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#### CIR will pass now but it will be tough

Nowicki, 10-30 -- Arizona Republic's national political reporter

[Dan, and Erin Kelly, "Fleeting Hopes for Immigration Reform," AZ Central, 10-30-13, www.azcentral.com/news/politics/articles/20131029fleeting-hopes-immigration-reform.html?nclick\_check=1, accessed 10-31-13, mss]

However, reform backers point to encouraging signs in addition to the intense push by the business lobby. Key House Republicans, including Reps. Paul Ryan of Wisconsin, Mario Diaz-Balart of Florida and Darrell Issa of California, reportedly are working on proposals to address the status of the estimated 11 million undocumented immigrants who already have settled in the United States, which is the central issue for Democrats and immigration activists. The Democrat-controlled Senate on June 27 passed a sweeping reform bill that included a 13-year pathway to citizenship for immigrants who pass background checks, pay assessed taxes and fines and take other steps to get right with the law, as well as a massive investment in border security. There are indications that some Republicans are becoming impatient with the House inaction on piecemeal bills that have been talked about since the Senate bill passed. Two House Republicans — Reps. Jeff Denham of California and Ileana Ros-Lehtinen of Florida — have become the first two GOP lawmakers to sign onto a comprehensive immigration bill offered by House Democrats. Rep. Joe Heck, R-Nev., last week said in a written statement that the growing possibility that the House might punt on immigration reform in 2013 reflects “the leadership vacuum in Washington that rightly has so many people frustrated with this dysfunctional Congress.” Sen. Jeff Flake, R-Ariz., a former 12-year House member who helped negotiate the Senate bill, said Monday on Twitter that momentum appears to be building in the House. “That’s good news for Arizona, and the country,” he said in the message. For their part, Boehner and his fellow House Republican leaders have not yet publicly declared immigration reform dead, which even the most pessimistic reform supporters say means there is still a chance the House could act in November or early December. House committees so far have approved five bills, including legislation to strengthen border security and require employers to use a federal database to ensure they are hiring people who are legally eligible to work in the United States. “The speaker said last week, ‘I still think immigration reform is an important subject that needs to be addressed. And I’m hopeful,’ ” Boehner spokesman Michael Steel told The Arizona Republic on Tuesday via e-mail. “He added that he supports a step-by-step immigration process.” Businesses speak out Hoping to make sure immigration reform gets on the House’s 2013 agenda, more than 600 business, law-enforcement, religious and political leaders from Arizona and nearly 40 other states flooded Capitol Hill on Tuesday. The fly-in was organized by the U.S. Chamber of Commerce and other groups, including FWD.us, which was founded by leaders of high-tech companies. The activists, mostly self-described conservatives, met with more than 100 members of Congress to urge them to take action on broad legislation that includes a way for most undocumented immigrants in the U.S. to earn citizenship. “In every corner of the Capitol, the energy these farmers, tech leaders, police chiefs and pastors brought to the Hill was palpable,” said Ali Noorani, executive director of the National Immigration Forum. “They brought a new perspective to the debate, one informed by what they see every day in their local businesses, churches and police stations — a broken system that has a negative impact on local communities nationwide.” Peoria Vice Mayor Tony Rivero is a conservative Republican who urged Arizona’s GOP congressmen to support reform this year. His city needs more farmworkers who are legally authorized to work, and it needs its undocumented residents to come out of the shadows, he said. “My message to our congressional delegation is that, as a constituent and a conservative Republican, I support a solution to this problem,” Rivero said. “We need to secure the border, identify the people who are here illegally and put them on a path to legality and put enforcement measures in place to make sure we aren’t here again in 10 years.” Former Phoenix Police Chief Jack Harris said he told members of Arizona’s congressional delegation that the current immigration system makes police officers’ jobs more complicated. “Every community is trying to solve the problem in a different way,” he said. “In some places, you (an undocumented immigrant) can get a driver’s license. In some places, you can’t. Some places are very liberal and report almost no crimes (committed by undocumented immigrants). Others deport you for just minor infractions. There’s great confusion among the law-enforcement community about what the rules are and what their authority is.” ‘I do care about them’ The conservative lobbying efforts are in conjunction with efforts from more liberal immigration-advocacy groups. Last week, a contingent of 44 undocumented immigrants and their supporters traveled from Phoenix by bus to Washington, D.C., and Ohio in hope of meeting with Boehner to persuade him to schedule a vote on a bill that includes a pathway to citizenship. The group, which included many “dreamers,” or undocumented immigrants brought to the United States as children, never got the opportunity to talk with Boehner. However, the immigration activists from the advocacy group Promise Arizona who camped outside Franks’ house did get the chance to talk with the representative for more than 25 minutes. They initially were buoyed by his response, which they interpreted as support for a pathway to citizenship. However, Franks later clarified to The Republic that he would not support a special pathway to citizenship. Franks said he would support legalizing undocumented immigrants under certain conditions but would not allow them to subsequently seek citizenship. Or the undocumented immigrants could return to their home countries and apply for green cards and citizenship that way, he said. Franks said he didn’t fully articulate his position to the activists because he felt compassion for their pleas. “Sometimes, in any situation, you don’t hit people in the face with the worst of it,” Franks said. “I wanted them to know, while maybe we didn’t agree on everything, there were some things we do agree on. I do care about them.” Proponents are positive Glenn Hamer, president and CEO of the Arizona Chamber of Commerce and Industry, said the group of Arizonans that flew in as part of the U.S. Chamber-led D.C. visit were going to meet with all nine House members from Arizona. After morning meetings with Republican Reps. Paul Gosar, Matt Salmon and David Schweikert, Hamer said the sessions were positive. “There is complete agreement that we have a busted immigration system,” he said. “It’s fair to say that there is an understanding that we need immigration reform. It’s very clear that the House is going to pass its vision for immigration reform. If it’s simply the Senate bill or bust, then nothing will happen.” Flake said he believes the methodical and strategic lobbying by the business community, faith groups and activist organizations will **help** motivate the House. He said he is OK with House Republicans taking a step-by-step strategy rather than passing a comprehensive bill like the one he helped craft in the Senate. “My position is, if you can move it piecemeal or sequentially, that’s fine,” Flake said. “If you have to go comprehensive, that’s fine. Let’s get something to the president’s desk.” Frank Sharry, executive director of the pro-reform organization America’s Voice, said the two House Republicans who signed on to the alternative Democratic bill also are examples of **momentum**. “When that bill was first introduced, it was widely panned as a Democratic ‘message bill’ that was going nowhere and was setting up the blame game in a run toward 2014,” Sharry said. “But because Democrats made the smart move of making sure every policy in the bill was passed with bipartisan support either in the Senate or the House, it has become a serious offering and a **place where Republicans can go.** I think you will see more Republicans getting on board.” Because of Boehner’s leadership style and uneasy relationship with many of his rank-and-file members, Sharry said, it may take “a convergence and emergence of a critical mass of Republicans to convince leadership to go forward.” Hamer said he believes there is still a possibility for compromise between the House and Senate. “I don’t want to be too Pollyannaish,” he said. “Passing immigration reform is not like renaming a post office. It’s going to be tough.”

#### The plan is a huge loss for Obama –Democrats cracking down on war powers makes Obama look weak

Paterno 6/23/2013 (Scott, Writer for Rock the Capital, “Selfish Obama” http://www.rockthecapital.com/06/23/selfish-obama/)

Now we have a Democratic president who wants to make war and does not want to abide by the War Powers Resolution. But rather than truly test the constitutionality of the measure, he is choosing to simply claim that THIS use of US military power is not applicable.¶ This is an extraordinarily selfish act, and one liberals especially should fear. POTUS is setting a precedent that subsequent presidents will be able to use – presidents that the left might not find so “enlightened.” Left as is, President Obama has set a standard where the president can essentially attack anywhere he wants without congressional approval for as long as he wants so long as he does not commit ground forces.¶ That is an extraordinarily selfish act. Why selfish? Because the president is avoiding congress because he fears a rebuke – from his own party, no less. The politically safe way to both claim to be decisive and to not face political defeat at the hands of Democrats – a defeat that would signal White House weakness – is to avoid congress all together. Precedent be damned, there is an election to win after all.

#### Capital is key to spur a compromise -

Munro 10/21/13 (Neil, White House Correspondent for the Daily caller, "US Chamber of Commerce Pleads for Obama's Help to Pass Immigration Boost")

The president needs to get personally involved in the high-stakes immigration battle to overcome growing GOP distrust, Tom Donohue, head of the U.S. Chamber of Commerce, said Monday.¶ “I have serious concerns about trust all around in town right now, which suggests the way to get out is leadership,” Donohue told reporters at a breakfast meeting hosted by the Christian Science Monitor.¶ “We need leadership in the business community, we need leadership in the House, we need leadership in the Senate, and we need leadership in the White House,” he said. However, he indirectly acknowledged the difficulty of getting the unpopular bill through Congress this year, amid bitter partisan fights over higher-priority budgets bills.¶ “We’ve got a whole year plus [left to go] of this Congress,” he said.¶ The backers of the immigration bill had initially hoped to get it done by August 2013.¶ Donohue’s call for Obama to get more involved comes as more GOP legislators say the immigration deal should be sidelined because Obama can’t be trusted to negotiate in good faith, or even to implement provisions that he doesn’t like.

#### Reform key to the economy – decline in immigration spurs new recession.

Smith 12. [Gerry, technology reporter, "Brain Drain: Why We're Driving Immigration Talent Overseas" Huffington Post -- November 5 -- www.huffingtonpost.com/2012/11/09/immigrant-entrepreneur\_n\_2077183.html]

Stories like his are not unique. They’re also troubling for the U.S. economy, advocates say. For the first time, the number of immigrant-founded startups is in decline, as foreign-born entrepreneurs struggle to obtain a limited number of visas and green cards and decide to launch companies in other countries that offer perks to start businesses there. Losing founders like Darash, who launch startups that create jobs, means that America risks losing a source of employment and a competitive edge in the global economy as the country claws its way out of a recession, they say.¶ For years, immigrant entrepreneurs have propelled the growth of Silicon Valley, building some of the most successful tech companies in the world: Sergey Brin, co-founder of Google, was born in Russia; Elon Musk, co-founder of PayPal and Tesla, was born in South Africa; Vinod Khosla, co-founder of Sun Microsystems, was born in India. When they immigrated, it was likely easier for them because there was not a backlog that there is today, according to Vivek Wadhwa, a professor at the Pratt School of Engineering at Duke University who researches high-tech immigration. Immigrants are more than twice as likely to start a business as native-born Americans, according to a report earlier this year by the Partnership for a New American Economy. And their companies have produced sizable economic benefits. This year, engineering and technology companies founded in the United States employed about 560,000 workers and generated $63 billion in sales, according to Wadhwa. About a quarter of those companies had at least one foreign-born founder.¶ An estimated three out of every four startups fail, if not more. But by the conventional wisdom of Silicon Valley, Darash’s chances were even slimmer. For one, he does not have a co-founder. He insists he doesn’t need one. (Paul Graham, creator of the startup incubator Y Combinator, has said having a co-founder is critical because “a startup is too much for one person to bear.”) Darash also never worked for a major tech company before, so he did not have the network of contacts that help other entrepreneurs find engineers and meet investors.¶ But what he has lacked in support and connections he has made up for through a work ethic that borders on obsession.¶ “Asaf is a stubborn guy,” said Adam Gries, a childhood friend and founder of Smart Bites, a smartphone app that teaches people English. “He gets into his head that something is going to happen and he’s tenacious.”¶ Darash awakes every morning at 4:30 a.m., takes the BART train from his home in Berkeley to San Francisco, and arrives at the office by 6 a.m. He works for an hour, then walks across the street to the gym to swim and lift weights (A back injury he suffered while serving in the Israeli army requires him to stay physically strong). He typically does not go home until 9 p.m., after his children have gone to bed. Employees say he is a “total workaholic” who sends emails past midnight and sleeps just a few hours a night.¶ “I have a one-and-a-half year old who sees his Daddy maybe three hours a week,” Darash said. “It’s hard to explain how much sacrifice you make to bring a company from an idea to something real, especially if it’s a company with high-level technology.”¶ He is hands-on about all aspects of the company, from courting new clients to writing code. But lately, Darash has been distracted, spending valuable hours gathering documents and talking to lawyers, instead of running his company. His wife recently flew back to Israel to find housing and a school for their kids in case they have to leave the United States. He describes feeling a range of emotions: anger, fear, frustration. Mostly, though, he is confused. In his homeland of Israel, politicians fight over who can attract more foreign entrepreneurs. The United States, he says, should be rolling out the welcome mat for him, not ushering him out the door.¶ “I could not even comprehend this would become a problem,” he said. “I’m creating a company. I’m creating jobs. There’s nothing bad in what I’m doing and there’s nothing I’m taking away from someone else. The only thing I’m doing is creating more!”¶ “SERIOUS ALARM”¶ Since 2005, the number of immigrant-founded startups in Silicon Valley has declined from 52 percent to 44 percent, according to Wadhwa, who argues this drop is cause for “serious alarm” because America needs to attract immigrant entrepreneurs for its economy to recover.¶ “The United States risks losing a key growth engine right at the moment when it’s economy is stuck in a deep ditch, growing slowly and struggling to create jobs,” Wadhwa wrote in his new book, The Immigrant Exodus.¶ Their recent decline could be linked to entrepreneurs finding better business prospects abroad, especially in countries with growing economies like India and China. But advocates say a major reason why immigrants are launching fewer startups in the United States is because they are struggling to secure visas to remain in the country.

#### Impact is global nuclear war

Harris and Burrows 9 Mathew, PhD European History @ Cambridge, counselor of the U.S. National Intelligence Council (NIC) and Jennifer, member of the NIC’s Long Range Analysis Unit “Revisiting the Future: Geopolitical Effects of the Financial Crisis” <http://www.ciaonet.org/journals/twq/v32i2/f_0016178_13952.pdf>

Of course, the report encompasses more than economics and indeed believes the future is likely to be the result of a number of intersecting and interlocking forces. With so many possible permutations of outcomes, each with ample Revisiting the Future opportunity for unintended consequences, there is a growing sense of insecurity. Even so, history may be more instructive than ever. While we continue to believe that the Great Depression is not likely to be repeated, the lessons to be drawn from that period include the harmful effects on fledgling democracies and multiethnic societies (think Central Europe in 1920s and 1930s) and on the sustainability of multilateral institutions (think League of Nations in the same period). There is no reason to think that this would not be true in the twenty-first as much as in the twentieth century. For that reason, the ways in which the potential for greaterconflict could grow would seem to be even more apt in a constantly volatile economic environment as they would be if change would be steadier. In surveying those risks, the report stressed the likelihood that terrorism and nonproliferation will remain priorities even as resource issues move up on the international agenda. Terrorism’s appeal will decline if economic growth continues in the Middle East and youth unemployment is reduced. For those terrorist groups that remain active in 2025, however, the diffusion of technologies and scientific knowledge will place some of the world’s most dangerous capabilities within their reach. Terrorist groups in 2025 will likely be a combination of descendants of long established groups\_inheriting organizational structures, command and control processes, and training procedures necessary to conduct sophisticated attacks and newly emergent collections of the angry and disenfranchised that become self-radicalized, particularly in the absence of economic outlets that would become narrower in an economic downturn. The most dangerous casualty of any economically induced drawdown of U.S. military presence would almost certainly be the Middle East. Although Iran’s acquisition of nuclear weapons is not inevitable, worries about a nuclear-armed Iran could lead states in the region to develop new security arrangements with external powers, acquire additional weapons, and consider pursuing their own nuclear ambitions. It is not clear that the type of stable deterrent relationship that existed between the great powers for most of the Cold War would emerge naturally in the Middle East with a nuclear Iran. Episodes of low intensity conflict and terrorism taking place under a nuclear umbrella could lead to an unintended escalation and broader conflict if clear red lines between those states involved are not well established. The close proximity of potential nuclear rivals combined with underdeveloped surveillance capabilities and mobile dual-capable Iranian missile systems also will produce inherent difficulties in achieving reliable indications and warning of an impending nuclear attack. The lack of strategic depth in neighboring states like Israel, short warning and missile flight times, and uncertainty of Iranian intentions may place more focus on preemption rather than defense, potentially leading to escalating crises. 36 Types of conflict that the world continues to experience, such as over resources, could reemerge, particularly if protectionism grows and there is a resort to neo-mercantilist practices. Perceptions of renewed energy scarcity will drive countries to take actions to assure their future access to energy supplies. In the worst case, this could result in interstate conflicts if government leaders deem assured access to energy resources, for example, to be essential for maintaining domestic stability and the survival of their regime. Even actions short of war, however, will have important geopolitical implications. Maritime security concerns are providing a rationale for naval buildups and modernization efforts, such as China’s and India’s development of blue water naval capabilities. If the fiscal stimulus focus for these countries indeed turns inward, one of the most obvious funding targets may be military. Buildup of regional naval capabilities could lead to increased tensions, rivalries, and counterbalancing moves, but it also will create opportunities for multinational cooperation in protecting critical sea lanes. With water also becoming scarcer in Asia and the Middle East, cooperation to manage changing water resources is likely to be increasingly difficult both within and between states in a more dog-eat-dog world.

### 2

#### A. Definitions

#### The only War Power authority is the ability to MAKE MILITARY DECISIONS

Bajesky 13 (2013¶ Mississippi College Law Review¶ 32 Miss. C. L. Rev. 9¶ LENGTH: 33871 words ARTICLE: Dubitable Security Threats and Low Intensity Interventions as the Achilles' Heel of War Powers NAME: Robert Bejesky\* BIO: \* M.A. Political Science (Michigan), M.A. Applied Economics (Michigan), LL.M. International Law (Georgetown). The author has taught international law courses for Cooley Law School and the Department of Political Science at the University of Michigan, American Government and Constitutional Law courses for Alma College, and business law courses at Central Michigan University and the University of Miami.)

