# 1AC

### plan

#### Plan:  The United States Federal Judiciary should conduct judicial ex post review of United States’ targeted killing operations, with liability falling on the government for any constitutional violation, on the grounds that the political question doctrine should not bar justiciability of cases against the military.

### Allies

#### Advantage 1 is Allied Cooperation –

#### U.S. drone policy is more important than the spying and data scandal to European partners – it threatens the trans-atlantic relationship

Dworkin 7/17/13 (Anthony, Senior Policy Fellow at the European Council on Foreign Relations, “Actually, drones worry Europe more than spying” <http://globalpublicsquare.blogs.cnn.com/2013/07/17/actually-drones-worry-europe-more-than-spying/>)

Relations between the United States and Europe hit a low point following revelations that Washington was spying on European Union buildings and harvesting foreign email messages. Behind the scenes, though, it is not data protection and surveillance that produces the most complications for the transatlantic intelligence relationship, but rather America's use of armed drones to kill terrorist suspects away from the battlefield. Incidents such as the recent killing of at least 17 people in Pakistan are therefore only likely to heighten European unease. In public, European governments have displayed a curiously passive approach to American drone strikes, even as their number has escalated under Barack Obama’s presidency. Many Europeans believe that the majority of these strikes are unlawful, but their governments have maintained an uneasy silence on the issue. This is partly because of the uncomfortable fact that information provided by European intelligence services may have been used to identify some targets. It is also because of a reluctance to accuse a close ally of having violated international law. And it is partly because European countries have not worked out exactly what they think about the use of drones and how far they agree within the European Union on the question. Now, however, Europe’s muted stance on drone strikes looks likely to change. Why? For one thing, many European countries are now trying to acquire armed drones themselves, and this gives them an incentive to spell out clearer rules for their use. More importantly, perhaps, Europeans have noticed that drones are proliferating rapidly, and that countries like China, Russia and Saudi Arabia are soon likely to possess them. There is a clear European interest in trying to establish some restrictive standards on drone use before it is too late. For all these reasons, many European countries are now conducting internal reviews of their policy on drones, and discussions are also likely to start at a pan-European level. But as Europeans begin to articulate their policy on the use of drones, a bigger question looms. Can Europe and the United States come together to agree on when drone strikes are permissible? Until now, that would have seemed impossible. Since the September 11 attacks, the United States has based its counterterrorism operations on the claim that it is engaged in a worldwide armed conflict with al Qaeda and associated forces — an idea that President Obama inherited from President George W. Bush and has been kept as the basis for an expanded drone strike campaign. European countries have generally rejected this claim. However, the changes to American policy that President Obama announced in May could open the way to at least the possibility of a dialogue. Obama suggested that he anticipated a time in the not-too-distant future when the armed conflict against al Qaeda might come to an end. More substantially, he made clear that his administration was in the process of switching its policy so that, outside zones of hostilities, it would only use drone strikes against individuals who posed a continuing and imminent threat to the U.S. That is a more restrictive standard than the claim that any member of al Qaeda or an associated force could lawfully be killed with a drone strike at any time. European countries might be more willing to accept an approach based on this kind of “self-defense” idea. However, there remain some big stumbling blocks. First, a good deal about Obama’s new standards is still unclear. How does he define a “zone of hostilities,” where the new rules will not apply? And what is his understanding of an “imminent” threat? European countries are likely to interpret these key terms in a much narrower way than the United States. Second, Obama’s new approach only applies as a policy choice. His more expansive legal claims remain in the background so that he is free to return to them if he wishes. But if the United States is serious about working toward international standards on drone strikes, as Obama and his officials have sometimes suggested, then Europe is the obvious place to start. And there are a number of steps the administration could take to make an agreement with European countries more likely. For a start, it should cut back the number of drone strikes and be much more open about the reasons for the attacks it conducts and the process for reviewing them after the fact. It should also elaborate its criteria for determining who poses an imminent threat in a way that keeps attacks within tight limits. And, as U.S. forces prepare to withdraw from Afghanistan in 2014, it should keep in mind the possibility of declaring the war against al Qaeda to be over. All this said, Europe also has some tough decisions to make, and it is unclear whether European countries are ready to take a hard look at their views about drone strikes, addressing any weaknesses or inconsistencies in their own position. If they are, the next few years could offer a breakthrough in developing international standards for the use of this new kind of weapon, before the regular use of drones spreads across the globe.

#### Accountability over standards of imminence are impossible from executive internal measures – no one trusts Obama on drones – only the plans court action solves

Goldsmith 13 (Jack Goldsmith teaches at Harvard Law School and is a member of the Hoover Institution Task Force on National Security and Law, “How Obama Undermined the War on Terror,” http://www.newrepublic.com/article/112964/obamas-secrecy-destroying-american-support-counterterrorism)

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

#### Unrestrained drone policy results in collapse of NATO

Parker 9/17/12 (Tom, former policy director for Terrorism, Counterterrorism and Human Rights at Amnesty International USA. He is also a former officer in the British Security Service (MI5), “U.S. Tactics Threaten NATO” <http://nationalinterest.org/commentary/us-tactics-threaten-nato-7461?page=1>)

A growing chasm in operational practice is opening up between the United States and its allies in NATO. This rift is putting the Atlantic alliance at risk. Yet no one in Washington seems to be paying attention. The escalating use of unmanned aerial vehicles to strike terrorist suspects in an increasing number of operational environments from the Arabian Peninsula to Southeast Asia, coupled with the continued use of military commissions and indefinite detention, is driving a wedge between the United States and its allies. Attitudes across the Atlantic are hardening fast. This isn’t knee-jerk, man-on-the-street anti-Americanism. European governments that have tried to turn a blind eye to U.S. counterterrorism practices over the past decade are now forced to pay attention by their own courts, which will restrict cooperation in the future. As recently as last month, the German federal prosecutor’s office opened a probe into the October 2010 killing of a German national identified only as “Buenyamin E.” in a U.S. drone strike in Pakistan. There are at least four other similar cases involving German nationals and several reported strikes involving legal residents of the United Kingdom. In March, Polish prosecutors charged the former head of Polish intelligence, Zbigniew Siemiatkowski, with “unlawfully depriving prisoners of the their liberty” because of the alleged role he played in helping to establish a CIA secret prison in northeastern Poland in 2002–2003. Last December, British Special Forces ran afoul of the UK courts for informally transferring two Al Qaeda suspects detained in Iraq, Yunus Rahmatullah and Amanatullah Ali, to U.S. forces. The British government has been instructed to recover the men from U.S. custody or face legal sanctions that could result in two senior ministers being sent to prison. Perhaps the most dramatic example illustrating the gap that has opened up between the United States and its European allies concerns the 2009 in absentia conviction of twenty-three U.S. agents in an Italian court for the role they played in the extraordinary rendition of radical Imam Hassan Mustafa Osama Nasr from Milan to Cairo. Britain, Poland, Italy and Germany are among America’s closest military partners. Troops from all four countries are currently serving alongside U.S. forces in Afghanistan, but they are now operating within a very different set of constraints than their U.S. counterparts. The European Court of Human Rights established its jurisdiction over stabilization operations in Iraq, and by implication its writ extends to Afghanistan as well. The British government has lost a series of cases before the court relating to its operations in southern Iraq. This means that concepts such as the right to life, protection from arbitrary punishment, remedy and due process apply in areas under the effective control of European forces. Furthermore, the possibility that intelligence provided by any of America’s European allies could be used to target a terrorism suspect in Somalia or the Philippines for a lethal drone strike now raises serious criminal liability issues for the Europeans. The United States conducts such operations under the legal theory that it is in an international armed conflict with Al Qaeda and its affiliates that can be pursued anywhere on the globe where armed force may be required. But not one other member of NATO shares this legal analysis, which flies in the face of established international legal norms. The United States may have taken issue with the traditional idea that wars are fought between states and not between states and criminal gangs, but its allies have not. The heads of Britain’s foreign and domestic intelligence services have been surprisingly open about the “inhibitions” that this growing divergence has caused the transatlantic special relationship, telling Parliament that it has become an obstacle to intelligence sharing. European attitudes are not going to change—the European Court of Human Rights is now deeply embedded in European life, and individual European governments cannot escape its oversight no matter how well disposed they are to assist the United States. The United States has bet heavily on the efficacy of a new array of counterterrorism powers as the answer to Al Qaeda. In doing so it has evolved a concept of operations that has much more in common with the approach to terrorist threats taken by Israel and Russia than by its European partners. There has been little consideration of the wider strategic cost of these tactics, even as the Obama administration doubles down and extends their use. Meanwhile, some of America’s oldest and closest allies are beginning to place more and more constraints on working with U.S. forces. NATO cannot conduct military operations under two competing legal regimes for long. Something has to give—and it may just be the Atlantic alliance.

#### NATO prevents global nuclear war

Zbigniew Brzezinski 9, former U.S. National Security Adviser, Sept/Oct 2009, “An Agenda for NATO,” Foreign Affairs, 88.5, EBSCO

NATO's potential is not primarily military. Although NATO is a collective-security alliance, its actual military power comes predominantly from the United States, and that reality is not likely to change anytime soon. NATO's real power derives from the fact that it combines the United States' military capabilities and economic power with Europe's collective political and economic weight (and occasionally some limited European military forces). Together, that combination makes NATO globally significant. It must therefore remain sensitive to the importance of safeguarding the geopolitical bond between the United States and Europe as it addresses new tasks. The basic challenge that NATO now confronts is that there are historically unprecedented risks to global security. Today's world is threatened neither by the militant fanaticism of a territorially rapacious nationalist state nor by the coercive aspiration of a globally pretentious ideology embraced by an expansive imperial power. The paradox of our time is that the world, increasingly connected and economically interdependent for the first time in its entire history, is experiencing intensifying popular unrest made all the more menacing by the growing accessibility of weapons of mass destruction -- not just to states but also, potentially, to extremist religious and political movements. Yet there is no effective global security mechanism for coping with the growing threat of violent political chaos stemming from humanity's recent political awakening. The three great political contests of the twentieth century (the two world wars and the Cold War) accelerated the political awakening of mankind, which was initially unleashed in Europe by the French Revolution. Within a century of that revolution, spontaneous populist political activism had spread from Europe to East Asia. On their return home after World Wars I and II, the South Asians and the North Africans who had been conscripted by the British and French imperial armies propagated a new awareness of anticolonial nationalist and religious political identity among hitherto passive and pliant populations. The spread of literacy during the twentieth century and the wide-ranging impact of radio, television, and the Internet accelerated and intensified this mass global political awakening. In its early stages, such new political awareness tends to be expressed as a fanatical embrace of the most extreme ethnic or fundamentalist religious passions, with beliefs and resentments universalized in Manichaean categories. Unfortunately, in significant parts of the developing world, bitter memories of European colonialism and of more recent U.S. intrusion have given such newly aroused passions a distinctively anti-Western cast. Today, the most acute example of this phenomenon is found in an area that stretches from Egypt to India. This area, inhabited by more than 500 million politically and religiously aroused peoples, is where NATO is becoming more deeply embroiled. Additionally complicating is the fact that the dramatic rise of China and India and the quick recovery of Japan within the last 50 years have signaled that the global center of political and economic gravity is shifting away from the North Atlantic toward Asia and the Pacific. And of the currently leading global powers -- the United States, the EU, China, Japan, Russia, and India -- at least two, or perhaps even three, are revisionist in their orientation. Whether they are "rising peacefully" (a self-confident China), truculently (an imperially nostalgic Russia) or boastfully (an assertive India, despite its internal multiethnic and religious vulnerabilities), they all desire a change in the global pecking order. The future conduct of and relationship among these three still relatively cautious revisionist powers will further intensify the strategic uncertainty. Visible on the horizon but not as powerful are the emerging regional rebels, with some of them defiantly reaching for nuclear weapons. North Korea has openly flouted the international community by producing (apparently successfully) its own nuclear weapons -- and also by profiting from their dissemination. At some point, its unpredictability could precipitate the first use of nuclear weapons in anger since 1945. Iran, in contrast, has proclaimed that its nuclear program is entirely for peaceful purposes but so far has been unwilling to consider consensual arrangements with the international community that would provide credible assurances regarding these intentions. In nuclear-armed Pakistan, an extremist anti-Western religious movement is threatening the country's political stability. These changes together reflect the waning of the post-World War II global hierarchy and the simultaneous dispersal of global power. Unfortunately, U.S. leadership in recent years unintentionally, but most unwisely, contributed to the currently threatening state of affairs. The combination of Washington's arrogant unilateralism in Iraq and its demagogic Islamophobic sloganeering weakened the unity of NATO and focused aroused Muslim resentments on the United States and the West more generally.

#### Courts don’t leak intel methods or classified information—this fear has been repeatedly dispelled by hundreds of successfully tried terrorism cases

Jaffer-director ACLU’s National Security Project-12/9/08 <http://www.salon.com/2008/12/09/guantanamo_3/> Don’t replace the old Guantánamo with a new one

The contention that the federal courts are incapable of protecting classified information — “intelligence sources and methods,” in the jargon of national security experts — is another canard. When classified information is at issue in federal criminal prosecutions, a federal statute — the Classified Information Procedures Act (CIPA) — generally permits the government to substitute classified information at trial with an unclassified summary of that information. It is true that CIPA empowers the court to impose sanctions on the government if the substitution of the unclassified summary for the classified information is found to prejudice the defendant, and in theory such sanctions can include the dismissal of the indictment. In practice, however, sanctions are exceedingly rare, and of the hundreds of terrorism cases that have been prosecuted over the last decade, none has been dismissed for reasons relating to classified information. Proponents of new detention authority, including Waxman and Wittes, invoke the threat of exposing “intelligence sources and methods” as a danger inherent to terrorism prosecutions in U.S. courts, but the record of successful prosecutions provides the most effective rebuttal.

#### No over-deterrence of military operations- government liability is rooted in the FTCA and it avoids the chilling associated with individual liability.

Kent, Constitutional Law prof, 13 (Andrew, Faculty Advisor-Center on National Security at

Fordham Law School, prof @ Fordham University School of Law- constitutional law, foreign relations law, national security law, federal courts and procedure, “ARE DAMAGES DIFFERENT?: BIVENS AND NATIONAL SECURITY,” October 8, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2330476>) \*\* Evidence is gender paraphrased

Because of sovereign immunity, federal officials are sued under Bivens in their so-called personal rather than official capacities.43 In theory, persons injured by actions of a federal official could also seek compensation by suing the agent’s employer, the United States Government for damages, but the sovereign immunity of the federal government blocks this route.44 The Federal Tort Claims Act (FTCA), originally enacted in 1946 and frequently amended since,45 effects a partial waiver of sovereign immunity by allowing suits directly against the federal government instead of officers (who might be judgment proof) and making the United States liable for injuries caused by the negligent or wrongful act or omission of any federal employee acting within the scope of ~~his~~ employment, in accordance with the law of the state where the act or omission occurred.46 Under the Westfall Act of 1988, the FTCA is the exclusive remedy for torts committed by federal officials within the scope of their employment, except for suits brought for violations of the Constitution.47 In other words, state law tort claims against individual official defendants are now generally barred. The Supreme Court takes the prospect of individual liability in damages for officials very seriously and has crafted immunity doctrines to soften the blow. The Court’s rulings provide the President of the United States and certain classes of officials defined functionally—prosecutors doing prosecutorial work, legislators legislating, judges doing judicial work and certain persons performing “quasijudicial” functions—with absolute immunity from money damages suits, generally for the reason that such suits would be likely to be frequent, frequently meritless, and uniquely capable of disrupting job performance.48 All other government officials are entitled to only “qualified immunity” from money damages suits. Under the qualified immunity doctrine, officials are liable only when they violate “clearly established” federal rights, that is, when “[t]he contours of [a] right [are] sufficiently clear that every reasonable official would have understood that what ~~he is~~ [they are] doing violates that right.”49 Because qualified immunity is not just a defense to liability but also “a limited entitlement not to stand trial or face the other burdens of litigation,”50 the Court’s doctrine encourages speedy resolution of immunity questions by judges. The policy reasons for the Court’s active protection of federal officials through a robust immunity doctrine, including fear of dampening the zeal with which officials perform their jobs because of fear of personal liability, are discussed below in Section V.A.

#### The plan balances the definition to 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 Hamdi, 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 Supreme 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 allows 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.

### Yemen

#### Executive control over the definition of “imminence” makes its scope totally unlimited- makes drone overuse and abuse inevitable.

**Greenwald 13** (Glenn, J.D. from NYU, award-winning journalist, February 5th, 2013, "Chilling legal memo from Obama DOJ justifies assassination of US citizens," www.theguardian.com/commentisfree/2013/feb/05/obama-kill-list-doj-memo)

4. **Expanding the concept of "imminence" beyond recognition The memo claims that the president's assassination power applies to a senior al-Qaida member who "poses an imminent threat** of violent attack against the United States". **That is designed to convince citizens to accept this power by leading them to believe it's similar to** common and **familiar domestic uses of lethal force on US soil**: if, for instance, an armed criminal is in the process of robbing a bank or is about to shoot hostages, then the "imminence" of the threat he poses justifies the use of lethal force against him by the police. **But this rhetorical tactic is totally misleading**. **The memo is authorizing** assassinations against citizens in **circumstances far beyond this understanding of "imminence**". Indeed, **the memo expressly states that it is inventing "a broader concept of imminence"** than is typically used in domestic law. **Specifically, the president's** assassination **power "does not require that the US have clear evidence that a specific attack . . . will take place in the immediate future".** **The US routinely assassinates its targets not when they are engaged in or plotting attacks** but when they are at home, with family members, riding in a car, at work, at funerals, rescuing other drone victims, etc. **Many** of the early **objections to this new memo have focused on this warped and incredibly broad definition of "imminence**". The ACLU's Jameel **Jaffer told Isikoff that the memo "redefines the word imminence in a way that deprives the word of its ordinary meaning".** **Law Professor** Kevin Jon **Heller called Jaffer's objection "an understatement", noting that the memo's understanding of "imminence" is "wildly overbroad" under international law**. Crucially, Heller points out what I noted above: **once you accept the memo's reasoning** - that the US is engaged in a global war, that the world is a battlefield, and the president has the power to assassinate any member of al-Qaida or associated forces - **then** there is no way coherent way to limit this power **to places where capture is infeasible or to persons posing an "imminent" threat.** The legal framework adopted by the memo means the president can kill anyone he claims is a member of al-Qaida regardless of where they are found or what they are doing. The only reason to add these limitations of "imminence" and "feasibility of capture" is, as Heller said, purely political: to make the theories more politically palatable. But **the definitions for these terms are so vague and broad that they provide no real limits on the president's assassination power**. As the ACLU's **Jaffer says: "This is a chilling document" because** "it argues that the government has the right to carry out the extrajudicial killing of an American citizen" and **the purported limits "are elastic and vaguely defined, and it's easy to see how they could be manipulated."**

#### Indiscriminate strikes create Yemen instability and swell AQAP ranks – reducing strikes to calculated, high value targeting is key

Boyle Ph.D in Political Science, 13 (Michael J., Assistant Professor of Political Science at La Salle University in Philadelphia. “The costs and consequences of drone warfare,” International Affairs 89 : 1 (2013) 1–29. <http://www.chathamhouse.org/sites/default/files/public/International%20Affairs/2013/89_1/89_1Boyle.pdf>)

The second major claim for the effectiveness of drone strikes is based on their ability to kill HVTs, defined as key operational and political leaders of Al-Qaeda and related groups. From the campaign trail to his time in office, Presi - dent Obama has consistently maintained that he would not hesitate to use lethal force to remove leading figures in Al-Qaeda. 44 Yet the actual record of drone strikes suggests that forces under his command have killed far more lower-ranked operatives associated with other Islamist movements and civilians than HVTs from Al-Qaeda. Peter Bergen has estimated that the drone strikes have killed 49 high-ranking ‘militant’ leaders since 2004, only 2 per cent of the total number of deaths from drone strikes. 45 The remaining 98 percent of drone strikes have been directed against lower-ranking operatives, only some of whom are engaged in direct hostilities against the United States, and civilians. Many of these actors pose no direct or imminent threats, but rather speculative ones, such as individ - uals who might some day attack the US or its interests abroad. 46 Even as Presi - dent Obama has increased the number of drone strikes, the number of HVTs killed has ‘slipped or barely increased’. 47 In 2010, a mid-ranking Haqqani network fighter concluded that ‘it seems they really want to kill everyone, not just the leaders’. 48 The decision to expand targeted killing to this scale and take aim at even low-ranking ‘foot soldiers’ is unprecedented and sets the Obama administra - tion’s drone programme apart in both scale and character from targeted killing operations elsewhere. 4 The extent to which the Obama administration has targeted lower-ranked operatives is not without consequences. Many of these lower-ranked operatives are densely connected to local tribal and clan structures. Their deaths in drone strikes may lead those connected to them by family and tribal ties to seek revenge, thus swelling the ranks of Al-Qaeda and its affiliate groups. As David Kilcullen and Andrew Exum have argued, ‘every one of these dead noncombatants repre - sents an alienated family, a new desire for revenge, and more recruits for a militant movement that has grown exponentially even as drone strikes have increased’. 50 Moreover, the vast increase in the number of deaths of low-ranking operatives has deepened political resistance to the US programme in Pakistan, Yemen and other countries. For example, while Pakistani officials have supported and even celebrated drone strikes against high-ranking operatives such as Baitullah Mehsud, they have taken a dimmer view of CIA attempts to kill mere foot soldiers with similar strikes. 51 Such strikes tend to generate more political pressure on the Pakistani government to oppose the US than strikes against well-known figures whose leadership in militant networks was indisputable. Pakistani opposition leader Imran Khan has pointed directly to the deaths of civilians and low-level operatives as the reason why, if elected to office, he would order the air force to shoot down US drones. 52 A similar dynamic has occurred in Yemen, where US drone strikes have driven more civilians into the ranks of Al-Qaeda and strength - ened local insurgent forces challenging the Yemeni government. 53

#### AQAP poses the largest threat to the United States – they have the means and motive for attack

Cilluffo et al 13 Subcommittee Hearing: Understanding the Threat to the Homeland from AQAP, September 18, 2013, Mr. Frank J. Cilluffo, Associate Vice President, Director, Homeland Security Policy Institute, The George Washington University, Ms. Katherine Zimmerman, Senior Analyst, The American Enterprise Institute, Mr. Brian Katulis, Senior Fellow, Center for American Progress, http://www.securityassistance.org/content/understanding-threat-homeland-aqap#sthash.0ztnhYSX.dpuf

Yet to do so would be a real mistake. Notwithstanding the importance of Syria as a threat to (U.S.) national, regional, and international security—and as a situation that terrorists may seek to exploit, there is a broader range of forces and factors that pose serious and ongoing threats to the United States. One critical example is the terrorist group AQAP which is currently the al Qaeda affiliate that poses the greatest threat to the U.S. homeland. Why AQAP Matters AQAP is the most active of al Qaeda’s affiliate groups. AQAP has directly targeted the U.S. homeland as well as U.S. interests abroad on multiple occasions. AQAP (and Yemen) is home to one of the world’s most dangerous and innovative bomb- makers who has actively tried and shown himself to be able to circumvent U.S. countermeasures intended to thwart his improvised explosive devices. AQAP has invested significantly in encouraging radicalization and “lone wolf” homegrown attacks, including “Inspire” magazine. AQAP’s efforts in this regard propagate the ideology that underpins al Qaeda as a movement, and provide the “how- to” do it yourself in terrorist tactics, techniques, and procedures. AQAP is currently led by Nasser al-Wuhayshi, formerly a direct confidant of Osama bin Laden, who was recently named the number two figure within al Qaeda writ large. The number two leadership slot is symbolically important but also operationally so, particularly as the boundaries between al Qaeda components (core and affiliates) fade away and their activities converge. AQAP has for some time assumed a leadership role within al Qaeda as a whole, and has cooperated with multiple al Qaeda affiliates. AQAP’s leadership position offers a conduit to foster intent in others to attack the U.S. homeland and U.S. interests. AQAP was established in 2009 by the merger of Yemeni al Qaeda with Saudi al Qaeda elements that were driven out of the Kingdom. The influence of Yemeni al Qaeda was felt long before, however, and pre-dated 9/11. Bear in mind that Yemen, the birthplace of Osama bin Laden, was the host country of the terrorist attack on the U.S.S. Cole in 2000, in which seventeen U.S. sailors perished. Since its creation, AQAP has demonstrated ample evidence of intent to attack the U.S. homeland and U.S. interests, including the 2009 Christmas Day airliner bomb attempt by “underwear bomber” Umar Farouk Abdulmutallab the 2010 cargo / plane bomb attempt in which explosives were concealed in printer cartridges; and the spring 2012 concealed explosives plot.1 The first two of these attempted attacks were overseen by AQAP’s former external operations leader Anwar al-Awlaki. AQAP has managed to attract western recruits or others with the ability to travel, to facilitate such attacks. In addition to Abdulmutallab, examples include American Sharif Mobley, who is in the custody of the Yemeni government following his shooting of two Yemeni security guards, and British national Minh Qhang Pham, who was indicted on terrorism charges in New York in 2012. Most recently, this August (before all eyes turned to Syria and the regime’s use of chemical weapons on its own people there), there was much discussion of a threat stream emanating from Yemen, where AQAP is based. A spate of articles appeared in the press reporting on a so-called “conference call” between al Qaeda Senior Leadership (AQSL) figure Ayman al- Zawahiri and a dozen chiefs of al Qaeda affiliates including AQAP’s Nasser al-Wuhayshi.2 The intelligence suggested that a major terrorist plot directed against western targets was afoot and prompted a range of countermeasures including a U.S. decision to shut temporarily nineteen embassies and consulates. The plot is said to have involved “a new generation of liquid explosive, currently undetectable,” which U.S. officials described as “`ingenious’.”3 In addition to these various demonstrations of intent to attack, AQAP has also evidenced a record of innovation in terror tradecraft. AQAP’s lead bomb-maker Ibrahim al-Asiri personifies this, as the mastermind behind the devices used in the 2009 attempted assassination of the Saudi Interior Minister, the 2009 Christmas Day attack, the 2010 cargo printer bomb, and plots that involve surgically implanted explosives. Over and above his own considerable expertise, al-Asiri has been training the next generation of bomb-makers.4 AQAP has also expressed an interest in attacks using biological warfare agents, including ricin.5 Encouraging radicalization and “lone wolf” homegrown attacks has been a further hallmark and focus of AQAP. Cases of this type inspired by AQAP—and Anwar al-Awlaki in particular— include the attack on Fort Hood in 2009 by Major Nidal Hasan, the attack on a military recruiting center in Arkansas in the same year by Carlos Bledsoe, the 2010 attack on a British parliamentarian by student Roshonara Choudhry, and the Boston marathon bombing earlier this year. AQAP “bridge figure” Anwar al-Awlaki possessed an almost unmatched ability to recruit and inspire new and existing members to al Qaeda’s cause and ideology. Though killed in a drone strike in 2011, Awlaki’s voice lives on including in the many radical and violent “sermons” that he recorded in multiple media formats—and continues to resonate. Ideology is the lifeblood that sustains al Qaeda, and instruments such as “Inspire” magazine are intended to fuel the fire, including the “homegrown” component. Although the original authors and publishers of “Inspire” (Awlaki and colleague Samir Khan) are now deceased, the magazine continues and its production values have improved recently. Immediately following the death of Awlaki and Khan, there was a highly noticeable degradation of “Inspire”; the more recent issues of Inspire, including the 11th issue released after the Boston marathon attack, once again demonstrate high production quality and appear to be written by a native English speaker. The linkages between AQAP and other al Qaeda affiliates and terrorist groups are another source of significant concern. As mentioned, current AQAP leader al-Wuhayshi is the overall number two in al Qaeda.6 He is also directly connected to Osama bin Laden, having served as his secretary until 2001. For him, the battle may be personal; being a direct protégé of bin Laden may add an extra layer of resolve and determination to his actions. Other important links exist, however, beyond al-Wuhayshi’s connection with AQSL. These include AQAP ties to al- Shabaab in Somalia, as discussed by convicted terrorist leader Ahmed Warsame in his guilty plea7; and a reported AQAP role in the attack on the U.S. mission in Benghazi.8

#### And, terrorism escalates and causes 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

#### Terrorists have means and motive 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)

#### The plan balances good strikes with bad ones---solves overuse while preserving the option

Jonathan Hafetz 13, Associate Professor of Law, Seton Hall University School of Law, 3/8/13, “Reviewing Drones,” http://www.huffingtonpost.com/jonathan-hafetz/reviewing-drones\_b\_2815671.html

Judges must also be able to afford a remedy to victims. Mistakes happen and, as a recent report by Columbia Law School and the Center for Civilians in Conflict suggests, they happen more than the U.S. government wants to acknowledge.

