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#### 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.

#### Commanders are adapting to litigation to maintain unit cohesion – they will instill the rule of law to lower level officers in order to build a stable chain of command

Dunlap 9 (Charles J., Major General, USAF, is Deputy Judge Advocate General, Headquarters U.S. Air Force, “Lawfare: A Decisive Element of 21st-Century Conflicts?” Joint Force Quarterly – issue 54, 3d

quarter 2009, www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA515192‎)

Of course, the availability of expert legal advice is absolutely necessary in the age of lawfare. The military lawyers (judge advocates) responsible for providing advice for combat operations need schooling not only in the law, but also in the characteristics of the weapons to be used, as well as the strategies for their employment. Importantly, commanders must make it unequivocally clear to their forces that they intend to conduct operations in strict adherence to the law. Helping commanders do so is the job of the judge advocate. Assuring troops of the legal and moral validity of their actions adds to combat power. In discussing the role of judge advo- cates, Richard Schragger points out: Instead of seeing law as a barrier to the exercise of the clients power, [military lawyers] understand the law as a prerequisite to the meaning- ful exercise of power.... Law makes just wars possible by creating a well-defined legal space within which individual soldiers can act without resorting to their own personal moral codes}\* That said, commanders should aim not to have a judge advocate at the elbow of every rifleman, but rather to imbue troops with the right behaviors so they instinctively do the right thing on the battlefield. The most effective way is to carefully explain the enemy's lawfare strategies and highlight the pragmatic, real-world impact of Abu Ghraib-type incidents on the overall success of the mission. One of the most powerful motivators of troop conduct is the desire to enhance the security of fellow soldiers. Making the connection between adherence to law and troop safety is a critical leader- ship task. Integral to defensive lawfare operations is the education of the host nation population and, in effect, the enemy themselves. In many 21\*-century battlespaces, these audiences are not receptive to what may appear as law imposed by the West. In 1999, for example, a Chinese colonel famously argued that China was "a weak country, so do we need to fight according to your rules? No. War has rules. but those rules arc set by the West……[I]f you use those rules, then weak countries have no chance." To counter such beliefs, it is an essential lawfare technique to look for touchstones within the culture of the target audience. For example, in the early 1990s, the International Committee of the Red Cross produced an illustrated paperback that matched key provi- sions of the Geneva Convention "with bits of traditional Arab and Islamic wisdom!\*" Such innovations ought to be reexamined, along with creative ideas that would get the messages to the target audience. One way might be to provide audio cassettes in local languages that espouse what arc really Geneva Convention values in a context and manner that tit with community religious and cultural imperatives. The point is to delegitimize the enemy in the eyes of the host nation populace. This is most effectively accomplished when respected indigenous authorities lead the effort. Consider Thomas Friedman's favor- able assessment to the condemnation by Indian Muslim leaders to the November 2008 Mumbai attacks: The only effective way to stop (terrorism) is tor "the village"—the Muslim community itself— to say "no more" When a culture and a faith community delegitimize this kind of behavior, openly, loudly and consistently, it is more impor- tant than metal detectors or extra police.\* Moreover, it should not be forgotten that much of the success in suppressing violence in Iraq was achieved when Sunnis in Anbar Province and other areas realized that al Qaeda operatives were acting contrary to Iraqi, and indeed Islamic, sensibilities, values, and law. It also may be possible to use educa- tional techniques to change the attitudes of enemy lighters as well. Finally, some critics believe that "lawfare\* is a code to condemn anyone who attempts to use the courts to resolve national security issues. For example, lawyer-turned- journalist Scott Horton charged in the luly 2007 issue ot Harper's Magazine that "lawfare theorists\* reason that lawyers who present war-related claims in court "might as well be terrorists themselves."™ Though there are those who object to the way the courts have been used by some litigants.\*0 it is legally and morally wrong to paint anyone legitimately using legal processes as the "enemy." Indeed, the courageous use of the courts on behalf of unpopular clients, along with the insistence that even our vilest enemies must be afforded due process of law. is a deeply embedded American value, and the kind of principle the Armed Forces exist to preserve. To be clear, recourse to the courts and other legal processes is to be encouraged: if there are abuses, the courts are well equipped to deal with them. It is always better to wage legal battles, however vicious, than it is to fight battles with the lives of young Americans. Lawfare has become such an indel- ible feature of 21st-century conflicts that commanders dismiss it at their peril. Key leaders recognize this evolution. General James Jones. USMC (Ret.), the Nation's new National Security Advisor, observed several years ago that the nature of war has changed. "It's become very legalistic and very complex." he said, adding that now "you have to have a lawyer or a dozen."\*' Lawfare. of course, is about more than lawyers, it is about the rule of law and its relation to war. While it is true, as Professor Eckhardt maintains, that adherence to the rule of law is a "center of gravity" for democratic societ- ies such as ours—and certainly there arc those who will try to turn that virtue into a vulnerability—we still can never forget that it is also a vital source of our great strength as a nation." We can—and must—meet the chal- lenge of lawfare as effectively and aggressively as we have met every other issue critical to our national security.

