter crisis by publicly defining national policy in advance, through the sanctioning of treaties or other legislative declarations. Equally, Congress may participate formally in policymaking after the event through legislative authorization of sustained combat, either by means of a declaration of war, or through legislative action having more limited legal and political consequences. Either of these devices, or both in combination, should be available in situations where cooperation between the two branches is indicated at many points along an arc ranging from pure diplomacy at one end to a declaration of war at the other.” In other words, for Congress to understand itself as having any justifiable role in challenging executive security determinations, especially at moments of crisis, would be to undermine the strength that the executive requires in order to protect the nation. Conflict in this domain represents political degradation.

### Esc

#### Executive self-restraint now- Obama is not their egregious examples- war-fighting decisions are deliberative and vetted now

Pillar, 13 -- Brookings Foreign Policy Senior Fellow

[Paul, "The Danger of Groupthink," The National Interest, 2-26-13, webcache.googleusercontent.com/search?q=cache:6rnyjYlVKY0J:www.brookings.edu/research/opinions/2013/02/26-danger-groupthink-pillar+&cd=3&hl=en&ct=clnk&gl=us, accessed 9-23-13, mss]

David Ignatius has an interesting take on national security decision-making in the Obama administration in the wake of the reshuffle of senior positions taking place during these early weeks of the president's second term. Ignatius perceives certain patterns that he believes reinforce each other in what could be a worrying way. One is that the new team does not have as much “independent power” as such first-term figures as Clinton, Gates, Panetta and Petraeus. Another is that the administration has “centralized national security policy to an unusual extent” in the White House. With a corps of Obama loyalists, the substantive thinking may, Ignatius fears, run too uniformly in the same direction. He concludes his column by stating that “by assembling a team where all the top players are going in the same direction, he [Obama] is perilously close to groupthink.” We are dealing here with tendencies to which the executive branch of the U.S. government is more vulnerable than many other advanced democracies, where leading political figures with a standing independent of the head of government are more likely to wind up in a cabinet. This is especially true of, but not limited to, coalition governments. Single-party governments in Britain have varied in the degree to which the prime minister exercises control, but generally room is made in the cabinet for those the British call “big beasts”: leading figures in different wings or tendencies in the governing party who are not beholden to the prime minister for the power and standing they have attained. Ignatius overstates his case in a couple of respects. Although he acknowledges that Obama is “better than most” in handling open debate, he could have gone farther and noted that there have been egregious examples in the past of administrations enforcing a national security orthodoxy, and that the **Obama** administration **does not even come close** to these examples. There was Lyndon Johnson in the time of the Vietnam War, when policy was made around the president's Tuesday lunch table and even someone with the stature of the indefatigable Robert McNamara was ejected when he strayed from orthodoxy. Then there was, as the most extreme case, the George W. Bush administration, in which there was no policy process and no internal debate at all in deciding to launch a war in Iraq and in which those who strayed from orthodoxy, ranging from Lawrence Lindsey to Eric Shinseki, were treated mercilessly. **Obama's prolonged**—to the point of inviting charges of dithering—**internal debates on** the **Afghanistan** War **were the polar opposite** of this Ignatius also probably underestimates the contributions that will be made to internal debate by the two most important cabinet members in national security: the secretaries of state and defense. He says John Kerry “has the heft of a former presidential candidate, but he has been a loyal and discreet emissary for Obama and is likely to remain so.” The heft matters, and Kerry certainly qualifies as a big beast. Moreover, the discreet way in which a member of Congress would carry any of the administration's water, as Kerry sometimes did when still a senator, is not necessarily a good indication of the role he will assume in internal debates as secretary of state. As for Chuck Hagel, Ignatius states “he has been damaged by the confirmation process and will need White House cover.” But now that Hagel's nomination finally has been confirmed, what other “cover” will he need? It's not as if he ever will face another confirmation vote in the Senate. It was Hagel's very inclination to flout orthodoxy, to arrive at independent opinions and to voice those opinions freely that led to the fevered opposition to his nomination.

#### Status quo is goldilocks- Obama won’t start wars but is preserving flexible self-defense- Syria proves

Corn, 13 -- Mother Jones' Washington bureau chief

[David, "Obama, Syria, and Congress: Why Did He Go There?" Mother Jones, www.motherjones.com/politics/2013/09/why-obama-sought-congressional-authorization-syria, accessed 9-23-13, mss]

Given all these swirling and complicated political dynamics, why did Obama grant Congress the right to hold him hostage? Some cynics have suggested that he might be seeking a way out of the corner he red-lined himself into. The polls show a strike would likely be highly unpopular among American voters, and experts of various ideological bents have raised serious questions about the efficacy and impact of a limited US military assault designed to deter Assad from the further use of chemical weapons. If Congress doesn't green light the endeavor, Obama can say he gave it a shot and retreat. Others have slammed Obama for not having the spine to go it alone, speculating he felt the need for political cover. But there's an alternative explanation: He's doing the right thing—or what he believes is the right thing. A former senior Obama adviser who still works with the White House says, "Look at this. Is there any other explanation, other than he thinks this is what he ought to do?" Meaning that Obama, the former law professor, is paying heed to the constitutional notion that the president shares war-making responsibility with Congress. Though this question has long been a source of unresolved conflict between presidents and legislators—and Obama did not seek congressional approval for the military action in Libya and has ordered drone strikes without official Capitol Hill backing—he does appear to be sympathetic to the idea that a president does not possess unhindered and unchecked war-making authority. During the 2008 campaign, he declared, "The president does not have power under the Constitution to unilaterally authorize a military attack in a situation that does not involve stopping an actual or imminent threat to the nation." In Libya, Obama did not act in sync with his campaign statement. But in that instance, past and present Obama aides have contended, the president had only two days or so to mount a strike (with European and Arab allies) to prevent a possible slaughter of Libyan civilians. So Obama sidestepped his previously held view, put that particular principle on hold—and took the hit. This time around, as Obama has pointed out, he does not have to move quickly to thwart an imminent threat. Consequently, he has had the chance to proceed according to constitutional rules (as he sees them). "I think it was pretty clear to him," says a former senior White House official, "that if he blew past Congress this time, that would be it." That is, the idea of joint executive-legislative responsibility for war would be trampled so far into the ground it could remain buried for years to come. Though **Obama** has **aimed to preserve a flexible degree of executive privilege**—and he still might order a strike on Syria without Congress' okay—**he didn't want to do long-term damage to this central constitutional principle.** Sure, **he'll bend it, but he won't break it**. Guiding him, this former aide suggested, was that trademarked Obama nuance-ism that blends pragmatism and principle in a manner that hardly lends itself to crystal-clear messaging.

#### The plan decimates that flexibility- makes global war inevitable and turns their case NR

WAXMAN 2013 - law professor at Columbia Law School, co-chairs the Roger Hertog Program on Law and National Security (Matthew Waxman, “The Constitutional Power to Threaten War,” August 27, 2013, http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2316777)

