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### War Fighting

#### Advantage one: counter terrorism

#### International support for the US drone program is collapsing, threatening to shut it down entirely. Reform is key.

Zenko, CFR Fellow, 13 (Micah, is the Douglas Dillon fellow in the Center for Preventive Action (CPA) at the Council on Foreign Relations (CFR)., “Reforming U.S. Drone Strike Policies,” http://www.cfr.org/wars-and-warfare/reforming-us-drone-strike-policies/p29736)

In his Nobel Peace Prize acceptance speech, President Obama declared: “Where force is necessary, we have a moral and strategic interest in binding ourselves to certain rules of conduct. Even as we confront a vicious adversary that abides by no rules, I believe the United States of America must remain a standard bearer in the conduct of war.”63 Under President Obama drone strikes have expanded and intensified, and they will remain a central component of U.S. counterterrorism operations for at least another decade, according to U.S. officials.64 But much as the Bush administration was compelled to reform its controversial counterterrorism practices, it is likely that the United States will ultimately be forced by domestic and international pressure to scale back its drone strike policies. The Obama administration can preempt this pressure by clearly articulating that the rules that govern its drone strikes, like all uses of military force, are based in the laws of armed conflict and international humanitarian law; by engaging with emerging drone powers; and, most important, by matching practice with its stated policy by limiting drone strikes to those individuals it claims are being targeted (which would reduce the likelihood of civilian casualties since the total number of strikes would significantly decrease). The choice the United States faces is not between unfettered drone use and sacrificing freedom of action, but between drone policy reforms by design or drone policy reforms by default. Recent history demonstrates that domestic political pressure could severely limit drone strikes in ways that the CIA or JSOC have not anticipated. In support of its counterterrorism strategy, the Bush administration engaged in the extraordinary rendition of terrorist suspects to third countries, the use of enhanced interrogation techniques, and warrantless wiretapping. Although the Bush administration defended its policies as critical to protecting the U.S. homeland against terrorist attacks, unprecedented domestic political pressure led to significant reforms or termination. Compared to Bush-era counterterrorism policies, drone strikes are vulnerable to similar—albeit still largely untapped—moral outrage, and they are even more susceptible to political constraints because they occur in plain sight. Indeed, a negative trend in U.S. public opinion on drones is already apparent. Between February and June 2012, U.S. support for drone strikes against suspected terrorists fell from 83 percent to 62 percent—which represents less U.S. support than enhanced interrogation techniques maintained in the mid-2000s.65 Finally, U.S. drone strikes are also widely opposed by the citizens of important allies, emerging powers, and the local populations in states where strikes occur.66 States polled reveal overwhelming opposition to U.S. drone strikes: Greece (90 percent), Egypt (89 percent), Turkey (81 percent), Spain (76 percent), Brazil (76 percent), Japan (75 percent), and Pakistan (83 percent).67 This is significant because the United States cannot conduct drone strikes in the most critical corners of the world by itself. Drone strikes require the tacit or overt support of host states or neighbors. If such states decided not to cooperate—or to actively resist—U.S. drone strikes, their effectiveness would be immediately and sharply reduced, and the likelihood of civilian casualties would increase. This danger is not hypothetical. In 2007, the Ethiopian government terminated its U.S. military presence after public revelations that U.S. AC-130 gunships were launching attacks from Ethiopia into Somalia. Similarly, in late 2011, Pakistan evicted all U.S. military and intelligence drones, forcing the United States to completely rely on Afghanistan to serve as a staging ground for drone strikes in Pakistan. The United States could attempt to lessen the need for tacit host-state support by making significant investments in armed drones that can be flown off U.S. Navy ships, conducting electronic warfare or missile attacks on air defenses, allowing downed drones to not be recovered and potentially transferred to China or Russia, and losing access to the human intelligence networks on the ground that are critical for identifying targets. According to U.S. diplomats and military officials, active resistance— such as the Pakistani army shooting down U.S. armed drones— is a legitimate concern. In this case, the United States would need to either end drone sorties or escalate U.S. military involvement by attacking Pakistani radar and antiaircraft sites, thus increasing the likelihood of civilian casualties.68 Beyond where drone strikes currently take place, political pressure could severely limit options for new U.S. drone bases. For example, the Obama administration is debating deploying armed drones to attack al-Qaeda in the Islamic Maghreb (AQIM) in North Africa, which would likely require access to a new airbase in the region. To some extent, anger at U.S. sovereignty violations is an inevitable and necessary trade-off when conducting drone strikes. Nevertheless, in each of these cases, domestic anger would partially or fully abate if the United States modified its drone policy in the ways suggested below.

#### US counter-terrorism efforts are failing. Overreliance on drones results in civilian deaths that cause blowback- terrorist groups use civilian deaths for recruitment and fundraising, their key strategies for resurgence.

Cronin, prof-GMU, 13 (Audrey Kurth, Professor of Public Policy at George Mason University and the author of How Terrorism Ends: Understanding the Decline and Demise of Terrorist Campaigns, “Why Drones Fail,” Foreign Affairs, Jul/Aug2013, Vol. 92, Issue 4)

Like any other weapon, armed drones can be tactically useful. But are they helping advance the strategic goals of U.S. counterterrorism? Although terrorism is a tactic, it can succeed only on the strategic level, by leveraging a shocking event for political gain. To be effective, counterterrorism must itself respond with a coherent strategy. The problem for Washington today is that its drone program has taken on a life of its own, to the point where tactics are driving strategy rather than the other way around. The main goals of U.S. counterterrorism are threefold: the strategic defeat of al Qaeda and groups affiliated with it, the containment of local conflicts so that they do not breed new enemies, and the preservation of the security of the American people. Drones do not serve all these goals. Although they can protect the American people from attacks in the short term, they are not helping to defeat al Qaeda, and they may be creating sworn enemies out of a sea of local insurgents. It would be a mistake to embrace killer drones as the centerpiece of U.S. counterterrorism. AL QAEDA'S RESILIENCE At least since 9/11, the United States has sought the end of al Qaeda -- not just to set it back tactically, as drones have surely done, but also to defeat the group completely. Terrorist organizations can meet their demise in a variety of ways, and the killing of their leaders is certainly one of them. Abu Sayyaf, an Islamist separatist group in the Philippines, lost its political focus, split into factions, and became a petty criminal organization after the army killed its leaders in 2006 and 2007. In other cases, however, including those of the Shining Path in Peru and Action Directe in France, the humiliating arrest of a leader has been more effective. By capturing a terrorist leader, countries can avoid creating a martyr, win access to a storehouse of intelligence, and discredit a popular cause. Despite the Obama administration's recent calls for limits on drone strikes, Washington is still using them to try to defeat al Qaeda by killing off its leadership. But the terrorist groups that have been destroyed through decapitation looked nothing like al Qaeda: they were hierarchically structured, characterized by a cult of personality, and less than ten years old, and they lacked a clear succession plan. Al Qaeda, by contrast, is a resilient, 25-year-old organization with a broad network of outposts. The group was never singularly dependent on Osama bin Laden's leadership, and it has proved adept at replacing dead operatives. Drones have inflicted real damage on the organization, of course. In Pakistan, the approximately 350 strikes since 2004 have cut the number of core al Qaeda members in the tribal areas by about 75 percent, to roughly 50-100, a powerful answer to the 2001 attacks they planned and orchestrated nearby. As al Qaeda's center of gravity has shifted away from Pakistan to Yemen and North Africa, drone strikes have followed the terrorists. In September 2011, Michael Vickers, the U.S. undersecretary of defense for intelligence, estimated that there were maybe four key al Qaeda leaders remaining in Pakistan and about ten or 20 leaders overall in Pakistan, Somalia, and Yemen. Drones have also driven down the overall level of violence in the areas they have hit. The political scientists Patrick Johnston and Anoop Sarbahi recently found that drone strikes in northwestern Pakistan from 2007 to 2011 resulted in a decrease in the number and lethality of militant attacks in the tribal areas where they were conducted. Such strikes often lead militants simply to go somewhere else, but that can have value in and of itself. Indeed, the drone threat has forced al Qaeda operatives and their associates to change their behavior, keeping them preoccupied with survival and hindering their ability to move, plan operations, and carry them out. The fighters have proved remarkably adaptable: a document found left behind in February 2013 by Islamist fighters fleeing Mali detailed 22 tips for avoiding drone attacks, including using trees as cover, placing dolls and statues outside to mislead aerial intelligence, and covering vehicles with straw mats. Nonetheless, the prospect of living under the threat of instant death from above has made recruitment more difficult and kept operatives from establishing close ties to local civilians, who fear they might also be killed. But the benefits end there, and there are many reasons to believe that drone strikes are undermining Washington's goal of destroying al Qaeda. Targeted killings have not thwarted the group's ability to replace dead leaders with new ones. Nor have they undermined its propaganda efforts or recruitment. Even if al Qaeda has become less lethal and efficient, its public relations campaigns still allow it to reach potential supporters, threaten potential victims, and project strength. If al Qaeda's ability to perpetuate its message continues, then the killing of its members will not further the long-term goal of ending the group. Not only has al Qaeda's propaganda continued uninterrupted by the drone strikes; it has been significantly enhanced by them. As Sahab (The Clouds), the propaganda branch of al Qaeda, has been able to attract recruits and resources by broadcasting footage of drone strikes, portraying them as indiscriminate violence against Muslims. Al Qaeda uses the strikes that result in civilian deaths, and even those that don't, to frame Americans as immoral bullies who care less about ordinary people than al Qaeda does. And As Sahab regularly casts the leaders who are killed by drones as martyrs. It is easy enough to kill an individual terrorist with a drone strike, but the organization's Internet presence lives on. A more effective way of defeating al Qaeda would be to publicly discredit it with a political strategy aimed at dividing its followers. Al Qaeda and its various affiliates do not together make up a strong, unified organization. Different factions within the movement disagree about both long-term objectives and short-term tactics, including whether it is acceptable to carry out suicide attacks or kill other Muslims. And it is in Muslim-majority countries where jihadist violence has taken its worst toll. Around 85 percent of those killed by al Qaeda's attacks have been Muslims, a fact that breeds revulsion among its potential followers. The United States should be capitalizing on this backlash. In reality, there is no equivalence between al Qaeda's violence and U.S. drone strikes -- under the Obama administration, drones have avoided civilians about 86 percent of the time, whereas al Qaeda purposefully targets them. But the foolish secrecy of Washington's drone program lets critics allege that the strikes are deadlier and less discriminating than they really are. Whatever the truth is, the United States is losing the war of perceptions, a key part of any counterterrorism campaign. Since 2010, moreover, U.S. drone strikes have progressed well beyond decapitation, now targeting al Qaeda leaders and followers alike, as well as a range of Taliban members and Yemeni insurgents. With its so-called signature strikes, Washington often goes after people whose identity it does not know but who appear to be behaving like militants in insurgent-controlled areas. The strikes end up killing enemies of the Pakistani, Somali, and Yemeni militaries who may not threaten the United States at all. Worse, because the targets of such strikes are so loosely defined, it seems inevitable that they will kill some civilians. The June 2011 claim by John Brennan, President Barack Obama's top counterterrorism adviser at the time, that there had not been a single collateral death from drone attacks in the previous year strained credulity -- and badly undermined U.S. credibility. The drone campaign has morphed, in effect, into remote-control repression: the direct application of brute force by a state, rather than an attempt to deal a pivotal blow to a movement. Repression wiped out terrorist groups in Argentina, Brazil, Peru, and tsarist Russia, but in each case, it sharply eroded the government's legitimacy. Repression is costly, not just to the victims, and difficult for democracies to sustain over time. It works best in places where group members can be easily separated from the general population, which is not the case for most targets of U.S. drone strikes. Military repression also often results in violence spreading to neighboring countries or regions, which partially explains the expanding al Qaeda footprint in the Middle East and North Africa, not to mention the Caucasus. KEEPING LOCAL CONFLICTS LOCAL Short of defeating al Qaeda altogether, a top strategic objective of U.S. counterterrorism should be to prevent fighters in local conflicts abroad from aligning with the movement and targeting the United States and its allies. Military strategists refer to this goal as "the conservation of enemies," the attempt to keep the number of adversaries to a minimum. Violent jihadism existed long before 9/11 and will endure long after the U.S. war on terrorism finally ends. The best way for the United States to prevent future acts of international terrorism on its soil is to make sure that local insurgencies remain local, to shore up its allies' capacities, and to use short-term interventions such as drones rarely, selectively, transparently, and only against those who can realistically target the United States. The problem is that the United States can conceivably justify an attack on any individual or group with some plausible link to al Qaeda. Washington would like to disrupt any potentially powerful militant network, but it risks turning relatively harmless local jihadist groups into stronger organizations with eager new recruits. If al Qaeda is indeed becoming a vast collective of local and regional insurgents, the United States should let those directly involved in the conflicts determine the outcome, keep itself out, provide resources only to offset funds provided to radical factions, and concentrate on protecting the homeland. Following 9/11, the U.S. war on terrorism was framed in the congressional authorization to use force as a response to "those nations, organizations, or persons" responsible for the attacks. The name "al Qaeda," which does not appear in the authorization, has since become an ill-defined shorthand, loosely employed by terrorist leaders, counterterrorism officials, and Western pundits alike to describe a shifting movement. The vagueness of the U.S. terminology at the time was partly deliberate: the authorization was worded to sidestep the long-standing problem of terrorist groups' changing their names to evade U.S. sanctions. But Washington now finds itself in a permanent battle with an amorphous and geographically dispersed foe, one with an increasingly marginal connection to the original 9/11 plotters. In this endless contest, the United States risks multiplying its enemies and heightening their incentives to attack the country.

#### And, lack of transparency to the drone program collapses allied cooperation on terrorism, which is critical to intelligence sharing.

Human Rights First 13 (How to Ensure that the U.S. Drone Program does not Undermine Human Rights BLUEPRINT FOR THE NEXT ADMINISTRATION, Updated April 13, http://www.humanrightsfirst.org/wp-content/uploads/pdf/blueprints2012/HRF\_Targeted\_Killing\_blueprint.pdf)

The Obama Administration has dramatically escalated targeted killing by drones as a central feature of its counterterrorism response. Over the past two years, the administration has begun to reveal more about the targeted killing program, including in a leaked Department of Justice White paper on targeted killing1 and in public remarks by several senior officials.2 While this information is welcome, it does not fully address our concerns. Experts and other governments have continued to raise serious concerns about: The precedent that the U.S. targeted killing policy is setting for the rest of the world, including countries that have acquired or are in the process of acquiring drones, yet have long failed to adhere to the rule of law and protect human rights; The impact of the drone program on other U.S. counterterrorism efforts, including whether U.S. allies and other security partners have reduced intelligence-sharing and other forms of counterterrorism cooperation because of the operational and legal concerns expressed by these countries; The impact of drone operations on other aspects of U.S. counterterrorism strategy, especially diplomatic and foreign assistance efforts designed to counter extremism, promote stability and provide economic aid; The number of civilian casualties, including a lack of clarity on who the United States considers a civilian in these situations; and Whether the legal framework for the program that has been publicly asserted so far by the administration comports with international legal requirements. The totality of these concerns, heightened by the lack of public information surrounding the program, require the administration to better explain the program and its legal basis, and to carefully review the policy in light of the global precedent it is setting and serious questions about the effectiveness of the program on the full range of U.S. counterterrorism efforts. While it is expected that elements of the U.S. government’s strategy for targeted killing will be classified, it is in the national interest that the government be more transparent about policy considerations governing its use as well as its legal justification, and that the program be subject to regular oversight. Furthermore, it is in U.S. national security interests to ensure that the rules of engagement are clear and that the program minimizes any unintended negative consequences. How the U.S. operates and publicly explains its targeted killing program will have far-reaching consequences. The manufacture and sale of unmanned aerial vehicles (UAVs) is an increasingly global industry and drone technology is not prohibitively complicated. Some 70 countries already possess UAVs3 —including Russia, Syria and Libya4 —and others are in the process of acquiring them. As White House counterterrorism chief John Brennan stated: the United States is "establishing precedents that other nations may follow, and not all of them will be nations that share our interests or the premium we put on protecting human life, including innocent civilians."5 By declaring that it is in an armed conflict with al Qaeda’s “associated forces” (a term it has not defined) without articulating limits to that armed conflict, the United States is inviting other countries to similarly declare armed conflicts against groups they consider to be security threats for purposes of assuming lethal targeting authority. Moreover, by announcing that all “members” of such groups are legally targetable, the United States is establishing exceedingly broad precedent for who can be targeted, even if it is not utilizing the full scope of this claimed authority.6 As an alternative to armed conflict-based targeting, U.S. officials have claimed targeted killings are justified as self-defense responding to an imminent threat, but have referred to a “flexible” or “elongated” concept of imminence,7 without adequately explaining what that means or how that complies with the requirements of international law. In a white paper leaked to NBC news in February 2013, for example, the Department of Justice adopts what it calls a “broader concept of imminence” that has no basis in law. According to the white paper, an imminent threat need be neither immediate nor specific. This is a dangerous, unprecedented and unwarranted expansion of widely-accepted understandings of international law.8 It is also not clear that the current broad targeted killing policy serves U.S. long-term strategic interests in combating international terrorism. Although it has been reported that some high-level operational leaders of al Qaeda have been killed in drone attacks, studies show that the vast majority of victims are not high-level terrorist leaders.9 National security analysts and former U.S. military officials increasingly argue that such tactical gains are outweighed by the substantial costs of the targeted killing program, including growing antiAmerican sentiment and recruiting support for al Qaeda. 10 General Stanley McChrystal has said: “What scares me about drone strikes is how they are perceived around the world. The resentment created by American use of unmanned strikes ... is much greater than the average American appreciates.”11 The broad targeted killing program has already strained U.S. relations with its allies and thereby impeded the flow of critical intelligence about terrorist operations.12

#### Allied cooperation on intelligence is critical to effective counterterrorism

McGill and Gray 12 (Anna-Katherine Staser McGill, David H. Gray, “Challenges to International Counterterrorism Intelligence Sharing,” Global Security Studies, Summer 2012, Volume 3, Issue 3, http://globalsecuritystudies.com/McGill%20Intel%20Share.pdf)

In his article “Old Allies and New Friends: Intelligence-Sharing in the War on Terror”, Derek Reveron states “the war on terror requires high levels of intelligence to identify a threat relative to the amount of force required to neutralize it” as opposed to the Cold War where the opposite was true (455). As a result, intelligence is the cornerstone of effective counterterrorism operations in the post 9/11 world. Though the United States has the most robust intelligence community in the world with immense capability, skills, and technology, its efficiency in counterterrorism issues depends on coalitions of both traditional allies and new allies. Traditional allies offer a certain degree of dependability through a tried and tested relationship based on similar values; however, newly cultivated allies in the war on terrorism offer invaluable insight into groups operating in their own back yard. The US can not act unilaterally in the global fight against terrorism. It doesn’t have the resources to monitor every potential terrorist hide-out nor does it have the time or capability to cultivate the cultural, linguistic, and CT knowledge that its new allies have readily available. The Department of Defense’s 2005 Quadrennial Review clearly states that the United States "cannot meet today's complex challenges alone. Success requires unified statecraft: the ability of the U.S. government to bring to, bear all elements of national power at home and to work in close cooperation with allies and partners abroad" (qtd in Reveron, 467). The importance of coalition building for the war on terrorism is not lost on US decision-makers as seen by efforts made in the post 9/11 climate to strengthen old relationships and build new ones; however, as seen in the following sections, the possible hindrances to effective, long term CT alliances must also be addressed in order to sustain current operations.

#### Terrorists have means and motive for nuclear attacks, now-expertise and materials are widespread and multiple attempts prove.

