## 1AC

#### Same as round 2

## \*\*\*2AC

### 2AC Deference

#### B. U.N investigation will impose strict limitations on use of drones now – it will collapse our doctrine

Frankel 1/24/13 (Allison, staffwriter for the ACLU, “U.N. Human Rights Expert to Investigate U.S. Targeted Killing Program” https://www.aclu.org/blog/national-security/un-human-rights-expert-investigate-us-targeted-killing-program)

The U.S. government’s targeted killing policy and its use of drones for killing will be the subject of an investigation by the United Nations, it was announced today. The U.N. Special Rapporteur on counterterrorism and human rights, Ben Emmerson, announced today that he will carry out an inquiry into the civilian impact and human rights implications of targeted killing. In a press conference held in London, Mr. Emmerson stated that under international law, nations have an obligation to “establish effective independent and impartial investigations into any drone attack in which it is plausibly alleged that civilian casualties were sustained,” and if such investigations are not conducted, the U.N. may need to step in and investigate individual drone strikes. The inquiry marks an important step towards ensuring that U.S. policies and practices respect human rights. Thousands of people have been killed by U.S. drone strikes (conducted by the CIA and the military) as part of a secret targeted killing program that began in 2002 and has expanded dramatically under the Obama administration. Part of the problem with the targeted killing program is the government's vague and shifting legal standards, along with lack of accountability and oversight to ensure that killings are not carried out in violation of the Constitution and international law. Hina Shamsi, director of the American Civil Liberties Union’s National Security Project, welcomed the inquiry “in the hopes that global pressure will bring the U.S. back into line with international law requirements that strictly limit the use of lethal force.” As Shamsi said, “Virtually no other country agrees with the U.S.’s claimed authority to secretly declare people enemies of the state and kill them and civilian bystanders far from any recognized battlefield. To date, there has been an abysmal lack of transparency and no accountability for the U.S. government’s ever-expanding targeted killing program.”

#### C. Allied blowback over drones means the program will never be utilized operationally

Foust 5/1/12 (Josh, a fellow at the American Security Project, Joshua's research focuses on the role of market-oriented development strategies in post-conflict environments, and on the development of metrics in understanding national security policy, “How Strong Is al Qaeda Today, Really?” <http://www.theatlantic.com/international/archive/2012/05/how-strong-is-al-qaeda-today-really/256609/>)

The many successes in the fight against al-Qaeda have also come with substantial costs. In Pakistan and Yemen, an obsession with kinetic activities -- killing the bad guys -- has worsened political chaos and entrenched anti-Americanism. Some other countries now deny the U.S. permission to fly drones over their territory because they fear the political backlash that Obama's favorite weapon could bring. We don't know yet if these political consequences can be overcome, though it's a safe bet that continuing the same terror policies won't lessen them.

#### No unique link – past liberal detention cases

Bejesky 13 (Robert, The author has taught international law courses for 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, “Dubitable Security Threats and Low Intensity Interventions as the Achilles' Heel of War Powers,” 32 Miss. C. L. Rev. 9, lexis)

The judiciary is not reluctant to become involved in issues subsidiary to the use of force. The Court not only decided war power cases such as Hamdi v. Rumsfeld, 469 Rasul v. Bush, 470 Hamdan v. Rumsfeld 471 and Boumediene v. Bush, 472 but the decisions contradicted legal advice on detention and interrogation that was provided by Bush Administration attorneys. 473 In Hamdan, the Court held that the judiciary has the final authority to interpret treaties relating to the conduct of war, which meant that the Court was asserting authority to curtail the President's use of discretion as Commander-in-Chief as it relates to treaty interpretation. 474

#### C. Soft power – judicial review establishes credibility which is critical to hard power flexibility – that’s Sidhu – AND material power is irrelevant without legitimacy and soft power

Mendelsohn, Ph.D polysci, 10 (Barak, assistant professor of political science at Haverford College and a senior fellow of FPRI. Author of Combating Jihadism: American Hegemony and Interstate Cooperation in the War on Terrorism, June 2010, "The Question of International Cooperation in the War on Terrorism", http://www.fpri.org/enotes/201006.mendelsohn.cooperationwarterror.html)

Going against common conceptions, I argue that the United States sought to advance more than what it viewed as simply its own interest. The United States stands behind multiple collaborative enterprises and should be credited for that. Nevertheless, sometimes it has overreached, sought to gain special rights other states do not have, or presented strategies that were not compatible with the general design of the war on terrorism, to which most states subscribed. When it went too far, the United States found that, while secondary powers could not stop it from taking action, they could deny it legitimacy and make the achievement of its objectives unattainable. Thus, despite the common narrative, U.S. power was successfully checked, and the United States found the limitations of its power, even under the Bush administration. Defining Hegemony Let me begin with my conception of hegemony. While the definition of hegemony is based on its material aspects—the preponderance of power—hegemony should be understood also a part of a social web comprised of states. A hegemon relates to the other states in the system not merely through the prism of power balances, but through shared norms and a system of rules providing an umbrella for interstate relations. Although interstate conflict is ubiquitous in international society and the pursuit of particularistic interests is common, the international society provides a normative framework that restricts and moderates the hegemon's actions. This normative framework accounts for the hegemon's inclination toward orderly and peaceful interstate relations and minimizes its reliance on power. A hegemon’s role in the international community relies on legitimacy. Legitimacy is associated with external recognition of the hegemon’s right of primacy, not just the fact of this primacy. States recognize the hegemon’s power, but they develop expectations that go beyond the idea that the hegemon will act as it wishes because it has the capabilities to do so. Instead, the primacy of the hegemon is manifested in the belief that, while it has special rights that other members of the international society lack, it also has a set of duties to the members of the international society. As long as the hegemon realizes its commitment to the collective, its position will be deemed legitimate. International cooperation is hard to achieve. And, in general, international relations is not a story of harmony. A state’s first inclination is to think about its own interests, and states always prefer doing less over doing more. The inclination to pass the buck or to free ride on the efforts of others is always in the background. If a hegemon is willing to lead in pursuit of collective interests and to shoulder most of the burden, it can improve the prospects of international cooperation. However, even when there is a hegemon willing to lead a collective action and when states accept that action is needed, obstacles may still arise. These difficulties can be attributed to various factors, but especially prominent is the disagreement over the particular strategy that the hegemon promotes in pursuing the general interest. When states think that the strategy and policies offered by the hegemon are not compatible with the accepted rules of “rightful conduct” and break established norms, many will disapprove and resist. Indeed, while acceptance of a hegemon’s leadership in international society may result in broad willingness to cooperate with the hegemon in pursuit of shared interests it does not guarantee immediate and unconditional compliance with all the policies the hegemon articulates. While its legitimacy does transfer to its actions and grants some leeway, that legitimacy does not justify every policy the hegemon pursues—particularly those policies that are not seen as naturally deriving from the existing order. As a result, specific policies must be legitimated before cooperation takes place. This process constrains the hegemon’s actions and prevents the uninhibited exercise of power.

#### Review inevitable – now is better for flexibility

Wittes 8 (Benjamin Wittes is a Senior Fellow in Governance Studies at the Brookings Institution, where he is the Research Director in Public Law, “The Necessity and Impossibility of Judicial Review,” https://webspace.utexas.edu/rmc2289/National%20Security%20and%20the%20Courts/Law%20and%20the%20Long%20War%20%20Chapter%204.pdf)

WE COME, then, to the question of what judicial review ought to look like in the war on terror if one accepts that it should exist more robustly than the administration prefers but should not be of an unbridled or general nature, as human rights advocates wish to see. The answer is conceptually simple, though devilishly complicated in operation: Judicial review should be designed for the relatively narrow purpose of holding the executive to clearly articulated legislative rules, not to the often vague standards of international legal instruments that have not been implemented through American law. Judges should have an expanded role in the powers of presidential preemption in the antiterrorism arena, for the judiciary is essential to legitimizing the use of those powers. Without them, the powers themselves come under a barrage of criticism which they cannot easily withstand. And eventually the effort to shield them from judicial review fails, and the review that results from the effort is more intrusive, more suspicious, and less accommodating of the executive's legitimate need for operational flexibility. Judges, in other words, should be a part of the larger rules the legislature will need to write to govern the global fight against terrorism. Their role within these legal regimes will vary-from virtually no involvement in cases of covert actions and overseas surveillance to extensive involvement in cases of long-term detentions. The key is that the place of judges within those systems is not itself a matter for the judges to decide. The judiciary must not serve as the designer of the rules.