A numerical comparison indicates that the Framer's intended for Congress to be the dominant branch in war powers. Congressional war powers include the prerogative to "declare war;" "grant Letters of Marque and Reprisal," which were operations that fall short of "war"; "make Rules for Government and Regulation of the land and naval Forces;" "organize, fund, and maintain the nation's armed forces;" "make Rules concerning Captures on Land and Water," "raise and support Armies," and "provide and maintain a Navy." [n25](http://www.lexisnexis.com/lnacui2api/frame.do?tokenKey=rsh-20.771738.1261791409&target=results_DocumentContent&returnToKey=20_T17974748742&parent=docview&rand=1376677997032&reloadEntirePage=true#n25) In contrast, the President is endowed with one war power, named as the Commander-in-Chief of the Army and Navy. [n26](http://www.lexisnexis.com/lnacui2api/frame.do?tokenKey=rsh-20.771738.1261791409&target=results_DocumentContent&returnToKey=20_T17974748742&parent=docview&rand=1376677997032&reloadEntirePage=true#n26)¶ The Commander-in-Chief authority is a core preclusive power, predominantly designating that the President is the head of the military chain of command when Congress activates the power. [n27](http://www.lexisnexis.com/lnacui2api/frame.do?tokenKey=rsh-20.771738.1261791409&target=results_DocumentContent&returnToKey=20_T17974748742&parent=docview&rand=1376677997032&reloadEntirePage=true#n27) Moreover, peripheral Commander-in-Chief powers are bridled by statutory and treaty restrictions [n28](http://www.lexisnexis.com/lnacui2api/frame.do?tokenKey=rsh-20.771738.1261791409&target=results_DocumentContent&returnToKey=20_T17974748742&parent=docview&rand=1376677997032&reloadEntirePage=true#n28) because the President "must respect any constitutionally legitimate restraints on the use of force that Congress has enacted." [n29](http://www.lexisnexis.com/lnacui2api/frame.do?tokenKey=rsh-20.771738.1261791409&target=results_DocumentContent&returnToKey=20_T17974748742&parent=docview&rand=1376677997032&reloadEntirePage=true#n29) However, even if Congress has not activated war powers, the President does possess inherent authority to expeditiously and unilaterally react to defend the nation when confronted with imminent peril. [n30](http://www.lexisnexis.com/lnacui2api/frame.do?tokenKey=rsh-20.771738.1261791409&target=results_DocumentContent&returnToKey=20_T17974748742&parent=docview&rand=1376677997032&reloadEntirePage=true#n30) Explicating the intention behind granting the President this latitude, Alexander Hamilton explained that "it is impossible to foresee or to define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them." [n31](http://www.lexisnexis.com/lnacui2api/frame.do?tokenKey=rsh-20.771738.1261791409&target=results_DocumentContent&returnToKey=20_T17974748742&parent=docview&rand=1376677997032&reloadEntirePage=true#n31) The Framers drew a precise distinction by specifying that the President was empowered "to repel and not to commence war." [n32](http://www.lexisnexis.com/lnacui2api/frame.do?tokenKey=rsh-20.771738.1261791409&target=results_DocumentContent&returnToKey=20_T17974748742&parent=docview&rand=1376677997032&reloadEntirePage=true#n32)

#### B. Violation – the affirmative does not prohibit the ability of the President to make a military decision in one of the following areas mentioned in the topic – it merely requires a process or disclosure for the President to go through before exercising his commander and chief power

Jean Schiedler-Brown 12, Attorney, Jean Schiedler-Brown & Associates, Appellant Brief of Randall Kinchloe v. States Dept of Health, Washington, The Court of Appeals of the State of Washington, Division 1, http://www.courts.wa.gov/content/Briefs/A01/686429%20Appellant%20Randall%20Kincheloe%27s.pdf

3. The ordinary definition of the term "restrictions" also does not include the reporting and monitoring or supervising terms and conditions that are included in the 2001 Stipulation.

Black's Law Dictionary, 'fifth edition,(1979) defines "restriction" as;

A limitation often imposed in a deed or lease respecting the use to which the property may be put. The term "restrict' is also cross referenced with the term "restrain." Restrain is defined as; To limit, confine, abridge, narrow down, restrict, obstruct, impede, hinder, stay, destroy. To prohibit from action; to put compulsion on; to restrict; to hold or press back. To keep in check; to hold back from acting, proceeding, or advancing, either by physical or moral force, or by interposing obstacle, to repress or suppress, to curb.

In contrast, the terms "supervise" and "supervisor" are defined as; To have general oversight over, to superintend or to inspect. See Supervisor. A surveyor or overseer. . . In a broad sense, one having authority over others, to superintend and direct. The term "supervisor" means an individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but required the use of independent judgment.

Comparing the above definitions, it is clear that the definition of "restriction" is very different from the definition of "supervision"-very few of the same words are used to explain or define the different terms. In his 2001 stipulation, Mr. Kincheloe essentially agreed to some supervision conditions, but he did not agree to restrict his license.

#### C. Prefer our interpretation

#### Ground – the negative should be able to say Drone Strikes, Cyber ops, troop invasion and indefinite detention good– This is the core negative topic ground – they get to link turn our disad by saying we still allow authority in one of the areas.

#### Limits – they justify any aff that does transparency or requires a process before implementing a particular war power – this allows them to apply a process to any particular subsection – blows the lid off the topic because there are hundreds of different subsections of US law that could make policy more transparent

#### D. Voting Issue – If it were not the affirmative could run the same case year after year or unbeatable truths like racism is wrong.

### 3

#### Plan triggers dangerous uncertainty on cyber policy --- makes conflict more likely

BRADBURY 2011 - attorney at the Washington, D.C office of Dechert LLP; head of the Office of Legal Counsel (Steven G. Bradbury, “The Developing Legal Framework for Defensive and Offensive Cyber Operations”, Harvard National Security Journal, http://harvardnsj.org/wp-content/uploads/2011/02/Vol.-2\_Bradbury\_Final1.pdf)

Conclusion. So here’s my thesis: To my view, the lack of clarity on certain of these issues under international law means that with respect to those issues, the President is free to decide, as a policy matter, where and how the lines should be drawn on the limits of traditional military power in the sphere of cyberspace. For example, that means that within certain parameters, the President could decide when and to what extent military cyber operations may targetcomputers located outside areas of hot fighting that the enemy is using for military advantage. And when a cyber attack is directed at us, the President can decide, as a matter of national policy, whether and when to treat it as an act of war. The corollary to all this is that in situations where the customs of war, in fact, are not crystallized, the lawyers at the State Department and the Justice Department shouldn’t make up new red lines — out of some aspirational sense of what they think international law ought to be — that end up putting dangerous limitations on the options available to the United States. Certainly, the advice of lawyers is always important, especially so where the legal lines are established or firmly suggested. No one would contend that the laws of war have no application to cyber operations or that cyberspace is a law-free zone. But it’s not the role of the lawyers to make up new lines that don’t yet exist in a way that preempts the development of policy. 14 In the face of this lack of clarity on key questions, some advocate for the negotiation of a new international convention on cyberwarfare — perhaps a kind of arms control agreement for cyber weapons. I believe there is no foreseeable prospect that that will happen. Instead, the outlines of accepted norms and limitations in this area will develop through the practice of leading nations. And the policy decisions made by the United States in response to particular events will have great influence in shaping those international norms. I think that’s the way we should want it to work.

#### (B) That would uniquely decimate Obama and the military’s ability to calm alliances and deter enemies ---- makes terrorism and global nuclear war more likely

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.

### 4

The President should issue an Executive Order establishing a presumptive legal framework requiring that offensive cyber operations be funded, conducted, and directed pursuant to Title 50 United States Code § 413b. The Executive Order should also require negotiation with the Office of Legal Counsel regarding whether to require the President of the United States to negotiate with the legislative branch prior to the use of offensive cyber operations. The Office of Legal Counsel should publish a written opinion in support of the legal framework and set a declaratory policy that clearly defines what constitutes a ‘use of force’ and ‘hostilities’ in relation to cyber operations.

#### Presumptive legal regime solves

**Brecher 2012** – JD 2013, University of Michigan Law School (December, Aaron P., Michigan Law Review, “NOTE: Cyberattacks and the Covert Action Statute: Toward a Domestic Legal Framework for Offensive Cyberoperations”, 111 Mich. L. Rev. 423, Lexis)

Finally, while urging Congress to clarify the law governing cyberattacks may be advisable, one should consider the reality that such legislation is very difficult to pass. Congress is notoriously slow to act and legislation is difficult to push through the arduous process to enactment. There are numerous stages in the process at which a bill, even on an issue of significant importance, can be stalled or killed. n170 For example, a bill may not be considered by its corresponding committee in either House, may be bogged down with amendments that cause it to lose support, or be subject to the Senate filibuster, among other "vetogates." n171 In the case of clarifying the appropriate procedures for conducting a cyberattack, there may be concern that such legislation, either by imposing substantive constraints or reporting requirements, will improperly burden the president on a national security issue of increasing importance. Congress as an institution tends to acquiesce to presidential prerogative in national security matters. n172 Further, given that Congress has recently addressed cyberattacks in legislation, albeit in an unhelpfully vague provision, n173 the possibility of expansive legislative clarification in the near future seems even more remote.

An executive order making the covert action regime presumptive for cyberattacks gives the executive branch considerable flexibility while also ensuring notification to Congress. A presumptive regime helps remove current confusion within the executive branch, as well as allows cyberattack policy to develop with members of Congress gaining access to information that may be helpful in crafting later statutory controls on the use of cyberattacks. Moreover, some proposals for immediate legislative intervention overestimate congressional will to legislate in this field and underestimate the protections for interbranch collaboration offered by the covert action regime.

#### CP is competitive and solves the case ---- Coordination with OLC can ensure executive action

Trevor Morrison 11, Professor of Law at Columbia Law School, “LIBYA, ‘HOSTILITIES,’ THE OFFICE OF LEGAL COUNSEL, AND THE PROCESS OF EXECUTIVE BRANCH LEGAL INTERPRETATION,” Harvard Law Review Forum Vol.124:42, http://www.harvardlawreview.org/media/pdf/vol124\_forum\_morrison.pdf

Deeply rooted traditions treat the Justice Department’s Office of Legal Counsel (OLC) as the most important source of legal advice wit h- in the executive branch. A number of important norms guide the provision and handling of that advice. OLC bases its answers on its best view of the law, not merely its sense of what is plausible or arguable. 6 To ensure that it takes adequate account of competing perspectives within the executive branch, it typically requests and fully considers the views of other affected agencies before answering the questions put to it. Critically, once OLC arrives at an answer, it is treated as binding within the executive branch unless overruled by the Attorney General or the President. That power to overrule, moreover, is wielded extremely rarely — virtually never. As a result of these and related norms, and in spite of episodes like the notorious “torture memos,” OLC has earned a well-deserved reputation for providing credible, authoritative, thorough and objective legal analysis. The White House is one of the main beneficiaries of that reputation. When OLC concludes that a government action is lawful, its conclusion carries a legitimacy that other executive offices cannot so readily provide. That legitimacy is a function of OLC’s deep traditions and unique place within the executive branch. Other executive offices — be they agency general counsels or the White House Counsel’s Office — do not have decades-long traditions of providing legal advice based on their best view of the law after fully considering the competing positions; they have not generated bodies of authoritative precedents to inform and constrain their work; and they do not issue legal opinions that, whether or not they favor the President , are treated as presumptively binding within the executive branch. (Nor should those other offices mimic OLC; that is not their job.) Because the value of a favorable legal opinion from OLC is tied inextricably to these aspects of its work, each successive presidential administration has a strong incentive to respect and preserve them.

#### OLC deflects loss/blame on the President

POSNER 2011 - Kirkland & Ellis Professor, University of Chicago Law School (Eric A. Posner, “Deference To The Executive In The United States After September 11: Congress, The Courts, And The Office Of Legal Counsel”, http://www.harvard-jlpp.com/wp-content/uploads/2012/01/PosnerFinal.pdf)

However, there is an important twist that complicates the analysis. The president may choose to publicize OLC’s opinions. Naturally, the president will be tempted to publicize only favorable opinions. When Congress 22 claims that a policy is illegal, the president can respond that his lawyers advised him that the policy is legal. This response at least partially deflects blame from the president. There are two reasons for this. First, the Senate consented to the appointment of these lawyers; thus, if the lawyers gave bad advice, the Senate is partly to blame, and so the blame must be shared. Second, OLC lawyers likely care about their future prospects in the legal profession, which will turn in part on their ability to avoid scandals and to render plausible legal advice; they may also seek to maintain the office’s reputation. When OLC’s opinions are not merely private advice, but are used to justify actions, then OLC takes on a quasi-judicial function. Presidents are not obliged to publicize OL C’s opinions, but clearly they see an advantage to doing so, and they have in this way given OLC quasi-judicial status.

### Solvency

#### Would get circumvented and oversight fails

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Yet this legislation provides no guarantee that Congress will receive the¶ information it needs to play a meaningful role in the development or¶ execution of cyber warfare policy. It is not known, for example, precisely¶ what it means for the intelligence committees to be “fully and currently”¶ informed, what kinds of intelligence activities are regarded as “significant”¶ enough to report, or who decides.31 Other sections of the 1991 law call on all agencies involved in intelligence activities, not just the President, to¶ keep the intelligence committees informed about those activities, but only¶ “[t]o the extent consistent with due regard for the protection from¶ unauthorized disclosure of classified information relating to sensitive¶ intelligence sources and methods or other exceptionally sensitive matters.”32¶ The “due regard for” language might be invoked to keep Congress in the¶ dark.¶ Under the 1991 law, “covert actions,” those with respect to which “it is¶ intended that the role of the United States Government will not be apparent¶ or acknowledged publicly,”33 need only be reported to a small group of¶ legislators known as the “Gang of Eight,”34 and then only in a “timely¶ fashion,” a term not defined by statute.35 Characterization of U.S. planning¶ and execution of electronic warfare as “covert” could enable reporting to¶ the smaller group, making it more difficult for Congress to play a¶ significant role.36 Moreover, any reporting might be delayed indefinitely.37 Another potential obstacle to congressional involvement is the¶ reportedly common but statutorily unauthorized practice of informal¶ reporting to an even smaller “Gang of Four” – the leaders of the¶ intelligence committees – generally for sensitive non-covert intelligence¶ activities.38¶ The Defense Department is heavily engaged in preparations for cyber¶ warfare, having recently announced the establishment of a new U.S. Cyber¶ Command.39 But congressional oversight of the work of this command¶ could be hampered by the military’s reported practice of labeling its¶ clandestine activities – those that are intended to be secret, but that can be¶ publicly acknowledged if discovered or inadvertently revealed – as¶ “operational preparation of the environment,” rather than intelligence¶ activities, even though they may pose the same diplomatic and national¶ security risks.40 As thus characterized, these activities might not be reported¶ to the intelligence committees.41 Any oversight that occurred would be¶ conducted instead by the House and Senate Armed Services Committees.42¶ Such a division of responsibilities might create dangerous confusion.¶ Congressional involvement also might be frustrated by the statutory¶ exclusion of “traditional . . . military activities or routine support to such¶ activities” from the definition of “covert action.”43 If secret military¶ preparations for cyber war are regarded as “traditional military activities,”¶ under the rationale outlined above they might escape both the presidential findings requirement for covert actions and any reporting to the intelligence

committees.44

### LOAC

#### Congress cant check use of force

**Kriner 10** - Assistant Profess of Political Science at Boston University( Douglas 2010, After the Rubicon: Congress, Presidents, and the Politics of Waging War, p. 6-8)

The role that Congress plays in deciding whether a war is continued or concluded is of intrinsic interest to academics, policymakers, and casual observers of contemporary American politics alike. Yet the belief that Congress retains some capacity to shape the conduct of military affairs after a venture is launched is also a critically important and untested proposition underlying most theories asserting congressional influence over the initiation of military action. Why, according to this emerging literature, do presidents facing a strong opposition party in Congress use force less frequently than do their peers with strong partisan majorities in Congress? The most commonly offered answer is that presidents anticipate Congress's likely reaction to a prospective use of force and respond accordingly.14 Presidents who confront an opposition-led Congress anticipate that it is more willing and able to challenge the administration's conduct of military action than a Congress controlled by their partisan allies. Therefore, the frequency with which presidents use force abroad covaries with the strength of their party in Congress. However, this anticipatory logic requires that Congress has the ability to raise the costs of military action for the president, once that action has begun. If Congress lacks this capacity, presidents have little reason to adjust their willingness to initiate the use of force in anticipation of an adverse congressional response." As a result, determining whether and how Congress can influence the scope and duration of ongoing military operations is critically important even to evaluating prior research that asserts congressional influence over the initiation of military actions. Without it, such analyses rest on shaky ground. Unfortunately, because the dynamics change dramatically once American troops are deployed abroad, simply drawing lessons from existing studies of interbranch dynamics in military policymaking at the conflict initiation phase and applying them to the conflict conduct phase is unlikely to offer much insight." The decision-making environment at the conflict conduct phase differs from that at the conflict initiation phase along at least three key dimensions: the incentives and constraints governing congressional willingness to challenge presidential discretion; the relative institutional capacities of the executive and legislative branches to affect military policymaking; and finally, the ability of unfolding conflict events to change further the political and strategic environment in which the two branches vie for power. With regard to the political constraints that limit would-be adversaries in Congress, the president may **be in an even stronger position** after American troops are deployed in the field. Ordering troops abroad is akin to other unilateral presidential actions; by seizing his office's capacity for independent action, a president can dramatically **change the status quo** and fundamentally alter the political playing field on which Congress and other actors must act to challenge his policies.17 Once the troops are overseas, the political stakes for any congressional challenge to the president's policies are inexorably raised; any such effort is subject to potentially ruinous charges of failing to support the troops. Georgia Senator Richard Russell's conversion from opposition to U.S. intervention in Vietnam in the early 196os to stalwart support for staying the course after Lyndon Johnson's escalation of the American commitment there illustrates this change: "We are there now, and the time for debate has passed. Our flag is committed, and—more importantly—American boys are under fire."" Russell's sentiment was loudly echoed forty years later in the allegations by the Bush administration and its partisan allies in Congress that any legislative efforts to curtail the war in Iraq undermined the troops. As a result of these potentially **intense political costs**, there are reasons to question whether Congress can mount an effective challenge to the policies of the commander in chief. If it cannot, this would compel a reassessment of prior theories asserting congressional influence over the initiation of military actions through the logic of anticipated response. Certainly, more empirical analysis is needed to answer this question.