As a prescriptive matter, Part II also shows that examination of threatened force and the credibility requirements for its effectiveness calls into question many orthodoxies of the policy advantages and risks attendant to various allocations of legal war powers, including the existing one and proposed reforms.23 Most functional arguments about war powers focus on fighting wars or hostile engagements, but that is not all – or even predominantly – what the United States does with its military power. Much of the time it seeks to avert such clashes while achieving its foreign policy objectives: to bargain, coerce, deter.24 The President’s flexibility to use force in turn affects decision-making about threatening it, with major implications for securing peace or dragging the United States into conflicts. Moreover, constitutional war power allocations affect potential conflicts not only because they **may constrain U.S. actions** but because **they may send signals and shape** other states’ (including adversaries’) expectations of U.S. actions.25 That is, most analysis of war-powers law is inward-looking, focused on audiences internal to the U.S. government and polity, but thinking about threatened force prompts us to look outward, at how war-powers law affects external perceptions among adversaries and allies. Here, extant political science and strategic studies offer few clear conclusions, but they point the way toward more sophisticated and realistic policy assessment of legal doctrine and proposed reform. More generally, as explained in Part III, analysis of threatened force and war powers exposes an under-appreciated relationship between constitutional doctrine and grand strategy. Instead of proposing a functionally optimal allocation of legal powers, as legal scholars are often tempted to do, this Article in the end denies the tenability of any such claim. Having identified new spaces of war and peace powers that legal scholars need to take account of in understanding how those powers are really exercised, this Article also highlights the extent to which any normative account of the proper distribution of authority over this area depends on many matters that cannot be predicted in advance or expected to remain constant.26 Instead of proposing a policy-optimal solution, this Article concludes that the allocation of constitutional war powers is – and should be –geopolitically and strategically contingent; the actual and effective balance between presidential and congressional powers over war and peace in practice necessarily depends on fundamental assumptions and shifting policy choices about how best to secure U.S. interests against potential threats.27 I. Constitutional War Powers and Threats of Force Decisions to go to war or to send military forces into hostilities are immensely consequential, so it is no surprise that debates about constitutional war powers occupy so much space. But one of the most common and important ways that the United States uses its military power is by threatening war or force – and the constitutional dimensions of that activity receive almost no scrutiny or even theoretical investigation. A. War Powers Doctrine and Debates The Constitution grants Congress the powers to create military forces and to “declare war,”28 which the Supreme Court early on made clear includes the power to authorize limited uses of force short of full-blown war.29 The Constitution then vests the President with executive power and designates him commander in chief of the armed forces,30 and it has been well-accepted since the Founding that these powers include unilateral authority to repel invasions if the United States is attacked.31 Although there is nearly universal acceptance of these basic starting points, there is little legal agreement about how the Constitution allocates responsibility for the vast bulk of cases in which the United States has actually resorted to force. The United States has declared war or been invaded only a handful of times in its history, but it has used force – sometimes large-scale force – hundreds of other times.32 Views split over questions like when, if ever, the President may use force to deal with aggression against third parties and how much unilateral discretion the President has to use limited force short of full-blown war. For many lawyers and legal scholars, at least one important methodological tool for resolving such questions is to look at historical practice, and especially the extent to which the political branches acquiesced in common practices.33 Interpretation of that historical practice for constitutional purposes again divides legal scholars, but most would agree at least descriptively on some basic parts of that history. In particular, most scholars assess that from the Founding era through World War II, Presidents and Congresses alike recognized through their behavior and statements that except in certain narrow types of contingencies, congressional authorization was required for large-scale military operations against other states and international actors, even as many Presidents pushed and sometimes crossed those boundaries.34 Whatever constitutional constraints on presidential use of force existed prior to World War II, however, most scholars also note that the President asserted much more extensive unilateral powers to use force during and after the Cold War, and many trace the turning point to the 1950 Korean War.35 Congress did not declare war in that instance, nor did it expressly authorize U.S. participation.36 From that point forward, presidents have asserted broad unilateral authority to use force to address threats to U.S. interests, including threats to U.S. allies, and that neither Congress nor courts pushed back much against this expanding power.37 Concerns about expansive presidential war-making authority spiked during the Vietnam War. In the wind-down of that conflict, Congress passed – over President Nixon’s veto – the War Powers Resolution,38 which stated its purpose as to ensure the constitutional Founders’ original vision that the “collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.”39 Since then, presidentialists have argued that the President still retains expansive authority to use force abroad to protect American interests,40 and congressionalists argue that this authority is tightly circumscribed.41 These constitutional debates have continued through the first decade of the 21st century. Constitutional scholars split, for example, over President Obama’s power to participate in coalition operations against Libya without congressional authorization in 2011, especially after the War Powers Resolution’s 60-day clock expired.42 Some argue that President Obama’s use of military force without specific congressional authorization in that case **reflects the broad constitutional discretion presidents** now **have** to protect American interests, at least short of full-blown “war”, while others argue that it is the latest in a long record of presidential violations of the Constitution and the War Powers Resolution.43 B. Threats of Force and Constitutional Powers These days it is usually taken for granted that – whether or not he can make war unilaterally – the President is constitutionally empowered to threaten the use of force, implicitly or explicitly, through diplomatic means or shows of force. It is never seriously contested whether the President may declare that United States is contemplating military options in response to a crisis, or whether the President may move substantial U.S. military forces to a crisis region or engage in military exercises there. To take the Libya example just mentioned, is there any constitutional limitation on the President’s authority to move U.S. military forces to the Mediterranean region and prepare them very visibly to strike?44 Or his authority to issue an ultimatum to Libyan leaders that they cease their brutal conduct or else face military action? Would it matter whether such threats were explicit versus implicit, whether they were open and public versus secret, or whether they were just a bluff? If not a constitutional obstacle, could it be argued that the War Powers Resolution’s reporting requirements and limits on operations were triggered by a President’s mere ultimatum or threatening military demonstration, insofar as those moves might constitute a “situation where imminent involvement in hostilities is clearly indicated by the circumstances”? These questions simply are not asked (at least not anymore).45 If anything, most lawyers would probably conclude that the President’s constitutional powers to threaten war **are not just expansive but largely beyond Congress’s authority** to regulate directly. From a constitutional standpoint, to the extent it is considered at all, the President’s power to threaten force is probably regarded to be at least as broad as his power to use it. One way to look at it is that the power to threaten force is a lesser included element of presidential war powers; the power to threaten to use force is simply a secondary question, the answer to which is bounded by the primary issue of the scope of presidential power to actually use it. If one interprets the President’s defensive war powers very broadly, to include dealing with aggression not only directed against U.S. territories but also against third parties,46 then it might seem easy to conclude that the President can also therefore take steps that stop short of actual armed intervention to deter or prevent such aggression. If, however, one interprets the President’s powers narrowly, for example, to include only limited unilateral authority to repel attacks against U.S. territory,47 then one might expect objections to arguably excessive presidential power to include his unilateral threats of armed intervention. Another way of looking at it is that in many cases, threats of war or force might fall within even quite narrow interpretations of the President’s inherent foreign relations powers to conduct diplomacy or his express commander in chief power to control U.S. military forces – or some combination of the two – depending on how a particular threat is communicated. A President’s verbal warning, ultimatum, or declared intention to use military force, for instance, could be seen as merely exercising his role as the “sole organ” of U.S. foreign diplomacy, conveying externally information about U.S. capabilities and intentions.48 A president’s movement of U.S. troops or warships to a crisis region or elevation of their alert level could be seen as merely exercising his dayto- day tactical control over forces under his command.49 Generally it is not seriously contested whether the exercise of these powers alone could so affect the likelihood of hostilities or war as to intrude on Congress’s powers over war and peace.50 We know from historical examples that such unilateral military moves, even those that are ostensibly pure defensive ones, can provoke wars – take, for example, President Polk’s movement of U.S. forces to the contested border with Mexico in 1846, and the resulting skirmishes that led Congress to declare war.51 Coming at the issue from Congress’s Article I powers rather than the President’s Article II powers, the very phrasing of the power “To declare War” puts most naturally all the emphasis on the present tense of U.S. military action, rather than its potentiality. Even as congressionalists advance interpretations of the clause to include not merely declarative authority but primary decision-making authority as to whether or not to wage war or use force abroad, their modern-day interpretations do not include a power to threaten war (except perhaps through the specific act of declaring it). None seriously argues – at least not any more – that the Declare War Clause precludes presidential threats of war. This was not always the case. During the early period of the Republic, there was a powerful view that beyond outright initiation of armed hostilities or declaration of war, more broadly the President also could not unilaterally take actions (putting aside actual military attacks) that would likely or directly risk war,52 provoke a war with another state,53 or change the condition of affairs or relations with another state along the continuum from peace to war.54 To do so, it was often argued, would usurp Congress’s prerogative to control the nation’s state of peace or war.55 During the Quasi-War with France at the end of the 18th century, for example, some members of Congress questioned whether the President, absent congressional authorization, could take actions that visibly signaled an intention to retaliate against French maritime harassment,56 and even some members of President Adams’ cabinet shared doubts.57 Some questions over the President’s power to threaten force arose (eventually) in relation to the Monroe Doctrine, announced in an 1823 presidential address to Congress and which in effect declared to European powers that the United States would oppose any efforts to colonize or reassert control in the Western Hemisphere.58 “Virtually no one questioned [Monroe’s proclamation] at the time. Yet it posed a constitutional difficulty of the first importance.”59 Of course, Monroe did not actually initiate any military hostilities, but his implied threat – without congressional action – risked provoking rather than deterring European aggression and by putting U.S. prestige and credibility on the line it limited Congress’s practical freedom of action if European powers chose to intervene.60 The United States would have had at the time to rely on British naval power to make good on that tacit threat, though a more assertive role for the President in wielding the potential for war or intervention during this period went hand in hand with a more sustained projection of U.S. power beyond its borders, especially in dealing with dangers emanating from Spanish-held Florida territory.61 Monroe’s successor, John Quincy Adams, faced complaints from opposition members of Congress that Monroe’s proclamation had exceeded his constitutional authority and had usurped Congress’s by committing the United States – even in a non-binding way – to resisting European meddling in the hemisphere.62 The question whether the President could unilaterally send militarily-threatening signals was in some respects a mirror image of the issues raised soon after the Constitution was ratified during the 1793 Neutrality Controversy: could President Washington unilaterally declare the United States to be neutral as to the war among European powers. Washington’s politically controversial proclamation declaring the nation “friendly and impartial” in the conflict between France and Great Britain (along with other European states) famously prompted a back-and-forth contest of public letters by Alexander Hamilton and James Madison, writing pseudonymously as “Pacificus” and “Helvidius”, about whether the President had such unilateral power or whether it belonged to Congress.63 Legal historian David Currie points out the irony that the neutrality proclamation was met with stronger and more immediate constitutional scrutiny and criticism than was Monroe’s threat. After all, Washington’s action accorded with the principle that only Congress, representing popular will, should be able to take the country from the baseline state of peace to war, whereas Monroe’s action seemed (at least superficially) to commit it to a war that Congress had not approved.64 Curiously (though for reasons offered below, perhaps not surprisingly) this issue – whether there are constitutional limits on the President’s power to threaten war – has almost vanished completely from legal discussion, and that evaporation occurred even before the dramatic post-war expansion in asserted presidential power to make war. Just prior to World War II, political scientist and presidential powers theorist Edward Corwin remarked that “[o]f course, it may be argued, and has in fact been argued many times, that the President is under constitutional obligation not to incur the risk of war in the prosecution of a diplomatic policy without first consulting Congress and getting its consent.”65 “Nevertheless,” he continued,66 “the supposed principle is clearly a maxim of policy rather than a generalization from consistent practice.” In his 1945 study World Policing and the Constitution, James Grafton Rogers noted: [E]xamples of demonstrations on land and sea made for a variety of purposes and under Presidents of varied temper and in different political climates will suffice to make the point. The Commander-in-Chief under the Constitution can display our military resources and threaten their use whenever he thinks best. The weakness in the diplomatic weapon is the possibility of dissidence at home which may cast doubt on our serious intent. The danger of the weapon is war.67 At least since then, however, the importance to U.S. foreign policy of threatened force has increased dramatically, while legal questions about it have receded further from discussion. In recent decades a few prominent legal scholars have addressed the President’s power to threaten force, though in only brief terms.