#### Court review increase warfighting – key to assessing terrorism policy – takes out deference link

Coughenour 08 (John C. , The Right Place to Try Terrorism Cases, July 27, 2008, http://articles.washingtonpost.com/2008-07-27/opinions/36772256\_1\_terrorism-trials-district-court-federal-courts)

I have spent 27 years on the federal bench. In particular, my experience with the trial of Ahmed Ressam, the "millennium bomber," leads me to worry about Attorney General Michael Mukasey's comments last week, urging Congress to pass legislation outlining judicial procedures for reviewing Guantanamo detainees' habeas petitions. As constituted, U.S. courts are not only an adequate venue for trying terrorism suspects but are also a tremendous asset in combating terrorism. Congress risks a grave error in creating a parallel system of terrorism courts unmoored from the constitutional values that have served our country so well for so long. I have great sympathy for those charged with protecting our national security. That is an awesome responsibility. But this is not a choice between the existential threat of terrorism and the abstractions of a 200-year-old document. The choice is better framed as: Do we want our courts to be viewed as another tool in the "war on terrorism," or do we want them to stand as a bulwark against the corrupt ideology upon which terrorism feeds? Detractors of the current system argue that the federal courts are ill-equipped for the unique challenges that terrorism trials pose. Such objections often begin with a false premise: that the threat of terrorism is too great to risk an "unsuccessful" prosecution by adhering to procedural and evidentiary rules that could constrain prosecutors' abilities. This assumes that convictions are the yardstick by which success is measured. Courts guarantee an independent process, not an outcome. Any tribunal purporting to do otherwise is not a court. Critics raise more-legitimate concerns about whether judges have sufficient expertise over the subject matter of terrorism trials and whether the courts can adequately safeguard classified information. The truth is that judges are generalists. Just as they decide cases as varied as employment discrimination and bank robbery, they are capable of negotiating the complexities of terrorism trials. Last month in Boumediene v. Bush, the Supreme Court confirmed its confidence in the capability of federal courts. The justices explicitly rejected an attempt to carve away an area of federal court jurisdiction in service of the war against terrorism, saying: "We recognize, however, that the Government has a legitimate interest in protecting sources and methods of intelligence gathering; and we expect that the District Court will use its discretion to accommodate this interest to the greatest extent possible. . . . These and the other remaining questions are within the expertise and competence of the District Court to address in the first instance." As for protecting classified information, courts are guided by the Classified Information Procedures Act, which played a prominent role during the trial of Ressam in my courtroom in 2001. I found the act's extensive protections to be more than adequate, but I also think that any shortcoming in the law can and should be addressed by further revision rather than by undermining the judiciary.

### 2AC Politics

#### No link – court action shields Obama from controversy

Pacelle, Prof-Political Science-Georgia Southern, 2002 (Richard L., Prof of Poli Sci @ Georgia Southern University, The Role of the Supreme Court in American Politics: The Least Dangerous Branch? 2002 p 175-6)

The limitations on the Court are not as significant as they once seemed. They constrain the Court, but the boundaries of those constraints are very broad. Justiciability is self-imposed and seems to be a function of the composition of the Court, rather than a philosophical position. Checks and balances are seldom successfully invoked against the judiciary, in part because the Court has positive institutional resources to justify its decisions. The Supreme Court has a relatively high level of diffuse support that comes, in part, from a general lack of knowledge by the public and that contributes to its legitimacy.[6] The cloak of the Constitution and the symbolism attendant to the marble palace and the law contribute as well. As a result, presidents and Congress should pause before striking at the Court or refusing to follow its directives. Indeed, presidents and members of Congress can often use unpopular Court decisions as political cover. They cite the need to enforce or support such decisions even though they disagree with them. In the end, the institutional limitations do not mandate judicial restraint, but turn the focus to judicial capacity, the subject of the next chapter.

#### More evidence – Obama doesn’t get the blame from court action

Sanger-Katz 12 (Margot, healthcare correspondent for the National Journal, Poll: No Blame if Court Nixes Health Care Law, June 5, http://www.nationaljournal.com/daily/poll-no-blame-if-court-nixes-health-care-law-20120605)

Even though President Obama fought for passage of the landmark 2010 health care law, very small minorities say their attitudes about him would change one way or the other should the Supreme Court strike down the law that is so often referred to as “Obamacare.” Two-thirds of those surveyed in a new public-opinion poll said that their respect for Obama would be unchanged if the Supreme Court struck down his signature legislative achievement. Fourteen percent said they would respect Obama more under such a scenario, while 15 percent said they would respect him less. That trend was consistent across the political spectrum—similar proportions of Republicans, Democrats, and independents said they would be unmoved, despite the pundits’ speculation that a Court decision declaring the Affordable Care Act unconstitutional in part or in its entirety might alter public opinion toward the president. The nonplussed attitude also held across nearly all age, income, regional, and racial categories, with at least 60 percent of each surveyed group saying that the ruling would have no impact on their view of the president.

#### No link – the plan is the D.C. circuit court

Jaffer, Director-ACLU Center for Democracy, 13 (Jameel Jaffer, Director of the ACLU's Center for Democracy, “Judicial Review of Targeted Killings,” 126 Harv. L. Rev. F. 185 (2013), http://www.harvardlawreview.org/issues/126/april13/forum\_1002.php)

This is why the establishment of a specialized court would more likely institutionalize the existing program, with its elision of the imminence requirement, than narrow it. Second, judicial engagement with the targeted killing program does not actually require the establishment of a new court. In a case pending before Judge Rosemary Collyer of the District Court for the District of Columbia, the ACLU and the Center for Constitutional Rights represent the estates of the three U.S. citizens whom the CIA and JSOC killed in Yemen in 2011. The complaint, brought under Bivens v. Six Unknown Named Agents, seeks to hold senior executive officials liable for conduct that allegedly violated the Fourth and Fifth Amendments. It asks the court to articulate the limits of the government’s legal authority and to assess whether those limits were honored. In other words, the complaint asks the court to conduct the kind of review that many now seem to agree that courts should conduct. This kind of review—ex post review in the context of a Bivens action—could clarify the relevant legal framework in the same way that review by a specialized court could. But it also has many advantages over the kind of review that would likely take place in a specialized court. In a Bivens action, the proceedings are adversarial rather than ex parte, increasing their procedural legitimacy and improving their substantive accuracy. Hearings are open to the public, at least presumptively. The court can focus on events that have already transpired rather than events that might or might not transpire in the future. And a Bivens action can also provide a kind of accountability that could not be supplied by a specialized court reviewing contemplated strikes ex ante: redress for family members of people killed unlawfully, and civil liability for officials whose conduct in approving or carrying out the strike violated the Constitution. (Of course, in one profound sense a Bivens action will always come too late, because the strike alleged to be unlawful will already have been carried out. Again, though, if “imminence” is a requirement, ex ante judicial review is infeasible by definition.) Another advantage of the Bivens model is that the courts are already familiar with it. The courts quite commonly adjudicate wrongful death claims and “survival” claims brought by family members of individuals killed by law enforcement agents. In the national security context, federal courts are now accustomed to considering habeas petitions filed by individuals detained at Guantánamo. They opine on the scope of the government’s legal authority and they assess the sufficiency of the government’s evidence — the same tasks they would perform in the context of suits challenging the lawfulness of targeted killings. While Congress could of course affirm or strengthen the courts’ authority to review the lawfulness of targeted killings if it chose to do so, or legislatively narrow some of the judicially created doctrines that have precluded courts from reaching the merits in some Bivens suits, more than 40 years of Supreme Court precedent since Bivens makes clear that federal courts have not only the authority to hear after-the-fact claims brought by individuals whose constitutional rights have been infringed but also the obligation to do so.

#### --District court controversial now—EPA rulings

Adler, prof of law at Case Western Reserve University, 8/18/13 (Jonathan H., Director of the Center for Business Law and Regulation, JD from George Mason, “Is the DC Circuit a “Broken Circuit”?”, http://www.volokh.com/2013/08/18/is-the-d-c-circuit-a-broken-circuit/)