Errors are not merely devastating for family members and their communities. They also increase radicalization in the affected region and beyond. Drone strikes -- if unchecked -- could ultimately create more terrorists than they eliminate.

Courts should thus be able to review lethal strikes to determine whether they are consistent with the Constitution and with the 2001 Authorization for Use of Military Force, which requires that such uses of force be consistent with the international laws of war. If a drone strike satisfies these requirements, the suit should be dismissed.

Government officials, moreover, would be liable only if they violate clearly established legal standards. This limitation helps avoid chilling the use of drones where the law is uncertain, while still deterring their misuse.

### PQD

#### Invocation of the political question doctrine in national security contexts unravels attempts to apply civilian justice to the military—line drawing fails, only a clear signal solves

Vladeck 12 (Stephen, Professor of Law and Associate Dean for Scholarship, American University,

Washington College of Law, “THE NEW NATIONAL SECURITY CANON,” June 14, http://www.aulawreview.org/pdfs/61/61-5/Vladeck.website.pdf)

But if what in fact has taken place over the last decade is a testament to a longer-term pattern, one that neither the political branches nor the Supreme Court disrupt in the near future, then we must confront a more alarming possibility: that as these “national security”-based exceptions increasingly become the rule in contemporary civil litigation against government officers—whether with regard to new “special factors” under Bivens, new bases for contractor preemption under Boyle, proliferation of the political question doctrine, or even more expansive reliance upon the qualified immunity defense—the line between the unique national security justifications giving rise to these cases and ordinary civil litigation will increasingly blur. Thus, wherever one comes down on the virtues and vices of this new national security canon, perhaps the most important point to take away is the need to carefully cabin its scope. Otherwise, exceptions articulated in the guise of such unique fact patternss could serve more generally to prevent civil liability for government misconduct and to thereby dilute the effectiveness of judicial review as a deterrent for any and all unlawful government action—not just those actions undertaken in ostensibly in defense of the nation.

#### And, the plan’s repudiation of the PQD will not be limited to targeted killing—judges will be able to apply that rationale in future cases

Tokaji 12 (Daniel, Professor in Law at The Ohio State University Michael E. Moritz College of Law, with Owen Wolfe†, BAKER, BUSH, AND BALLOT BOARDS: THE FEDERALIZATION OF ELECTION ADMINISTRATION, <http://law.case.edu/journals/lawreview/documents/62CaseWResLRev4.3.Tokaji.pdf>)

Bush can be understood as the new Baker, in the sense that it opened the federal courts to election administration litigation, just as its predecessor opened the federal courts to districting litigation. So as to avoid any misunderstanding, let us first state two qualifications to this claim. First, we are not talking about citation counts. Baker has been cited many times by the Supreme Court and the lower courts in subsequent years.49 By contrast, the Supreme Court has been exceedingly reluctant to cite Bush v. Gore, and there are not a huge number of lower court cases that have cited the case either.50 Second, we are not talking about the intent of the Supreme Court, which was quite different in these two sets of cases. The Baker Court was quite conscious of the fact that it was opening the door, if not the floodgates, to litigation over legislative districts.51 The Bush Court, by contrast, seemed intent on shutting the door behind it, by limiting the principle upon which it sought to rely. This is most clearly evident in the Court’s statement that: Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities. The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections.52 Some commentators have criticized these sentences for being unprincipled, in the sense of declaring a rule of law good for one day only.53 We disagree. What the Court did instead was to (1) assert an equal protection principle established by cases like Baker and Reynolds, variously characterized as “equal weight” to each vote and “equal dignity” to each voter and as valuing one person’s vote over another by "arbitrary and disparate treatment";54 (2) apply this principle to a new context, namely the recounting of punch card ballots in the State of Florida;55 and (3) conclude that this process contravened this basic equal protection principle, without clearly specifying its precise boundaries.56 In other words, the Court applied an established principle to a new area of law without specifying the precise legal test or how it will apply to future cases.57 The wording may be different, but the mode of analysis is not that unusual. In this respect. Bush bears comparison to what the Court did when it decided Baker and later Reynolds. The Court was certainly aware that it was entering the political thicket in Baker.58 It may have had a general rule of law in mind, but it did not specify its precise boundaries. And while Reynolds (like Bush) relies on a vaguely stated principle of law, variously defined as "one person, one vote"59 and an "equally effective voice in the election of members of [the] state legislature,"60 it too does not define the exact boundaries of this principle. The Court in Reynolds was aware that it was entering a new area without precisely specifying the bounds of the new equal protection rule it articulated. This is evident in Chief Justice Earl Warren's notes on the case. These notes, in the Chiefs handwriting, include thirty- four numbered, single sentence points on seven sheets of paper.61 The first reads: "There can be no formula for determining whether equal protection has been afforded."62 Another note, number twenty, reads: "Cannot set out all possibilities in any given case."63 In other words, the Court that decided Baker and Reynolds—like the Court that decided Bush—rested on a somewhat imprecisely stated principle, allowing for refinement in future cases presenting different facts. This also shows up in Chief Justice Warren’s opinion for the Reynolds majority, which declines to say exactly how close to numerical equality districts much be: For the present, we deem it expedient not to attempt to spell out any precise constitutional tests. . . . Developing a body of doctrine on a case-by-case basis appears to us to provide the most satisfactory means of arriving at detailed constitutional requirements in the area of state legislative apportionment.64 And later: We do not consider here the difficult question of the proper remedial devices which federal courts should utilize in state legislative apportionment cases. Remedial techniques in this new and developing area of the law will probably often differ with the circumstances of the challenged apportionment and a variety of local conditions.65 The similarity to Bush’s language is striking—and given that Reynolds is one of just four equal protection cases cited in Bush, 66 one wonders whether it was conscious. The Court stated a broad principle, declined to state precisely the test it was applying, and bracketed other cases presenting different circumstances, reserving them for another day. Of course, the Reynolds Court did provide some clarity in the one person, one vote cases that followed. So far, the current Court has failed to provide comparable clarity for election administration cases since Bush. And, in fact, in the most prominent election administration case to have arisen since then, Crawford v. Marion County Election Board, 67 the Court did not cite Bush at all. Again, we are not arguing that there is an exact parallel between Baker and Bush. Our claim is more modest: that there is an important similarity between the two cases in that both set the stage for an increased federal role in their respective realms, redistricting and election administration. While the Supreme Court has avoided Bush v. Gore like the plague—as others have noted, it has become the Voldemort of Supreme Court cases, “the case that must not be named”68—that does not mean the case has been without an impact. Indeed, the Supreme Court’s clear distrust of state institutions in Bush69 (which is also implicit in Baker) has apparently trickled down to the rest of the federal courts, who are now taking a more active role in state election disputes. As Professor Samuel Issacharoff has put it, Bush v. Gore declared that “federal courts were open for business when it came to adjudicating election administration claims.”70 Lower courts “relaxed rules regarding standing, ripeness, and . . . justiciability”71 in order to hear more election disputes. They allowed these cases to go to the front of the queue, often deciding them on an expedited basis in the weeks preceding an election. In some areas, like voting technology, election litigation led to changes in how elections are run, even in the absence of a binding decision on the merits.72

#### Scenario 1- Civil Military Relations

#### Judicial review and ending deference is key to CMR- executive and congressional action is not sufficient to check the military

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)

In February 1958, Army Master Sergeant James B. Stanley, who was stationed at Fort Knox, Kentucky, volunteered to participate in a program to test the effectiveness of protective clothing and equipment against chemical warfare. Unknown to Stanley, he was secretly administered four doses of LSD as part of an Army plan to study the effects of the drug on human subjects. Stanley then allegedly began suffering from hallucinations and periods of memory loss and incoherence, which impaired his ability to perform military service and which led to his discharge from the Army and later a divorce from his wife. He discovered what he had undergone when the Army sent him a letter soliciting his cooperation in a study of the long-term effects of LSD on "'volunteers who participated' in the 1958 tests." After exhausting his administrative remedies, Stanley filed suit against the government in federal district court. 81 Stanley argued that in this case, his superiors might not have been superior military officers, as in Chappell, but rather civilians, and further that his injuries were not incident to military service, as in Feres, because his injuries resulted from secret experimentation. The federal district and appellate courts held that Stanley was not preempted by United States v. Chappell in asserting a claim under Bivens by limiting Chappell to bar actions against superior officers for wrongs that involve direct orders in the performance of military duties. In other words, the lower courts limited the reach of Chappell to only matters involving the performance of military duties and the discipline and order necessary to carry out such orders, which did not include surreptitious testing of dangerous drugs on military members. 82 The Supreme Court summarily disregarded the lower courts' attempt to differentiate the instant case from precedent because Stanley was on active duty and was participating in a "bona fide" Army program, therefore, his injuries were incident to service. With regard to the attempt to differentiate his case from Chappell, the Supreme Court conceded that some of the language in Chappell focusing on the officer-subordinate relationship would not apply to Stanley's case, but nevertheless ruled that the basis for Feres also applied and controlled in Bivens actions. Accordingly, the test was not [\*219] so much that an officer-subordinate relationship was involved, but rather an "incident to service" test. 83 The Court thus transplanted the Feres doctrine to govern and limit Bivens actions by military members. In overturning the lower courts' ruling, the Supreme Court again discussed the special factors that mandate hesitation of judicial interference. They also discussed the explicit constitutional assignment of responsibility to Congress of maintaining the armed forces in ruling that even this most egregious misconduct and complete lack of concern of human rights is not a basis upon which the pl–aintiff can seek damages in a court of law. Based upon this case and previous cases, military members are totally extricated from the general population and are subject to a lower standard that is not even contemplated for the remaining citizenry in matters of constitutional import. The Court expressly declined to adopt a test that would determine whether a case is cognizable based upon military discipline and decision making. Believing that such a test would be an intrusion of judicial inquiry into military matters, thereby causing problems by making military officers liable for explaining in court proceedings the details of their military commands and disrupting "the military regime," the Court adopted a virtual blanket of protection for military commanders. Because Congress had not invited judicial review by passing a statute authorizing such a suit by a military member, the Court was not going to intrude into military affairs left to the discretion of Congress. 84 In essence, the Court has constructed a military exception to the Constitution. Had the Court actually reviewed the facts presented by the cases discussed above, applied the tests that are normally applied to the type of cases presented, and then ruled in favor the military, they possibly still could have been criticized, but at least respected for actually conducting a meaningful judicial review of the presented cases. Completely changing constitutional principles in order to provide great deference with little to no inquiry is an abdication of the Court's responsibility and surrenders the rights of military members to the complete subjugation by Congress and the President. The question now presented is whether such an exception is appropriate in terms of civil-military relations. [\*220] The Efficacy of a Military Exception To The Constitution In Civil-Military Relations Does the lack of judicial protection strengthen or erode democratic civilian control at a time when some commentators express concern over the state of civil-military relations? The current hands-off approach by the judiciary in cases concerning or impacting military affairs presents a paradoxical dilemma for civil-military relations. Did the framers of the Constitution intend to establish civilian control over the military by giving plenary authority to two branches of the government to the exclusion of the third branch? 85 Can the military develop its own professionalism, which is essential to an objective civilian control, if the military is totally removed from society's system of judicial protection? Are the Foxes Going To Take Care Of The Hens When The Farmer Is Not Watching? On one hand, the eschewal of becoming involved in military affairs through judicial review of lawsuits concerning the military more completely subordinates the military to the constitutional authority of Congress and the President and, in essence, creates a "split Constitution." 86 The Congress and President thus can control the military virtually without concern about judicial interference, which will occur only under the most egregious circumstances, and can be assured that the military will not attempt to overturn their decisions and orders through judicial review 87 After all, should not the judiciary trust the Congress, a co-equal branch of government sworn, as is the judiciary, to uphold the Constitution? 88 On the other hand, the Constitution establishes certain basic rights for all Americans, regardless of position within society. In fact, the Constitution and laws that support the Constitution serve as the ultimate protector for the weakest of society who have no other means by which to thwart infringement of their rights. By the U.S. Supreme Court stating that the military is a separate society with specialized and complex concerns, and that the Constitution grants plenary authority over the military to the legislative and executive branches, military members are excluded from the protection of a society that depends upon their service. Moreover, they [\*221] are left to the mercy of a power that can act with impunity, notwithstanding Supreme Court prescription that the Congress and the President fulfill their awesome positions of trust in upholding the Constitution and subordinate laws to the greatest extent possible while acting to protect our national security through military affairs. By excluding military members from the same protections that their civilian counterparts enjoy, military members are subject to a much more severe form of government that does not contain the checks and balances that restrict government infringement upon rights. Would it indeed be so bad if the judiciary reviewed and decided lawsuits brought by military members on their merits? Would such oversight be an unreasonable intrusion wreaking havoc in the minds of military leaders? Have any such problems evolved in the federal government in the civilian sector where employees may file suits against the government in court? Empowering Objective Control By Removing Judicial Oversight The increase of the power exercised by the legislative and executive branches of our federal government by the decrease in the power of review by the judicial branch supports Professor Huntington's model of objective civilian control. 89 Rather than making the military a mirror of the state, such as in subjective control, the removal of judicial oversight provides the military with the autonomy to control their profession. At the same time, the total dependence of the military upon their civilian and military leaders as judge and jury creates an independent military sphere. Nevertheless, Huntington completely ignores the role of the judiciary in civil-military relations. Even when he addresses the separation of powers, which traditionally includes the relationship of the judiciary to the other branches, he only examines the role of the executive branch vis-a-vis the legislative branch. 90 The weakening of the influence of the judiciary over matters concerning the military produces an equivalent concomitant strengthening of the two primary branches of government charged with establishing, maintaining, and running the armed forces. More than merely strengthening the control by Congress and the President over the military, 91 the judiciary, in its current position, protects ~~her [\*222] sister~~ branches of government from outside interference of those who want to change or affect the military, such as those who seek judicial overturn of the DoD homosexual conduct policy, and from inside interference of those who seek to challenge the authority of their superiors. 92 In this vein, the judicial self-restraint in becoming an ombudsman for aggrieved military members who seek either damages, redress, or reversal of orders can be argued to produce a correlating increase in the strictness of good order and discipline of the armed forces. 93 Dissension is reduced to the point of a member either accepting the supremacy of those superior or separating from the military service for which they volunteered. The unquestioning loyalty produced squelches dissension within the military ranks and portrays the military as a single unit of uniformity committed to serving without question the national civilian leadership, thereby preserving the delicate balance between freedom and order. 94 In a speech on the Bill of Rights and the military at the New York University Law School in 1962, then-Chief Justice of the Supreme Court, Earl Warren, discussed how our country was created in the midst of deep and serious distrust of standing military forces. He then described the debate on how best to preserve civilian control of the military in the Constitution so that the military could never reverse its subordination to civilian authority. Finally, he declared that the military has embraced this concept as part of our rich tradition that "must be regarded as an essential constituent of the fabric of our political life." 95 Former Chief Justice Warren was correct that the military culture in the United States is completely imbued with the idea of civilian control. Recent events strongly evidence this core understanding of military members. When the Chief of Staff of the Air Force, General Fogelman, resigned from his position and retired because of a disagreement with the civilian Secretary of the Air Force over appropriate action to take in a particular case, he did so because he could do nothing else in protest. There is no doubt that Congress maintains and regulates the armed forces and that the President is Commander-in-Chief. Unfortunately, civilian control of the military has been confused with the non-interference with Presidential and Congressional control of the military, yet the Supreme Court is no less "civilian" than these other branches. Ironically, because of the [\*223] extensive delegation of authority from Congress and the President to the military hierarchy, the military itself has become all powerful in relation to its members. Unless the judiciary branch becomes involved, there is no civilian oversight of the military in the way it treats its members. This important civilian check on the military has been forfeited by the Court. With these realizations, the judiciary is wrong in avoiding inquiry into cases brought by military members. The military is not a complex, separate and distinct society. If it were, the danger of losing control would be greater. By characterizing it as such and giving the military leadership complete reign over subordinates in all matters, the judiciary ignores their responsibility to provide a check to military commanders and balance the rights of those subject to orders, which if not followed may lead to criminal charges. 96 A professional military, as envisioned by our nation's leaders and written about by Professor Huntington, can operate efficiently in a system that allows judicial review of actions brought by military members. Their professionalism will deter wrongs and will accept responsibility when wrongs are committed. Removing the military from the society that they serve by denying them judicial protection alienates the military and frustrates those who have no protection from wrongs other than the independent judiciary. The proper role of the judiciary in civil-military relations is to ensure that neither the legislative branch, the executive branch, nor the military violate their responsibility to care for and treat fairly the sons and daughters of our nation who volunteer for military service. When federal prisoners can file lawsuits for often frivolous reasons, but military members cannot enter a courtroom after being subjected to secret experimentation with dangerous, illegal drugs, something is wrong. When military members cannot seek redress even for discrimination or injury caused by gross negligence, civil-military relations suffer because the judiciary is not ensuring that the balance of power is not being abused.

CMR erosion collapses hegemony

Barnes, Retired Colonel, 11 (Rudy Barnes, Jr., BA in PoliSci from the Citadel, Military Awards: Legion of Merit, Meritorious Service Medal, Army Commendation Medal, Army Achievement Medal with Oak Leaf Cluster, Army Reserve Component Achievement Medal, National Defense Service Medal, “An Isolated Military as a Threat to Military Legitimacy,” http://militarylegitimacyreview.com/?page\_id=159)

The legitimacy of the US military depends upon civil-military relations. In Iraq and Afghanistan conflicting religions and cultures have presented daunting challenges for the US military since mission success in counterinsurgency (COIN) operations depends upon public support in those hostile cultural environments; and even in the US, civil-military relations are fragile since the military is an authoritarian regime within a democratic society. This cultural dichotomy within our society creates the continuing potential for conflict between authoritarian military values and more libertarian civilian values that can undermine military legitimacy, especially when there are fewer bridges between the military and the civilian population it serves. The US military is a shield that protects our national security, but it can also be a sword that threatens our national security. After all, the US military controls the world’s most destructive weaponry. Our Founding Fathers understood this danger and provided for a separation of powers to prevent a concentration of power in the military. Still, if the US military were ever to become isolated from the civilian population it serves, then civil-military relations would deteriorate and US security would be at risk. Richard Cohen has opined that we are slowly but inexorably moving toward an isolated military: The military of today is removed from society in general. It is a majority white and, according to a Heritage Foundation study, disproportionately Southern. New England is underrepresented, and so are big cities, but the poor are no longer cannon fodder – if they ever were – and neither are blacks. We all fight and die just about in proportion to our numbers in the population. The all-volunteer military has enabled America to fight two wars while many of its citizens do not know of a single fatality or even of anyone who has fought overseas. This is a military conscripted by culture and class – induced, not coerced, indoctrinated in all the proper cliches about serving one’s country, honored and romanticized by those of us who would not, for a moment, think of doing the same. You get the picture. Talking about the picture, what exactly is wrong with it? A couple of things. First, this distant Army enables us to fight wars about which the general public is largely indifferent. Had there been a draft, the war in Iraq might never have been fought – or would have produced the civil protests of the Vietnam War era. The Iraq debacle was made possible by a professional military and by going into debt. George W. Bush didn’t need your body or, in the short run, your money. Southerners would fight, and foreigners would buy the bonds. For understandable reasons, no great songs have come out of the war in Iraq. The other problem is that the military has become something of a priesthood. It is virtually worshipped for its admirable qualities while its less admirable ones are hardly mentioned or known. It has such standing that it is awfully hard for mere civilians – including the commander in chief – to question it. Dwight Eisenhower could because he had stars on his shoulders, and when he warned of the military-industrial complex, people paid some attention. Harry Truman had fought in one World War and John Kennedy and Gerald Ford in another, but now the political cupboard of combat vets is bare and there are few civilian leaders who have the experience, the standing, to question the military. This is yet another reason to mourn the death of Richard Holbrooke. He learned in Vietnam that stars don’t make for infallibility, sometimes just for arrogance. (Cohen, How Little the US Knows of War, Washington Post, January 4, 2011) The 2010 elections generated the usual volume of political debate, but conspicuously absent were the two wars in which US military forces have been engaged for ten years. It seems that dissatisfaction with the wars in Iraq and Afghanistan has caused the American public to forget them and those military forces left to fight them. A forgotten military can become an isolated military with the expected erosion of civil-military relations. But the forgotten US military has not gone unnoticed: Tom Brokaw noted that there have been almost 5,000 Americans killed and 30,000 wounded, with over $1 trillion spent on the wars in Afghanistan and Iraq, with no end in sight. Yet most Americans have little connection with the all-volunteer military that is fighting these wars. It represents only one percent of Americans and is drawn mostly from the working class and middle class. The result is that military families are often isolated “…in their own war zone.” (See Brokaw, The Wars that America Forgot About, New York Times, October 17, 2010) Bob Herbert echoed Brokaw’s sentiments and advocated reinstating the draft to end the cultural isolation of the military. (Herbert, The Way We Treat Our Troops, New York Times, October 22, 2010) In another commentary on the forgotten military, Michael Gerson cited Secretary of Defense Robert Gates who warned of a widening cultural gap between military and civilian cultures: “There is a risk over time of developing a cadre of military leaders that politically, culturally and geographically have less and less in common with the people they have sworn to defend.” Secretary Gates promoted ROTC programs as a hedge against such a cultural divide. Gerson concluded that the military was a professional class by virtue of its unique skills and experience: “They are not like the rest of America—thank God. They bear a disproportionate burden, and they seem proud to do so. And they don’t need the rest of society to join them, just to support them.” (Gerson, The Wars We Left Behind, Washington Post, October 28, 2010) The Chairman of the Joint Chiefs of Staff, Admiral Mike Mullen, has seconded the observations of Secretary Gates and warned of an increasingly isolated military and “…a potentially dangerous gulf between the civilian world and men and women in uniform.” Mullen explained, “To the degree that we are out of touch I believe is a very dangerous force.” And he went on to observe that “Our audience, our underpinnings, our authority, everything we are, everything we do, comes from the American people…and we cannot afford to be out of touch with them.” (Charley Keyes, Joint Chiefs Chair Warns of Disconnect Between Military and Civilians, CNN.com, January 10, 2011) Gerson’s observation that the military are not like the rest of Americans goes to the heart of the matter. An isolated military that exacerbates conflicting military and civilian values could undermine civil-military relations and threaten military legitimacy. The potential for conflicting values is evident in the article by Kevin Govern on Higher Standards of Honorable Conduct Reinforced: Lessons (Re) Learned from the Captain Honors Incident (see article posted under this section) which highlights the “exemplary conduct” standard for military personnel and the need to enforce the unique standards of exemplary conduct to maintain good order and discipline in the military. The communal and authoritarian military values inherent in the standards of exemplary conduct often clash with more libertarian civilian values; but in the past that clash has been moderated by bridges between the military and civilian cultures, most notably provided by the draft, the National Guard and reserve components. The draft is gone and the National Guard and reserve components are losing ground in an all-volunteer military that is withdrawing from Iraq and Afghanistan. The Reserve Officer Training Program (ROTC) has provided most civilian-soldier leaders for the US military in the past, but it is doubtful that will continue in the future. If Coleman McCarthy speaks for our best colleges and universities, then ROTC is in trouble and so are civil-military relations: These days, the academic senates of the Ivies and other schools are no doubt pondering the return of military recruiters to their campuses. Meanwhile, the Pentagon, which oversees ROTC programs on more than 300 campuses, has to be asking if it wants to expand to the elite campuses, where old antipathies are remembered on both sides. It should not be forgotten that schools have legitimate and moral reasons for keeping the military at bay, regardless of the repeal of “don’t ask, don’t tell.” They can stand with those who for reasons of conscience reject military solutions to conflicts. ROTC and its warrior ethic taint the intellectual purity of a school, if by purity we mean trying to rise above the foul idea that nations can kill and destroy their way to peace. If a school such as Harvard does sell out to the military, let it at least be honest and add a sign at its Cambridge front portal: Harvard, a Pentagon Annex. (Coleman McCarthy, Don’t ask, don’t tell has been repealed. ROTC still shouldn’t be on campus, Washington Post, December 30, 2010) McCarthy’s attitude toward ROTC reflects a dangerous intellectual elitism that threatens civil-military relations and military legitimacy. But there are also conservative voices that recognize the limitations of ROTC and offer alternatives. John Lehman, a former Secretary of the Navy, and Richard Kohn, a professor of military history at the University of North Carolina at Chapel Hill, don’t take issue with McCarthy. They suggest that ROTC be abandoned in favor of a combination of military scholarships and officer training during summers and after graduation: Rather than expanding ROTC into elite institutions, it would be better to replace ROTC over time with a more efficient, more effective and less costly program to attract the best of America’s youth to the services and perhaps to military careers. Except from an economic perspective, ROTC isn’t efficient for students. They take courses from faculty almost invariably less prepared and experienced to teach college courses, many of which do not count for credit and cover material more akin to military training than undergraduate education. Weekly drills and other activities dilute the focus on academic education. ROTC was begun before World War I to create an officer corps for a large force of reservists to be mobilized in a national emergency. It has outgrown this purpose and evolved into just another source of officers for a military establishment that has integrated regulars and reservists into a “total force” in which the difference is between part-time and full-time soldiering. The armed services should consider a program modeled in part on the Marine Platoon Leaders Corps to attract the nation’s most promising young people. In a national competition similar to ROTC scholarships, students should be recruited for four years of active duty and four years of reserve service by means of all-expenses-paid scholarships to the college or university of their choice. Many would no doubt take these lucrative grants to the nation’s most distinguished schools, where they would get top-flight educations and could devote full attention on campus to their studies. Youths would gain their military training and education by serving in the reserve or National Guard during college (thus fulfilling their reserve obligation). Being enlisted would teach them basic military skills and give them experience in being led before becoming leaders themselves. As reservists during college, they would be obligated to deploy only once, which would not unduly delay their education or commissioned service. They could receive their officer education at Officer Candidate School summer camps or after graduation from college. This program could also be available to those who do not win scholarships but are qualified and wish to serve. Such a system would cost less while attracting more, and more outstanding, youth to military service, spare uniformed officers for a maxed-out military establishment, and reconnect the nation’s leadership to military service – a concern since the beginning of the all-volunteer armed force. (Lehman and Kohn, Don’t expand ROTC. Replace it. Washington Post, January 28, 2011) The system proposed by Lehman and Kohn would preserve good civil-military relations only if it could attract as many reserve component (civilian-soldier) military officers as has ROTC over the years. Otherwise the demise of ROTC will only hasten the isolation of the US military. As noted by Richard Cohen, Tom Brokaw, Bob Herbert, Michael Gerson, Secretary of Defense Bill Gates and Chairman of the Joint Chiefs Admiral Mike Mullen, the increasing isolation of the US military is a real danger to civil-military relations and military legitimacy. The trends are ominous: US military forces are drawing down as they withdraw from Iraq and Afghanistan and budget cuts are certain to reduce both active and reserve components, with fewer bridges to link a shrinking and forgotten all-volunteer military to the civilian society it serves. The US has been blessed with good civil-military relations over the years, primarily due to the many civilian-soldiers who have served in the military. But with fewer civilian-soldiers to moderate cultural differences between an authoritarian military and a democratic society, the isolation of the US military becomes more likely. Secretary Gates and Admiral Mullen were right to emphasize the danger of an isolated military, but that has not always been the prevailing view. In his classic 1957 work on civil-military relations, The Soldier and the State, Samuel Huntington advocated the isolation of the professional military to prevent its corruption by civilian politics. It is ironic that in his later years Huntington saw the geopolitical threat environment as a clash of civilizations which required military leaders to work closely with civilians to achieve strategic political objectives in hostile cultural environments such as Iraq and Afghanistan. (see discussion in Barnes, Military Legitimacy: Might and Right in the New Millennium, Frank Cass, 1996, at pp 111-115) Today, the specter of an isolated military haunts the future of civil-military relations and military legitimacy. With fewer civilian-soldiers from the National Guard and Reserve components to bridge the gap between our military and civilian cultures, an all-volunteer professional military could revive Huntington’s model of an isolated military to preserve its integrity from what it perceives to be a morally corrupt civilian society. It is an idea that has been argued before. (see Robert L. Maginnis, A Chasm of Values, Military Review (February 1993), cited in Barnes, Military Legitimacy: Might and Right in the New Millennium, Frank Cass, 1996, at p 55, n 6, and p 113, n 20) The military is a small part of our population—only 1 percent—but the Department of Defense is our largest bureaucracy and notorious for its resistance to change. Thomas Jefferson once observed the need for such institutions to change with the times: “Laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstance, institutions must advance also, and keep pace with the times.” Michael Gerson noted that the military remains a unique culture of warriors within a civilian culture, and that “it is not like the rest of America.” For that reason a forgotten and isolated military with values that do not keep pace with changing times and circumstances and conflict with civilian values would not only be a threat to military legitimacy but also be a threat to our individual freedom and democracy. In summary, the US military is in danger of becoming isolated from the civilian society it must serve. Military legitimacy and good civil-military relations depend upon the military maintaining close bonds with civilian society. In contemporary military operations military leaders must be both diplomats as well as warriors. They must be effective working with civilians in domestic and foreign emergencies and in civil-military operations such as counterinsurgency and stability operations, and they must be combat leaders who can destroy enemy forces with overwhelming force. Diplomat-warriors can perform these diverse leadership roles and maintain the close bonds needed between the military and civilian society. Such military leaders can help avoid an isolated military and insure healthy civil-military relations.