### 2

#### Advantage 2- Imminence:

#### 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."

#### This broad definition of imminence has increased the frequency of attacks and the scope of who can be targeted, which decreases the program’s effectiveness because it reduces the ratio of high-value decapitations to accidental kills

Hudson 11 (Leila Hudson is associate professor of anthropology and history in the School of Middle Eastern & North African Studies at the University of Arizona and director of the Southwest Initiative for the Study of Middle East Conflicts, “Drone Warfare: Blowback From the New American Way of War,” Middle East Policy, <http://www.mepc.org/journal/middle-east-policy-archives/drone-warfare-blowback-new-american-way-war>)

The Bush administration's increased reliance on the program started in 2008; however, it is with the Obama administration that we see the most rapid proliferation of attacks. The final phase of the drone program is characterized by an even greater increase in attack frequency and an expansion of the target list to include targets of opportunity and unidentified militants of dubious rank — and funerals.12 As of May 2011, the CIA under the Obama administration has conducted nearly 200 drone strikes. This suggests that the drone target list now includes targets of opportunity, likely including some selected in consultation with the Pakistani authorities in order to facilitate the increasingly unpopular program. This development, in turn, has now decreased the effectiveness of the program when assessed in terms of the ratio of high-value to accidental kills. As Figure 2 shows, the steady increase in drone attacks conducted in Pakistan between 2004 and 2010 has resulted in a far higher number of deaths overall, but a lower rate of successful killings of high-value militant leaders who command, control and inspire organizations. If we define a high-value target as an organizational leader known to intelligence sources and the international media prior to attack and not someone whose death is justified with a posthumous militant status, we see fewer and fewer such hits — the alleged killing of al-Qaeda commander Ilyas al-Kashmiri in 2009 and again in June 2011 notwithstanding.13 Data analysis shows that at the beginning of the drone program (2002-04), five or six people were killed for each defined high-value target. As part of that high-value target's immediate entourage, they were much more likely to be militants than civilians. By 2010, one high-value target was killed per 147 total deaths. The increased lethality of each attack is due to larger payloads, broader target sets such as funeral processions, and probable new targeting guidelines (including targets of opportunity).14 Over time, these more deadly drone attacks have failed to effectively decapitate the leadership of anti-U.S. organizations but have killed hundreds of other people subsequently alleged to be militants; many were civilians.15 The rapidly growing population of survivors and witnesses of these brutal attacks have emotional and social needs and incentives to join the ranks of groups that access and attack U.S. targets in Afghanistan across the porous border. Drone attacks themselves deliver a politically satisfying short-term "bang for the buck" for U.S. constituencies ignorant of and indifferent to those affected by drone warfare or the phenomenon of blowback. In the Pakistani and Afghan contexts, they inflame the populations and destabilize the institutions that drive regional development. In addition to taking on an unacceptable and extrajudicial toll in human life, the drone strikes in unintended ways complicate the U.S. strategic mission in Afghanistan, as well as the fragile relationship with Pakistan. As a result, the U.S. military's counterinsurgency project in Afghanistan becomes a victim of the first two forms of blowback.