#### No cyber aggression- restraint and public pressure win out

**Lawson 6-11**-13 [Sean, professor and researcher in the Department of Communication at the University of Utah, doctorate from the Department of Science and Technology Studies at Rensselaer Polytechnic Institute, interests include cybersecurity policy, surveillance, network-centric warfare, and military use of social media, “Is There A Silver Lining To The President's Cyber War Policy?” <http://www.forbes.com/sites/seanlawson/2013/06/11/is-there-a-silver-lining-to-the-presidents-cyber-war-policy/>]

This is where we see one aspect of how some of the document might help to allay critics’ concerns. One of the biggest criticisms that many had of the Stuxnet operation (myself included) was that it seemed to have been carried out without adequate thought given to the larger implications. This document appears to initiate a process meant to engage in such thought. The document identifies a number of criteria to be considered when deciding upon the use of defensive and offensive cyber effects operations, including “impact,” “risks,” “methods,” “geography and identity,” “transparency,” and “authorities and civil liberties” (p. 13). Thomas Rid of the War Studies Department at Kings College asked this week, “How would the authors of #PPD20 assess Stuxnet in hindsight against their own criteria?” His answer, “Probably ambiguous.” He pointed to the possibility for economic retaliation and “the establishment of unwelcome norms of international behavior” as at least two areas where the Stuxnet operation would likely fall short of PPD–20’s criteria. He is likely correct. On the other hand, given the firestorm of criticism that followed revelations of Stuxnet, perhaps PPD–20’s criteria can be read as a lesson learned and a commitment not to repeat the mistakes of Stuxnet. Only time will tell.¶ Increasingly bellicose rhetoric in the U.S. public discourse about cyber warfare combined with revelations of the Stuxnet operation have led myself and others to worry that the United States was perhaps getting trigger happy with its cyber capabilities and that it had a too simplistic and overly optimistic idea of how those capabilities could realistically be used. But, there are elements of PPD–20 that, if truly heeded by planners, should help to allay those fears.¶ First, critics have noted that the dense interconnectivity of cyberspace, which spans geographic boundaries, places serious limitations on the ability to precisely target and then control the effects of a cyber attack. Stuxnet’s escape into the “wild” soon emerged as an important piece of evidence in support of this caveat. We might take some comfort, therefore, in the fact that PPD–20 acknowledges that the global interconnectivity of cyberspace means that both defensive and offensive cyber operations, “even for subtle or clandestine operations, may generate cyber effects in locations other than the intended target, with potential unintended or collateral consequences that may affect U.S. national interests in many locations” (p. 6). A true appreciation of this possibility should serve to restrain the United States’s use of cyber attacks. Again, only time will tell if this lesson has truly been understood by U.S. policy makers.¶ Second, though the document does confirm the President’s belief that “OCEO can offer unique and unconventional capabilities to advance U.S. national objectives around the world” and therefore calls for the U.S. Government to “identify potential targets of national importance where OCEO can offer a favorable balance of effectiveness” (p. 9), it also recognizes the considerable difficulties in accomplishing this task. Some cyber war proponents have tended to talk about cyber weapons as though they are munitions like any other, that they can be created easily and cheaply, stored up, and then used at lightening speed on any target. They have pointed to Stuxnet as evidence of this latest revolution in military affairs. Others, however, have seen in Stuxnet an example of the costs and complexity of developing and deploying such weapons, as well as their limited operational effectiveness [PDF]. This is because cyber weapons with the greatest potential effectiveness are those tailored to their targets. This tailoring, however, is complex, costly, and in need of constant updating as the target and the wider environment change. PPD–20 recognizes this fact when it says, “The development and sustainment of OCEO capabilities, however, may require considerable time and effort if access and tools for a specific target do not already exist” (9).¶ Taken together, the application of the criteria laid out in PPD–20, its recognition of the difficulties of targeting and containing the effects of cyber attacks, and its acknowledgement of the considerable time and effort needed to develop a targeted, contained, and effective cyber weapon should all serve to constrain the United States’ use of cyber attack. Of course, the key word here is “should.” It is certainly disappointing that the problem of cyber security is still being framed primarily as a national security and military problem and, as such, the United States continues its march towards the militarization of cyberspace. Nonetheless, there are several possible benefits to the public availability of PPD–20.¶ First, one action item at the end of PPD–20 is to develop a communication plan to explain the policy to the public. Ironically, the leak of this document might make that job easier. The public availability of PPD–20 helps to clarify for the public what its government’s understanding of and preparation for cyber warfare does and does not entail.¶ Second, PPD–20 could help to change the public discourse about cyber warfare. On the whole, the language in PPD–20 is less bellicose than much of the rhetoric that has come to dominate the public discussion of this issue. If truly appreciated and applied, the caveats and criteria identified in PPD–20, though they will not stop the United States’s development of offensive cyber warfare capabilities, should serve to restrain the use of those capabilities. The kind of sober assessment found in PPD–20, which acknowledges the potential negative impacts of and limitations to the use of cyber attack, should replace the sometimes overheated and overly optimistic public discourse about cyber warfare.¶ Finally, the public and the press now have an agreed-upon criteria against which to judge future calls by politicians or others for the use of offensive cyber attacks. The public can hold them to account for following “their own criteria,” as Rid has said, because now we know what the criteria is. And there is no room in that criteria for the kind of cyber warmongering that has become all too prominent recently.

#### No risk of a Chinese military conflict – it’ll never reach that level of hostilities

Moss 4/19/13 (Trefor, Independent Journalist for the Diplomat, "Is Cyber war the New Cold War")

Cyberspace is anarchic, and incidents there span a hazy spectrum from acts of protest and criminality all the way to invasions of state sovereignty and deliberate acts of destruction. Cyber attacks that might be considered acts of war have so far been rare. It is certainly hard to characterise the rivalry between China and the U.S. as it stands as cyber warfare, argues Adam Segal, a senior fellow at the Council on Foreign Relations. “I tend to stay away from the term ‘cyber war’ since we have seen no physical destruction and no deaths,” he explains. Segal accepts that there is a conflict of sorts between China and the U.S. in cyberspace, though he says it is “likely to remain below a threshold that would provoke military conflict.”. While there is no internationally accepted categorization of different kinds of cyber activity (individual states have varying definitions), it is self-evident that some episodes are more serious than others. NATO’s Cooperative Cyber Defence Centre of Excellence (CCDCOE) – a unit based, not by accident, in Estonia, which experienced a massive cyber-attack [from Russia](http://news.bbc.co.uk/2/hi/europe/6665145.stm) in 2007 – distinguishes between “cyber crime,”“cyber espionage,” and “cyber warfare.”¶ China’s cyber operations, for all their notoriety, have essentially been acts of theft – either criminals attempting to extract privileged data, or incidents of state-sponsored espionage (some of which, admittedly, had national security implications, such as the [extraction of blueprints](http://www.theaustralian.com.au/news/world/security-experts-admit-china-stole-secret-fighter-jet-plans/story-fnb64oi6-1226296400154) for the F-35 Joint Strike Fighter). But these operations did not seek to cause any physical destruction, and so would be hard to interpret as acts of war. This may explain why the U.S. government has been quite tolerant of Chinese hacking until now, seeing it as an irritant rather than as anything more provocative.

#### No Taiwan war Econ ties outweigh everything

Daniel **Lynch 12**, IR prof at USC, “Why Ma Won the Elections and what’s Next for Taiwan and China”, January 15, <http://www.foreignaffairs.com/articles/137029/daniel-lynch/why-ma-won-the-elections-and-whats-next-for-taiwan-and-china?page=show>

During the campaign, most observers insisted that the election was not about cross-strait relations but about socio-economic issues, including rapid economic growth amid worsening inequality, reduced career opportunities for recent college graduates, and unaffordable housing costs. In fact, socio-economic issues are inseparable from cross-strait issues. Ma ran on his record of improving ties between China and Taiwan, claiming that friendship meant stability and prosperity and that a reversion to DPP rule would throw Taiwan back into the dark days of the mid-2000s, when DPP President Chen Shui-bian's avowedly Taiwan-centric policies blocked negotiations even on direct passenger plane flights across the Taiwan Strait. Tsai, no protectionist or isolationist herself, promised not to roll back cooperation with China for the same reason. Her main criticism of Ma was that he is naive about China. According to her, issues of further integration -- such as allowing Chinese professionals and white-collar workers to take jobs in Taiwan -- should be approached cautiously. For their part, voters seem to have accepted Ma's contention that reducing cross-strait tensions improves the country's economic well-being. Indeed, more than ever, Taiwan's economy is dependent on China's. This is partly a result of market dynamics (Taiwanese capital flows across the Taiwan Strait in search of lower production costs) and partly a result of the KMT and Chinese Communist Party's efforts to facilitate integration. By the end of 2011, some 80,000 Taiwanese firms had invested up to $200 billion in mainland factories, research and development centers, stores, and restaurants. And annual trade between the two sides exceeded $150 billion. Meanwhile, out of a total population of 23 million, one million or more Taiwanese live in China. Directly or indirectly, the majority of Taiwanese households depend on Chinese economic dynamism for their livelihood. These are the dynamics that had helped Ma win a landslide victory in the 2008 Taiwan elections to begin with. He had made the campaign promise to pursue something like a Taiwanese-Chinese common market. He delivered on this pledge in 2010 by signing with Beijing the Economic Cooperation Framework Agreement (ECFA), under which the two sides agreed to slash tariffs on a wide variety of goods and services. By December 2011, 16.1 percent of Taiwanese goods exported to China and 10.5 percent of Chinese goods exported to Taiwan were already tariffed at preferential rates. Important services were also covered under ECFA's "early harvest" provisions.

Accidental launch lands in the ocean

**Slocombe 9**

Frmr Under Secretary of Defense for Policy; Caplin & Drysdale Attorneys (Walter, De-Alerting: Diagnoses, Prescriptions, and Side-Effects, <http://www.ewi.info/system/files/Slocombe.pdf>,)

Moreover, in recent years, both the US and Russia, as well as Britain and China, have modified their procedures so that even if a nuclear-armed missile were launched, it would go not to a “real” target in another country but – at least in the US case - to empty ocean. In addition to the basic advantage of insuring against a nuclear detonation in a populated area, the fact that a missile launched in error would be on flight path that diverged from a plausible attacking trajectory should be detectable by either the US or the Russian warning systems, reducing the possibility of the accident being perceived as a deliberate attack. De-targeting, therefore, provides a significant protection against technical error. These arrangements – PALs and their equivalents coupled with continued observance of the agreement made in the mid-90s on “de-targeting” – do not eliminate the possibility of technical or operator-level failures, but they come very close to providing absolute assurance that such errors cannot lead to a nuclear explosion or be interpreted as the start of a deliberate nuclear attack.6 The advantage of such requirements for external information to activate weapons is of course that the weapons remain available for authorized use but not susceptible of appropriation or mistaken use. The drawback from a deterrence and operational point of view is, of course, that the system for transmitting the information must not be susceptible of interruption – that is, there must be assurance that an authorized decision maker will be able to act and have the decision – and the accompanying authenticated orders and unlock combinations – communicated to and received by the operators of the weapon systems. Accordingly, a system of combination-locked safeties requires a highly survivable network for decision and communication with the operators. Otherwise there would be pressures for early transmission of the codes, with their insertion subject to a later execute order or even more dangerous, pre-delegation of authority to issue the execute orders. In this, as in other aspects of measures to meet the “never” requirement, a highly capable and highly survivable command and control system is essential.

### Deterrence

#### No meltdowns

Adams ’12 (Rod Adams, Former submarine Engineer Officer, Founder, Adams Atomic Engines, Inc., “Has Apocalyptic Portrayal of Climate Change Risk Backfired?”, http://atomicinsights.com/2012/05/has-apocalyptic-portrayal-of-climate-change-risk-backfired.html?utm\_source=feedburner&utm\_medium=feed&utm\_campaign=Feed%3A+AtomicInsights+%28Atomic+Insights%29, May 2, 2012)

Not only was the discussion enlightening about the reasons why different people end up with different opinions about climate change responses when presented with essentially the same body of information, but it also got me thinking about a possible way to fight back against the Gundersens, Caldicotts, Riccios, Grossmans and Wassermans of the world. That group of five tend to use apocalyptic rhetoric to describe what will happen to the world if we do not immediately start turning our collective backs on all of the benefits that abundant atomic energy can provide. They spin tall tales of deformed children, massive numbers of cancers as a result of minor radioactive material releases, swaths of land made “uninhabitable” for thousands of years, countries “cut in half”, and clouds of “hot particles” raining death and destruction ten thousand miles from the release point. Every one of those clowns have been repeating similar stories for at least two solid decades, and continue to repeat their stories even after supposedly catastrophic failures at Fukushima have not resulted in a single radiation related injury or death. According to eminent scientists – like Dr. Robert Gale – Fukushima is unlikely to EVER result in any measurable increase in radiation related illness. One important element that we have to consider to assess cancer risks associated with an accident like Fukushima is our baseline risk for developing cancer. All of us, unfortunately, have a substantial risk of developing cancer in our lifetime. For example, a 50-year-old male has a 42% risk of developing cancer during his remaining life; it’s almost the same for a 10-year-old. This risk only decreases when we get much older and only because we are dying of other causes. It’s true that excess radiation exposure can increase our cancer risk above baseline levels; it’s clear from studies of the survivors of the 1945 atomic bombings of Hiroshima and Nagasaki, of people exposed to radiation in medical and occupational settings, and of people exposed to radon decay products in mines and home basements. When it comes to exposures like that of Fukushima, the question is: What is the relative magnitude of the increased risk from Fukushima compared to our baseline cancer risk? Despite our fears, it is quite small. If the nuclear industry – as small and unfocused as it is – really wanted to take action to isolate the apocalyptic antinuclear activists, it could take a page from the effective campaign of the fossil fuel lobby. It could start an integrated campaign to help the rest of us to remember that, despite the dire predictions, the sky never fell, the predicted unnatural deaths never occurred, the deformations were figments of imagination, and the land is not really irreversibly uninhabitable for generations. The industry would effectively share the story of Ukraine’s recent decision to begin repopulating the vast majority of the “dead zone” that was forcibly evacuated after the Chernobyl accident. It would put some context into the discussion about radiation health effects; even if leaders shy away from directly challenging the Linear No Threshold (LNT) dose assumption, they can still show that even that pessimistic model says that a tiny dose leads to a tiny risk. Aside: My personal opinion is that the LNT is scientifically unsupportable and should be replaced with a much better model. We deserve far less onerous regulations; there is evidence that existing regulations actually cause harm. I hear a rumor that there is a group of mostly retired, but solidly credentialed professionals who are organizing a special session at the annual ANS meeting to talk about effective ways to influence policy changes. End Aside. Most of us recognize that there is no such thing as a zero risk; repeated assertions of “there is no safe level” should be addressed by accepting “close enough” to zero so that even the most fearful person can stop worrying. The sky has not fallen, even though we have experienced complete core meltdowns and secondary explosions that did some visible damage. Nuclear plants are not perfect, there will be accidents and there will be radioactive material releases. History is telling me that the risks are acceptable, especially in the context of the real world where there is always some potential for harm. The benefits of accepting a little nuclear risk are immense and must not be marginalized by the people who market fear and trembling.

#### China wont attack US space assets—they know that they will receive international backlash

**Tellis 2007** - senior associate at the Carnegie Endowment for International Peace [specializing in international security, defense, and Asian strategic issues. PhD from U of Chicago Ashley J. Tellis, August, 30 2007, published online on September, 1 2007, “China's Military Space Strategy”, Survivial, http://www.carnegieendowment.org/files/tellis\_china\_space1.pdf, accessed 7-14]

**A similar situation obtains with regard to physically neutralising the g**lobal **p**ositioning **s**ystem constellation. The precision navigation and timing data provided by this system are vital for military and civilian purposes worldwide. Both rely on the system for accurate location information, but military users also depend on it for accurate weapons delivery, synchronisation of operations requiring precise coordination, and successful search and rescue. Highly accurate three-dimensional location information requires four or more satellites to be within the field of view of the receiver. Since the global positioning system constellation comprises 24 spacecraft (plus spares) at 20,000km, where it takes each satellite 12 hours to complete one orbit, at any given time there are usually 5–12 satellites in view of most users, depending on topography. Physically destroying the constellation to deny the US military the precision navigation and timing data it has come to rely on would, therefore, require more than discrete attacks on a few satellites. Even more substantial attacks would only deny navigation and timing data for a part of the day.74 **The United States could**, albeit painfully, **compensate for spacecraft losses by either changing the orbits of the surviving satellites, or by relying on other positioning constellations,** such as those operated by the Russians or eventually the Europeans, or by minimising the use of coordinate-seeking weapons in favour of other precision systems. **Any loss of capabilities that compelled the United States to rely on such alternatives** would no doubt be extremely costly in military terms, but it would not be pain free for China either: it **would make Beijing the object of international opprobrium and would increase the prospect of American escalation, both of which China would presumably want to avoid.**75

#### Unrestrained use deters cyber war – legal norms increase risk of conflict

Crosston 12 (Dr. Matthew Crosston is the Miller Endowed Chair for Industrial and International Security and founder and director of the International Security and Intelligence Studies (ISIS) program at Bellevue University. He has authored two books, several book chapters, and nearly a dozen peer-reviewed articles on counterterrorism, corruption, democratization, radical Islam, and cyber deterrence, “Virtual Patriots and a New American Cyber Strategy” Winter 2012, Strategic Studies Quarterly, p. 100-118)

These proposed behavioral rules about jus in cyber bello are paradoxical: with so many constraints on allowable action, the underlying motivational framework of fear—so essential in the original Cold War in moderating behavior—becomes nonexistent. Indeed, if the above parameters were ob served, then a state could arguably be more motivated to attack. Remove the civilian population and domestic infrastructure from cyber attack, and you have sanitized cyber war to a point where **there is no fear of engagement**.