**Jaspal, Quaid-i-Azam University IR professor, 2012**

(Zafar, “Nuclear/Radiological Terrorism: Myth or Reality?”, Journal of Political Studies, <http://pu.edu.pk/images/journal/pols/pdf-files/Nuclear%20Radiological%20terrorism%20Jaspa_Vol_19_Issue_1_2012.pdf>, ldg)

The misperception, miscalculation and above all ignorance of the ruling elite about security puzzles are perilous for the national security of a state. Indeed, in an age of transnational terrorism and unprecedented dissemination of dual-use nuclear technology, ignoring nuclear terrorism threat is an imprudent policy choice. The incapability of terrorist organizations to engineer fissile material does not eliminate completely the possibility of nuclear terrorism. At the same time, the absence of an example or precedent of a nuclear/ radiological terrorism does not qualify the assertion that the nuclear/radiological terrorism ought to be remained a myth.x Farsighted rationality obligates that one should not miscalculate transnational terrorist groups — whose behavior suggests that they have a death wish — of acquiring nuclear, radiological, chemical and biological material producing capabilities. In addition, one could be sensible about the published information that huge amount of nuclear material is spread around the globe. According to estimate it is enough to build more than 120,000 Hiroshima-sized nuclear bombs (Fissile Material Working Group, 2010, April 1). The alarming fact is that a few storage sites of nuclear/radiological materials are inadequately secured and continue to be accumulated in unstable regions (Sambaiew, 2010, February). Attempts at stealing fissile material had already been discovered (Din & Zhiwei, 2003: 18). Numerous evidences confirm that terrorist groups had aspired to acquire fissile material for their terrorist acts. Late Osama bin Laden, the founder of al Qaeda stated that acquiring nuclear weapons was a“religious duty” (Yusufzai, 1999, January 11). The IAEA also reported that “al-Qaeda was actively seeking an atomic bomb.” Jamal Ahmad al-Fadl, a dissenter of Al Qaeda, in his trial testimony had “revealed his extensive but unsuccessful efforts to acquire enriched uranium for al-Qaeda” (Allison, 2010, January: 11). On November 9, 2001, Osama bin Laden claimed that “we have chemical and nuclear weapons as a deterrent and if America used them against us we reserve the right to use them (Mir, 2001, November 10).” On May 28, 2010, Sultan Bashiruddin Mahmood, a Pakistani nuclear scientist confessed that he met Osama bin Laden. He claimed that “I met Osama bin Laden before 9/11 not to give him nuclear know-how, but to seek funds for establishing a technical college in Kabul (Syed, 2010, May 29).” He was arrested in 2003 and after extensive interrogation by American and Pakistani intelligence agencies he was released (Syed, 2010, May 29). Agreed, Mr. Mahmood did not share nuclear know-how with Al Qaeda, but his meeting with Osama establishes the fact that the terrorist organization was in contact with nuclear scientists. Second, the terrorist group has sympathizers in the nuclear scientific bureaucracies. It also authenticates bin Laden’s Deputy Ayman Zawahiri’s claim which he made in December 2001: “If you have $30 million, go to the black market in the central Asia, contact any disgruntled Soviet scientist and a lot of dozens of smart briefcase bombs are available (Allison, 2010, January: 2).” The covert meetings between nuclear scientists and al Qaeda members could not be interpreted as idle threats and thereby the threat of nuclear/radiological terrorism is real. The 33Defense Secretary Robert Gates admitted in 2008 that “what keeps every senior government leader awake at night is the thought of a terrorist ending up with a weapon of mass destruction, especially nuclear (Mueller, 2011, August 2).” Indeed, the nuclear deterrence strategy cannot deter the transnational terrorist syndicate from nuclear/radiological terrorist attacks. Daniel Whiteneck pointed out: “Evidence suggests, for example, that al Qaeda might not only use WMD simply to demonstrate the magnitude of its capability but that it might actually welcome the escalation of a strong U.S. response, especially if it included catalytic effects on governments and societies in the Muslim world. An adversary that prefers escalation regardless of the consequences cannot be deterred” (Whiteneck, 2005, Summer: 187)

#### And, Nuclear terrorism attacks escalate and cause extinction.

**Morgan, Hankuk University of Foreign Studies, 2009**

(Dennis, World on fire: two scenarios of the destruction of human civilization and possible extinction of the human race Futures, Volume 41, Issue 10, December, ldg)

In a remarkable website on nuclear war, Carol Moore asks the question “Is Nuclear War Inevitable??” In Section , Moore points out what most terrorists obviously already know about the nuclear tensions between powerful countries. No doubt, they’ve figured out that the best way to escalate these tensions into nuclear war is to set off a nuclear exchange. As Moore points out, all that militant terrorists would have to do is get their hands on one small nuclear bomb and explode it on either Moscow or Israel. Because of the Russian “dead hand” system, “where regional nuclear commanders would be given full powers should Moscow be destroyed,” it is likely that any attack would be blamed on the United States” Israeli leaders and Zionist supporters have, likewise, stated for years that if Israel were to suffer a nuclear attack, whether from terrorists or a nation state, it would retaliate with the suicidal “Samson option” against all major Muslim cities in the Middle East. Furthermore, the Israeli Samson option would also include attacks on Russia and even “anti-Semitic” European cities In that case, of course, Russia would retaliate, and the U.S. would then retaliate against Russia. China would probably be involved as well, as thousands, if not tens of thousands, of nuclear warheads, many of them much more powerful than those used at Hiroshima and Nagasaki, would rain upon most of the major cities in the Northern Hemisphere. Afterwards, for years to come, massive radioactive clouds would drift throughout the Earth in the nuclear fallout, bringing death or else radiation disease that would be genetically transmitted to future generations in a nuclear winter that could last as long as a 100 years, taking a savage toll upon the environment and fragile ecosphere as well. And what many people fail to realize is what a precarious, hair-trigger basis the nuclear web rests on. Any accident, mistaken communication, false signal or “lone wolf’ act of sabotage or treason could, in a matter of a few minutes, unleash the use of nuclear weapons, and once a weapon is used, then the likelihood of a rapid escalation of nuclear attacks is quite high while the likelihood of a limited nuclear war is actually less probable since each country would act under the “use them or lose them” strategy and psychology; restraint by one power would be interpreted as a weakness by the other, which could be exploited as a window of opportunity to “win” the war. In other words, once Pandora's Box is opened, it will spread quickly, as it will be the signal for permission for anyone to use them. Moore compares swift nuclear escalation to a room full of people embarrassed to cough. Once one does, however, “everyone else feels free to do so. The bottom line is that as long as large nation states use internal and external war to keep their disparate factions glued together and to satisfy elites’ needs for power and plunder, these nations will attempt to obtain, keep, and inevitably use nuclear weapons. And as long as large nations oppress groups who seek self-determination, some of those groups will look for any means to fight their oppressors” In other words, as long as war and aggression are backed up by the implicit threat of nuclear arms, it is only a matter of time before the escalation of violent conflict leads to the actual use of nuclear weapons, and once even just one is used, it is very likely that many, if not all, will be used, leading to horrific scenarios of global death and the destruction of much of human civilization while condemning a mutant human remnant, if there is such a remnant, to a life of unimaginable misery and suffering in a nuclear winter. In “Scenarios,” Moore summarizes the various ways a nuclear war could begin: Such a war could start through a reaction to terrorist attacks, or through the need to protect against overwhelming military opposition, or through the use of small battle field tactical nuclear weapons meant to destroy hardened targets. It might quickly move on to the use of strategic nuclear weapons delivered by short-range or inter-continental missiles or long-range bombers. These could deliver high altitude bursts whose electromagnetic pulse knocks out electrical circuits for hundreds of square miles. Or they could deliver nuclear bombs to destroy nuclear and/or non-nuclear military facilities, nuclear power plants, important industrial sites and cities. Or it could skip all those steps and start through the accidental or reckless use of strategic weapons

#### Only judicial review provides the due process necessary to solve confidence in targeting—key to viability of the program

Corey, Army Colonel, 12 (Colonel Ian G. Corey, “Citizens in the Crosshairs: Ready, Aim, Hold Your Fire?,” http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA561582)

Alternatively, targeted killing decisions could be subjected to judicial review. 103 Attorney General Holder rejected ex ante judicial review out of hand, citing the Constitution’s allocation of national security operations to the executive branch and the need for timely action.104 Courts are indeed reluctant to stray into the realm of political questions, as evidenced by the district court’s dismissal of the ACLU and CCR lawsuit. On the other hand, a model for a special court that operates in secret already exists: the Foreign Intelligence Surveillance Court (FISC) that oversees requests for surveillance warrants for suspected foreign agents. While ex ante judicial review would provide the most robust form of oversight, ex post review by a court like the FISC would nonetheless serve as a significant check on executive power.105 Regardless of the type of oversight implemented, some form of independent review is necessary to demonstrate accountability and bolster confidence in the targeted killing process. Conclusion The United States has increasingly relied on targeted killing as an important tactic in its war on terror and will continue to do so for the foreseeable future.106 This is entirely reasonable given current budgetary constraints and the appeal of targeted killing, especially UAS strikes, as an alternative to the use of conventional forces. Moreover, the United States will likely again seek to employ the tactic against U.S. citizens assessed to be operational leaders of AQAM. As demonstrated above, one can make a good faith argument that doing so is entirely permissible under both international and domestic law as the Obama Administration claims, the opinions of some prominent legal scholars notwithstanding. The viability of future lethal targeting of U.S. citizens is questionable, however, if the government fails to address legitimate issues of transparency and accountability. While the administration has recently made progress on the transparency front, much more remains to be done, including the release in some form of the legal analysis contained in OLC’s 2010 opinion. Moreover, the administration must be able to articulate to the American people how it selects U.S. citizens for targeted killing and the safeguards in place to mitigate the risk of error and abuse. Finally, these targeting decisions must be subject to some form of independent review that will both satisfy due process and boost public confidence.

#### Court action is key—using the legal process to protect constitutional rights is critical to counter-terrorism credibility and US soft power.

Sidhu, J.D, 11 (Dawinder S., J.D., The George Washington University; M.A., Johns Hopkins University; B.A., University of Pennsylvania. Mr. Sidhu is an attorney whose primary intellectual focus is the relationship between individual rights and heightened national security concerns, “JUDICIAL REVIEW AS SOFT POWER: HOW THE COURTS CAN HELP US WIN THE POST-9/11 CONFLICT,” NATIONAL SECURITY LAW BRIEF Vol 1, No 1, <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1003&context=nslb>)

The legal principles established by the Framers and enshrined in the Constitution are a source of attraction only if we have meaningfully adhered to them in practice. Part II will posit that the Supreme Court’s robust evaluation of cases in the wartime context suggests that the nation has been faithful to the rule of law even in times of national stress. As support, this part will provide exam- ples of cases involving challenges to the American response to wars both before and after 9/11, the discussion of which will exhibit American respect for the rule of law. While the substantive results of some of these cases may be particularly pleasing to Muslims, for instance the extension of habeas protections to detainees in Guantánamo, 30 this part will make clear that it is the legal process—not substantive victories for one side or against the government—which is the true source of American legal soft power. If it is the case that the law may be an element of soft power conceptually and that the use of the legal process has refl ected this principle in practice, the conclusion argues that it would benefit American national security for others in the world to be made aware of the American constitutional framework and the judiciary’s activities related to the war. Such information would make it more likely that other nations and peoples, especially moderate Muslims, will be attracted to American interests. This Article thus reaches a conclusion that may seem counterintuitive—that the judicial branch, in the performance of its constitutional duty of judicial review, furthers American national security and foreign policy objectives even when it may happen to strike down executive or legislative arguments for expanded war powers to prosecute the current war on terror and even though the executive and legislature constitute the foreign policy branches of the federal government. In other words, a “loss” for the executive or legislature, may be considered, in truth, a reaffirmation of our constitutional system and therefore a victory for the entire nation in the neglected but necessary post-9/11 war of ideas. 31 As such, it is the central contention of this Article that the judicial branch is a repository of American soft power and thus a useful tool in the post-9/11 conflict

Only external checks on the executive’s use of drones can create international norms of accountability and transparency---risks large scale conflicts

Brooks, Ph.D in Law @ Georgetown 4/23/13 (Rosa, Professor of Law, Georgetown University Law Center, “The Constitutional and Counterterrorism Implications of Targeted Killing Testimony Before the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights” <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1114&context=cong>)

Defenders of administration targeted killing policy acknowledge that the criteria for determining how to answer these many questions have not been made public, but insist that this should not be cause for concern. The Administration has reportedly developed a detailed “playbook” outlining the targeting criteria and procedures,40, and insiders insist that executive branch officials go through an elaborate process in which they carefully consider every possible issue before determining that a drone strike is lawful.41 No doubt they do, but this is somewhat cold comfort. Formal processes tend to further normalize once-exceptional activities -- and "trust us" is a rather shaky foundation for the rule of law. Indeed, the whole point of the rule of law is that individual lives and freedom should not depend solely on the good faith and benevolence of government officials. As with law of war arguments, stating that US targeted killings are clearly legal under traditional self-defense principles requires some significant cognitive dissonance. Law exists to restrain untrammeled power. It is no doubt possible to make a plausible legal argument justifying each and every U.S. drone strike -- but this merely suggests that we are working with a legal framework that has begun to outlive its usefulness. The real question isn't whether U.S. drone strikes are "legal." The real question is this: Do we really want to live in a world in which the U.S. government's justification for killing is so malleable? Setting Troubling International Precedents Here is an additional reason to worry about the U.S. overreliance on drone strikes: Other states will follow America's example, and the results are not likely to be pretty. Consider once again the Letelier murder, which was an international scandal in 1976: If the Letelier assassination took place today, the Chilean authorities would presumably insist on their national right to engage in “targeted killings” of individuals deemed to pose imminent threats to Chilean national security -- and they would justify such killings using precisely the same legal theories the US currently uses to justify targeted killings in Yemen or Somalia. We should assume that governments around the world—including those with less than stellar human rights records, such as Russia and China—are taking notice. Right now, the United States has a decided technological advantage when it comes to armed drones, but that will not last long. We should use this window to advance a robust legal and normative framework that will help protect against abuses by those states whose leaders can rarely be trusted. Unfortunately, we are doing the exact opposite: Instead of articulating norms about transparency and accountability, the United States is effectively handing China, Russia, and every other repressive state a playbook for how to foment instability and –literally -- get away with murder. Take the issue of sovereignty. Sovereignty has long been a core concept of the Westphalian international legal order.42 In the international arena, all sovereign states are formally considered equal and possessed of the right to control their own internal affairs free of interference from other states. That's what we call the principle of non-intervention -- and it means, among other things, that it is generally prohibited for one state to use force inside the borders of another sovereign state. There are some well-established exceptions, but they are few in number. A state can lawfully use force inside another sovereign state with that state's invitation or consent, or when force is authorized by the U.N. Security Council, pursuant to the U.N. Charter,43 or in self-defense "in the event of an armed attack." The 2011 Justice Department White Paper asserts that targeted killings carried out by the United States don't violate another state's sovereignty as long as that state either consents or is "unwilling or unable to suppress the threat posed by the individual being targeted." That sounds superficially plausible, but since the United States views itself as the sole arbiter of whether a state is "unwilling or unable" to suppress that threat, the logic is in fact circular. It goes like this: The United States -- using its own malleable definition of "imminent" -- decides that Person X, residing in sovereign State Y, poses a threat to the United States and requires killing. Once the United States decides that Person X can be targeted, the principle of sovereignty presents no barriers, because either 1) State Y will consent to the U.S. use of force inside its borders, in which case the use of force presents no sovereignty problems or 2) State Y will not consent to the U.S. use of force inside its borders, in which case, by definition, the United States will deem State Y to be "unwilling or unable to suppress the threat" posed by Person X and the use of force again presents no problem. This is a legal theory that more or less eviscerates traditional notions of sovereignty, and has the potential to significantly destabilize the already shaky collective security regime created by the U.N. Charter.44 If the US is the sole arbiter of whether and when it can use force inside the borders of another state, any other state strong enough to get away with it is likely to claim similar prerogatives. And, of course, if the US executive branch is the sole arbiter of what constitutes an imminent threat and who constitutes a targetable enemy combatant in an illdefined war, why shouldn’t other states make identical arguments—and use them to justify the killing of dissidents, rivals, or unwanted minorities?

#### Courts try terrorism cases and don’t leak classified information – empirics.

Vladeck et al 08 (Steven, A CRITIQUE OF “NATIONAL SECURITY COURTS”, A REPORT BY THE CONSTITUTION PROJECT’S LIBERTY AND SECURITY COMMITTEE & COALITION TO DEFEND CHECKS AND BALANCES, June 23,

http://www.constitutionproject.org/pdf/Critique\_of\_the\_National\_Security\_Courts.pdf)

Advocates of national security courts that would try terrorism suspects claim that traditional Article III courts are unequipped to handle these cases. This claim has not been substantiated, and is made in the face of a significant — and growing — body of evidence to the contrary. A recent report released by Human Rights First persuasively demonstrates that our existing federal courts are competent to try these cases. The report examines more than 120 international terrorism cases brought in the federal courts over the past fifteen years. It finds that established federal courts were able to try these cases without sacrificing either national security or the defendants’ rights to a fair trial.3 The report documents how federal courts have successfully dealt with classified evidence under the Classified Information Procedures Act (CIPA) without creating any security breaches. It further concludes that courts have been able to enforce the government’s Brady obligations to share exculpatory evidence with the accused, deal with Miranda warning issues, and provide means for the government to establish a chain of custody for physical evidence, all without jeopardizing national security.

#### Deference to the executive encourages whistleblowers, the media, and other countries to backlash – causes volatile restrictions of policy and worse intel leaks

Marguilies ‘10 Peter, Professor of Law, Roger Williams University, “Judging Myopia in Hindsight: Bivens Actions, National Security Decisions, and the Rule of Law” IOWA LAW REVIEW Vol. 96:195

The categorical-deference approach also fails to acknowledge that those stymied by the lack of formal redress can substitute for litigation other paths that pose greater danger. For example, consider the perspective of the official who leaks a document, not to advance a personal agenda, but to focus public attention on government policy.170 Whistleblowers of this kind, like Daniel Ellsberg, who leaked the Pentagon Papers to the New York Times, 171 are advancing a constitutional vision of their own in which senior officials have strayed from the limits of the original understanding.172 If the courts and Congress do not work to restore the balance, the whistleblower engages in self-help. Because leakers are risk-seekers who believe the status quo is unacceptable, they lack courts’ interest in safeguarding sensitive information. Policy shaped by blowback from leaks is far more volatile than policy reacting to judicial precedent.173 Similarly, the media has a constitutional role to play that includes investigative reporting. The media will step up its efforts if other institutions like courts take a more deferential stance.174 When government hides information, the media’s sense of its own role leads to greater distrust of government and a willingness to both uncover and publish more information. On some occasions, the First Amendment will oblige us to tolerate journalists’ disclosure of operational details of covert programs.175 Journalists will understandably view government’s claims that information is sensitive with greater skepticism when government has methodically locked down information in other settings. Similarly, shutting off damage suits regarding terrorism issues leaves other kinds of litigation, including litigation the government has initiated. Journalists and activists will seek to scrutinize and mobilize around these cases, even if the avenue of civil suits is closed. Indeed, activism may be distorted in these other venues when they are the only game in town. For example, journalists may be more inclined to credit even outlandish claims made by some lawyers on behalf of detainees when the government has a track record of concealing information.176 While some might argue that courts should not speculate about future conduct of third parties, a court that makes empirical predictions about the effect of liability should not selectively ignore major unintended consequences of its holding. There are parallel developments in international law. Some countries have prosecuted criminal cases against American agents who allegedly were complicit in extraordinary renditions. In Italy, a number of American government employees and personnel were convicted in absentia because of legal action generated by popular pressure.177 U.S. public-interest organizations, like the Center for Constitutional Rights, have encouraged these assertions of universal jurisdiction. These prosecutions occurred because of officials’ sense that they were above the law. Judicial remedies available in the United States can check these officials, thereby reducing the incidence and impact of universal-jurisdiction proceedings in the future.

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#### Advantage Two: Civil-military relations

#### Judicial review of the military is collapsing now- judicial deference over targeted killing results in an unchecked executive.

McCormack, law prof-Utah, 13 (Wayne McCormack is the E. W. Thode Professor of Law at the University of Utah S.J. Quinney College of Law, U.S. Judicial Independence: Victim in the “War on Terror”, Aug 20, https://today.law.utah.edu/projects/u-s-judicial-independence-victim-in-the-war-on-terror/)

One of the principal victims in the U.S. so-called “war on terror” has been the independence of the U.S. Judiciary. Time and again, challenges to assertedly illegal conduct on the part of government officials have been turned aside, either because of overt deference to the Government or because of special doctrines such as state secrets and standing requirements. The judiciary has virtually relinquished its valuable role in the U.S. system of judicial review. In the face of governmental claims of crisis and national security needs, the courts have refused to examine, or have examined with undue deference, the actions of government officials. The U.S. Government has taken the position that inquiry by the judiciary into a variety of actions would threaten the safety of the nation. This is pressure that amounts to intimidation. When this level of pressure is mounted to create exceptions to established rules of law, it undermines due process of law. Perhaps one or two examples of Government warnings about the consequences of a judicial decision would be within the domain of legal argument. But a long pattern of threats and intimidation to depart from established law undermines judicial independence. That has been the course of the U.S. “war on terror” for over a decade now. Here are some of the governmental actions that have been challenged and a brief statement of how the Courts responded to Government demands for deference. 1. Guantanamo. In Boumediene v. Bush,1 the Supreme Court allowed the U.S. to detain alleged “terrorists” under unstated standards to be developed by the lower courts with “deference” to Executive determinations. The intimidation exerted on the Court was reflected in Justice Scalia’s injudicious comment that the Court’s decision would “surely cause more Americans to be killed.” 2. Detention and Torture Khalid El-Masri2 claimed that he was detained in CIA “black sites” and tortured – case dismissed under the doctrine of “state secrets privilege.” (SSP) Maher Arar3 is a Canadian citizen who was detained at Kennedy Airport by U.S. authorities, shipped off to Syria for imprisonment and mistreatment, and finally released to Canadian authorities – case dismissed under “special factors” exception to tort actions for violations of law by federal officials – awarded $1 million by Canadian authorities. Jose Padilla4 was arrested deplaning at O’Hare Airport, imprisoned in the U.S. for four years without a hearing and allegedly mistreated in prison – case dismissed on grounds of “good faith” immunity. Binyam Mohamed5 was subjected to “enhanced interrogation techniques” at several CIA “black sites” before being repatriated to England, which awarded him £1 million in damages – U.S. suit dismissed under SSP. 1 553 U.S. 723 (2008). 2 El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007). 3 Arar v. Ashcroft, 414 F. Supp. 2d 250 (E.D.N.Y. 2005), aff’d by 585 F.3d 559 (2009). 4 Padilla v. Yoo, 678 F.3d 748 (9th Cir. 2012). 5 Mohamed v. Jeppesen Dataplan, 614 F.3d 1070 (9th Cir. en banc 2010) damages – U.S. suit dismissed under SSP. 3. Unlawful Detentions Abdullah Al-Kidd6 arrested as a material witness, held in various jails for two weeks, and then confined to house arrest for 15 months – suit dismissed on grounds of “qualified immunity” and apparent validity of material witness warrant. Ali Al-Marri was originally charged with perjury, then detained as an enemy combatant, for a total detention of four years before the Fourth Circuit finally held that he must be released or tried.7 Javad Iqbal8 was detained on visa violations in New York following 9/11 and claimed he was subjected to mistreatment on the basis of ethnic profiling – suit dismissed on grounds that he could not prove Attorney General authorization of illegal practices and court’s unwillingness to divert attention of officials away from national security. Osama Awadallah9 was taken into custody in Los Angeles after his name and phone number were found on a gum wrapper in the car of one of the 9/11 hijackers – charged with perjury before grand jury and held as material witness – Second Circuit reversed district court ruling on abuse of the material witness statute 4. Unlawful Surveillance Amnesty International10 is one of numerous organizations that brought suit believing that its communications, especially with foreign clients or correspondents had been monitored by the National Security Agency – suit dismissed because the secrecy of the NSA spying program made it impossible to prove that any particular person or group had been monitored. The validity of the entire Foreign Surveillance Act (FISA) rests on the “special needs” exception to the Fourth Amendment, a conclusion that was rejected by one district court although accepted by others. 5. Targeted Killing Anwar Al-Awlaki (or Aulaqi)11 was reported by press accounts as having been placed on a “kill list” by President Obama – suit by his father dismissed on grounds that Anwar himself could come forward and seek access to U.S. courts – not only Anwar but his son were then killed in separate drone strikes. 6. Asset Forfeiture 6 Al-Kidd v. Ashcroft, 580 F.3d 949, 951-52 (9th Cir. 2009). 7Al-Marri v. Wright, 487 F.3d 160 (4th Cir. 2007). 8 Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009) 9 United States v. Awadallah, 349 F.3d 42 (2d Cir. 2003); see also In re Grand Jury Material Witness Detention, 271 F. Supp. 2d 1266 (D. Or. 2003); In re Application of U.S. for a Material Witness Warrant, 213 F. Supp. 2d 287 (S.D. N.Y. 2002). 10 Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138 (2013). 11 Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010) Both Al Haramain Islamic Foundation12 and KindHearts for Charitable Humanitarian Development13 have been found by the Department of Treasury to be fronts for raising money for Hamas, and their assets have been blocked – despite findings of due process violations by the lower courts, the blocking of assets has been upheld on the basis that their support for terrorist activities is public knowledge. Avoiding Accountability The “head in the sand” attitude of the U.S. judiciary in the past decade is a rather dismal record that does not fit the high standard for judicial independence on which the American public has come to rely. Many authors have discussed these cases from the perspective of civil rights and liberties of the individual. What I want to highlight is how undue deference to the Executive in “time of crisis” has undermined the independent role of the judiciary. Torture, executive detentions, illegal surveillance, and now killing of U.S. citizens, have all escaped judicial review under a variety of excuses. To be clear, many of the people against whom these abuses have been levied are, or were, very dangerous if not evil individuals. Khalid Sheikh Muhamed and Anwar al-Aulaqi should not be allowed to roam free to kill innocent civilians. But hundreds of years of history show that there are ways of dealing with such people within the limits of restrained government without resort to the hubris and indignity of unreviewed executive discretion. The turning of blind eyes by many, albeit not all, federal judges is a chapter of this history that will weigh heavily against us in the future. No judge wants to feel responsible for the deaths of innocents. But moral responsibility for death is with those who contribute to the act. Meanwhile the judge has a moral responsibility for abuses by government of which the judiciary is a part. There is nothing “new” in the killing of innocents for religious or political vengeance. This violence has always been with us and will unfortunately continue despite our best efforts to curb it. Pleas for executive carte blanche power are exactly what the history of the writ of habeas corpus were developed to avoid,14 and what many statements in various declarations of human rights are all about. The way of unreviewed executive discretion is the way of tyranny.