#### This overuse of drones causes massive blowback in Pakistan-this is the consensus of research and assumes unique Pakistani cultural traits

**Dengler, US Secret service Assistant to the Special Agent in Charge, 2013**

(Judson, “An examination of the collateral psychological and political damage of drone warfare in the FATA region of Pakistan”, September, <http://calhoun.nps.edu/public/bitstream/handle/10945/37611/13Sep_Dengler_Judson.pdf?sequence=1>, ldg)

University of Arizona researchers Hudson, Owens, and Flannes state there are five distinct, yet overlapping, forms of blowback from the use of drones in counter-terror operations: the purposeful retaliation against the United States, the creation of new insurgents, complications in the Afghan-Pakistan theatre, further destabilization of Pakistan and the deterioration of U.S. and Pakistani relations.45 The authors, who are members of the Southwest Initiative for the Study of Middle East Conflicts (SISMEC), capture the main arguments against drone warfare. Most of the literature I reviewed seems to fall into one of the five categories listed above. There is an abundance of scholarly sources which support the findings of these researchers. Definitive statistical support of the negative aspects of drone warfare is difficult to assess due to intervening factors in this volatile region. Many factors can influence the criteria established by Hudson, Owens, and Flannes. In his discussion about the history of the CIA’s covert drone warfare program, University of Massachusetts—Dartmouth history faculty member Brian Glyn Williams adds to the case against drone warfare. He finds the collateral damage of drone strikes gives the media and religious leaders an opportunity to rally anti-American sentiment in Pakistan and the Islamic world in general.46 This article highlights the ability of radicals to easily use drone strikes, regardless if successful or not, to their advantage to manipulate the views of the local population. This view was supported by multiple other materials I reviewed. Writing for the German based Institute for the Study of Labor (IZA), Jaeger and Siddique discuss an example of retaliation by the Taliban which is attributed to drone strikes.47 This is typical of many examples of the Taliban or al-Qaeda directly stating their attack against the local government or U.S. was in response to drone policy in the region. In his Georgetown University Master’s thesis, Luke Olney evaluates the long term effectiveness of drone warfare. He supports the previously mentioned findings with particular emphasis on drones inspiring further radicalization, increased recruitment opportunities and further destabilization of local governments. However, he does note that drones may have some short-term success in disrupting militant groups.48 This seems to be a reoccurring theme in much of the readings I have conducted. Most researchers support the short-term advantage of drone strikes because they eliminate the target but drones have only been used extensively over the last ten years and questions exist about their effectiveness over time. The elimination of the militant is positive. But at what point does this victory become outweighed by the long-term effects of the killing? Support of the argument that drones have a negative political and diplomatic impact is made by Anne L. Oblinger in her 2011 Georgetown University thesis depicting the moral, legal, and diplomatic implications of drone warfare. Her thesis discusses the cultural and religious motivations behind terrorist activities which will be useful in a socio-cultural examination of this topic. She notes that despite their precision, drones still create many diplomatic hurdles for the U.S.49 This is another example of research which states that despite their tactical success, negative consequences still exist when leveraging drones. The majority of the literature indicates that there is a strong possibility of drone strikes having a negative overall influence in the FATA. Researchers from the University of Massachusetts, Dartmouth, Plaw, Fricker, and Williams, find that civilian casualties, real or perceived, will be the primary instigator. No matter how precise drone strikes are executed or how much technology improves, Pakistani press and society will be prone to believe that high percentages of civilians are being targeted. While the U.S. keeps details of the program somewhat secure, this practice allows the targeted groups to report the details of drone strikes to their advantage.50 There are numerous examples available of the collateral damage and devastation that drones inflict on the local community. Even if the strike successfully hits the intended target, statistics can be manipulated by the Taliban or Pakistani government. Investigative journalist Porter Gareth criticizes drone strikes because they are based on “scant evidence” in his article for The Washington Report for Middle East Affairs. He finds that the U.S. is targeting militant groups rather than al-Qaeda planning global terrorism.51 This was one of the few pieces of information which discussed who was being targeted by drone strikes and I found it particularly valuable. There should