Taylor Reveley noted in his volume on war powers the importance of allocating constitutional responsibility not only for the actual use of force but also “[v]erbal or written threats or assurances about the circumstances in which the United States will take military action …, whether delivered by declarations of American policy, through formal agreements with foreign entities, by the demeanor or words of American officials, or by some other sign of national intent.”68 Beyond recognizing the critical importance of threats and other non-military actions in affecting war and peace, however, Reveley made little effort to address the issue in any detail. Among the few legal scholars attempting to define the limiting doctrinal contours of presidentially threatened force, Louis Henkin wrote in his monumental Foreign Affairs and the Constitution that: Unfortunately, the line between war and lesser uses of force is often elusive, sometimes illusory, and the use of force for foreign policy purposes can almost imperceptibly become a national commitment to war. Even when he does not use military force, the President can incite other nations or otherwise plunge or stumble this country into war, or force the hand of Congress to declare or to acquiesce and cooperate in war. As a matter of constitutional doctrine, however, one can declare with confidence that a President begins to exceed his authority if he willfully or recklessly moves the nation towards war…69 The implication seems to be that the President may not unilaterally threaten force in ways that are dramatically escalatory and could likely lead to war, or perhaps that the President may not unilaterally threaten the use of force that he does not have the authority to initiate unilaterally.70 Jefferson Powell, who generally takes a more expansive view than Henkin of the President’s war powers, argues by contrast that “[t]he ability to warn of, or threaten, the use of military force is an ordinary and essential element in the toolbox of that branch of government empowered to formulate and implement foreign policy.”71 For Powell, the President is constantly taking actions as part of everyday international relations that carry a risk of military escalation, and these are well-accepted as part of the President’s broader authority to manage, if not set, foreign policy. Such brief mentions are in recent times among the rare exceptions to otherwise barren constitutional discussion of presidential powers to threaten force. That the President’s authority to threaten force is so well-accepted these days as to seem self-evident is not just an academic phenomenon. It is also reflected in the legal debates among and inside all three branches of government. In 1989, Michael Reisman observed: Military maneuvers designed to convey commitment to allies or contingent threats to adversaries … **are matters of presidential competence**. Congress does not appear to view as within its bailiwick many low-profile contemporaneous expressions of gunboat diplomacy, i.e., the physical interposition of some U.S. war-making capacity as communication to an adversary of United States’ intentions and capacities to oppose it.72 This was and remains a correct description but understates the pattern of practice, insofar as even major and high-profile expressions of coercive diplomacy are regarded among all three branches of government as within presidential competence. In Dellums v. Bush – perhaps the most assertive judicial scrutiny of presidential power to use large-scale force abroad since the end of the Cold War – the district court dismissed on ripeness grounds congressmembers’ suit challenging President George H. W. Bush’s intended military operations against Iraq in 1991 and seeking to prevent him from initiating an offensive attack against Iraq without first securing explicit congressional authorization for such action.73 That at the time of the suit the President had openly threatened war – through ultimatums and deployment of several hundred thousand U.S. troops – but had not yet “committed to a definitive course of action” to carry out the threat meant there was no justiciable legal issue, held the court.74 The President’s threat of war did not seem to give the district court legal pause at all; quite the contrary, the mere threat of war was treated by the court as a non-issue entirely.75 There are several reasons why constitutional questions about threatened force have dropped out of legal discussions. First, the more politically salient debate about the President’s unilateral power to use force has probably swallowed up this seemingly secondary issue. As explained below, it is a mistake to view threats as secondary in importance to uses of force, but they do not command the same political attention and their impacts are harder to measure.76 Second, the expansion of American power after World War II, combined with the growth of peacetime military forces and a set of defense alliance commitments (developments that are elaborated below) make at least some threat of force much more common – in the case of defensive alliances and some deterrent policies, virtually constant – and difficult to distinguish from other forms of everyday diplomacy and security policy.77 Besides, for political and diplomatic reasons, presidents rarely threaten war or intervention without at least a little deliberate ambiguity. As historian Marc Trachtenberg puts it: “It often makes sense … to muddy the waters a bit and avoid direct threats.”78 Any legal lines one might try to draw (recall early attempts to restrict the President’s unilateral authority to alter the state of affairs along the peacetime-wartime continuum) have become blurrier and blurrier. In sum, if the constitutional power to threaten war ever posed a serious legal controversy, it does so no more. As the following section explains, however, threats of war and armed force have during most of our history become a greater and greater part of American grand strategy, defined here as long-term policies for using the country’s military and non-military power to achieve national goals. The prominent role of threatened force in U.S. strategy has become the focus of political scientists and other students of security strategy, crises, and responses – but constitutional study has not adjusted accordingly.79 C. Threats of Force and U.S. Grand Strategy While the Korean and Vietnam Wars were generating intense study among lawyers and legal scholars about constitutional authority to wage military actions abroad, during that same period many political scientists and strategists – economists, historians, statesmen, and others who studied international conflict – turned their focus to the role of threatened force as an instrument of foreign policy. The United States was building and sustaining a massive war-fighting apparatus, but its security policy was not oriented primarily around waging or winning wars but around deterring them and using the threat of war – including demonstrative military actions – to advance U.S. security interests. It was the potential of U.S. military might, not its direct application or engagement with the enemy, that would do much of the heavy lifting. U.S. military power would be used to deter the Soviet Union and other hostile states from taking aggressive action. It would be unsheathed to prompt them to back down over disputes. It would reassure allies that they could depend on U.S. help in defending themselves. All this required that U.S. willingness to go to war be credible in the eyes of adversaries and allies alike. Much of the early Cold War study of threatened force concerned nuclear strategy, and especially deterrence or escalation of nuclear war. Works by Albert Wohlstetter, Herman Kahn, and others not only studied but shaped the strategy of nuclear threats, as well as how to use limited applications of force or threats of force to pursue strategic interests in remote parts of the globe without sparking massive conflagrations.80 As the strategic analyst Bernard Brodie wrote in 1946, “Thus far the chief purpose of our military establishment has been to win wars. From now on its chief purpose must be to avert them.”81 Toward that end, U.S. government security and defense planners during this time focused heavily on preserving and improving the credibility of U.S. military threats – while the Soviet Union was doing likewise.82 The Truman administration developed a militarized version of containment strategy against the Soviet empire, emphasizing that stronger military capabilities were necessary to prevent the Soviets from seizing the initiative and to resist its aggressive probes: “it is clear,” according to NSC-68, the government document which encapsulated that strategy, “that a substantial and rapid building up of strength in the free world is necessary to support a firm policy intended to check and to roll back the Kremlin's drive for world domination.”83 The Eisenhower administration’s “New Look” policy and doctrine of “massive retaliation” emphasized making Western collective security both more effective and less costly by placing greater reliance on deterrent threats – including threatened escalation to general or nuclear war. As his Secretary of State John Foster Dulles explained, “[t]here is no local defense which alone will contain the mighty landpower of the Communist world. Local defenses must be reinforced by the further deterrent of massive retaliatory power.”84 As described in Evan Thomas’s recent book, Ike’s Bluff, Eisenhower managed to convince Soviet leaders that he was ready to use nuclear weapons to check their advance in Europe and elsewhere. In part due to concerns that threats of massive retaliation might be insufficiently credible in Soviet eyes (especially with respect to U.S. interests perceived as peripheral), the Kennedy administration in 1961 shifted toward a strategy of “flexible response,” which relied on the development of a wider spectrum of military options that could quickly and efficiently deliver varying degrees of force in response to foreign aggression.85 Throughout these periods, the President often resorted to discrete, limited uses of force to demonstrate U.S. willingness to escalate. For example, in 1961 the Kennedy administration (mostly successfully in the short-run) deployed intervention-ready military force immediately off the coast of the Dominican Republic to compel its government's ouster,86 and that same year it used military exercises and shows of force in ending the Berlin crisis;87 in 1964, the Johnson administration unsuccessfully used air strikes on North Vietnamese targets following the Tonkin Gulf incidents, failing to deter what it viewed as further North Vietnamese aggression.88 The point here is not the shifting details of U.S. strategy after World War II – during this era of dramatic expansion in asserted presidential war powers – but the central role of credible threats of war in it, as well as the interrelationship of plans for using force and credible threats to do so. Also during this period, the United States abandoned its long-standing aversion to “entangling alliances,”89 and committed to a network of mutual defense treaties with dependent allies. Besides the global collective security arrangement enshrined in the UN Charter, the United States committed soon after World War II to mutual defense pacts with, for example, groups of states in Western Europe (the North Atlantic Treaty Organization)90 and Asia (the Southeast Asia Treaty Organization,91 as well as a bilateral defense agreement with the Republic of Korea,92 Japan,93 and the Republic of China,94 among others). These alliance commitments were part of a U.S. effort to “extend” deterrence of Communist bloc aggression far beyond its own borders.95 “Extended deterrence” was also critical to reassuring these U.S. allies that their security needs would be met, in some instances to head off their own dangerous rearmament.96 Among the leading academic works on strategy of the 1960s and 70s were those of Thomas Schelling, who developed the theoretical structure of coercion theory, arguing that rational states routinely use the threat of military force – the manipulation of an adversary’s perceptions of future risks and costs with military threats – as a significant component of their diplomacy.97 Schelling distinguished between deterrence (the use of threats to dissuade an adversary from taking undesired action) and compellence (the use of threats to persuade an adversary to behave a certain way), and he distinguished both forms of coercion from brute force: “[B]rute force succeeds when it is used, whereas the power to hurt is most successful when held in reserve. It is the threat of damage to come that can make someone yield of comply. It is latent violence that can influence someone’s choice.”98 Alexander George, David Hall, and William Simons then led the way in taking a more empirical approach, reviewing case studies to draw insights about the success and failure of U.S. coercive threats, analyzing contextual variables and their effects on