Loss of mission effectiveness risks multiple nuclear wars

Kagan and O’Hanlon 7 Frederick, resident scholar at AEI and Michael, senior fellow in foreign policy at Brookings, “The Case for Larger Ground Forces”, April 2007, http://www.aei.org/files/2007/04/24/20070424\_Kagan20070424.pdf

We live at a time when wars not only rage in nearly every region but threaten to erupt in many places where the current relative calm is tenuous. To view this as a strategic military challenge for the United States is not to espouse a specific theory of America’s role in the world or a certain political philosophy. Such an assessment flows directly from the basic bipartisan view of American foreign policy makers since World War II that overseas threats must be countered before they can directly threaten this country’s shores, that the basic stability of the international system is essential to American peace and prosperity, and that no country besides the United States is in a position to lead the way in countering major challenges to the global order. Let us highlight the threats and their consequences with a few concrete examples, emphasizing those that involve key strategic regions of the world such as the Persian Gulf and East Asia, or key potential threats to American security, such as the spread of nuclear weapons and the strengthening of the global Al Qaeda/jihadist movement. The Iranian government has rejected a series of international demands to halt its efforts at enriching uranium and submit to international inspections. What will happen if the US—or Israeli—government becomes convinced that Tehran is on the verge of fielding a nuclear weapon? North Korea, of course, has already done so, and the ripple effects are beginning to spread. Japan’s recent election to supreme power of a leader who has promised to rewrite that country’s constitution to support increased armed forces—and, possibly, even nuclear weapons— may well alter the delicate balance of fear in Northeast Asia fundamentally and rapidly. Also, in the background, at least for now, Sino Taiwanese tensions continue to flare, as do tensions between India and Pakistan, Pakistan and Afghanistan, Venezuela and the United States, and so on. Meanwhile, the world’s nonintervention in Darfur troubles consciences from Europe to America’s Bible Belt to its bastions of liberalism, yet with no serious international forces on offer, the bloodletting will probably, tragically, continue unabated. And as bad as things are in Iraq today, they could get worse. What would happen if the key Shiite figure, Ali al Sistani, were to die? If another major attack on the scale of the Golden Mosque bombing hit either side (or, perhaps, both sides at the same time)? Such deterioration might convince many Americans that the war there truly was lost—but the costs of reaching such a conclusion would be enormous. Afghanistan is somewhat more stable for the moment, although a major Taliban offensive appears to be in the offing. Sound US grand strategy must proceed from the recognition that, over the next few years and decades, the world is going to be a very unsettled and quite dangerous place, with Al Qaeda and its associated groups as a subset of a much larger set of worries. The only serious response to this international environment is to develop armed forces capable of protecting America’s vital interests throughout this dangerous time. Doing so requires a military capable of a wide range of missions—including not only deterrence of great power conflict in dealing with potential hotspots in Korea, the Taiwan Strait, and the Persian Gulf but also associated with a variety of Special Forces activities and stabilization operations. For today’s US military, which already excels at high technology and is increasingly focused on re-learning the lost art of counterinsurgency, this is first and foremost a question of finding the resources to field a large-enough standing Army and Marine Corps to handle personnel intensive missions such as the ones now under way in Iraq and Afghanistan. Let us hope there will be no such large-scale missions for a while. But preparing for the possibility, while doing whatever we can at this late hour to relieve the pressure on our soldiers and Marines in ongoing operations, is prudent. At worst, the only potential downside to a major program to strengthen the military is the possibility of spending a bit too much money. Recent history shows no link between having a larger military and its overuse; indeed, Ronald Reagan’s time in office was characterized by higher defense budgets and yet much less use of the military, an outcome for which we can hope in the coming years, but hardly guarantee. While the authors disagree between ourselves about proper increases in the size and cost of the military (with O’Hanlon preferring to hold defense to roughly 4 percent of GDP and seeing ground forces increase by a total of perhaps 100,000, and Kagan willing to devote at least 5 percent of GDP to defense as in the Reagan years and increase the Army by at least 250,000), we agree on the need to start expanding ground force capabilities by at least 25,000 a year immediately. Such a measure is not only prudent, it is also badly overdue.

#### Scenario 2---Japan

#### Japan currently models the U.S. political question doctrine – that stifles judicial review and results in expansive interpretations of Japanese war powers in Article 9

Martin 8/4/12 (Craig, associate professor of Law at the Washburn University School of Law, and frequent visiting lecturer at Osaka University Graduate School of Law and Politics, “Why Japan should amend its war-renouncing Article 9” <http://www.japantimes.co.jp/opinion/2012/08/04/commentary/why-japan-should-amend-its-war-renouncing-article-9/#.Uu2DIxCwIax>)

Such constitutional war powers provisions, which date back to the U.S. Constitution, and which have theoretical origins in the writings of Kant, Madison and others, are becoming increasingly common in the constitutions of democracies all around the world. Such provisions are based on the idea that it is important for the direct representatives of the people, who will be paying for and often dying in the wars decided upon by executive branch of government, to have a direct say in the decision-making process. Moreover, requiring legislative approval, and thus a separation of the power to decide on making war, ensures wide public debate with intense interrogation of the government’s rationales for wanting to use force. This makes for better decisions, and makes military misadventure less likely. The convention for Diet approval already exists in Japan, and it is indeed criticized as being cumbersome and time consuming. But the decision to engage in armed conflict should be difficult, and if the government cannot convince the legislature that such use of force is necessary, then it suggests that the policy is indeed not required. Finally, a new paragraph four would establish an explicit authority and responsibility for the courts to exercise their power of judicial review of government decisions or actions alleged to be in violation of Article 9. The Constitution already confers upon the Japanese courts robust powers of judicial review, and establishes that the courts are the ultimate authority for interpreting the Constitution, but the Supreme Court has largely abdicated this authority in the context of enforcing Article 9. Through dubious application of the “political question” doctrine (a controversial doctrine developed by American courts to insulate certain types of issue as being non-justiciable by the courts, primarily because their resolution falls under the authority of another branch of government), and the creation of increasingly narrow grounds for “standing” (the legitimate legal basis upon which one can commence constitutional claims) the Supreme Court has almost entirely insulated Article 9 from any possible enforcement by the courts. This has greatly weakened the provision, and has more generally undermined the scheme of constitutional separation of powers. An explicit provision is thus required to establish judicial review powers with respect to Article 9 itself. It should provide for a broad range of possible remedies, and it should grant broad standing so that regular citizens could advance claims when the government is perceived to have violated the provision. This is just the summary of one proposal, offered as a basis for further discussion. But such discussion among defenders of Article 9 is urgently required. When the language of Article 9 was being debated in the Diet in 1946, it was argued that Article 9 would put Japan in the vanguard of a new movement toward international peace. The constraint on the use of force in paragraph one has indeed effectively operated to shape Japanese foreign policy, such that it has not been in an armed conflict in 65 years. Moreover, Article 9 has helped to foster pacifism as a central strand of Japan’s post-war national identity. Nonetheless, the international system has not evolved as envisioned in 1946. The world and Japan’s role in it have changed, and the conflicts over the proper interpretation of the Constitution have only grown over time. Article 9 itself must be amended in recognition of these shifting realities if it is not to be revised into oblivion or made utterly irrelevant by policies that violate it with impunity. In short, Article 9 must be amended to help preserve it.

#### Japanese court activism checks executive re-interpretation of article 9– only this prevents regional misperceptions that spark conflict

Martin 7 (Craig, associate professor of Law at the Washburn University School of Law, and frequent visiting lecturer at Osaka University Graduate School of Law and Politics, “The Case Against “Revising Interpretations” of the Japanese Constitution” <http://japanfocus.org/-craig-martin/2434>)

It is not within the authority of the executive to mandate interpretations of the Constitution. But if it is not within the authority of the executive to mandate constitutional interpretations, at least the executive is a branch of government. The “panel of experts” established by the executive, to the extent that it is being called upon to provide an interpretation that will be relied upon by the government as a means of legitimizing its policies and persuading the other branches of government that the “re-interpretation” is valid and correct, has no legitimacy or authority whatsoever to engage in constitutional interpretation, and is a body not contemplated in any manner by the Constitution. Of course, policies and laws based on new interpretations of the Constitution can be challenged in court, and so some may think that the concern being expressed here is exaggerated. But given the timidity of the courts – particularly the Supreme Court – when called upon to enforce Article 9, there is good reason to question whether the courts would step in to correct any such “re-interpretation”. Moreover, as we will discuss in the next section, there is cause for concern that the government is seeking to use this “panel of experts” to further exclude the courts from any discourse on Article 9 issues.[13] The Legitimate Interpreters – the Courts How has the judiciary, as the branch of government with the authority under the Constitution to interpret the Constitution, actually performed in enforcing Article 9 of the Constitution? We should begin by reviewing briefly the power of judicial review that the courts enjoy under the Constitution. As noted above, Article 81 provides that the courts are vested with the authority to interpret the Constitution and determine the constitutionality of any law, order, regulation or other act of government. In the very first case to come before it on the issue of Article 9, the Supreme Court in 1952 decided that judicial review generally was limited to ex post facto consideration of concrete cases, in the American tradition, as opposed to permitting requests, either by private litigants or the government, for determination of hypothetical questions on the constitutionality of prospective events.[14] Thus, the government cannot refer the question of whether, for example, a government policy permitting the deployment of Maritime Self Defense Force (MSDF) ships in defense of US vessels in international waters would violate Article 9, as would be possible in Germany or Canada, to name just a couple of constitutional democracies with a system that permits constitutional references. Justices of the Supreme Court of Japan, those with the constitutional authority to interpret the Constitution Nonetheless, the courts in countries that have followed the American model of judicial review, in which courts are limited to the consideration of concrete cases, not only function as the final guardian and interpreter of the nation’s constitution, but many have done so in a very robust fashion. The Supreme Court of the Unites States is itself a prime example. What is more, where there is no general “reference” jurisdiction of the courts, it may be argued that it is all the more important that the courts establish a broad basis for standing (that is, the criteria for permitting one to commence constitutional claims), so that concrete cases involving the constitutionality of government acts can be brought before the courts. It is precisely because the courts of Japan, particularly the Supreme Court, have so narrowed both their own jurisdiction and the basis for standing to commence constitutional claims, that one has to be concerned about the Abe government’s “re-interpretation” efforts. There are two significant Supreme Court decisions on Article 9. In the Sunakawa case, decided in 1959, shortly before the US-Japan Security Treaty was to be renewed, the defendants to criminal proceedings for trespassing on a US Forces base challenged the constitutionality of the US-Japan Security Treaty and the presence of US military forces in Japan. Article 9(2) provides that “land, sea, and air forces as well as other war potential will never be maintained”, and the defendants argued that US Forces in Japan offended this clause. The trial court acquitted them on the basis of this argument, but the Supreme Court overturned the decision on the grounds that the status of the treaty was a “political consideration” best left to the cabinet and the legislature, and that only if government policy was “obviously unconstitutional” (whatever that means) should the courts intervene. The Court went on to comment, however, that Article 9 did not deprive Japan of the inherent right of self-defense, and that such measures or arrangements that were limited to the purpose of protecting Japan would not therefore be inconsistent with Article 9. Finally, the Court noted that the US Forces in Japan were not under the command and control of the Japanese government, and thus could not constitute military forces or “war potential” maintained by Japan so as to offend Article 9.[15] The clear implications of these comments, of course, were that actions or arrangements that were not strictly for the defense of Japan, and military forces or other war potential that were under the command of the Japanese government, might be held to be in violation of Article 9. When the constitutionality of the SDF itself came before the Supreme Court in 1982, however, the Court again dodged the issue, and in the process narrowed the standing for claims under Article 9 to a degree that makes them all but impossible. In the Naganuma case a number of residents in Hokkaido challenged the constitutionality of the SDF and the US-Japan Security Treaty within the context of a plan to develop a missile site on a forestry reserve. They did so on the basis that the decision of the Minister of Agriculture and Forestry to convert the forestry reserve had been made for an improper purpose, and one not in the public interest; and also that they would suffer harm, both in terms of direct damage to the water table caused by the construction, and more indirect harm in that their neighborhood would be thereby transformed into a high-value target in the event of armed conflict. While their arguments were accepted by the lower court,[16] on final appeal the Supreme Court dismissed their application on the basis that none of the applicants had a direct legal interest implicated by either the decision of the Minister or the construction of the missile site, since the SDF had (after the judgment on the application by the lower court) taken special measures to ensure that there would be no harm to the water table. Thus, regardless of whether the Minister’s decision had been for an improper purpose, or whether the SDF itself existed in violation of Article 9, the applicants had no standing to make a claim.[17] The Supreme Court has not explicitly relied upon the “political question” doctrine since the Sunakawa decision, but it has in other constitutional cases emphasized the importance of deferring to the discretion of the cabinet or legislature. Moreover, just last year it relied on the narrowest interpretation of direct legal standing as a basis for dismissing a constitutional challenge to the Prime Minister’s visits to Yasukuni Shrine.[18] It is with this history in mind that one must consider the intentions of the Abe government in establishing the “panel of experts”, and question how its “re-interpretation” will be used. The courts have so narrowed the basis for standing that virtually no one other than an SDF member ordered to deploy in some collective security operation in accordance with the new policy, would have standing to challenge the policies and laws flowing from the “re-interpretation”. In the unlikely event that a claim actually got past those preliminary hurdles, one can see how the government’s arguments to invoke the “political question” doctrine and deference to government discretion would be squarely based on how the government established the “panel of experts”. The argument would be made that not only is the question of how the government deploys its forces, in accordance with its treaty obligations to the US and under the UN Charter, entirely within the realm of politics and foreign policy rather than law, but that the government established its policy in the most careful and deliberate fashion, taking the advice of a “panel of experts” that deliberated for months on the issue before advising cabinet on its views. Thus, so the argument would run, the courts should not interfere in this complex area of governmental discretion. In my view such an argument is not in the least bit convincing, since the question that would be before the court is in fact a purely legal one.[19] The question would be whether the actions of the government in engaging in some collective security operation, and the enabling regulations or laws pursuant to which such action was undertaken, constituted a violation of the prohibition in Article 9 against the use or threat of use of force for the purposes of settling international disputes. It is a mischaracterization to argue that the question is “political”, unless one merely means that it has political ramifications. That of course does not alter the fundamentally legal nature of the issue at hand. There are, indeed, few important constitutional questions that are not politically sensitive, or the deciding of which will not have significant political ramifications. But that does not make the question a “political question” that is therefore outside of the jurisdiction of the courts. The point, however, is that the Supreme Court of Japan has been persuaded by such arguments in the past, or perhaps more accurately, has relied upon such arguments as a cover for avoiding the risks of confrontation with the other branches of government. And the effort to develop this “re-interpretation” has to be examined in that context. In the circumstances of a weak Court and limited standing to advance claims for court interpretations of the Constitution, expert “re-interpretations” have the potential to assume an importance and an air of validity that can be exploited by the government, notwithstanding how illegitimate the exercise may be. The “Re-Interpretation” Sought is Unreasonable The final argument to be made against this attempt by the Abe government to “re-interpret” Article 9 is that the specific interpretation that the government seeks to obtain is simply not one that can be reasonably reconciled with the language of the Constitution. Massive amounts have been written on the interpretation of Article 9, and it is obviously an issue of considerable controversy, which we can only touch on here. But it is well to begin by recalling that Article 9 specifically provides that: (i) Japan renounces war as a sovereign right of the nation, and the use or threat of use of force as a means of settling international disputes; (ii) Japan will not maintain land, sea and air forces, as well as any other war potential; and (iii) the rights of belligerency of the state will not be recognized. The Cabinet Legislation Bureau in 1954 provided the government with an interpretation of Article 9 according to which Japan was not denied the right to self-defense under Article 9, and Japan was entitled to maintain such limited military forces that comprised the minimum necessary to defend the country against direct attack. Thus, pursuant to this understanding of Article 9, Japan could not maintain “offensive” weapons systems, or deploy forces abroad.[20] The government developed its policies in accordance with that interpretation, and as we have seen earlier, the Supreme Court obliquely acknowledged the validity of that interpretation in the Sunakawa decision. This interpretation leads, of course, to all kinds of tortured arguments over what constitutes defensive weapons as opposed to offensive weapons, what exactly “war potential” means, and when defensive weapons systems might cross the line to become war potential.[21] But putting aside questions of whether, for instance, Japan’s Kongo Class Aegis guided-missile-system destroyers and its fleet of 16 submarines constitute offensive weapons, this is and has long been the accepted interpretation in Japan. It was departed from with the passage of legislation in 1992 to permit support activities in UN peace keeping missions, and to deploy support forces for the Afghanistan and Iraq campaigns, but the prohibition against collective self-defense remains the prevailing understanding of Article 9.[22] Thus, while Japanese SDF troops were deployed to Iraq under special legislation for “support” purposes, the troops were classified as “non-combat” and operated under strict self-defense rules of engagement, to the point that they were under the “protection” of the Australian forces.[23] The Kirishima, one of Japan's 4 Kongo Class Aegis guided-missile-system destroyers, and part of a fleet of 44 destroyers It is precisely this restriction on Japanese participation in collective security operations that the Abe government wants to escape. The “panel of experts” has been asked to consider specifically such scenarios as Japanese missiles being used to intercept intercontinental ballistic missiles targeting the United States or US targets outside of Japan, and MSDF vessels engaging the naval forces of some third country in joint defense of US assets outside of Japanese territorial waters.[24] Thus, could Japanese MSDF Aegis destroyers currently deployed in the Indian Ocean engage the forces of Iran, for instance, were they to be in the process of attacking US forces in the area? Or, if Australians came under attack in Iraq, or some other country’s contingent in a UN peacekeeping mission came under attack, could the SDF troops deployed nearby engage the attackers in defense of their coalition partners? Of course, these questions, and the answers that the government is looking for, lead naturally to more significant issues governed by the same principles, such as could Japan come to the defense of US and Taiwanese forces in the event that hostilities break out with China in the Taiwan Straits? For no one should be under any illusion that the answers to the seemingly narrow questions put to the “panel of experts” will not be used to establish more general principles governing defense policy. These scenarios would of course constitute the use of armed force in armed conflict. The SDF would be engaged in the application of deadly military force against enemy forces, for purposes that are not directly related to the defense of Japan, or in response to any attack on Japan. They would, in short, be involved in the use of force for purposes of settling international disputes, the very thing prohibited by Article 9(1). Naturally, in the context of such armed conflict Japan would expect the laws of war to apply to its forces, such that, for instance, SDF personnel would both obey and enjoy the benefits of the Geneva Conventions. Similarly, it would expect that the Hague Conventions would govern such things as the weapons that could be used against its troops. In other words, Japan would expect that it would enjoy the status of a belligerent state under international law in the event that its forces were involved in military combat as part of collective security operations. While many scholars tend to ignore or dismiss the significance of the clause stating that “the rights of belligerency shall not be recognized” in Article 9(2), belligerency is a status enjoyed under international law that triggers the application of the laws of war. There is simply no way that Article 9 can be interpreted in any reasonable fashion that is not utterly inconsistent with such armed conflict that is unrelated to a direct attack on Japan. “Re-interpreting” Article 9 to allow for Japanese forces to engage in armed conflict for the purposes of collective security, would not only render Article 9 meaningless, but would throw into question the normative power and meaning of all other provisions of the Constitution. A perverse interpretation of one provision cannot help but bleed through and influence the extent to which other provisions are taken seriously. The reasoning behind attempts to justify “re-interpretations” that would permit such collective security operations is almost entirely result-oriented. The starting proposition is that Japan ought to be able to engage in such collective security operations, that other “normal countries” do engage in such operations, that Japan has international obligations that require it to engage in such operations, from which it follows that the most reasonable interpretation of the Constitution must be that that Japan can engage in such operations. Prime Minister Abe himself has complained that “a military alliance is an ‘alliance of blood’” and that while American troops will shed blood for Japan, “the Japanese Self Defense Forces are not asked to be prepared to shed blood when the United States comes under attack”.[24] These are certainly legitimate considerations for the debate on whether to or how to amend Article 9 of the Constitution, but they are absolutely and entirely irrelevant to how Article 9 as it currently reads is to be interpreted. Constitutional interpretation is a legal matter, not one of foreign policy or military imperatives. And as a legal matter, the “re-interpretation” that Mr. Abe wants, in order to permit Japanese troops to shed blood for the defense of others, is utterly inconsistent with any reasonable interpretation of Article 9, and is inconsistent with the closest thing to an interpretation of Article 9 that has been provided by the Supreme Court.[25] Of course, there is already a considerable gulf between the reality of Japan’s defense posture and any reasonable reading of Article 9. While the accepted interpretation of Article 9 in Japan is that Japan is entitled to defend itself, and thus some minimal level of military force for self-defense is permitted under Article 9, the fact is that Japan’s military spending is the 4th or 5th largest in the world, (depending on how one estimates the defense expenditures of China), and it has the most sophisticated navy in Asia.[26] It is in the process of developing the two-tiered BMD system discussed above, and recent headlines reflect how threatening Russia views the deployment of similar BMD systems in Eastern Europe. It is often argued that BMD systems are not purely defensive, as they increase the vulnerability of those states whose deterrence power is thereby undermined. Even if one accepts that some minimal level of defense capability is permitted, therefore, it becomes very difficult to reconcile Japan’s current military capability with the language of Article 9(2) renouncing the maintenance of military forces or other war potential. As the gulf between the constitutional norm and the reality increases, of course, the integrity and normative power of the Constitution is undermined. The great danger in the effort to develop a further “re-interpretation” that would essentially make nonsense of the constitutional provision is that it would undermine and erode the validity of the constitutional order much more broadly. If the government can ignore, or interpret out of existence, one provision, what is to stop it from so subverting any other provision? How are citizens to have any confidence in the rule of law and the value of constitutional rights if the government can, in Orwellian fashion, define constitutional norms into oblivion? Moreover, it undermines the efforts to convince both Japan’s citizens and its neighbors that the amendments proposed for Article 9 in the legitimate amending process are designed merely to allow Japan to play a more responsible role in international society as a mature constitutional democracy. If it reveals itself willing to disregard or distort existing constitutional constraints on its military power, how is anyone to take at face value the representations made by the government regarding the measured developments proposed in the amending process? Herein lie the grave dangers inherent in Mr. Abe’s announced “re-interpretation” process. Conclusion The Constitution of Japan has operated without amendment for a longer period than any other constitution in modern history. There are some good reasons to consider amending it now. Concerns over the growing gap between the clear language of Article 9 and the reality of Japan’s defense posture and capabilities is one. The desire to have Japan play a more active role in the international collective security system, in order to bring Japan’s defense posture more in line with its treaty obligations, and to raise its diplomatic influence to a level that is commensurate with its economic power, is another. The governing party has tabled amendment proposals, and the government has developed the legislative procedures and a timetable, for amending the Constitution. The intervening period should be used for thorough debate of the competing ideas and for careful consideration of not only whether Article 9 should be amended, but if so, precisely how it should be amended and what additional provisions may be required to ensure democratic accountability, civilian control, and other constraints on exactly how the military may be used. If the government fails to achieve the amendments it desires, however, then it will have to accept that that is the will of the people of Japan. The government ought not to be permitted to hedge against that possibility by developing an alternate track for changing the constitutional constraints on defense policy, a process that circumvents the legitimate amending procedures and frustrates the sovereign will of the people. It is a process that appears to be designed to both exploit and further entrench the weakness of the courts when it comes to questions of Article 9, yet it is the courts that hold the legitimate authority to interpret the Constitution. It is particularly dangerous for the government to employ extra-constitutional bodies to develop new interpretations that may be used to usurp or suppress the voice of the courts in interpreting the Constitution. Ultimately, it is not overstating the issue to say that for all these reasons, the process of changing the Constitution by “expert re-interpretation” could do serious violence to the constitutional order of Japan. And while the primary reason for opposing the process should be to prevent such harm to the constitutional order, the impact of the process on Japan’s neighbors, and thus Japan’s foreign policy, should not be overlooked. A perception (and one that is likely to be exploited by nationalists elsewhere) that Japan is re-militarizing through extra-constitutional means, and that Japan’s so-called “Pacifist Constitution” has lost its power to constrain nationalist governments, would be very destabilizing for the region, and inimical to Japan’s national security interests.