#### And, judicial review of the military is critical to balanced civil-military relations- Congress and the Executive cannot check themselves

Gilbert, Lieutenant Colonel, 98 (Michael, Lieutenant Colonel Michael H. Gilbert, B.S., USAF Academy; MSBA, Boston University; J.D., McGeorge School of Law; LL.M., Harvard Law School. He is a member of the State Bars of Nebraska and California. “ARTICLE: The Military and the Federal Judiciary: an Unexplored Part of the Civil-Military Relations Triangle,” 8 USAFA J. Leg. Stud. 197, lexis)

The legislative, executive, and judicial branches of the federal government comprise and form a triangle surrounding the military, each branch occupying one side of the civil-military triangle. Commentators have written countless pages discussing, analyzing, and describing the civil-military relationship that the Congress and the President have with the armed forces they respectively regulate and command. Most commentators, however, have neglected to consider the crucial position and role of the federal judiciary. This article examines the relationship between the judiciary and the military in the interest of identifying the role that the judiciary, specifically the United States Supreme Court, plays in civil-military relations. Without an actual, meaningful presence of the judiciary as a leg of the civil-military triangle, the triangle is incomplete and collapses. In its current structure, the judiciary has adopted a non-role by deferring its responsibility to oversee the lawfulness of the other two branches to those branches themselves. This dereliction, which arguably is created by the malfeasance of the United States Supreme Court, has resulted in inherent inequities to the nation, in general, and to service members, in particular, as the federal courts are reluctant to protect even basic civil rights of military members. Judicial oversight is one form of civilian control over the military; abrogating this responsibility is to return power to the military hierarchy that is not meant to be theirs. [\*198] Under the United States Constitution, Congress has plenary authority over the maintenance and regulation of the armed forces, and the President is expressly made the Commander-in-Chief of the armed forces. The unwillingness of the Court to provide a check and balance on these two equal branches of the federal government creates an area virtually unchallengeable by the public. As a result, a large group of people, members of the military services, lack recourse to address wrongs perpetrated against them by their military and civilian superiors. Ironically, the very men and women dedicating their lives to protect the U.S. Constitution lack many of the basic protections the Constitution affords everyone else in this nation. The weakness in the present system is that the Supreme Court has taken a detour from the Constitution with regard to reviewing military issues under the normally recognized requirements of the Constitution. The federal judiciary, following the lead of the Supreme Court, has created de facto immunity from judicial interference by those who seek to challenge policy or procedure established by the other two branches and the military itself. When the "Thou Shalt Nots" of the Amendments to the Constitution compete with the necessities of the military, the conflict is resolved in favor of the military because it is seen as a separate society based upon the constitutionally granted authority of Congress to maintain and regulate the armed forces. 1 Essentially, the Court permits a separate world to be created for the military because of this regulation, distinguishing and separating the military from society. 2 The Court needs to reexamine their almost complete deference on military matters, which is tantamount to an exception to the Bill of Rights for matters concerning members of the military. Unless the Court begins to provide the oversight that is normally dedicated to many other areas of law fraught with complexity and national importance, judicial review of the military will continue to be relegated to a footnote in the annals of law. Combined with the downsizing and further consequent decline of interaction between the military and general society, 3 this exile from the protection of the Constitution could breed great injustices within the military. Perhaps even more importantly, the military might actually begin to believe that they are indeed second-class citizens, separate from the general [\*199] population, which could create dire problems with civil-military relations that are already the subject of concern by many observers. 4

#### Latin America models CMR---absent a strong signal of independence versus the military hardline control is inevitable

Weeks, prof- political science, 06 (By Gregory Weeks, Assistant Professor of Political Science, University of North Carolina at Charlotte, FIGHTING TERRORISM WHILE PROMOTING DEMOCRACY: COMPETING PRIORITIES IN U.S. DEFENSE POLICY TOWARD LATIN AMERICA,<http://clas-pages.uncc.edu/gregory-weeks/files/2012/04/WeeksG_2006JTWSarticle.pdf>)

There is a growing literature on judicial reform in Latin America, which emphasizes the need for greater access, efficiency, transparency, and independence.38 For democratic civil-military relations, the most important factor is judicial independence. The judicial branch is the main civilian source of accountability for members of the armed forces who have committed crimes against civilians. At the same time, it provides due process to the accused, thus ensuring that they receive a fair trial and maintaining the military's faith in the system. To serve in that role, judges must be independent from outside pressure. It is also necessary for those same soldiers to view the courts as fair and impartial. When the process becomes routinized, then the institution can be considered fully effective. Measuring the effectiveness of the courts is perhaps the most straightforward. In a study of judicial reform in Latin America, William Prillaman argues that independence can be measured by tracking the willingness of courts to rule against the government.39 However, for cases involving members of the military, independence also means ruling against the military leadership. Have soldiers been tried, convicted, and imprisoned for crimes they have committed? Even further, were judges successful in that regard even in the face of military resistance? Especially in the context of countries emerging from authoritarian rule (and even more so when the dictatorship was highly repressive) judges can be harassed, threatened, or even killed, or the civilian government may accept military demands to be left alone, fearing the political (or perhaps even personal) consequences. With some exceptions, judicial systems in Latin American countries have not been successful in addressing crimes committed by the armed forces (or the police). Even in some countries—such as Guatemala-where judges have periodically been able to overcome military pressure, court cases have been accompanied by violence or the threat of it. The worst records have been in Central America and the Andean region, whereas in the southern cone notable advances have been made. Especially in Colombia, but also in Ecuador and Peru, intimidation means that many cases are never investigated and judges are reluctant to hear them. Amnesties blocked civilian courts to a significant degree in Brazil, Chile, and Uruguay. In both Argentina and (surprisingly) Chile, the process of routinization is further advanced than elsewhere, so that when officers are called to testify there is less civil-military conflict than in the past, but this remains exceptional in the region. At the 2004 defense meetings in Ecuador, the Mexican Defense Minister spoke of the Mexican military's more "pro-active" stance in the fighting terrorism, which will certainly raise questions about jurisdiction if officers are implicated in abuses. Apart from interaction on the basis of extradition requests (most prominently in the case of Colombia) the judiciary is not a central issue for U.S. defense policy and it is not raised in the 2000 or 2002 National Security Strategy except for the goal of teaching respect for human rights in U.S. military training programs. Nonetheless, the United States Agency for International Development does provide funding for training and judicial development in general.'"' There are two important ways in which U.S. defense policy affects the judiciary, First, support for the regimes that commit serious abuses almost certainly contributes to a general sense of impunity. This was, of course, particularly true when dictatorships were the norm in the region Second, the militarization of areas deemed havens for terrorism (especially drug traffickers) has increased the number of human rights abuses and, in several countries, has increased pressure on judges not to prosecute (especially in Colombia). Another dilemma for civilian governments in Latin America is the scope of military justice in Latin America. In many countries, civilians can be brought before military courts for a broad range of offenses and officers can often find protection from prosecution by civilian courts. Reform has been slow and uneven."' The Staff Judge Advocate's Office of the United States Southern Command has created programs for military justice, such as in Colombia and Venezuela in 1998."^ The main goal for Colombia was to institutionalize the protection of human rights in military courts, whereas the Venezuelan military wished to reform its system of courts martial. Renewed emphasis on antiterrorism and internal security, however, raises the risk that military judges will try more civilians, who will not enjoy the same rights and privileges as they would in civilian courts. Given the debate over terrorist suspects being held in the United States, Latin American armed forces can easily claim that military courts are more appropriate in the context of the war against terrorism. They can also claim that, given national security concerns, the military should not be held accountable to any courts other than its own. The same arguments were often made during the Cold War. Finally, just as with the legislative branch, the emphasis on military intelligence gathering as an element of anti-terrorist policy reinforces the military's perceived need for secrecy and a minimum of civilian oversight. Even before the attacks on the United States, analysts were noting the "heightened tension between demands for secrecy and the desire for enhanced civil liberties.'"43 A return to Cold War-era notions of national security and secrecy represents an obstacle to the development of an effective judicial branch. In particular, the call for regional sharing of intelligence raises legitimate questions about precisely which judicial bodies would have authority to act in defense of civil liberties. Although leaders—both civilian and military—of numerous Latin American countries have indicated approval of the general idea (and southern cone countries have even broached the issue of a regional military) no specifics have yet been forthcoming. The primary historical parallel would be Operation Condor, the multinational (Argentina, Bolivia, Brazil, Chile, Paraguay, and Uruguay) intelligence system created in 1975 as a way to consolidate anti-communist dictatorships and eliminate political enemies. Although transitions to civilian rule have long taken place, judiciaries remain ill-equipped to confront what would become complex issues of jurisdiction, human rights, and the role military courts. CONCLUSION For civil-military relations to become more democratic in Latin America, it is obviously vital for civilian defense institutions to become stronger. When both civilians and officers view those institutions as legitimate, then the civil-military relationship will become increasingly predictable and differences can be mediated without overt conflict. Defense institutions provide a structure through which civilians and officers can accept each other's expertise and gradually learn that enmity is not always inevitable. This is an especially difficult process in Latin America, where civil-military discord has historically been the norm. The military's historic skepticism of civilian policy makers has, in most countries, solidified the notion that civilians are incapable of handling national defense, while civilians view the armed forces with a suspicion born of military intervention and dictatorship. Therefore, the task of "civilianizing" those institutions is formidable. Beginning in the 1990s, the United States developed a defense policy toward Latin America that, for the first time, emphasized the need for greater civilian expertise and oversight in the region, especially in terms of building more democratic civil-military institutions, which had been sorely lacking in the region. The terrorist attacks of 11 September 2001, however, reoriented U.S. defense policy toward encouraging Latin American militaries to become more involved in intelligence gathering, border patrol and domestic law enforcement, roles that civilians had painstakingly been trying to wrest away from military control. These competing policy goals thus send mixed messages about the real priorities of the U.S. government. Although U.S. policy makers remain focused primarily on the Andean region, it is clear that they view terrorism as a threat in every Latin American country. Furthermore, the main proposed tactic for combating terrorism is increased use of the armed forces in each country, whether it is border patrol, intelligence gathering, fighting guerrillas, or taking over a variety of national police duties. By militarizing policy and emphasizing a largely military response, anti-terrorist initiatives have the strong potential for undermining the stated policy goal of democratizing civil-military institutions in the region. These institutions, which already suffer from a lack of historical effectiveness, have only begun to assert themselves, and these efforts will suffer as a result of a renewed military emphasis on perceived threats to national security.

#### Civilian control is critical to nuclear cooperation agreements that check prolif---goes global

Sanchez 11/16/11 (Alex, Research Fellow @ Council on Hemispheric Affairs “The Unlikely Success: Latin America and Nuclear Weapons” <http://wasanchez.blogspot.com/2011/11/unlikely-success-latin-america-and.html>)

Nuclear Cooperation Even though Latin American states haven’t had a nuclear weapons program in decades, nuclear cooperation does exist. The best example is the creation of the ABACC (Agencia Brasileno-Argentina de Contabilidad y Control de Materiales Nucleares - Brazilian-Argentine Agency for Accounting and Control of Nuclear Materials), which is responsible for overseeing a cooperation agreement initiated in 1991, in which Buenos Aires and Brasilia agreed to commit to using nuclear energy for solely peaceful purposes. In that year, Argentina, Brazil, the ABACC, and the International Atomic Energy Agency (IAEA) signed the Quadripartite Agreement, specifying procedures for IAEA and ABACC for the monitoring and verification of Argentine and Brazilian nuclear installations. (8) Nevertheless, it is worth stating that neither country has signed the additional protocol by the IEAE which gives the international watchdog the right to access information and visit nuclear sites. (9) A 2009 commentary by the Carnegie Endowment for International Peace, a think tank headquartered in Washington DC, puts the nuclear relations between Brasilia and Buenos Aires into perspective: “Argentina and Brazil are seen as having been successful in turning their nuclear competition into cooperation through mutual confidence. This approach is often considered as a model for other regions where potential nuclear proliferation risks may be perceived. However, it is not yet certain that both countries will become competent partners by taking advantage of their joint strengths. Certain obstacles could endanger this process. Bureaucratic resistance, as well as possible asymmetries of interests and views -especially those related to the possibility of sharing proprietary technology - could upset the internal balance of the agreement and, therefore, its long-term sustainability.” (10) Indeed, while the current levels of nuclear cooperation between Brazil and Argentina are positive, it is important to understand that they are not fault-proof and there is the possibility that cooperation could take a turn for the worst. For example, should inter-state disputes arise, or if military governments appear again, then a worst case scenario could be that nuclear weapons programs could be revisited. In addition Venezuela has had plans for creating its own nuclear energy program with support from Iran. Some analysts have gone as far as arguing that Iranian mining companies currently operating in Venezuela may be trying to find uranium to use in Iran’s nuclear projects. (11) In interviews between the author of this essay and several Latin America military officials, (12) the consensus was that regional governments did not have a problem with Caracas looking to produce nuclear energy, but greater transparency is necessary to maintain inter-state confidence.

#### Latin American prolif risks nuclear war

Cote 9 (Owen, joined the MIT Security Studies Program in 1997 as Associate Director. Prior to that he was Assistant Director of the International Security Program at Harvard's Center for Science and International Affairs, where he remains co-editor of the Center's journal, International Security. He received his Ph.D. from MIT, where he specialized in U.S. defense policy and international security affairs, “The ABC's of Nuclear Disarmament in Latin America” <http://ocw.mit.edu/courses/political-science/17-951-nuclear-weapons-in-international-politics-past-present-and-future-spring-2009/projects/MIT17_951S09_abcs.pdf>)

Nuclear Weapons in Latin America are more destabilizing than stabilizing Security concerns in Latin America do not only include nuclear weapons. On December 9, 1974 la Declaración de Ayacucho was made in order to increase security perception. Argentina, Bolivia, Chile, Colombia, Ecuador, Panama, Peru and Venezuela set the goal to "create conditions which permit effective limitation of armaments and put an end to their acquisition for offensive military purposes, in order to dedicate all possible resources to economic development (Ayacucho Declaration, 1974 1)." This treaty prohibited weapons and equipment, including biological, chemical and nuclear weapons, aircraft carriers, ballistic missiles, cruisers and nuclear submarines. This agreement discussed "the concepts of intraregional balance and trust within the countries of the region (Portales 25)."2 There are several resources that indicate that Latin American political scientists were worried about the effect nuclear weapons would have on the region. Several theorists believed that the introduction of even the hint of a weapons program would make the entire region paranoid and further increase a state's incentive to produce a bomb. Other theorists view the development of nuclear weapons in the region as a risk in that it draws attention from the rest of the world onto Latin America. This unwanted attention could lead to disastrous affects for the region if any country was perceived as a threat to any of the greater superpowers. Security perception motivates a country's weapons development. Carlos Portales discusses how the introduction of a new weapon to the Latin American region has a "contagious" effect; first one country has it and then the rest of them struggle to obtain it. If any country is perceived to be looking or developing a new weapon, all countries will follow in order to keep the balance of power within the region. The introduction of a new weapon limits any arms control treaties until all countries possess the new weapon (Mercado Jarrín; Portales 27). In his article "Consequences of a Nuclear Conflict for the Climate in South America," Licio da Silva describes the consequences to South America if there were to be a nuclear attack on North America. He calls this the "Optimistic Hipothesis [sic]" for South America and calculates population death by smoke in the atmosphere. His "Pessimistic Hipothesis [sic]" involves attacks on South American cities and the destruction that could be cause, he even takes into account the possibility of the Amazon going up in flames. His article is quite alarming and one can see that he is truly terrified at the possibilities. As a conclusion, he calls for countries to be prepared for the worse and for the region to try and avoid international conflict by not obtaining nuclear weapons. da Silva states that if no South American country possesses a nuclear weapon, then no nuclear weapon state should perceive South America as a threat. If a Latin American state were to have a nuclear weapon, then that country could be perceived as a threat and thus could be targeted in an international conflict if it is seen as taking sides: "When a country becomes the owner of a nuclear arsenal, it also becomes a potential target (da Silva 56)." Therefore, da Silva calls for Latin American countries to remain disarmed so as not to put the region in peril. His directly names Argentina and Brazil for their involvement in nuclear weapons programs and accuses them of putting the entire region at risk: This shows the temerity of Argentine and Brazilian military who are in favour of the possession of nuclear weapons in their respective countries; we believe that the price we would have to pay for the dubious pride of belonging to the small group of nations in possession of nuclear technology for military purposes is too high. da Silva 56 Here we see a sincere fear of the security risks that one country can pose on an entire region. For da Silva, the destabilizing effect that nuclear weapons would have on South America alarm him enough to single out the two countries and negatively describe their search for nuclear weapons as "dubious pride." He continues on to ask for "the commitment not to install any nuclear arms in their [South American's] territory (da Silva 56)." The use of the word "their" refers to a collective identity shared by those in South America. Military improvements of individual countries should not be as important as the well being of the entire region. South Americans countries are lumped together and thus, must take into account the entire region before pursuing precarious programs. An arms race in the region would affect all countries in Latin America since such an arms race "contributes to increase both international tensions and the danger of armed conflicts, in addition to diverting resources indispensable to the economic and social progress of the peoples of the world. (Brazil and the Non-Proliferation of Nuclear Weapons 19)." One country's search for nuclear weapons or even nuclear power, increases all the other countries' likelihood to obsess, overreact or become hostile during the situation. Regions that are economically dependent on each other, such as South America, would have a very hard time surviving if there existed no trust between the nations Although some attribute South America's disarmament to be a factor of the emergence of democratic and civilian governments, the initial talks about nuclear weapons and their negative effects on the region were discussed by the military dictatorships of XXX in Argentina and XXX in Brazil. Even in Latin American military dictatorships the perception of an increasing imbalance of power would lead a country's leader to find a way to keep the status quo. This could come from fear of losing the race (specifically the nuclear arms race in this situation) and having it result in a hegemon among the South American countries, which has never really happened. Throughout South American history, the balance of power in the region has been relatively stable, with no one country overpowering the others. Anything that challenging that would be very disruptive to the region's sense of security.

#### No turns---prolif is destabilizing, risks accidental nuclear war

Busch, Professor of Government-Christopher Newport, 04 (Nathan, “No End in Sight: The Continuing Menace of Nuclear Proliferation” p 281-314)

Summing Up: Will the Further Spread of Nuclear Weapons Be Better or Worse? This study has revealed numerous reasons to be skeptical that the spread of nuclear weapons would increase international stability by helping prevent conventional and nuclear wars. Because there is reason to suspect that emerging NWSs will not handle their nuclear weapons and fissile materials any better than current NWSs have, we should conclude that the further spread of nuclear weapons will tend to undermine international stability in a number of ways. First, because emerging NWSs will probably rely on inadequate command-and-control systems, the risks of accidental and unauthorized use will tend to be fairly high. Second, because emerging NWSs will tend to adopt systems that allow for rapid response, the risks of inadvertent war will also be high, especially during crisis situations. Third, because emerging NWSs will tend to adopt MPC&A systems that are vulnerable to overt attacks and insider thefts, the further spread of nuclear weapons could lead to rapid, destabilizing proliferation and increased opportunities for nuclear terrorism. Finally, there is reason to question whether nuclear weapons will in fact increase stability. Although nuclear weapons can cause states to be cautious about undertaking actions that can be interpreted as aggressive and can prevent states from attacking one another, this may not always be the case. While the presence of nuclear weapons did appear to help constrain U.S. and Soviet actions during the Cold War, this has generally not held true in South Asia. Many analysts conclude that Pakistan invaded Indian-controlled Kargil in 1999, at least in part, because it was confident that its nuclear weapons would deter a large-scale Indian retaliation. The Kargil war was thus in part caused by the presence of nuclear weapons in South Asia. Thus, the optimist argument that nuclear weapons will help prevent conventional war has not always held true. Moreover, this weakness in the optimist argument should also cause us to question the second part of their argument, that nuclear weapons help prevent nuclear war as well. Conventional wars between nuclear powers can run serious risks of escalating to nuclear war."5 Based on a careful examination of nuclear programs in the United States, Russia, China, India, and Pakistan, as well as preliminary studies of the programs in Iraq, North Korea, and Iran, this book concludes that the optimists' arguments about the actions that emerging NWSs will probably take are overly optimistic. While it is impossible to prove that further nuclear proliferation will necessarily precipitate nuclear disasters, the potential consequences are too severe to advocate nuclear weapons proliferation in hopes that the stability predicted by the optimists will indeed occur.

### Bivens 1AC

#### Advantage Three: Bivens

#### The Court is going to rule against al-Aulaki’s Bivens claim, a type of suit that seeks civil damages against constitutional violations from the targeted killing program—this will set a precedent against Bivens application on other national security issues.

Vladeck 12 (Stephen, Al-Aulaqi and the Futility (and Utility) of Bivens Suits in National Security Cases, July 23, http://www.acslaw.org/acsblog/al-aulaqi-and-the-futility-and-utility-of-bivens-suits-in-national-security-cases)

There’s quite a lot to say about the damages suit filed last week by the American Civil Liberties Union and the Center for Constitutional Rights on behalf of the family of Anwar al-Aulaqi and his 16-year-old son Abdulrahman, both of whom were killed (along with a third U.S. citizen) in a pair of drone strikes in Yemen in the fall 0f 2011. And although the suit raises a host of important and thorny legal questions of first impression, including whether a non-international armed conflict existed in Yemen at the time of the strikes and whether a U.S. citizen can claim a substantive due process right not to be collateral damage in an otherwise lawful military operation, I suspect my Lawfare colleague Ben Wittes is quite correct that this case won’t actually resolve any of them. Instead, as Ben suggests, it seems likely that the federal courts will refuse to recognize a “Bivens” remedy — a cause of action for damages arising directly out of the constitutional provision allegedly offended (e.g., the Fifth Amendment’s Due Process Clause), and that the plaintiffs will therefore be unable to state a valid cause of action. As I explain below, such a result would unfortunately perpetuate a fundamental — and increasingly pervasive — misunderstanding of Bivens. Moreover, even if plaintiffs will ultimately lose suits like Al-Aulaqi because of various defenses — including qualified immunity, the state secrets privilege, and the political question doctrine — getting the Bivens question right still matters. To the extent that the specter of judicial review deters governmental misconduct down the road, Bivens suits can and should have a salutary effect on the conduct of U.S. national security policy — so long as they’re properly understood in the first place.