parties’ reactions to threats during crises. Among their goals was to generate lessons informed by history for successful strategies that combine diplomatic efforts with threats or demonstrations of force, recognizing that the United States was relying heavily on threatened force in addressing security crises. Coercive diplomacy – if successful – offered ways to do so with minimal actual application of military force.99 One of the most influential studies that followed was Force Without War: U.S. Armed Forces as a Political Instrument, a Brookings Institution study led by Barry Blechman and Stephen Kaplan and published in 1977.100 They studied “political uses of force”, defined as actions by U.S. military forces “as part of a deliberate attempt by the national authorities to influence, or to be prepared to influence, specific behavior of individuals in another nation without engaging in a continued contest of violence.”101 Blechman and Kaplan’s work, including their large data set and collected case studies, was important for showing the many ways that threatened force could support U.S. security policy. Besides deterrence and compellence, threats of force were used to assure allies (thereby, for example, avoiding their own drive toward militarization of policies or crises) and to induce third parties to behave certain ways (such as contributing to diplomatic resolution of crises). The record of success in relying on threatened force has been quite mixed, they showed. Blechman and Kaplan’s work, and that of others who built upon it through the end of the Cold War and the period that has followed,102 helped understand the factors that correlated with successful threats or demonstrations of force without resort or escalation to war, especially the importance of credible signals.103 After the Cold War, the United States continued to rely on coercive force – threatened force to deter or compel behavior by other actors – as a central pillar of its grand strategy. During the 1990s, the United States wielded coercive power with varied results against rogue actors in many cases that, without the overlay of superpower enmities, were considered secondary or peripheral, not vital, interests: Iraq, Somalia, Haiti, Bosnia, and elsewhere. For analysts of U.S. national security policy, a major puzzle was reconciling the fact that the United States possessed overwhelming military superiority in raw terms over any rivals with its difficult time during this era in compelling changes in their behavior.104 As Daniel Byman and I wrote about that decade in our study of threats of force and American foreign policy: U.S. conventional and nuclear forces dwarf those of any adversaries, and the U.S. economy remains the largest and most robust in the world. Because of these overwhelming advantages, the United States can threaten any conceivable adversary with little danger of a major defeat or even significant retaliation. Yet coercion remains difficult. Despite the United States’ lopsided edge in raw strength, regional foes persist in defying the threats and ultimatums brought by the United States and its allies. In confrontations with Somali militants, Serb nationalists, and an Iraqi dictator, the U.S. and allied record or coercion has been mixed over recent years…. Despite its mixed record of success, however, coercion will remain a critical element of U.S. foreign policy.105 One important factor that seemed to undermine the effectiveness of U.S. coercive threats during this period was that many adversaries perceived the United States as still afflicted with “Vietnam Syndrome,” unwilling to make good on its military threats and see military operations through.106 Since the turn of the 21st Century, major U.S. security challenges have included non-state terrorist threats, the proliferation of nuclear and other weapons of mass destruction (WMD), and rapidly changing power balances in East Asia, and the United States has accordingly been reorienting but retaining its strategic reliance on threatened force. The Bush Administration’s “preemption doctrine” was premised on the idea that some dangerous actors – including terrorist organizations and some states seeking WMD arsenals – are undeterrable, so the United States might have to strike them first rather than waiting to be struck.107 On one hand, this was a move away from reliance on threatened force: “[t]he inability to deter a potential attacker, the immediacy of today’s threats, and the magnitude of potential harm that could be caused by our adversaries’ choice of weapons, do not permit” a reactive posture.108 Yet the very enunciation of such a policy – that “[t]o forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively”109 – was intended to persuade those adversaries to alter their policies that the United States regarded as destabilizing and threatening. Although the Obama administration pulled back from this rhetoric and placed greater emphasis on international institutions, it has continued to rely on threatened force as a key pillar of its strategy with regard to deterring threats (such as aggressive Iranian moves), intervening in humanitarian crises (as in Libya), and reassuring allies.110 With regard to East Asia, for example, the credible threat of U.S. military force is a significant element of U.S. strategy for deterring Chinese and North Korean aggression as well as reassuring other Asian powers of U.S. protection, to avert a destabilizing arms race.111 D. The Disconnect Between Constitutional Discourse and Strategy There is a major disconnect between the decades of work by strategists and many political scientists on American security policy and practice since the Second World War and legal analysis and scholarship of constitutional war powers during that period. Lawyers and strategists have been relying on not only distinct languages but distinct logics of military force – in short, when it comes to using U.S. military power, lawyers think in terms of “going to war” while strategists focus on potential war and processes leading to it. These framings manifest in differing theoretical starting points for considering how exercises of U.S. military might affect war and peace, and they skew the empirical insights and normative prescriptions about Presidential power often drawn from their analyses. 1. Lawyers’ Misframing Lawyers’ focus on actual uses of force – especially engagements with enemy military forces – as constitutionally salient, rather than including threats of force in their understanding of modern presidential powers tilts analysis toward a one-dimensional strategic logic, rather than a more complex and multi-dimensional and dynamic logic in which the credible will to use force is as important as the capacity to do so. As discussed above, early American constitutional thinkers and practitioners generally wanted to slow down with institutional checks decisions to go to war, because they thought that would make war less likely. “To invoke a more contemporary image,” wrote John Hart Ely of their vision, “it takes more than one key to launch a missile: It should take quite a number to start a war.”112 They also viewed the exercise of military power as generally a ratchet of hostilities, whereby as the intensity of authorized or deployed force increased, so generally did the state of hostilities between the United States and other parties move along a continuum from peace to war.113 Echoes of this logic still reverberate in modern congressionalist legal scholarship: the more flexibly the President can use military force, the more likely it is that the United States will find itself in wars; better, therefore, to clog decisions to make war with legislative checks.114 Modern presidentialist legal scholars usually respond that rapid action is a virtue, not a vice, in exercising military force.115 Especially as a superpower with global interests and facing global threats, presidential discretion to take rapid military **action** – endowed with what Alexander Hamilton called “[**d]ecision, activity, secrecy, and dispatch**”116 – **best protects American interests**. In either case the emphasis tends overwhelmingly to be placed on actual military engagements with adversaries. Strategists and many political scientists, by contrast, view some of the most significant use of military power as starting well before armed forces clash – and including important cases in which they never actually do. Coercive diplomacy and strategies of threatened force, they recognize, often involve a set of moves and countermoves by opposing sides and third parties before or even without the violent engagement of opposing forces. It is often the parties’ perceptions of anticipated actions and costs, not the actual carrying through of violence, that have the greatest impact on the course of events and resolution or escalation of crises. Instead of a ratchet of escalating hostilities, the flexing of military muscle can increase as well as decrease actual hostilities, inflame as well as stabilize relations with rivals or enemies. Moreover, those effects are determined not just by U.S. moves but by the responses of other parties to them – or even to anticipated U.S. moves and countermoves.117 Indeed, as Schelling observed, strategies of brinkmanship sometimes operate by “the deliberate creation of a recognizable risk of war, a risk that one does not completely control.”118 This insight – that effective strategies of threatened force involve not only great uncertainty about the adversary’s responses but also sometimes involve intentionally creating risk of inadvertent escalation119 – poses a difficult challenge for any effort to cabin legally the President’s power to threaten force in terms of likelihood of war or some due standard of care.120 2. Lawyers’ Selection Problems Methodologically, a lawyerly focus on actual uses of force – a list of which would then commonly be used to consider which ones were or were not authorized by Congress – vastly undercounts the instances in which presidents wield U.S. military might. It is already recognized by some legal scholars that studying actual uses of force risks ignoring instances in which President contemplated force but refrained from using it, whether because of political, congressional, or other constraints.121 The point here is a different one: that some of the most significant (and, in many instances, successful) presidential decisions to threaten force do not show up in legal studies of presidential war powers that consider actual deployment or engagement of U.S. military forces as the relevant data set. Moreover, some actual uses of force, whether authorized by Congress or not, were preceded by threats of force; in some cases these threats may have failed on their own to resolve the crisis, and in other cases they may have precipitated escalation. To the extent that lawyers are interested in understanding from historical practice what war powers the political branches thought they had and how well that understanding worked, they are excluding important cases. Consider, as an illustration of this difference in methodological starting point, that for the period of 1946-1975 (during which the exercise of unilateral Presidential war powers had its most rapid expansion), the Congressional Research Service compilation of instances in which the United States has utilized military forces abroad in situations of military conflict or potential conflict to protect U.S. citizens or promote U.S. interests – which is often relied upon by legal scholars studying war powers – lists only about two dozen incidents.122 For the same time period, the Blechman and Kaplan study of political uses of force (usually threats) – which is often relied upon by political scientists studying U.S. security strategy – includes dozens more data-point incidents, because they divide up many military crises into several discrete policy decisions, because many crises were resolved with threat-backed diplomacy, and because many uses of force were preceded by overt or implicit threats of force.123 Among the most significant incidents studied by Blechman and Kaplan but not included in the Congressional Research Service compilation at all are the 1958-59 and 1961 crises over Berlin and the 1973 Middle East War, during which U.S. Presidents signaled threats of superpower war, and in the latter case signaled particularly a willingness to resort to nuclear weapons.124 Because the presidents did not in the end carry out these threats, these cases lack the sort of authoritative legal justifications or reactions that accompany actual uses of force. It is therefore difficult to assess how the executive branch and congress understood the scope of the President’s war powers in these cases, but historical inquiry would probably show the executive branch’s interpretation to be very broad, even to include full-scale war and even where the main U.S. interest at stake was the very credibility of U.S. defense commitments undergirding its grand strategy, not simply the interests specific to divided Germany and the Middle East region.