#### Re-interpreting article 9 results in war China over the Senkaku islands – historical factors and economic interdependence doesn’t check

Carpenter 13 (Ted, senior fellow at the Cato Institute, June 17 2013, “Japan’s Containment Strategy against China”, CATO, <http://www.cato.org/publications/commentary/japans-containment-strategy-against-china>)

Japan has begun to play a more vigorous role in East Asia’s security affairs, and China is responding with a mixture of wariness and outright hostility. That development puts the United States in an awkward position. Japan is Washington’s most important political and military ally in the region, as well as a long-standing, crucial economic partner. But China’s economic importance to the United States, already substantial, is likely to become even more so in the coming years. And U.S. officials understand that China is a fast-rising geopolitical player in East Asia and globally. “ Washington needs to proceed with great caution, lest it find itself in the middle of a growing power struggle between Japan and China.” Washington wants to maintain friendly, productive relations with both countries, but that task may prove extremely challenging in the coming decade. Because of historical factors, especially Imperial Japan’s brutal treatment of a weak China during the 1930s and early 1940s, Sino-Japanese relations have typically been rather cool, despite substantial economic ties. Overall bilateral relations have become even frostier over the past year or so. The proximate cause of that chill is the territorial dispute over the Diaoyu/Senkaku Islands in the East China Sea. That simmering quarrel flared in mid and late 2012 when the Japanese government purchased some of the islands from a private owner and proceeded to tighten its administrative control. Anti-Japanese riots erupted in several Chinese cities during that period. Chinese leaders see Tokyo’s actions regarding the islands as symptomatic of a broader, worrisome trend in the country’s behavior. The emergence of the nationalistic Shinzo Abe as Japan’s prime minister adds to Beijing’s concerns. Indications that Tokyo might end its self-imposed limit of spending no more than one percent of the country’s annual gross domestic product on the military provoke strongly negative reactions in Beijing. The same is true of signs that Abe’s government might seek to modify article 9 of Japan’s post-World War II constitution, which places severe restrictions on the country’s use of military force. “Given the Japanese government’s refusal to apologize for Japan’s aggression during World War II, any revision of Japan’s constitution,” an editorial in China Daily warned, would be “a cause for concern in the rest of the world.” Japan is fast embracing a more active foreign policy, especially with regard to security matters, and much of the policy appears aimed at curbing China’s power and influence in the region. Even ostensibly non-military measures seem to have that goal. In late May, Japan canceled the remaining debt that Myanmar owed to Tokyo and then extended a new loan for $504 million. That was an unsubtle effort to dilute Beijing’s influence with a long-standing economic and security client. Japan’s direct moves regarding security issues have spooked Chinese leaders even more, as the Japanese government has established or strengthened security ties with several countries. In January 2013, Tokyo and Manila agreed to enhance their cooperation on maritime security. Collaboration also is growing between Japan and both Singapore and Australia on such matters. In the recent summit between Prime Minister Abe and Indian Prime Minister Manmohan Singh, the first steps were taken toward cooperation between their two countries on the highly sensitive issue of nuclear technology. Tokyo’s rhetoric is also noticeably more assertive—and not just on its territorial dispute with China. In early April, former defense minister Shigeru Ishiba, a leading figure in the governing Liberal Democratic Party, insisted that Japan had a right to launch preemptive military strikes against North Korea—another prominent Chinese client—if officials concluded that an act of aggression was imminent. China has recently softened its overall policy in East Asia in an attempt to appear more reasonable to its neighbors and to focus attention (and suspicion) on Japan’s ambitions. Speaking to the Shangri-La Dialogue, an annual security conference in Singapore, in early June, Lt. Gen. Qi Jianguo, deputy chief of staff of the People’s Liberation Army, affirmed that China recognized Japan’s sovereignty over Okinawa and the other islands in the Ruyuku chain. His statement repudiated an earlier editorial in People’s Daily, the Chinese Communist Party’s main publication, which questioned Japan’s historical claim to those islands. The People’s Daily comment had sparked widespread worries that the Diaoyu/Senkaku dispute might escalate dramatically, with unpleasant ramifications for the entire region. Beijing’s diplomatic olive branch, though, is accompanied by pressure on the United States to rein-in its Japanese ally. And there is an undertone of suspicion that Washington is actually encouraging Tokyo’s bolder stance. China rebuked then-Secretary of State Hillary Clinton for supporting Japan’s right to administer the disputed islands. “We urge the U.S. side to take a responsible attitude towards dealing with the Diaoyu Islands,” stated Foreign Ministry spokesman Hong Lei, adding that U.S. officials needed to “be cautious in what they say and do and take concrete steps to maintain regional stability.” Other Chinese opinion leaders have been more caustic regarding U.S. policy. In October, veteran Chinese diplomat Chen Jia charged that Washington was deliberately using Japan as a strategic tool aimed at containing China. Chen, who earlier served as China’s ambassador to Japan, accused the United States of encouraging the revival of Japanese militarism. The Obama administration will continue to be buffeted by such conflicting pressures from East Asia’s two leading powers. Japan is insisting on stronger backing from its American ally, not only regarding its territorial dispute with China but on such matters as dealing with North Korea. Tokyo is seeking nothing less than Washington’s endorsement of a more active, vigorous Japanese security role in East Asia. It has already secured U.S. backing for the Diaoyu/Senkaku dispute, and it is clear that the Obama administration sees Japan as a crucial component of the U.S. strategic pivot to East Asia. But if the United States embraces a more assertive Japanese regional security role, it risks antagonizing an already worried and annoyed China. Washington needs to proceed with great caution, lest it find itself in the middle of a growing power struggle between Japan and China.

#### Results in escalation and nuclear war – the U.S. will be drawn in

Eland 12/10/13 (Ivan, senior fellow and director of the center on peace and liberty at the independent institute, Ph.D in Public Policy – George Washington University, “Stay Out of Petty Island Disputes in East Asia” <http://www.huffingtonpost.com/ivan-eland/stay-out-of-petty-island-_b_4414811.html>)

One of the most dangerous international disputes that the United States could get dragged into has little importance to U.S. security -- the disputes nations have over small islands (some really rocks rising out of the sea) in East Asia. Although any war over these islands would rank right up there with the absurd Falkland Islands war of 1982 between Britain and Argentina over remote, windswept sheep pastures near Antarctica, any conflict in East Asia always has the potential to escalate to nuclear war. And unlike the Falklands war, the United States might be right in the atomic crosshairs. Of the two antagonists in the Falklands War, only Britain had nuclear weapons, thus limiting the possibility of nuclear escalation. And although it is true that of the more numerous East Asian contenders, only China has such weapons, the United States has formal alliance commitments to defend three of the countries in competition with China over the islands -- the Philippines, Japan, and South Korea -- and an informal alliance with Taiwan. Unbeknownst to most Americans, those outdated alliances left over from the Cold War implicitly still commit the United States to sacrifice Seattle or Los Angeles to save Manila, Tokyo, Seoul, or Taipei, should one of these countries get into a shooting war with China. Though a questionable tradeoff even during the Cold War, it is even less so today. The "security" for America in this implicit pledge has always rested on avoiding a faraway war in the first place using a tenuous nuclear deterrent against China or any other potentially aggressive power. The deterrent is tenuous, because friends and foes alike might wonder what rational set of U.S. leaders would make this ridiculously bad tradeoff if all else failed. Of course these East Asian nations are not quarreling because the islands or stone outcroppings are intrinsically valuable, but because primarily they, depending on the particular dispute involved, are in waters that have natural riches -- fisheries or oil or gas resources. In one dispute, the Senkaku or Diaoyu dispute -- depending on whether the Japanese or Chinese are describing it, respectively -- the United States just interjected itself, in response to the Chinese expansion of its air defense zone over the islands, by flying B-52 bombers through this air space to support its ally Japan. The United States is now taking the nonsensical position that it is neutral in the island kerfuffle, even though it took this bold action and pledged to defend Japan if a war ensues. Predictably and understandably, China believes that the United States has chosen sides in the quarrel.

# 2AC

### 2AC A2: Circumvention

#### Ex post review solves circumvention – the executive can’t overcome legitimacy and audience costs when the public knows the court just ruled against him – that’s Hafetz

#### Fiat solves – even if Obama fights the courts will stand tall since they abrogate the political question doctrine as a result of the plan

#### Ex Post review constrains executive behavior

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)

Since 9/11, the CIA and Joint Special Operations Command (JSOC) have used armed drones to kill thousands of people in places far removed from conventional battlefields. Legislators, legal scholars, and human rights advocates have raised concerns about civilian casualties, the legal basis for the strikes, the process by which the executive selects its targets, and the actual or contemplated deployment of armed drones into additional countries. Some have proposed that Congress establish a court to approve (or disapprove) strikes before the government carries them out. While judicial engagement with the targeted killing program is long overdue, those aiming to bring the program in line with our legal traditions and moral intuitions should think carefully before embracing this proposal. Creating a new court to issue death warrants is more likely to normalize the targeted killing program than to restrain it. The argument for some form of judicial review is compelling, not least because such review would clarify the scope of the government’s authority to use lethal force. The targeted killing program is predicated on sweeping constructions of the 2001 Authorization for Use of Military Force (AUMF) and the President’s authority to use military force in national self-defense. The government contends, for example, that the AUMF authorizes it to use lethal force against groups that had nothing to do with the 9/11 attacks and that did not even exist when those attacks were carried out. It contends that the AUMF gives it authority to use lethal force against individuals located far from conventional battlefields. As the Justice Department’s recently leaked white paper makes clear, the government also contends that the President has authority to use lethal force against those deemed to present “continuing” rather than truly imminent threats.These claims are controversial. They have been rejected or questioned by human rights groups, legal scholars, federal judges, and U.N. special rapporteurs. Even enthusiasts of the drone program have become anxious about its legal soundness. (“People in Washington need to wake up and realize the legal foundations are crumbling by the day,” Professor Bobby Chesney, a supporter of the program, recently said.) Judicial review could clarify the limits on the government’s legal authority and supply a degree of legitimacy to actions taken within those limits. It could also encourage executive officials to observe these limits. Executive officials would be less likely to exceed or abuse their authority if they were required to defend their conduct to federal judges. Even Jeh Johnson, the Defense Department’s former general counsel and a vocal defender of the targeted killing program, acknowledged in a recent speech that judicial review could add “rigor” to the executive’s decisionmaking process. In explaining the function of the Foreign Intelligence Surveillance Court, which oversees government surveillance in certain national security investigations, executive officials have often said that even the mere prospect of judicial review deters error and abuse.

#### Judicial rulings shape agency norms on the rule of law

Rathod 09 (Jason, Duke University School of Law, J.D, NOT PEACE, BUT A SWORD: NAVY V. EGAN AND THE CASE AGAINST JUDICIAL ABDICATION IN FOREIGN AFFAIRS, http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1447&context=dlj)

Reopening a Bivens cause of action could also reshape agency norms. By making pronouncements on the rule of law and especially the Constitution, the judiciary wields influence through social norms. As Professor Richard Primus has said, “[J]udicial articulation of a system of constitutional values in which racial discrimination is reprehensible might shape the normative atmosphere in which government officials act, making them less likely to want to discriminate in the first place.”249 Thus, the prospect of censure by Article III judges could compel agency adjudicators to examine the motives underlying their determinations, to recalibrate those motives to accord with the Constitution, and to provide candidates from critical communities with fairer hearings.250 Even if individual adjudicators’ attitudes fail to change, judicial pronouncement of constitutional values could alert an adjudicator’s coworkers and superiors that a fundamental change in culture is needed, fostering agency attitudes and norms likely to serve as a deterrent for discriminatory actions.

#### Ex post review won’t get circumvented – there is no deference

Daskal, Prof of National Security Law- Georgetown, 13 (Jennifer, Fellow and Adjunct Professor, Georgetown Center on National Security and the Law, Georgetown University Law Center, ARTICLE: THE GEOGRAPHY OF THE BATTLEFIELD: A FRAMEWORK FOR DETENTION AND TARGETING OUTSIDE THE "HOT" CONFLICT ZONE, April, 2013, 161 U. Pa. L. Rev. 1165, lexis)

That said, there is a reasonable fear that any such court or review board will simply defer. In this vein, FISC's high approval rate is cited as evidence that reviewing courts or review boards will do little more than rubber-stamp the Executive's targeting decisions. 180 But the high approval rates only tell part of the story. In many cases, the mere requirement of justifying an application before a court or other independent review board can serve as an internal check, creating endogenous incentives to comply with the statutory requirements and limit the breadth of executive action. 181 Even if this system does little more than increase the attention paid to the stated requirements and expand the circle of persons reviewing the factual basis for the application, those features in and of themselves can lead to increased reflection and restraint. [\*1223] Additional accountability mechanisms, such as civil or criminal sanctions in the event of material misrepresentations or omissions, the granting of far-reaching authority to the relevant Inspectors General, and meaningful ex post review by Article III courts, 182 are also needed to help further minimize abuse.

### 2AC T Signature Strikes

#### We meet- targeted killing is in the plan – plan text in a vacuum means theres no violation – reasonability first because competing interpretations is a race to the bottm

And targeted killing includes signature strikes with broad standards of imminence – only the plan solves – the interpretations are up in the air

Guardian 13 [Jan, translator at the International Monetary Fund, Resident Representative Office in Belarus, “TARGETED KILLINGS: A SUMMARY,” <http://acontrarioicl.com/2013/02/27/targeted-killings-a-summary/>]

Currently there is no legal definition of targeted killings in either international or domestic law.[1] ‘Targeted killing’ is rather a descriptive notion frequently used by international actors in order to refer to a specific action undertaken in respect to certain individuals.¶ Various scholars propose different definitions. Machon, for example, refers to ‘targeted killing’ as an “intentional slaying of a specific individual or group of individuals undertaken with explicit governmental approval,”[2] whereas Solis suggests that for there to be a targeted killing (i) there must be an armed conflict, either international or non-international in character; (ii) the victim must be specifically targeted; (iii) he must be beyond a reasonable possibility of arrest; (iv) the killing must be authorized by senior military commanders or the head of government; (v) and the target must be either a combatant or someone directly participating in the hostilities.[3] But whereas some scholars seek to use a human rights-based definition, [4] others propose those which do not entail the applicability of international humanitarian law. [5]¶ However, such definitions are incorrect for several reasons. First of all, the definition of a ‘targeted killing’ has to be broad enough as to cover a wide range of practices and flexible enough as to encompass situations within and outside the scope of an armed conflict, thus, being subject to the application of both international human rights law and international humanitarian law, as opposed to the definition provided by some scholars and even states themselves.[6] Secondly, one should bear in mind that defining an act as an instance of ‘targeted killing’ should not automatically render the illegality of such an act at stake.[7] Moreover, the definition also has to cover situations where such an act is carried out by other subjects of international law, rather than only by states.¶ Therefore, maintaining an element-based approach and synthesizing common characteristics of multiple definitions, it is more advisable to use the one employed by Alston and Melzer, which refers to targeted killings as a use of lethal force by a subject of international law (encompassing non-state actors) that is directed against an individually selected person who is not in custody and that is intentional (rather than negligent or reckless), premeditated (rather than merely voluntary), and deliberate (meaning that ‘the death of the targeted person [is] the actual aim of the operation, as opposed to deprivations of life which, although intentional and premeditated, remain the incidental result of an operation pursuing other aims).[8]

#### No link to the DA – the plan reduces standards of imminence that produce de facto signature strikes – the judiciary will spill over – that’s Goldstien and Kwoka

#### --UQ overwhelms- The new procedures against signature strikes will be institutionalized—result of a year of deliberation to carefully calibrate targeted killing policy, Brennan

WP 13 The Washington Post January 20, 2013 CIA drone strikes in Pakistan to get pass in ’playbook,’ http://articles.washingtonpost.com/2013-01-19/world/36474007\_1\_drone-strikes-cia-director-playbook

The Obama administration is nearing completion of a detailed counterterrorism manual that is designed to establish clear rules for targeted-killing operations but leaves open a major exemption for the CIA’s campaign of drone strikes in Pakistan, U.S. officials said. The carve-out would allow the CIA to continue pounding al-Qaeda and Taliban targets for a year or more before the agency is forced to comply with more stringent rules spelled out in a classified document that officials have described as a counterterrorism “playbook.” The document, which is expected to be submitted to President Obama for final approval within weeks, marks the culmination of a year-long effort by the White House to codify its counterterrorism policies and create a guide for lethal operations through Obama’s second term. A senior U.S. official involved in drafting the document said that a few issues remain unresolved but described them as minor. The senior U.S. official said the playbook “will be done shortly.” The adoption of a formal guide to targeted killing marks a significant — and to some uncomfortable — milestone: the institutionalization of a practice that would have seemed anathema to many before the Sept. 11 , 2001, terrorist attacks. Among the subjects covered in the playbook are the process for adding names to kill lists, the legal principles that govern when U.S. citizens can be targeted overseas and the sequence of approvals required when the CIA or U.S. military conducts drone strikes outside war zones. U.S. officials said the effort to draft the playbook was nearly derailed late last year by disagreements among the State Department, the CIA and the Pentagon on the criteria for lethal strikes and other issues. Granting the CIA a temporary exemption for its Pakistan operations was described as a compromise that allowed officials to move forward with other parts of the playbook. The decision to allow the CIA strikes to continue was driven in part by concern that the window for weakening al-Qaeda and the Taliban in Pakistan is beginning to close, with plans to pull most U.S. troops out of neighboring Afghanistan over the next two years. CIA drones are flown out of bases in Afghanistan. “There’s a sense that you put the pedal to the metal now, especially given the impending” withdrawal, said a former U.S. official involved in discussions of the playbook. The CIA exception is expected to be in effect for “less than two years but more than one,” the former official said, although he noted that any decision to close the carve-out “will undoubtedly be predicated on facts on the ground.” The former official and other current and former officials interviewed for this article spoke on the condition of anonymity because they were talking about ongoing sensitive matters. Obama’s national security team agreed to the CIA compromise late last month during a meeting of the “principals committee,” comprising top national security officials, that was led by White House counterterrorism adviser John O. Brennan, who has since been nominated to serve as CIA director. White House officials said the committee will review the document again before it is presented to the president. They stressed that it will not be in force until Obama has signed off on it. The CIA declined requests for comment. The outcome reflects the administration’s struggle to resolve a fundamental conflict in its counterterrorism approach. Senior administration officials have expressed unease with the scale and autonomy of the CIA’s lethal mission in Pakistan. But they have been reluctant to alter the rules because of the drone campaign’s results. The effort to create a playbook was initially disclosed last year by The Washington Post. Brennan’s aim in developing it, officials said at the time, was to impose more consistent and rigorous controls on counterterrorism programs that were largely ad-hoc in the aftermath of the Sept. 11 attacks.

### 2AC XO CP

#### Doesn’t solve CMR – the executive conducting self-restraint doesn’t resolve the break in civil accountability from a lack of court oversight – that’s Brooks and Gilbert

#### Doesn’t solve PQD – court action is critical to abrogate the doctrine – that’s 1AC Vladeck

#### Doesn’t solve allies – they’re looking for external accountability on part of the executive, the executive will maintain a broad selfserving standard of imminence – that’s Goldstein.

#### Permutation do both – shields the link to politics and the terror DA since the court would just be enforcing the CP

#### XOs link to politics

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

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

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

Executive order counterplan is a voting issue – undermines the literature base the topic was written around, destroys aff ground by using fiat to skirt core solvency comparisons and trivializes topic education by overlimiting the base of affirmatives

#### Conditionality is a voting issue – no risk nature of the advocacies skews 2AC strategy and it promotes argumentative irresponsibility killing real world decision-making skills

#### Doesn’t solve imminence – counterplan doesn’t limit the scope of authority – Greenwald says executive interpretation of imminence makes abuse inevitable and Obama will just circumvent his public declaration anyways – courts check that

Glenn Greenwald 13, J.D. from NYU, award-winning journalist, February 5th, 2013, "Chilling legal memo from Obama DOJ justifies assassination of US citizens," The Guardian, www.theguardian.com/commentisfree/2013/feb/05/obama-kill-list-doj-memo

This memo is not a judicial opinion. It was not written by anyone independent of the president. To the contrary, it was written by life-long partisan lackeys: lawyers whose careerist interests depend upon staying in the good graces of Obama and the Democrats, almost certainly Marty Lederman and David Barron. Treating this document as though it confers any authority on Obama is like treating the statements of one's lawyer as a judicial finding or jury verdict.¶ Indeed, recall the primary excuse used to shield Bush officials from prosecution for their crimes of torture and illegal eavesdropping: namely, they got Bush-appointed lawyers in the DOJ to say that their conduct was legal, and therefore, it should be treated as such. This tactic - getting partisan lawyers and underlings of the president to say that the president's conduct is legal - was appropriately treated with scorn when invoked by Bush officials to justify their radical programs. As Digby wrote about Bush officials who pointed to the OLC memos it got its lawyers to issue about torture and eavesdropping, such a practice amounts to:¶ "validating the idea that obscure Justice Department officials can be granted the authority to essentially immunize officials at all levels of the government, from the president down to the lowest field officer, by issuing a secret memo. This is a very important new development in western jurisprudence and one that surely requires more study and consideration. If Richard Nixon and Ronald Reagan had known about this, they could have saved themselves a lot of trouble."¶ Life-long Democratic Party lawyers are not going to oppose the terrorism policies of the president who appointed them. A president can always find underlings and political appointees to endorse whatever he wants to do. That's all this memo is: the by-product of obsequious lawyers telling their Party's leader that he is (of course) free to do exactly that which he wants to do, in exactly the same way that Bush got John Yoo to tell him that torture was not torture, and that even it if were, it was legal.¶ That's why courts, not the president's partisan lawyers, should be making these determinations. But when the ACLU tried to obtain a judicial determination as to whether Obama is actually authorized to assassinate US citizens, the Obama DOJ went to extreme lengths to block the court from ruling on that question. They didn't want independent judges to determine the law. They wanted their own lawyers to do so.¶ That's all this memo is: Obama-loyal appointees telling their leader that he has the authority to do what he wants. But in the warped world of US politics, this - secret memos from partisan lackeys - has replaced judicial review as the means to determine the legality of the president's conduct.

#### Not binding- Circumvention is specifically true for executive orders on drones- the executive can secretly change them.