A Cyber Cold War would be multilateral rather than bilateral: it would involve many nations, with different interests and not allied by treaty. Furthermore, the parties would include major non-governmental players such as private compa nies or even individuals or groups of individual hackers, perhaps with political interests. It is unlikely, in the more capitalistic and constitutionally free countries, which national governments can easily rein in these potential corporate and indi vidual cyber attackers. 20

The problem with this formulation is that it envisions a so-called cyber cold war beholden to apparently voluntary parameters of constraint. The parameters elaborated, however, do not honor but corrupt the true deterring force that existed in the Cold War. If an overt strategy of credible cyber debilitation were allowed to openly develop, then most of the problems mentioned above would be inconsequential to the proper functioning of the virtual global commons—multilateral or bilateral, individuals or groups, national governments or private corporations, clearly defined adversaries or anonymous, nonattributable attacks. A system that does not rely on arbitrary good behavior and instead proactively establishes overt cyber-weaponization strategies alongside continued covert capabili ties creates an environment where the futility of first-strike efficacy and perceived retaliatory devastation reigns in behavior globally.

The United States tends to be obsessive about keeping its technological capabilities classified. This is partially explained by the need to maintain effective surprise in retaliation to an attack rather than striving to prevent an attack initially. Yet, it is also explained by the US attempt to be the leading voice for liberally idealistic global cyber norms. This was confirmed in 2008 when former intelligence official Suzanne Spaulding testified before the House Cybersecurity Subcommittee.

My concern is that (the Department of Defense) has been so vocal about the development and deployment of [classified] cyber-warfare capabilities that it will be very difficult for that department to develop and sustain the trust necessary to undertake essential collaboration on defensive cybersecurity efforts with the private sector and with international stakeholders. . . . There is significant risk that these vital partners will suspect that the collaboration is really aimed at strengthening our offensive arsenal (emphasis added). 21

There are two problems with the above quote. On the one hand, policymakers continue to focus on apparent voluntary trust in a domain that is not typified by such behavior. On the other hand, the DoD remains stead fast in its worship of clandestine capability and thus loses the preemptive deterrence of overt strategy which can compel cooperation as opposed to just hoping for it. These are not small problems, as trust and collaboration between dangerous actors work when there is an element of consequence to poor action. An overt strategy of offensive cyber capability—revealing some cards while not revealing all, with no nod to ethical considerations that demand targeting constraints and a focus purely on the efficacy of preemptive deterrence—arguably has a chance to shine a light of consequence into the shadowy anarchy of cyber. This is how the United States, as men tioned at the beginning of this article, could be inspired by the essence of Chinese cyber strategy, but it must ultimately elevate to a higher capability and competence.

Further hindering this evolution, **the academic community has re mained too enamored with trying to connect ethical theories into the cyber domain to create a liberal, idealistic governing code.** Many scholars have acknowledged that these theories, whether utilitarianism, Kantian theory, or natural rights theory, have cast relatively little new light into the cyber domain. 22 Despite such sincere if misguided efforts, **the best possibility for preemptive cyber deterrence might be** old-school strategic realism **and not new-school ethical liberalism.**

As awkward as it may be to admit publicly, the Chinese might have something for the United States to truly consider. A fusion of Sun Tzu’s pragmatism with Machiavelli’s overt strategic amorality carries the potential to deter negative cyber action before it ever begins. As Sun Tzu as serted, the highest realization of warfare is to attack the enemy’s plans; next is to attack its alliances; next to attack the army; and the lowest is to attack its fortified cities. Machiavelli made it clear that if an injury has to be done to a man, it should be so severe that his vengeance need not be feared. This overt, amoral offensive fusion has one purpose: not to logistically conduct war but to strategically avoid it. At the present time there is no current discussion of US cyber strategy broaching these subjects, and subsequently, the zero-sum cyber game remains unchanged.

#### No modeling - strategic incentive to maintain legal ambiguity

Waxman 11

Matthew C. Waxman, Associate Professor, Columbia Law School; Adjunct Senior Fellow, Council on Foreign Relations; Member of the Hoover Institution Task Force on National Security and Law, Yale Journal of International Law, March 16, 2011, “Cyber-Attacks and the Use of Force: Back to the Future of Article 2(4)," vol 36, http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=1674565

B. Technology, Power Shifts, and the Strategic Logic of Legal Interpretation

With these relationships between law and power in mind, the United States has an interest in regulating cyber-attacks, but it will be difficult to achieve such regulation through international use-of-force law or through new international agreements to outlaw types of cyber-attacks.143 That is because the distribution of emerging cyber-capabilities and vulnerabilities— vulnerabilities defined not only by the defensive capacity to block actions but also by the ability to tolerate and withstand attacks—is unlikely to correspond to the status quo distribution of power built on traditional measures like military and economic might.

It is not surprising that the United States seems inclined toward an interpretation of Articles 2(4) and 51 that allows it to classify some offensive cyber-attacks as prohibited “force” or an “armed attack” but does not otherwise move previously drawn lines to encompass economic coercion or other means of subversion in that classification. Nor is it surprising to see the United States out in front of other states on this issue. The power and vulnerability distribution that accompanies reliance on networked information technology is not the same as past distributions of military and economic power, and perhaps not to the United States’s advantage relative to rivals. Moreover, some U.S. strengths are heavily built on digital interconnectedness and infrastructure that is global, mostly private, and rapidly changing; these strengths are therefore inextricably linked to new and emerging vulnerabilities.144

Although some experts assess that the United States is currently strong relative to others in terms of offensive capabilities,145 several factors make the United States especially vulnerable to cyber-attack, including the informational and electronic interconnectedness of its military and public and private sectors, and political obstacles to curing some of these vulnerabilities through regulation.146 As the Obama administration’s 2010 National Security Strategy acknowledged:

The very technologies that empower us to lead and create also empower those who would disrupt and destroy. They enable our military superiority . . . . Our daily lives and public safety depend on power and electric grids, but potential adversaries could use cyber vulnerabilities to disrupt them on a massive scale.147

In other words, U.S. technological strengths create corresponding exposures to threats. The U.S. government is especially constrained politically and legally in securing its information infrastructure—which is largely privately held or privately supplied—against cyber-threats, and these constraints shape its international strategy. Proposals to improve cyber-security through regulation include promulgating industry standards to enhance the security of information technology products and protect networks and computers from intrusion, and, more invasively, expanding the government’s authority to monitor information systems and communications.148 Such proposals invariably face powerful antiregulatory industry pressures and heightened civil liberties sensitivities.149 Information technology industry groups and privacy organizations have together pushed back against moves to impose government security mandates and against more intrusive government cyber-security activities, arguing that they would stifle innovation, erode civil liberties, and fail to keep up with rapidly evolving threats amid a globalized economy.150 A reluctance to secure information systems domestically through government regulation then elevates U.S. government reliance on other elements of a defensive strategy.

In that light, U.S. legal interpretations and declaratory postures that define prohibited force in ways that extend narrow Charter interpretations to take account of cyber-warfare may be seen as part of an effort to sustain a legal order in which anticipated U.S. military and economic moves and countermoves against potential adversaries fit quite comfortably—that is, a legal order that preserves U.S. comparative advantages. In extending the foundational U.N. Charter prohibition on force to cyber-attacks by emphasizing their comparable effects to conventional military attacks, such interpretations help deny that arsenal to others by raising the costs of its use. At the same time, by casting that prohibition and complementary self-defense authority in terms that help justify military force in response, this interpretation reduces the costs to the United States of using or threatening to use its vast military edge (and it helps signal a willingness to do so).

Put another way, the United States appears to be placing hedged bets about what the future strategic environment will look like and how best to position itself to operate and compete in it. On balance, for example, the United States may prefer relatively clear standards with respect to cyber-actions that have immediate destructive effects—at least clear enough to justify armed response or deterrence to activities or scenarios deemed threatening—while at the same time preferring some permissive haziness with respect to intelligence collection and its own countermeasures in cyberspace. Such a posture allows the United States to protect itself from hostile penetrations while also preserving some latitude for those activities in which it may be relatively strong.151 Internally, that clarity facilitates planning for contingencies and deliberation about options;152 externally, it may help articulate and deter the crossing of red lines.153

In trying to explain what may be driving the U.S. interpretation, this Article is neither affirming nor denying this strategic logic, which is contingent on future capabilities and vulnerabilities that are both highly uncertain and shrouded in secrecy. Rather, it is trying to uncover and scrutinize some of the underlying assumptions.

There are several strategic reasons for the United States to be cautious in considering interpretations that expand narrow definitions of “force” and “attack” so that they include potentially broad categories of cyber-attacks— risks that are often not acknowledged or addressed in discussions of the U.S. interpretive trajectory. For one thing, the United States has generally defeated efforts by other states to interpret Articles 2(4) and 51 expansively to include economic coercion and other forms of political subversion.154 In thinking about the Charter regime as a whole, therefore, the United States may not want to reopen those debates. Cyber-attacks can allow state and nonstate actors to inflict massive harm without resort to arms, but that has long been true of many other instruments, including economic and financial means, covert subterfuge, and other widely used instruments. In that regard, one advantage of promoting legal regulation of cyber-attacks through a new treaty or international agreement instead of through Charter interpretation is that such efforts would have little if any effect on broader Charter law. An advantage, however, to working through Charter interpretation rather than new agreements is that Charter law can evolve incrementally and begin shaping international actors’ expectations through unilaterally initiated state practice without having to reach consensus (the difficulties of which are discussed in the next Section).

Depending on the relative risk of different types of future cyber-attack scenarios, it might also be in the United States’s strategic interest to legally delink cyber-activities from armed force instead of defining force by reference to effects, or at least to impose extremely high legal thresholds for treating cyberattacks equivalent to force or armed attack, in order to reduce the chances of military escalation from cyber-activities.155 As capabilities proliferate among state and nonstate actors to conduct various sorts of malicious, hostile, or intelligence-gathering activities in cyberspace, any normative constraints that come from treating some cyber-attacks as force prohibited by Article 2(4) and any deterrence value of treating them as armed attacks triggering self-defense rights under Article 51 might be outweighed by the dangers of lowering legal barriers to military force in a wider range of circumstances.156 That is, the value of promoting a right of armed self-defense against cyber-attacks may turn out to be quite low—since, among other things, it may be difficult to sufficiently prove one’s case publicly in justifying military responses—while doing so may introduce greater security instability to the international system by eroding normative constraints on military responses to nonmilitary harms.157

As the following Section explores, it is very difficult to assess these risk balances because the global security environment is shifting dramatically and unpredictably. Moreover, even if the United States could assess the risks accurately, other states may be operating under different sets of strategic assumptions about that future.

C. Divergent Interests and Implications for Charter Interpretation

Assuming the United States decides firmly on a legal interpretation going forward, the redrawing of legal lines on a map of inequitably distributed power and vulnerabilities would create winners and losers and would make it difficult to reach agreement on new legal boundaries, whether through interpretive evolution of the U.N. Charter or new conventions.158 In thinking about legal interpretations of Articles 2(4) and 51, success therefore depends on the ability of proponents to articulate and defend their legal lines using combinations of traditional and new forms of power for deterrence, self-defense, enforcement, and influence.

Again, one should not divorce analysis of any proposed content of Articles 2(4) and 51 from the processes by which it is interpreted, reinterpreted, enforced, and reinforced.159 The likely factual ambiguity surrounding cyberattacks and the pressures to take aggressive responsive or escalatory measures more quickly than those facts can be resolved may sometimes require strategic and military decisionmaking amid legal gray zones. Moreover, as involved states marshal their arguments amid these moves and countermoves, and as they consider their long-term interests, they may also calculate differently what Stone calls “the expected value . . . of built-in [legal] ambiguities as future political weapons.”160

That is, even if states widely share a common, minimum interest in restricting some cyber-attacks, states may have divergent interests regarding specific substantive content as well as the desired degree of clarity in the law. Salient differences will likely stem from asymmetries of geostrategic ambitions, internal and external commitment to legal norms generally, and the nature and extent of public-private institutional relationships.161

In contrast to the United States, some states that are developing offensive cyber-warfare capabilities (such as North Korea, according to many experts) are non-status-quo powers or aspiring regional powers,162 and they may prefer legal ambiguity as to cyber-attacks or narrow interpretations of Article 51 that would allow them—if they resort to cyber-attacks—to portray themselves as victims of any responsive military strikes.163 Offensive cyber-capabilities have the potential to shift or upset international balances of power, because some states are more vulnerable than others to cyber-attack (in terms of capacity to block actions as well as to tolerate or withstand them), and attacks could have a disproportionately large impact on countries or militaries that have a higher reliance on networked information systems.164 Developing an offensive cyberwarfare capability is likely to be less expensive in resources and diplomatic costs than competing economically or militarily with much stronger states, though legal flexibility or constraints could alter that calculus.165 On the other hand, some small states that are unlikely to develop sophisticated offensive or defensive systems may advocate international legal interpretations or new agreements that are very restrictive of cyber-attacks and define attacks broadly, seeing themselves as highly reliant on protective norms.166 Individually, though, they will have little power to promote those principles.

Like the United States, other major actors may have much to lose from cyber-attacks. However, they may calculate their short- and long-term strategic interests with respect to cyber-warfare and its regulation differently than the United States, in light of their own matrix of offensive and defensive capabilities, public-private institutional relationships, and asymmetries in the ways international law constrains different actors.167 Russia, for example, has proposed to the United Nations a draft statement of principles that would prohibit the development, creation, and use of cyber-attack tools. Meanwhile, though, Russia is engaged in developing cyber-attack capabilities,168 and some analysts are skeptical of Russia’s sincerity in proposing cyber-arms control agreements, especially given the difficulties of verifying them.169 China likely sees cyber-warfare capabilities as a way of equalizing the conventional military superiority of the United States,170 so it may be reluctant to concede legally “disarming” interpretations, at least without some reciprocal benefit or legal concession. Russia and China, which, as mentioned earlier, both reportedly exploit informal relationships with private actors (i.e., “citizen hackers”) to conduct attacks and collect intelligence in cyberspace, may also incline toward legal doctrine that makes it difficult to impute private cyber-actions to governments.171 Meanwhile, some European states have approached the legal relationship between cyber-attacks and force cautiously, perhaps because of general concerns about military escalation of crises and divergent strategic assessments among themselves.172

Differences in internal politics, ideology, and government control over information will also shape state interests in competing interpretations of Charter norms. With echoes of debates from prior eras,173 various types of states are likely to view cyber-threats differently and to distinguish offensive attacks from defensive measures differently. For instance, some states that tightly control information, including major powers like China, are especially concerned about internal political dissent and might therefore define what the United States sees as “Internet freedom” as a threat to vital security interests. Efforts to crack down on what they (or other states that exercise strong state control over Internet content) may view as defensive measures against hostile subversion may be viewed by the United States (or other states that value and promote free speech) as hostile, offensive measures.174 It is hard to envision a state in China’s position strongly endorsing or standing behind U.S. visions for international legal regulation of cyber-attacks without some unlikely concessions by the United States.175

From a policy standpoint, this should sound another cautionary note about efforts to build international legal consensus about cyber-attacks and the use of force, whether through Charter interpretation or new agreements. Emergent U.S. government inclinations toward effects-based interpretations of the Charter may be legally reasonable and protective of some core U.S. interests, as well as widely shared foreign interests. But even if they help in the short term to manage competing risks of too much or too little authority to employ cyberattacks, or too much or too little leeway to resort to armed self-defense in response, a coherent legal strategy can only be forged and advanced in the long term if it is integrated effectively with broader diplomacy and security strategy, including efforts to build and sustain offensive, defensive, deterrent, and intelligence capabilities—while others do the same based on a different set of objectives, capabilities, vulnerabilities, and constraints.

#### Detterence fails or its inevitable

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Second, even if reducing the U.S. stockpile did affect U.S. deterrent posture, missile defense couldn't replace any lost deterrent value because missile defense doesn't *deter* nuclear attacks. The purpose of missile defense is to *defend*--or, more accurately, *attempt* to defend. An adversary wouldn't be deterred from launching a nuclear attack because of the existence of missile defense; rather, it's the credible threat of overwhelming nuclear retaliation that deters an adversary. If the enemy is irrational and suicidal enough to discount the threat of massive nuclear retaliation, then a missile defense system that can theoretically intercept only some of the attacking missiles most certainly isn't going to be a deterrent. In wonk parlance, the NPR conveniently conflates *reprisal* deterrence with*denial* deterrence. **Reprisal deterrence is the 800-pound gorilla, and denial deterrence is the flea**. If our adversaries are thinking twice about using nuclear weapons it's because they're scared of reprisal deterrence. **And if they aren't sufficiently scared of reprisal, fractional denial certainly isn't going to stop them**. To borrow an analogy used by Thomas Schelling, a Nobel laureate with a deep knowledge of arms control and game theory: **Denial deterrence adds to reprisal deterrence like tying an extra cotton string adds to the strength of an aircraft carrier's anchor chain.**

#### Stuxnet kills credibility of any US cyber-restraint norm—try or die for deterrence through offensive cyber capabilities

Tim Stevens, associate of the Centre for Science and Security Studies at King’s College, London, 2012, A Cyberwar of Ideas? Deterrence and Norms in Cyberspace, Contemporary Security Policy 33. 1

Even as states attempt to regulate the use of cyberspace for, inter alia, military first strikes, they will retain significant military and intelligence cyber capabilities to be exercised below the level of an as-yet unascertained cyber conflict threshold. The latter may require legal definition at the global level, or it may yet fall to unilateral declarations of tolerance, or displays of force posture or operational capacity, most likely in conjunction with strategic allies. It may be that the norm that emerges from this situation is not of non-use but of ‘acceptable’ use, which serves to demonstrate where the ‘red lines’ of cyber operations are. It is unlikely, therefore, that a ‘cyber taboo’ analogous to nuclear and chemical weapons taboos will be constructed.129 In the absence of any firm notion of what, for example, a ‘cyberwar’ might actually look like, there may be little immediate societal pressure to avoid one, and plenty of latitude afforded to states to develop capabilities that might conceivably be used in one, if such a thing even exists.130 Nevertheless, as Nina Tannenwald argues with respect to the nuclear taboo, a norm of non-use may stand a greater chance of being adopted by alliances of democracies than by authoritarian states.131 However, given the possible US-Israeli involvement in the Stuxnet sabotage of Iranian nuclear technology, we must wonder if we are already past this point.132 The lure of a voluntary framework banning the offensive use of cyberspace may prove irresistible to many ‘like-minded nations’, even if its actual applicability is strictly limited. Importantly, an international normative regime not backed with coordinated and credible force will serve no deterrent functionfffff against exactly those ‘rogue’ and non-state actors most likely to conduct disruptive cyber operations.