Earlier this summer, the Environmental Law Institute’s Environmental Forum featured a cover story on the U.S. Court of Appeals for the D.C. Circuit by Doug Kendall and Simon Lazarus of the Constitutional Accountability Center entitled “Broken Circuit.” As the sub-head promised, this article made the case that “A new breed of activism on the Court of Appeals for the D.C. Circuit — for environmental cases second in importance only to the Supreme Court and the central venue for high-profile lawsuits — threatens decades of progress.” The Forum also included my brief counterpoint essay, “The D.C. Circuit Is Hardly in Crisis.” This short piece was intended as a response to the Kendall-Lazarus piece though, as is the Environmental Forum‘s usual practice, I had to write my piece without having seen the article to which it was responding. The Kendall-Lazarus article makes several conventional points. It noted that the D.C. Circuit is of particular importance in environmental law because it hears the lion’s share of challenges to federal regulatory programs. This is both because of its location and because, under some statutes, the D.C. Circuit has special or even exclusive jurisdiction over petitions challenging agency rules. One consequence is that the D.C. Circuit has been the locus of controversy. Senators and activist groups tend to pay more attention to D.C. Circuit nominees than to those for other circuits. Thus it is no surprise that the first appellate judicial nominee ever defeated by a filibuster (Miguel Estrada) was a D.C. Circuit nominee, as was one of President Obama’s nominees who Republican Senators successfully blocked. The Kendall-Lazarus article repeats Washington Post columnist Steven Pearlstein’s charge that the D.C. Circuit is dominated by ”a new breed of activist judges [who] are waging a determined and largely successful war on federal regulatory agencies.” This is just silly. To support this claim, the article notes that the D.C. Circuit’s hawkish view of standing is often an obstacle to environmentalist plaintiffs who seek to challenge EPA rules and that a divided panel of the D.C. Circuit struck down the Obama EPA’s Cross-State Air Pollution Rule in EME Homer City Generation v. EPA . Yet as the article notes, the Bush EPA had it’s cross-state rule struck down too and the EPA’s most costly and controversial rules — those applying the Clean Air Act to greenhouse gases — have sailed through the court. Indeed, it is the very same standing rules about which Kendall and Lazarus complain that helped the EPA prevail in the challenge to its Tailoring Rule. Industry groups have hit a standing wall in other cases as well, and the only successful challenge to an EPA greenhouse gas rule thus far was brought by environmental groups seeking more stringent regulation. As I note in my Environmental Forum essay: While the Obama administration has had its share of losses, the Obama EPA’s decisions have fared slightly better than those of the Bush EPA. In addition to the prior administration’s effort to address interstate air pollution, the D.C. Circuit also struck down the Bush EPA’s mercury emission regulations and efforts to reform New Source Review — all of which were lambasted by environmentalists as overly lax. At the same time, environmentalist litigants and others seeking more stringent application of the CAA have prevailed against the agency at a higher rate than those seeking regulatory relief. This is hardly what one would expect from an ideologically oriented, anti-regulatory court. While not particularly hostile to regulation, the D.C. Circuit has a well-deserved reputation for subjecting agency action to exacting scrutiny. Much of what the D.C. Circuit does involves no more than questioning whether agency actions conform with relevant statutory requirements. In many cases, this is enough to set aside agency action. As D.C. Circuit Judge David Tatel explained in a 2009 speech to the Environmental Law Institute, “You’d be surprised how often agencies don’t seem to have given their authorizing statutes so much as a quick skim.” Agency officials no doubt chafe against judicial review when it prevents them from adopting desired polices, but it’s a mistake to confuse active judicial review with “judicial activism” or an anti-regulatory bias. Throw non-environmental cases into the mix, and the bottom line remains the same. Agencies tend to win in the D.C. Circuit so long as they abide by the relevant statutory limits and engage in reasoned decision-making. Yes the D.C. Circuit occasionally issues a particularly aggressive opinion (e.g. Noel Caning), but overall the Court is hardly anti-regulatory. The D.C. Circuit was not the only court to rule against the President’s recess appointments to the NLRB and, as readers may recall, the D.C. Circuit rejected constitutional challenges to the PPACA. Since Kendall and Lazarus wrote their article, the Senate unanimously confirmed Sri Srinivasan to the D.C. Circuit, giving the court eight full-time judges — four nominated by Republicans and four nominated by Democrats — in addition to the six judges on “senior status,” all of whom continue to hear cases. President Obama has made nominations to fill the remaining three vacancies on the court, and the Senate should consider these nominations in due course, but the D.C. Circuit is hardly but understaffed. There are three dozen vacancies classified as “judicial emergencies” according to the Federal Judicial Center, seven of which are on circuit courts of appeals. None are in the D.C. Circuit, however (and only three have pending nominees). Judicial vacancies should be filled and a President’s judicial nominees should in most cases be confirmed — but the D.C. Circuit is not the court with the greatest need. President Obama has prioritized his D.C. Circuit nominees because he’s hoping to influence the ideological orientation of that court, not to address the problem of judicial vacancies. For more on the D.C. Circuit and its history, check out Adam White’s article in The Weekly Standard. It provides more useful background on the court and the controversy it engenders.

#### ---targeted killing restrictions now- saying the CIA cannot deny its involvement in the drone program

Jaffer 13 (Jameel Jaffer, Deputy Legal Director, ACLU, “What the Government Should Disclose About Its Targeted Killing Program,” https://www.aclu.org/blog/national-security/what-government-should-disclose-about-its-targeted-killing-program)

The U.S. Court of Appeals for the D.C. Circuit recently ruled that the Central Intelligence Agency may no longer refuse to acknowledge something that everyone knows to be true: the agency has "an interest" in the use of drones to carry out targeted killings. The CIA is unaccustomed to courts rejecting its secrecy claims, but in asking the courts to pretend that the agency might have no connection whatsoever to the targeted killing program, the agency dramatically overreached. Unsurprisingly, the appeals court was unwilling to give its "imprimatur to a fiction of deniability that no reasonable person would regard as plausible."

#### --Court ruling against Obama commander-in-chief powers now—Yucca and immigration

Judicial Watch 8-14 (Fed Appeals Court Rules Obama is “Flouting the Law”, http://www.judicialwatch.org/blog/2013/08/fed-appeals-court-rules-obama-is-flouting-the-law/)

A federal appellate court has blasted President Obama for using executive authority to ignore the law, a talent that the commander-in-chief has become well known for in many areas especially immigration. This particular case involves a proposed nuclear waste dump in Yucca Mountain Nevada. President Obama and his pal, Nevada Senator Harry Reid, want to kill the project, which has already cost U.S. taxpayers an astounding $15 billion, according to various federal audits. So, Obama is using a federal agency with presidential appointees, the Nuclear Regulatory Commission (NRC), to nix the dump site. As per the commander-in-chief, the NRC has declined to conduct the statutorily mandated Yucca Mountain licensing process. This essentially destroys the project, which the U.S. government has been working on since the early 1980s to be the nation’s sole repository for high-level nuclear waste. In 2010, the NRC, then led by Obama appointee Gregory Jaczko, ordered the licensing process terminated. Whether you are for or against the Nevada nuclear waste project is irrelevant. The issue here is a strong-armed commander-in-chief abusing his power to disregard the law. This creates a dangerous precedent and clearly threatens the separation of powers that keep government in check with balance. A federal appellate court confirms in a 29-page ruling issued this week. The administration “is simply flouting the law,” according to the U.S. Court of Appeals for the District of Columbia ruling, which made clear in its decision that the order to halt the Yucca Mountain licensing process is not supported by the law. “It is no overstatement to say that our constitutional system of separation of powers would be significantly altered if we were to allow executive and independent agencies to disregard federal law in the manner asserted in this case by the Nuclear Regulatory Commission,” the ruling says. President Obama received a similar spanking for his backdoor amnesty initiative from a different federal court just a few weeks ago. That case involves a lawsuit brought by 10 Immigration and Customs Enforcement (ICE) agents opposed to implementing Obama’s amnesty, known as Deferred Action for Childhood Arrivals (DACA). Obama blew off Congress and issued DACA via executive order to allow illegal immigrants 30 and younger to remain in the U.S. and obtain work permits if they entered the country as children (“through no fault of their own,” as Homeland Security Secretary Janet Napolitano loves to say). A federal court in Texas, where the agents’ case was heard, ruled that the policy is “contrary to congressional mandate.”

#### Syria and executive incompetence triggers the link even if it’s not on top of the docket

Hunt 9/15/13 (Albert, staffwriter, “Obama’s Syria Meanderings Border on Incompetence” <http://www.bloomberg.com/news/2013-09-15/obama-s-syria-meanderings-border-on-incompetence.html>)

President Barack Obama risks getting stuck with a rap as toxic as an unpopular war or a troubled economy: incompetence. The president may escape collateral damage if the ambitious deal reached Sept. 14 between the U.S. and Russia holds and Syria relinquishes its chemical weapons. Despite the conventional wisdom, Obama did a pretty good job last week of threading the needle between the imperative to respond to the gassing of civilians by President Bashar al-Assad’s regime and the overwhelming desire of Americans not to get bogged down in another fight. The White House says that what matters is the outcome, not the process. Yet the administration’s overall handing of the Syrian situation, particularly in the last two weeks, has friends and foes shaking their heads. The U.S. government’s response has been anything but measured, coherent and purposeful. It’s hard to argue with Republican Senator John McCain of Arizona that this performance “makes you a little queasy.” This criticism follows earlier complaints, often from Democrats, about the White House’s miscalculations in dealing with irrational Republican demands on debt and deficit issues, and the unwillingness of the president to seek counsel beyond his small comfort zone.