#### Rejecting Bivens suits against the military creates confusion in the case law and lower court splits—setting precedent that Bivens suits are permitted is key to resolve this uncertainty

Loevy 13 (ARTHUR LOEVY, partner Loevy & Loevy, a firm specializing in constitutional and civil rights, with MICHAEL KANOVITZ, Counsel of Record, et al, PETITION FOR A WRIT OF CERTIORARI, DONALD VANCE AND NATHAN ERTEL v.DONALD RUMSFELD, http://cryptome.org/2013/03/vance-ertel-v-rumsfeld.pdf)

The Decision to Bar Civilian Bivens Actions Contradicts Chappell, Stanley, and Saucier As Well As Lower Courts That Allow Civilians to Sue Military Officials for Constitutional Injuries Review is warranted because the decision to bar civilian constitutional claims against military officials contradicts this Court’s precedents that set the bounds of Bivens actions involving the military. It also creates a split among the lower courts, which until now had permitted Bivens actions by American civilians against military personnel. In light of the continual interaction between military and civilians, this Court should immediately address this division among the circuits. 1. The majority below concluded erroneously that Chappell and Stanley compelled its judgment that no American civilian may ever sue a military official for constitutional violations. App. 12a-13a. This conclusion actually contradicts Chappell and Stanley, which simply applied to Bivens the doctrine of Feres v. United States, 340 U.S. 135 (1950). Feres barred recovery under the Federal Tort Claims Act for servicemembers alleging injuries incident to military service, id. at 141; and Chappell and Stanley applied the same restriction to Bivens actions, see Stanley, 483 U.S. at 684; Chappell, 462 U.S. at 305. Both Chappell and Stanley expressly limited their holdings, rejecting a complete bar on all constitutional claims by servicemembers against other military personnel. This Court left servicemembers room to bring constitutional claims against military officials for violations arising outside of military service------i.e., arising in servicemembers’ capacity as civilians. Stanley, 483 U.S. at 681-83; Chappell, 462 U.S. at 304-05. These cases impose no limits on civilian Bivens actions against the military, 4 but instead draw a line between claims of servicemembers and those of civilians. Chappell, 462 U.S. at 303-04 (‘‘[T]his Court has long recognized two systems of justice[:] one for civilians and one for military personnel.’’). The Seventh Circuit contradicts both decisions by disregarding their limitation to intra-military injuries suffered incident to service and by applying them to foreclose relief for civilians. As Judge Williams noted, the majority’s judgment ‘‘goes well beyond what the Supreme Court has expressly identified as a bridge too far.’’ App. 74a. Saucier further illustrates the conflict between this Court’s decisions and the Seventh Circuit’s new bar to civilian Bivens claims. 553 U.S. 194. Saucier was a Bivens action brought by a civilian after Chappell and Stanley, in which the civilian alleged the use of excessive force by a military official. This Court found that the military officer was entitled to qualified immunity but nowhere suggested that civilians cannot bring Bivens claims against military personnel in the first place. Cf. Stanley, 483 U.S. at 684-85 (distinguishing the question of the Bivens cause of action from the immunity inquiry). The Seventh Circuit’s decision conflicts with this Court’s approval of such suits. 2. It is not surprising given these precedents that the lower courts had unanimously permitted civilians to bring Bivens actions against military officials who violated their constitutional rights. Before this case, five courts, including the Seventh Circuit, had taken that position. See Case v. Milewski, 327 F.3d 564, 568-69 (7th Cir. 2003) (considering civilian claim alleging military officers used excessive force); Morgan v. United States, 323 F.3d 776, 780-82 (9th Cir. 2003) (allowing Bivens action for civilian alleging military officers conducted illegal search); Roman v. Townsend, 224 F.3d 24, 29 (1st Cir. 2000) (entertaining Bivens action by civilian against military police); Applewhite v. U.S. Air Force, 995 F.2d 997, 999 (10th Cir. 1993) (considering military officers’ immunity from civilian’s allegations of illegal strip search); Dunbar Corp. v. Lindsey, 905 F.2d 754, 756-63 (4th Cir. 1990) (permitting civilian Bivens action against military officers for deprivation of property). No court had previously barred such claims.5 The judgment below contradicts decisions of the First, Fourth, Ninth, and Tenth Circuits that permit civilian suits against military officers, consistent with Saucier. This conflict and the uncertainty that the judgment below engenders in interactions between military officials and American civilians------whether contractors, military families, or workers on bases------calls for review by this Court.

#### Plan: The United States Federal Judiciary should subject United States’ targeted killing operations to judicial ex post review by allowing a cause of action for damages arising directly out of the constitutional provision allegedly offended, on the basis that special factors cannot preclude a right of action in cases where Congress has already authorized suits against federal officers.

#### The court should recognize that Congress has already authorized Bivens suits against ALL federal officers

Pfander and Baltmanis 09 (James E. Pfander, Professor of Law, Northwestern University School of Law; and David Baltmanis, Law Clerk to the Honorable Paul V. Niemeyer, United States Court of Appeals for the Fourth

Circuit; “Rethinking Bivens: Legitimacy and Constitutional Adjudication,” http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1181&context=facultyworkingpapers)

By approving of Bivens and making it the exclusive mode for vindicating constitutional rights, Congress has provided a solid legislative foundation for routine recognition of a Bivens remedy. Such congressional ratification, moreover, requires that the Court adjust its approach to the evaluation of constitutional claims for damages. The Court should no longer regard itself as creating rights of action on a case-by-case basis. Rather, the Court should simply recognize that Congress has authorized suits against federal officials for constitutional violations and has foreclosed all alternative remedies. Along with this recognition, the Court should no longer consider the possible existence of state common law remedies as a reason to proceed cautiously. Congress has eliminated the state common law option and has failed to replace it with suits under the FTCA to vindicate constitutional rights. It thus makes little sense for the Court in Wilkie v. Robbins to tout the possible existence of state common law remedies as the basis for proceeding cautiously in the recognition of a Bivens right of action.86 State common law, as such, no longer applies and no longer offers a way to present constitutional claims. One can imagine an argument that the Westfall Act’s reference to actions for violation of the Constitution operates not to approve an all-purpose Bivens action but to codify the case-by-case Bivens calculus that was in place in 1988 when the statute took effect. The text of the Westfall Act provides little basis for such a contention. The statute refers to a “civil action” “brought” against federal officers asserting a claim for “violation of the Constitution.” State common law, as such, no longer applies and no longer offers a way to present constitutional claims. 87 The unqualified references in the statute seemingly authorize the pursuit of all “civil actions[]” that assert constitutional claims, without suggesting that the federal courts may refrain from hearing certain claims. We explain below why Congress may have chosen to switch from the case-by-case approach to a more routinely available right of action.

#### Convention Against Torture

#### Blocking Bivens remedies under special factors of national security questions is a violation of the Convention Against Torture – the plan is critical to aligning the United States with CAT

Amnesty International 13 (global movement of 3 million people in more than 150 countries and territories, who campaign on human rights. Our vision is for every person to enjoy all the rights enshrined in the Universal Declaration of Human Rights and other international human rights instruments. We research, campaign, advocate and mobilize to end abuses of human rights. Amnesty International is independent of any government, political ideology, economic interest or religion, “USA: Chronicle of Immunity Foretold”, http://www.amnestyusa.org/sites/default/files/amr510032013en.pdf)

INTERNATIONAL LAW AND BEING ECONOMICAL WITH THE TRU TH In fact, the US government has relied on the availability of Bivens claims in cases of government torture to help show that the US is complying with our obligations under the United Nations Convention Against Torture. A United Nations committee overseeing compliance questioned the fact that the United States had enacted virtually no new legislation to implement the Convention Against Torture. The State Department assured the United Nations that the Bivens remedy is available t o victims of torture by US officials Vance v. Rumsfeld , Seventh Circuit Court of Appeals, Judge Hamilton dissenting A “ Bivens ” claim is one brought under a 1971 US Supreme Cour t decision which established that victims of constitutional violations have a ri ght to recover damages in federal court against the official or officials in question even in the absence of a statutory route to remedy passed by Congress. 17 In 2007 the Supreme Court set out a two-step process in Bivens cases. Firstly, it said that the court in question should determine whether any alternative route to remedy exists requiring the judiciary to “refrain from providing a new and freestanding damages remedy”. Secondly, in the absence of an alternative, the cou rt must make “the kind of remedial determination that is appropriate for a common-law t ribunal, paying particular heed to any special factors counselling hesitation before autho rizing a new kind of federal litigation”. 18 The notion of “special factors” requiring judicial “hesitation”, which appeared in the original Bivens ruling, has been successfully used by the Bush and Obama administrations in persuading courts not to create a judicial remedy f or the kind of abuses alleged by detainees in the post 9/11 counter-terrorism context. In this regard, the “special factors” asserted are factors such as national security, intelligence gat hering, waging war, and foreign relations. These broad notions have smothered the pursuit of remedy for abuses committed in the counter-terrorism context like some executive-spun, court-endorsed fire blanket, with the legislature looking away. Even in the absence of a finding of “special factor s”, the court may find the officials in question to be entitled to “qualified immunity” whic h will also block the lawsuit from being allowed to proceed. The doctrine of qualified immunity in US law protects government officials “from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” 19 An official’s conduct violates clearly established law “when, at the time of the challenged conduct, the contours of a right are suf ficiently clear that every reasonable official would have understood that what he is doing violates that right.” 20 The Supreme Court has said that qualified immunity “balances two importan t interests – the need to hold public officials accountable when they exercise power irres ponsibly and the need to shield officials from harassment, distraction, and liability when the y perform their duties reasonably.” 21 Given the blocking of lawsuit after lawsuit, as illust rated below, plaintiffs could be forgiven for concluding that the balance is institutionally weighted towards injustice. The right to an effective remedy is recognized in a ll major international and regional human rights treaties, including the International Covena nt on Civil and Political Rights (ICCPR), ratified by the USA in 1992. Under Article 2.3 of t he ICCPR, any person whose rights under the ICCPR have been violated “shall have an effectiv e remedy, notwithstanding that the violation has been committed by persons acting in a n official capacity”. International law requires that remedies not only be available in the ory, but accessible and effective in practice. 22 The right to an effective remedy can never be derogated from. Even in a state of emergency, “the state party must comply with the fun damental obligation, under article 2, paragraph 3, of the Covenant to provide a remedy th at is effective.” 23 Victims are entitled to equal and effective access to justice; adequate, ef fective and prompt reparation for harm suffered; and access to relevant information concer ning violations and reparation mechanisms. 24 Full and effective reparation includes restitution , compensation, rehabilitation, satisfaction and guarantees of non- repetition. 25 Further, under article 9.5 of the ICCPR, anyone who has been subjected to unlawful d etention must be provided with “an enforceable right to compensation”. The UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) also specifically obliges the US A to “ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabi litation as possible.” 26 All four US citizen plaintiffs in the cases outlined in this report have alleged torture and other ill-treatment as well as unlawful detention by the US military. All four lawsuits have been blocked from proceeding before the evidence of the abuses has been scrutinized on the merits, as a result of the USA’s doctrine of qualified immunity or of Bivens “special factors”. The blocking of these lawsuits in this way clearly contravenes the USA’s obligations to provide a remedy under international law. The UN Com mittee against Torture has emphasised that “under no circumstances may arguments of natio nal security be used to deny redress for victims.” 27 The US courts should not therefore be blocking access to a remedy for victims of torture or other ill-treatment based on “special factors” such as national security, intelligence gathering, waging war, and foreign relations

#### **Complying with the Convention against Torture is critical to United States global leadership – noncompliance weakens the spread of global democracy and threatens allied cooperation on international issues**

CVT 13 (Center for Victims of Torture Policy Report: US Bi-Partisan Leadership Against Torture”, April 2013, international nonprofit dedicated to healing survivors of torture and violent conflict. We provide direct care for those who have been tortured, train partners around the world who can prevent and treat torture, and advocate for human rights and an end to torture, http://www.cvt.org/sites/cvt.org/files/downloads/Report\_Bipartisan%20Leadership%20Against%20Torture\_April%202013.pdf)

WHY U.S. GLOBAL LEADERSHIP TO COMBAT TORTURE MATTERS The United States, as a democratic society that respects the rule of law, has an interest in abiding by its legal obligation under both international and domestic law to uphold the absolute prohibition against torture. Additionally, the United States has both a foreign policy and national security interest in being a global leader on human rights generally, and a leader in combatting torture specifically. Generally, U.S. global leadership on human rights promotes good will and cooperation from allies and world citizens in furtherance of U.S. interests. More specifically, U.S. leadership on combatting torture helps to build democratic societies and institutions abroad – where often, torture is used to repress and destroy democratic freedoms. Additionally, because of the U.S. economic, military and political power on the world stage, U.S. global leadership against torture has serious ramifications for the torture movement and survivors’ healing worldwide. INTERNATIONAL AND U.S. DOMESTIC LEGAL OBLIGATIONS The absolute prohibition against torture is a universally recognized legal obligation under international law from which no exception is ever permitted. In addition to the Convention Against Torture, torture is unequivocally banned under the Universal Declaration of Human Rights,26 International Covenant on Civil and Political Rights,27 Geneva Conventions,28 and in every regional human rights treaty.29 Indeed, the prohibition against torture is well established under customary international law as a legal norm in which no country can derogate.30 Torture is also banned under U.S. law under the federal Anti-Torture Act,31 the War Crimes Act,32 and the Detainee Treatment Act.33 Torture also violates rights established under the U.S. Constitution, including the Eighth Amendment’s right to be free of cruel or unusual punishment.34 As the U.S. Assistant Secretary of State for Democracy, Human Rights, and Labor, Harold Koh, testified to a United Nations committee: "Torture is prohibited by law throughout the United States. It is categorically denounced as a matter of policy and as a tool of state authority. In every instance, torture is a criminal offense. No official of the government—federal, state, or local, civilian or military—is authorized to commit or to instruct anyone else to commit torture. Nor may any official condone or tolerate torture in any form. No exceptional circumstances may be invoked as a justification for torture."35 The United States has long embraced the principles and values underpinning democratic societies such as justice, fairness and individual rights. Enforcing and upholding the rule of law is an essential pillar of democracy. The U.S., therefore, should embrace its international and domestic obligations to prohibit torture. As Koh wrote in 2008, “Official cruelty has long been considered both illegal and abhorrent to our values and constitutional traditions. The commitment to due process and the ban against cruel and unusual punishment are legal principles of the highest significance in American life.” 36 Furthermore, international treaties are a practical step toward creating international cooperation and consensus toward a more stable world. Reducing risk and creating a more manageable global community are in the United States’ interest. William H. Taft, IV, Legal Adviser for the U.S. State Department, under President George W. Bush, warned “A decision that the [Geneva] Conventions do not apply to the conflict in Afghanistan in which our armed forces are engaged deprives our troops there of any claim to the protection of the Convention in the event they are captured and weakens the protections afforded by the Conventions to our troops in future conflicts.”37 U.S. FOREIGN POLICY The U.S. State Department has repeatedly acknowledged that U.S. funding to the UN Voluntary Fund for Victims of Torture “supports the U.S. foreign policy goal of promoting democracy and human rights.”38 In 2002, the U.S. State Department affirmed, “The use of torture presents a formidable obstacle to establishing and developing accountable democratic governmental institutions. Assisting torture victims helps establish and reinforce a climate of respect for the rule of law, good governance and respect for human rights.”39 Moreover, the United States needs to engage the international community on many complex issues requiring multilateral cooperation. U.S. leadership to promote and protect human rights encourages political, military, and intelligence cooperation from our allies. By contrast, U.S. engagement in torture and abuse discourages cooperation from allies and international partners critical to furthering interests abroad.

#### Democratic backsliding causes great power war

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

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

#### Global democracy solves extinction

**Diamond 95** Larry, Senior Fellow – Hoover Institution, Promoting Democracy in the 1990s, December, http://wwics.si.edu/subsites/ccpdc/pubs/di/1.htm

OTHER THREATS This hardly exhausts the lists of threats to our security and well-being in the coming years and decades. In the former Yugoslavia nationalist aggression tears at the stability of Europe and could easily spread. The flow of illegal drugs intensifies through increasingly powerful international crime syndicates that have made common cause with authoritarian regimes and have utterly corrupted the institutions of tenuous, democratic ones. **Nuclear, chemical, and biological weapons continue to proliferate. The very source of life on Earth, the global ecosystem, appears increasingly endangered.** Most of **these** new and unconventional **threats** to security **are associated with** or aggravated by the weakness or **absence of democracy, with its provisions for** legality**, accountability,** popular sovereignty, **and openness.** LESSONS OF THE TWENTIETH CENTURY The experience of this century offers important lessons. **Countries that govern themselves in a** **truly** **democratic fashion do not go to war with one another.** They do not aggress against their neighbors to aggrandize themselves or glorify their leaders. **Democratic governments do not ethnically "cleanse" their own populations,** and they are much less likely to face ethnic insurgency. Democracies do not sponsor terrorism against one another. **They do not build weapons of mass destruction to use on or to threaten one another. Democratic countries form more reliable, open, and enduring trading partnerships.** In the long run **they offer better and more stable climates for investment. They are more environmentally responsible because they must answer to their own citizens,** who organize to protest the destruction of their environments. They are better bets to honor international treaties since they value legal obligations and because their openness makes it much more difficult to breach agreements in secret. Precisely because, within their own borders, they respect competition, civil liberties, property rights, and the rule of law, **democracies are the only reliable foundation** **on which a new world order** **of international security and prosperity** **can be built.**

#### Civil suits solve-- only subjecting the military to more civilian justice remedies the current crisis in military legitimacy – civil courts restore public confidence in the military while freeing up military resources to spend on operations, training, and recruiting.

Hillman, law prof-UC Hastings, 13 (Elizabeth L. Hillman, a professor of law at the University of California, Hastings, is the president of the National Institute of Military Justice, “Get Civilian Authorities Involved,” July 13, http://www.nytimes.com/roomfordebate/2013/05/28/ensuring-justice-in-the-military/get-civilian-authorities-involved-in-military-justice)

Since the end of the draft in 1973, we’ve become accustomed to a very active military, composed only of volunteers, to which our civilian leaders have reflexively deferred, whether on matters of personnel policy or strategy. Consider the remarkable solicitude that was required before “don’t ask/don’t tell” came to an end. Before this civil rights reform could be implemented, surveys and studies and working groups that dwarfed the resources that have been invested in understanding sexual assault were dedicated to making sure that lesbians and gay men serving openly would not undermine morale. A sense of superiority, and a resentful posture toward civilian authority, have pervaded military culture as our use of the military to pursue national goals has expanded since the end of World War II, and presidential power has grown. The Supreme Court has increasingly deferred to military decision-making. While valuing the sacrifices of service members and honoring our responsibility to veterans, we need to end this isolation of the military from civil society. Doing so would help restore confidence in military justice. The notion that soldiers are superior to civilians was not, of course, invented in the late 20th-century, but historians and legal scholars alike have remarked on this recent trend. Robert L. Goldich casts the post-modern army as staffed with legionnaires rather than citizen-soldiers. Andrew J. Bacevich sees the relatively new “warrior-professional” as standing above, not with, his or her civilian counterpart. Diane H. Mazur considers judicial deference to the military a misguided constitutional doctrine that undermines military professionalism itself. To end the sexual assaults that have eroded confidence in military justice, we need to consider whether our service members, and our nation, are well served by leaving all decisions about crime and punishment entirely in the hands of those in uniform. Civilian authorities should help shoulder the burdens of having a professional armed force by participating in the process of investigating and prosecuting service members' misconduct. Shrinking military jurisdiction so that some crimes committed by service members are prosecuted by civilian courts could help disrupt the isolated culture of the military and educate civilians about military life. If an alleged rape, robbery, or drunk driving offense were prosecuted by civil authorities, military resources could be conserved for military operations, training, and discipline rather than spent on criminal investigation, prosecution and punishment. Even a modest shift in the direction of civil authority would signal the military's openness to change and progress, as well as its essential connection to civil law and government.

## \*\*\*2AC

### \*\*\*Case

### 2AC A2: Warfighting

#### The plan turns the DA –

#### A. We control uniqueness on use of drones – without ex post review and accountability, the program will collapse because of domestic and international pressure – backlash in Pakistan proves – that’s 1AC Zenko – more evidence, we’re reducing drone use now

Shane 13 (Scott, Debate Aside, Number of Drone Strikes Drops Sharply, May 21, http://www.nytimes.com/2013/05/22/us/debate-aside-drone-strikes-drop-sharply.html?pagewanted=all&\_r=1&)

“Globally these operations are hated,” said Micah Zenko, a scholar at the Council on Foreign Relations who wrote a major study of targeted killing this year. “It’s the face of American foreign policy, and it’s an ugly face.” Tracing the rise and decline of strikes in Pakistan and Yemen, it is possible to correlate some of the numbers with shifting political conditions. In Pakistan, for instance, the C.I.A. has cut back on strikes as relations have grown strained — after the arrest of a C.I.A. contractor, Raymond Davis, in January 2011, for example, and after the incursion of a SEAL team to kill Osama bin Laden in May 2011. A recent hiatus in strikes in Pakistan may have been prompted by the desire not to fuel anti-American sentiments during the campaign before the May 11 general elections. Bruce Riedel, a former C.I.A. analyst and Brookings Institution scholar, said there were many reasons for the declining number of strikes in Pakistan. “But a growing awareness of the cost of drone strikes in U.S.-Pakistan relations is probably at the top of the list,” Mr. Riedel said. “They are deadly to any hope of reversing the downward slide in ties with the fastest growing nuclear weapons state in the world.” In Yemen, strikes rose sharply last year as the United States supported efforts by Yemeni authorities to reclaim territory taken over by the local Al Qaeda branch and its supporters in the tumultuous aftermath of the Arab Spring, said Bill Roggio, editor of the Long War Journal, a Web site that tracks the strikes. The numbers have declined since, and there were no strikes at all in Yemen in February or March. Mr. Roggio said a growing chorus of criticism — including a young Yemeni journalist who passionately criticized the strikes at a recent Senate hearing — may be influencing American policy. “I get the sense that the microscope on the program is leading to greater selectivity in ordering strikes,” he said.

#### Denial of drone overflight kills the program now

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.