Yet the question remains: how effective is a norms-based approach to cyber deterrence likely to be? How can we tell what aspects of a deterrence strategy are working, or which aren't? In truth, it is much too early to know. Even if it were possible to get all parties to comply with a set of norms hammered out through diplomacy and other forms of negotiation, what guarantees are there that these would be adhered to? Again, there are no such guarantees. It may be that states can be persuaded to comply with international normative frameworks through a mix of inducement, coercion and moral pressure. So too might industry and civil society be persuaded to do their part through a gradual process of cultural learning, and all parties work together to achieve the ‘global culture of cybersecurity’ currently aspired to. Even were these norms to operate strongly and bind together these actors such that norms of non-use or acceptable use became institutionalized, they are never likely to persuade all who might have the capabilities to prosecute actions in cyberspace that constitute strategic threats. For this reason alone, states and their militaries and security services will, even whilst pursuing denial strategies and improving defensive cybersecurity, be loath to abandon the search for effective punitive measures through which deterrence might be achieved. In turn, the norm of retaliatory punishment may prove to be a powerful deterrent in itself.

## 2NC

#### OLC opinions bind executive action and are perceived internationally

Harris 5 (George C., Professor of Law – University of the Pacific McGeorge School of Law, “The Professional Responsibilities of Executive Branch Lawyers in the Wake of 9/11,” Journal of National Security Law & Policy, 1 J. Nat'l Security L. & Pol'y 409, Lexis)

C. The Role of Government Lawyers in Formulating the Unlawful Enemy Combatant Doctrine

In the months following 9/11, the OLC responded to requests from the White House and the Department of Defense for interpretation of domestic and international law bearing on the detention and treatment of terrorism suspects. OLC lawyers surely understood not only the urgency and significance of those requests, but also the profound implications of the issues raised for international relations and the rule of law itself.

[\*428] If those lawyers consulted the professional canons at this historic moment, they found, as demonstrated above, somewhat varied and equivocal guidance. Even approaching their responsibilities in the narrowest possible way, however, as parallel to the duties of a private lawyer asked by an organizational client for guidance regarding the limits of legal conduct, certain guiding principles should have been uncontroversial.

As expressed in Model Rules 1.2 and 2.1, they were obligated: (1) to provide advice, not advocacy - an honest and objective assessment of the actual legal and other consequences likely to result from any proposed courses of conduct, including the risks associated with those courses of conduct; (2) not to confine themselves to technical legal advice, if broader moral and ethical considerations were relevant; and (3) not to counsel any criminal conduct or recommend any means by which a crime might be committed with impunity. Whether or not those lawyers had broader, constitutional duties in light of their high office and oath, as a simple matter of competence and diligence n89 they were obligated to consider: (1) relevant executive branch as well as judicial precedent, including any history of prior executive branch opinions on related topics; and (2) likely responses to any proposed course of conduct by other government officials or parties that would be of consequence to the client.

The OLC lawyers who authored the Opinion Memos were not, however, merely lawyers for a private organizational client. The Assistant Attorney General in charge of the OLC was himself a high government official, appointed by the President and confirmed by the Senate. He and all of his deputies had taken oaths to uphold the Constitution and laws of the United States. n90 In preparing opinion memos for the President and other executive branch officials, they were exercising authority, given to the Attorney General by Congress in the Judiciary Act of 1789 and delegated by the Attorney General to the OLC, to determine the legal boundaries of executive power and discretion under the Constitution and laws. They knew that their opinions would likely guide the conduct of the President and bind the rest of the executive branch.

As noted above, commentators with OLC experience have differed regarding if and when the OLC's role should be quasi-judicial rather than client-centered. Unlike many of the opinion requests routinely discharged by the OLC that are subject to immediate judicial testing through the adversary [\*429] process - such as, for example, the constitutionality and effect of proposed legislation or the soundness of the government's proposed litigation posture-OLC lawyers understood that the requests addressed by the post-9/11 Opinion Memos had immediate implications for executive action that would be reviewed, if ever, only after the implementation of executive policies with potentially far-reaching impact on domestic and international affairs. Indeed, the Opinion Memos opined that the President's determination of some of these matters would never be subject to judicial review. n91

In this context, the quasi-judicial model championed by former OLC chief Randolph Moss a year before the 9/11 attacks n92 seems particularly appropriate. Guardianship of the rule of law itself lay conspicuously in the OLC's in-box. Advising the President on whether he could unilaterally suspend or disregard treaty obligations or customary international law would be reckless on anything but the "best view" of the law arrived at after full consideration of relevant executive branch as well as judicial precedent.

#### The counterplan pre-commits to a DOJ process that effectively restrains the executive

**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.

#### Counterplan solves the case and sets a strong precedent – it is comparatively better than legislation and overcomes all agency and regime based solvency deficits

**Brecher 2012** – JD 2013, University of Michigan Law School (December, Aaron P., Michigan Law Review, “NOTE: Cyberattacks and the Covert Action Statute: Toward a Domestic Legal Framework for Offensive Cyberoperations”, 111 Mich. L. Rev. 423, Lexis)

III. Enacting the Covert Action Regime as Presumptive via Executive Order

Cyberattacks present a challenge for U.S. policymakers: they are difficult to locate within a clear legal category and there is a significant risk of uncontrollable consequences associated with their use. As a result, policymakers must choose a paradigm to govern their use that will ensure that the executive branch is held accountable and shares information with legislators.

This Part argues that the federal government should adopt the presumption that cyberattacks will be carried out under the covert action statute, and that the best way forward is for the president to issue an executive order making the covert action regime the presumptive framework for cyberattacks. It includes a brief discussion of why a president might willingly constrain her discretion by issuing the proposed executive order. It also shows that while the internal executive processes associated with both military and intelligence legal frameworks help mitigate the risk of cyberattacks' misuse by the executive, only the covert action regime provides an adequate role for Congress. Finally, this Part argues that the executive order option is preferable to one alternative proposed by scholars - enacting legislation - because of the practical difficulties of passing new legislation.

The covert action regime is the best approach for committing cyberattacks under the current law, as it would facilitate cooperation among executive agencies. The debate over which agency and set of legal authorities govern cyberattacks has caused no small amount of confusion. n145 Apparently, an Office of Legal Counsel ("OLC") memorandum declined to decide which legal regime should govern the use of cyberattacks, and the uncertainty has led to interagency squabbles, as well as confusion over how cyberattacks are to be regulated. n146 Establishing a presumptive answer would go far toward resolving this dispute.

Most importantly, adopting the covert action framework as the presumptive legal regime would be a principled way to help ensure constitutional legitimacy when the president orders a cyberattack. n147 There is also reason to believe that presidential power is intimately bound up in credibility, which in turn is largely dependent on the perception of presidential compliance with applicable domestic law. n148 A practice of complying with the covert action [\*448] regime for cyberattacks, both when they do not constitute a use of force and when it is unclear whether they do, is most likely to be in compliance with the law. Compliance with the covert action regime would also encourage covert action procedures in close cases without unduly restricting the executive's choice to use military authorities in appropriate circumstances.

The executive might also issue the proposed order, even though it would limit her freedom in some ways, because of the possible benefits of constraining future administrations or preempting legislative intervention. n149 For example, in this context, an administration may choose to follow the finding and reporting requirements in order to convince Congress that legislative intervention is unnecessary for proper oversight. This is acceptable if the covert action regime is in fact adequate on its own. Moreover, if greater statutory control over cyberattacks is needed, the information shared with Congress may give Congress the tools and knowledge of the issue necessary to craft related legislation. n150 Additionally, while executive orders are hardly binding, the inertia following adoption of an order may help constrain future administrations, which may be more or less trustworthy than the current one. Creating a presumption through an executive order also establishes a stable legal framework for cyberattacks that allows law to follow policy in this new field, and permits decisionmakers to learn more about the nature of cyberoperations before passing detailed statutes that may result in unintended consequences.

A presumption in favor of the title 50 regime for cyberattacks is also desirable because it comports with the reality of an executive constrained by its own internal processes. Though energy, dispatch, and secrecy are among the key advantages the executive possesses over Congress, n151 the existence of a professional bureaucratic corps, including many lawyers, within the executive branch can foster necessary deliberation about important policy decisions. n152 For issues on which there is disagreement among executive agencies, such as a potential turf war between the military and intelligence communities over control of cyberattacks, advisory and adjudicatory bodies such as the Office of Legal Counsel can play a constructive role. n153 Even on an issue such as the best legal regime to govern cyberattacks, which is essentially [\*449] a policy choice, the friction between different competing agencies itself can serve a checking function. n154

**Constraints through executive coordination solves signaling**

**POSNER & VERMEULE 2006** --- \*Prof of Law at U Chicago, AND \*\* Prof of Law at Harvard (9/19/2006, Eric A. Posner & Adrian Vermeule, “The Credible Executive,” <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=931501)>)

IV. Executive Signaling: Law and Mechanisms

We suggest that the executive’s credibility problem can be solved by second-order mechanisms of executive signaling. In the general case, well-motivated executives send credible signals by taking actions that are more costly for ill-motivated actors than for well-motivated ones, thus distinguishing themselves from their ill-motivated mimics. Among the specific mechanisms we discuss, an important subset involve executive self-binding, whereby executives commit themselves to a course of action that would impose higher costs on ill-motivated actors. Commitments themselves have value as signals of benign motivations.

This departs from the usual approach in legal scholarship. Legal theory has often discussed self-binding by “government” or government officials. In constitutional theory, it is often suggested that constitutions represent an attempt by “the people” to bind “themselves” against their own future decisionmaking pathologies, or relatedly that constitutional prohibitions represent mechanisms by which governments commit themselves not to expropriate investments or to exploit their populations.71 Whether or not this picture is coherent,72 it is not the question we examine here, although some of the relevant considerations are similar.73 We are not concerned with binding the president so that he cannot abuse his powers, but with how he might bind himself or take other actions that enhance his credibility, so that he can generate support from the public and other members of the government.

Furthermore, our question is subconstitutional; it is whether a well-motivated executive, acting within an established set of constitutional and statutory rules, can use signaling to generate public trust. Accordingly we proceed by assuming that no constitutional amendments or new statutes will be enacted. Within these constraints, what can a well-motivated executive do to bootstrap himself to credibility? The problem for the well-motivated executive is to credibly signal his benign motivations; in general, the solution is to engage in actions that are less costly for good types than for bad types.

We begin with some relevant law; then examine a set of possible mechanisms, emphasizing both the conditions under which they might succeed and the conditions under which they might not; and then examine the costs of credibility.

A. A Preliminary Note on Law and Self-Binding

Many of our mechanisms are unproblematic from a legal perspective, as they involve presidential actions that are clearly lawful. But a few raise legal questions; in particular, those that involve self-binding.74 Can a president bind himself to respect particular first-order policies? With qualifications, the answer is “yes, at least to the same extent that a legislature can.” Formally, a duly promulgated executive rule or order binds even the executive unless and until it is validly abrogated, thereby establishing a new legal status quo.75 The legal authority to establish a new status quo allows a president to create inertia or political constraints that will affect his own future choices. In a practical sense, presidents, like legislatures, have great de facto power to adopt policies that shape the legal landscape for the future**.** A president might commit himself to a long-term project of defense procurement or infrastructure or foreign policy, narrowing his own future choices and generating new political coalitions that will act to defend the new rules or policies.

More schematically, we may speak of formal and informal means of self-binding:

(1) The president might use formal means to bind himself. This is possible in the sense that an executive order, if otherwise valid, legally binds the president while it is in effect and may be enforced by the courts. It is not possible in the sense that the president can always repeal the executive order if he can bear the political and reputational costs of doing so.

(2) The president might use informal means to bind himself. This is not only possible but frequent and important. Issuing an executive rule providing for the appointment of special prosecutors, as Nixon did, is not a formal self-binding.76 However, there may be large political costs to repealing the order. This effect does not depend on the courts’ willingness to enforce the order, even against Nixon himself. Court enforcement makes the order legally binding while it is in place, but only political and reputational enforcement can protect it from repeal. Just as a dessert addict might announce to his friends that he is going on a no-dessert diet in order to raise the reputational costs of backsliding and thus commit himself, so too the repeal of an executive order may be seen as a breach of faith even if no other institution ever enforces it.

In what follows, we will invoke both formal and informal mechanisms. For our purposes, the distinction between the authority to engage in de jure self-binding (legally limited and well-defined) and the power to engage in de facto self-binding (broad and amorphous) is secondary. So long as policies are deliberately chosen with a view to generating credibility, and do so by constraining the president’s own future choices in ways that impose greater costs on ill-motivated presidents than on well-motivated ones, it does not matter whether the constraint is formal or informal.

B. Mechanisms

What signaling mechanisms might a well-motivated executive adopt to credibly assure voters, legislators and judges that his policies rest on judgments about the public interest, rather than on power-maximization, partisanship or other nefarious motives? Intrabranch separation of powers. In an interesting treatment of related problems, Neal Katyal suggests that the failure of the Madisonian system counsels “internal separation of powers” within the executive branch.77 Abdication by Congress means that there are few effective checks on executive power; second-best substitutes are necessary. Katyal proposes some mechanisms that would be adopted by Congress, such as oversight hearings by the minority party, but his most creative proposals are for arrangements internal to the executive branch, such as redundancy and competition among agencies, stronger civil-service protections and internal adjudication of executive controversies by insulated “executive” decisionmakers who resemble judges in many ways.78Katyal’s argument is relevant because the mechanisms he discusses might be understood as signaling devices, but his overall approach is conceptually flawed, on two grounds. First, the assumption that second-best constraints on the executive should reproduce the Madisonian separation of powers within the executive branch is never defended. The idea seems to be that this is as close as we can get to the first-best, while holding constant everything else in our constitutional order. But the general theory of second-best states that approaching as closely as possible to the first-best will not necessarily be the preferred strategy;79 the best approach may be to adjust matters on other margins as well, in potentially unpredictable ways. If the Madisonian system has failed in the ways Katyal suggests, the best compensating adjustment might be, for all we know, to switch to a parliamentary system. (We assume that no large-scale changes of this sort are possible, whereas Katyal seemingly assumes that they are, or at least does not make clear his assumptions in this regard). Overall, Katyal’s view has a kind of fractal quality – each branch should reproduce within itself the very same separation of powers structure that also describes the whole system – but it is not explained why the constitutional order should be fractal.

Second, Katyal’s proposals for internal separation of powers are self-defeating: the motivations that Katyal ascribes to the executive are inconsistent with the executive adopting or respecting the prescriptions Katyal recommends.80 Katyal never quite says so explicitly, but he clearly envisions the executive as a power-maximizing actor, in the sense that the president seeks to remove all constraints on his current choices.81 Such an executive would not adopt or enforce the internal separation of powers to check himself. Executive signaling is not, even in principle, a solution to the lack of constraints on a power-maximizing executive in the sense Katyal implicitly intends. Although an illmotivated executive might bind himself to enhance his strategic credibility, as explained above, he would not do so in order to restore the balance of powers. Nor is it possible, given Katyal’s premise of legislative passivity or abdication, that Congress would force the internal separation of powers on the executive. In what follows, we limit ourselves to proposals that are consistent with the motivations, beliefs, and political opportunities that we ascribe to the well-motivated executive, to whom the proposals are addressed. This limitation ensures that the proposals are not self-defeating, whatever their costs.

The contrast here must not be drawn too simply. A well-motivated executive, in our sense, might well attempt to increase his power. The very point of demonstrating credibility is to encourage voters and legislators to increase the discretionary authority of the executive, where all will be made better off by doing so. Scholars such as Katyal who implicitly distrust the executive, however, do not subscribe to this picture of executive motivations. Rather, they see the executive as an unfaithful agent of the voters; the executive attempts to maximize his power even where fully-informed voters would prefer otherwise. An actor of that sort will have no incentive to adopt proposals intended to constrain that sort of actor.

Independent commissions. We now turn to some conceptually coherent mechanisms of executive signaling. Somewhat analogously to Katyal’s idea of the internal separation of powers, a well-motivated executive might establish independent commissions to review policy decisions, either before or after the fact. Presidents do this routinely, especially after a policy has had disastrous outcomes, but sometimes beforehand as well. Independent commissions are typically blue-ribbon and bipartisan.82

We add to this familiar process the idea that the President might gain credibility by publicly committing or binding himself to give the commission authority on some dimension. The president might publicly promise to follow the recommendations of such a commission, or to allow the commission to exercise de facto veto power over a policy decision before it is made, or might promise before the policy is chosen that the commission will be given power to review its success after the fact. To be sure, there will always be some wiggle room in the terms of the promise, but that is true of almost all commitments, which raise the costs of wiggling out even if they do not completely prevent it.

Consider whether George W. Bush’s credibility would have been enhanced had he appointed a blue-ribbon commission to examine the evidence for weapons of mass destruction in Iraq before the 2003 invasion, and publicly promised not to invade unless the commission found substantial evidence of their existence. Bush would have retained his preexisting legal authority to order the invasion even if the commission found the evidence inadequate, but the political costs of doing so would have been large. Knowing this, and knowing that Bush shared that knowledge, the public could have inferred that Bush’s professed motive – elimination of weapons of mass destruction – was also his real motive. Public promises that inflict reputational costs on badly motivated behavior help the well-motivated executive to credibly distinguish himself from the ill-motivated one.