### 2AC Executive CP

#### No solvency – Public doesn’t trust the executive’s mandates will be transparent and public – secret evidence

Roach 13 (Kent, eds. Cole, D. Fabbrini, F. Vedaschi, A., David Cole, Federico Fabbrini, Arianna Vedaschi, “Managing Secrecy and its Migration in a Post-9/11 World,” Secrecy, National Security and the Vindication of Constitutional Law, google books pg 118-119)

At the same time, the taint of prior uses of secret evidence as well as public suspicion that secrecy will be used to cover up torture and other misconduct lingers. Although Congress decided at the end of 2011 to create a rebuttable presumption in favor of military detention and trial of alien terrorists suspected of involvement in al Qaeda, President Obama has indicated that he will waive this option when it might prevent other countries from extraditing or transferring terrorist suspects to the United States. Secret evidence as it was previously used at Guantanamo stands a potent and easily understood symbol of unfair counter-terrorism. The unfairness of secret evidence towards those targeted may have strategic as well as normative costs. Many believe that al Qaeda has morphed into an ideology that builds on grievances and a sense that Muslims are under attack throughout the world. In such a context, the public relations costs of using secret evidence should be taken seriously because it may promote a sense that innocent people have been unfairly detained, convicted or targeted as terrorists. Secret evidence is used by the US military and the CIA in decisions about targeted killing. Attorney General Holder has stressed that the evidence supporting such decisions is carefully reviewed within the government and has argued that the process satisfies due process because due process need not be judicial process." The problem with this approach is that it requires people to trust the government that the secret evidence has been thoroughly tested and vetted even though the executive has an incentive to err on the side of security. In contrast to the Israeli courts, American courts have taken a hands-off approach to review of targeted killing.12 The Israeli courts have in one prominent case reviewed targeted killings and have stressed the importance of both ex ante and ex post review within the military and involving the courts.0 To be sure. Israel has not gone as far as the United Kingdom in giving security cleared special advocates access to secret information, but it has provided a process that goes beyond the executive simply reviewing itself. The Obama administration does not seem to think that anyone could seriously challenge the legitimacy of their attempts to keep strategic military information behind targeted killings secret. In a sense, this is a return to a Cold War strategy where the need to preserve secrets from the other side was widely accepted. What has changed since 9/11, however, is that terrorism as opposed to invasion or nuclear war is widely accepted as the prime threat to national security. Terrorism is seen by many as a crime and the use of war-like secrecy is much more problematic in responding to a crime than to a threat of invasion or nuclear war. Hence, the legitimacy of the US's use of secrets to kill people in its controversial war against al Qaeda has been challenged. It may become a liability in the US's dealings with the Muslim world.

#### Counterplan doesn’t solve legitimacy or warfighting – the international community doesn’t trust it

Shane 11/24/12 (SCOTT, staffwriter, “Election Spurred a Move to Codify U.S. Drone Policy” http://www.nytimes.com/2012/11/25/world/white-house-presses-for-drone-rule-book.html?pagewanted=all&\_r=0)

WASHINGTON — Facing the possibility that President Obama might not win a second term, his administration accelerated work in the weeks before the election to develop explicit rules for the targeted killing of terrorists by unmanned drones, so that a new president would inherit clear standards and procedures, according to two administration officials. The matter may have lost some urgency after Nov. 6. But with more than 300 drone strikes and some 2,500 people killed by the Central Intelligence Agency and the military since Mr. Obama first took office, the administration is still pushing to make the rules formal and resolve internal uncertainty and disagreement about exactly when lethal action is justified. Mr. Obama and his advisers are still debating whether remote-control killing should be a measure of last resort against imminent threats to the United States, or a more flexible tool, available to help allied governments attack their enemies or to prevent militants from controlling territory. Though publicly the administration presents a united front on the use of drones, behind the scenes there is longstanding tension. The Defense Department and the C.I.A. continue to press for greater latitude to carry out strikes; Justice Department and State Department officials, and the president’s counterterrorism adviser, John O. Brennan, have argued for restraint, officials involved in the discussions say. More broadly, the administration’s legal reasoning has not persuaded many other countries that the strikes are acceptable under international law. For years before the Sept. 11, 2001, attacks, the United States routinely condemned targeted killings of suspected terrorists by Israel, and most countries still object to such measures. But since the first targeted killing by the United States in 2002, two administrations have taken the position that the United States is at war with Al Qaeda and its allies and can legally defend itself by striking its enemies wherever they are found. Partly because United Nations officials know that the United States is setting a legal and ethical precedent for other countries developing armed drones, the U.N. plans to open a unit in Geneva early next year to investigate American drone strikes.

#### No solvency – XO isn’t binding – can be modified in secret

Dreyfuss 12 (Mike Dreyfuss is a Candidate for Doctor of Jurisprudence, “My Fellow Americans, We Are Going to Kill You: The Legality of Targeting and Killing U.S. Citizens Abroad,” http://www.vanderbiltlawreview.org/content/articles/2012/01/Dreyfuss\_65\_Vand\_L\_Rev\_249.pdf)

Notwithstanding any of the above, the President can revoke or modify Executive Order 12,333 by issuing a new executive order. Executive orders do not bind executive practice any more than the President wants them to, and the President can keep executive orders secret if he so chooses.40 Typically, new executive orders have to be published in the Federal Register. 41 However, when the President determines that as a result of an attack or a threatened attack on the United States, publication would be impracticable or would not “give appropriate notice to the public,” the President can suspend this filing requirement.42 So while targeted killing is distinct from assassination and, under currently published laws, must be distinct to be legal, the distinction matters little. Even classifying all targeted killings as assassinations within the meaning of Executive Order 12,333 would be of little practical importance, as any President who wished to continue the programs could secretly modify the order to carve out an exception for whatever activities he wished to conduct.

#### Delay – executive orders take years

Mayer-prof political science-1 Kenneth, “With the Stroke of a Pen: Executive Orders and Presidential Power”, p. 61, <http://www.questiaschool.com/read/103282967?title=With%20the%20Stroke%20of%20a%20Pen%3a%20Executive%20Orders%20and%20Presidential%20Power>)

In contemporary practice, executive orders typically either originate from the advisory structures within the Executive Office of the President or percolate up from executive agencies desirous of presidential action. For particularly complex or far-reaching orders, the White House will solicit comment and suggestions from affected agencies on wording and substantive content. Simple executive orders navigate this process in a few weeks; complex orders can take years, and can even be derailed over an inability to obtain the necessary consensus or clearances.

#### XO links to the net benefit

Wetzel-JD Candidate Valpo-7 42 Val. U.L. Rev. 385

NOTE: BEYOND THE ZONE OF TWILIGHT: HOW CONGRESS AND THE COURT CAN MINIMIZE THE DANGERS AND MAXIMIZE THE BENEFITS OF EXECUTIVE ORDERS

C. Framing the Debate: Congress Must Critique Executive Orders in Terms of the Power Itself, not the President Exercising the Power Executive orders are often debated in highly politicized atmospheres, with loyalty following party lines and attacks centering [\*429] less on the merits of an order and more on a specific President. 187 Rather than debating whether Presidents ought to have the power to issue binding orders at all, members of Congress simply attack the individual President who issued the order. 188 For this reason, abusive orders are more associated with the President who issued the order than with the institution of executive orders. 189 In the future, if Congress wishes to restrain the President's ability to issue executive orders, it should frame the debate in terms of the power itself, not the President exercising the power. By questioning the practice of issuing executive orders Congress would, in turn, focus the media and the public debate upon the great power that executive orders grant Presidents, resulting in increased oversight. Such increased oversight into executive orders would still allow the President the power to issue important and expedient orders, while making it less likely that an order will be used for Presidential abuse and tyranny.

#### 1. Executive Orders kill SOP.

Branum, Associate for Fulbright & Jaworski, 02

Tara Branum, Associate for Fulbright & Jaworski, “President or King? The Use and Abuse of Executive Orders in Modern-Day America,” LexisNexus.com, 02

Congressmen and private citizens besiege the President with demands [\*58] that action be taken on various issues. n273 To make matters worse, once a president has signed an executive order, he often makes it impossible for a subsequent administration to undo his action without enduring the political fallout of such a reversal. For instance, President Clinton issued a slew of executive orders on environmental issues in the weeks before he left office. n274 Many were controversial and the need for the policies he instituted was debatable. n275 Nevertheless, President Bush found himself unable to reverse the orders without invoking the ire of environmentalists across the country. n276 A policy became law by the action of one man without the healthy debate and discussion in Congress intended by the Framers. Subsequent presidents undo this policy and send the matter to Congress for such debate only at their own peril. This is not the way it is supposed to be.