#### B. Blowback and Overreliance – without external checks on drones they’ll be used excessively and without proper intelligence promoting blowback and terrorist attacks against the homeland

#### C. Allied cooperation – unrestricted drone policy is killing allied cooperation on counter-terrorism, undermining key intel sources that solve attacks – that’s HRF and Mcgill

#### D. Muslim cooperation – our Sidhu evidence says judicial review is key to cooperation with Muslim communities at home and abroad – that’s key to beat terrorism

Ramirez et al, 2k4 (Deborah, professor at Northwestern University School of Law. Sasha Cohen O’Connell, Northeastern University. Rabia Zafer, Northeastern University. “Developing Partnerships Between Law Enforcement and American Muslim, Arab, and Sikh Communities: A Promising Practices Guide” http://www.ace.neu.edu/pfp/downloads/Guide\_Final5.4.04.pdf)

After September 11th, it became increasingly clear that community input and assistance is even more critical to counterterrorism investigations then it was to traditional investigations focused on guns, drugs and violent crime. In traditional investigations, law enforcement is aided in its work by the existence of a crime scene and/or a focus on a specific criminal object, e.g. a weapon or narcotics. In contrast, terrorism investigations focus on information and the nuanced analysis of that information. Further, the primary goal of a counterterrorism investigation is to prevent, detect, and deter crime before it occurs. Both the relevant cultural information and the linguistic expertise needed for accurate analysis reside predominantly in the Arab, Muslim, and Sikh communities in this country; therefore, a community-based approach is not only beneficial to counterterrorism investigations, it is an essential component for success. The Global Perspective The war on terrorism cannot be won with military might alone. The most dangerous threats in this war are rooted in the successful propagation of anger and fear directed at unfamiliar cultures and people. The only way to ultimately counter this type of threat is to address the anger and fear through the presentation and demonstration of alternative paradigms. Currently, extremists – both those abroad who spread anti-Ameriscan propaganda and those at home who tout anti-Arab and Islamophopic messages of hate - are propagating a series of ideas that are based on the notion that Islam is ultimately incompatible with American ideals. Partnerships between American Arab and Muslim communities and law enforcement have the potential to offer an ideological counterweight to this idea. Specifically, the very existence of such partnerships explicitly demonstrates the desire of these communities to actively participate in American life. Additionally these partnerships demonstrate the American government’s need for assistance from these communities. Further, the partnerships envisioned in this Guide may facilitate discussions that would better inform U.S. policies, both domestic and foreign, by including the perspectives of communities who have a unique understanding of international concerns.

#### Whistleblower turn – 1AC Marguilles evidence says deference to the executive causes whistleblowers and worse intel-link than litigation would because the public and plantiffs will backlash to a lack of accountability

#### Intelligence failure turn – the plan incentivizes better information gathering

Taylor, Senior Fellow-Center for Policy & Research, 13 (Paul, Senior Fellow at the Center for Policy & Research and an alumnus of Seton Hall Law School and the Whitehead School of Diplomacy and International Relations, and is veteran of the Army’s 82nd Airborne Division, with deployments to both Afghanistan and to Iraq, “Former DOD Lawyer Frowns on Drone Court,” March, http://transparentpolicy.org/2013/03/former-dod-lawyer-frowns-on-drone-court/)

Lastly, there is the concern of creating perverse incentives: whether a person’s name or identity is known has never been a factor in determining the legality of targeting an otherwise-lawful military target. But by creating a separate legal regime for known targets, we could create a disincentive to collect information about a target. We do not want a military or intelligence agency that keeps itself intentionally uninformed. Nor do we want to halt a military operation in progress simply because one of the targets is recognized late. Conducting the review ex post would not eliminate these issues, but it would substantially mitigate them. The military (or CIA, if it keeps its program), would not fear an interruption of its operations, and could even have an incentive to collect more information in order to later please a court that has plenty of time to look back at the past operations and question whether an individual was in fact targeted.

#### Its unique-Massive intelligence failures in the SQ causing mission failure

Huq Ph.D. in Law 12 (Aziz Z., Assistant professor of law, University of Chicago Law School, “Structural Constitutionalism as Counterterrorism,” CALIFORNIA LAW REVIEW [Vol. 100:887], <http://www.californialawreview.org/assets/pdfs/100-4/03-Huq.pdf>)

The Price of Executive Primacy Executive primacy has surprising costs. Evidence suggests that analytic failures are common in federal counterterrorism policy. 157 Much effort is currently wasted or misdirected, while resources and information are poorly deployed. Consider as illustration the Christmas 2009 attempt by Nigerian national Umar Farouk Abdulmutallab to explode a bomb aboard Northwest Airlines Flight 253 from Amsterdam to Detroit. Two months earlier, Saudi officials had warned U.S. authorities that an attack of the type Abdulmutallab tried was being planned in Yemen. 158 Weeks before the attempt, Abdulmutallab’s father approached the CIA in Lagos to warn them of his son’s links to Yemeni terrorist groups. 159 Nothing was done. Subsequent presidential and congressional inquiries found an “overall systemic failure”: intelligence agencies had “dots [that] were never connected.” 160 Far from an isolated incident, this failure appears symptomatic. Five years beforehand, the National Commission on the Terrorist Attacks upon the United States reached a similar diagnosis respecting 9/11. It found that “no one was firmly in charge of managing [threat information] . . . and able to draw relevant intelligence from anywhere in the government” about the 9/11 attacks. 161 A similar failure of analysis preceded the deadly November 5, 2009, shootings at Fort Hood, Texas, 162 where the military intelligence unit tasked with tracking internal threats focused instead on student associations 163 that were more readily analyzed but ultimately harmless. It is clear, therefore, that the executive branch has not wholly heeded the 9/11 Commission’s warnings. To summarize, the internal architecture of national security institutions within the executive branch can hinder just as much as it can foster rapid, informed responses to terrorism. Presidential control through Article II’s assumed unitary hierarchy provides no panacea. There is hence no reason to believe that executive responses to terrorism will either be optimal or even as accurate, timely, and efficient as is generally believed. The institutional competence logic of pro-executive structural constitutional presumptions thus rests on shaky ground.

#### No link to imminence –

#### 1. The rules on constitutional grounds – McKelvey is about international law grounds – it doesn’t apply

#### 2. Court won’t ban strikes on imminence - Hamdi proves we can defend imminence

Kwoka 11 (Lindsay, J.D. UPenn, “TRIAL BY SNIPER: THE LEGALITY OF TARGETED KILLING IN THE WAR ON TERROR” Accessed at HeinOnline)

But this is not the end of the inquiry. Even if a targeted individual is not located on a field of battle, he may still be a threat, and tar- geted killing may potentially be necessary and appropriate in some circumstances. Applying the reasoning of" Hamdi here, a court would likely find that the use of targeted killing is only "necessary and ap- propriate" if it is the only way to prevent someone like Al-Awlaki from engaging in terrorist activity or otherwise harming the United States. The Hamdi Court was concerned with assuring that the executive used the least intrusive means in achieving its objective of preventing the enemy combatant from returning to battle. The Court made clear that the means used to achieve this objective should be no more intrusive than necessary.7\* It is consistent with the Court's concern to allow targeted killing only when it is the only means available to pre- vent harm to the United States. If the executive can demonstrate that an individual outside of a warzone will harm the United States unless he is killed, targeted kill- ing may be authorized. This is consistent with Havuli, in which the main concern was preventing future harm to the United States while using the least intrusive means available. This is also consistent with U.S. criminal law, in which the executive branch is permitted to kill an individual if there is no peaceful means left to apprehend him. Such an approach is also consistent with the approach of the Su- preme Court. Even the most stalwart protectors of constitutional rights of alleged terrorists recognize that immediate action by the executive is at times necessary to prevent attacks.7'' An approach that al- lows the executive to use deadly force when it is the only available means of preventing harm effectively balances the need to protect citizen's constitutional rights while affording sufficient deference to the executive.

#### Imminence won’t be considered – it isn’t a factor in determining due process – your author

McKelvey 11 Benjamin, J.D., Vanderbilt University Law School, November 2011, “NOTE: Due Process Rights and the Targeted Killing of Suspected Terrorists: The Unconstitutional Scope of Executive Killing Power,” Vanderbilt Journal of Transnational Law, 44 Vand. J. Transnat'l L. 1353

The Fifth Amendment provides, in part, that no American may be “deprived of life, liberty, or property, without due process of law.”127 The case of Anwar al-Aulaqi implicates procedural due process because the plaintiff’s complaint alleges that the government is attempting to deprive Aulaqi of life without any formal presentation of the charges against him or an opportunity to protest these charges at a hearing before an impartial judge.128 The Supreme Court uses a balancing test for determining the level of due process in different contexts.129 This balancing test has three factors: the private interest that will be affected by a deprivation, the risk of an erroneous deprivation by the procedural method in question, and the government interests involved

#### Courts solve Intel leaks – 1AC Vladeck says theres overwhelming evidence that they are able to maintain security clearance through CIPA protections – prefer it – 120 terrorism cases prove – AND not a single case ever leaked intel – no risk of link

Zabel and Benjamin-former Assistant U.S. Attorneys-8

In Pursuit of Justice Prosecuting Terrorism Cases in the Federal Courts

http://www.humanrightsfirst.org/wp-content/uploads/pdf/080521-USLS-pursuit-justice.pdf

A separate statute, the Classified Information Procedures Act (“CIPA”), outlines a comprehensive process for dealing with instances in which either the defendant or the government seeks to use evidence that is classified. Before CIPA was adopted in 1980, some criminal defendants, mainly in espionage cases, sought to engage in “graymail,” the practice of threatening to disclose classified information in open court in an effort to force the government to dismiss the charges. CIPA was intended to eliminate this tactic and, more broadly, to establish regularized procedures and heavy involvement by the presiding judge, so that the defendant’s right to a fair trial would be protected while national security would not be jeopardized by the release of classified information. Under CIPA’s detailed procedures, classified evidence need not be disclosed to the defense in discovery unless the court finds, based on an in camera review, that it is relevant under traditional evidentiary standards. If the government still objects to the disclosure after a finding that the information is relevant, then the court enters a non-disclosure order and determines an appropriate sanction for the government’s failure to disclose. Absent a non-disclosure order, the judge enters a protective order and the information is disclosed only to defense counsel, who must obtain a security clearance, but not to the defendant. Alternatively, the judge may find that the information can be provided directly to the defendant in a sanitized form—e.g., through a summary or redacted documents. As trial draws near, if either the government or the defense seeks to use classified information at trial, a separate proceeding occurs, in private, in which the judge and the lawyers for both sides (but not the defendant himself) attempt to craft substitutions for the classified evidence— using pseudonyms, paraphrasing, and the like—which must afford the defendant substantially the same ability to make his defense as if the original evidence were used. If it proves impossible to craft an adequate substitution, then the court must consider an appropriate sanction against the government, ranging from the exclusion of evidence to findings against the government on particular issues to dismissal of the indictment in extreme cases. Under CIPA, all of these proceedings are conducted in secure facilities within the courthouse, and sensitive documents are carefully safeguarded pursuant to written security procedures. CIPA repeatedly has been upheld as constitutional, and it has been used successfully in scores of terrorism prosecutions. We are aware of two reported incidents in which sensitive information was supposedly disclosed in terrorism cases, but we have not been able to confirm one of those incidents, and in the other it is our understanding that the government did not try to invoke non-disclosure protections. Based on our review of the case law, we are not aware of a single terrorism case in which CIPA procedures have failed and a serious security breach has occurred. This is not to say that CIPA is perfect, and in this White Paper we note some potentially problematic situations—e.g., where a defendant seeks to proceed pro se such as Zacarias Moussaoui—as well as some areas for possible improvement in the statute.

#### Qualified immunity solves chilling effect- officers know suits protect them so it doesn’t undermine special forces

Pillard 99 (Cornelia, Associate Professor of Law, Georgetown University Law Center, former Deputy Assistant Attorney General- Office of Legal Counsel in the Department of Justice, “Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under Bivens,” <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1719&context=facpub>)

These two parallel but distinct regimes-indemnification and qualified immunity-create different sets of incentives. Either of the two regimes, taken alone, would protect against chilling public employees' vigorous performance of their duties, as qualified immunity would allow for dismissal of most suits and indemnification would ensure that employees need not pay monetary judgments or settlements out of their own pockets.122 In terms of plaintiffs' incentives to sue, in contrast, the two regimes differ significantly. 123 [start footnote 122:] 122. One might argue that qualified immunity, by eliminating not just employees' obligations to pay but also forestalling liability findings flowing from their conduct, more effectively prevents overdeterrence. An employee who is fully reimbursed for monetary losses may still seek to avoid the risk to reputation that comes from being a defendant in a civil rights lawsuit. One response to that concern, however, is that if it were generally understood that under Bivens (as under Ex parte Young) individual defendants function as stand-ins for the government, reputational harm to the individual would be minimized. When a bureaucrat is personally sued for a failure to provide due process, for example, the observing public fairly assumes that such lawsuits come with the job, and that the individual is not a bad person for being formally held responsible. Another response to the concern about overdeterrence flowing from risks to reputation is that, to the extent reputational harm persists even when the government is known to be the real party in interest, a concern to shield defendants from such harm would seem to require qualified immunity even in cases of governmental liability-such as municipal liability under section 1983-because those cases are typically premised on the missteps of identified government employees. The Court in Owen v. City of Independence, 445 U.S. 622, 655-56 (1980), however, held that qualified immunity is unwarranted in those cases, and the Court does not seem poised to reconsider Owen. See, e.g., Board of County Comm'rs v. Brown, 520 U.S. 397, 405-06 (1997) (relying on Owen). Putting aside the reputational concerns, therefore, the two regimes both appear adequately to serve an interest in avoiding public employee overdeterrence.

[end footnote 122]

#### No impact- bioweapons are ineffective- even if they weren’t their record of failure deters their use

**Stratfor, 2007**

(“Bioterrorism: Sudden Death Overtime?" 12-22-2007, [www.lebanonwire.com/0712MLN/07122212STR.asp](http://www.lebanonwire.com/0712MLN/07122212STR.asp), ldg)

First, it must be recognized that during the past several decades of the modern terrorist era, biological weapons have been used very infrequently — and there are some very good reasons for this. Contrary to their portrayal in movies and television shows, biological agents are difficult to manufacture and deploy effectively in the real world. In spite of the fear such substances engender, even in cases in which they have been somewhat effective they have proven to be less effective and more costly than more conventional attacks using firearms and explosives. In fact, **nobody even noticed** what was perhaps the largest malevolent deployment of biological agents in history, in which thousands of gallons of liquid anthrax and botulinum toxin were released during several attacks in a major metropolitan area over a three-year period. This use of biological agents was perpetrated by the Japanese apocalyptic cult Aum Shinrikyo. An examination of the group’s chemical and biological weapons (CBW) program provides some important insight into biological weapons, their costs — and their limitations. In the late 1980s, Aum’s team of trained scientists spent millions of dollars to develop a series of state-of-the-art biological weapons research and production laboratories. The group experimented with botulinum toxin, anthrax, cholera and Q fever and even tried to acquire the Ebola virus. The group hoped to produce enough biological agent to trigger a global Armageddon. Between April of 1990 and August of 1993, Aum conducted seven large-scale attacks involving the use of thousands of gallons of biological agents — four with anthrax and three with botulinum toxin. The group’s first attempts at unleashing mega-death on the world involved the use of botulinum toxin. In April of 1990, Aum used a fleet of three trucks equipped with aerosol sprayers to release liquid botulinum toxin on targets that included the Imperial Palace, the Diet and the U.S. Embassy in Tokyo, two U.S. naval bases and the airport in Narita. In spite of the massive quantities of agent released, there were no mass casualties and, in fact, nobody outside of the cult was even aware the attacks had taken place. When the botulinum operations failed to produce results, Aum’s scientists went back to the drawing board and retooled their biological weapons facilities to produce anthrax. By mid-1993, they were ready to launch attacks involving anthrax, and between June and August of 1993 the group sprayed thousands of gallons of aerosolized liquid anthrax in Tokyo. This time Aum not only employed its fleet of sprayer trucks, but also use sprayers mounted on the roof of their headquarters to disperse a cloud of aerosolized anthrax over the city. Again, the attacks produced no results and were not even noticed. It was only after the group’s successful 1995 subway attacks using sarin nerve agent that a Japanese government investigation discovered that the 1990 and 1993 biological attacks had occurred. Aum Shinrikyo’s team of highly trained scientists worked under ideal conditions in a first-world country with a virtually unlimited budget. The team worked in large, modern facilities to produce substantial quantities of biological weapons. Despite the millions of dollars the group spent on its bioweapons program, it still faced problems in creating virulent biological agents, and it also found it difficult to dispense those agents effectively. Even when the group switched to employing a nerve agent, it only succeeded in killing a handful of people. A comparison between the Aum Shinrikyo Tokyo subway attack and the jihadist attack against the Madrid trains in 2004 shows that chemical/biological attacks are more expensive to produce and yield fewer results than attacks using conventional explosives. In the March 1995 Tokyo subway attack — Aum’s most successful — the group placed 11 sarin-filled plastic bags on five different subway trains and killed 12 people. In the 2004 Madrid attack, jihadists detonated 10 improvised explosive devices (IEDs) and killed 191 people. Aum’s CBW program cost millions and took years of research and effort; the Madrid bombings only cost a few thousand dollars, and the IEDs were assembled in a few days. The most deadly biological terrorism attack to date was the case involving a series of letters containing anthrax in the weeks following the Sept. 11 attacks — a case the FBI calls Amerithrax. While the Amerithrax letters did cause panic and result in companies all across the country temporarily shutting down if a panicked employee spotted a bit of drywall dust or powdered sugar from doughnuts eaten by someone on the last shift, in practical terms, the attacks were very ineffective. The Amerithrax letters resulted in five deaths; another 22 victims were infected but recovered after receiving medical treatment. The letters did not succeed in infecting senior officials at the media companies targeted by the first wave of letters, or Sens. Tom Daschle and Patrick Leahy, who were targeted by a second wave of letters. By way of comparison, John Mohammed, the so-called “D.C. Sniper,” was able to cause mass panic and kill twice as many people (10) by simply purchasing and using one assault rifle. This required far less time, effort and expense than producing the anthrax spores used in the Amerithrax case. It **is this** cost-benefit ratio t**hat, from a militant’s perspective, makes** firearms and **explosives more attractive weapons** for an attack. **This** then **is the primary reason** that **more attacks using bio**logical **weapons have not been executed:** The cost is higher than the benefit.

#### Special ops fail – under-resourced

Robinson 13 (Linda, adjunct senior fellow for U.S. national security and foreign policy at the Council on Foreign Relations (CFR) “The Future of U.S. Special Operations Forces” Council of Foreign Relations Report - Council Special Report No. 66)

OPERATIONAL SHORTFALLS The most glaring and critical operational deficit is the fact that, accord- ing to doctrine, the theater special operations commands are supposed to be the principal node for planning and conducting special operations in a given theater—yet they are the most severely under resourced com- mands. Rather than world-class integrators of direct and indirect capa- bilities, theater special operations commands are egregiously short of sufficient quantity and quality of staff and intelligence, analytical, and planning resoruces. They are also supposed to be the principal advisers on special operations to their respective geographic combatant com- manders, but they rarely have received the respect and support of the four-star command. The latter often redirects resources and staff that are supposed to go to the theater special operations commands, which routinely receive about 20 percent fewer personnel than they have been formally assigned.'2 Furthermore, career promotions from TSOC staff jobs are rare, which makes those assignments unattractive and results in a generally lower-quality workforce. Finally, a high proportion of the personnel are on short-term assignment or are reservists with inade- quate training. Because of this lack of resources, theater special opera- tions commands have been unable to fulfill their role of planning and conducting special operations.

### \*\*\*Aff

### 2AC T - Restriction

#### We meet-Due process rights are judicial restrictions on executive authority

Al-Aulaqi Motion to Dismiss Memo 2013 (PLAINTIFFS’ OPPOSITION TO DEFENDANTS’ MOTION TO DISMISS, files February 5, 2013)

Despite Defendants’ attempt to distinguish the habeas cases, Defs. Br. 12, claims alleging unlawful deprivation of life under the Fifth Amendment’s Due Process Clause are as textually committed to the courts as claims brought under the Suspension Clause. Both are fundamental judicial checks on executive authority. Cf. Boumediene v. Bush, 476 F.3d 981, 993 (D.C. Cir. 1997) (rejecting distinction between the Suspension Clause and Bill of Rights amendments because both are “restrictions on governmental power”), rev’d on other grounds by Boumediene, 553 U.S. 723.

#### Their ex-post evidence concludes aff – we’re a restriction and ex-ante is not

Vladeck 13 (Steve, Professor of Law and the Associate Dean for Scholarship – American University Washington College of Law, JD – Yale Law School, Senior Editor – Journal of National Security Law & Policy, “Why a “Drone Court” Won’t Work–But (Nominal) Damages Might…,” Lawfare Blog, 2-10, http://www.lawfareblog.com/2013/02/why-a-drone-court-wont-work/)

That’s why, even though [I disagree](http://www.lawfareblog.com/2013/02/whats-really-wrong-with-the-targeted-killing-white-paper/) with the [DOJ white paper](http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf) that ex ante review would present a nonjusticiable political question, I actually agree that courts are ill-suited to hear such cases–not because, as the white paper suggests, they lack the power to do so, but because, in most such cases, they would lack the competence to do so. **III. Drone Courts and the Legitimacy Problem** That brings me to perhaps the biggest problem we should all have with a “drone court”–the extent to which, even if one could design a legally and practically workable regime in which such a tribunals could operate, its existence would put irresistible pressure on federal judges to sign off even on those cases in which they have doubts. As a purely practical matter, it would be next to impossible meaningfully to assess imminence, the existence of less lethal alternatives, or the true nature of a threat that an individual suspect poses ex ante. Indeed, it would be akin to asking law enforcement officers to obtain judicial review before they use lethal force in defense of themselves or third persons–when the entire legal question turns on what was actually true in the moment, as opposed to what might have been predicted to be true in advance. At its core, that’s why the analogy to search warrants utterly breaks down–and why it would hardly be surprising if judges in those circumstances approved a far greater percentage of applications than they might have on a complete after-the-fact record. Judges, after all, are humans. In the process, the result would be that such ex ante review would do little other than to add legitimacy to operations the legality of which might have otherwise been questioned ex post. Put another way, ex ante revew in this context would most likely lead to a more expansive legal framework within which the targeted killing program could operate, one sanctioned by judges asked to decide these cases behind closed doors; without the benefit of adversary parties, briefing, or presentation of the facts; and with the very real possibility that the wrong decision could directly lead to the deaths of countless Americans. Thus, even if it were legally and practically possible, a drone court would be a very dangerous idea. **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](http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=471&invol=1) contemplates, after all). And if the Guantánamo litigation of the past five years has shown nothing else, [it demonstrates that](http://www.brookings.edu/research/reports/2011/05/guantanamo-wittes) 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. To similar effect, whether the government used excessive force in relation to the object of the attack is also something that can only reasonably be assessed post hoc. And in addition to the substantive questions, it will also be much easier for courts to review the government’s own procedures after they are employed, especially if the government itself is already conducting after-action reviews that could be made part of the (classified) record in such cases. Indeed, the government’s own analysis could, in many cases, go along way toward proving the lawfulness vel non of an individual strike… To be sure, there are a host of legal doctrines that would get in the way of such suits–foremost among them, [the present judicial hostility](http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=471&invol=1) to causes of action under [*Bivens*](http://supreme.justia.com/cases/federal/us/403/388/case.html); the state secrets privilege; and official immunity doctrine. But I am a firm believer that, except where the President himself is concerned (where there’s a stronger argument that [immunity is constitutionally grounded](http://www.law.cornell.edu/supct/html/historics/USSC_CR_0457_0731_ZS.html)), each of these concerns can be overcome by statute–so long as Congress creates an express cause of action for nominal damages, and so long as the statute both (1) expressly overrides state secrets and official immunity doctrine; and (2) replaces them with carefully considered procedures for balancing the secrecy concerns that would arise in many–if not most–of these cases, these legal issues would be overcome. **V. Why Damages Actions Aren’t Perfect–But Might Be the Least-Worst Alternative** Perhaps counterintuitively, I also believe that after-the-fact judicial review wouldn’t raise anywhere near the same prudential concerns as those noted above. Leaving aside how much less pressure judges would be under in such cases, it’s also generally true that damages regimes don’t have nearly the same validating effect on government action that ex ante approval does. Otherwise, one would expect to have seen a dramatic upsurge in lethal actions by law enforcement officers after each judicial decision refusing to impose individual liability arising out of a prior use of deadly force. So far as I know, no such evidence exists. Of course, damages actions aren’t a perfect solution here. It’s obvious, but should be said anyway, that in a case in which the government does act unlawfully, no amount of damages will make the victim (or his heirs) whole. It’s also inevitable that, like much of the Guantánamo litigation, most of these suits would be resolved under extraordinary secrecy, and so there would be far less public accountability for targeted killings than, ideally, we might want. That said, there are two enormous upsides to damages actions that, in my mind, make them worth it–even if they are deeply, fundamentally flawed: First, if nothing else, the specter of damages, even nominal damages, should have a deterrent effect on future government officers, such that, if a targeted killing operation ever was carried out in a way that violated the relevant legal rules, there would be liability–and, as importantly, precedent–such that the next government official in a similar context might think twice, and might make sure that he’s that much more convinced that the individual in question is who the government claims, and that there’s no alternative to the use of lethal force. Second, at least where the targets of such force are U.S. citizens, I believe that there is a non-frivolous argument that the Constitution requires at least some form of judicial process–and, compared to the alternatives, nominal damages actions litigated under carefully circumscribed rules of secrecy may be the only way to get all of the relevant constituencies to the table. That’s a very long way of reiterating what I wrote in [my initial response](http://www.lawfareblog.com/2013/02/whats-really-wrong-with-the-targeted-killing-white-paper/) to the DOJ white paper, but I end up in the same place: If folks really want to provide a judicial process to serve as a check on the U.S. government’s conduct of targeted killing operations, this kind of regime, and not an ex ante “drone court,” is where such endeavors should focus.