Of course, one might argue that because the threatened military actions were never carried out in these cases, it is impossible to know if the President would have sought congressional authorization or how Congress would have reacted to the use of force; nonetheless, it is easy to see that in crises like these a threat by the President to use force, having put U.S. credibility on the line in addition to whatever other foreign policy stakes were at issues, would have put Congress in a bind. 3. Lawyers’ Mis-Assessment Empirically, analysis of and insights gleaned from any particular incident – which might then be used to evaluate the functional merits of presidential powers – looks very different if one focuses predominantly on the actual use of force instead of considering also the role of threatened force. Take for example, the Cuban Missile Crisis – perhaps the Cold War’s most dangerous event. To the rare extent that they consider domestic legal issues of this crisis at all, lawyers interested in the constitutionality of President Kennedy’s actions generally ask only whether he was empowered to initiate the naval quarantine of Cuba, because that is the concrete military action Kennedy took that was readily observable and that resulted in actual engagement with Soviet forces or vessels – as it happens, very minimal engagement.125 To strategists who study the crisis, however, the naval quarantine is not in itself the key presidential action; after all, as Kennedy and his advisers realized, a quarantine alone could not remove the missiles that were already in Cuba. The most consequential presidential actions were threats of military or even nuclear escalation, signaled through various means including putting U.S. strategic bombers on highest alert.126 The quarantine itself was significant not for its direct military effects but because of its communicative impact in showing U.S. resolve. If one is focused, as lawyers often are, on presidential military action that actually engaged the enemy in combat or nearly did, it is easy to dismiss this case as not very constitutionally significant. If one focuses on it, as strategists and political scientists often do, on nuclear brinkmanship, it is arguably the most significant historical exercise of unilateral presidential powers to affect war and peace.127 Considering again the 1991 Gulf War, most legal scholars would dismiss this instance as constitutionally a pretty uninteresting military conflict: the President claimed unilateral authority to use force, but he eventually sought and obtained congressional authorization for what was ultimately – at least in the short-run – a quite successful war. For the most part this case is therefore neither celebrated nor decried much by either side of legal war powers debates,128 though some congressionalist scholars highlight the correlation of congressional authorization for this war and a successful outcome.129 Political scientists look at the case differently, though. They often study this event not as a successful war but as failed coercive diplomacy, in that the United States first threatened war through a set of dramatically escalating steps that ultimately failed to persuade Saddam Hussein to withdraw from Kuwait.130 Some political scientists even see U.S. legal debate about military actions as an important part of this story, assessing that adversaries pay attention to congressional arguments and moves in evaluating U.S. resolve (an issue taken up in greater detail below) and that congressional opposition to Bush’s initial unilateralism in this case undermined the credibility of U.S. threats.131 Whether one sees the Gulf War as a case of (successful) war, as lawyers usually do, or (unsuccessful) threatened war, as political scientists usually do, colors how one evaluates the outcome and the credit one might attach to some factors such as vocal congressional opposition to initially-unilateral presidential moves. Notice also that legal analysis of Presidential authority to use force is sometimes thought to turn partly on the U.S. security interests at stake, as though those interests are purely contextual and exogenous to U.S. decision-making and grand strategy. In justifying President Obama’s 2011 use of force against the Libyan government, for example, the Justice Department’s Office of Legal Counsel concluded that the President had such legal authority “because he could reasonably determine that such use of force was in the national interest,” and it then went on to detail the U.S. security and foreign policy interests.132 The interests at stake in crises like these, however, are altered dramatically if the President threatens force: doing so puts the credibility of U.S. threats at stake, which is important not only with respect to resolving the crisis at hand but with respect to other potential adversaries watching U.S. actions.133 The President’s power to threaten force means that he may unilaterally alter the costs and benefits of actually using force through his prior actions.134 The U.S. security interests in carrying through on threats are partly endogenous to the strategy embarked upon to address crises (consider, for example, that once President George H.W. Bush placed hundred of thousands of U.S. troops in the Persian Gulf region and issued an ultimatum to Saddam Hussein in 1990, the credibility of U.S. threats and assurances to regional allies were put on the line).135 Moreover, interests at stake in any one crisis cannot simply be disaggregated from broader U.S. grand strategy: if the United States generally relies heavily on threats of force to shape the behavior of other actors, then its demonstrated willingness or unwillingness to carry out a threat and the outcomes of that action affect its credibility in the eyes of other adversaries and allies, too.136 It is remarkable, though in the end not surprising, that the executive branch does not generally cite these credibility interests in justifying its unilateral uses of force. It does cite when relevant the U.S. interest in sustaining the credibility of its formal alliance commitments or U.N. Security Council resolutions, as reasons supporting the President’s constitutional authority to use force.137 The executive branch generally refrains from citing the similar interests in sustaining the credibility of the President’s own threats of force, however, probably in part because doing so would so nakedly expose the degree to which the President’s prior unilateral strategic decisions would tie Congress’s hands on the matter. \* \* \* In sum, lawyers’ focus on actual uses of force – usually in terms of armed clashes with an enemy or the placement of troops into hostile environments – does not account for much vaster ways that President’s wield U.S. military power and it skews the claims legal scholars make about the allocation of war powers between the political branches. A more complete account of constitutional war powers should recognize the significant role of threatened force in American foreign policy. II. Democratic Checks on Threatened Force The previous Parts of this Article showed that, especially since the end of World War II, the United States has relied heavily on strategies of threatened force in wielding its military might – for which credible signals are a necessary element – and that the President is not very constrained legally in any formal sense in threatening war. Drawing on recent political science scholarship, this Part takes some of the major questions often asked by students of constitutional war powers with respect to the actual use of force and reframes them in terms of threatened force. First, as a descriptive matter, in the absence of formal legal checks on the President’s power to threaten war, is the President nevertheless informally but significantly constrained by democratic institutions and processes, and what role does Congress play in that constraint? Second, as a normative matter, what are the strategic merits and drawbacks of this arrangement of democratic institutions and constraints with regard to strategies of threatened force? Third, as a prescriptive matter, although it is not really plausible that Congress or courts would ever erect direct legal barriers to the President’s power to threaten war, how might legal reform proposals to more strongly and formally constrain the President’s power to use force indirectly impact his power to threaten it effectively? For reasons discussed below, I do not consider whether Congress could legislatively restrict directly the President’s power to threaten force or war; in short, I set that issue aside because assuming that were constitutionally permissible, even ardent congressionalists have exhibited no interest in doing so, and instead have focused on legally controlling the actual use of force. Political science insights that bear on these questions emerge from several directions. One is from studies of Congress’ influence on use of force decisions, which usually assume that Congress’s formal legislative powers play only a limited role in this area, and the effects of this influence on presidential decision-making about threatened force. Another is international relations literature on international bargaining138 as well as literature on the theory of democratic peace, the notion that democracies rarely, if ever, go to war with one another.139 In attempting to explain the near-absence of military conflicts between democracies, political scientists have examined how particular features of democratic governments – electoral accountability, the institutionalized mobilization of political opponents, and the diffusion of decision-making authority regarding the use of force among executive and legislative branches – affect decision-making about war.140 These and other studies, in turn, have led some political scientists (especially those with a rational choice theory orientation) to focus on how those features affect the credibility of signals about force that governments send to adversaries in crises.141 My purpose in addressing these questions is to begin painting a more complete and detailed picture of the way war powers operate, or could operate, than one sees when looking only at actual wars and use of force. This is not intended to be a comprehensive account but an effort to synthesize some strands of scholarship from other fields regarding threatened force to inform legal discourse about how war powers function in practice and the strategic implications of reform. The answers to these questions also bear on raging debates among legal scholars on the nature of American executive power and its constraint by law. Initially they seem to support the views of those legal scholars who have long believed that in practice law no longer seriously binds the President with respect to war-making.142 That view has been taken even further recently by Eric Posner and Adrian Vermeule, who argue that “[l]aw does little constraint the modern executive” at all, but also observe that “politics and public opinion” operate effectively to cabin executive powers.143 The arguments offered here, however, do more to support the position of those legal scholars who describe a more complex relationship between law and politics, including that law is constitutive of the processes of political struggle.144 That law helps constitute the processes of political struggles is true of any area of public policy, though, and what is special here is the added importance of foreign audiences – including adversaries and allies, alike – observing and reacting to those politics, too. Democratic Constraints on the Power to the Threaten Force Whereas most lawyers usually begin their analysis of the President’s and Congress’s war powers by focusing on their formal legal authorities, political scientists usually take for granted these days that the President is – in practice – the dominant branch with respect to military crises and that Congress wields its formal legislative powers in this area rarely or in only very limited ways. A major school of thought, however, is that congressional members nevertheless wield significant influence over decisions about force, and that this influence extends to threatened force, so that Presidents generally refrain from threats that would provoke strong congressional opposition. Even without any serious prospect for legislatively blocking the President’s threatened actions, Congress under certain conditions can loom large enough to force Presidents to adjust their policies; even when it cannot, congressional members can oblige the President expend lots of political capital. As Jon Pevehouse and William Howell explain: When members of Congress vocally **oppose a use of force, they undermine the president’s ability to convince** foreign states that he will see a fight through to the end. Sensing hesitation on the part of the United States, **allies may be reluctant to contribute** to a military campaign, **and adversaries are likely to fight harder and longer** when conflict erupts— thereby raising the costs of the military campaign, decreasing the president’s ability to negotiate a satisfactory resolution, and increasing the probability that American lives are lost along the way. Facing a limited band of allies willing to participate in a military venture and an enemy emboldened by domestic critics, presidents may choose to curtail, and even abandon, those military operations that do not involve vital strategic interests. 