#### 2. Causes nuclear war

Hemesath, J.D./M.S.F.S. Georgetown, 2k

(J.D./M.S.F.S. Georgetown University Law Center, School of Foreign Service, 2001; B.A. University of California at Los Angeles, 1996.88 Geo. L. J. 2473. Lexis Nexis Academic)

Politically, nuclear weapons wield such powerful and unique symbolic effects n70 that a decision regarding their offensive use--outside the context of a declared war or defensive maneuver--may fall under the ambit of congressional control as an act tantamount to a declaration of war. n71 Such political consequences may place the nuclear decision beyond mere tactical strategy intended for the judgement of the Commander in Chief alone. Professor Louis Henkin believes that Congress has the authority to decide the essential character of a war, and specifically, whether the conflict should be escalated to a nuclear level or not. n72 President Lyndon Johnson admitted that the decision to go nuclear is a "political decision of the highest order." n73 That nuclear engagement connotes a political decision, as opposed to a mere choice of weaponry, may place the nuclear decision beyond the scope of military decisions normally reserved for the President alone. Regardless, proponents of the Executive position insist that nuclear weapons [\*2484] are not constitutionally unique. n74 In support of their claim, nothing in the text of the Constitution indicates a special classification for particularly destructive weaponry, nor does the Constitution allow the Congress to override the President's choice of weapons. n75 Decisions regarding the type of weapons used in war are considered tactical--of a type supposed to be well within the scope of the Commander in Chief's power. n76 Furthermore, no congressional law or judicial decision has drawn an instructive distinction between nuclear and conventional weaponry. n77 Such a distinction would require artificial constructions distinguishing weapons systems that, despite differences of magnitude and technology, are basically designed to do the same thing. However, the lack of textual references to nuclear weapons in the Constitution does not adequately resolve the question of nuclear war authority. Although nuclear weapons as weapons are indistinguishable in literal constitutional terms, their uniquely pernicious and lingering effects may nevertheless define their offensive use as a quintessential act of war and thus constitutionally place them within the sphere of congressional war power via the War Powers Clause. As critics have noted, there currently exists no source of constitutional authority or judicial reasoning that would resolve this debate in favor of either side. n78

#### Counterplan doesn’t solve judicial review or independent judiciary

Sullivan 96, Professor of Law

[January, 1996, Kathleen M. Sullivan, Professor of Law, Stanford University, “CONSTITUTIONAL CONSTANCY: WHY CONGRESS SHOULD CURE ITSELF OF AMENDMENT FEVER”, 17 Cardozo L. Rev. 691]

How have we managed to survive over two hundred years of social and technological change with only twenty-seven constitutional amendments? The answer is that we have granted broad interpretive latitude to the Supreme Court. Narrow construction would necessitate more frequent resort to formal constitutional amendments. Broad construction eliminates the need. Thus, the Court has determined that eighteenth century restrictions on searches of our "papers and effects" apply to our twentieth century telephone calls, and that the command of equal protection forbids racially segregated schools even though such segregation was known to the Fourteenth Amendment's framers. Neither of these decisions - Katz v. United States and Brown v. Board of Education - required a constitutional amendment. Nor did the Court's "switch in time that saved nine" during the New Deal. In the early twentieth century, the Court struck down much federal economic legislation as exceeding Congress's power and invading the province of the states. Under President Roosevelt's threat to expand and pack the Court, the Court desisted, and started to defer to all legislation bearing some plausible relationship to interstate commerce. Some scholars have called the Court's decision to defer to national economic legislation revolutionary enough to count as an informal constitutional amendment, but most view it as within the broad contours of reasonable interpretive practice. Increasing the frequency of constitutional amendment would undermine the respect and legitimacy the Court now enjoys in this interpretive role. This danger is especially acute in the case of proposed constitutional amendments that would literally overturn Supreme Court decisions, such as amendments that would declare a fetus a person with a right to life, permit punishment of flag-burning, or authorize school prayer. Such amendments suggest that if you don't like a Court decision, you mobilize to overturn it. Justice Jackson once quipped that the Court's word is not final because it is infallible, but is infallible because it is final. That finality, though, has many salutary social benefits. For example, it allows us to treat abortion clinic bombers as terrorists rather than protesters. If every controversial Supreme Court decision resulted in plebiscitary overruling in the form of a constitutional amend- [\*703] ment, surely the finality of its word would be undermined, and with it the social benefits of peaceful conflict resolution. The fact that we have amended the Constitution only four times in order to overrule the Supreme Court is worth remembering.

#### Strong judicial model prevents Russian loose nukes

Nagle, Independent Research Consultant Specializing in the Soviet Union, 1994 (Chad. “What America needs to do to help Russia avoid chaos” Washington Times, August 1, Lexis Nexis)

As things stand right now, there is indeed potential for danger and instability in Russia, as Mr. Criner notes. But this is not because America has failed to act as a "moral compass" in the marketplace. Rather, Russia's inherent instability at present stems from the fact that in all of its 1,000-year history, it never had a strong, independent judiciary to act as a check on political power. The overwhelming, monolithic power of the executive, whether czar or Communist Party, has always been the main guarantor of law and order. Now, as a fragile multiparty democracy, Russia has no more than an embryo of a judiciary. The useless Constitutional Court is gone, the Ministry of Justice is weak, and the court system is chaotic and ineffective. Hence, the executive determined the best safeguard against the recurrence of popular unrest, the kind that occurred in October 1993, to be the concentration of as much power as possible in its hands at the expense of a troublemaking parliament. Under a sane and benign president, Russia with a "super presidency" represents the best alternative for America and the West. The danger lies in something happening to cause Mr. Yeltsin's untimely removal from office. If Russia is ever to develop a respected legal system, it will need the protracted rule of a non-tyrannical head of state. In the meantime, the United States can provide a model to Russia of a system in which the judiciary functions magnificently. America, the world's only remaining superpower, can provide advice and technical expertise to the Russians as they try to develop a law-based society. We can also send clear signals to the new Russia instead of the mixed ones emanating from the Clinton administration. Now is the time for America to forge ahead with the "new world order," by promoting the alliance of the industrialized democracies of the Northern Hemisphere on American terms, not Russian. This constitutes the real "historical moment" to which Mr. Criner refers. Russia is not in a position to make threats to or demands of the United States any more so than when it ruled a totalitarian empire. It should learn to play by new rules as a first lesson in joining the family of nations. Coddling an aggressive Russia and giving it unconditional economic aid (as Alexander Rutskoi has called for) would be counterproductive, and might even encourage Russia to "manufacture" crises whenever it wanted another handout. Russia is indeed a dangerous and unstable place. The prospect of ordinary Third World political chaos in an economically marginal country with a huge stockpile of intercontinental ballistic missiles is a nightmare. However, Mr. Yeltsin is busily consolidating power, and the presidential apparatus is growing quickly. With his new team of gray, non-ideological figures intent on establishing order in the face of economic decline and opposition from demagogues (e.g. Vladimir Zhirinovsky and Mr. Rutskoi), Mr. Yeltsin is already showing signs of success. Under such circumstances, the best America can do is stand firm, extend the hand of friendship and pray for Mr. Yeltsin's continued good health.

Extinction

Helfand and Pastore 9 [Ira Helfand, M.D., and John O. Pastore, M.D., are past presidents of Physicians for Social Responsibility. March 31, 2009, “U.S.-Russia nuclear war still a threat”, http://www.projo.com/opinion/contributors/content/CT\_pastoreline\_03-31-09\_EODSCAO\_v15.bbdf23.html]

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

## \*\*\*1AR

### A2: Sig Strikes

#### There are no more signature strikes used

Brown 13 (Hayes, “Report: U.S. Drops Signature Strikes In Pakistan” <http://thinkprogress.org/security/2013/07/25/2356391/pakistan-drones-signature-strikes/>)

The United States has ended the use of so-called signature drone strikes in Pakistan, and the total number of incidents involving armed unmanned aerial vehicles there has plummeted, according to a new report from the Associated Press.

In gathering hours upon hours of footage of a given location, drones allow analysts to piece together “pattern of life” data, which are then examined for clues that suspected terrorists are using the area for planning or staging purposes. The evidence used to justify strikes against these locations — “signature strikes” — doesn’t include the appearance of known terrorists, but rather often circumstantial proof such as large gatherings of men between the ages of 16-55, where they’ve traveled while under surveillance and whether or not they were in the vicinity of known targets when the strike occurred. According to the Obama administration, however, drone strikes carried out since the president took office have all been against high-level members of the Taliban and al-Qaeda, making these drones a valuable tool in the fight against terrorism. Despite that insistence, President Obama announced in May that the use of drone strikes and other applications of force in fighting terrorism will be streamlined to a more limited set of targets, with a higher level of scrutiny applied when determining them. That decision was codified in the administration’s new “playbook” on counterterrorism tactics around the same time. According to a letter from Attorney General Eric Holder to Congress, in future drone strikes “will impose the same standard for strikes on foreign enemies now used only for American citizens deemed to be terrorists.”