#### C/I – Authority is what the president may do not what the president can do

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

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

#### C/I --- Restriction is limitation, NOT prohibition

CAC 12,COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, COUNTY OF LOS ANGELES, Plaintiff and Respondent, v. ALTERNATIVE MEDICINAL CANNABIS COLLECTIVE et al., Defendants and Appellants, DIVISION ONE, 207 Cal. App. 4th 601; 143 Cal. Rptr. 3d 716; 2012 Cal. App. LEXIS 772

We disagree with County that in using the phrases “further restrict the location or establishment” and “regulate the location or establishment” in [\*615] section 11362.768, subdivisions (f) and (g), the Legislature intended to authorize local governments to ban all medical marijuana dispensaries that are otherwise “authorized by law to possess, cultivate, or distribute medical marijuana” (§ 11362.768, subd. (e) [stating scope of section's application]); the Legislature did not use the words “ban” or “prohibit.” Yet County cites dictionary definitions of “regulate” (to govern or direct according to rule or law); “regulation” (controlling by rule or restriction; a rule or order that has legal force); “restriction” (a limitation or qualification, including on the use of property); “establishment” (the act of establishing or state or condition of being established); “ban” (to prohibit); and “prohibit” (to forbid by law; to prevent or hinder) to attempt to support its interpretation. County then concludes that “the ordinary meaning [\*\*\*23] of the terms, ‘restriction,’ ‘regulate,’ and ‘regulation’ are consistent with a ban or prohibition against the opening or starting up or continued operation of [a medical marijuana dispensary] storefront business.” We disagree.¶CA(9)(9) The ordinary meanings of “restrict” and “regulate” suggest a degree of control or restriction falling short of “banning,” “prohibiting,” “forbidding,” or “preventing.” Had the Legislature intended to include an outright ban or prohibition among the local regulatory powers authorized in section 11362.768, subdivisions (f) and (g), it would have said so. Attributing the usual and ordinary meanings to the words used in section 11362.768, subdivisions (f) and (g), construing the words in context, attempting to harmonize subdivisions (f) and (g) with section 11362.775 and with the purpose of California's medical marijuana [\*\*727] statutory program, and bearing in mind the intent of the electorate and the Legislature in enacting the CUA and the MMP, we conclude that HN21Go to this Headnote in the case.the phrases “further restrict the location or establishment” and “regulate the location or establishment” in section 11362.768, subdivisions (f) and (g) do not authorize a per se ban at the local level. The Legislature [\*\*\*24] decided in section 11362.775 to insulate medical marijuana collectives and cooperatives from nuisance prosecution “solely on the basis” that they engage in a dispensary function. To interpret the phrases “further restrict the location or establishment” and “regulate the location or establishment” to mean that local governments may impose a blanket nuisance prohibition against dispensaries would frustrate both the Legislature's intent to “[e]nhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects” and “[p]romote uniform and consistent application of the [CUA] among the counties within the state” and the electorate's intent to “ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes” and “encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana.”

### 2AC Politics

#### No immigration vote – House GOP leadership won’t take it up

Palmer and Sherman 10/25/13 (Staffwriters for Politico, “House GOP plans no immigration vote in 2013” <http://www.politico.com/story/2013/10/house-gop-plans-no-immigration-vote-in-2013-98824_Page2.html>)

House Republican leadership has no plans to vote on any immigration reform legislation before the end the year. The House has just 19 days in session before the end of 2013, and there are a number of reasons why immigration reform is stalled this year. Following the fiscal battles last month, the internal political dynamics are tenuous within the House Republican Conference. A growing chorus of GOP lawmakers and aides are intensely skeptical that any of the party’s preferred piecemeal immigration bills can garner the support 217 Republicans — they would need that if Democrats didn’t lend their votes. Republican leadership doesn’t see anyone coalescing around a single plan, according to sources across GOP leadership. Leadership also says skepticism of President Barack Obama within the House Republican Conference is at a high, and that’s fueled a desire to stay out of a negotiating process with the Senate. Republicans fear getting jammed. Of course, the dynamics could change. Some, including Majority Leader Eric Cantor (R-Va.), are eager to pass something before the end of the year. Speaker John Boehner (R-Ohio) has signaled publicly that he would like to move forward in 2013 on an overhaul of the nation’s immigration laws. If Republicans win some Democratic support on piecemeal bills, they could move forward this year. But still, anything that makes its way to the floor needs to have significant House Republican support And Obama is also ramping up his messaging on immigration reform. “It’s good for our economy, it’s good for our national security, it’s good for our people, and we should do it this year,” Obama said Thursday. That same afternoon his chief of staff Denis McDonough met with business CEOs to strategize on immigration reform. Attendees included representatives from the U.S. Chamber of Commerce and the National Association of Manufacturers. Getting immigration through this deeply divided Congress in 2014 — an election year — would be incredibly difficult. That’s why immigration reform supporters are growing increasingly worried that the window for a bigger reform package could be slipping away since it would be even more difficult to try and forge ahead in an election year. “I think there are a lot of folks who are concerned about this issue not getting solved, and I think legitimately so,” Rep. Mario Diaz-Balart (R-Fla.) told POLITICO. “Because I do think that every day that goes by, it makes it more and more difficult.” Other prominent immigration supporters like Sen. Marco Rubio (R-Fla.) have also backed off any deal, saying the Obama administration has “undermined” negotiations by not defunding his signature health care law. Rep. Raul Labrador (R-Idaho) went further, saying Obama is trying to “destroy the Republican Party” and that GOP leaders would be “crazy” to enter into talks with Obama. That rhetoric combined with signals in private conversations with lawmakers and staff has led some immigration advocates to say they see the writing on the wall and they aren’t going to invest heavily until there’s more momentum. “After Obama poisoned the well in the fiscal showdown and [House Minority Leader Nancy] Pelosi now is actively trying to use immigration as a political weapon, the chances for substantive reforms, unfortunately, seem all but gone,” said one GOP operative involved in the conservative pro-immigration movement. Many of the groups that ran ads after the Senate passed its immigration bill — including the American Action Network and U.S. Chamber of Commerce — have gone silent on air. Several immigration reform proponents said that until House Republicans come up with legislation, there won’t be any television advertising campaigns. Liberals’ patience with House Republicans is also waning, as many argue that its time for the Obama administration to step in. National Day Laborer Organizing Network Executive Director Pablo Alvarado has been leading the charge, pressing the White House to use his “existing legal authority to alleviate the suffering of immigrants.” Frank Sharry of America’s Voice said there is a “strong preference” for action before the end of the year. “We’re either going to pass immigration reform or punish Republicans who block it,” Sharry said. “If they can’t convince their leadership then of course we want a Democratic majority that will … We’d much rather have a signing ceremony on immigration reform than a punishing electoral campaign where we’re trying to take people out.”

#### The GOP is putting other issues first and won’t work with Obama

Berman-The Hill-10/25/13

GOP comfortable ignoring Obama pleas for vote on immigration bill

For President Obama and advocates hoping for a House vote on immigration reform this year, the reality is simple: Fat chance. [Video] Since the shutdown, Obama has repeatedly sought to turn the nation’s focus to immigration reform and pressure Republicans to take up the Senate’s bill, or something similar. But there are no signs that Republicans are feeling any pressure. Speaker John Boehner (R-Ohio) has repeatedly ruled out taking up the comprehensive Senate bill, and senior Republicans say it is unlikely that the party, bruised from its internal battle over the government shutdown, would pivot quickly to an issue that has long rankled conservatives. Rep. Tom Cole (R-Okla.), a leadership ally, told reporters Wednesday there is virtually no chance the party would take up immigration reform before the next round of budget and debt-ceiling fights are settled. While that could happen by December if a budget conference committee strikes an agreement, that fight is more likely to drag on well into 2014: The next deadline for lifting the debt ceiling, for example, is not until Feb. 7. “I don’t even think we’ll get to that point until we get these other problems solved,” Cole said. He said it was unrealistic to expect the House to be able to tackle what he called the “divisive and difficult issue” of immigration when it can barely handle the most basic task of keeping the government’s lights on. “We’re not sure we can chew gum, let alone walk and chew gum, so let’s just chew gum for a while,” Cole said. In a colloquy on the House floor, Minority Whip Steny Hoyer (D-Md.) asked Majority Leader Eric Cantor (R-Va.) to outline the GOP's agenda between now and the end of 2013. Cantor rattled off a handful of issues — finishing a farm bill, energy legislation, more efforts to go after ObamaCare — but immigration reform was notably absent. When Hoyer asked Cantor directly on the House floor for an update on immigration efforts, the majority leader was similarly vague. “There are plenty of bipartisan efforts underway and in discussion between members on both sides of the aisle to try and address what is broken about our immigration system,” Cantor said. “The committees are still working on this issue, and I expect us to move forward this year in trying to address reform and what is broken about our system.” Immigration reform advocates in both parties have long set the end of the year as a soft deadline for enacting an overhaul because of the assumption that it would be impossible to pass such contentious legislation in an election year. Aides say party leaders have not ruled out bringing up immigration reform in the next two months, but there is no current plan to do so. The legislative calendar is also quite limited; because of holidays and recesses, the House is scheduled to be in session for just five weeks for the remainder of the year. In recent weeks, however, some advocates have held out hope that the issue would remain viable for the first few months of 2014, before the midterm congressional campaigns heat up. Democrats and immigration reform activists have long vowed to punish Republicans in 2014 if they stymie reform efforts, and the issue is expected to play prominently in districts with a significant percentage of Hispanic voters next year. With the shutdown having sent the GOP’s approval rating plummeting, Democrats have appealed to Republicans to use immigration reform as a chance to demonstrate to voters that the two parties can work together and that Congress can do more than simply careen from crisis to crisis. “Rather than create problems, let’s prove to the American people that Washington can actually solve some problems,” Obama said Thursday in his latest effort to spur the issue on. But Republicans largely dismiss that line of thinking and say the two-week shutdown damaged what little trust between the GOP and Obama there was at the outset. “There is a sincere desire to get it done, but there is also very little goodwill after the president spent the last two months refusing to work with us,” a House GOP leadership aide said. “In that way, his approach in the fiscal fights was very short-sighted: It made his achieving his real priorities much more difficult.”

#### Not intrinsic – a rational policymaker could choose to push both immigration reform and the plan because its within their power to do so

#### No link – courts shield – A. Obama asked to limit drones – means he’ll get credit from the plan and wont’ backlash

Baker, New York Times, 2013

(Peter, “Pivoting From a War Footing, Obama Acts to Curtail Drones”, 5-23, <http://www.nytimes.com/2013/05/24/us/politics/pivoting-from-a-war-footing-obama-acts-to-curtail-drones.html?pagewanted=all&_r=0>, ldg)

WASHINGTON — Nearly a dozen years after the hijackings that transformed America, President Obama said Thursday that it was time to narrow the scope of the grinding battle against terrorists and begin the transition to a day when the country will no longer be on a war footing. Declaring that “America is at a crossroads,” the president called for redefining what has been a global war into a more targeted assault on terrorist groups threatening the United States. As part of a realignment of counterterrorism policy, he said he would curtail the use of drones, recommit to closing the prison at Guantánamo Bay, Cuba, and seek new limits on his own war power. In a much-anticipated speech at the National Defense University, Mr. Obama sought to turn the page on the era that began on Sept. 11, 2001, when the imperative of preventing terrorist attacks became both the priority and the preoccupation. Instead, the president suggested that the United States had returned to the state of affairs that existed before Al Qaeda toppled the World Trade Center, when terrorism was a persistent but not existential danger. With Al Qaeda’s core now “on the path to defeat,” he argued, the nation must adapt. “Our systematic effort to dismantle terrorist organizations must continue,” Mr. Obama said. “But this war, like all wars, must end. That’s what history advises. It’s what our democracy demands.” The president’s speech reignited a debate over how to respond to the threat of terrorism that has polarized the capital for years. Republicans contended that Mr. Obama was declaring victory prematurely and underestimating an enduring danger, while liberals complained that he had not gone far enough in ending what they see as the excesses of the Bush era. The precise ramifications of his shift were less clear than the lines of argument, however, because the new policy guidance he signed remains classified, and other changes he embraced require Congressional approval. Mr. Obama, for instance, did not directly mention in his speech that his new order would shift responsibility for drones more toward the military and away from the Central Intelligence Agency. But the combination of his words and deeds foreshadowed the course he hopes to take in the remaining three and a half years of his presidency so that he leaves his successor a profoundly different national security landscape than the one he inherited in 2009. While President George W. Bush saw the fight against terrorism as the defining mission of his presidency, Mr. Obama has always viewed it as one priority among many at a time of wrenching economic and domestic challenges. “Beyond Afghanistan, we must define our effort not as a boundless ‘global war on terror,’ ” he said, using Mr. Bush’s term, “but rather as a series of persistent, targeted efforts to dismantle specific networks of violent extremists that threaten America.” “Neither I, nor any president, can promise the total defeat of terror,” he added. “We will never erase the evil that lies in the hearts of some human beings, nor stamp out every danger to our open society. But what we can do — what we must do — is dismantle networks that pose a direct danger to us, and make it less likely for new groups to gain a foothold, all the while maintaining the freedoms and ideals that we defend.” Some Republicans expressed alarm about Mr. Obama’s shift, saying it was a mistake to go back to the days when terrorism was seen as a manageable law enforcement problem rather than a dire threat. “The president’s speech today will be viewed by terrorists as a victory,” said Senator Saxby Chambliss of Georgia, the top Republican on the Senate Intelligence Committee. “Rather than continuing successful counterterrorism activities, we are changing course with no clear operational benefit.” Senator John McCain, Republican of Arizona, said he still agreed with Mr. Obama about closing the Guantánamo prison, but he called the president’s assertion that Al Qaeda was on the run “a degree of unreality that to me is really incredible.” Mr. McCain said the president had been too passive in the Arab world, particularly in Syria’s civil war. “American leadership is absent in the Middle East,” he said. The liberal discontent with Mr. Obama was on display even before his speech ended. Medea Benjamin, a co-founder of the antiwar group Code Pink, who was in the audience, shouted at the president to release prisoners from Guantánamo, halt C.I.A. drone strikes and apologize to Muslims for killing so many of them. “Abide by the rule of law!” she yelled as security personnel removed her from the auditorium. “You’re a constitutional lawyer!” Col. Morris D. Davis, a former chief prosecutor at Guantánamo who has become a leading critic of the prison, waited until after the speech to express disappointment that Mr. Obama was not more proactive. “It’s great rhetoric,” he said. “But now is the reality going to live up to the rhetoric?” Still, some counterterrorism experts saw it as the natural evolution of the conflict after more than a decade. “This is both a promise to an end to the war on terror, while being a further declaration of war, constrained and proportional in its scope,” said Juan Carlos Zarate, a counterterrorism adviser to Mr. Bush. The new classified policy guidance imposes tougher standards for when drone strikes can be authorized, limiting them to targets who pose “a continuing, imminent threat to Americans” and cannot feasibly be captured, according to government officials. The guidance also begins a process of phasing the C.I.A. out of the drone war and shifting operations to the Pentagon. The guidance expresses the principle that the military should be in the lead and responsible for taking direct action even outside traditional war zones like Afghanistan, officials said. But Pakistan, where the C.I.A. has waged a robust campaign of air assaults on terrorism suspects in the tribal areas, will be grandfathered in for a transition period and remain under C.I.A. control. That exception will be reviewed every six months as the government decides whether Al Qaeda has been neutralized enough in Pakistan and whether troops in Afghanistan can be protected. Officials said they anticipated that the eventual transfer of the C.I.A. drone program in Pakistan to the military would probably coincide with the withdrawal of combat units from Afghanistan at the end of 2014. Even as he envisions scaling back the targeted killing, Mr. Obama embraced ideas to limit his own authority. He expressed openness to the idea of a secret court to oversee drone strikes, much like the intelligence court that authorizes secret wiretaps, or instead perhaps some sort of independent body within the executive branch. He did not outline a specific proposal, leaving it to Congress to consider something along those lines. He also called on Congress to “refine and ultimately repeal” the authorization of force it passed in the aftermath of Sept. 11. Aides said he wanted it limited more clearly to combating Al Qaeda and affiliated groups so it could not be used to justify action against other terrorist or extremist organizations. In renewing his vow to close the Guantánamo prison, Mr. Obama highlighted one of his most prominent unkept promises from the 2008 presidential campaign. He came into office vowing to shutter the prison, which has become a symbol around the world of American excesses, within a year, but Congress moved to block him, and then he largely dropped the effort. With 166 detainees still at the prison, Mr. Obama said he would reduce the population even without action by Congress. About half of the detainees have been cleared for return to their home countries, mostly Yemen. Mr. Obama said he was lifting a moratorium he imposed on sending detainees to Yemen, where a new president has inspired more faith in the White House that he would not allow recidivism. The policy changes have been in the works for months as Mr. Obama has sought to reorient his national security strategy. The speech was his most comprehensive public discussion of counterterrorism since he took office, and at times he was almost ruminative, articulating both sides of the argument and weighing trade-offs out loud in a way presidents rarely do. He said that the United States remained in danger from terrorists, as the attacks in Boston and Benghazi, Libya, have demonstrated, but that the nature of the threat “has shifted and evolved.” He noted that terrorists, including some radicalized at home, had carried out attacks, but less ambitious than the ones on Sept. 11. “We have to take these threats seriously and do all that we can to confront them,” he said. “But as we shape our response, we have to recognize that the scale of this threat closely resembles the types of attacks we faced before 9/11.”

#### B. Allows political cover

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.

#### C. Healthcare proves

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.

#### D. Aff happens in the DC Circuit – no unique reason that links

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.

#### No political capital link – fiating through attitudinal inherency means that Congresspeople would never backlash to themselves

#### Link non-unique –

#### Health care kills Obama’s political capital

DOVERE 10/25/13 (EDWARD-ISAAC, staffwriter, “Democrats' united front cracks” <http://www.politico.com/story/2013/10/the-democratic-crackup-98832.html?hp=t1>)

For weeks leading up to the shutdown — and over the 16 days it dragged on — President Barack Obama did the unthinkable: he held every Democrat in the House and Senate together. There weren’t any defectors. There wasn’t even anyone running to reporters to question his strategy. The man who’d disappointed them so many times was suddenly exciting them, with his newly apparent backbone and successful resistance to Republicans. They were rushing to do whatever they could to stand by him, next to him, with him. Like any fad, that’s gone the way of trucker hats and the macarena. The problems with the Obamacare website have transformed the president from a man who seemed to have gotten a sudden infusion of political capital to a man who’s been pushed back on his heels. He was firm, and he was setting the agenda. Now he’s back to trying to beating back the latest frame Republicans have forced on him, inadvertently providing evidence to support the doubts they’ve been trying to sow from the beginning. He spent last week against the backdrop of a shutdown that made people appreciate all the things government can do for them. Now he has a website which shows how little it can. And Democrats have scattered, raising the question of whether the president will be able to preserve any of the new cohesion he inspired earlier in the month, or whether the rift is going to widen again. With every day, there was more impatience and dismay with the botched rollout of the website. Meanwhile, the White House spent much of the week dealing with a bizarre episode with Sen. Dick Durbin (D-Ill.) over whether an unnamed Republican insulted the president, forced to support Speaker John Boehner’s denial over the insistent statement of one of its closest allies on the Hill. Privately, certain Republicans express concern with the party’s decision to focus so much attention on a website that could very well be fixed over the next few months, instead of calling attention to other potentially problematic aspects of the law. And polls show support for Republicans remains way down, while support for Obamacare is still ticking up. But instead of spending the week beating up on Republican overreach, or promoting all the aspects of the law that don’t involve uninsured people spending hours trying to sign up, Democrats have had to confront undeniable problems that have even core liberals worried. That’s led a growing number of people on the Hill to push the White House to change its current position that it can fix the problems with the website without changing the deadlines or time frame. “I can’t honestly say that we’ve tried our hardest to fix things,” said Sen. Joe Manchin (D-W.Va.), who chose Bill O’Reilly’s talk show as his venue to unveil a plan to delay the individual mandate penalty for a year. “You have to give me a reason I want to buy what you want to sell me. And until they get that in their minds, they’re going to have a lot of headwinds, if you will.” Manchin says he’s still hopeful the law can work, but that it’s going to take a lot more than what the administration’s done so far to convince him. So far, he said, he hasn’t heard back on the call he made to the White House to tell them about his announcement.