be more such information available, or forthcoming, because who is being targeted is critical to evaluating drone warfare. Ken Dilanian, of the Los Angeles Times, finds that the U.S. drone program has killed dozens of al-Qaeda operatives and hundreds of low-level militants but is has also infuriated many Pakistanis. Some officials in the State Department and National Security Council say these strikes are counterproductive because they only kill easily replaceable militants and the civilian casualties, which the U.S. disputes, destabilize the government of President Asif Ali Zardari of Pakistan. The number of drone strikes has grown since 2008 and now includes targeting of individuals based on a “pattern of life” that suggests involvement with insurgents. A former senior U.S. intelligence official stated that the CIA maintains a list of the top 20 targets and has at times had difficulty finding high value militants to add to the list. Are lower-level militants being targeted just to fill the list? This official is among those urging the CIA to reconsider its approach because the agency cannot kill all Islamic militants and drones alone will not solve challenge presented in the region. One former senior State Department official stated that drone strikes probably give motivation to those that fight us. Dilanian offers that it is impossible to independently assess the accuracy or effectiveness of the strikes because the program is classified, the Obama administration refuses to release information about the program and Pakistan has barred access to FATA from Western journalists or humanitarian agencies.52 This is one of Dilanian’s many pieces documenting drone warfare in Pakistan. Considering the sources of information he uses for this article, it appears that many in the military and intelligence community are beginning to realize the potential negative aspects of this tactic. He also identifies why it is so difficult to accurately and independently report on the impact of drone strikes and how data can be easily manipulated by the U.S., Pakistan, and militants. The New America Foundation database reflects the aggregation of credible news reports about U.S. drone strikes in Pakistan. The media outlets that New America relies upon are the three major international wire services (Associated Press, Reuters, Agence France Presse), the leading Pakistani newspapers (Dawn, Express Times, The News, The Daily Times), leading South Asian and Middle Eastern TV networks (Geo TV and Al Jazeera), and Western media outlets with extensive reporting capabilities in Pakistan (CNN, New York Times, Washington Post, LA Times, BBC, The Guardian, Telegraph). The New America Foundation makes no independent claims about the veracity of casualty reports provided by these organizations. The purpose of this database is to provide as much information as possible about the covert U.S. drone program in Pakistan. The Obama administration dramatically increased the frequency of the drone strikes, in comparison to the Bush Administration, with the peak number of drone attacks occurring in 2010, but the ratio of civilians killed in drone strikes fell to just over two percent. Despite the record 122 strikes in 2010, an average of 0.3 civilians were killed per strike, the lowest civilian death rate per strike until 2012, which saw only 0.1 civilians killed per attack in the first eight months of the year. According to data collected as of the summer of 2011, only one out of every seven drone strikes killed a militant leader. Under President Bush, about one-third of the militants killed were identified as leaders, but under President Obama, just 13 percent have been militant leaders. Drone strikes dropped sharply in 2011, as the relationship between the United States and Pakistan deteriorated. During the first half of 2012, the rate of strikes continued to fall and the civilian death ratio was close to zero. Since the U.S. drone campaign in Pakistan began in 2004, 84 to 85 percent of those killed were reported to be militants; six to eight percent were reported to be civilians and seven to nine percent remain “unknown.”53 The New America Foundation and Terror Free Tomorrow conducted the first comprehensive public opinion survey covering sensitive political issues in FATA. This survey was conducted from June 30 to July 20, 2010, and consisted of face-to-face interviews of 1,000 FATA residents age 18 or older across 120 villages or sampling points in all seven tribal Agencies of FATA. The respondents were 99 percent Pashtun, and 87 percent Sunni. Among their findings were that nearly nine out of ten opposed the U.S. following al-Qaeda and the Taliban into FATA and most would prefer that the Pakistani military fight these forces in FATA. Seventy-six percent are opposed to U.S. drone strikes, 16 percent believe they accurately target militants and just under half believed that drones predominantly kill civilians. The majority of FATA residents reject the presence of the Taliban or al-Qaeda in their region. Their top priorities included lack of jobs which was closely followed by lack of schools, good roads and security, poor health care and corruption of local official officials.54 Avner uses