145 This statement also highlights the important point, alluded to earlier, that force and threatened force are not neatly separable categories. Often limited uses of force are intended as signals of resolve to escalate, and most conflicts involve bargaining in which the threat of future violence – rather than what Schelling calls “brute force”146 – is used to try to extract concessions. The formal participation of political opponents in legislative bodies provides them with a forum for registering dissent to presidential policies of force through such mechanisms floor statements, committee oversight hearings, resolution votes, and funding decisions.147 These official actions prevent the President “from monopolizing the nation’s political discourse” on decisions regarding military actions can thereby make it difficult for the President to depart too far from congressional preferences.148 Members of the political opposition in Congress also have access to resources for gathering policy relevant information from the government that informs their policy preferences. Their active participation in specialized legislative committees similarly gives opponent party members access to fact-finding resources and forums for registering informed dissent from decisions within the committee’s purview.149 As a result, legislative institutions within democracies can enable political opponents to have a more **immediate** and informed **impact** on executive’s decisions regarding force than can opponents among the general public. Moreover, studies suggest that Congress can actively shape media coverage and public support for a president’s foreign policy engagements.150 In short, these findings among political scientists suggest that, even without having to pass legislation or formally approve of actions, Congress often operates as an important check on threatened force by providing the president’s political opponents with a forum for registering dissent from the executive’s decisions regarding force in ways that attach domestic political costs to contemplated military actions or even the threats to use force. Under this logic, Presidents, anticipating dissent, will be more selective in issuing¶ threats in the first place, making only those commitments that would not incite¶ widespread political opposition should the threat be carried through.151 Political¶ opponents within a legislature also have few electoral incentives to collude in an¶ executive’s bluff, and they are capable of expressing opposition to a threatened use of¶ force in ways that could expose the bluff to a threatened adversary.152 This again narrows¶ the President’s range of viable policy options for brandishing military force. Counter-intuitively, given the President’s seemingly unlimited and unchallenged¶ constitutional power to threaten war, it may in some cases be easier for members of¶ Congress to influence presidential decisions to threaten military action than presidential¶ war decisions once U.S. forces are already engaged in hostilities. It is widely believed¶ that once U.S. armed forces are fighting, congress members’ hands are often tied: policy¶ opposition at that stage risks being portrayed as undermining our troops in the field.153¶ Perhaps, it could be argued, the President takes this phenomenon into account and¶ therefore discounts political opposition to threatened force; he can assume that such¶ opposition will dissipate if he carries it through. Even if that is true, before that point¶ occurs, however, members of Congress may have communicated messages domestically¶ and communicated signals abroad that the President will find difficult to counter.154 The bottom line is that a body of recent political science, while confirming the¶ President’s dominant position in setting policy in this area, also reveals that policymaking¶ with respect to threats of force is significantly shaped by domestic politics and¶ that Congress is institutionally positioned to play a powerful role in influencing those¶ politics, even without exercising its formal legislative powers. Given the centrality of¶ threatened force to U.S. foreign policy strategy and security crises, this suggests that the¶ practical war powers situation is not so imbalanced toward the President as many assume. B. Democratic Institutions and the Credibility of Threats A central question among constitutional war powers scholars is whether robust¶ checks – especially congressional ones – on presidential use of force lead to “sound”¶ policy decision-making. Congressionalists typically argue that legislative control over¶ war decisions promotes more thorough deliberation, including more accurate weighing of¶ consequences and gauging of political support of military action.155 Presidentialists¶ usually counter that the executive branch has better information and therefore better¶ ability to discern the dangers of action or inaction, and that quick and decisive military¶ moves are often required to deal with security crises.156 If we are interested in these sorts of functional arguments, then reframing the¶ inquiry to include threatened force prompts critical questions whether such checks also¶ contribute to or detract from effective deterrence and coercive diplomacy and therefore¶ positively or negatively affect the likelihood of achieving aims without resort to war.¶ Here, recent political science provides some reason for optimism, though the scholarship¶ in this area is neither yet well developed nor conclusive. To be sure, “soundness” of policy with respect to force is heavily laden with¶ normative assumptions about war and the appropriate role for the United States in the¶ broader international security system, so it is difficult to assess the merits and¶ disadvantages of constitutional allocations in the abstract. That said, whatever their¶ specific assumptions about appropriate uses of force in mind, constitutional war powers¶ scholars usually evaluate the policy advantages and dangers of decision-making¶ allocations narrowly in terms of the costs and outcomes of actual military engagements¶ with adversaries. The importance of credibility to strategies of threatened force adds important new¶ dimensions to this debate. On the one hand, one might intuitively expect that robust democratic checks would generally be ill-suited for coercive threats and negotiations –¶ that institutional centralization and secrecy of decision-making might better equip nondemocracies¶ to wield threats of force. As Quincy Wright speculated in 1944, autocracies¶ “can use war efficiently and threats of war even more efficiently” than democracies,157¶ especially the American democracy in which vocal public and congressional opposition¶ may undermine threats.158 Moreover, proponents of democratic checks on war powers¶ usually assume that careful deliberation is a virtue in preventing unnecessary wars, but¶ strategists of deterrence and coercion observe that perceived irrationality is sometimes¶ important in conveying threats: “don’t test me, because I might just be crazy enough to¶ do it!”159 On the other hand, some political scientists have recently called into question this¶ view and concluded that the institutionalization of political contestation and some¶ diffusion of decision-making power in democracies of the kind described in the previous¶ section make threats to use force rare but especially credible and effective in resolving¶ international crises without actual resort to armed conflict. In other words, recent¶ arguments in effect turn some old claims about the strategic disabilities of democracies¶ on their heads: whereas it used to be generally thought that democracies were ineffective¶ in wielding threats because they are poor at keeping secrets and their decision-making is¶ constrained by internal political pressures, a current wave of political science accepts this¶ basic description but argues that these democratic features are really strategic virtues.160 Rationalist models of crisis bargaining between states assume that because war is¶ risky and costly, states will be better off if they can resolve their disputes through¶ bargaining rather than by enduring the costs and uncertainties of armed conflict.161¶ Effective bargaining during such disputes – that which resolves the crisis without a resort¶ to force – depends largely on states’ perceptions of their adversary’s capacity to wage an¶ effective military campaign and its willingness to resort to force to obtain a favorable¶ outcome. A state targeted with a threat of force, for example, will be less willing to resist¶ the adversary’s demands if it believes that the adversary intends to wage and is capable of¶ waging an effective military campaign to achieve its ends. In other words, if a state¶ perceives that the threat from the adversary is credible, that state has less incentive to¶ resist such demands if doing so will escalate into armed conflict. The accuracy of such perceptions, however, is often compromised by¶ informational asymmetries that arise from private information about an adversary’s¶ relative military capabilities and resolve that prevents other states from correctly¶ assessing another states’ intentions, as well as by the incentives states have to¶ misrepresent their willingness to fight – that is, to bluff.162 Informational asymmetries¶ increase the potential for misperception and thereby make war more likely; war,¶ consequentially, can be thought of in these cases as a “bargaining failure.”163 Some political scientists have argued in recent decades – contrary to previously common wisdom – that features and constraints of democracies make them better suited than non-democracies to credibly signal their resolve when they threaten force. To bolster their bargaining position, states will seek to generate credible signals of their resolve by taking actions that can enhance the credibility of such threats, such as mobilizing military forces or making “hand-tying” commitments from which leaders cannot back down without suffering considerable political costs domestically.164 These domestic audience costs, according to some political scientists, are especially high for leaders in democratic states, where they may bear these costs at the polls.165 Given the potentially high domestic political and electoral repercussions democratic leaders face from backing down from a public threat, they have considerable incentives to refrain from bluffing. An adversary that understands these political vulnerabilities is thereby more likely to perceive the threats a democratic leader does issue as highly credible, in turn making it more likely that the adversary will yield.166 Other scholars have recently pointed to the special role of legislative bodies in signaling with regard to threatened force. This is especially interesting from the perspective of constitutional powers debates, because it posits a distinct role for Congress – and, again, one that does not necessarily rely on Congress’s ability to pass binding legislation that formally confines the President. Kenneth Schultz, for instance, argues that the open nature of competition within democratic societies ensures that the interplay of opposing parties in legislative bodies over the use of force is observable not just to their domestic publics but to foreign actors; this inherent transparency within democracies – magnified by legislative processes – **provides more information to adversaries** regarding the unity of domestic opponents around a government’s military and foreign policy decisions.167 Political opposition parties can undermine the credibility of some threats by the President to use force if they publicly voice their opposition in committee hearings, public statements, or through other institutional mechanisms. Furthermore, legislative processes – such as debates and hearings – make it difficult to conceal or misrepresent preferences about war and peace. Faced with such institutional constraints, Presidents will incline to be more selective about making such threats and avoid being undermined in that way.168 This restraining effect on the ability of governments to issue threats simultaneously makes those threats that the government issues more credible, if an observer assumes that the President would not be issuing it if he anticipated strong political opposition. Especially when members of the opposition party publicly support an executive’s threat to use force during a crisis, their visible support lends additional credibility to the government’s threat by demonstrating that political conditions domestically favor the use of force should it be necessary.169 In some cases, Congress may communicate greater willingness than the president to use force, for instance through non-binding resolutions.170 Such powerful signals of resolve should in theory make adversaries more likely to back down. The credibility-enhancing effects of legislative constraints on threats are subject to dispute. Some studies question the assumptions underpinning theories of audience costs – specifically the idea that democratic leaders suffer domestic political costs to failing to make good on their threats, and therefore that their threats are especially credible171 – and others question whether the empirical data supports claims that democracies have credibility advantages in making threats.172 Other scholars dispute the likelihood that leaders will really be punished politically for backing down, especially if the threat was not explicit and unambiguous or if they have good policy reasons for doing so.173 Additionally, even if transparency in democratic institutions allows domestic dissent from threats of force to be visible to foreign audiences, it is not clear that adversaries would interpret these mechanisms as political scientists expect in their models of strategic interaction, in light of various common problems of misperception in international relations.174 These disputes are not just between competing theoretical models but also over the links between any of the models and real-world political behavior by states. At this point there remains a dearth of good historical evidence as to how foreign leaders interpret political maneuvers within Congress regarding threatened force. Nevertheless, at the very least, strands of recent political science scholarship cast significant doubt on the intuition that democratic checks are inherently disadvantageous to strategies of threatened force. Quite the contrary, they suggest that legislative checks – or, indeed, even the signaling functions that Congress is institutionally situated to play with respect to foreign audiences interpreting U.S. government moves – can be harnessed in some circumstances to support such strategies. C. Legal Reform and Strategies of Threatened Force Among legal scholars of war powers, the ultimate prescriptive question is whether the President should be constrained more formally and strongly than he currently is by legislative checks, especially a more robust and effective mandatory requirement of congressional authorization to use force. Calls for reform usually take the form of narrowing and better enforcement (by all three branches of government) of purported constitutional requirements for congressional authorization of presidential uses of force or revising and enforcing the War Powers Resolutions or other framework legislation requiring express congressional authorization for such actions.175