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

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

#### The executive ALREADY claims to do the CP- only real legal codification increases credibility of the program – that’s key to solve our allies advantage

DeFranco 13 (Lenny, Fear Drones Not As High-Tech Killing Machines, But As An Extension Of American Imperialism, Feb 15, http://www.policymic.com/articles/26687/fear-drones-not-as-high-tech-killing-machines-but-as-an-extension-of-american-imperialism/377470)

Quite a few members of Washington’s policy elite are surprised by the backlash that these things have brought. To the traditionally jingoistic eye of the U.S. media, drones themselves could not possibly be controversial. Far from being a turning point in warfare, drones are merely new manifestations of the longstanding promise of unquestioned American military supremacy that the electorate is instructed to demand. Advocates of peace are right to protest the accelerating frequency of the Obama administration’s use of drones. They are murderers of innocents and a blemish on the United States’ foreign policy. We should also recognize that on both of those counts they are in plentiful company. In fact, drones are no departure at all from the militarism that this country has always boasted. The U.S. government is already killing people they deem — on sparse evidence — to be terrorists in many countries, but they’re operating in virgin legal territory. The white paper obtained by NBC News last Tuesday may one day describe illegal government action if a law is passed that directly addresses drone use. The paper is not a binding assertion of right, but rather, a summary of the legal parameters within which to defend the killing of Americans considered terrorists or terrorist "associates." The definition is admittedly vague, but consider the issue without the drone factor. Imagine a land war in which American troops were ambushed. Imagine that our troops engaged them, defeated them, and found that among the enemy dead was an American citizen. Would there be any doubt that our soldiers, and by extension the government, had a right — a duty, even — to kill him? Would the untried execution of the ex-American citizen be the military’s failure to differentiate, or would it be immediately and ruthlessly ascribed to justice delivered to a turncoat? We all know the answer. This scenario instructs us how uneasy the Obama administration must feel about using drones in the way that they have. If an American traitor were killed in combat, the public reaction would likely be closer to jubilation than introspection. The last thing on anyone’s mind would be demanding a legal defense from the administration for having committed an untried execution. We accept that killing an American who is seeking to kill us is just — unless the situation is ethically murkier than that. There are two fundamental distinctions that together separate that scenario from the death of Anwar al-Awlaki (thus far the only American target, though not victim, of a drone strike) and his two American associates. One is a valid objection, and one I will present as more hidden and invalid: the factors of imminence and military overstep. "The United States retains its authority to use force against Al-Qaeda and associated forces outside the area of active hostilities when it targets a senior operational leader of the enemy forces who is actively engaged in planning operations to kill Americans," claims the Justice Department’s memo. However, "the condition that an operational leader present an 'imminent' threat of violent attack against the United States does not require the United States to have clear evidence that a specific attack…will take place in the immediate future." It doesn’t really require clear evidence of anything. Therein lies the valid criticism of this policy. If a law were written requiring a burden of proof comparable to what the domestic justice system must provide, the only part of the memo that would be left is the discussion of foreign-state sovereignty. A law would effectively end the concern: it would be illegal for the government to kill anyone, let alone an American civilian, without proof that they were planning an imminent attack. If there was concern without proof of imminence or guilt, then they would have to apprehend the citizen some other way. The administration, of course, claims that they do just that, and only resort to lethal force in exigent circumstances. The Atlantic reported that the government indeed has a high threshold for using lethal force by analyzing a number of terrorist cases. If that is the case, which makes sense, then President Obama should confront this white paper leak by proposing to legally codify the high rigor of his existing standard. The explanation provided in the paper — which, again, is not an indication of administration intent, but an exploration of the legal space — is certainly inadequate. For the drone program to recover its moral credibility, it is crucial that this standard be required for all targets of drone violence, not just American citizens. The death of al-Awlaki and his cohorts is abhorrent in the context of the dozens of civilian deaths also caused by drones and the suppression of data about such civilians, either by labeling them "military combatants" or by plainly lying about their existence.

#### XOs get watered down with exceptions during implementation and enforcement

Canestaro-Afghanistan Task Force, CIA-3 26 B.C. Int'l & Comp. L. Rev. 1

ARTICLE: American Law and Policy on Assassinations of Foreign Leaders: The Practicality of Maintaining the Status Quo

As an Executive Order, the implementation and enforcement of Executive Order 12333 is left entirely to the pleasure of the President. Should he determine that the Order restricts his ability to uphold his oath to "preserve, protect, and defend the Constitution of the United States," he could at any time amend, revoke, or temporarily suspend Executive Order 12333 so as to allow whatever use of force he sees fit. Even when it remains in effect, the two exceptions created by Presidents Reagan and Clinton have narrowed its scope by excluding deaths resulting from strikes on valid military targets or counterterror operations. Furthermore, should the President wish to keep an alteration of Executive Order 12333 away from the eyes of the enemy  [\*34]  and the American public for tactical reasons, he could conceal it under the shroud of the classification regime.

#### The court doesn’t solve the aff – rubberstamp

Brighten-Jurisprudence and Social Policy Program, Berkeley-10

‘TheWay Ahead’ orThe Status Quo? Why National Security Court Proposals Threaten Judicial Independence A Review of Glenn Sulmasy’s TheNational SecurityCourt System: ANatural Evolution of Justice in an Age of Terror1

<http://laworgs.depaul.edu/journals/RuleofLaw/Documents/Brighten%20-%20final.pdf>

The preceding sections demonstrate that virtually all the foreign and domestic antecedents of Sulmasy’s proposal exhibit similar characteristics: by transferring jurisdiction from more independent to less independent adjudicators, they facilitate politically motivated executive action unchecked by the rigors of legitimate judicial review. Recognizing this dynamic should provide liberal commentators with stronger theoretical ammunition with which to critique national security court proposals. To elaborate, several legal scholars have recently emphasized the dialogic nature of judicial review in the American constitutional system. As Barry Friedman observes, “judicial review is central to American political discourse,” a means of facilitating dialogue between the branches of government and the larger population. 193 Josh Benson likewise argues that the U.S. Supreme Court “wield[s] judicial review less to vindicate its own policy preferences than to promote the democratic involvement of each branch in wartime policy.”194 These insights imply that a non-independent national security court, as Sulmasy effectively proposes, would risk short-circuiting American political discourse and make for ill-considered, ineffective national security policy. As Stephen Holmes argues, “the claim that an executive agency will, on balance, perform best when it is never observed or criticized would not be worth discussing were it not so vehemently advanced.” 195 Mark Davies similarly asks, “what form of judicial review is most likely to assure that we get the best possible performance from our security agencies,” in terms of “accurate facts and logical thinking?” 196 Davies concludes that FISC represents a suboptimal model because it fails to meaningfully evaluate the executive’s security claims, and thereby provides “little reason to think that [it] advances [security].” 197 Indeed, as Robinson argues, available evidence suggests that FISC has produced an “ambiguous, if not minimal” effect on counterintelligence metrics. 198 There would accordingly seem little reason to predict that Sulmasy’s proposal would advance security against terrorism, structured as it is to promote less rigorous adjudication of habeus corpus applications, and thereby less targeted and effective detainment and prosecution of terrorists. As Holmes argues, “[i]f a government no longer has to provide plausible reasons for its actions, [] it is very likely [] to stop having plausible reasons for its actions.” 199 In Sulmasy’s haste to minimize the impact of bothersome constitutional protections on the military’s counter-terrorism objectives, he neglects to consider that the latter may not obtain without the former.consider that the latter may not obtain without the former.

#### The plan opens the door to successful challenges of active Sonar through NEPA

Times Tribune 11/24/13

http://thetimes-tribune.com/news/health-science/sonar-tests-hazardous-to-sea-life-1.1589369

Sonar tests hazardous to sea life

Q: I understand the Navy is doing sonar testing and training in the oceans and that their activities will likely kill hundreds, if not thousands, of whales and other marine mammals. What can be done to stop this? A: Active sonar is a technology used on ships to aid in navigation, and the Navy tests and trains with it extensively in American territorial waters. The Navy also conducts missile and bomb testing in the same areas. But environmentalists and animal advocates contend that this is harming whales and other marine wildlife, and are calling on the Navy to curtail such training and testing exercises accordingly. "Naval sonar systems work like acoustic floodlights, sending sound waves through ocean waters for tens or even hundreds of miles to disclose large objects in their path," reports the nonprofit Center for Biological Diversity. "But this activity entails deafening sound: even one low-frequency active sonar loudspeaker can be as loud as a twin-engine fighter jet at takeoff." According to the CBD, sonar and other military testing can have an especially devastating effect on whales, given how dependent they are on their sense of hearing for feeding, breeding, nursing, communication and navigation. The group adds that sonar can also directly injure whales by causing hearing loss, hemorrhages and other kinds of trauma, as well as drive them rapidly to the surface or toward shore. In 2007, a U.S. appeals court sided with the Natural Resources Defense Council, which had contended that Navy testing violated the National Environmental Policy Act, Marine Mammal Protection Act and Endangered Species Act. But within three months of this ruling, then-President George W. Bush exempted the Navy, citing national security reasons. The exemption was subsequently upheld by the Supreme Court upon challenge, and the Navy released estimates that its training exercises scheduled through 2015 could kill upward of 1,000 marine mammals and seriously injure another 5,000. But in September a federal court in California sided with green groups in a lawsuit charging that the National Marine Fisheries Service failed to protect thousands of marine mammals from Navy warfare training exercises in the Northwest Training Range Complex along the coasts of California, Oregon and Washington. As a result, the NMFS must reassess its permits to ensure that the Navy's activities comply with protective measures under the Endangered Species Act. The ruling will no doubt be challenged. Also, the Navy still has the green light to use sonar and do weapons testing off the East Coast.

#### Active Sonar Creates a shockwave that causes hulls of subs to literally collapse

Hyson-Research Director and Co-Founder Sirius Institute-2K

Letter to chief of the marine mammal conservation division of NMFS, 4/3, http://www.interpac.net/~plntpuna/siriusa/VOD/vod-vol-3No-4.htm)

“Another matter ignored is that TIME REVERSED ACOUSTICS are used….even available in Scientific American.”

Another matter ignored is that TIME REVERSED ACOUSTICS are used, as detailed by Dr. Mathias Fink in the November 1999 Scientific American. In this article, Dr. Fink shows how any sound received by a LFAS array can be reversed in time (after recording) and sent back to the point of detection, massively amplified. This is known as a phase-conjugate system. At the proposed 240 dB levels of output reported, and using several ships in concert, where the powers of each are combined in phase, one can develop powers and intensities orders of magnitude more intense than a single array, in fact the increase is on the order of the SQUARE of the number of systems combined. Thus the 5 ship fleet proposed for testing when combined will have powers approaching 5 X 5 or 25 times as intense, and with 30 ships together (as projected for the DEPLOYED system, which is what the EIS should have actually covered) then the total power is some 30 X 30 or 900 times the power and intensity of a single 18 projector array hung under only one ship. These systems can create shock waves in the water, intense pressure waves traveling at 5500 feet per second. With sharp focusing, and by making two or more shock waves cross going different directions, the water cavitates, leaving a region of steam in the cavitated area. This area then collapses, like a large bubble, with the release of tremendous focused energy, analagous to an acoustic "laser" Suppose one projected a broad band sound into the water, and then listened. Some frequencies would cause, say, a submarine hull to resonate, just as the whales' ears and tissues do. One would then receive the reflected sounds from the submarines in the area using the LFAS arrays. One then "time reverses" and amplifies this sound and sends it back. The hull of the targeted submarine will then be resonated, "rung like hitting a bell", with this resonant frequency at extremely high intensities. This could cause a hull, especially near its crush depth, to rupture, sinking the sub, killing the crew. This is an acoustic weapon, with capabilities both in detection and offensive attack. Such acoustic weapons were outlawed years ago by joint treaty of the US and USSR and in the Geneva Conventions. Thus, the LFAS is a matter for Geneva and the United Nations, and other planetary governing bodies such as the World Court at the Hague, and is thus beyond the jurisdiction of the NMFS, and in fact, is a matter for strategic debate. This is "Star Wars" underwater. I have also been told that the completed system will include some 1200 separate units mounted on the bottom of the world's oceans. This increases the influence and magnitude of sound even more. Then, to understand the total impact of this development, we must include the parallel work of NATO allies, France and opposing countries, perhaps the Russians, Chinese or others. Rapid proliferation is likely, given the basic principles are even available in Scientific American.

#### That triggers escalatory accidental war

Wallace-Poli Sci, University of British Columbia-95

Submarine Proliferation and Regional Conflict

Journal of Peace Research vol 32 no 1

http://www.jstor.org.ezproxy.uky.edu/stable/425469?seq=1

In such circumstances, there are a number of ways in which a shooting war could begin accidentally. The most obvious starting- point would see a submarine initiating an attack against an underwater opponent by mistake or miscalculation. With luck, the shooting might stop there, but it need not. Other subs, hearing the distant battle, might assume general war had broken out and launch their own attacks. Political and military commanders, faced with the loss of powerful and expensive assets, would likely be under pressure to retaliate. Most ominously of all, once a submarine battle had begun, those submarines tasked with attacking surface vessels or land targets in the event of all-out war might, out of fear or ignorance, launch their weapons rather than risk their possible destruction. Thus might tactical confusion beneath the waves lead to a full-scale strategic battle above.

#### Judicial interpretation on NEPA key to human survival

Villmer ’10 (Matthew,- attorney with the law firm of Emmanuel, Sheppard & Condon 11 Fl. Coastal L. Rev. 321)

The National Environmental Policy Act (NEPA or the Act) 1 greatly improved United States environmental policy, promising judicial oversight to federal actions. However, due to years of judicial interpretation that significantly reduced NEPA's requirements, the Act lost its substantive impact. This erosion of NEPA protections risked local and regional disaster in the nuclear era--but now, government contravention of NEPA provisions risks even more: complete global destruction. This Article follows the creation, development, and eventual demise of NEPA's environmental protections. The Article tracks NEPA's application throughout the last thirty years using three case studies and particularly analyzes the United States government's intentional evasion of the Act's safeguards. This Article then culminates with a detailed proposition for rehabilitating NEPA to its former status as an environmental safeguard for not only the United States, but the earth as a whole. By amending NEPA to adequately protect the environment, humanity will ensure its future on this planet.

### 2AC SOF CP

#### Perm do both

#### Perm – do the counterplan – “targeted killing” does not include Special Forces

Bachmann 13 (Sascha-Dominik, Associate Professor at the University of Bournemouth (UK), research focus on international legal subjects, “Targeted Killings: Contemporary Challenges, Risks and Opportunities”, http://jcsl.oxfordjournals.org/content/early/2013/05/31/jcsl.krt007.full)

An early example of ‘targeted killing’ in the history of armed conflict can be found in the military tactics applied mainly by snipers. Prominent and well-documented examples of sniper warfare can be found in the annals of the Eastern Front during World War II: German and Soviet forces used snipers to annihilate systematically the enemy’s mid-level military leadership: German losses to Soviet snipers were so severe during the battle for Stalingrad in autumn of 1942 that officers as well as non-commissioned officers had to adapt means of camouflage to blend in with their (enlisted) men and in order to avoid being targeted by enemy snipers.21 Operation ‘Neptune Spear’ as well as the alleged Israeli Mossad Operation to kill the Hamas official Mahmud al-Mabhuh in Dubai in 201122 involved the use of Special Forces on the ground, or intelligence operatives/assets respectively, constitute commando operations as well targeting operations in the wider sense. Such tactical capture and kill operations executed by Special Forces assets are not the focus of this short contribution: its focus is solely on targeted killing, as a means of warfare which is executed by using remotely piloted aircraft, UAVs or drones respectively, as weapons platform. Falling outside the scope of targeted killings discussed in this article is the continuing use of Improvised Explosive Devices (IEDs) in Iraq and Afghanistan by the Taliban and other affiliated groups. Targeted terrorism, involving the use of IEDs, suicide bombings or suicide attack squads as impressively shown in the 2011 Mumbai attacks, seem to constitute a hybrid form of unconventional warfare which combines elements of both, assassination and targeted killings in the widest sense. The scope of this article is on targeted killing as a means of warfare and hence does not warrant a further discussion of this form of attacks as a potential example for targeted killings. Targeted killing as a means of killing enemies of a state has been employed most frequently by the USA as part of its overall military strategy against Al-Qaeda and the Taliban.23 While the USA did not ‘invent’ this form of warfare it has taken the lead in advancing its development and overall design in respect of targeting processes, command and control as well as the use of increasingly sophisticated technology.24 The use of drones for executing kinetic, lethal, strikes against hostile and enemy targets has its tangible military benefits in terms of operational capabilities, readiness and its overall availability as a defensive as well as offensive form of warfare. Targeted killing by UCAS can be executed at very short notice and does not require the deployment of and the presence of substantial own forces in the theatre of operations. This availability and flexibility of using drones as a platform for the execution of targeted killings makes this form of warfare (without own casualties) so formidable when responding to present threats at an ad hoc basis. Consequently, both proliferation and expansion of the use of UCAS are increasing.25 Examples hereof are the present discussions in the UK to increase the availability of UAV systems for reconnaissance and combat, the RAF’s decision to relocate its UAV assets from the US to RAF Waddington near Lincoln and to establish a new Unmanned Air Systems Capability Development Centre (UASCDC) there. The overall capabilities of such airborne weapon platform systems has also found supporters among nations who were initially opposed to this form of warfare, such as Germany which for historical as well as political reasons has been known to be more reluctant to the use of force and to participate in combat operations in a more active role.26

#### Night raids increase blowback and collapse relations – terrorism is a DA

OSF 11 (Open Society Foundations, with the Liaison Office, “The Cost of Kill/Capture: Impact of the Night Raid Surge on Afghan Civilians”, http://www.opensocietyfoundations.org/sites/default/files/Night-Raids-Report-FINAL-092011.pdf)

Increased night raids spark backlash The number of night raids has skyrocketed: publicly available statistics suggest a five - fold increase between February 2009 and December 2010. 3 International military conducted, on average, 19 night raids per night — a total of 1700 night raids — in the three-month period from roughly December 2010 to February 2011, according to the NATO-led International Security Assistance Force (ISAF). 4 ISAF has not released more up-to-date figures; however, interviews conducted for this report suggest a continuing trend of large numbers of night raids, possibly at even higher rates. In April 2011, a senior U.S. military advisor told the Open Society Foundations that as many as 40 raids might take place on a given night across Afghanistan. 5 International military officials argue that the increase in night raids has been their most successful strategy in the last year, although they have offered no evidence to support these claims. They argue that absent the ability to continue night raids, insurgent attacks would increase significantly. However, these touted gains have come at a high cost. The escalation in raids has taken the battlefield more directly into Afghan homes, sparking tremendous backlash among the Afghan population. The Afghan government calls the raids counter - productive to reconciliation efforts with insurgent groups, and a threat to Afghan sovereignty, given the limited Afghan control of night raids. Complaints over night raids have marred Afghan relations with international partners, particularly the United States, and have complicated long - term strategic partnership discussions.

#### Counterplan links to the net benefit – Special Forces conduct drone strikes

Currier 13 (Cora, covers national security, previously editorial staff at the New Yorker, “Everything We Know So Far About Drone Strikes”, http://www.propublica.org/article/everything-we-know-so-far-about-drone-strikes)

The CIA isn’t alone in conducting drone strikes. The military has acknowledged “direct action” in Yemen and Somalia. Strikes in those countries are reportedly carried out by the secretive, elite Joint Special Operations Command. Since 9/11, JSOC has grown more than tenfold, taking on intelligence-gathering as well as combat roles. (For example, JSOC was responsible for the operation that killed Osama Bin Laden.) The drone war is carried out remotely, from the U.S. and a network of secret bases around the world. The Washington Post got a glimpse – through examining construction contracts and showing up uninvited – at the base in the tiny African nation of Djibouti from which many of the strikes on Yemen and Somalia are carried out. Earlier this year, Wired pieced together an account of the war against Somalia’s al-Shabaab militant group and the U.S.’s expanded military presence throughout Africa.

#### Night raids require accountability – perception of impunity decreases effectiveness

OSF 11 (Open Society Foundations, with the Liaison Office, “The Cost of Kill/Capture: Impact of the Night Raid Surge on Afghan Civilians”, http://www.opensocietyfoundations.org/sites/default/files/Night-Raids-Report-FINAL-092011.pdf)

The increased number of night raids, with a potential to impact a greater number of non - combatants, should be matched by stronger transparency, accountability, and redress 20 mechanisms — issues that ISAF and U.S. forces have been weak on in the past, particularly with regard to Special Forces activities. ISAF has made efforts in the last year to try to address complaints about accountability for civilian casualty incidents more generally, including those resulting from night raids. ISAF has continued to su pport the development of a Civilian Casualty Tracking Cell since it was created in December 2008, as well as other reporting and investigation processes. Incidents that ISAF suspects of resulting in civilian casualties are investigated by the Joint Inciden t Assessment Teams (JIAT), with investigations supervised by a one - star general or equivalent. Particularly controversial or murky cases may involve a site investigation by the JIAT, often undertaken jointly with Afghan government counterparts. These prima rily involve an assessment of any evidence at the site, interviews with those troops involved, and with Afghan local officials. A Civilian Casualties Working Group was instituted in March 2011 to explore policy changes at an operational or tactical level that could better reduce civilian casualties and complaints. In the late spring and summer of 2011, ISAF demonstrated greater efforts to reach out to international and Afghan civil society by hosting or participating in conferences designed to allow civil society to engage with them on civilian casualty concerns , and taking more meetings with those raising independent concerns. 70 Though these are positive steps forward, other aspects of accountability have failed to improve, or even worsened. ISAF has app eared less responsive to independent monitors raising civilian casualty concerns than in the past. For example, ISAF has more often than not refused to discuss a number of suspected civilian casualty cases, provide evidence that those alleged to be civilia ns were in fact combatants, share video or other on - site evidence (which used to be forthcoming in the past), re - examine initial findings where contrary evidence surfaces, or to report the final results of investigations. 71 Public accountability also rema ins poor. Though press releases are often issued immediately following an incident, often noting if an investigation into civilian casualties is underway, the results of that investigation, or any subsequent information, is typically not made publicly avai lable later on. 72 When press releases announcing that insurgents are killed or detained have later been proven wrong, public corrections are rarely issued. Civilian casualty totals in the Civilian Casualty Tracking Cell do not always appear to be corrected to admit mistakes in initial reporting. 73 ISAF has not released public versions of the significant tactical directives since February 2010. 74 Accountability issues are particularly weak for night raids because the forces responsible for the vast majority o f night raids — the Special Forces Task Force Joint Special Operations Command (JSOC) (formerly under Admiral William McCraven ) — are the least transparent of international forces operating in Afghanistan. 75 As a rule, they do not accept interviews or meetings with independent monitors. Despite greater efforts to integrate them into ISAF - HQ, these forces report back to the Special Operations Command ( U.S. SOCOM) based in Tampa, Florida . Despite repeated inquiries, international military officials were not able to confirm that the ISAF tactical directives 21 applied to these forces, given their different command structure. ISAF officials noted that these forces follow all of the tactical directives in practice, including reporting incidents like suspected civilian cas ualties immediately . Some night raids are reportedly CIA operations . Though likely not constituting the majority of night raids, there is zero public accountability over CIA conduct during raids. In addition, it has been more difficult to raise concerns regarding night raids because of a strong presumption by ISAF and U.S. officials that these raids are accurate and effective. Because they are confident that night raid targeting has improved, ISAF and U.S. officials have shown a tendency to disbelieve allegations of civilian casualties. For example, after a night raid in May 2010 in Surkh Rod, Nangarhar, inquiries by the Afghan government, the UN, the Afghanistan Independent Human Rights Commission (AIHRC) , and Human Rights Watch all concluded that this had been a case of mistaken identity, which had led to the deaths of nine civilians. ISAF and U.S. officials steadfastly rejected these claims, and continued to view the raid as a success. It is troubling that in instances like this, separate and unanimou s inquiries by so many credible organizations are not sufficient to challenge ISAF’s internal assessments, which too often appear to rely upon their own officials rather than interviews with eyewitnesses. Because of the overall lack of transparency over t hese night raids, when those involved in civilian casualty incidents or other misconduct are disciplined, these responses rarely — if ever — are publicly acknowledged. The result is a perception of impunity for the entire practice, if not for international forces as a whole.

#### No internal link – even if Special Forces conduct targeted killing operations, it’s not their only duty – the plan doesn’t impact counter-prolif missions unless they include legally defined targeted killings

#### Can’t solve – must be applied equally to all platforms for targeted killing

Chesney 13 (Professor Robert Chesney, Associate Dean for Academic Affairs, University of Texas School of Law, Testimony before the United States House of Representatives Committee on the Judiciary, “Drones and the War on Terror: When Can the United States Target Alleged American Terrorists Overseas?” February 27, 2013, http://www.brookings.edu/~/media/Research/Files/Testimony/2013/02/27%20drones%20chesney/Robert%20Chesney%20Testimony\_House%20Committee%20on%20Judiciary\_%2002272013.pdf)

First, this conversation should focus on the use of lethal force against U.S. persons (i.e., citizens and lawful permanent residents) without respect to the weapons or weapons platform that might be involved. It is true that we have grown accustomed to equating lethal force in the counterterrorism setting with the use of “drones” (i.e., remotely-piloted aircraft). That is perhaps to be expected; drones are the focus of intense public curiosity and media scrutiny, and important policy questions arise as a result of their particular capacity for loitering, gathering intelligence, striking with immediacy, and projecting force into regions that are not easily accessible by ground forces. But if the task at hand is to identify the legal boundaries hemming in the government’s capacity to use lethal force overseas against U.S. persons, then it is a mistake to frame the issue solely in terms of drones. The same issue would arise, after all, if we were speaking instead of missiles launched by manned aircraft, sea-launched missiles, shells from artillery, or bullets from a rifle. Below, therefore, I refer to the use of lethal force without specifying particular weapons or weapons platforms.,

#### Special operation forces fail – they are 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 commands. Rather than world-class integrators of direct and indirect capabilities, theater special operations commands are egregiously short of sufficient quantity and quality of staff and intelligence, analytical, and planning resources. 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 operations commands have been unable to fulfill their role of planning and conducting special operations.