The more common version of this tactic is to appoint commissions after the relevant event, as George W. Bush did to investigate the faulty reports by intelligence agencies that Iraq possessed weapons of mass destruction.83 If the president appoints after-the-fact commissions, the commissions can enhance his credibility for the next event—by showing that he will be willing, after that event, to subject his statements to scrutiny by public experts. Here, however, the demonstration of credibility is weaker, because there is no commitment to appoint any after-the-fact commissions in the future – merely a plausible inference that the president’s future behavior will track his past behavior.

Bipartisan appointments. In examples of the sort just mentioned, the signaling arises from public position-taking. The well-motivated executive might produce similar effects through appointments to office.84 A number of statutes require partisan balance on multimember commissions; although these statutes are outside the scope of our discussion, we note that presidents might approve them because they allow the president to commit to a policy that legislators favor, thus encouraging legislators to increase the scope of the delegation in the first place.85 For similar reasons, presidents may consent to restrictions on the removal of agency officials, because the restriction enables the president to commit to giving the agency some autonomy from the president’s preferences.86

Similar mechanisms can work even where no statutes are in the picture. As previously mentioned, during World War II, FDR appointed Republicans to important cabinet positions, making Stimson his Secretary of War. Clinton appointed William Cohen, a moderate Republican, as Secretary of Defense in order to shore up his credibility on security issues. Bipartisanship of this sort might improve the deliberation that precedes decisions, by impeding various forms of herding, cascades and groupthink;87 however, we focus on its credibility-generating effects. By (1) expanding the circle of those who share the president’s privileged access to information, (2) ensuring that policy is partly controlled by officials with preferences that differ from the president’s, and (3) inviting a potential whistleblower into the tent, bipartisanship helps to dispel the suspicion that policy decisions rest on partisan motives or extreme preferences, which in turn encourages broader delegations of discretion from the public and Congress.

A commitment to bipartisanship is only one way in which appointments can generate credibility. Presidents might simply appoint a person with a reputation for integrity, as when President Nixon appointed Archibald Cox as special prosecutor (although plausibly Nixon did so because he was forced to do so by political constraints, rather than as a tactic for generating credibility). A person with well-known preferences on a particular issue, even if not of the other party or widely respected for impartiality, can serve as a credible whistleblower on that issue. Thus presidents routinely award cabinet posts to leaders of subsets of the president’s own party, leaders whose preferences are known to diverge from the president’s on the subject; one point of this is to credibly assure the relevant interest groups that the president will not deviate (too far) from their preferences.

The Independent Counsel Statute institutionalized the special prosecutor and strengthened it. But the statute proved unpopular and was allowed to lapse in 1999.88 This experience raises two interesting questions. First, why have presidents confined themselves to appointing lawyers to investigate allegations of wrongdoing; why have they not appointed, say, independent policy experts to investigate allegations of policy failure? Second, why did the Independent Counsel Statute fail? Briefly, the statute failed because it was too difficult to control the behavior of the prosecutor, who was not given any incentive to keep his investigation within reasonable bounds.89 Not surprisingly, policy investigators would be even less constrained since they would not be confined by the law, and at the same time, without legal powers they would probably be ignored on partisan grounds. A commission composed of members with diverse viewpoints is harder to ignore, if the members agree with each other.

More generally, the decision by presidents to bring into their administrations members of other parties, or persons with a reputation for bipartisanship and integrity, illustrates the formation of domestic coalitions of the willing. Presidents can informally bargain around the formal separation of powers90 by employing subsets of Congress, or of the opposing party, to generate credibility while maintaining a measure of institutional control. FDR was willing to appoint Knox and Stimson, but not to give the Republicans in Congress a veto. Truman was willing to ally with Arthur Vandenbergh but not with all the Republicans; Clinton was willing to appoint William Cohen but not Newt Gingrich. George W. Bush likewise made a gesture towards credibility by briefing members of the Senate Intelligence Committee – including Democrats – on the administration’s secret surveillance program(s), which provided a useful talking point when the existence of the program(s) was revealed to the public.

Counter-partisanship. Related to bipartisanship is what might be called counterpartisanship: presidents have greater credibility when they choose policies that cut against the grain of their party’s platform or their own presumed preferences.91 Only Nixon could go to China, and only Clinton could engineer welfare reform. Voters and publics rationally employ a political heuristic: the relevant policy, which voters are incapable of directly assessing, must be highly beneficial if it is chosen by a president who is predisposed against it by convictions or partisan loyalty.92 Accordingly, those who wish to move U.S. terrorism policy towards greater security and less liberty might do well to support the election of a Democrat.93 By the same logic, George W. Bush is widely suspected of nefarious motives when he rounds up alleged enemy combatants, but not when he creates a massive prescription drug benefit.

Counter-partisanship can powerfully enhance the president’s credibility, but it depends heavily on a lucky alignment of political stars. A peace-loving president has credibility when he declares a military emergency but not when he appeases; a belligerent president has credibility when he offers peace but not when he advocates military solutions. A lucky nation has a well-motivated president with a belligerent reputation when international tensions diminish (Ronald Reagan) and a president with a pacific reputation when they grow (Abraham Lincoln, who opposed the Mexican War). But a nation is not always lucky.

Transparency. The well-motivated executive might commit to transparency, as a way to reduce the costs to outsiders of monitoring his actions.94 The FDR strategy of inviting potential whistleblowers from the opposite party into government is a special case of this; the implicit threat is that the whistleblower will make public any evidence of partisan motivations. The more ambitious case involves actually exposing the executive’s decisionmaking processes to observation. To the extent that an ill-motivated executive cannot publicly acknowledge his motivations or publicly instruct subordinates to take them into account in decisionmaking, transparency will exclude those motivations from the decisionmaking process. The public will know that only a well-motivated executive would promise transparency in the first place, and the public can therefore draw an inference to credibility.

Credibility is especially enhanced when transparency is effected through journalists with reputations for integrity or with political preferences opposite to those of the president. Thus George W. Bush gave Bob Woodward unprecedented access to White House decisionmaking, and perhaps even to classified intelligence,95 with the expectation that the material would be published. This sort of disclosure to journalists is not real-time transparency – no one expects meetings of the National Security Council to appear on CSPAN – but the anticipation of future disclosure can have a disciplining effect in the present. By inviting this disciplining effect, the administration engages in signaling in the present through (the threat of) future transparency.

There are complex tradeoffs here, because transparency can have a range of harmful effects. As far as process is concerned, decisionmakers under public scrutiny may posture for the audience, may freeze their views or positions prematurely, and may hesitate to offer proposals or reasons for which they can later be blamed if things go wrong.96 As for substance, transparency can frustrate the achievement of programmatic or policy goals themselves. Where security policy is at stake, secrecy is sometimes necessary to surprise enemies or to keep them guessing. Finally, one must take account of the incentives of the actors who expose the facts—especially journalists who might reward presidents who give them access by portraying their decisionmaking in a favorable light.97

We will take up the costs of credibility shortly.98 In general, however, the existence of costs does not mean that the credibility-generating mechanisms are useless. Quite the contrary: where the executive uses such mechanisms, voters and legislators can draw an inference that the executive is well-motivated, precisely because the existence of costs would have given an ill-motivated executive an excuse not to use those mechanisms.

#### No accidental launch

Williscroft ‘10 (Six patrols on the *John Marshall* as a Sonar Technician, and four on the *Von Steuben* as an officer – a total of twenty-two submerged months. Navigator and Ops Officer on *Ortolan* & *Pigeon* – Submarine Rescue & Saturation Diving ships. Watch and Diving Officer on *Oceanographer* and *Surveyor*. “Accidental Nuclear War” http://www.argee.net/Thrawn%20Rickle/Thrawn%20Rickle%2032.htm, 2010)

Is there a realistic chance that we could have a nuclear war by accident? Could a ballistic submarine commander launch his missiles without specific presidential authorization? Could a few men conspire and successfully bypass built-in safety systems to launch nuclear weapons? The key word here is “realistic.” In the strictest sense, yes, these things are possible. But are they realistically possible? This question can best be answered by examining two interrelated questions. Is there a way to launch a nuclear weapon by accident? Can a specific accidental series of events take place—no matter how remote—that will result in the inevitable launch or detonation of a nuclear weapon? Can one individual working by himself or several individuals working in collusion bring about the deliberate launch or detonation of a nuclear weapon? We are protected from accidental launching of nuclear weapons by mechanical safeguards, and by carefully structured and controlled mandatory procedures that are always employed when working around nuclear weapons. Launching a nuclear weapon takes the specific simultaneous action of several designated individuals. System designers ensured that conditions necessary for a launch could not happen accidentally. For example, to launch a missile from a ballistic missile submarine, two individuals must insert keys into separate slots on separate decks within a few seconds of each other. Barring this, the system cannot physically launch a missile. There are additional safeguards built into the system that control computer hardware and software, and personnel controls that we will discuss later, but—in the final analysis—without the keys inserted as described, there can be no launch—it’s not physically possible. Because the time window for key insertion is less than that required for one individual to accomplish, it is physically impossible for a missile to be launched accidentally by one individual. Any launch must be deliberate. One can postulate a scenario wherein a technician bypasses these safeguards in order to effect a launch by himself. Technically, this is possible, but such a launch would be deliberate, not accidental. We will examine measures designed to prevent this in a later column. Maintenance procedures on nuclear weapons are very tightly controlled. In effect always is the “two-man rule.” This rule prohibits any individual from accessing nuclear weapons or their launch vehicles alone. Aside from obvious qualification requirements, two individuals must be present. No matter how familiar the two technicians may be with a specific system, each step in a maintenance procedure is first read by one technician, repeated by the second, acknowledged by the first (or corrected, if necessary), performed by the second, examined by the first, checked off by the first, and acknowledged by the second. This makes maintenance slow, but absolutely assures that no errors happen. Exactly the same procedure is followed every time an access cover is removed, a screw is turned, a weapon is moved, or a controlling publication is updated. Nothing, absolutely nothing is done without following the written guides exactly, always under two-man control. This even applies to guards. Where nuclear weapons are concerned, a minimum of two guards—always fully in sight of each other—stand duty. There is no realistic scenario wherein a nuclear missile can be accidentally launched...ever...under any circumstances...period!

#### No risk of China offensive cyber operation - globalization means it not in their self-interest

Chou 2/8/11 (Ella, Graduate Student in Regional Studies at Harvard Law, "US-China Cyber War Scenario in the Eyes of a Chinese Student" The Atlantic)

In this equation, intent ranges from zero to 100% (100% meaning the country is willing to devote all capability to one mission). Even if China's capability in the cyber arena is increasing, it does not make it a threat to U.S. national security if China does not have the intent to use that capability in an attack against the United States. It would hardly be surprising to learn that China, like all countries with such capabilities, is engaged in cyber espionage. But real or threatened attacks against either U.S. military or the civilian infrastructure would not be in China's interests for a variety of reasons: the negative effects on trade which would have a direct impact on its volatile migrant labor population, the international backlash that would destroy its hard-earned position in the international organizations in which it has strong interests, not to mention the danger of confronting the full weight of U.S. military.

#### Interdependence checks cyber war with China

Austin and Gady 2012(Greg, professorial fellow at the EastWest Institute and senior visiting fellow in the department of War Studies at King’s College London, and Franz-Stefan, associate and foreign policy analyst at the EastWest Institute, "Cyber Detente Between the united States and China: Shaping the Agenda", http://www.ewi.info/system/files/detente.pdf)

That said, the two countries’ economies, though very different in many respects, are each highly dependent on a global Internet and shared communications platforms and hardware. While the Chinese economy is not as dependent on the Internet as the U.S., economy is, the difference between the two is fast shrinking. China’s export-driven economy and its trade in financial services make it as vulnerable to cyber attack as the United States. This interdependence—despite occasional outbursts of confrontational rhetoric coming from both Beijing and Washington— can be leveraged to promote stability in bilateral relations. In fact, this is already happening. We can think of this interdependency as a bal-ance of cyber power. If one accepts that both governments make rational calculations, than this new interconnectedness can be exploited to make conflict less likely. In today’s interconnected, digitalized world, the “opportunity cost” associated with embarking on a confrontational course will deter both parties from engaging in open hostile actions. This of course does not preclude cyber espionage, intellectual property theft, or even what some analysts have called the “long game,” i.e. the slow and gradual infiltration of strategically significant economic ICT systems by hackers on both sides.

#### .No impact – even if the worst case scenario we would survive Chinese attacks and win the war – we would regulate our satellites and use other assets for information

Forden 8 (Geoffrey, MIT research associate, his research includes the analysis of Russian and Chinese space systems, previously a strategic weapons analyst in the National Security Division of the Congressional Budget Office, January 10, 2008, “How China Loses the Coming Space War (Pt. 1),” http://www.wired.com/dangerroom/2008/01/inside-the-chin/#more)

Since China doesn’t have enough deep-space ASATs to stop communications — or even prevent GPS being used during most hours of the day — Beijing might not even attempt to attack those targets. Which means the United States wouldn’t have much of warning, to prepare for the onslaught. In that case, it is almost certain that China could destroy a number of surveillance and signals intelligence satellites in low Earth orbit before the US could take action. If we assume that the US chain of command takes an hour, due to bureaucratic inertia, to react, China could destroy a total of nine such satellites before the US responds in the specific case examined here. This includes two out of the three functioning Keyhole high resolution photo-reconnaissance satellites, one of the three Lacrosse signals intelligence satellites in orbit, and six of the 15 NOSS satellites that the Navy uses to locate enemy ships at sea. This represents billions of dollars lost and, more important, a large fraction of the US space assets in low Earth orbit that could have been used in the subsequent conflict. At that point, however, the United States could effectively stop China’s attack simply by changing the remaining satellites’ orbital speeds by as little as 200 mph (they are typically moving at over 16,500 mph). This very small change will have a large effect in the position of the satellite the next time it crosses over China; effectively putting the satellite out of range of the pre-positioned ASAT launcher. This is not an excessive change in speed and, unless the satellite is very close to the end of its operational life, is well within the capability of its onboard fuel supply. Furthermore, it does not have to change its speed very rapidly the way a deep-space satellite would have to in order to avoid collision in its final moments. Instead, this relatively small velocity change has tens of minutes or even hours to change the position of the satellite before the next time it crosses over China. During this time, it is steadily moving away from its original position so that it could be hundreds of miles from where China thought it was going to be. While it is possible that the pre-positioned ASAT missiles could still reach their target even after it had changed, they would not know where, exactly, to aim the missile. Instead, they would have to perform a radar search for the satellite in an ever expanding volume of space. This volume quickly becomes too large for even the most powerful of mobile radars. In fact, it would take a fairly large (perhaps 50 feet in diameter) to detect the satellite during its next pass and China does not have a lot of those radars. So most, if not all, of the satellites remaining after the first hour would be safe for the next 24. During that time, the United States could try to destroy all of China’s fixed radars that are capable of tracking the satellites in their new orbits. (In other words, it does not matter how many additional ASATs China has to shoot at low Earth orbit satellites; a very different circumstance than the deep-space ASATs.) This might, however, prove difficult; especially those facilities in the center of China that are out of reach of Tomahawk cruise missiles. Currently, only B-2 bombers could reach those sites with any chance of success and timing might prove difficult if they need to transit other countries during night time. A Global Strike capability, such as a conventionally armed Trident missile, might ease this task. Of course, even if all the radars are destroyed, China could still use optical telescopes to determine the new positions of the satellites but these methods are too slow to be used for aiming the ASAT missiles. And even then, China would have to spend days repositioning its mobile ASAT launchers, a task that would probably take several days and would extend the time the US could use for hunting down and destroying Chinese assets. The short-term military consequences of an all attack by China on US space assets are limited, at most. Even under the worst-case scenario, China could only reduce the use of precision-guided munitions or satellite communications into and out of the theater of operations. They would not be stopped. China could destroy a large fraction of strategic intelligence gathering capabilities; but not all of it. With a greater than normal expenditure of fuel, the remaining US spy satellites could continue to survive their crosses over China and photograph Chinese troop movements, harbors, and strategic forces but, of course, at a reduced rate. The war would, however, quickly move into a tactical phase where the US gathers most of its operational photographs using airplanes, instead of satellites. US ships and unmanned vehicles might, theoretically, have difficulty coordinating, during certain hours of the day. Most of the time, they would be free to function normally. China’s space strike would fail to achieve its war aims even if the United States failed to respond in any way other than moving its low Earth orbit satellites. When it warned of a space Pearl Harbor, the Rumsfeld space commission was afraid that a lesser power could launch a surprise attack that would wipe out key US strategic assets and render the US impotent. This is what Japan tried, but failed, to do at the start of World War II. And much like Japan’s failure to destroy the US carrier fleet, a Chinese attack on US satellites would fail to cripple our military, China’s strategic goal in launching a space war.

#### Deterrence by denial fails – adversaries will attack even if success chances are small because the pay-off is large

Morgan, 10 - defense policy researcher working in RAND Corporation's Pittsburgh Office. Prior to joining RAND in January 2003, Dr. Morgan served a 27-year career in the U.S. Air Force (Forrest, “Deterrence and First-Strike Stability in Space,” http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA522541&Location=U2&doc=GetTRDoc.pdf

The Difficulties of Denial-Based Deterrence in Space

Efforts to deter would-be aggressors by persuading them that the United States can deny them the benefits of attacking its space capa bilities also face serious challenges. While the United States should always emphasize the resilience of its space systems in order to discourage potential adversaries from attacking them, several factors may make this difficult. First, it is necessary to assume that potential adversaries are well aware that the transformational capabilities that give U.S. military forces their qualitative advantage are significantly enhanced by space support.

MARKED at support

#### Zero probability of meltdown attacks

Hargreaves ‘9 (Steve Hargreaves, CNNMoney.com staff writer,The threat of nuclear meltdown, <http://money.cnn.com/2009/11/12/news/economy/nuclear_security/index.htm>, November 12, 2009)

This is only a drill, but the threat they're preparing for is very real. It's one of the worst disaster scenarios imaginable: Terrorists infiltrate a nuclear power plant and cause a meltdown. The government and the industry say that with all the security measures in place, the chance of that happening is practically zero.