#### Johnson nomination triggers the link

Mathews 10/23/13 (Kevin, staffwriter, “5 Worrisome Facts About Obama’s Homeland Security Nominee” <http://www.care2.com/causes/5-worrisome-facts-about-obamas-homeland-security-nominee.html>)

President Barack Obama has selected Jeh Johnson to lead the Department of Homeland Security this week. Johnson, who accepted Obama’s nomination, is considered a favorable choice by some liberals due to his purported desire to end the war on terror and having played a pivotal legal role in overturning the military’s Don’t Ask, Don’t Tell policy. That said, others are worried by details that have them question what kind of DHS head Johnson will be. Here are five of the troublesome factors: 1. Drones As the United Nations begins to take a firmer stance against U.S. drone attacks (they believe it may violate international humanitarian law and that the strikes are killing more innocent civilians than the United States acknowledges), the new homeland security nominee takes a contrary position. As Johnson posits, drones are not only extremely necessary, but also certainly legal. In his previous position as a leading attorney for the military, Johnson was the man to authorize specific drone strikes on foreign targets. Worse yet, he even has no problem with one of the more controversial talking points of drone warfare: targeted assassinations of United States citizens. Though many argue that citizens are Constitutionally guaranteed due process when suspected of criminal behavior, Johnson sees it differently. “Belligerents who also happen to be U.S. citizens do not enjoy immunity,” he claimed last year.

#### **Impeachment hearings will kill Obama agenda**

Sink-The Hill-10/19/13

http://thehill.com/blogs/blog-briefing-room/news/329449-dem-gop-planning-impeachment-circus-to-thwart-immigration-reform

Rep. Jim McDermott (D-Wash.) says congressional Republicans are planning an "impeachment circus" to thwart President Obama's legislative goals on the economy and immigration reform. "It's like a magician who snaps his fingers in one place so you won`t see what he`s doing with his other hand," McDermott said Friday during an appearance on MSNBC. "They are basically trying to keep the president from doing anything on jobs or on immigration or on climate change or any other issue that the American people are facing or pensions or anything." The former House Ethics Committee chairman said that Republicans would turn to the impeachment strategy after they were unsuccessful in using the debt ceiling and government shutdown as leverage to dismantle ObamaCare. "They've run the let's run the country over the cliff strategy and that didn't work. And so now back at the second one of the Republican strategies. That is let`s impeach the president," McDermott said. The Washington Democrat warned that "as long as they can keep this impeachment circus going, nobody will pay any attention" to more substantive policy issues. A number of Republicans, including Texas Reps. Steve Stockman and Blake Farenthold, as well as Sen. Jim Inhofe (R-Okla.) and Rep. Michele Bachmann (R-Minn.) have suggested that the House of Representatives could consider impeachment procedures. Still, there's been no movement by House Republican leadership to pursue such a strategy. McDermott predicted that even if Republicans fulfilled his prophecy and did undertake impeachment proceedings, they would not prevail. "That`s exactly what they did to Clinton and they are going to fail at this," McDermott told MSNBC on Friday. "They simply believe that it`s an impeachable offense if they don't agree with it."

### 2AC PQD DA

#### The PQD is already dead in the realm for foreign policy

Skinner 8/23, Professor of Law at Willamette

(13, Gwynne, Misunderstood, Misconstrued, and Now Clearly Dead: The 'Political Question Doctrine' in Cases Arising in the Context of Foreign Affairs, papers.ssrn.com/sol3/papers.cfm?abstract\_id=2315237)

Lower federal courts often erroneously cite the “political question doctrine” to dismiss as nonjusticiable individual rights claims arising in foreign or military affairs contexts, a trend that has increased since the 1962 case of Baker v. Carr. Similarly, lower courts have begun citing “special factors counselling hesitation” when dismissing constitutional claims (“Bivens claims”) in similar contexts, inappropriately treating “special factors” as a nonjusticiability doctrine. Lower federal courts should not cite either doctrine as a reason to avoid adjudicating individual rights claims arising in the context of foreign or military affairs. Rather, lower federal courts should adjudicate these claims on their merits by deciding whether the political branch at issue had the power under the Constitution to act as it did. Doing so is consistent with the manner in which the Supreme Court has approached these types of cases for over 200 years. The Court affirmed this approach in the 2012 case of Zivotofsky v. Clinton, a case in which the Court once and for all rung the death knell for the application of the “political question doctrine” as a nonjusticiability doctrine in cases involving individual rights – even those arising in a foreign policy context. In fact, a historical review of Supreme Court cases demonstrates that the Supreme Court has never applied the so-called “political question doctrine” as a true nonjusticiable doctrine to dismiss individual rights claims (and arguably, not to any claims at all), even those arising in the context of foreign or military affairs. This includes the seminal “political question” case of Marbury v. Madison. Rather, the Supreme Court has almost always rejected the “political question doctrine” as a basis to preclude adjudication of individual rights claims, even in the context of foreign or military affairs. Moreover, the Supreme Court has consistently admonished lower courts regarding the importance of the judiciary branch’s adjudication of individual rights claims, even in such contexts.13 That is not to say that from time to time the Court has not cited a “political question doctrine” in certain of its cases. However, a close review of those cases demonstrates that rather than dismissing such claims in those cases as “nonjusticiable,” the Court in fact adjudicated the claims by finding that either the executive or Congress acted constitutionally within their power or discretion. Moreover, the post-9/11 Supreme Court cases of Hamdi v. Rumsfeld, Rasul v. Bush, and Bush v. Boumediene, in which the Supreme Court consistently found that the political branches overstepped their constitutional authority, clarified that the doctrine should not be used to dismiss individual rights claims as nonjusticiable, even those arising in a foreign or military affairs context. In case there remained any doubt, the Supreme Court in Zivotofsky rejected the “political question doctrine” as a nonjusticiability doctrine, at least in the area individual rights, if not altogether. The Court found the case, involving whether the parents of a boy born in Jerusalem had the right to list Israel as his place of birth pursuant to a Congressional statute, was justiciable.17 The Court addressed the real issue, which was whether Congress had the authority to trump the President over whether Israel could be listed as the country of birth on passports where a person was born in Jerusalem, notwithstanding the President’s sole authority to recognize other governments. 18 In ruling as it did, the Court stayed true to many of its earlier cases involving “political questions” by adjudicating the claim through deciding whether one of the political branches took action that was within its constitutional authority. In the case, the Court showed its willingness to limit the power of the President in the area of foreign affairs rather than finding the claim nonjusticiable.

#### **No link – ex post review doesn’t violate political question doctrine**

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).

#### No extinction-empirically denied

**Carter et al., James Cook University adjunct research fellow, 2011**

(Robert, “Surviving the Unpreceented Climate Change of the IPCC”, 3-8, <http://www.nipccreport.org/articles/2011/mar/8mar2011a5.html>, ldg)

On the other hand, they indicate that some biologists and climatologists have pointed out that "many of the predicted increases in climate have happened before, in terms of both magnitude and rate of change (e.g. Royer, 2008; Zachos *et al*., 2008), and yet biotic communities have remained remarkably resilient (Mayle and Power, 2008) and in some cases thrived (Svenning and Condit, 2008)." But they report that those who mention these things are often "placed in the 'climate-change denier' category," although the purpose for pointing out these facts is simply to present "a sound scientific basis for understanding biotic responses to the magnitudes and rates of climate change predicted for the future through using the vast data resource that we can exploit in fossil records." Going on to do just that, Willis et al. focus on "intervals in time in the fossil record when atmospheric CO2 concentrations increased up to 1200 ppm, temperatures in mid- to high-latitudes increased by greater than 4°C within 60 years, and sea levels rose by up to 3 m higher than present," describing studies of past biotic responses that indicate "the scale and impact of the magnitude and rate of such climate changes on biodiversity." And what emerges from those studies, as they describe it, "is evidence for rapid community turnover, migrations, development of novel ecosystems and thresholds from one stable ecosystem state to another." And, most importantly in this regard, they report "there is very little evidence for broad-scale extinctions due to a warming world." In concluding, the Norwegian, Swedish and UK researchers say that "based on such evidence we urge some caution in assuming broad-scale extinctions of species will occur due solely to climate changes of the magnitude and rate predicted for the next century," reiterating that "the fossil record indicates remarkable biotic resilience to wide amplitude fluctuations in climate.

### 2AC CP

#### No solvency – the international community doesn’t trust Obama even if there are mandates for self-restraint – external checks key

Mazzetti and Landler 8/2/13 (\*Mark, a correspondent for The New York Times, where he has covered national security from the newspaper's Washington bureau since April 2006. In 2009, he shared a Pulitzer Prize for reporting on the intensifying violence in Pakistan and Afghanistan and Washington's response, \*Mark, White House correspondent for The New York Times. “Despite Administration Promises, Few Signs of Change in Drone Wars” <http://www.nytimes.com/2013/08/03/us/politics/drone-war-rages-on-even-as-administration-talks-about-ending-it.html?pagewanted=all>)

WASHINGTON — There were more drone strikes in Pakistan last month than any month since January. Three missile strikes were carried out in Yemen in the last week alone. And after Secretary of State John Kerry told Pakistanis on Thursday that the United States was winding down the drone wars there, officials back in Washington quickly contradicted him. More than two months after President Obama signaled a sharp shift in America’s targeted-killing operations, there is little public evidence of change in a strategy that has come to define the administration’s approach to combating terrorism. Most elements of the drone program remain in place, including a base in the southern desert of Saudi Arabia that the Central Intelligence Agency continues to use to carry out drone strikes in Yemen. In late May, administration officials said that the bulk of drone operations would shift to the Pentagon from the C.I.A. But the C.I.A. continues to run America’s secret air war in Pakistan, where Mr. Kerry’s comments underscored the administration’s haphazard approach to discussing these issues publicly. During a television interview in Pakistan on Thursday, Mr. Kerry said the United States had a “timeline” to end drone strikes in that country’s western mountains, adding, “We hope it’s going to be very, very soon.” But the Obama administration is expected to carry out drone strikes in Pakistan well into the future. Hours after Mr. Kerry’s interview, the State Department issued a statement saying there was no definite timetable to end the targeted killing program in Pakistan, and a department spokeswoman, Marie Harf, said, “In no way would we ever deprive ourselves of a tool to fight a threat if it arises.” Micah Zenko, a fellow with the Council on Foreign Relations, who closely follows American drone operations, said Mr. Kerry seemed to have been out of sync with the rest of the Obama administration in talking about the drone program. “There’s nothing that indicates this administration is going to unilaterally end drone strikes in Pakistan,” Mr. Zenko said, “or Yemen for that matter.” The mixed messages of the past week reveal a deep-seated ambivalence inside the administration about just how much light ought to shine on America’s shadow wars. Even though Mr. Obama pledged a greater transparency and public accountability for drone operations, he and other officials still refuse to discuss specific strikes in public, relying instead on vague statements about “ongoing counterterrorism operations.” Some of those operations originate from a C.I.A. drone base in the southern desert of Saudi Arabia — the continued existence of which encapsulates the hurdles to changing how the United States carries out targeted-killing operations. The Saudi government allowed the C.I.A. to build the base on the condition that the Obama administration not acknowledge that it was in Saudi Arabia. The base was completed in 2011, and it was first used for the operation that killed Anwar al-Awlaki, a radical preacher based in Yemen who was an American citizen. Given longstanding sensitivities about American troops operating from Saudi Arabia, American and Middle Eastern officials say that the Saudi government is unlikely to allow the Pentagon to take over operations at the base — or for the United States to speak openly about the base. Spokesmen for the White House and the C.I.A. declined to comment. Similarly, military and intelligence officials in Pakistan initially consented to American drone strikes on the condition that Washington not discuss them publicly — a bargain that became ever harder to honor when the United States significantly expanded American drone operations in the country. There were three drone strikes in Pakistan last month, the most since January, according to the Bureau of Investigative Journalism, which monitors such strikes. At the same time, the number of strikes has declined in each of the last four years, so in that sense Mr. Kerry’s broader characterization of the program was accurate. But because the drone program remains classified, administration officials are loath to discuss it in any detail, even when it is at the center of policy discussions, as it was during Mr. Obama’s meeting in the Oval Office on Thursday with President Abdu Rabbu Mansour Hadi of Yemen. After their meeting, Mr. Obama and Mr. Hadi heaped praise on each other for cooperating on counterterrorism, though neither described the nature of that cooperation. Mr. Obama credited the setbacks of Al Qaeda in the Arabian Peninsula, or A.Q.A.P., the terrorist network’s affiliate in Yemen, not to the drone strikes, but to reforms of the Yemeni military that Mr. Hadi undertook after he took office in February 2012. And Mr. Hadi twice stressed that Yemen was acting in its own interests in working with the United States to root out Al Qaeda, since the group’s terrorist attacks had badly damaged Yemen’s economy. “Yemen’s development basically came to a halt whereby there is no tourism, and the oil companies, the oil-exploring companies, had to leave the country as a result of the presence of Al Qaeda,” Mr. Hadi said. Asked specifically about the recent increase in drone strikes in Yemen, the White House spokesman, Jay Carney, said: “I can tell you that we do cooperate with Yemen in our counterterrorism efforts. And it is an important relationship, an important connection, given what we know about A.Q.A.P. and the danger it represents to the United States and our allies.” Analysts said the administration was still grappling with the fact that drones remained the crucial instrument for going after terrorists in Yemen and Pakistan — yet speaking about them publicly could generate a backlash in those countries because of issues like civilian casualties. That fear is especially pronounced in Pakistan, where C.I.A. drones have become a toxic issue domestically and have provoked anti-American fervor. Mr. Kerry’s remarks seemed to reflect those sensitivities. “Pakistan’s leaders often say things for public consumption which they don’t mean,” said Husain Haqqani, Pakistan’s former ambassador to the United States. “It seems that this was one of those moments where Secretary Kerry got influenced by his Pakistani hosts.” Congressional pressure for a public accounting of the drone wars has largely receded, another factor allowing the Obama administration to carry out operations from behind a veil of secrecy. This year, several senators held up the nomination of John O. Brennan as C.I.A. director to get access to Justice Department legal opinions justifying drone operations. During that session, Senator Rand Paul, Republican of Kentucky, delivered a nearly 13-hour filibuster, railing against the Obama administration for killing American citizens overseas without trial. For all that, though, the White House was able to get Mr. Brennan confirmed by the Senate without having to give lawmakers all the legal memos. And, in the months since, there has been little public debate on Capitol Hill about drones, targeted killing and the new American way of war.

#### External checks are critical

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.

#### The counterplans linedrawing fails – 1AC Pfander says without a precedent against special factors there is lower court confusion that makes remedies denied in any circumstance – more evidence, any limits to Biven’s availability means remedies will be denied

Banta 08 (Banta, Natalie, Death by a Thousand Cuts or Hard Bargaining?: How the Court‘s Indecision in Wilkie v. Robbins Improperly Eviscerates the Bivens Action,

http://www.law2.byu.edu/jpl/papers/v23n1\_Natalie\_Banta.pdf)

The ideal maxim expounded in Marbury v. Madison—that for every right there is a remedy—is far from true in practical applications of modern litigation. Due to immunity doctrines, many injured individuals are left without a remedy when the government is the defendant in the suit.8 Moreover, the complex doctrine of justiciability provides another bar to receiving remedies when rights have been violated.9 The curtailment of the availability of a Bivens cause of action is another example in the modern legal system where an individual injured by a federal officer has no remedy. It is unclear, however, why federal officers should be excluded from paying damages if they violate an individual‘s constitutional rights. State actors, for example, are still required under 42 U.S.C. § 1983 to pay damages if they violate federal constitutional rights. Because Bivens causes of actions were created by federal common law instead of a statutorily defined structure akin to § 1983, Bivens causes of actions have hardly been embraced. With the most recent decision in Wilkie v. Robbins,10 not much of the original jurisprudence established in Bivens remains. Wilkie continues the trend of substantially retreating from the original Bivens action. By failing to provide a Bivens remedy when the Court conceded that no other adequate remedy existed, and by expanding the policy arguments for ―special factors counseling hesitation,‖11 the Wilkie decision not only prevents the extension of the Bivens remedy, but effectively limits prior cases where the remedy has been granted to their facts.12 The Court‘s retrenchment of the availability of the Bivens remedy reinforces the idea that as a practical matter not every right has a remedy. The Court avoids deciding whether the alternative remedies are adequate to preclude the Bivens actions. The Court also avoids deciding whether the BLM agents violated Robbins‘s constitutional rights through the series of threats and intimidation levied against him. The majority weighs the BLM actions as ―death by a thousand cuts‖13 at one point and ―hard bargaining‖14 at another, and then assumes that the intimidation was not severe enough to warrant a remedy. Finally, the Court pronounces that Congress should decide whether there should be a remedy for intimidation by federal officers.15 By avoiding the pivotal decision of whether a right was actually violated, the Court changes the analysis to focus on factors that allow the limitation of the Bivens remedy in almost any circumstance. This note begins with a brief discussion of the principal issues discussed in Bivens and then traces the development of the two exceptions to the Bivens action that have swallowed the rule. Part III discusses the facts, holding, and dissent of Wilkie v. Robbins. Part IV argues that the Wilkie decision broadly denies the enforcement of a constitutional right and improperly eviscerates the Bivens remedy in four ways. First, the Court departs from the most important consideration in determining whether a Bivens remedy applies, which is deciding whether an alternative remedy exists. Second, the Court adopts an unnecessarily broad interpretation of special factors counseling hesitation to include concern over opening the floodgates to litigation and the difficulty of deciding whether a right was violated that precludes a Bivens remedy. Third, the Court improperly declines to decide whether a constitutional right was in fact violated before deciding how the severity of the violation of the right affects the plaintiff‘s receipt of damages. Fourth, the Court improperly bases its denial of the Bivens remedy on concerns about legislating, but in doing so, reveals the legislative nature of the Bivens remedy itself as being a matter of federal common law. This note concludes by discussing the future of the availability of the Bivens remedy.

#### Uncertainty makes denial inevitable—a case-by-case approach means judges can arbitrarily choose when to deny claims.

Pfander and Baltmanis 09 (James E. Pfander, Professor of Law, Northwestern University School of Law; and David Baltmanis, Law Clerk to the Honorable Paul V. Niemeyer, United States Court of Appeals for the Fourth

Circuit; “Rethinking Bivens: Legitimacy and Constitutional Adjudication,” http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1181&context=facultyworkingpapers)

The Court’s willingness to analyze the existence of a Bivens action on a case-by-case basis introduces a layer of uncertainty into constitutional litigation. Rather than assuming the existence of a Bivens action for claims against federal officers and agents, the federal courts must conduct a threshold inquiry to determine if the specific constitutional claim at issue will support an implied right of action. Often, the federal courts undertake this analysis at a high level of particularity.9 Thus, the discharged employee of a member of Congress may bring a Fifth Amendment equal protection claim,10 but a dissatisfied applicant for government benefits may not press a Fifth Amendment due process claim.11 Fifth Amendment takings claims have fared slightly better,12 but retaliation aimed at the exercise of the Fifth Amendment right to resist a government taking of property does not give rise to a Bivens action.13 Inmates of federal institutions may bring Eighth Amendment claims for cruel and unusual punishment,14 but individuals confined in privately run facilities have been less successful.15 Cases growing out of the Bush administration’s terrorism-related detention and extraordinary rendition programs highlight these concerns with the case-by case evaluation of the viability of novel Bivens claims. In a series of cases involving individuals who were allegedly subjected to extraordinary rendition and to harsh and degrading conditions of confinement at Guantanamo Bay and elsewhere, the lower federal courts have consistently refused to recognize a Bivens remedy.16 Partly, these decisions may reflect a reluctance on the part of lower courts to second-guess military judgments during a time of war. The decisions may also reflect uncertainty about how to apply the Court’s malleable standards and a presumption against the viability of any novel claim. Apart from the uncertainty it engenders, the practice of judicial selectivity raises legitimacy issues of its own along with the very real possibility that judicial evaluation of the merits of the constitutional claim may influence the Bivens calculus.17 Scholars have offered a range of theories to shore up the legitimacy of the Bivens action. An early article by Walter Dellinger viewed the grant of “judicial power” in Article III of the Constitution as providing the ultimate source of remedial authority.18 Henry Monaghan sought to include the Bivens remedy within the framework of what he called “constitutional common law,” law that grows out of permissible choices among remedial alternatives and (like other federal common law) remains subject to some degree of congressional control.19 Gene Nichol defended the Court’s exercise of remedial creativity, pointing out that courts in the common law tradition have long played a role in defining the remedies needed to vindicate important rights.20 Richard Fallon and Daniel Meltzer would incorporate the Bivens remedy into a remedial framework that seeks to ensure that government actors generally operate within the bounds of the law.21 Notably, the Fallon and Meltzer approach places greater emphasis on systemic issues than on the right of any particular individual to secure a remedy. Thus, a Bivens remedy operates as a fallback device and its availability necessarily depends in part, as it did in Wilkie, on a case-by-case evaluation of the array of available alternative remedies. Despite these efforts at justifying, narrowing, and defending the Bivens remedy, critics remain dubious. In this Essay, we offer a new account of the legitimacy of the Bivens right of action. In our view, scholars and courts have paid too much attention to the state of the law in 1971, when Bivens came down, and too little to legislative developments that have occurred in its wake. Congress has taken steps to preserve and ratify the Bivens remedy with amendments to the Federal Tort Claims Act that took effect in 1974 and 1988. In 1974, responding to concerns with the adequacy of a Bivens remedy, Congress expanded the right of individuals to sue the government itself for certain law enforcement torts. At the time, Congress deliberately chose to retain the right of individuals to sue government officers for constitutional torts and rejected draft legislation from the Department of Justice that would have substituted the government as a defendant on such claims. Similarly, in the Westfall Act of 1988, Congress took further steps to solidify the Bivens remedy. The Westfall Act virtually immunizes federal government officials from state common law tort liability, substituting the government as a defendant under the FTCA for such claims. 22 In the course of doing so, it declares that the remedy provided against the federal government shall be deemed “exclusive of any other civil action or proceeding for money damages . . . against the employee whose act or omission gave rise to the action.”23 In order to preserve the Bivens action, Congress declared the exclusivity rule inapplicable to suits brought against government officials “for a violation of the Constitution of the United States.”24 Although the Supreme Court has apparently never considered the issue, we think the Westfall Act should be interpreted to provide for the routine availability of Bivens claims. Both the language of the Act, with its express preservation of claims for constitutional violations, and its structure support this conclusion. The structural confirmation flows from the fact that Congress, by transforming claims for law enforcement (and other) torts into claims against the United States under the FTCA,25 has largely eliminated state common law remedies as a relevant source of relief for individuals who have suffered a constitutional injury. It is no longer possible, as it was in Bivens’ day, to proceed to judgment against federal officers on the basis of the common law.26 Moreover, Congress has declined to make a remedy for constitutional violations available against the federal government under the FTCA, a decision that (under the prevailing law of federal sovereign immunity) forecloses that remedial option.27 As a result, it makes little sense to assume (as the dissenting Justices did in Bivens and as others have done in later cases) that the denial of a Bivens remedy will leave individuals fully able to pursue claims on a state law theory of liability. Today, Bivens provides the only generally available basis on which individuals can seek an award of damages for federal violations of constitutional rights. In 1971, it was “damages or nothing” for Webster Bivens, as Justice Harlan vividly explained;28 today, it has become Bivens or nothing for those who seek to vindicate constitutional rights. Recognition that the Bivens remedy enjoys a much firmer federal statutory foundation than conventionally understood will require some rethinking of the way constitutional litigation proceeds. If, as our analysis suggests, Congress has ratified the pursuit of Bivens claims, courts need no longer agonize at the threshold about whether to recognize the existence of such an action. We suggest instead that federal courts should treat the Bivens action, much like its counterpart under section 1983, as routinely available. Such an approach would build on the Court’s sensible decision to treat the Bivens action and the section 1983 claims as parallel proceedings that warrant similar treatment. As the Court explained long ago, it would be “untenable to draw a distinction for purposes of immunity law between suits brought against state officials . . . and suits brought directly under the Constitution against federal officials.” 29 With the right to bring a Bivens action routinely available, the federal courts no longer need to see themselves as fashioning a right of action to vindicate a novel constitutional claim; rather, the litigation would focus as it does under section 1983 on whether the complaint states a claim for violation of the Constitution that overcomes the officers’ qualified immunity defense. Such a course of action would answer critics of the judicial role and end the case-by-case process by which the federal courts now evaluate the availability of a Bivens action. By presuming the availability of a Bivens action, our proposed reconceptualization provides a more satisfying explanation of the Court’s cases and a more coherent account of the shape of constitutional tort doctrine. Many scholars have puzzled over the Court’s willingness in cases such as Bush v. Lucas 30 and Correctional Services Corp. v. Malesko31 to treat the availability of alternative remedies as fatal to the individual’s right to pursue a Bivens claim.32 Those decisions may make more sense when viewed through the lens of section 1983. In Fitzgerald v. Barnstable School Committee, 33 the Court provided a framework for evaluating when alternative statutory remedies displace the section 1983 remedy for constitutional tort claims. One might sensibly apply this framework in assessing the Court’s decision in Bush v. Lucas, where civil service remedies for a whistleblower’s constitutional claims served to displace a Bivens remedy. Similarly, in Parratt v. Taylor, 34 the Court held that the existence of post-deprivation remedies may, in certain circumstances, obviate procedural due process claims that section 1983 would otherwise remedy. Cases in the Parratt line may help to explain Malesko, which featured allegations of negligence that would apparently fail to support a claim of actionable deprivation. By drawing on the section 1983 framework for the analysis of remedial alternatives, the Court would avoid the ad hoc reliance on “special factors” that has characterized its recent Bivens decisions.