#### No counter-value – the US. Would never do it

### 2AC Soliciter General

Non intrinsic

#### **Link N/U – district court just ruled on detention which is a major loss for Obama and invites new national security suits**

Savage 2/11 (Charlie, “Appeals Court Allows Challenges by Detainees at Guantánamo Prison”, http://www.nytimes.com/2014/02/12/us/appeals-court-clears-way-for-guantanamo-challenges.html)

WASHINGTON — A federal appeals court ruled Tuesday that judges had the power to oversee complaints by detainees about the conditions of their confinement at the military prison at Guantánamo Bay, Cuba. The ruling was a defeat for the Obama administration and may open the door to new lawsuits by the remaining 155 Guantánamo inmates. In a two-to-one decision, a panel of the United States Court of Appeals for the District of Columbia Circuit held that courts may oversee conditions at the prison as part of a habeas corpus lawsuit. The ruling overturned lower court decisions that judges could not oversee such matters. At the same time, the court rejected a request by three detainees on a hunger strike at Guantánamo for an injunction barring the government from force-feeding them by strapping them into a restraint chair, inserting a gastric tube through their noses and pouring a liquid nutritional supplement into their stomachs. Judge David S. Tatel wrote that “absent exceptional circumstances prison officials may force-feed a starving inmate actually facing the risk of death.” He added, “Petitioners point to nothing specific to their situation that would give us a basis for concluding that the government’s legitimate penological interests cannot justify the force-feeding of hunger-striking detainees at Guantánamo.” Still, because the majority concluded that the judiciary had the authority to review such claims, it sent the case back to Federal District Court for further consideration. Jon Eisenberg, a lawyer for the prisoners, celebrated the larger reach of the ruling as a “huge win” for those seeking greater judicial oversight of how the military treats detainees. “This decision establishes that the federal courts have the power to stop the mistreatment of detainees at Guantánamo Bay,” Mr. Eisenberg said. “The Court of Appeals has given us the green light to continue our challenge to the detainees’ force-feeding as being unconstitutionally abusive. We intend to do that.” Among other things, he added, the government, after the Oct. 18 oral arguments in the case, revised its procedures for using restraint chairs in the force-feeding, but has declined to let the detainees’ lawyers review those guidelines. The ruling, he said, “gives us the green light to ask the district court to order such disclosure.” Allison Price, a Justice Department spokeswoman, said, “The department is reviewing the decision.” If the case stands — the Justice Department could file an appeal asking the full appeals court or the Supreme Court to review it — it would be a milestone in a long-running legal battle, involving all three branches of government, over the extent to which detainees are entitled to judicial review if they are being indefinitely detained without trial at the prison. The Bush administration initially argued that courts had no jurisdiction over foreigners held at the prison, which is on Cuban soil. In 2004, the Supreme Court ruled that courts did have jurisdiction to hear detainees’ lawsuits. In 2005, Congress enacted a law stripping courts of the power to hear such claims. The following year, the Supreme Court — in a case involving military commissions — ruled that the law only applied to future lawsuits. Congress responded by passing the Military Commissions Act of 2006, which barred courts from hearing both existing and future lawsuits by detainees. Two years later, the Supreme Court ruled that detainees nevertheless could bring habeas corpus lawsuits challenging the factual basis for their detention as accused enemy combatants. That left open the question of whether they could bring cases involving unrelated complaints over the conditions of confinement. Lower courts said they could not, and the Obama administration agreed. But in the force-feeding case, two of the three judges on the panel said they could bring such cases because conditions were a subset of habeas corpus cases. Moreover, Judge Tatel wrote, if a judge ordered the military to stop treating a detainee in some “unlawful manner,” and it did not rectify the conditions, the court said judges may then “simply order the prisoner released.” Judge Tatel, who was appointed by President Bill Clinton, was joined by Judge Thomas B. Griffith, who was appointed by President George W. Bush. The third judge on the panel, Judge Stephen F. Williams, who was appointed by President Ronald Reagan and took senior status in 2001, disagreed. In a dissenting opinion, Judge Williams said his colleagues should have followed Congress’s intentions and dismissed the case. Congress “unmistakably sought to prevent the federal courts from entertaining claims based on detainees’ conditions of confinement,” he wrote. “Such evident congressional intent would seem to counsel a cautious rather than a bravura reading” of whether such claims fell into the category of habeas corpus lawsuits. The claims arose after a major hunger strike at Guantánamo a year ago, with a majority of detainees participating at one point, according to the military’s official count. The mass protest refocused global attention on the prison and pushed the Obama administration to revive the effort to close it. Those who lost sufficient weight were forced to eat a nutritional supplement, a practice that revived complaints by medical ethics groups that doctors should not force-feed prisoners who decide not to eat. A similar debate erupted during the Bush administration. Four detainees filed a lawsuit seeking to stop the military from force-feeding them. One was later transferred to Algeria, but three — Shaker Aamer, a Saudi citizen and former resident of Britain; Ahmed Belbacha, an Algerian; and Abu Dhiab, a Syrian, remain at Guantánamo. All had been approved for transfer, if security conditions could be met in the receiving country, by a 2009-10 task force. The hunger strike dwindled in the last six months of 2013, and in December the United Sates Southern Command stopped reporting the daily count of hunger strikers. Mr. Eisenberg, who recently visited his clients, said he was told that there were 25 detainees still on hunger strikes, with 16 of them being force-fed. A military spokesman declined to confirm or deny that count.

#### judicial assertiveness into terrorism policy high now

Kent, Constitutional Law prof, 10-8-13 (Andrew, Faculty Advisor-Center on National Security at

Fordham Law School, prof @ Fordham University School of Law- constitutional law, foreign relations law, national security law, federal courts and procedure, “ARE DAMAGES DIFFERENT?: BIVENS AND NATIONAL SECURITY,” October 8, http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2330476)

But the refusal to allow Bivens damages remedies in these national security cases is exceptional in another sense: the Supreme Court has never been more assertive in adjudicating national security and foreign relations issues than it has in recent years. The last decade saw the executive lose (or have its legal arguments offered as amicus curiae rejected) time after time in Supreme Court cases concerning questions judicial power and justiciability in foreign relations and national security.11 In the most high profile of these cases, the ones concerning the post-9/11 war on terror, the Court emphatically asserted its authority and rejected or ignored the notion that deference to the executive was appropriate because of the national security or foreign affairs dimensions of the disputes.12 In these war-on-terror cases as well as in other national security or foreign relations contexts, the Supreme Court has ruled repeatedly against the executive and, in so doing, approved judicial review of the executive’s national security actions, in suits where plaintiffs sought prospective, injunctive-type remedies against the government.13 Remedies of that type are typically thought to involve much more judicial intrusion into executive functioning than would a retrospective award of money damages,14 and in some instances injunctive-type remedies were implied by the courts from a jurisdictional statute or said to be required by the Constitution itself, rather than being expressly created by Congress. In addition, the war-on-terror decisions in Rasul, Hamdi, Hamdan and Boumediene were intended by the Court to have, and did in fact have, enormously significant practical effects—restructuring the worldwide interrogation, detention and military commission policies of the executive branch.15 The many critics who think the judiciary has not done enough to remedy perceived excesses in the war-on-terror are missing the larger picture of unprecedented judicial assertiveness and effectiveness.16

#### Capital doesn’t matter – ideology and merit

Coy 2012

Peter, Anthony Kennedy, the Justice Everyone Is Watching, BusinessWeek, http://www.businessweek.com/articles/2012-06-27/anthony-kennedy-the-justice-everyone-is-watching

In Congress, log-rolling is business as usual: If you vote for my bill, I’ll vote for yours. So observers were quick to spot evidence of log-rolling on the Supreme Court in the big rulings that came on June 25—and to extrapolate what those votes might mean for the decision on the Patient Protection and Affordable Care Act. Not so fast, says Cornell Law School professor Michael Dorf, who clerked for Justice Anthony Kennedy: Log-rolling is not how the high court works. Dorf makes two key points about the pending health-care ruling. First, justices on the Supreme Court strive to make decisions on the merits, although like all humans, they are affected by interpersonal dynamics. Second, Kennedy, the court’s swing voter, is an independent thinker and not merely a split-the-difference compromiser. The theory that justices voted strategically in Monday’s cases to affect the Affordable Care Act vote is expressed in a Bloomberg View column by Harvard Law School professor Noah Feldman. He notes that liberal justices Sonia Sotomayor, Stephen Breyer, and Ruth Bader Ginsburg voted with Kennedy in the majority decision that upheld a key feature of the Arizona immigration law while striking down others. Writes Feldman: “The three liberals may have been willing to give Justice Kennedy more room to maneuver than usual because they wanted to keep him close for the health-care decision.” Chief Justice John Roberts, who generally doesn’t vote with the court’s liberals, also joined Kennedy’s majority opinion. It’s possible, Feldman writes, that “Roberts, too, was hoping to bring Kennedy to his side in the health-care decision.” Dorf, who blogs at Dorf on Law, is skeptical of that theory. “It violates the court’s internal norms for the justices to engage in log-rolling,” Dorf tells me. “It is virtually inconceivable that there was any kind of a deal in which the liberals go along with Kennedy on the Arizona case in exchange for his vote on the ACA.” (Dorf says Harvard’s Feldman never made such a strong claim; he came close, though.)

#### Economic collapse doesn’t cause war

**Bazzi et al., UCSD economics department, 2011**

(Samuel, “Economic Shocks and Conflict: The (Absence of?) Evidence from Commodity Prices”, November, <http://www.chrisblattman.com/documents/research/2011.EconomicShocksAndConflict.pdf?9d7bd4>, ldg)

VI. Discussion and conclusions A. Implications for our theories of political instability and conflict The state is not a prize?—Warlord politics and the state prize logic lie at the center of the most influential models of conflict, state development, and political transitions in economics and political science. Yet we see no evidence for this idea in economic shocks, even when looking at the friendliest cases: fragile and unconstrained states dominated by extractive commodity revenues. Indeed, we see the opposite correlation: if anything, higher rents from commodity prices weakly 22 lower the risk and length of conflict. Perhaps shocks are the wrong test. Stocks of resources could matter more than price shocks (especially if shocks are transitory). But combined with emerging evidence that war onset is no more likely even with rapid increases in known oil reserves (Humphreys 2005; Cotet and Tsui 2010) we regard the state prize logic of war with skepticism.17 Our main political economy models may need a new engine. Naturally, an absence of evidence cannot be taken for evidence of absence. Many of our conflict onset and ending results include sizeable positive and negative effects.18 Even so, commodity price shocks are highly influential in income and should provide a rich source of identifiable variation in instability. It is difficult to find a better-measured, more abundant, and plausibly exogenous independent variable than price volatility. Moreover, other time-varying variables, like rainfall and foreign aid, exhibit robust correlations with conflict in spite of suffering similar empirical drawbacks and generally smaller sample sizes (Miguel et al. 2004; Nielsen et al. 2011). Thus we take the absence of evidence seriously. Do resource revenues drive state capacity?—State prize models assume that rising revenues raise the value of the capturing the state, but have ignored or downplayed the effect of revenues on self-defense. We saw that a growing empirical political science literature takes just such a revenue-centered approach, illustrating that resource boom times permit both payoffs and repression, and that stocks of lootable or extractive resources can bring political order and stability. This countervailing effect is most likely with transitory shocks, as current revenues are affected while long term value is not. Our findings are partly consistent with this state capacity effect. For example, conflict intensity is most sensitive to changes in the extractive commodities rather than the annual agricultural crops that affect household incomes more directly. The relationship only holds for conflict intensity, however, and is somewhat fragile. We do not see a large, consistent or robust decline in conflict or coup risk when prices fall. A reasonable interpretation is that the state prize and state capacity effects are either small or tend to cancel one another out. Opportunity cost: Victory by default?—Finally, the inverse relationship between prices and war intensity is consistent with opportunity cost accounts, but not exclusively so. As we noted above, the relationship between intensity and extractive commodity prices is more consistent with the state capacity view. Moreover, we shouldn’t mistake an inverse relation between individual aggression and incomes as evidence for the opportunity cost mechanism. The same correlation is consistent with psychological theories of stress and aggression (Berkowitz 1993) and sociological and political theories of relative deprivation and anomie (Merton 1938; Gurr 1971). Microempirical work will be needed to distinguish between these mechanisms. Other reasons for a null result.—Ultimately, however, the fact that commodity price shocks have no discernible effect on new conflict onsets, but some effect on ongoing conflict, suggests that political stability might be less sensitive to income or temporary shocks than generally believed. One possibility is that successfully mounting an insurgency is no easy task. It comes with considerable risk, costs, and coordination challenges. Another possibility is that the counterfactual is still conflict onset. In poor and fragile nations, income shocks of one type or another are ubiquitous. If a nation is so fragile that a change in prices could lead to war, then other shocks may trigger war even in the absence of a price shock. The same argument has been made in debunking the myth that price shocks led to fiscal collapse and low growth in developing nations in the 1980s.19 B. A general problem of publication bias? More generally, these findings should heighten our concern with publication bias in the conflict literature. Our results run against a number of published results on commodity shocks and conflict, mainly because of select samples, misspecification, and sensitivity to model assumptions, and, most importantly, alternative measures of instability. Across the social and hard sciences, there is a concern that the majority of published research findings are false (e.g. Gerber et al. 2001). Ioannidis (2005) demonstrates that a published finding is less likely to be true when there is a greater number and lesser pre-selection of tested relationships; there is greater flexibility in designs, definitions, outcomes, and models; and when more teams are involved in the chase of statistical significance. The cross-national study of conflict is an extreme case of all these. Most worryingly, almost no paper looks at alternative dependent variables or publishes systematic robustness checks. Hegre and Sambanis (2006) have shown that the majority of published conflict results are fragile, though they focus on timeinvariant regressors and not the time-varying shocks that have grown in popularity. We are also concerned there is a “file drawer problem” (Rosenthal 1979). Consider this decision rule: scholars that discover robust results that fit a theoretical intuition pursue the results; but if results are not robust the scholar (or referees) worry about problems with the data or empirical strategy, and identify additional work to be done. If further analysis produces a robust result, it is published. If not, back to the file drawer. In the aggregate, the consequences are dire: a lower threshold of evidence for initially significant results than ambiguous ones.20

### 2AC Iran Politics

#### No link – we’re the DC Court

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

This is why the establishment of a specialized court would more likely institutionalize the existing program, with its elision of the imminence requirement, than narrow it. Second, judicial engagement with the targeted killing program does not actually require the establishment of a new court. In a case pending before Judge Rosemary Collyer of the District Court for the District of Columbia, the ACLU and the Center for Constitutional Rights represent the estates of the three U.S. citizens whom the CIA and JSOC killed in Yemen in 2011.

#### Court action shields Obama from controversy

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

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

#### And Obama won’t backlash

#### A. distancing himself from the program now

McDuffee 1/16 (Allen, “Congress Blocks Plan to Transfer Drone Control From CIA to Pentagon”, http://www.wired.com/dangerroom/2014/01/drone-strikes-likely-stay-cia/)

An effort by President Obama to transfer America’s lethal, highly classified drone program from the CIA to the Pentagon appears to have been thwarted by lawmakers wielding a secret weapon of their own. The Washington Post reported Wednesday that members of Congress inserted a provision in a classified annex to the $1.1 trillion government spending bill introduced this week that would restrict funding or authorization to transfer from one to the other. The move is an unusual one for Congress, and the debate over it will be closed to a small circle because of the classified nature of the addendum. President Obama, under considerable pressure from the left over the program’s civilian deaths and potential violations of international law, has for some time sought a way to distance himself from the controversial program that has come to be seen as his signature foreign policy and national security tool. However, many members of Congress, even some in the president’s own party, are not in agreement with the transfer of authority. Sen. Dianne Feinstein (D-Calif.), chairman of the Senate Intelligence Committee and a member of the Appropriations Committee, declined to offer comment in the Post report, but said last year that she had seen the CIA “exercise patience and discretion specifically to prevent collateral damage” and that she “would really have to be convinced that the military would carry it out that well.” In Beltway circles, experts say that while the U.S. drone program will have minor adjustments as needed, major debate over the direction of the program concluded years ago. “Realistically, the policy window for reforming how the U.S. conducts lethal counterterrorism strikes is closed in Washington,” says Council on Foreign Relations fellow Micah Zenko. However, during his nomination hearings last February, CIA Director John Brennan said that lethal operations are a “last resort” and could distract from the agency’s core mission of intelligence gathering. Over the course of the spring, following Brennan’s hearings, President Obama began laying the groundwork for the shift. In a May 2013 speech on counterterrorism at National Defense University, Obama opaquely signaled that he would minimize the number of lethal strikes and that he was transferring the program from the CIA to the Pentagon — a move that some observers understood as an attempt to make the program more transparent. Just weeks before Obama’s speech, when the Obama administration declined to send a representative to a Senate hearing on drone operations, Sen. Dick Durbin (D-Ill.) said “more transparency is needed to maintain the support of the American people and the international community.” He added that the White House should provide details on its claim to “its legal authority to engage in targeted killings and the internal checks and balances involved in U.S. drone strikes.”

#### B. he wants restrictions

Baker 2013

(Peter, , New York Times, “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.”

#### PC fails and Winners win

Hirsh ’13 (National Journal chief correspondent, citing various political scientists, Michael, former Newsweek senior correspondent, "There’s No Such Thing as Political Capital," National Journal, 2-9-13, www.nationaljournal.com/magazine/there-s-no-such-thing-as-political-capital-20130207, accessed 2-8-13, mss]

The idea of political capital—or mandates, or momentum—is so poorly defined that presidents and pundits often get it wrong. On Tuesday, in his State of the Union address, President Obama will do what every president does this time of year. For about 60 minutes, he will lay out a sprawling and ambitious wish list highlighted by gun control and immigration reform, climate change and debt reduction. In response, the pundits will do what they always do this time of year: They will talk about how unrealistic most of the proposals are, discussions often informed by sagacious reckonings of how much “political capital” Obama possesses to push his program through. Most of this talk will have no bearing on what actually happens over the next four years. Consider this: Three months ago, just before the November election, if someone had talked seriously about Obama having enough political capital to oversee passage of both immigration reform and gun-control legislation at the beginning of his second term—even after winning the election by 4 percentage points and 5 million votes (the actual final tally)—this person would have been called crazy and stripped of his pundit’s license. (It doesn’t exist, but it ought to.) In his first term, in a starkly polarized country, the president had been so frustrated by GOP resistance that he finally issued a limited executive order last August permitting immigrants who entered the country illegally as children to work without fear of deportation for at least two years. Obama didn’t dare to even bring up gun control, a Democratic “third rail” that has cost the party elections and that actually might have been even less popular on the right than the president’s health care law. And yet, for reasons that have very little to do with Obama’s personal prestige or popularity—variously put in terms of a “mandate” or “political capital”—chances are fair that both will now happen. What changed? In the case of gun control, of course, it wasn’t the election. It was the horror of the 20 first-graders who were slaughtered in Newtown, Conn., in mid-December. The sickening reality of little girls and boys riddled with bullets from a high-capacity assault weapon seemed to precipitate a sudden tipping point in the national conscience. One thing changed after another. Wayne LaPierre of the National Rifle Association marginalized himself with poorly chosen comments soon after the massacre. The pro-gun lobby, once a phalanx of opposition, began to fissure into reasonables and crazies. Former Rep. Gabrielle Giffords, D-Ariz., who was shot in the head two years ago and is still struggling to speak and walk, started a PAC with her husband to appeal to the moderate middle of gun owners. Then she gave riveting and poignant testimony to the Senate, challenging lawmakers: “Be bold.” As a result, momentum has appeared to build around some kind of a plan to curtail sales of the most dangerous weapons and ammunition and the way people are permitted to buy them. It’s impossible to say now whether such a bill will pass and, if it does, whether it will make anything more than cosmetic changes to gun laws. But one thing is clear: The political tectonics have shifted dramatically in very little time. Whole new possibilities exist now that didn’t a few weeks ago. Meanwhile, the Republican members of the Senate’s so-called Gang of Eight are pushing hard for a new spirit of compromise on immigration reform, a sharp change after an election year in which the GOP standard-bearer declared he would make life so miserable for the 11 million illegal immigrants in the U.S. that they would “self-deport.” But this turnaround has very little to do with Obama’s personal influence—his political mandate, as it were. It has almost entirely to do with just two numbers: 71 and 27. That’s 71 percent for Obama, 27 percent for Mitt Romney, the breakdown of the Hispanic vote in the 2012 presidential election. Obama drove home his advantage by giving a speech on immigration reform on Jan. 29 at a Hispanic-dominated high school in Nevada, a swing state he won by a surprising 8 percentage points in November. But the movement on immigration has mainly come out of the Republican Party’s recent introspection, and the realization by its more thoughtful members, such as Sen. Marco Rubio of Florida and Gov. Bobby Jindal of Louisiana, that without such a shift the party may be facing demographic death in a country where the 2010 census showed, for the first time, that white births have fallen into the minority. It’s got nothing to do with Obama’s political capital or, indeed, Obama at all. The point is not that “political capital” is a meaningless term. Often it is a synonym for “mandate” or “momentum” in the aftermath of a decisive election—and just about every politician ever elected has tried to claim more of a mandate than he actually has. Certainly, Obama can say that because he was elected and Romney wasn’t, he has a better claim on the country’s mood and direction. Many pundits still defend political capital as a useful metaphor at least. “It’s an unquantifiable but meaningful concept,” says Norman Ornstein of the American Enterprise Institute. “You can’t really look at a president and say he’s got 37 ounces of political capital. But the fact is, it’s a concept that matters, if you have popularity and some momentum on your side.” The real problem is that the idea of political capital—or mandates, or momentum—is so poorly defined that presidents and pundits often get it wrong. “Presidents usually over-estimate it,” says George Edwards, a presidential scholar at Texas A&M University. “The best kind of political capital—some sense of an electoral mandate to do something—is very rare. It almost never happens. In 1964, maybe. And to some degree in 1980.” For that reason, political capital is a concept that misleads far more than it enlightens. It is distortionary. It conveys the idea that we know more than we really do about the ever-elusive concept of political power, and it discounts the way unforeseen events can suddenly change everything. Instead, it suggests, erroneously, that a political figure has a concrete amount of political capital to invest, just as someone might have real investment capital—that a particular leader can bank his gains, and the size of his account determines what he can do at any given moment in history. Naturally, any president has practical and electoral limits. Does he have a majority in both chambers of Congress and a cohesive coalition behind him? Obama has neither at present. And unless a surge in the economy—at the moment, still stuck—or some other great victory gives him more momentum, it is inevitable that the closer Obama gets to the 2014 election, the less he will be able to get done. Going into the midterms, Republicans will increasingly avoid any concessions that make him (and the Democrats) stronger. But the abrupt emergence of the immigration and gun-control issues illustrates how suddenly shifts in mood can occur and how political interests can align in new ways just as suddenly. Indeed, the pseudo-concept of political capital masks a larger truth about Washington that is kindergarten simple: You just don’t know what you can do until you try. Or as Ornstein himself once wrote years ago, “Winning wins.”

In theory, and in practice, depending on Obama’s handling of any particular issue, even in a polarized time, he could still deliver on a lot of his second-term goals, depending on his skill and the breaks. Unforeseen catalysts can appear, like Newtown. Epiphanies can dawn, such as when many Republican Party leaders suddenly woke up in panic to the huge disparity in the Hispanic vote. Some political scientists who study the elusive calculus of how to pass legislation and run successful presidencies say that political capital is, at best, an empty concept, and that almost nothing in the academic literature successfully quantifies or even defines it. “It can refer to a very abstract thing, like a president’s popularity, but there’s no mechanism there. That makes it kind of useless,” says Richard Bensel, a government professor at Cornell University. Even Ornstein concedes that the calculus is far more complex than the term suggests. Winning on one issue often changes the calculation for the next issue; there is never any known amount of capital. “The idea here is, if an issue comes up where the conventional wisdom is that president is not going to get what he wants, and [they]he gets it, then each time that happens, it changes the calculus of the other actors” Ornstein says. “If they think he’s going to win, they may change positions to get on the winning side. It’s a bandwagon effect.” ALL THE WAY WITH LBJ Sometimes, a clever practitioner of power can get more done just because [they’re]he’s aggressive and knows the hallways of Congress well. Texas A&M’s Edwards is right to say that the outcome of the 1964 election, Lyndon Johnson’s landslide victory over Barry Goldwater, was one of the few that conveyed a mandate. But one of the main reasons for that mandate (in addition to Goldwater’s ineptitude as a candidate) was President Johnson’s masterful use of power leading up to that election, and his ability to get far more done than anyone thought possible, given his limited political capital. In the newest volume in his exhaustive study of LBJ, The Passage of Power, historian Robert Caro recalls Johnson getting cautionary advice after he assumed the presidency from the assassinated John F. Kennedy in late 1963. Don’t focus on a long-stalled civil-rights bill, advisers told him, because it might jeopardize Southern lawmakers’ support for a tax cut and appropriations bills the president needed. “One of the wise, practical people around the table [said that] the presidency has only a certain amount of coinage to expend, and you oughtn’t to expend it on this,” Caro writes. (Coinage, of course, was what political capital was called in those days.) Johnson replied, “Well, what the hell’s the presidency for?” Johnson didn’t worry about coinage, and he got the Civil Rights Act enacted, along with much else: Medicare, a tax cut, antipoverty programs. He appeared to understand not just the ways of Congress but also the way to maximize the momentum he possessed in the lingering mood of national grief and determination by picking the right issues, as Caro records. “Momentum is not a mysterious mistress,” LBJ said. “It is a controllable fact of political life.” Johnson had the skill and wherewithal to realize that, at that moment of history, he could have unlimited coinage if he handled the politics right. He did. (At least until Vietnam, that is.)

#### Court link non-unique – Obama fighting health care litigation

Bluestein 3/25 (Adam, “Could U.S. District Court Banish Obamacare Penaties?”, http://www.inc.com/adam-bluestein/obamacare-halbig-sebelius.html)

With the deadline for enrollment in health plans fast approaching, the legal challenges to Obamacare keep coming. The U.S. Court of Appeals for the D.C. Circuit is now hearing arguments in Halbig v. Sebelius, a case that opponents of the health care law hope could put a final nail in its coffin. The plaintiffs in the case--a group of individuals and employers in states that did not set up their own healthcare exchanges, and instead let the federal government manage the exchanges for them--say that the IRS pulled a fast one when it clarified the Affordable Care Act's rules about who is eligible to receive Obamacare subsidies. As written, the Act states that only people who buy health coverage through an exchange "established by the state" can qualify for income-based subsidies. In part, the rule was put there to motivate states to set up their own exchanges--because not doing so would mean that lower-income citizens couldn't obtain the subsidies that make health insurance affordable for them. Nonetheless, for ideological or practical reasons, 34 states opted not to run their own exchanges. So, in May 2013, the Internal Revenue Service issued its own "interpretation" of the law--clarifying that individuals buying coverage in the federally facilitated exchanges could also qualify for subsidies. The plaintiffs in Halbig argue that the IRS had no standing to essentially rewrite the health care law, and they want to eliminate the subsidies in states with federally run exchanges. On January 15, the U.S. District Court for the District of Columbia handed the plaintiffs a defeat, agreeing with the IRS that it had reasonably interpreted the meaning of a complex rule. If the Court of Appeals sees things differently, however, it could have major consequences for individuals and businesses. First, if individuals live in states in which they can't qualify for subsidies, their costs for buying health coverage would be greater. That means they will more easily be able to claim hardship exemptions to the individual mandate, which requires everyone to have health coverage or else pay a penalty of up to 1 percent of household income. For business owners, eliminating subsidies has the potential to effectively eliminate employer mandate penalties. That's because the ACA's large-employer penalties--for either not offering coverage for full-time workers, or for offering coverage that is too expensive--are triggered only if and when employees who aren't satisfied with their companies' insurance go and qualify for subsidies in the public exchange. Therefore, if there are no subsidies to qualify for, there can't be any penalties, either. But it's unlikely the Obama administration will let that happen. Even if the Court of Appeals reverses the earlier ruling, the administration may just ignore it. Last week, the Justice Department submitted paperwork declaring that because Halbig is not a class action, any adverse ruling would only apply to the named plaintiffs and would not be enough to strike down the IRS rule.

#### Losers lose non-unique – Obama lost on foreign policy IMF reforms

Weisman 3-26 (Jonathan, Senate Democrats Drop I.M.F. Reforms From Ukraine Aid, http://www.nytimes.com/2014/03/26/world/europe/senate-democrats-drop-imf-reforms-from-ukraine-aid-package.html?\_r=0)

Senate Democrats, bowing to united House Republican opposition, dropped reforms of International Monetary Fund governance from a Ukraine aid package on Tuesday, handing President Obama an embarrassing defeat as he huddled in Europe with allies who have already ratified the changes. The monetary fund language would have enlarged the Ukraine loan package while finally ratifying changes dating to 2010 that only the United States has opposed. Mr. Obama himself negotiated those changes, and European allies conferring with him on Ukraine have been pressing for American action. But the need for speed on loans and direct assistance to Ukraine overcame the White House’s willingness for a fight. Senator Harry Reid of Nevada, the majority leader, said he was taking his lead from Secretary of State John Kerry, who had signaled that the administration would push for the monetary fund language separately.