#### No risk of attacks – newest evidence

NEI ’12 (Nuclear Energy Institute, “Myths & Facts About Safety”, http://www.nei.org/newsandevents/nei-backgrounders/myths--facts-about-nuclear-energy/myths--facts-about-safety, January 2012)

Myth: Nuclear power plants are likely targets for terrorism. Fact: With protective measures similar to high-security military installations, U.S. nuclear plants are among the most highly protected facilities in the nation’s industrial infrastructure. It is because of their fortifications and multiple layers of security that nuclear plants present a strong deterrent to potential threats. Myth: A nuclear power plant cannot withstand a terrorist attack. Fact: With protective measures similar to high-security military installations, U.S. nuclear plants are among the most highly protected facilities in the nation’s industrial infrastructure. Nuclear power plants are protected 24/7 by professional security personnel armed with automatic weapons prepared to repel ground and airborne terrorist attacks. It is because of their fortifications and multiple layers of security that nuclear plants are far less likely to be targets of terrorism than the thousands of far more vulnerable potential targets across the nation. Anti-terrorism measures are regularly tested and closely coordinated with local, state and federal authorities. Myth: A nuclear power plant cannot withstand the impact of a jetliner. Fact: Following the terrorist attacks of Sept. 11, 2001, sophisticated computer modeling by some of the world’s leading structural engineers showed that nuclear power facilities that contain radioactive material can withstand a jetliner impact without releasing radiation. Likewise, all new nuclear power plants are required to withstand the direct impact of a fully fueled commercial jetliner. Myth: Nuclear plants are vulnerable to cyber attacks. Fact: There has never been a successful cyber attack at any U.S. nuclear plant. Unlike industries for which two-way data flow is critical (e.g. banking), nuclear power plants do not require incoming data flow.None of a plant’s safety and control systems are connected to the Internet. Any additional computers utilized in a nuclear plants are strictly controlled with their content, use and possession monitored by security personnel. Nuclear plants are protected from grid instability and are able to safely shut down in a variety of ways without computer controls under any condition including a total loss of off-site power.

## 1NR

## Warfighting DA

### AT Link not cyber

#### The plan causes turf wars --- makes conflict more likely

DYCUS 2010 - Professor, Vermont Law School (Stephen Dycus, Sep 29, 2010, “Congress’s Role in Cyber Warfare”, <http://jnslp.com/wp-content/uploads/2010/08/11_Dycus.pdf>)

The strategic, technological, and political problems described here present challenges of unprecedented complexity. The risks of error both in the *formulation* of a cyber warfare policy and in its *execution* are substantial. And despite the importance of developing a coherent, coordinated response to this threat, it seems unlikely that we will find a way to overcome entirely the endless turf battles among federal agencies and congressional committees.8

#### DA comes faster than the aff solves --- the plan collapses perceptions of deterrence which makes attack on the US more likely --- also prevents new categories of responses

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](http://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.

### AT Link turn

#### Squo solves the aff but the aff links to the DA --- US already follows international law on cyber but limiting flexibility increases likelihood of war

BRADBURY 2011 - attorney at the Washington, D.C office of Dechert LLP; head of the Office of Legal Counsel (Steven G. Bradbury, “The Developing Legal Framework for Defensive and Offensive Cyber Operations”, Harvard National Security Journal, http://harvardnsj.org/wp-content/uploads/2011/02/Vol.-2\_Bradbury\_Final1.pdf)

Traditional military activities. So what is meant by “ traditional military activities ” and how do we apply it in classifying offensive cyber operations? Note that it's not the case that an operation must be treated as covert action just because the role of the United States is intended to be secret. That's true of lots of military and counterintelligence missions as well. Think of special ops, military deception operations, or clandestine oper a- tions to prepare the environment for potential future military action. 10 And another thing: “ traditional ” can't refer to the technology being used. The military is a l- ways at the cutting edge in developing new war fighting technologies, and information systems and computer network operations are integral parts of war in the 21st century. One possibility is to define “ traditional military activities ” by reference to the laws and customs of war. The laws of war impose a number of very important limitations on when and how military force is to be used. These include, for example, the basic principles of non-aggression and self-defense e n- shrined in the United Nations Charter; the humanitarian protections and restrictions on warfare embodied in the War Crimes Act, the Geneva Conventions, and related treaties and principles of customary international law; and the laws and treaty provisions prohibiting the use of certain types of weapons, such as chemical and biological weapons. Some of the fundamental rules of war include the principle of military necessity (that an appropriate target is one that will confer a definite military advantage), the requirement to disti n- guish military forces from civilian populations, the prohibition on targeting civilians and civilian objects, the principle of proportionality of response, the imperative to minimiz e collateral da m- age, the ban on perfidy, and the principle of neutrality. One thing that distinguishes the United States from lots of other nations is the care we take to honor our international commitments. In carrying out military missions, for ex ample, DoD is scrupulous about always trying to comply with the laws and customs of war. You may be su rprised to learn that it's quite often the norm these days for combatant commanders to make si g- nificant targeting decisions on the battlefield with the re al - time input of JAG lawyers. Military operations occur within the title 10 chain of command, which means that they're conducted pursuant to “ execute orders ” from the President through the SecDef down to the combatant commanders. Execute orders usually define the general scope and purpose of the oper a- tion, and the details are filled in with operational plans and specific rules of engagement. It's fair to assume that by the time the President signs an execute order for a particular military operation, DoD has satisfied itself that the operation can be conducted in accordance with the laws of war. So, in my view, a good, practical way to think about “ traditional military activities, ” for purposes of distinguishing them from covert action, is that they can include any operation the Pres i- dent chooses to order the military to carry out under title 10 authorities, provided it's consistent with the accepted norms of war. This approach preserves critical flexibility for the President in deciding when and how to employ the military might of the United States to meet a national security threat that justifies our use of force. It should be recognized that in the context of our armed conflict with the Taliban and inte r- national terrorist o r ganiz ations like al Qaeda, there will be a range of missions, including in the realm of cyber operations, where the President can decide to use either the military option or the \*607 covert action option, or both. They are two instruments of national policy ava ilable to the President, and they need not be mutually exclusive. The fact that the administration is standing up a unified Cyber Command and putting such focus and resources into it suggests that the President has largely decided to conduct offensive cyber operations through the military option. Evolving customary law. This approach also accommodates the reality that how the U.S. chooses to use its armed forces will significantly influence the development of customary inte r- national law. As the label implies, customary law can evolve depending on the accepted conduct of major nations like the United States. The real-world practice of the United States in adapting the use of its military to the new challenges raised by computer warfare will (and should) help clarify the accepted customs of war in areas where the limits are not clearly established today.

And if you just review the literature on cyber war, you quickly see that that's where we are: precisely how the laws and customs of war should apply to offensive cyber operations is not yet crystallized in key respects. For example, there aren't always bright lines to tell us when a cyber attack on computer systems constitutes an “ armed attack ” or a “ use of force ” that justifies a nation in launching a responsive military strike under Article 51 of the U.N. Charter. Some questions are easy: Hacking into a sensitive government computer system to steal information is an act of espionage, not an armed attack. It's clearly not prohibited by the laws and customs of war. On the other hand, if the cyber intrusion inflicts significant physical destruction or loss of life by causing the failure of critical infrastructure, like a dam or water supply system, then it obviously would constitute an armed attack under the law of war and would justify a full military response if it could be attributed to a foreign power. Where committed as an offensive act of aggression, such an attack may violate international law. If significant enough, the effect of the attack will determine its treatment, not nece s sarily whether the attack is delivered through computer lines as opposed to conventional weapons sy s- tems. In these cases, the laws and customs of war provide a cle ar rule to apply. But there will be gray areas in the middle. Thus, it's far less clear that a computer assault that's limited to deleting or corrupting data or temporarily disabling or disrupting a computer network or some specific equipment associ ated with the network in a way that's not life threate n- ing or widely destructive should be considered a use of force justifying military retaliation, even if the network belongs to the military or another government agency. This was the case with th e “ distributed denial of service ” attacks experienced by Estonia in 2007, which severely disrupted the country's banking and communications systems. Suspecting that Russia was behind it, Estonia suggested that NATO declare that Estonia's sovereignty had be en attacked, which would have triggered the collective self - defense article of the NATO Tre a- ty, but that suggestion was rebuffed on the ground that a cyber attack is not a clear military a c- tion. [FN12] 12 There's an echo of that reasoning in Article 41 of the U.N. Charter, which says that a “ co m- plete or partial inte r rupti on of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communications ” is not a “ measure ... involving armed force. ” And what about Stuxnet? As I understand it from public reports, Stuxnet was a computer worm that found its way into the systems controlling Iran's nuclear program and gave faulty commands causing the destruction of the centrifuges used for enriching uranium. Suppose Pres i- dent Ahmadinejad claimed that Israel was behind the Stuxnet worm and claimed that Stuxnet constituted an armed attack on Iran that justified a military response against Israel. I suspect the United States would disagree. At the same time, when it comes to a cyber attack directed against U.S. computer systems, I certainly want the President to have leeway in determining whether or not to treat the attack as a use of force that supports military retaliation. Making such judgments is a traditional power exercised by the President, and I think he retains that leeway. Similarly, I submit, it's not clearly established that a cyber attack aimed at disrupting a ser v- er or Web site located in a neutral country or in a country outside a theater of open hostilities would be a violation of that country's ne u trality. The serv er might be a valid military target because it's being used for the communications or command and co n trol of the enemy fighters in the area of hostilities (after all, al Qaeda regularly uses the Internet in planning and o r dering operations). The server mig ht have no connection to the host country's military, government, or critical infr a structure, and it might be readily targeted for a computer attack without inflicting widespread damage on unrelated systems used for civi l- ian purposes. Such a focused cyber operation -- with little physical impact beyond the destruction of data or the crippling of a server -- is very different from the kind of physical violation of territory -- such as a conventional troop incursion or a kinetic bombing raid -- that we ordinarily think of as constituting an affront to neutrality. [FN13] Although every s erver has a physical location, the Internet is not segmented along national borders, and the e n emy may gain greater tactical advantage from a server hosted half way around the world than from one located right in the middle of hostilities. The targe ting of a server in a third country may well raise significant diplomatic difficulties (and I wouldn't minimize those), but I don't think the law-of-war principle of neutrality categorically precludes the President from authorizing such an operation by an execute order to Cyber Command.

#### Perception of the micromanagement by the plan causes military backlash

**Ruffaa et al ’13** [Chiara Ruffaa, Department of Peace and Conﬂict Research, Uppsala University, Christopher Dandekerb, Department of Peace and Conﬂict Research, Uppsala University, Pascal Vennessonc, S. Rajaratnam School of International Studies (RSIS), Nanyang Technological University, “Soldiers drawn into politics? The inﬂuence of tactics in civil –military relations,” June, Small Wars & Insurgencies, Vol. 24, No. 2, 322–334, <http://www.kcl.ac.uk/kcmhr/publications/assetfiles/other/Ruffa2013politics.pdf>]

Actions in the theater of operation may have consequences for civil–military¶ relations back home. Furthermore, the desired objectives to be achieved have¶ shifted. Recent literature has agreed on ‘a shift away from the idea of the pursuit¶ of victory to that of success’ speciﬁcally at ‘establishing security condition’.16¶ Another feature of contemporary operations is the ‘process of dispersion of¶ military authority to lower levels of the command chain’.17 The dispersion of¶ military authority combines coercive and hierarchical elements typical of a¶ military organization with ‘group consensus’ and persuasive forms of authority¶ and it has led to the emergence of different leadership styles.18While sometimes¶ combined with micromanagement, this dispersion has led to greater autonomy for¶ soldiers in the ﬁeld and to a reduced control. Military operations have traditionally¶ been exceptional environments but in contemporary missions decisions often¶ have to be taken without orders.19 To be sure, communication technology has¶ encouraged both decentralization and centralization. Still, it is only a technology¶ and much depends on culture and organization of the user. This becomes¶ particularly difﬁcult to control when soldiers have wider margins of maneuver.¶ These interventions, Afghanistan and Iraq in particular, are ‘wars of contested¶ choice’, meaning that notwithstanding their differences they are not of existential¶ necessity.20 To complicate things further, politicians get involved while the¶ operation is ongoing; they **sometimes change the political objectives during the mission** or they have a moral and politically unrealistic view of the political¶ objectives to be achieved. This is the result of a combination of two constituent¶ elements, of what has been called the ‘dialectic of control’: dispersion and¶ micromanagement.21 Dispersion occurs when the military authority is dispersed¶ across levels of command; while micromanagement refers to a growing tendency¶ of centralizing control.22 Dispersion and micromanagement lead to a¶ compression of the three levels of war, namely strategic, operational, and¶ tactical.23 While these two elements may seem at odds with each other, they are¶ in fact connected. Micromanagement matters as much as dispersion. The tensions¶ between micromanagement – which refers to a centralized control and a topdown process – and diffusion lead to inconsistencies between orders given from¶ the top (without in-depth knowledge of the context) and diffusion of the level of¶ command. While potentially effective for operational activities, micromanagement risks being potentially frustrating when soldiers have to carry out activities¶ that range from humanitarian tasks to building bridges because they need to¶ assess on the ground where this is needed. Thus communications technologies are¶ double edged: (a) technology allows for either dispersion with local actors being¶ able to use a common picture with others to make local decisions that nonetheless¶ conform to the strategic principles set down by higher authority, or (b) they allow¶ senior ofﬁcers to micromanage as they think they know best because they can see¶ the detail that the lower levels can not. The key point here is that which direction¶ is taken – (a) or (b) – depends on factors such as the command culture of the military organization; the personality and orientation of senior ofﬁcers; and the¶ political nervousness/sensitivity/choices of ministers worried or not about what is¶ going on ‘down there’ and the consequences for the mission, their reputation, and¶ that of the government of which they are a part. These elements taken together¶ have created a set of conditions that have changed soldiers’ role in operations and¶ have made the tactical level more relevant and altered the ways in which they¶ connect to politicians and the political process.

#### That triggers the DA and there’s an independent nuclear war impact

COHEN 1997 [Eliot, PhD from Harvard in political science, Professor of Strategic Studies at the Paul H. Nitze School of Advanced International Studies (SAIS) at the Johns Hopkins University, Director of the Strategic Studies Program at SAIS, served as Counselor to the United States Department of State under Secretary Condoleezza Rice from 2007 to 2009, http://www.fpri.org/americavulnerable/06.CivilMilitaryRelations.Cohen.pdf]

Left uncorrected, the trends in American civil-military relations could breed certain pathologies. The most serious possibility is that of a dramatic civil-military split during a crisis involving the use of force. In the recent past, such tensions did not result in open division. For example, Franklin Roosevelt insisted that the United States invade North Africa in 1942, though the chiefs of both the army and the navy vigorously opposed such a course, favoring instead a buildup in England and an invasion of the continent in 1943. Back then it was inconceivable that a senior military officer would leak word of such a split to the media, where it would have reverberated loudly and destructively. To be sure, from time to time individual officers broke the vow of professional silence to protest a course of action, but in these isolated cases the officers paid the accepted price of termination of their careers. In the modern environment, such cases might no longer be isolated. Thus, presidents might try to shape U.S. strategy so that it complies with military opinion, and rarely in the annals of statecraft has military opinion alone been an adequate guide to sound foreign policy choices. Had Lincoln followed the advice of his senior military advisers there is a good chance that the Union would have fallen. Had Roosevelt deferred to General George C. Marshall and Admiral Ernest J. King there might well have been a gory debacle on the shores of France in 1943. Had Harry S. Truman heeded the advice of his theater commander in the Far East (and it should be remembered that the Joint Chiefs generally counseled support of the man on the spot) there might have been a third world war. Throughout much of its history, the U.S. military was remarkably politicized by contemporary standards. One commander of the army, Winfield Scott, even ran for president while in uniform, and others (Leonard Wood, for example) have made no secret of their political views and aspirations. But until 1940, and with the exception of periods of outright warfare, the military was a negligible force in American life, and America was not a central force in international politics. That has changed. Despite the near halving of the defense budget from its high in the 1980s, it remains a significant portion of the federal budget, and the military continues to employ millions of Americans. More important, civil-military relations in the United States now no longer affect merely the closet-room politics of Washington, but the relations of countries around the world. American choices about the use of force, the shrewdness of American strategy, the soundness of American tactics, and the will of American leaders have global consequences. What might have been petty squabbles in bygone years are now magnified into quarrels of a far larger scale, and conceivably with far more grievous consequences. To ignore the problem would neglect one of the cardinal purposes of the federal government: “to provide for the common defense” in a world in which security cannot be taken for granted.

### AT Drones

#### Offensive cyber-war is key to an effective deterrence capability

Libicki 13 (Martin C., Rand Corporation, Research Defense and Prepared for Office of the Secretray of Defense, "Brandishing Cyberatack Capabilities")

Brandishing a cyberattack capability would do three things: declare a capability, suggest the possibility of its use in a particular circumstance, and indicate that such use would really hurt. In the era of the U.S.-Soviet nuclear standoff, the suggestion of use was the most relevant. Possession was obvious, and its consequences were well understood. The same does not hold true for cyberweapons. Possession is likely not obvious, and the ability to inflict serious harm is debatable. Even if demonstrated, what worked yesterday may not work today. But difficult does not mean impossible.fffff¶ Advertising cyberwar capabilities may be helpful. It may back up a deterrence strategy. It might dissuade other states from conventional mischief or even from investing in mischief- making capabilities. It may reduce the other side’s confidence in the reliability of its informa- tion, command and control, or weapon systems. In a nuclear confrontation, it may help build the edge that persuades other states that the brandisher will stay the course, thereby persuading them to yield.