As applied to strategies of threatened force, generally **under these proposals the President would lack authority to make good on them** unilaterally (except in whatever narrow circumstances for which he retains his own unilateral authority, such as deterring imminent attacks on the United States). Whereas legal scholars are consumed with the internal effects of war powers law, such as whether and when it constrains U.S. government decision-making, the analysis contained in the previous section shifts attention externally to whether and when U.S. law might influence decision-making by adversaries, allies, and other international actors. In prescriptive terms, if the President’s power to use force is linked to his ability to threaten it effectively, then any consideration of war powers reform on policy outcomes and longterm interests should include the important secondary effects on deterrent and coercive strategies – and how U.S. legal doctrine is perceived and understood abroad.176 Would stronger requirements for congressional authorization to use force reduce a president’s opportunities for bluffing, and if so would this improve U.S. coercive diplomacy by making ensuing threats more credible? Or would it undermine diplomacy by taking some threats off the table as viable policy options? Would stronger formal legislative powers with respect to force have significant marginal effects on the signaling effects of dissent within Congress, beyond those effects already resulting from open political discourse? These are difficult questions, but the analysis and evidence above helps generate some initial hypotheses and avenues for further research and analysis. One might ask at this point why, though, having exposed as a hole in war powers legal discourse the tendency to overlook threatened force, this Article does not take up whether Congress should assert some direct legislative control of threats – perhaps statutorily limiting the President’s authority to make them or establishing procedural conditions like presidential reporting requirements to Congress. This Article puts such a notion aside for several reasons. First, for reasons alluded to briefly above, such limits would be very constitutionally suspect and difficult to enforce.177 Second, even the most ardent war-power congressionalists do not contemplate such direct limits on the President’s power to threaten; they are not a realistic option for reform. Instead, this Article focuses on the more plausible – and much more discussed – possibility of strengthening Congress’s power over the ultimate decision whether to use force, but augments the usual debate over that question with appreciation for the importance of credible threats. A claim previously advanced from a presidentialist perspective is that stronger legislative checks on war powers is harmful to coercive and deterrent strategies, because it establishes easily-visible impediments to the President’s authority to follow through on threats. This was a common policy argument during the War Powers Resolution debates in the early 1970s. Eugene Rostow, an advocate inside and outside the government for executive primacy, remarked during consideration of legislative drafts that any serious restrictions on presidential use of force would mean in practice that “no President could make a credible threat to use force as an instrument of deterrent diplomacy, even to head off explosive confrontations.”178 He continued: In the tense and cautious diplomacy of our present relations with the Soviet Union, as they have developed over the last twenty-five years, the authority of the President to set clear and silent limits in advance is perhaps **the *most* important** of all the powers in our constitutional armory to prevent confrontations that could **carry nuclear implications**. … [I]t is the **diplomatic power the President needs** most under the circumstance of modern life—the power to make a credible threat to use force in order to prevent a confrontation which might escalate.179 In his veto statement on the War Powers Resolution, President Nixon echoed these concerns, arguing that **the law would undermine the credibility of U.S. deterrent** and coercive threats in the eyes of both adversaries and allies – they would know that presidential authority to use force would expire after 60 days, so absent strong congressional support they could assume U.S. withdrawal at that point.180 In short, those who oppose tying the president’s hands with mandatory congressional authorization requirements to use force sometimes argue that doing so incidentally and dangerously ties his hands in threatening it. A critical assumption here is that presidential flexibility, preserved in legal doctrine, enhances the credibility of presidential threats to escalate.