#### National security link non-unique – Ukraine

Huntley 3/24 (Steven, “Obama fails to sell foreign policy”, http://www.suntimes.com/news/huntley/26412108-452/obama-fails-to-sell-foreign-policy.html)

President Barack Obama is at the Hague trying to build unity among European allies for tough sanctions against Russia for its abuse of Ukraine. Hanging over his effort will be the question of why Obama didn’t shore up support at home for his foreign policy with Congress? Surely he would be in a much stronger position in talking to European leaders, many wary of endangering trade, commercial and energy ties with Moscow, if he could point to a public display of bipartisan resolve with leaders of Congress. In times of overseas crisis — and Russia’s unlawful annexation of Crimea is that — a president is wise to orchestrate homefront solidarity before launching foreign policy initiatives. All evidence points to Russian President Vladimir Putin doing just that before he ordered troops to take over Crimea and organized a sham vote of residents of the peninsula, a majority of them ethnic Russians, asking for Moscow to annex Crimea. Putin had Russia’s media, most of it friendly or controlled by him, to whip up passions among Russians against America and for retaking an area long Russian until given by the Soviet Union to Ukraine in 1954. Being an authoritarian ruler, Putin had his secret police suppress dissenting voices. Obama has his own problems with war-weary Americans cautious about venturing into a fight far away. A CNN poll found 75 percent of Americans against sending military weapons and supplies to Ukraine and 52 percent opposed to even providing economic aid to the beleaguered government in Kiev. Clearly Obama left the home front less than completely secured before heading to Europe. Americans tend to rally behind a president during times of foreign trouble. Polling does show majority support for diplomatic and economic sanctions against Moscow. Yet Obama has done little to mobilize public opinion, mostly confining himself to public warnings to Putin, with little effect. Putin annexed Crimea, had his troops overwhelm Ukrainian forces there and massed Russian soldiers along Ukraine’s eastern border, raising fears of a further invasion. Calling leaders from Capitol Hill to the White House is an obvious way to build support. But Obama has only disdain for Republicans, and they reciprocate the feeling. Still, strong bipartisan sentiment against Russia’s violation of international norms exists and Obama could have harnessed it. Not doing so has had the unhappy effect of seeing an economic aid package to Kiev stall in the Senate. The House passed a bill authorizing a $1 billion loan guarantee. But the usual stalemate ensued when Obama and Senate Democrats insisted on adding a provision to achieve a long-sought goal to overhaul the International Monetary Fund, which Republicans oppose. The unfortunate result was that Obama traveled to Europe seeking unity there without exercising the leadership required to demonstrate unity at home. European nations already were bickering behind the scenes over how to apportion the economic pain sure to come from tough sanctions against Russia. Ukraine is disappointed Obama turned down its request that the United States supply its forces with small arms. Obama is taking hits from Republicans who see weakness in his response to overseas crises. Only Putin can take pleasure from such disarray. Strength, like charity, begins at home.

#### Every effort for tougher moves on Iran has failed – the effort is over

Shapiro 3/26 (Dmitiry, “Senate, House differ in letters supporting Obama administration on Iran talks”, http://www.jns.org/latest-articles/2014/3/26/senate-house-differ-in-letters-supporting-obama-administration-on-iran-talks#.UzMhi\_ldX00)

An analysis of recent letters sent by members of the U.S. Senate and House of Representatives to President Barack Obama pledging support for the administration’s ongoing negotiations on Iran’s nuclear program reveal subtle, but crucial differences in tone. Though the idea of a letter on Iran occupied a key position in the agenda at the American Israel Public Affairs Committee’s annual policy conference in early March, the day the letters were delivered to the White House on March 18, the self-labeled “pro-Israel, pro-peace” lobby J Street—whose positions on the Iran issue have been more in line with Obama administration policy—claimed victory, stating that the conversation had moved away from “saber-rattling” to support of American-led diplomacy. Dylan Williams, J Street’s director of government affairs, drew attention to the fact that the letters do not list any prerequisites for a final deal and also would allow Iran to develop a civilian nuclear energy program. “This started in mid-December as an effort to impose sanctions and conditions as a matter of law through a bill,” said Williams. “That effort failed. Then it transformed into an effort to get a resolution, a bipartisan resolution, laying down parameters and final conditions for a deal. That effort failed.” “Then there was an effort to get a letter which laid down parameters and conditions, including zero [uranium] enrichment,” he continued. “That effort failed. So then you have a letter that will only be called bipartisan if it is genuinely supportive of the administration’s efforts and does not impose any onerous conditions on the negotiators.” Both letters, which were signed by an overwhelming majority of senators and House members from both parties, expressed support for the P5+1 negotiations in Geneva, while reasserting the belief that Congress should have a role in any final agreement. “As negotiations progress, we expect your administration will continue to keep Congress regularly apprised of the details,” the House letter stated. “And, because any long-term sanctions relief will require Congressional action, we urge you to consult closely with us so that we can determine the parameters of such relief in the event an agreement is reached, or, if no agreement is reached or Iran violates the interim agreement, so that we can act swiftly to consider additional sanctions and steps necessary to change Iran’s calculation.” The House letter, crafted by Majority Leader Eric Cantor (R-VA) and Minority Whip Steny Hoyer (D-MD), received 395 signatures. On the topic of sanctions, including those that have been rolled back by the administration after reaching an interim agreement with Iran back in January, the Senate letter stated that members of the chamber “believe, as you do, that the pressure from economic sanctions brought Iran to the table, and that it must continue until Iran abandons its efforts to build a nuclear weapon.” The Senate letter was led by Sens. Robert Menendez (D-NJ), Lindsey Graham (R-SC), Charles Schumer (D-NY), Mark Kirk (R-IL), Chris Coons (D-DE), and Kelly Ayotte (R-NH). It was signed by 83 senators. The letter was not specific whether the senators want to roll sanctions back to pre-framework levels or prevent further relief without an agreement. It also laments the danger of allowing Iran to circumvent current sanctions and benefit from growing international investment in its economy, mentioning reports of rising purchases of Iranian oil as proof. “Iran cannot be allowed to be open for business,” the letter stated. Such language could be seen as going further than those on the House side were willing to go. The only mention of sanctions in the House letter indicates that signatories do not oppose the rollback in sanctions, only that they will oppose future relief if certain conditions aren’t met. “Iran’s leaders must understand that further sanctions relief will require Tehran to abandon its pursuit of a nuclear weapon and fully disclose its nuclear activities,” stated the House letter. While both letters mention dismantling Iran’s nuclear weapons program, the House letter specifically mentions the possibility of a civilian program. “We do not seek to deny Iran a peaceful nuclear energy program, but we are gravely concerned that Iran’s industrial-scale uranium enrichment capability and heavy water reactor being built at Arak could be used for the development of nuclear weapons,” the House members wrote. The Senate letter seemed to go further. “We believe that Iran has no inherent right to enrichment under the Nuclear Non-Proliferation Treaty,” the letter stated. According to a senior Capitol Hill staffer who requested anonymity, these intentional differences had to do with the bipartisan goals set for the letters. The House letter, the staffer explained, is a direct descendent of a previously planned Hoyer-Cantor resolution on Iran sanctions that fell through earlier this year as the administration began pushing back against legislation demanding more sanction if negotiations failed. The staffer said Hoyer was more sensitive towards giving the administration leeway in negotiations before having House Democrats sign on. In the Senate, meanwhile, Menendez, who had earlier sponsored the Nuclear Weapons Free Iran Bill, was leading the effort with Graham, while Majority Leader Sen. Harry Reid (D-NV) and other key senators stayed off. Regardless of the House-Senate differences, the message remains that an overwhelming majority of both chambers want to be involved in what a final deal with Iran will look like. “Although the P5+1 process is focused on Iran’s nuclear program, we remain deeply concerned by Iran’s state sponsorship of terrorism,” the House letter stated. “We want to work with you to address these concerns as part of a broader strategy of dealing with Iran.”

#### Obama cannot resolve the talks because congress won’t permanently remove existing sanctions – prevents any serious concessions from Iran

Cullis 3/24 (Tyler, Policy Associate at the National Iranian American Council (NIAC), “Will US Sanctions Scuttle a Deal With Iran?”, http://iranian.com/posts/view/post/30246)

Less discussed, however, is what will need to happen in the US should that balance be found. This is troubling, especially in light of the fact that the White House might not have the power at present to meet its commitments if and when a nuclear deal is agreed to. July 1, 2010 - President Obama signs the 2010 Iran Sanctions Bill into law as lawmakers from both parties look on. (AP Photo/J. Scott Applewhite) As a recent NIAC report demonstrates, the President is deeply constrained in his ability to lift the robust energy and financial sanctions Congress has imposed on Iran. Under current law, the best the President can offer Iran are time-limited waivers that he promises to renew for as long as Iran keeps to its commitments under a nuclear deal and for as long as he remains in office. Whether succeeding Administrations would feel similarly bound to a nuclear deal that might well prove a political thunderbolt is unclear. If this is supposed to inspire the confidence required for Iran to agree to strong and sustained nuclear concessions, we’d do well to reconsider. Any deal that allows Congress to litigate and re-litigate the issue every six months (as would happen if waiver were used as the primary means of sanctions relief) is not one that Iran will feel comfortable hanging its hat on. The White House is aware of the problem. On the eve of the latest round of talks in Vienna, a senior administration official noted that the White House is “doing a considerable amount of work, including consultations with Congress . . . to understand in great detail how to unwind the sanctions.” Presumably, US negotiators have also communicated to the Iranians what is possible at present in terms of sanctions relief. But if so, therein lies the problem. If the US is offering limited and reversible sanctions relief to Iran’s negotiators, Iran might well reciprocate with similarly limited and reversible concessions on its nuclear program. This is especially likely to be the case as Iran’s negotiators came into the talks explicitly conditioning a nuclear deal on the dual principles of proportionality and reciprocity: limits to Iran’s nuclear program would be balanced out by what the US offered in return. In other words, the US could not ask for more while giving less. Moreover, by withholding from the President the ability to lift sanctions on a more permanent basis than available at present, we distort the logic that ostensibly informed sanctions advocates. Under this logic, Congress would impose sanctions on Iran so that if and when a nuclear deal was ever agreed to, lifting the sanctions would come with a cost to Iran. That cost would be measured out in the limits it placed on Iran’s nuclear program. But if the President is unable to relieve the sanctions on a permanent basis, this logic is defeated. It does not matter whether Iran is willing to concede important elements of its nuclear program. The White House is simply unable to match Iran’s concessions with sanctions relief of its own. In the give-and-take of negotiations, the US – it turns out -- has too little to offer. That is why it is critical that the White House and allies in Congress look closely at the current authorizations for the President to relieve the sanctions and consider what needs to take place if and when a nuclear deal is reached. It is entirely possible that Iran and the P5+1 reach agreement in the next several months. If so, the White House must be prepared to meet its commitments under a nuclear deal and, in so doing, ensure that Iran does the same. It would be a terrible irony if the sanctions – which its advocates contend are responsible for the seriousness of Iran’s present engagement – acted as a final bar to a secure and stable nuclear agreement with Iran.

#### Russia collapses the talks – they’ll use it as leverage over Ukraine

Gladstone 3/20 (Rick, “Russia Hints at Using Iran Talks as Leverage”, http://www.nytimes.com/2014/03/21/world/middleeast/russia-hints-at-using-iran-talks-as-leverage.html)

Despite public assurances by Western officials, concern is growing that the escalating animosity between the United States and Russia over the Ukraine crisis could have a corrosive effect on the nuclear talks with Iran. Even before the Obama administration expanded the scope of sanctions on Thursday over Russia’s annexation of Ukraine’s Crimean Peninsula, the Russians had sent signals that their retaliatory tools might include an altered position regarding the Iran talks, in which Russia and the United States are colleagues in the six-nation group negotiating with the Iranians. Two days of talks in Vienna concluded on Wednesday, with another round scheduled to begin April 7. Both sides said the talks had been constructive. But Russia’s delegate to the Iran talks, Sergei A. Ryabkov, the deputy foreign minister, hinted in comments reported by the Interfax news agency Wednesday night that Russia might link the Ukraine and Iran issues as part of its own diplomatic leverage with the United States and European Union. “We wouldn’t like to use these talks as an element of the game of raising the stakes, taking into account the sentiments in some European capitals, Brussels and Washington,” Mr. Ryabkov was quoted as saying. “But if they force us into that, we will take retaliatory measures here as well. The historic importance of what happened in the last weeks and days regarding the restoration of historical justice and reunification of Crimea with Russia is incomparable to what we are dealing with in the Iranian issue.” Mr. Ryabkov did not elaborate on what kind of retaliatory measures were envisioned. But some experts on Iran sanctions said they would not be surprised if the Russian president, Vladimir V. Putin, took steps to revive delayed plans for a barter deal with the Iranians that would enable them to sell more oil, undercutting the pressure exerted on Iran by Western sanctions. “I’m personally deeply concerned that the Russians are going to move ahead, if not with this deal, then some other sanction-busting scheme,” said Mark Dubowitz, the executive director of the Foundation for Defense of Democracies, a Washington-based group that has advocated tough sanctions on Iran. “If you’re Putin and you think you’re going to be a target of sanctions, the most obvious leverage is in the Iranian file, where Russian cooperation is so important,” Mr. Dubowitz said. The talks aim to resolve a decade-old dispute about Iran’s nuclear intentions, with the goal of reaching a comprehensive agreement in July. The six-nation group negotiating with Iran, known as the P5-plus-1 because it includes the five permanent members of the United Nations Security Council plus Germany, wants verifiable guarantees that Iran will never achieve the ability to make atomic bombs, despite Iran’s repeated assertions that its nuclear activities are peaceful. Some political analysts who have monitored the Iran talks said they were not necessarily troubled by Mr. Ryabkov’s remarks because Russia shares Western concerns about Iran’s nuclear ambitions and wants the issue resolved. “I think it’s bluster, trying to deter the kind of tough sanctions the U.S. announced today and the E.U. may impose tomorrow,” said Cliff Kupchan, the senior Iran analyst at the Eurasia Group, a Washington-based political risk consultancy. “Russia wants a deal on the nuclear issue — not a war in its backyard or an Iran with nuclear weapons. I think they’ll continue to play ball,” Mr. Kupchan said in an email. At the same time, he said: “Putin is on a ‘political bender,’ taking abrasive and unpredictable decisions. He’s lashing out. I don’t think he’ll do it, but he could impede the Iran talks — despite Russia’s own interest in their success. So there is risk.” A senior Obama administration official, speaking after the latest round of talks, said that so far there had been no change in Russian cooperation on Iran. Still, the official acknowledged, the Ukraine crisis was lurking in the background. “I continue to hope that ongoing events in the Ukraine and actions that may be taken will not change that,” said the official, who spoke on condition of anonymity because the negotiations are delicate. “But I can’t tell you today for a certainty that will be the case because all the events happening in the world are not under our control.”

#### Talks fail – Iranian right to enrich uranium and fissures between the P5+1 countries

NST 3/27 (New Strait Times, “Iran nuclear deal proves elusive”, http://www.nst.com.my/world/iran-nuclear-deal-proves-elusive-1.535445)

Foreign ministers from world powers struggled Saturday to nail down a landmark nuclear deal with Iran, with US Secretary of State John Kerry announcing his imminent departure and Iran's chief negotiator downbeat. As talks in Geneva went late into an unscheduled fourth day, Kerry's spokesman said Washington's top diplomat would be flying to London on Sunday morning -- presumably with or without a deal. Iranian chief negotiator Abbas Ar aqchi said he doubted that Tehran and the P5+1 world powers -- the United States, Britain, France, China, Russia and Germany -- could reach an accord by the end of Saturday. "Intense and difficult negotiations are under way and it is not clear whether we can reach an agreement tonight," Fars news agency quoted Araqchi as saying. The talks, mostly between Iranian Foreign Minister Mohammad Javad Zarif and P5+1 chief negotiator Catherine Ashton, are aimed at securing a freeze on parts of Iran's nuclear programme in return for limited sanctions relief. The arrival of Kerry and other P5+1 foreign ministers late Friday and on Saturday had raised hopes, after three long days of intense negotiations among lower-level officials, that a breakthrough was in sight. However the talks continued to drag on inside the smart Geneva hotel late Saturday. "We have now entered a very difficult stage," Zarif told state television. He insisted he would not bow to "excessive demands", without detailing the obstacles. British Foreign Secretary William Hague said on his arrival that the talks "remain very difficult" and that "we are not here because things are necessarily finished". Late on Saturday, Kerry went into a three-way meeting with Ashton and Zarif for the second time, a US official said following a meeting among the powers' foreign ministers. Two weeks ago, the ministers had jetted in seeking to sign on the dotted line, only to fail as cracks appeared among the P5+1 nations -- fissures that officials say are now repaired. But a second fruitless effort in Geneva in as many weeks would not only be an diplomatically embarrassing. If there is no deal, or at least an agreement to meet again soon and keep the diplomatic momentum going, the standoff could enter a new, potentially dangerous phase.

Since being elected in June, Iranian President Hassan Rouhani has raised big hopes that, after a decade of rising tensions over Tehran's nuclear programme, a solution might be within reach. Devil in the detail But if his diplomatic push fails to bear fruit, Tehran could resume its expansion of nuclear activities, leading to ever more painful sanctions -- and possible military action by Israel or the United States. Mark Hibbs, an analyst from the Carnegie Endowment for International Peace, said Kerry's imminent departure might not necessarily be a bad sign, however. Kerry leaving "might set a deadline and focus people's minds, especially if things this afternoon are bogging down in the details," Hibbs told AFP. Iran insists its nuclear programme is peaceful, but has failed to allay the international community's suspicions it is aimed at acquiring atomic weapons. The six powers want Iran to stop enriching uranium to a fissile purity of 20 percent, close to weapons-grade, but while allowing it to continue enrichment to lower levels. That would be a step back from successive UN Security Council resolutions that have called for Iran to halt all uranium enrichment. The powers also want Tehran to stop construction on a new reactor at Arak and to grant the International Atomic Energy Agency more intrusive inspection rights. A hard sell In return they are offering Iran minor and "reversible" relief from painful sanctions, including unlocking several billion dollars in oil revenues and easing some trade restrictions. This "first phase" interim deal is meant to build trust and ease tensions while negotiators push on for a final accord to end once and for all fears that Tehran will acquire an atomic bomb. A major sticking point has been Iran's demand -- again expressed by supreme leader Ayatollah Ali Khamenei t his week -- that the powers formally recognise it has a "right" to enrich uranium. Getting an agreement palatable to hardliners in the United States and in the Islamic republic -- as well as in Israel, which is not party to the talks -- is tough. Israel's Haaretz daily reported that over the last three days, Intelligence Affairs Minister Yuval Steinitz spoke by phone with two of the P5+1's foreign ministers to press Israel's concerns. In Washington there is a push by lawmakers to ignore President Barack Obama's pleas and pass yet more sanctions on Iran if there is no deal -- or one seen as too soft.

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### Studies

#### Torts do deter action- Schwartz concedes

Schwartz 95 (Gary T., Ph.D in law @ UCLA School of Law, “REALITY IN THE ECONOMIC ANALYSIS OF TORT LAW: DOES TORT LAW REALLY DETER?” 42 UCLA L. Rev. 377 1994-1995, Accessed @ HeinOnline)

Ever since the early 1970s, economically-minded scholars have advanced a deterrence theory of tort law. Yet critics, citing a list of realistic objections, have countered by claiming that tort law fails to deter. The ob- jections brought forward by the critics are quite plausible, and make it diffi- cult to believe that tort law deters as effectively as the economic analysis suggests. Moreover, the real-world indications of the deterrence efficacy of tort law are not immediately apparent. Tort scholars can easily envy their colleagues who teach courses such an environmental law and property law, in which the beneficial effects of legal rules arc often dramatic.111 Yet between the economists' strong claim that tort law systematically deters and the critics' response that ton law rarely if ever deters lies an intermediate position: tort law, while not as effective as economic models suggest, may still be somewhat successful in achieving its stated deterrence goals. Having formulated this intermediate position, this Article reviewed what information is available about tort law's effect upon safety efforts and safety results. The information is diverse—including formal empirical studies, surveys of physicians and corporate managers, reports provided by jour- nalists, and my own interview inquiries. The information suggests that the strong form of the deterrence argument is in error Yet it provides support for that argument in its moderate form: sector-by-sector, tort law provides something significant by way of deterrence. If, however, only the argument's moderate version is sound, one can wonder about the economists' efforts to fine-tune liability rules in an effort to achieve near-perfect deterrence. These efforts can be sized up as stimu- lating intellectual exercises that are often lacking in real-world relevance. (Often but not always: over time some fraction of these exercises will prob- ably yield findings with actual social payoffs.) Furthermore, if tort law is only moderately successful in achieving deterrence, the question remains whether its deterrence benefits are large enough to justify all the costs it imposes on society's actors. As it happens, pertinent data are available for medical malpractice in 1984. If these data are reliable, the malpractice sys- tem can be judged to have then been cost-beneficial. In addition, when the auto tort system is compared to complete auto no-fault, the relevant da- ta support a finding that the tort system produces safety benefits that pro- vide it with at least partial justification. Moreover, these favorable findings can be rendered even though the malpractice system reduces the malpractice rate by less than thirty percent, and even though the auto liability system (compared to no-fault) reduces the rate of negligent driving only by about ten percent. Admittedly, for most sectors of tort law the pertinent data bearing on safety benefits and defendant compliance costs are now and are likely to remain unavailable. For this and other reasons, most sectors of tort law cannot be subjected to anything resembling a full cost-benefit re- view. Nevertheless, even if tort law is only moderately successful in deter- ring negligent conduct, this success has been largely unacknowledged by the realist critics and has a major bearing on any public-policy review of the tort system.

## SG

### DC

#### 2. Case won’t make it to the Supreme Court - the DC circuit will have last word

Wheeler-Brookings, Governance Studies-5/22/13 http://www.acslaw.org/acsblog/all/u.s.-court-of-appeals-for-the-district-of-columbia-circuit?page=2 Scuttling a President’s ‘Popular Imprint’ on the Judiciary

While the Supreme Court attracts the lion’s share of attention from the press and the public, it hears only a tiny fraction of the appeals filed each year. The nine Justices, who generally get to pick which appeals they will consider, heard only 79 cases during the 2011-2012 term. Only a tiny number of those cases were appealed from the D.C. Circuit. In contrast, the D.C. Circuit cannot simply choose not to hear an appeal. In the year that ended in September 2012, nearly 1,200 appeals were filed before the court. This means that when the D.C. Circuit makes a ruling, it is almost guaranteed to have the last word.

And because of the D.C. Circuit’s jurisdiction it has the last word on a wide range of federal laws, including congressional enactments and regulations adopted by federal agencies and departments. By virtue of the types of cases it hears, the court has a unique ability to put its stamp on an enormous array of the nation’s laws in a way that other circuits simply do not. Congress requires the D.C. Circuit to be the immediate and exclusive court to consider appeals of a breathtaking array of agency regulations and decisions. Moreover, even when parties appealing agency decisions have a choice of venues, they often choose to have their cases heard by the D.C. Circuit, sometimes due to its expertise in complex administrative matters and sometimes to take advantage of the court’s ideological imbalance. For the same reason, the D.C. Circuit is also a prime choice for those challenging congressionally passed statutes or presidential actions. Much of the machinery of United States administrative law (the rules adopted by federal agencies that affect so many aspects of our society) runs through the D.C. Circuit. According to a September 2012 report by the Administrative Office of U.S. Courts, 43 percent of the appeals filed at the D.C. Circuit in the past year were related to administrative actions. For circuit courts overall, that number is only 15 percent.

#### 3. Even if it gets appealed, the appeals process can take a whole year—after their disad

Wisenberg 08 (Adrienne U. is Of Counsel in the DC office of Barnes & Thornburg, LLP, Federal Criminal Appeals: 10 Things You Should Know, http://corporate.findlaw.com/litigation-disputes/federal-criminal-appeals-10-things-you-should-know.html)

But no technology can make the central task of the appellate process go faster. The process requires that individual judges read, research, and consider the arguments. Judges are obviously human beings, and human beings can only work so many hours a day. To be sure, federal appellate judges have staffs of clerks and assistants to help them, and many courts also employ large groups of attorneys, called staff attorneys, who process the more routine cases and present them in truncated form to the judges. Still, the bottom line is that people are handling your appeal, and they are handling hundreds of others too, so it takes a while to resolve these cases. The slow nature of the federal criminal appeals process is a fact of life. I've been dealing with this fact of life for the balance of my career. I've observed that clients are generally amazed-even after I've warned them from the start regarding the slowness of the process-how long these cases take. It is important, however, for the development of American jurisprudence, that every case be carefully researched and considered. After all, our legal system is based on the development of precedent, so the research that goes into a particular decision is the most critical part of every case. The process simply takes time. When I tell clients the process is slow, they want to know just how slow. The Administrative Office of the U.S. Courts produces detailed annual statistics of each federal court's caseload. You can check out those numbers at http://www.uscourts.gov/cgi-bin/cmsa2007.pl These statistics reveal that cases on appeal in the federal system generally take right around a year. If you are in a big rush, you have the best chance of a "quick" decision if you happen to be in the Fourth Circuit, which covers Maryland, North Carolina, South Carolina, Virginia and West Virginia. In 2007, the Fourth Circuit's median time for the "life" of an appeal (from notice of appeal to decision) was 8.8 months. The slowest of the 12 federal circuits in 2007 was the Ninth Circuit, which covers California, Nevada, Washington, Oregon, Idaho and Montana, where the median time for resolution was 17.4 months.