## \*\*\*1AR

### \*\*\*COUNTERPLAN

### 1AR: T/ CMR

#### Friction risks great power war, turns the ability to exercise hegemony

Richard Kohn, Professor of History, University of North Carolina, Military Personnel Subcommittee Of The House Armed Services, FDCH POLITICAL TRANSCRIPTS, November 4, **‘**99, p. Nexis

My focus is on the relationship of the military to society. Civil-military relations are **critical to national defense**. If the armed forces diverge in attitude or understanding beyond what is expected of the military profession in a democratic society, have less contact, grow less interested in or knowledgeable about each other, the **consequences could be significant**. Each could **lose confidence in the other**. Recruiting could be **damaged**. **Military effectiveness** could be **harmed**. The resources devoted to national defense could decline below what is adequate. Civil-military cooperation could deteriorate, with **impact on the ability** of the United States to use military forces to **maintain the peace** or **support American foreign policy**.

### 1AR: JR Good

#### 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.

### \*\*\*Warfighting

### 1AR AT: Chilling

#### NO chilling, qualified immunity solves, soldiers know they wont be personally liable the gov pays but they also know if they did something unjust it would be them that would have all of the legal hassles, doesn’t over deter them but its enough to create caution, that’s Pillar.

They know its in their training

#### It’s a universal norm-never failed

Pillard 99 (Cornelia, Associate Professor of Law, Georgetown University Law Center, former Deputy Assistant Attorney General- Office of Legal Counsel in the Department of Justice, “Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under Bivens,” http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1719&context=facpub)

The Court brushed aside the contention that it should treat Bivens as effectively establishing governmental rather than individual liability more than a decade ago on the ground that federal regulations did not make reimbursement "sufficiently certain and generally available.", 58 The fiction is, to be sure, not airtight. From the perspective of an individual federal official sued under Bivens, the residual uncertainty in indemnification and representation policies can be cause for concern. 59 However, reimbursement policies are now more uniformly the norm among federal agencies and departments than they were ten years ago. 60 Looking at the run of cases, the risk that an official who acted within the scope of his employment would be left paying damages is negligible.61 Moreover, in order to help assuage employees' concern that they might nonetheless bear personal liability for constitutional torts, the government may subsidize premiums on professional liability insurance for law-enforcement officers and supervisory or management officials.62 In sum, it is now fair to conclude that, as a practical matter, Bivens liability runs against the federal government, even though as a formal matter the named defendants must be individual officials in their personal capacities.

[footnote 61 starts:]

61. In cases in which the United States has provided representation to the individual defendant, it has not once failed to reimburse a federal employee for the costs of a Bivens settlement or judgement. See Goldberg Interview, supra note 6; Colgate Memo, supra note 51, at 1. The Court's concern in Anderson is also unfounded because the claims least likely to be covered by indemnification are also unlikely to warrant qualified immunity, eliminating any argument that the individual liability/qualified immunity regime provides more complete protection.

[footnote 61 ends]

### No Restrictive Rulings

#### And the court would only ban things like signature strikes based on imminence, not attacks on leaders that facilitate terrorist attacks – Hamdi precedent proves

Kwoka 11 (Lindsay, J.D. UPenn, “TRIAL BY SNIPER: THE LEGALITY OF TARGETED KILLING IN THE WAR ON TERROR” Accessed at HeinOnline)

But this is not the end of the inquiry. Even if a targeted individual is not located on a field of battle, he may still be a threat, and tar- geted killing may potentially be necessary and appropriate in some circumstances. Applying the reasoning of" Hamdi here, a court would likely find that the use of targeted killing is only "necessary and ap- propriate" if it is the only way to prevent someone like Al-Awlaki from engaging in terrorist activity or otherwise harming the United States. The Hamdi Court was concerned with assuring that the executive used the least intrusive means in achieving its objective of preventing the enemy combatant from returning to battle. The Court made clear that the means used to achieve this objective should be no more intrusive than necessary.7\* It is consistent with the Court's concern to allow targeted killing only when it is the only means available to pre- vent harm to the United States. If the executive can demonstrate that an individual outside of a warzone will harm the United States unless he is killed, targeted kill- ing may be authorized. This is consistent with Havuli, in which the main concern was preventing future harm to the United States while using the least intrusive means available. This is also consistent with U.S. criminal law, in which the executive branch is permitted to kill an individual if there is no peaceful means left to apprehend him. Such an approach is also consistent with the approach of the Su- preme Court. Even the most stalwart protectors of constitutional rights of alleged terrorists recognize that immediate action by the executive is at times necessary to prevent attacks.7'' An approach that al- lows the executive to use deadly force when it is the only available means of preventing harm effectively balances the need to protect citizen's constitutional rights while affording sufficient deference to the executive.

### 1AR A2: Maher

#### THIS IS NOT ABOUT BIVINS – it is about the previous Al-Awlaki case that was rejected because it interfered too much with the president since Al-Awlaki’s grounds were not civil redress but determining drones were illegal under LOAC

#### And the courts will still declare Al Qaeda is an enemy under AUMF

Orr 11 (Andrew C., J.D. Candidate, Cornell Law School, 2012, “Unmanned, Unprecedented, and Unresolved: The Status of American Drone Strikes in Pakistan Under International Law,” Cornell International Law Journal Vol. 44, <http://www.lawschool.cornell.edu/research/ILJ/upload/Orr-final.pdf>)

C. The Drone Strikes Constitute Lawful Self-Defensive Force Against Qaeda. A Non-State Actor Some commentators argue that the United States\* use of force against al Qaeda is impermissible because only armed attacks by state actors trig- ger the right to use self-defensive force.77 Indeed, the ICJ's recent jurispru- dence limits the concept of Article 51 armed attacks to the actions of state actors.78 This reading of Article 51. however, contradicts the provision's plain meaning and drafting history, as well as customary international legal paradigms. Al Qaeda's activities, of course, are not attributable to Pakistan even if Pakistan's intelligence service has turned a blind eye toward their opera- tion.79 Thus, the drone strikes against al Qaeda in Pakistan are only per- missible as self-defensive force against a non-state actor. While the 1CJ has famously held that acts constituting armed attacks must be "by or on behalf of a state,"80 this reading of Article 51, is neither natural nor realistic. Read naturally. Article 51 permits the use of self-defensive force in response to hostilities by non-state actors. The Vienna Convention on the Law of Treaties provides that treaties "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty."81 Read alongside Article 2(4)'s general prohibition on the use of force by "Members," against "any State," Article 51's conspicuous omission of a State actor requirement confirms that the Charter itself contains no such limitation.82 Indeed, writing separately in the Wall case. Judge Hig- gins sharply criticized the majority's purportedly textualist reading of Arti- cle 51, saying "there is, with respect, nothing in the text of Article 51 that thus stipulates that self-defence is available only when an armed attack is made by a State."85 Article 51 is, therefore, unambiguous by its terms. The Charter's travaux prcpartois suggests a similar reading,84 and at least three recent ICJ judges have questioned whether armed attacks are limited to State actors. While considering the Charter's accommodation of regional security agreements, such as the Rio Treaty, the delegates at San Francisco in 1945 rejected a version of Article 51 that referred to attacks carried out "by any State."8"' Therefore, Article 51's drafting history does not limit the concept of armed attacks to State actions. Moreover, ICJ Judges Koojimans, Higgins, and Simma have questioned or rejected a state actor requirement under Article 51. In an era where non- state groups project military-scale power, the better view is that non-state actors, such as al Qaeda, can carry out armed attacks.86 Writing sepa- rately in the Annca" Activities case. Judge Koojimans noted that it is "unrea- sonable to deny the attacked State the right to self-defence merely because there is no attacker State."87 Like the Charter and its drafting history, customary international law also supports this definition of an armed attack. The Caroline paradigm, which is the source of the modern customary understanding of self- defense,88 permits States to use self-defensive force to repel attacks by non- state actors.89 Indeed, the Caroline case itself involved non-state hostili- ties.90 Finally, the acquiescence of the international community to the United States' use of military force in Afghanistan after the attacks of Sep- tember 11th supports the view that attacks by non-state actors can trigger a State's right to use self-defensive force.91

### 1AR A2: Geography (Sterio)

#### No Link – their evidence says that only the UN thinks that drone strikes violate geographical interpretations of International Law – obviously doesn’t apply to U.S. courts

#### The plan doesn’t rule on international law

Shriver Center 12 (5.2 implied causes of action, http://federalpracticemanual.org/node/30)

Bivens actions are not needed when a statute authorizes the relief sought. For example, Bivens actions are not necessary to sue for claims under the Tucker Act and the Federal Tort Claims Act, because those statutes authorize damages./9/ In contrast, the Administrative Procedure Act does not authorize damages against persons acting under color of federal law, and therefore, Bivens actions are necessary to support a damage claim against individual federal actors for constitutional violations. Although the Court has not overruled Bivens, recently the Court has disparaged Bivens and refused to extend it. In Correctional Services Corporation v. Malesko, the Court expressly limited Bivens actions to the narrow range of claims previously recognized, those arising under the Fourth, Fifth, and Eighth Amendments to the U.S. Constitution./10/

#### More evidence – plan only affects constitutional rights – not international law

Scott 98 (COMMANDER ROGER D. SCOTT, “KIMMEL, SHORT, MCVAY: CASE STUDIES IN EXECUTIVE AUTHORITY, LAW AND THE INDIVIDUAL RIGHTS OF MILITARY COMMANDERS,” 156 Mil. L. Rev. 52, lexis)

Behind the common law concept of official immunity lies the belief that the public interest in information about government actions, and the need of public officials to act and speak decisively without fear of lawsuits, support an efficiency-based privilege accorded to statements public officials make in the execution of their duties. The Supreme Court in Barr specifically contemplated that harm to reputation might be done under a rule of absolute immunity and embraced the traditional common law of immunity as the law of the land notwithstanding. 310 Supporting the public policy served by the common law, the Barr Court upheld official immunity on the grounds that government officials should be free to perform their duties and exercise the discretion pertinent to their offices "unembarrassed by the fear of damage suits -- suits which would consume time and energies which would otherwise be devoted to governmental service, and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government." 311 The Court stated this rationale for official immunity as strongly the previous century in Spalding v. Vilas, 312 like Barr, a defamation case. The defendant official in Spalding [\*131] v. Vilas was a postmaster, and in Barr, the Acting Director of the Office of Rent Stabilization. Within the rational framework applied by the Supreme Court, the public interest in ensuring that military command is "fearless, vigorous, and effective," and not encumbered with lawsuits over discretionary decisions, is particularly compelling -- and that interest is most compelling in the case of command decisions made by the Commander in Chief in time of grave national crises. The Supreme Court later held in Butz v. Economou 313 that federal officials enjoyed only a qualified, good-faith immunity from suits for constitutional torts (known as Bivens actions), 314 but it seemed to have left intact the Barr rule of absolute immunity for all common law torts, including particularly defamation. 315 The Court then clarified in Paul v. Davis that defamation, even if it produces stigma or injury to reputation, does not rise to the level of a constitutional tort unless the defamation deprives some other constitutionally protected "liberty" or "property" interest. 316 As stated by one lower federal court, "Defamation or injury to reputation, while actionable in tort, is insufficient to invoke procedural due process guarantees." 317 More recently, the Court suggested in Siegert v. Gilley 318 that "no consequences, however grave, resulting from a loss of reputation can make defamation actionable as a constitutional tort." 319 Other lower federal courts have read Siegert as holding squarely that defamation is never cognizable as a constitutional tort. 320

### 1AR AT: No backlash

#### Backlash outweighs, we don’t have cultural/linguistic knowledge to go it alone, without overflight rights we have no way to deploy the drones, that’s McGill and Zenko

### 1AR A2: No Civ Casualties

#### The actual number of civilian casualties isn’t the key internal link, but the PERCEPTION that they have debilitating effects on Pakistani and Yemeni communities – that’s Corey – their Williams ev that says Pakistan exaggerates is the point, they exaggerate because of overreliance and backlash to lack of restraint

#### Killing civilians causes blowback, makes terrorism worse, increases recruiting to the point where there are so many you can’t just kill your way out of it

#### Their defense is wrong casualties meow

Bergen and Tiedemann 10 (\*Peter, director of the National Security Studies Program at the New America Foundation, a liberal think tank in Washington, D.C., M.A in History, \*Katherine, policy analyst at the New America Foundation/Counterterrorism Strategy Initiative, “The Year of the Drone” <http://counterterrorism.newamerica.net/sites/newamerica.net/files/policydocs/bergentiedemann2.pdf>)

The killing of civilians in drone attacks is an important and politically charged issue in Pakistan. The strikes are quite unpopular among Pakistanis, who view them as violations of national sovereignty; according to a Gallup poll from August 2009, only 9 percent approved of such attacks . 5 Statistics compiled by Pakistani authorities in early January 2010 indicated that more than 700 civilians were killed by the drones in 2009 alone.

#### Link turn, decapitation fails without good intel which only the aff provides, there is an incentive for better intelligence gathering because you want to win your case in court the exec gathers as much as possible, that’s Taylor.

#### AT: Allied Perception leaks; not grounded in ev, this is what I did in HS when I had no ev to answer the link defense, 120 court cases prove there is no leaks and allies want transparency, no way they pull the old switch-a-roo.

#### No decapitation because terrorists will move to cities – means we still can’t solve terrorism and drones cause more blowback

Mahadevan 10 (Prem, senior researcher with the Global Security Team at the Center for Security Studies (CSS), “THE MILITARY UTILITY OF DRONES” <http://e-collection.library.ethz.ch/eserv/eth:2252/eth-2252-01.pdf>)

The real problem might therefore not be political, but doctrinal. Regardless of tech - nological progress, drones are incapable of eliminating insurgent cadres in densely populated cities, where they are more dif - ficult to locate among the general popu - lation. The fact that a drone-launched missile (even if precision guided) is an ex - plosive device also reduces its utility while targeting a single individual in a crowded space. Extensive use of drones risks forc - ing Taliban insurgents to disperse into urban areas across Pakistan, where they will be much better placed to attack critical targets. Unless the United States and Pakistan can pre-empt this strategic shift, drone use might prove destabilising for Islamabad.

#### TKs are key to a point; overdoing it allows them to replenish with more recruits, their “we kill key leaders arg” doesn’t assume SQ levels of TKs

Jordan 10/24/12 (Jenna, assistant professor in the Sam Nunn School of International Affairs at the Georgia Institute of Technology, “ISSF Article Review By Jenna Jordan on Patrick B. Johnsons “Does Decapitation Work?” and Bryan C Price’s “Targeting top Terroristshttp://www.h-net.org/~diplo/ISSF/PDF/ISSF-AR15.pdf)

There are a few problems with Price’s theoretical arguments for why decapitation decreases terrorist group duration. I will address five main theoretical issues before discussing the empirical findings. First, according to Price’s analysis, two conditions are necessary in order for leadership decapitation to be effective. Terrorist group leaders must be important to the success of the organization and leadership succession must be difficult (14). By contrasting terrorist organizations to economic firms, Price argues that leadership succession is particularly hard for terrorist groups because they are violent, clandestine, and values-based. First, violent organizations are more cohesive and often led by charismatic leaders, which increases the difficulty of succession. While violent organizations use charisma to attract, control, and motivate their members, leaders from nonviolent organizations “depend upon conventional forms of authority to ensure compliance from their subordinates” (17). I find two main issues with this line of reasoning. First, Price does not provide a clear definition of charisma. As a result, it is difficult to identify whether authority is charismatic or conventional. In fact, I would argue that only certain terrorist groups are based on charismatic authority. Max Weber identified other forms of authority, traditional and rational-legal,4 yet Price does not explain why terrorist organizations must use charisma to motivate their members. Second, while some terrorist organizations are founded on charismatic authority, charisma itself can become routinized, resulting in a more stable basis of authority. Routinization helps terrorist organizations to covertly function and thrive. It can eliminate succession problems by establishing norms and rules for recruitment.5 It can also allow a group to acquire critical resources by providing a way to raise money and contributions.

### 1AR A2: Link Uniqueness (McNeal)

#### \*\*\*Don’t need to read first 2 cards if I read public doesn’t trust and international doesn’t trust on the XO CP\*\*\*\*

#### 1. Doesn’t take out the link turn – allies and the public will only see the drone program as legitimate if they are able to determine external accountability – more evidence – no one trusts the executive

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.

Neither does the international community   
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.

#### 2. Don’t evaluate this evidence – it is only speculative since targeted killing procedures are secretive

Jaffer 2/4/13 (Jameel, Director of the ACLU's Center for Democracy, “The Justice Department’s White Paper on Targeted Killing” <https://www.aclu.org/blog/national-security/justice-departments-white-paper-targeted-killing>)

Some of the white paper's key legal arguments don't stand up to even cursory review. The paper omits crucial language from Mathews v. Eldridge, a case in which the Supreme Court held that the question of what process must be afforded to a person before he is deprived of life or liberty must take into account "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." The white paper skips over this language, like the attorney general's speech did. While the white paper does acknowledge "the risk of erroneous deprivation of a citizen's life," it doesn't grapple with the possibility of additional procedural safeguards. And when the white paper dismisses the possibility of judicial review, it does so in a single paragraph that fails even to acknowledge the possibility of after-the-fact judicial review of the kind that our courts routinely provide in other contexts. (Incidentally, this after-the-fact judicial review is what the ACLU and CCR are seeking in Al-Aulaqi v. Panetta, a case now pending before the district court in D.C. We'll be filing our principal brief in that case tomorrow). The white paper also suggests, incorrectly, that the courts have endorsed the view that there is no geographic limitation on the government's exercise of war powers. In fact all of the cases in which the D.C. Circuit has upheld the detention of a prisoner held at Guantanamo involved a connection of some kind to Afghanistan. And, more important, the Supreme Court case on which the white paper relies most heavily involved an American who was detained in Afghanistan. You can't reasonably read a case that permitted the military detention of an American on an actual battlefield to supply a green light for the extrajudicial killing of American terrorism suspects anywhere in the world. Finally, the white paper assumes a key conclusion: It takes as a given that the target of the strike will be a "senior operational leader of al-Qa'ida or an associated force of al-Qa'ida," and it reasons from that premise that judicial process is unnecessary. This is a little bit like assuming that the defendant is guilty and then asking whether it's useful to have a trial. Perhaps the white paper omits analysis that appears in the Justice Department's legal memos, but again the legal memos are, inexcusably, still secret. My colleagues will have more to say about the white paper soon, but my initial reaction is that the paper only underscores the irresponsible extravagance of the government's central claim. Even if the Obama administration is convinced of its own fundamental trustworthiness, the power this white paper sets out will be available to every future president—and every "informed high-level official" (!)—in every future conflict. As I said to Isikoff, that's truly a chilling thought.

#### 3. Status quo limits are non-binding and the standards are unclear

Daskal 13 (Jennifer, Fellow and Adjunct Professor, Georgetown Center on National Security and the Law, Georgetown University Law Center.“The Geography of the Battlefield: A Framework for Detention and Targeting Outside the 'Hot' Conflict Zone” <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1252&context=facsch_lawrev>)

In a recent set of speeches. Obama Administration officials described some of the policy- based constraints on the exercise of their targeting authorities, but these are nonbinding limits. The recently leaked DOJ While Paper also purportedly describes circumstances in which a U.S. citizen could be targeted overseas. Bui the White Paper describes only one circumstance in which such killings are permissible, without setting any outer limits on that authority. DOJ WHITE PAPER, iupra note 17. And at the same time that officials have articulated discretionary policy limits, they have also argued for an underlying and broad-based authority to target anyone deemed to be 'part of the enemy force. See. e.g., Brennan, Wilson Center Speech, tupra note 12 (arguing that the Administration has the legal authority to target the "literally thousands of individuals who are part of al-Qaida, the Taliban, or associated forces,\* but noting that, in many cases, to do so would be unwise): we aim DANIEL Ki.AMMAN, KILL OR CAPTURE 117-43 (2012) (describing the difficulties the Obama Adminisiraiion faced in developing a coherent legal justification for detention and targeting policies); Becker & Shane, uipra note 113 (discussing the internal deliberations and the President's highly personal involvement in determining targets outside zones of active hostilities). The lack of any clearly articulated standards was a source of obvious concern at the February 2013 Senate Intelligence Committee confirmation hearing on John Brennan's nomination to be Director of the CIA. See. e.g. Nomination of John O. Brennan to be the Director of the Central Intelligence Agency 55 (Feb. 7, 2013) (question of Sen. Ron Wyden to Mr. Brennan during hearing before S. Select Comm. on Intelligence, 113th Cong.), available at htlp://intelligence. senate.gov/130207/transcript.pdf (emphasizing the need for increased transparency and a 'public conversation\* about drones).