### Mod

#### No US-China war

**Rosecrance et al ‘10** (Richard, Political Science Professor @ Cal and Senior Fellow @ Harvard’s Belfer Center and Former Director @ Burkle Center of IR @ UCLA, and Jia Qingguo, PhD Cornell, Professor and Associate Dean of School of International Studies @ Peking University, “Delicately Poised: Are China and the US Heading for Conflict?” Global Asia 4.4, <http://www.globalasia.org/l.php?c=e251>)

**Will China and the US Go to War?** If one accepts the previous analysis, the answer is “no,” or at least not likely. Why? First, despite its revolutionary past, **China has** gradually **accepted the US-**led **world** order **and become a status quo power.** It has joined most of the important inter-governmental international organizations. It has subscribed to most of the important international laws and regimes. It has not only accepted the current world order, it has become a strong supporter and defender of it. China has repeatedly argued that the authority of the United Nations and international law should be respected in the handling of international security crises. China has become an ardent advocate of multilateralism in managing international problems. And China has repeatedly defended the principle of free trade in the global effort to fight the current economic crisis, despite efforts by some countries, including the US, to resort to protectionism. To be sure, there are some aspects of the US world order that China does not like and wants to reform. However, it wishes to improve that world order rather than to destroy it. Second, **China** has **clearly rejected** the option of **territorial expansion.** It argues that territorial expansion is both immoral and counterproductive: immoral because it is imperialistic and counterproductive because it does not advance one’s interests. China’s behavior shows that instead of trying to expand its territories, **it has been trying to settle** its border **disputes through negotiation**. Through persistent efforts, China has concluded quite a number of border agreements in recent years. As a result, most of its land borders are now clearly drawn and marked under agreements with its neighbors. In addition, China is engaging in negotiations to resolve its remaining border disputes and making arrangements for peaceful settlement of disputed islands and territorial waters. Finally, **even on** the question of **Taiwan**, which China believes is an indisputable part of its territory, **it has adopted** a policy of **peaceful reunification**. A country that handles territorial issues in such a manner is by no means expansionist. Third, **China has relied on trade** and investment **for** national welfare and **prestige, instead of** military **conquest.** And like the US, Japan and Germany, China has been very successful in this regard. In fact, so successful that **it** really **sees no other option than** to continue on **this path to prosperity**. Finally, after years of reforms, China increasingly finds itself sharing certain basic values with the US, such as a commitment to the free market, rule of law, human rights and democracy. Of course, there are still significant differences in terms of how China understands and practices these values. However, at a conceptual level, Beijing agrees that these are good values that it should strive to realize in practice. A Different World It is also important to note that certain changes in international relations since the end of World War II have made the peaceful rise of a great power more likely. To begin with, the emergence of nuclear weapons has drastically reduced the usefulness of war as a way to settle great power rivalry. By now, all great powers either have nuclear weapons or are under a nuclear umbrella. If the objective of great power rivalry is to enhance one’s interests or prestige, the sheer destructiveness of nuclear weapons means that these goals can no longer be achieved through military confrontation. Under these circumstances, countries have to find other ways to accommodate each other — something that China and the US have been doing and are likely to continue to do. Also, globalization has made it easier for great powers to increase their national welfare and prestige through international trade and investment rather than territorial expansion. In conducting its foreign relations, the US relied more on trade and investment than territorial expansion during its rise, while Japan and Germany relied almost exclusively on international trade and investment. China, too, has found that its interests are best served by adopting the same approach. Finally, the development of relative pacifism in the industrialized world, and indeed throughout the world since World War II, has discouraged any country from engaging in territorial expansion. **There is less and less popular support for using force to address even legitimate concerns** on the part of nation states. Against this background, efforts to engage in territorial expansion are likely to rally international resistance and condemnation. Given all this, is the rise of China likely to lead to territorial expansion and war with the US? The answer is no.

#### No Senkaku Conflict

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At times in the past few months, **China and Japan have appeared almost ready to** do **battle** over the **Senkaku** (Diaoyu) Islands --which are administered by Tokyo but claimed by both countries -- and to ignite a war that could be bigger than any since World War II. Although Tokyo and Beijing have been shadowboxing over the territory for years, the standoff reached a new low in the fall, when the Japanese government nationalized some of the islands by purchasing them from a private owner. The decision set off a wave of violent anti-Japanese demonstrations across China. In the wake of these events, the conflict quickly reached what political scientists call a state of equivalent retaliation -- a situation in which both countries believe that it is imperative to respond in kind to any and all perceived slights. As a result, it may have seemed that armed engagement was imminent. **Yet, months later, nothing has happened**. And **despite their aggressive posturing** in the disputed territory, **both** sides **now show** glimmers of **willingness to dial down hostilities and to reestablish stability.** Some analysts have cited North Korea's recent nuclear test as a factor in the countries' reluctance to engage in military conflict. They argue that the detonation, and Kim Jong Un's belligerence, brought China and Japan together, unsettling them and placing their differences in a scarier context. Rory Medcalf, a senior fellow at the Brookings Institution, explained that "the nuclear test gives the leadership in both Beijing and Tokyo a chance to focus on a foreign and security policy challenge where their interests are not diametrically at odds." The nuclear test, though, is a red herring in terms of the conflict over the disputed islands. In truth, the **roots of the conflict -- and** the **reasons it has not** yet **exploded -- are much deeper**. Put simply, **China cannot afford military conflict with any of its Asian neighbors.** It is not that China believes it would lose such a spat; the country increasingly enjoys strategic superiority over the entire region, and it is difficult to imagine that its forces would be beaten in a direct engagement **over the islands, in the South China Sea or in the** disputed regions along the **Sino-Indian border**. However**, Chinese officials see** that **even the most pronounced victory would be outweighed by** the **collateral damage** that such a use of force would cause **to Beijing's two most fundamental national interests -- economic growth and preventing the escalation of radical nationalist sentiment at home. These constraints, rather than any external deterrent, will keep** Xi Jinping, **China's new leader, from** authorizing the use of deadly **force** in the Diaoyu Islands theater. For over **three decades**, **Beijing has promoted** peace and **stability in Asia** to facilitate conditions amenable to **China's** **economic** **development**. The origins of the policy can be traced back to the late 1970s, when Deng Xiaoping repeatedly contended that to move beyond the economically debilitating Maoist period, China would have to seek a common ground with its neighbors. Promoting cooperation in the region would allow China to spend less on military preparedness, focus on making the country a more welcoming destination for foreign investment, and foster better trade relations. All of this would strengthen the Chinese economy. Deng was right. Today, China's economy is second only to that of the United States. The fundamentals of Deng's grand economic strategy are still revered in Beijing. But any war in the region would erode the hard-won, and precariously held, political capital that China has gained in the last several decades. It would also disrupt trade relations, complicate efforts to promote the yuan as an international currency, and send shock waves through the country's economic system at a time when it can ill afford them. There is thus little reason to think that China is readying for war with Japan. At the same time, the specter of rising Chinese nationalism, **although** often seen as **a promoter of conflict**, **further limits the prospects for armed engagement**. This is because Beijing will try to discourage nationalism if it fears it may lose control or be forced by popular sentiment to take an action it deems unwise. **Ever since** the **Tiananmen Square** massacre put questions about the Chinese Communist Party's right to govern before the population, **successive generations of Chinese leaders have carefully negotiated a balance** between promoting nationalist sentiment and preventing it from boiling over. In the process, they cemented the legitimacy of their rule. A war with Japan could easily upset that balance by inflaming nationalism that could blow back against China's leaders. Consider a hypothetical scenario in which a uniformed Chinese military member is killed during a firefight with Japanese soldiers. Regardless of the specific circumstances, the casualty would create a new martyr in China and, almost as quickly, catalyze popular protests against Japan. Demonstrators would call for blood, and if the government (fearing economic instability) did not extract enough, citizens would agitate against Beijing itself. Those in Zhongnanhai, the Chinese leadership compound in Beijing, would find themselves between a rock and a hard place. It is possible that Xi lost track of these basic facts during the fanfare of his rise to power and in the face of renewed Japanese assertiveness. It is also possible that the Chinese state is more rotten at the core than is understood. That is, party elites believe that a diversionary war is the only way to hold on to power -- damn the economic and social consequences. But Xi does not seem blind to the principles that have served Beijing so well over the last few decades. Indeed, although he recently warned unnamed others about infringing upon China's "national core interests" during a foreign policy speech to members of the Politburo, he also underscored China's commitment to "never pursue development at the cost of sacrificing other country's interests" and to never "benefit ourselves at others' expense or do harm to any neighbor." Of course, wars do happen -- and still could in the East China Sea. Should either side draw first blood through accident or an unexpected move, Sino-Japanese relations would be pushed into terrain that has not been charted since the middle of the last century. However, understanding that war would be a no-win situation, China has avoided rushing over the brink. This relative restraint seems to have surprised everyone. But it shouldn't. Beijing will continue to disagree with Tokyo over the sovereign status of the islands, and will not budge in its negotiating position over disputed territory. However, it **cannot take the risk of going to war over a few rocks** in the sea. On the contrary, in the **coming months it will quietly** seek a way to **shelve the dispute in return for** securing **regional stability**, facilitating economic development, and keeping a lid on the Pandora's box of rising nationalist sentiment. **The ensuing peace**, while unlikely to be deep, or especially conducive to improving Sino-Japanese relations, **will be enduring.**