### UQ

#### Court wading into detention SG has to defend Obama’s highly politicized healthcare cases

#### Obama fights it now and if they fail, it will reopen debate

Cannon 3/25 (Michael F., “Hobby Lobby isn't today's most important case: Column”, http://www.usatoday.com/story/opinion/2014/03/25/obamacare-irs-halbig-sebelius-health-care-insurance-column/6830651/)

The Obama administration has acquired a reputation for unilaterally rewriting laws (to say nothing of abusing the IRS's powers) for political purposes, but this one takes the cake. The IRS is literally spending billions of taxpayer dollars not only without congressional authorization – itself a federal crime – but contrary to the clearly expressed will of Congress. And it gets worse. Since that spending triggers penalties under Obamacare's employer and individual mandates, the IRS also plans to tax millions of Americans without congressional authorization. Dozens of employers and individuals who would be subject to those illegal taxes have filed four separate lawsuits to stop the illegal spending that triggers them. Halbig is the first to reach the appellate level. When a statutory provision is clear and the rest of the statute is consistent with that provision, that's supposed to be the end of the story. The Supreme Court has long held, "[If] Congress has spoken directly to the precise question at issue…that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Yet the Obama administration fears that if consumers in 34 states experience the full cost of Obamacare, Congress will have no choice but to reopen the law. It has therefore offered numerous arguments in defense of its unauthorized spending and taxes – not because any of these arguments have merit, but because none of them do. Nevertheless, a district court ruled against the Halbig plaintiffs based on a severely distorted view of Congress' intent. The court wrote, "there is no evidence that either the House or the Senate considered making tax credits dependent upon whether a state participated in the Exchanges."

### Link

#### ---No link –

#### A. Meritless cases will be dismissed

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

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

#### B. Inherent checks

Harvard Law Review 79 (“Case Comments – Bivens Actions for Equal Protection Violations: Davis v. Passman”, Vol. 92, No. 3, Jan. 1979, Pg. 755 – 756)

Moreover, contrary to the majority's apprehensions, "extend- ing" Bivens remedies to encompass the entire Bill of Rights should have no dire consequences for the federal courts. The criteria distilled from Bivens itself assure that only under very limited circumstances will a court be required to imply a federal damage remedy or some other appropriate form of relief.69 As a threshold matter, the alleged injury must implicate a constitutionally protected interest. This would preclude the importation of a host of nonconstitutional torts under the guise of due process violations.70 Second, the court must determine that no adequate alternative remedy is available to the plaintiff. Presumably, a damage remedy would be implied only in those cases where the exercise of a court's traditional equitable powers was inappropriate 71 or would not provide adequate relief. At a maximum, the proposed scope of Bivens remedies would provide the functional equivalent of a federal section I983, with the important qualification that the Bivens action be available only in the absence of adequate alternative remedies. In the unlikely event that such claims should begin to overburden the courts, Congress could prescribe an alternate remedial mechanism or take steps to curb the lawless acts of federal officials.7

#### C. Limited amount of cases

Chesney 13 (Professor Robert Chesney, Associate Dean for Academic Affairs, University of Texas School of Law, Testimony before the United States House of Representatives Committee on the Judiciary, “Drones and the War on Terror: When Can the United States Target Alleged American Terrorists Overseas?” February 27, 2013, http://www.brookings.edu/~/media/Research/Files/Testimony/2013/02/27%20drones%20chesney/Robert%20Chesney%20Testimony\_House%20Committee%20on%20Judiciary\_%2002272013.pdf)

In theory, a judicial review mechanism need not be limited to the targeting of U.S. persons. But if Congress does enact a judicial-review system, it is far more likely to withstand constitutional challenge if it is so limited. Any proposal for judicial involvement in decisions to use force will prompt objections from those who view this as an unconstitutional interference with the President’s Article II authorities and obligations. Legislation of this kind would be far more likely to survive if weighty constitutional considerations also rest on the other side of the balance—as would be the case if the system is designed to vindicate the Fourth and Fifth Amendment rights of U.S. persons. This approach also has the virtue of bringing judicial review into play only on rare occasions (at least on current reasonably-foreseeable trends), thus avoiding practical objections pertaining to the limited bandwidth of the judiciary or the burdens that might be placed on the government itself.

## Obama DA

### Link

#### Obama wont backlash to court decision

Altmann 2007 (Jennifer Greenstein, assistant editor at the Princeton Weekly Bulletin, News At Princeton, http://www.princeton.edu/main/news/archive/S18/17/72G06/?section=featured)

In his new book, "Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court and Constitutional Leadership in U.S. History," Whittington argues that in recent years the court has become the key player in an important political tussle: Who has the final say in constitutional matters? Whittington asserts that the court has become the final arbiter, but that status did not result from a power grab by the court. Its power, remarkably, has come from politicians, who have pushed onto the court the responsibility for making final rulings on constitutional matters because, paradoxically, it benefits the politicians. "Presidents are mostly deferential to the court," said Whittington. "They have pushed constitutional issues into the courts for resolution and encouraged others to do the same. That has led to an acceptance of the court's role in these issues." It seems counterintuitive that politicians would want to defer to the court on some of the most high-stakes decisions in government, but Whittington has found that they do so because the court often rules in the ways that presidents want — and provides politicians with the political cover they need. In 1995, the Clinton administration faced a proposal from the Senate to regulate pornography on the Internet. The president thought the bill was unconstitutional, but he didn't want to risk appearing lenient on such a hot-button issue right before he was up for re-election, Whittington said. Clinton signed the legislation with the hope that the Supreme Court would strike it down as unconstitutional, which it later did.

#### studies prove losers lose in the context of courts is wrong

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.

#### c.) Supreme Court is crushing Obama left and right

McLaughlin, Washington Times, 6/26/13 (Seth, “Obama administration has lost two-thirds of Supreme Court cases”, http://www.washingtontimes.com/news/2013/jun/26/obama-administration-lost-two-thirds-of-cases-duri/?page=all)

President Obama celebrated the Supreme Court’s decisions Wednesday on gay marriage, but overall it has been a rocky term before the court for his administration, winning just more than a third of the cases in which it was involved. Lawyers said the government traditionally averages about a 70 percent winning percentage before the high court. Its advantages are so great that the Justice Department’s chief Supreme Court attorney, the solicitor general, is dubbed the “10th Justice.” But during the 2012-13 term, which began in October and ended Wednesday, the court rejected Mr. Obama’s arguments on property rights, affirmative action, voting rights and other issues. “Despite some notable victories, the Obama administration has had an unusually poor batting average at the high court,” said Adam Winkler, a constitutional law professor at UCLA. “Like last year, the Obama administration lost more cases than it won.” By Mr. Winkler’s count, the Obama administration has won 39 percent of the cases in which it has been a party in the litigation, and won 50 percent of the cases in which the government filed a “friend of the court” brief backing one side or the other. Mr. Winkler said a good portion of the administration’s poor batting average can be traced to ideological differences between the Obama administration and the five conservative-leaning Supreme Court justices. Indeed, the administration backed the losing argument in 11 cases that were decided 5-4, and one case that was decided 5-3. “What arguments can you make to a court that is determined to overturn the Voting Rights Act?” Mr. Winkler said. “The court is hostile to the administration’s arguments and the administration is not presenting the best arguments. So there is lot of blame to go around.” Still, not all of the cases were ideological battles. The Obama administration was on the losing end of several 9-0 decisions, including last year when the court held that churches have the right to make employment decisions free from government interference over discrimination laws, and said an Idaho couple could challenge the Environmental Protection Agency over government claims that they could not build a home on private property that was deemed a protected wetland. The nine justices also agreed this month to clear the way for California raisin growers to challenge the constitutionality of a Depression-era farming law that makes them keep part of their annual crop off the market. The losses continued to pile up for Mr. Obama this week after the court went against the wishes of the White House in cases that involved affirmative action in Texas, private property rights in Florida and a challenge to the Voting Rights Act of 1965. Ilya Somin, a constitutional law professor at George Mason University, said it is striking to take into account the number of times the Obama administration has been on the losing end of unanimous decisions. “When the administration loses significant cases in unanimous decisions and cannot even hold the votes of its own appointees — Justices Sonia Sotomayor and Elena Kagan — it is an indication that they adopted such an extreme position on the scope of federal power that even generally sympathetic judges could not even support it,” said Mr. Somin, adding that presidents from both parties have a tendency to make sweeping claims of federal power. “This is actually something that George W. Bush and Obama have in common.” The president scored at least a partial victory Wednesday in perhaps the biggest cases of the term when the court invalidated the 1996 Defense of Marriage Act, which defines marriage for the purpose of federal law as a legal union between one man and one woman. The court also ruled that the supporters of California’s Proposition 8, the ban on gay marriage that voters passed by referendum in 2008, did not have the standing to argue the case in court. Relaying Mr. Obama’s reaction, White House spokesman Jay Carney said the president described the DOMA ruling as “historic” and the Proposition 8 ruling as a “tremendous victory.” The rulings, though, were not complete victories for Mr. Obama’s stances. The court did not decide whether same-sex marriage is a constitutional right or address whether the California law is unconstitutional. “They made an argument in the Prop 8 case; it was rejected,” Mr. Winkler said. “They made an argument in the DOMA case; it was rejected. So they are happy with the results of today’s cases, but their arguments were not accepted by the court.”

Their backlash arguments are wrong—Obama is Teflon

Weigant, political commentator, 13

(Chris Weigant, “Obama's Teflon Presidency?,” http://www.huffingtonpost.com/chris-weigant/obamas-teflon-presidency\_b\_3309293.html, ldg)

Is Barack Obama our nation's second "Teflon president"? The question has occurred to me before, but it became impossible to ignore after the last week of "Scandalgate." Even after multiple scandals all vying for the top headline throughout the week, over the weekend CNN reported poll numbers showing Obama currently enjoys 53 percent of the public's approval for the job he's doing. His numbers actually rose from the last time the poll was taken, when Obama was at 51 percent approval. That's pretty stunning news, after the week the president just had. Which is why it's now time to ask the question -- does Obama have the "Teflon" quality of having nothing stick to him, no matter what? Of course, this might be a premature conclusion to draw, for quite a number of reasons. The first of which is that it's still pretty early, as Washington scandal cycles go (except for Benghazi, which has been around for months). More revelations are likely on the way, and they could bend public opinion in either direction, really. But you can bet the Republicans are going to spend a whole lot of time digging, for the foreseeable future. So even if nothing major comes to light, there will still be a steady stream of wonky details from congressional committees, which the pundits will chew over with delight. The second reason drawing any conclusions or predictions is premature is that it's too early for the public, as well. While people who constantly keep abreast of every tiny shred of political news (and I do include myself in that group) are already fully aware of the scandal details, the general public simply doesn't pay that close attention to politics. The number of people who get their news from late night comics is astounding, and has to be factored in. No matter what the political scandal, it takes time to seep in (or percolate up, take your pick) to the public's consciousness. Any poll takes a few days to conduct, and more time to compile, so CNN was asking the public pretty early on in the scandal cycle to begin with. Give it another week, and the numbers may shift dramatically, as more and more people become informed (in whatever way) about the details of what's going on. The third reason it's too early to declare a trend is that this is only one poll. It may be what pollsters call an "outlier" -- a random skewing of the responses that winds up being mistaken about the direction of the public's opinion. This isn't to knock CNN or their polling -- outliers can happen to any polling organization, and it's why smart poll-watchers only believe a valid trend exists after multiple polls begin to show the same picture. Even with all of these caveats, if the CNN poll does turn out to be indicative of the public's true feelings, it is pretty remarkable. Which leads to the Reagan comparison. Ronald Reagan (at least, up until the Iran-Contra scandal) was the first to be called a "Teflon president" because no matter what scandals popped up on his watch, he appeared to float above them all. Nothing stuck, hence the Teflon label. Barack Obama has long admired the transformational nature of Reagan's presidency (which has often been mischaracterized as Obama supporting or approving of Reagan's actual agenda, which is a completely different thing and not true). But the comparison in the two men's political skills seems to becoming more and more apt. Scandal after scandal (or, at least, what his opponents label "scandal," at any rate) is thrown at Obama, and not much of it gains any traction with the public, outside of people who already don't approve of Obama and never will. Take a look at a comparison chart of job approval numbers for Barack Obama and Ronald Reagan (and please note, this is a chart of monthly averages which doesn't include any Obama numbers for this month, yet): The blue and brown lines show Ronald Reagan's approval and disapproval. The green and red lines show Obama's. Reagan, by this point in his term (and excluding the first year's "honeymoon period"), had experienced higher highs and lower lows than Obama has. Reagan spent a whole 10 months with a lower job approval rating than the lowest number Obama has ever charted, and Reagan dipped well below 40 percent in his worst month. By comparison, Obama (also excluding the initial honeymoon) has kept his approval rating almost exclusively between 45 and 55 percent. That's amazingly stable. Obama did spend four months below 45 percent and hit a low of 43.4 percent in the middle of the debt ceiling budget fight in 2011. But other than that, his numbers don't change all that much, no matter what story is breaking. Even the death of Osama bin Laden didn't push Obama much above 50 percent approval, and if you remove that data point and his second post-election "honeymoon," his approval has stayed within the 45-50 percent range for over three years. That's a much tighter range than even Mr. Teflon himself, Ronald Reagan, could manage. During this period, the Republicans have thrown everything but the kitchen sink at him. They have made it their party's highest priority to tear down Obama, and they have stunningly failed to convince the public to change their mind about the man all that much. Perhaps this is a big part of the problem. Perhaps crying "Kenyan!" too often has discredited their alarms, to put this another way. The populace hears that Obama is a socialist or hates America or is trying to destroy this or that aspect of American life -- and they collectively yawn, because they are considering the source. Republican scandal overreach may be coming home to roost, to mix the metaphors a bit. Perhaps the CNN poll will indeed prove to be an outlier. Perhaps Obama's numbers aren't actually going up even after the trifecta of scandals last week. It is really too early to identify that trend, and we'll have to wait a week or so to see some other polls to figure out what's really going on out there. But I would be willing to bet that even if Obama's numbers do go down, they won't go down all that much. It seems that roughly 45 percent of the public will approve of Obama no matter what the other side throws at him, and roughly 45 percent of the public will never approve of the job Obama's doing (even killing bin Laden didn't convince them, remember) no matter what happens. The 10 percent in the middle will fluctuate by a few points, but on the whole, remain within a tight range. I don't know what else to call that but Teflon.

### Thumper

#### Losers lose non-unique – Ukraine – recent Obama interventions don’t overcome congressional backlash

McManus 3/23/14 (Doyle, staffwriter, “What would a Republican president do about Ukraine?” <http://www.latimes.com/opinion/commentary/la-oe-mcmanus-column-rebublicans-ukraine-20140323,0,4303362.column#axzz2x5kPkD4i>)

Here's what the United States has done so far in an attempt to deter further Russian incursions into Ukraine: applied two rounds of economic sanctions and asked Congress to approve $1 billion in loan guarantees for Kiev. Here's what President Obama says he won't do: "We are not going to be getting into a military excursion in Ukraine," he told a television station in San Diego last week. The president's careful response and unwillingness to consider military intervention has met with general support from other Democrats. But Republicans have been sharply critical. "This is the ultimate result of a feckless foreign policy in which nobody believes in America's strength anymore," Sen. John McCain (R-Ariz.) charged this month. The sniping is no surprise given the partisan divide in Washington. But would a Republican in the White House instead of Obama actually plot a different course? That would depend entirely on which Republican we're talking about. The GOP has long been divided on foreign policy, and Ukraine has exposed fault lines that are likely to grow as the Republicans' 2016 nomination contest nears. On foreign policy in general, and on Ukraine in particular, Republicans fall into three camps: hawks, realists and libertarians. Let's start with the hawks. McCain, the hawk's leading voice on Ukraine, has been warning against a resurgent Russia at least since his 2000 presidential campaign, when he called for sanctions against Putin over Russia's actions in Chechnya. In the current crisis, he is still not calling for U.S. boots on the ground, but he has called for immediate shipments of small arms and ammunition to Kiev, as well as U.S. intelligence-sharing. "The United States should not be imposing an arms embargo on a victim of aggression," he said last week. Sen. Marco Rubio (R-Fla.), a younger hawk, has gone a step further, calling not only for military aid to Kiev but also for suspending cooperation with Russia on other diplomatic projects, including negotiations with Iran. "Put simply, Russia should no longer be considered a responsible partner on any major international issue," Rubio wrote last week in what amounted to a call for a new Cold War. William Kristol, editor of the Weekly Standard, may be the most hawkish of the hawks. Last week, he told CNN that "deploying ground troops … should not be ruled out." Closer to the center of the GOP is moderate conservative Sen. Bob Corker (R-Tenn.), the top Republican on the Senate Foreign Relations Committee and a realist when it comes to foreign policy. Corker had the courage to praise Obama's economic sanctions as "a step in the right direction," although he said he thought the president should add tougher measures. "We should send some shock waves through the Russian economy," he told me. But military aid can wait, Corker said. "I don't know that that's something we should be doing right away." Over the long run, the United States should strengthen its military relationship with Ukraine, Corker said -- but not now, in the heat of the crisis. "Military assistance isn't the priority today," he said. "It's to establish with the Ukrainians that we're going to be with them over the long haul." The calmest part of the Republican Party when it comes to Ukraine may be its most traditional realists, who ran foreign policy during several presidencies. The main U.S. goal in Ukraine, former national security advisor Brent Scowcroft said last week, should be to make sure the conflict in Russia's backyard doesn't spread to other countries or other issues. "I don't think it's an issue of that great consequence," Scowcroft said of Crimea. It would be a mistake, he said, to try to match Russia "belligerence by belligerence." "That may be where we end up, but I doubt we have to start there." Finally, there are the libertarians, which brings us to Sen. Rand Paul (R-Ky.), who's at the top of early polls of potential Republican presidential nominees. Paul has been working hard in recent months to make his positions sound closer to the party's mainstream, which means criticizing the president and trying to sound hawkish. But as a libertarian, he still wants to wage a minimalist foreign policy. The current situation has left him sounding a bit incoherent. "If I were president, I wouldn't let Vladimir Putin get away with it," Paul announced in a column in Time magazine. What would he do? Among other steps, he'd suspend all U.S. economic aid to Ukraine, because some of the money might end up in Russia. In short, he'd destroy the Ukrainian economy in order to save it. But the senator didn't go as far as his far more isolationist libertarian father, who wrote in USA Today that even that much activism in Ukraine would be too much. "Why does the U.S. care which flag will be hoisted on a small piece of land thousands of miles away?" Ron Paul wrote. "So what?" And that attitude may have the most resonance with the American people. A Pew Research Center poll conducted in early March, before Crimea was annexed, found that most Americans believed the United States should "not get too involved" in the conflict. That included 50% of Republicans, against only 37% who favored taking a firm stance against Russia. The crisis in Ukraine has presented a new opportunity for Republicans to snipe at the Obama administration, and they have embraced the task enthusiastically. But the pile-on isn't without risk. Debate about what to do about Russia has also caused new fissures within the party, and they're unlikely to be healed before 2016.

#### Ukraine is a loss for Obama now even with responses

Lowery 3/17/14 (Wesley, covers Capitol Hill for The Fix and Post Politics, “Lawmakers praise sanctions, say Obama must go further to curb Russian aggression” <http://www.washingtonpost.com/blogs/post-politics/wp/2014/03/17/lawmakers-praise-sanctions-say-obama-must-go-further-to-curb-russian-aggression/>)

Several members of Congress voiced support for sanctions against Russian leaders announced by President Obama earlier today, but urged him to go further to deter Russian President Vladimir Putin from taking further steps to annex Crimea and take the region from Ukraine. The sanctions, announced Monday morning, freeze the assets of seven Russian officials and four of their allies in Ukraine's Crimea region. The action by the Obama administration was praised by several members of Congress, while others blasted the sanctions for not going far enough. "The crisis in Ukraine calls for a far more significant response from the United States," declared Sen. John McCain (R-Ariz.), in a lengthy statement released Monday afternoon. "Today's Executive Order could be an important part of that response, but sanctioning only seven Russian officials is wholly inadequate at this stage." Without stronger U.S. and Western reaction, McCain said, “we run the risk of signaling to Putin that he can be even more expansive in furthering his old imperial ambitions, not only in Ukraine, but also in Central and Eastern Europe, the Baltic countries and parts of Central Asia.” McCain urged the Obama administration to “rush the modest military assistance to the Ukrainian government that its leaders have requested.” Sen. Ted. Cruz (R-Tex.) urged Obama to install anti-ballistic missiles in Eastern Europe. “Appeasement hasn’t worked,” he told The Washington Post. He said an expanded U.S. military presence in Poland and the Czech Republic, similar to a missile-defense plan proposed by President George W. Bush and scrapped by the Obama administration in 2009, would provide a counterbalance to Putin’s regional power. And it wasn't just congressional Republicans urging the Obama administration to take a stronger stance; several Democrats also signaled that they would support a more heavy-handed response. “I support the sanctions announced today, and I strongly urge the President to go further and consider a broader range of consequences,” Rep. Tulsi Gabbard (D-Hawaii), an Army combat veteran and member of the House Foreign Affairs Committee, said in a statement. “ If Russia is allowed to continue its aggressive push for control in Ukraine, there will be long-term, serious, and costly security risks for the United States and Europe. Russia must face serious consequences for its actions; the U.S. must consider options that truly isolate Russia economically and diplomatically—not just sanction a handful of oligarchs—and send a message of unity and strength from the international community." Still other members of the Senate and House said that Obama's choice to impose limited sanctions afford the administration more leverage and flexibility to deal with the still-fluid situation moving forward.

#### No unique link – Ukraine is a loss for Obama

Curry 3/2/14 (Tom, staffwriter, “GOP Members of Congress Slam Obama Response to Ukraine Crisis” <http://www.nbcnews.com/storyline/ukraine-crisis/gop-members-congress-slam-obama-response-ukraine-crisis-n42506>)

Two prominent congressional Republicans slammed President Barack Obama’s handling of the Ukraine crisis Sunday and urged him to take action to punish Russian President Vladimir Putin. Sen. Lindsey Graham, R-S.C., said Obama ought to “stop going on television and trying to threaten thugs and dictators…. Every time the president goes on national television and threatens Putin or anyone like Putin, everybody's eyes roll, including mine. We have a weak and indecisive president that invites aggression.” House Intelligence Committee chairman Rep. Mike Rogers, R-Mich., said on Fox News Sunday that “Putin is playing chess and I think we are playing marbles, and I don’t think it’s even close. They’ve been running circles around us.” Rogers called Obama’s advisors “naïve” in their thinking about Russia.

### Deal fail

#### --negotiations fail – fundamental differences in what each country thinks the agreement is – makes Iran nuclearization and the impact inevitable

Rubin 1/24 (Jennifer, The Washington Post, “Iran negotiations train wreck ahead”, http://www.washingtonpost.com/blogs/right-turn/wp/2014/01/24/iran-negotiations-train-wreck-ahead/)

The last time a liberal (Sen. Max Baucus of Montana) warned about an Obama administration “train wreck” (regarding Obamacare), he was prescient. There is a good chance now that CNN’s foreign policy pundit and Post columnist Fareed Zakaria, usually very much in tune with the administration’s foreign policy, hit the nail on the head following an interview with Iranian President Hassan Rouhani. Zakaria surmised that the Iran negotiations are facing “a train wreck . . . a potentially huge obstacle because the Iranian conception of what the deal is going to look like and the American conception now look like they are miles apart.” There is good reason to believe Zakaria. His conclusion was based in large part on his interview with Rouhani, who candidly described his country’s views on dismantling its nuclear weapons program: “Not under any circumstances.” Zakaria’s conclusion, even without Rouhani’s admission, is also bolstered, as we have noted, by the independent Institute for Science and International Security report’s description of the vast changes Iran would have to make — far in excess of anything it has suggested in the past — to meet the bare minimum requirements even the U.S. negotiators say are required (already watered-down from the United Nations resolutions). Given everything we know, it is hard to fathom how the Obama administration, as feckless as it is, could possibly believe the Iranians are willing to do what we are demanding. Josh Block, a Democrat and executive director of the Israel Project, e-mailed, “It is deeply troubling but not at all shocking that Rouhani says Iran will never step back their nuclear pursuit. The America people know Iran is lying when they say they aren’t building nukes.” He continued, “Congress knows they are lying. But if the Administration wants to leaves Iran enriching uranium — after Rouhani himself said if they can enrich to 3.5% they can make a bomb and now declares they will never dismantle their centrifuges — clearly they would be putting our fate in Iran’s hands.” Or put differently, Obama seems willing to continue a ludicrous process and/or accept any deal to avoid the United States having to take matters into its own hands. Rouhani’s comment, coupled with the refusal to release publicly the entire text of the so-called implementation agreement for the interim deal, suggests either the White House is misleading the public (i.e. it knows negotiations can’t succeed) or is delusional in its expectation that a deal anywhere in the ballpark of acceptability is in the offing. (In the same way Secretary of State John Kerry is convinced a peace agreement for Syria can work out, abject fear of failure is a powerful narcotic.) The White House is obsessively focused on shutting down Senate legislation and on tamping down the push-back it has received from allies and pro-Israel groups here. No doubt the White House drones are buzzing with resentment that their handiwork is being revealed to be a smoke screen for containment. (You can hear it now: There is nothing to be done. We tried. Do you want boots on the ground? Do you?) The Obama gang has infinite time and energy to attack Israel for making trouble, label sanctions supporters as war-mongers, spin the media and its supporters (I repeat) and plot to block congressional action, but it has no stomach for dealing with the real world. Sen. Mark Kirk (R-Ill.), a co-sponsor of current and previous sanctions legislation, regards Rouhani’s admission as more than enough reason to push ahead with the only leverage we have at this point: more sanctions. He told Right Turn, “A continued policy of appeasement will lead to a world with Iranian nuclear weapons and unnecessarily risk a nuclear war in the Middle East. The overwhelming majority of the House and Senate support the bipartisan Nuclear Weapon Free Iran Act.” He pointedly added, “It’s time to schedule a vote on the bill to give the American people the diplomatic insurance policy they deserve.” A sanctions bill, however, is stalled. That’s because for all their fine words about Iranian danger and the beneficial effect of sanctions, Sen. Harry Reid (D-Nev.) and his fellow Democrats are, above all (and to a degree not fully comprehensible to Republicans, who have no problem squabbling among themselves), partisan loyalists. Knowing the president’s outlook is foolish and wrongheaded, they nevertheless refuse to move forward. The best you can say for the cowering Democrats is that they figure, like Zakaria, the talks will collapse anyway so the president can get his comeuppance from the Iranians rather than from Democrats. (Given the choice between defying the White House’s bleating and waiting for things to take their course, it is an easy choice for those in a party for which support for Israel is optional.) To be clear: The president doesn’t want to acknowledge a diplomatic impossibility and accept responsibility for decisive action against Iran. The Dems in Congress don’t want to admit publicly that the White House is in fantasyland and accept responsibility for implementing sanctions that might force Iran to be more forthcoming. As a result, Rouhani brags. The centrifuges spins. And Israel is left to contemplate how and when it will need to act in its own defense and in defense of the West.