That choice has apparently resulted in a corresponding drop in strikes within Pakistan, long the primary theater for Central Intelligence Agency-flown unmanned aerial vehicles. So far in 2013, there have been only 16 drone strikes carried out in Pakistan, compared to estimates of a peak of 122 in 2010 and 48 over the course of last year. Obama’s pledge and the drop in strikes suggests that the controversial — and until recently unacknowledged — method of targeting potential terrorists for execution is winding down.

### Solves

#### Solves

Jaffer, Director-ACLU Center for Democracy, 13 (Jameel Jaffer, Director of the ACLU's Center for Democracy, “Judicial Review of Targeted Killings,” 126 Harv. L. Rev. F. 185 (2013), http://www.harvardlawreview.org/issues/126/april13/forum\_1002.php)

The argument for some form of judicial review is compelling, not least because such review would clarify the scope of the government’s authority to use lethal force. The targeted killing program is predicated on sweeping constructions of the 2001 Authorization for Use of Military Force (AUMF) and the President’s authority to use military force in national self-defense. The government contends, for example, that the AUMF authorizes it to use lethal force against groups that had nothing to do with the 9/11 attacks and that did not even exist when those attacks were carried out. It contends that the AUMF gives it authority to use lethal force against individuals located far from conventional battlefields. As the Justice Department’s recently leaked white paper makes clear, the government also contends that the President has authority to use lethal force against those deemed to present “continuing” rather than truly imminent threats.These claims are controversial. They have been rejected or questioned by human rights groups, legal scholars, federal judges, and U.N. special rapporteurs. Even enthusiasts of the drone program have become anxious about its legal soundness. (“People in Washington need to wake up and realize the legal foundations are crumbling by the day,” Professor Bobby Chesney, a supporter of the program, recently said.) Judicial review could clarify the limits on the government’s legal authority and supply a degree of legitimacy to actions taken within those limits. It could also encourage executive officials to observe these limits. Executive officials would be less likely to exceed or abuse their authority if they were required to defend their conduct to federal judges. Even Jeh Johnson, the Defense Department’s former general counsel and a vocal defender of the targeted killing program, acknowledged in a recent speech that judicial review could add “rigor” to the executive’s decisionmaking process. In explaining the function of the Foreign Intelligence Surveillance Court, which oversees government surveillance in certain national security investigations, executive officials have often said that even the mere prospect of judicial review deters error and abuse. But to recognize that judicial review is indispensible in this context is not to say that Congress should establish a specialized court, still less that it should establish such a court to review contemplated killings before they are carried out. First, the establishment of such a court would almost certainly entrench the notion that the government has authority, even far away from conflict zones, to use lethal force against individuals who do not present imminent threats. When a threat is truly imminent, after all, the government will not have time to apply to a court for permission to carry out a strike. Exigency will make prior judicial review infeasible. To propose that a court should review contemplated strikes before they are carried out is to accept that the government should be contemplating strikes against people who do not present imminent threats. This is why the establishment of a specialized court would more likely institutionalize the existing program, with its elision of the imminence requirement, than narrow it. Second, judicial engagement with the targeted killing program does not actually require the establishment of a new court. In a case pending before Judge Rosemary Collyer of the District Court for the District of Columbia, the ACLU and the Center for Constitutional Rights represent the estates of the three U.S. citizens whom the CIA and JSOC killed in Yemen in 2011. The complaint, brought under Bivens v. Six Unknown Named Agents, seeks to hold senior executive officials liable for conduct that allegedly violated the Fourth and Fifth Amendments. It asks the court to articulate the limits of the government’s legal authority and to assess whether those limits were honored. In other words, the complaint asks the court to conduct the kind of review that many now seem to agree that courts should conduct. This kind of review—ex post review in the context of a Bivens action—could clarify the relevant legal framework in the same way that review by a specialized court could. But it also has many advantages over the kind of review that would likely take place in a specialized court. In a Bivens action, the proceedings are adversarial rather than ex parte, increasing their procedural legitimacy and improving their substantive accuracy. Hearings are open to the public, at least presumptively. The court can focus on events that have already transpired rather than events that might or might not transpire in the future. And a Bivens action can also provide a kind of accountability that could not be supplied by a specialized court reviewing contemplated strikes ex ante: redress for family members of people killed unlawfully, and civil liability for officials whose conduct in approving or carrying out the strike violated the Constitution. (Of course, in one profound sense a Bivens action will always come too late, because the strike alleged to be unlawful will already have been carried out. Again, though, if “imminence” is a requirement, ex ante judicial review is infeasible by definition.) Another advantage of the Bivens model is that the courts are already familiar with it. The courts quite commonly adjudicate wrongful death claims and “survival” claims brought by family members of individuals killed by law enforcement agents. In the national security context, federal courts are now accustomed to considering habeas petitions filed by individuals detained at Guantánamo. They opine on the scope of the government’s legal authority and they assess the sufficiency of the government’s evidence — the same tasks they would perform in the context of suits challenging the lawfulness of targeted killings. While Congress could of course affirm or strengthen the courts’ authority to review the lawfulness of targeted killings if it chose to do so, or legislatively narrow some of the judicially created doctrines that have precluded courts from reaching the merits in some Bivens suits, more than 40 years of Supreme Court precedent since Bivens makes clear that federal courts have not only the authority to hear after-the-fact claims brought by individuals whose constitutional rights have been infringed but also the obligation to do so.

Stops the executive—they won’t cross the line when they know they have to defend it in court

Jaffer 13 (Jameel Jaffer, Director of the ACLU's Center for Democracy, presents his reaction to the recent calls to establish a "drone court" to provide ex ante review of targeted killings.

“Judicial Review of Targeted Killings,” http://www.harvardlawreview.org/issues/126/april13/forum\_1002.php)

It could also encourage executive officials to observe these limits. Executive officials would be less likely to exceed or abuse their authority if they were required to defend their conduct to federal judges. Even Jeh Johnson, the Defense Department’s former general counsel and a vocal defender of the targeted killing program, acknowledged in a recent speech that judicial review could add “rigor” to the executive’s decisionmaking process. In explaining the function of the Foreign Intelligence Surveillance Court, which oversees government surveillance in certain national security investigations, executive officials have often said that even the mere prospect of judicial review deters error and abuse.

#### Solves blowback better---intelligence leads to reassessment

Taylor 13 (Paul, is a Senior Fellow, Center for Policy & Research. Focus on national security policy, international relations, targeted killings, and drone operations. “A FISC for Drones?,” http://centerforpolicyandresearch.com/2013/02/09/a-fisc-for-drones/)

Chesney also noted that executive officials involved in the nomination process would prefer an ex ante review to shield them from unexpected civil liability by the victims or their families. I’m sure that it is true that administration officials would like to have “certainty ex ante that they would not face a lawsuit.” However, this is not a guarantee that the courts can provide to the executive. As noted above, as with search and seizure warrants, there are issues to consider after the approval of the executive action. Ex ante review does not allow for inquiry into important ancillary issues, such as the balancing of risk to civilian bystanders. Also, it provides no assurances that new, exculpatory intelligence forces a reassessment of the targeting decision. Only ex post review would achieve this.

### PQD

#### Judicial review on targeted killing doesn’t spillover to other restrictions on military force

Brooks, prof of Law @ Georgetown, 13 (Rosa, Senior Fellow at the New America Foundation, “The Constitutional and Counterterrorism Implications of Targeted Killing”, Testimony Before the Senate, April 23, 2013, http://www.judiciary.senate.gov/pdf/04-23-13BrooksTestimony.pdf)

It is also worth noting that the practical concerns militating against justiciability in the context of traditional wartime situations do not exist to the same degree here. On traditional battlefields, imposing due process or judicial review requirements on targeting decisions would be unduly burdensome, as many targeting decisions must be made in situations of extreme urgency. In the context of targeted killings outside traditional battlefields, this is rarely the case. While the window of opportunity in which to strike a given target may be brief and urgent, decisions about whether an individual may lawfully be targeted are generally made well in advance.

#### Ex post review wouldn’t violate the political question doctrine or cause other branches to go to the court to settle disputes

Taylor 13 (Paul, is a Senior Fellow, Center for Policy & Research. Focus on national security policy, international relations, targeted killings, and drone operations. “Former DOD Lawyer Frowns on Drone Court,” http://centerforpolicyandresearch.com/2013/03/23/former-dod-lawyer-frowns-on-drone-court/)

First, Johnson notes, as others have, that judges would be loath to issue the equivalent of death warrants, first of all on purely moral grounds, but also on more political grounds. Courts enjoy the highest approval ratings of the three branches of government, yet accepting the responsibility to determine which individuals may live or die, without that individual having an opportunity to appear before the court would simply shift some of the public opprobrium from the Executive to the Judiciary. However, if the court exercised ex post review, it instead would be in its ordinary position of approving or disapproving the Executive’s decisions, not making its decisions for it. Another concern raised by Johnson is that the judges would be highly uncomfortable making such decisions because they would be necessarily involve a secret, purely ex parte process. While courts do this on a daily basis, as when they issue search or arrest warrants, the targeted killing context stands apart in that the judge’s decision would be effectively irreversible. Here again, the use of ex post process would free the courts from this problem, and place it in the executive (which includes the military, incidentally, an organization which deals with this issue as a matter of course).