#### But public backlash solves status quo strikes and the link

Benjamin and Mir ’13 (Medea Benjamin and Noor Mir, Medea Benjamin is author of Drone Warfare: Killing by Remote Control. Noor Mir is the Drone Campaign Coordinator at CODEPINK, “Finally, the Backlash Against Drones Takes Flight”, http://original.antiwar.com/mbenjamin/2013/03/25/finally-the-backlash-against-drones-takes-flight/, March 26, 2013)

Rand Paul’s marathon 13-hour filibuster was not the end of the conversation on drones. Suddenly, drones are everywhere, and so is the backlash. Efforts to counter drones at home and abroad are growing in the courts, at places of worship, outside air force bases, inside the UN, at state legislatures, inside Congress–and having an effect on policy. April marks the national month of uprising against drone warfare. Activists in upstate New York are converging on the Hancock Air National Guard Base where Predator drones are operated. In San Diego, they will take on Predator-maker General Atomics at both its headquarters and the home of the CEO. In D.C., a coalition of national and local organizations are coming together to say no to drones at the White House. And all across the nation—including New York City, New Paltz, Chicago, Tucson and Dayton—activists are planning picket lines, workshops and sit-ins to protest the covert wars. The word has even spread to Islamabad, Pakistan, where activists are planning a vigil to honor victims. There has been an unprecedented surge of activity in cities, counties and state legislatures across the country aimed at regulating domestic surveillance drones. After a raucous city council hearing in Seattle in February, the Mayor agreed to terminate its drones program and return the city’s two drones to the manufacturer. Also in February, the city of Charlottesville, VA passed a 2-year moratorium and other restrictions on drone use, and other local bills are pending in cities from Buffalo to Ft. Wayne. Simultaneously, bills have been proliferating on the state level. In Florida, a pending bill will require the police to get a warrant to use drones in an investigation; a Virginia statewide moratorium on drones passed both houses and awaits the governor’s signature, and similar legislation in pending in at least 13 other state legislatures. Responding to the international outcry against drone warfare, the United Nations’ special rapporteur on counterterrorism and human rights, Ben Emmerson, is conducting an in-depth investigation of 25 drone attacks and will release his report in the Spring. Meanwhile, on March 15, having returned from a visit to Pakistan to meet drone victims and government officials, Emmerson condemned the U.S. drone program in Pakistan, as “it involves the use of force on the territory of another State without its consent and is therefore a violation of Pakistan’s sovereignty.” Leaders in the faith-based community broke their silence and began mobilizing against the nomination of John Brennan, with over 100 leaders urging the Senate to reject Brennan. And in an astounding development, The National Black Church Initiative (NBCI), a faith-based coalition of 34,000 churches comprised of 15 denominations and 15.7 million African Americans, issued a scathing statement about Obama’s drone policy, calling it “evil”, “monstrous” and “immoral.” The group’s president, Rev. Anthony Evans, exhorted other black leaders to speak out, saying “If the church does not speak against this immoral policy we will lose our moral voice, our soul, and our right to represent and preach the gospel of Jesus Christ.” In the past four years the Congressional committees that are supposed to exercise oversight over the drones have been mum. Finally, in February and March, the House Judiciary Committee and the Senate Judiciary Committee held their first public hearings, and the Constitution Subcommittee will hold a hearing on April 16 on the “constitutional and statutory authority for targeted killings, the scope of the battlefield and who can be targeted as a combatant.” Too little, too late, but at least Congress is feeling some pressure to exercise its authority. The specter of tens of thousands of drones here at home when the FAA opens up US airspace to drones by 2015 has spurred new left/rightalliances. Liberal Democratic Senator Ron Wyden joined Tea Party’s Rand Paul during his filibuster. The first bipartisan national legislation was introduced by Rep. Ted Poe, R-Texas, and Rep. Zoe Lofgren, D-Calif., saying drones used by law enforcement must be focused exclusively on criminal wrongdoing and subject to judicial approval, and prohibiting the arming of drones. Similar left-right coalitions have formed at the local level. And speaking of strange bedfellows, NRA president David Keene joined The Nation’s legal affairs correspondent David Cole in an op-ed lambasting the administration for the cloak of secrecy that undermines the system of checks and balances. While trying to get redress in the courts for the killing of American citizens by drones in Yemen, the ACLU has been stymied by the Orwellian US government refusal to even acknowledge that the drone program exists. But on March 15, in an important victory for transparency, theD.C. Court of Appeals rejected the CIA’s absurd claims that it “cannot confirm or deny” possessing information about the government’s use of drones for targeted killing, and sent the case back to a federal judge. Most Democrats have been all too willing to let President Obama carry on with his lethal drones, but on March 11, Congresswoman Barbara Lee and seven colleagues issued a letter to President Obama calling on him to publicly disclose the legal basis for drone killings, echoing a call that emerged in the Senate during the John Brennan hearing. The letter also requested a report to Congress with details about limiting civilian casualties by signature drone strikes, compensating innocent victims, and restructuring the drone program “within the framework of international law.” There have even been signs of discontent within the military. Former Defense Secretary Leon Panetta had approved a ludicrous high-level military medal that honored military personnel far from the battlefield, like drone pilots, due to their “extraordinary direct impacts on combat operations.” Moreover, it ranked above the Bronze Star, a medal awarded to troops for heroic acts performed in combat. Following intense backlash from the military and veteran community, as well as a push from a group of bipartisan senators, new Defense Secretary Senator Chuck Hagel decided to review the criteria for this new “Distinguished Warfare” medal. Remote-control warfare is bad enough, but what is being developed is warfare by “killer robots” that don’t even have a human in the loop. Acampaign against fully autonomous warfare will be launched this April at the UK’s House of Commons by human rights organizations, Nobel laureates and academics, many of whom were involved in the successful campaign to ban landmines. The goal of the campaign is to ban killer robots before they are used in battle. Throughout the US–and the world–people are beginning to wake up to the danger of spy and killer drones. Their actions are already having an impact in forcing the Administration to share memos with Congress, reduce the number of strikes and begin a process of taking drones out of the hands of the CIA.

### AT No !

**Maintaining warfighting capabilities key to deter Chinese invasion of the South China Seas**

**Glaser 12**, CSIS Freeman Chair in China Studies

(Bonnie, Pivot to Asia: Prepare for Unintended Consequences, http://csis.org/files/publication/120413\_gf\_glaser.pdf)

Under the current administration, the pendulum in U.S. policy toward China has swung from attempting to cooperate with China on global problems to pushing back against Chinese assertiveness and challenges to international laws and norms. Getting tougher with Beijing was necessary, but it has also created unintended consequences that the next administration, either a second Obama team or a Republican lineup, will have to contend with. The Obama administration’s initial policy in 2009 raised fears in many Asian capitals of a G2 condominium that would make decisions over the heads of others. Those concerns were unwarranted and short lived. Beijing interpreted the U.S. approach as weakness, which, along with China’s economic success and America’s struggles, led to a year of Chinese hubris that manifested itself in a series of intimidating actions in China’s neighborhood. Subsequent entreaties by regional states to counterbalance China increased U.S. attention to the Asia-Pacific region. Now, the U.S. Asia “pivot” has prompted Chinese anxiety about U.S. containment and heightened regional worries about intensified U.S.-China strategic competition. In the run-up to the leadership transition that will take place at China’s 18th Party Congress this fall, Beijing is inwardly focused and unlikely to act on its fears. However, 2013 could see a shift in Chinese foreign policy based on the new leadership’s judgment that it must respond to a U.S. strategy that seeks to prevent China’s reemergence as a great power. Signs of a potential harsh reaction are already detectable. The U.S. Asia pivot has triggered an outpouring of anti-American sentiment in China that will increase pressure on China’s incoming leadership to stand up to the United States. Nationalistic voices are calling for military countermeasures to the bolstering of America’s military posture in the region and the new U.S. defense strategic guidelines. For example, an article published in China’s Global Times, a jingoistic newspaper owned by the Communist Party mouthpiece People’s Daily, called for China to strengthen its long-range strike capabilities. Deng Xiaoping’s guideline to keep a low profile in the international arena, designed more than two decades ago to cope with uncertainty produced by the collapse of the Soviet bloc, is increasingly seen by China’s elite and public as irrelevant and even harmful to the task of defending Chinese ever-expanding “core interests.” Some voices are calling for closer alignment with Moscow and promoting the BRICS grouping (Brazil, Russia, India, and China) as a new “pole” in the international arena to strengthen the emerging powers against the West. Xi Jinping, who will assume the helm as China’s new leader later this year, will be under pressure from many domestic constituencies to more forcefully defend Chinese interests in the international arena. Seeking to quickly consolidate his power and enhance the legitimacy of the Communist Party, Xi and his newly installed Politburo Standing Committee colleagues may be more willing than their predecessors to test drive a policy that is more confrontational. The U.S. response to a more muscular Chinese foreign and military policy, should it appear, will have to be carefully calibrated. Ignoring greater Chinese assertiveness would fuel the belief—already emerging in China and elsewhere— that the United States is in inexorable decline. History shows that when great powers falter, China does not hesitate to seize the opportunity to advance its interests, especially in the South China Sea. As American forces withdrew from Vietnam in the mid-1970s, the Chinese grabbed the Paracel Islands from Saigon. Similarly, when the Soviet Union withdrew from Vietnam’s Cam Ranh Bay and the United States terminated its base agreement with the Philippines, China quietly occupied Mischief Reef to the dismay of Manila. Yet a hostile and overbearing U.S. response would confirm Chinese suspicions that the United States seeks to contain its rise, which could cement the emergence of a U.S.-China Cold War. In addition, it would further alarm regional states who seek at all costs to avoid having to choose between the United States and China. U.S. policy will need to combine firmness with subtlety. A strategy will need to be shaped that protects regional stability and reassures China’s neighbors, but also avoids greater U.S.- China strategic competition and the classic security dilemma, wherein each side believes that growing capabilities reflect hostile intent and responds by producing that reality. Sustained attention and commitment of sufficient resources to the Asia- Pacific region will be key to assuaging the doubts of regional friends and allies about U.S. staying power. The United States also will need to maintain the military capabilities necessary to deter Chinese aggression.

#### Spratley Island conflict causes global war

Waldron ’97 (Arthur, Prof Strategy and Policy – Naval War College, Commentary, 3-[1, http://www.aei.org/publications/pubID.7442,f](http://www.aei.org/publications/pubID.7442)ilter.all/pub\_detail.asp)

Then there is Southeast Asia, which, having weathered the Vietnam war and a variety of domestic insurgencies, and having moved onto the track of prosperity, shows no desire to complicate matters with political headaches. Fault lines nevertheless remain, and not least between the numerous and disproportionately successful ethnic Chinese and other inhabitants. And here again China is a looming worry. Beijing's claim of "unquestionable sovereignty" over the Spratly Islands in the South China Sea and its recent seizure of one of them, Mischief Reef, also claimed by the Philippines, have alarmed Vietnam, the Philippines, Malaysia, and Brunei, and rattled Indonesia, which asserts its right to gas fields nearby. India and South Asia, long preoccupied with their own internal rivalries and content with their rates of growth, now look with envy and some concern as East Asia opens an ever-increasing lead in economics, military power, and general global clout. Indian and Chinese forces still face each other in the high mountains of their disputed border, as they have done since their war in 1962. Pakistan to the west is a key Chinese ally, and beyond, in the Middle East, China is reportedly supplying arms to Syria, Iraq, and Iran. To the north, Tibet (whose government-in-exile has been based in India since 1959) is currently the object of a vicious Chinese crackdown. And a new issue between India and China is Beijing's alliance

with Rangoon and its reported military or intelligence-gathering presence on offshore Burmese territories near the Indian naval base in the Andaman Islands. Finally there is Russia, which has key interests in Asia. Sidelined by domestic problems, but only temporarily, Moscow has repeatedly faced China in this century, both in the northeast and along the Mongolian border. The break-up of the Soviet Union has added a potentially volatile factor in the newly independent states of Central Asia and Chinese-controlled Xinjiang (Sinkiang), where Beijing is currently fighting a low-level counter-insurgency. Making these flash-points all the more volatile has been a dramatic increase in the quantity and quality of China's weapons acquisitions. An Asian arms race of sorts was already gathering steam in the post-cold-war era, driven by national rivalries and the understandable desire of newly rich

nation-states to upgrade their capacities; but the Chinese build-up has intensified it. In part a payoff to the military for its role at Tiananmen Square in 1989, China's current build-up is part

and parcel of the regime's major shift since that time away from domestic liberalization and international openness toward repression and irredentism. Today China buys weapons from European states and Israel, but most importantly from Russia. The latest multibillion-dollar deal includes two Sovremenny-class destroyers equipped with the much-feared SS-N-22 cruise missile, capable of defeating the Aegis anti-missile defenses of the U.S. Navy and thus sinking American aircraft carriers. This is in addition to the Su-27 fighter aircraft, quiet Kilo-class submarines, and other force-projection and deterrent technologies. In turn, the Asian states are buying or developing their own advanced aircraft, missiles, and submarines--and considering nuclear options. The sort of unintended escalation which started two world wars could arise from any of the conflicts around China's periphery. It nearly did so in March 1996, when China, in a blatant act of intimidation, fired ballistic missiles in the Taiwan Straits. It could arise from a Chinese-Vietnamese confrontation, particularly if the Vietnamese should score some unexpected military successes against the Chinese, as they did in 1979, and if the Association of Southeast Asian Nations (ASEAN), of which they are now a

member, should tip in the direction of Hanoi. It could flare up from the smoldering insurgencies among Tibetans, Muslims, or Mongolians living inside China. Chains of allianceor interest, perhaps not clearly understood until the moment of crisis itself, could easily draw in neighboring states--Russia, or India, or Japan--or the United States.

### AT Ambiguity

#### There’s an impact to ambiguity ---- it turns case --- offensive cyber capabilities turn all of the reasons why defense is key --- solves global conflict and terrorism

MCCONNELL 2010 - former vice admiral in the United States Navy <Mike. “Mike McConnell on how to win the cyber-war we're losing” The Washington Post. February 28, 2010. http://www.cyberdialogue.ca/wp-content/uploads/2011/03/Mike-McConnell-How-to-Win-the-Cyberwar-Were-Losing.pdf>

The United States is fighting a cyber-war today, and we are losing. It's that simple. As the most wired nation on Earth, we offer the most targets of significance, yet our cyber-defenses are woefully lacking. The problem is not one of resources; even in our current fiscal straits, we can afford to upgrade our defenses. The problem is that we lack a cohesive strategy to meet this challenge. The stakes are enormous. To the extent that the sprawling U.S. economy inhabits a common physical space, it is in our communications networks. If an enemy disrupted our financial and accounting transactions, our equities and bond markets or our retail commerce -- or created confusion about the legitimacy of those transactions -- chaos would result. Our power grids, air and ground transportation, telecommunications, and water-filtration systems are in jeopardy as well. These battles are not hypothetical. Google's networks were hacked in an attack that began in December and that the company said emanated from China. And recently the security firm NetWitness reported that more than 2,500 companies worldwide were compromised in a sophisticated attack launched in 2008 and aimed at proprietary corporate data. Indeed, the recent Cyber Shock Wave simulation revealed what those of us involved in national security policy have long feared: For all our war games and strategy documents focused on traditional warfare, we have yet to address the most basic questions about cyber-conflicts. What is the right strategy for this most modern of wars? Look to history. During the Cold War, when the United States faced an existential threat from the Soviet Union, we relied on deterrence to protect ourselves from nuclear attack. Later, as the East-West stalemate ended and nuclear weapons proliferated, some argued that preemption made more sense in an age of global terrorism. The cyber-war mirrors the nuclear challenge in terms of the potential economic and psychological effects. So, should our strategy be deterrence or preemption? The answer: both. Depending on the nature of the threat, we can deploy aspects of either approach to defend America in cyberspace. During the Cold War, deterrence was based on a few key elements: attribution (understanding who attacked us), location (knowing where a strike came from), response (being able to respond, even if attacked first) and transparency (the enemy's knowledge of our capability and intent to counter with massive force). Against the Soviets, we dealt with the attribution and location challenges by developing human intelligence behind the Iron Curtain and by fielding early-warning radar systems, reconnaissance satellites and undersea listening posts to monitor threats. We invested heavily in our response capabilities with intercontinental ballistic missiles, submarines and long-range bombers, as well as command-and-control systems and specialized staffs to run them. The resources available were commensurate with the challenge at hand -- as must be the case in cyberspace. Just as important was the softer side of our national security strategy: the policies, treaties and diplomatic efforts that underpinned containment and deterrence. Our alliances, such as NATO, made clear that a strike on one would be a strike on all and would be met with massive retaliation. This unambiguous intent, together with our ability to monitor and respond, provided a credible nuclear deterrent that served us well. How do we apply deterrence in the cyber-age? For one, we must clearly express our intent. Secretary of State Hillary Rodham Clinton offered a succinct statement to that effect last month in Washington, in a speech on Internet freedom. "Countries or individuals that engage in cyber-attacks should face consequences and international condemnation," she said. "In an Internet-connected world, an attack on one nation's networks can be an attack on all." That was a promising move, but it means little unless we back it up with practical policies and international legal agreements to define norms and identify consequences for destructive behavior in cyberspace. We began examining these issues through the Comprehensive National Cybersecurity Initiative, launched during the George W. Bush administration, but more work is needed on outlining how, when and where we would respond to an attack. For now, we have a response mechanism in name only. The United States must also translate our intent into capabilities. We need to develop an Early-Warning System to monitor cyberspace, identify intrusions and locate the source of attacks with a trail of evidence that can support diplomatic, military and legal options -- and we must be able to do this in milliseconds. More specifically, we need to reengineer the Internet to make attribution, geolocation, intelligence analysis and impact assessment -- who did it, from where, why and what was the result -- more manageable. The technologies are already available from public and private sources and can be further developed if we have the will to build them into our systems and to work with our allies and trading partners so they will do the same. Of course, deterrence can be effective when the enemy is a state with an easily identifiable government and location. It is less successful against criminal groups or extremists who cannot be readily traced, let alone deterred through sanctions or military action. There are many organizations (including al-Qaeda) that are not motivated by greed, as with criminal organizations, or a desire for geopolitical advantage, as with many states. Rather, their worldview seeks to destroy the systems of global commerce, trade and travel that are undergirded by our cyber-infrastructure. So deterrence is not enough; preemptive strategies might be required before such adversaries launch a devastating cyber-attack. We preempt such groups by degrading, interdicting and eliminating their leadership and capabilities to mount cyber-attacks, and by creating a more resilient cyberspace that can absorb attacks and quickly recover.