#### Avoids deference---tort claims are well within court jurisdiction---the plan isn’t

Taylor 13 (Paul, is a Senior Fellow, Center for Policy & Research. Focus on national security policy, international relations, targeted killings, and drone operations. “Former DOD Lawyer Frowns on Drone Court,” http://centerforpolicyandresearch.com/2013/03/23/former-dod-lawyer-frowns-on-drone-court/)

Johnson also raised a very significant separation of powers concern. While the President’s duties and powers are not well enumerated in the Constitution, one thing is made clear: the President is the Commander in Chief of the Armed Forces. According to Johnson, the President therefore cannot abdicate his responsibilities as Commander in Chief to another branch of the government, nor can Congress remove those powers to itself or the Judiciary. While this is not an entirely settled question of law (note the War Powers Act and Congress’ power of the purse strings), it can be easily avoided by conducting the review ex post. After all, ex post review of the execution of nearly any of the President’s powers is fully within the authorities of the Judicial Branch. Johnson also notes that any requirement for ex ante review of a national security issue will require an exception for exigent circumstances. Johnson asks, “is it therefore worth it?” Without coming to a conclusion on this question, ex post review would obviate the concern. No exigent circumstances can occur after the the [sic] deed is done.

### AT: leaks

#### ---No link – Meritless cases will be dismissed

Reinert, Law prof-Cardozo, 10 (Alexander A. Reinert, Assistant Professor of Law, Benjamin N. Cardozo School of Law; counsel of record for Javaid Iqbal in Ashcroft v. Iqbal, MEASURING THE SUCCESS OF BIVENS LITIGATION AND ITS CONSEQUENCES FOR THE INDIVIDUAL LIABILITY MODEL, http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=1475356)

Several principles accompany the qualified immunity doctrine which also stem from the Court’s concern about meritless Bivens litigation. Defendants who seek dismissal on qualified immunity grounds are protected from discovery until the threshold legal question of qualified immunity is resolved.83 Relatedly, defendants are entitled to take interlocutory appeals of otherwise unappealable denials of motions to dismiss or summary judgment if the issue they seek to appeal relates to the legal question of qualified immunity.84 This exception to the final judgment rule is justified as one more tool for public officials to terminate insubstantial suits promptly.85 Thus, as one appellate court observed, the Court has “embraced the policy-making flexibility that Bivens claims afford in crafting the scope of qualified immunity for federal officials.”86 The Supreme Court has advised lower courts to be attentive to “artful pleading” and to rely on “firm application” of the Federal Rules of Civil Procedure to protect federal officials from “frivolous lawsuits.”87 Similar concerns were expressed by the Court in this past term’s decision in Ashcroft v. Iqbal,88 an opinion which gave lower courts more discretion to dismiss cases prior to discovery if certain allegations were deemed not plausible.89

#### Judicial review is insulated from intelligence leaks

Vladeck 13 (Steve Vladeck is a professor of law and the associate dean for scholarship at American University Washington College of Law. “Why a Drone Court Won’t Work –But Nominal Damages Might…” http://www.lawfareblog.com/2013/02/why-a-drone-court-wont-work/)

IV. Why Damages Actions Don’t Raise the Same Legal Concerns

At first blush, it may seem like many of these issues would be equally salient in the context of after-the-fact damages suits. But as long as such a regime was designed carefully and conscientiously, I actually think virtually all of these concerns could be mitigated. For starters, retrospective review doesn’t raise anywhere near the same concerns with regard to adversity or judicial competence. Re: adversity, presumably those who are targeted in an individual strike could be represented as plaintiffs in a post-hoc proceeding, whether through their next friend or their heirs. And as long as they could state a viable claim for relief (more on that below), it’s hard to see any pure Article III problem with such a suit for retrospective relief. As for competence, judges routinely review whether government officers acted in lawful self-defense under exigent circumstances (this is exactly what Tennessee v. Garner contemplates, after all). And if the Guantánamo litigation of the past five years has shown nothing else, it demonstrates that judges are also more than competent to resolve not just whether individual terrorism suspects are who the government says they are (and thus members of al Qaeda or one of its affiliates), but to do so using highly classified information in a manner that balances–albeit not always ideally–the government’s interest in secrecy with the detainee’s ability to contest the evidence against him. Just as Guantánamo detainees are represented in their habeas proceedings by security-cleared counsel who must comply with court-imposed protective orders and security procedures, so too, the subjects of targeted killing operations could have their estates represented by security-cleared counsel, who would be in a far better position to challenge the government’s evidence and to offer potentially exculpatory evidence / arguments of their own. More to the point, it should also follow that courts would be far more able to review the questions that will necessary be at the core of these cases after the fact. Although the pure membership question can probably be decided in the abstract, it should stand to reason that the imminence and infeasibility-of-capture issues will be much easier to assess in hindsight–removed from the pressures of the moment and with the benefit of the dispassionate distance on which judicial review must rely

### AT: Slow

#### Ex post review solves speed – the process and execution of the targeted killing is left entirely to the military

Mohamed 2/6/13 (Faisel G., He is a Professor in the Department of English of the University of Illinois at Urbana-Champaign, where he also holds appointments in the Unit for Criticism and Interpretive Theory and the Center for South Asian and Middle Eastern Studies, “The Targeted Killing Memo: What the U.S. Could Learn From Israel” <http://www.huffingtonpost.com/feisal-g-mohamed/the-targeted-killing-memo_b_2634078.html>)

Well, you may say, what's the alternative? In fact there is an alternative that a careful legal brief would have noted: the Supreme Court of Israel's 2005 decision in Public Committee Against Torture in Israel [PCATI] v. Government of Israel (HCJ 769/02). Citing the European Court of Human Rights decision in McCann v. United Kingdom (21 ECHR 97 GC), the Israeli court concludes that while a targeted killing is a military matter in its planning and execution, the courts must be free to conduct post-operational judicial review. This would shed light on the internal deliberations leading up to the targeted killing, assuring sound evidentiary procedures and the absence of a reasonable alternative to the killing. While that remains a form of due process that is less than ideal for the defendant, who is dead when his day in court arrives, it at least exposes military and governmental decision-makers to judicial scrutiny.

#### More evidence – ex post solves

Taylor 13 (Paul, is a Senior Fellow, Center for Policy & Research. Focus on national security policy, international relations, targeted killings, and drone operations. “A FISC for Drones?,” http://centerforpolicyandresearch.com/2013/02/09/a-fisc-for-drones/)

I’m not sure that it does. Names may be placed on the list at any time, conceivably as the result of a time sensitive push within the intelligence community. While I am not an expert in the process of targeting decisions, I think that the executive may need to be able to act quickly on new information that indicates that a subject is targetable. Ex ante review would place an additional hurdle between the decisive intelligence and the operation. Chesney seems to realize this by admitting the need for an “exigent circumstances exemption.” But this exception would itself mean defaulting back to an ex post review.

Extinction

Helfand and Pastore 9 [Ira Helfand, M.D., and John O. Pastore, M.D., are past presidents of Physicians for Social Responsibility. March 31, 2009, “U.S.-Russia nuclear war still a threat”, http://www.projo.com/opinion/contributors/content/CT\_pastoreline\_03-31-09\_EODSCAO\_v15.bbdf23.html]

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

### K2 Legit

#### Court action is key to check the executive- perception of legal restraint key.

Brust 12 (Richard, assistant managing editor for the ABA Journal , As DC Circuit Weighs the Future of Guantanamo Inmates, Some Say Judicial Review Can Harm Military, Oct 1, http://www.abajournal.com/magazine/article/detention\_dilemma\_as\_d.c.\_circuit\_considers\_guantanamo\_inmates\_can\_judicial)

Ultimately, asked Vladeck: “Why should [we] be so afraid of judicial review”? He posed that question in his essay for the book Patriots Debate: Contemporary Issues in National Security Law, published this summer by the American Bar Association’s Standing Committee on Law and National Security. First, Vladeck wrote, the D.C. Circuit’s jurisprudence has “left the government with far greater detention authority than might otherwise be apparent where non-citizens outside the United States are concerned.”¶ Judicial review has also “added a semblance of legitimacy to a regime that had previously and repeatedly been decried as lawless,” Vladeck added, referring to the supervision of Guantanamo.¶ “The reality is that until judicial review there was no semblance of legal restraint on detention,” Vladeck says in a phone interview. “It’s easy for folks to look at Guantanamo and say that’s a law-free zone. With judicial review the government can now say what we are doing is endorsed not just by Congress but by the courts as well.”

#### The CP would still have to involve secret, internal deliberation—public doesn’t trust this.

Jack Goldsmith 13, Henry L. Shattuck Professor at Harvard Law School, May 1 2013, “How Obama Undermined the War on Terror,” <http://www.newrepublic.com/article/112964/obamas-secrecy-destroying-american-support-counterterrorism>

For official secrecy abroad to work, the secrets must be kept at home as well. In speeches, interviews, and leaks, Obama's team has tried to explain why its operations abroad are lawful and prudent. But to comply with rules of classified information and covert action, the explanations are conveyed in limited, abstract, and often awkward terms. They usually raise more questions than they answer—and secrecy rules often preclude the administration from responding to follow-up questions, criticisms, and charges. ¶ As a result, much of what the administration says about its secret war—about civilian casualties, or the validity of its legal analysis, or the quality of its internal deliberations—seems incomplete, self-serving, and ultimately non-credible. These trust-destroying tendencies are exacerbated by its persistent resistance to transparency demands from Congress, from the press, and from organizations such as the aclu that have sought to know more about the way of the knife through Freedom of Information Act requests.¶ A related sin is the Obama administration's surprising failure to secure formal congressional support. Nearly every element of Obama's secret war rests on laws—especially the congressional authorization of force (2001) and the covert action statute (1991)—designed for different tasks. The administration could have worked with Congress to update these laws, thereby forcing members of Congress to accept responsibility and take a stand, and putting the secret war on a firmer political and legal foundation. But doing so would have required extended political efforts, public argument, and the possibility that Congress might not give the president precisely what he wants.¶ The administration that embraced the way of the knife in order to lower the political costs of counterterrorism abroad found it easier to avoid political costs at home as well. But this choice deprived it of the many benefits of public argumentation and congressional support. What Donald Rumsfeld said self-critically of Bush-era unilateralism applies to Obama's unilateralism as well: it fails to "take fully into account the broader picture—the complete set of strategic considerations of a president fighting a protracted, unprecedented and unfamiliar war for which he would need sustained domestic and international support." ¶ Instead of seeking contemporary congressional support, the administration has relied mostly on government lawyers' secret interpretive extensions of the old laws to authorize new operations against new enemies in more and more countries. The administration has great self-confidence in the quality of its stealth legal judgments. But as the Bush administration learned, secret legal interpretations are invariably more persuasive within the dark circle of executive branch secrecy than when exposed to public sunlight. On issues ranging from proper targeting standards, to the legality of killing American citizens, to what counts as an "imminent" attack warranting self-defensive measures, these secret legal interpretations—so reminiscent of the Bushian sin of unilateral legalism—have been less convincing in public, further contributing to presidential mistrust.¶ Feeling the heat from these developments, President Obama promised in his recent State of the Union address "to engage with Congress to ensure not only that our targeting, detention, and prosecution of terrorists remains consistent with our laws and system of checks and balances, but that our efforts are even more transparent to the American people and to the world." So far, this promise, like similar previous ones, remains unfulfilled. ¶ The administration has floated the idea of "[shifting] the CIA's lethal targeting program to the Defense Department," as The Daily Beast reported last month. Among other potential virtues, this move might allow greater public transparency about the way of the knife to the extent that it would eliminate the covert action bar to public discussion. But JSOC's non-covert targeted killing program is no less secretive than the CIA's, and its congressional oversight is, if anything, less robust. ¶ A bigger problem with this proposed fix is that it contemplates executive branch reorganization followed, in a best-case scenario, by more executive branch speeches and testimony about what it is doing in its stealth war. The proposal fails to grapple altogether with the growing mistrust of the administration's oblique representations about secret war. The president cannot establish trust in the way of the knife through internal moves and more words. Rather, he must take advantage of the separation of powers. Military detention, military commissions, and warrantless surveillance became more legitimate and less controversial during the Bush era because adversarial branches of government assessed the president's policies before altering and then approving them. President Obama should ask Congress to do the same with the way of the knife, even if it means that secret war abroad is harder to conduct.

#### Judicial process key

Steven Clark 12, former Staff Sergeant in the US Army, BA in Poli Sci and Government from Campbell University, “Targeted Killings: Justified Acts of War or Too Much Power for One Government?” Global Security Studies, Summer 2012, Volume 3, Issue 3, http://globalsecuritystudies.com/Clark%20Targeted.pdf

Although Eric Holder was right when he distinguished between judicial process and due process, there is more than legality to this question. If the United States continues to ignore judicial oversight, this could also cause a loss of credibility and create a legitimacy problem. To prevent this, the United States needs to include judicial oversight while still maintaining national security and not revealing specific intelligence to the public. This could be done with a special court, similar to the Foreign Intelligence Surveillance Court. 79 A court like this would also be able to act quickly in situations requiring immediate action

#### Executive orders invite judicial intervention

Cooper-prof public administration Portland State- 2 [Phillip, By Order of the President: The Use and Abuse of Executive Direct Action” p.77

Despite the apparent deference by the judiciary to the president's orders, this chapter has plainly demonstrated any number of instances in which the White House has lost in court. Executive orders, both legal and illegal, can expose officials to liability. It is an old argument, developed long before the battle over the so-called Nuremberg defense, that illegal orders do not insulate a public official from liability for his or her actions. The classic example harks back to Little v. Barreme 13 1 during the Washington administration. Even legal orders can expose the government to liability. Though the federal courts have often upheld dramatic actions taken by the president during difficult periods, they have not been hesitant to support claims against the government later. The many cases that were brought involving the U.S. Shipping Board Emergency Fleet Corporation after World War I provide examples of just how long such postorder legal cleanup can take and how much it can Cost. 112 Later, in a 1951 case, the Supreme Court subjected government to claims by business for the damages done to their interests during the government's operation of the coal mines during World War II after FDR seized the mines in 1943.133 Thus, the legal issues that may arise are concerned with both the validity of orders and with addressing the consequences of admittedly legitimate decrees.

### Inev Ext

Benjamin Wittes 9, senior fellow and research director in public law at the Brookings Institution, is the author of Law and the Long War: The Future of Justice in the Age of Terror and is also a member of the Hoover Institution's Task Force on National Security and Law, “Legislating the War on Terror: An Agenda for Reform”, November 3, Book, p. 17

A new administration now confronts the same hard problems that plagued its ideologically opposite predecessor, and its very efforts to turn the page on the past make acute the problems of institutionalization. For while the new administration can promise to close the detention facility at Guantanamo Bay and can talk about its desire to prosecute suspects criminally, for example, it cannot so easily forswear noncriminal detention. While it can eschew the term "global war on terror," it cannot forswear those uses of force—Predator strikes, for example—that law enforcement powers would never countenance. Nor is it hastening to give back the surveillance powers that Congress finally gave the Bush administration. In other words, its very efforts to avoid the Bush administrations vocabulary have only emphasized the conflicts hybrid nature—indeed- emphasized that the United States is building something new here, not merely applying something old.¶ That point should not provoke controversy. The evidence that the United States is fumbling toward the creation of hybrid institutions to handle terrorism cases is everywhere around us. U.S. law, for example, now contemplates extensive- probing judicial review of detentions under the laws of war—a naked marriage of criminal justice and wartime traditions. It also contemplates warrantless wiretapping with judicial oversight of surveillance targeting procedures—thereby mingling the traditional judicial role in reviewing domestic surveillance with the vacuum cleaner-type acquisition of intelligence typical of overseas intelligence gathering. Slowly but surely, through an unpredictable combination of litigation, legislation, and evolutionary developments within executive branch policy, the nation is creating novel institutional arrangements to authorize and regulate the war on terror. The real question is not whether institutionalization will take place but whether it will take place deliberately or haphazardly, whether the United States will create through legislation the institutions with which it wishes to govern itself or whether it will allow an endless sequence of common law adjudications to shape them.¶ The authors of the chapters in this book disagree about a great many things. They span a considerable swath of the U.S. political spectrum, and they would no doubt object to some of one another's policy prescriptions. Indeed, some of the proposals are arguably inconsistent with one another, and it will be the very rare reader who reads this entire volume and wishes to see all of its ideas implemented in legislation. What binds these authors together is not the programmatic aspects of their policy prescriptions but the belief in the value of legislative action to help shape the contours of the continuing U.S. confrontation with terrorism. That is, the authors all believe that Congress has a significant role to play in the process of institutionalization—and they have all attempted to describe that role with reference to one of the policy areas over which Americans have sparred these past several years and will likely continue sparring over the next several years.