psychoanalysis, psychology, psychiatry, sociology, anthropology, and Islamic studies to understand Islamic terror. His research discusses the religion and culture of Islam, the psychology of Islam, the Muslim family and Muslim society from which many terrorists originate. Avner finds that terror can originate with emotions such as rage, hatred, fear and surprisingly, love and longing.56 Shame is an excessively painful feeling and is prevalent in Muslim culture. Shame, loss of honor, loss of face, and humiliation are unbearable feelings. Hamady found that shame was the worst and most painful feeling for an Arab. Preserving one’s honor and the honor of their tribe or clan is crucial. Any injury, real or imagined, causes unbearable shame that must be repaired through acts of revenge against those that damaged your honor.57 The importance of pride, honor and dignity is critical in Muslim culture. “Everything must be done to erase one’s humiliations and to regain one’s honor.”58 For Muslims who feel they have been shamed or humiliated, the only way to repair these feelings is by humiliating those that inflicted shame and humiliation on them.59 Avner’s research identifies multiple psychological factors which may explain the existing anger within segments of the Muslim community. Honor and shame is a tremendous motivator in Islam and may provide a solid predisposition for action against the offending party to regain one’s honor. Maintaining your honor or the honor of your tribe is of high importance to the Pashtun tribesmen of FATA. Once this has been violated, retaliation is obligated against those that have humiliated you. Stern reveals that the real or perceived national humiliation of the Palestinian people by Israeli policies gives rise to desperation and uncontrollable rage. Citing Mark Jurgensmeyer, Stern notes that suicide bombers are attempting to “dehumiliate” the deeply humiliated and traumatized. Through their actions, suicide bombers belittle their enemies and provide themselves with a sense of power. Repeated, small humiliations add up to a feeling of nearly unbearable despair and frustration, which can result in atrocities being committed in the belief that attacking the oppressor restores dignity.60 A skilled terrorist leader can strengthen and utilize feelings of betrayal and the desire for revenge.61 Stern shows the extent to which a Muslim will go to in order to restore their honor after being humiliated. The uncontrollable rage may not be proportionate when measured by Western standards. Even small humiliations will build to the point of suicide attacks to repair the loss of dignity. The hopelessness and aggravation many may feel in FATA should not be overlooked or diminished. Charismatic militant leaders can manipulate shame to motivate groups to action against whom they perceive has wronged their group. The most important psychoanalytic idea for understanding terrorism, according to Avner, is Heinz Kohut’s notion of narcissistic rage, “The need for revenge, for righting a wrong, for undoing a hurt by whatever means, and a deeply anchored, unrelenting compulsion in the pursuit of all these aims, which gives no rest to those that have suffered a narcissistic injury. These are the characteristic features of narcissistic rage in all its forms and which set it apart from other kinds of aggression.” This boundless rage, together with unconscious factors and the traditional Muslim family dynamic may explain Islamic terrorism, including suicidal versions.62 Kohut’s finding that narcissistic rage is the most important psychoanalytic factor for understanding is significant. The narcissistic aspect depicts how personal the hostility is and rage shows the intensity of the emotion which drives terrorists. Narcissistic rage allows the militant to pursue those that they perceive have wronged them by using extreme measures to regain their honor.

#### Overuse of drones in Pakistan empowers militants and destabilizes the government

Michael J Boyle 13, Assistant Professor of Political Science at La Salle University, former Lecturer in International Relations and Research Fellow at the Centre for the Study of Terrorism and Political Violence at the University of St Andrews, PhD from Cambridge University, January 2013, “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 escalation of drone strikes in Pakistan to its current tempo—one every few days—directly contradicts the long-term American strategic goal of boosting the capacity and legitimacy of the government in Islamabad. Drone attacks are more than just temporary incidents that erase all traces of an enemy. They have lasting political effects that can weaken existing governments, undermine their legitimacy and add to the ranks of their enemies. These political effects come about because drones provide a powerful signal to the population of a targeted state that the perpetrator considers the sovereignty of their government to be negligible. The popular perception that a government is powerless to stop drone attacks on its territory can be crippling to the incumbent regime, and can embolden its domestic rivals to challenge it through violence. Such continual violations of the territorial integrity of a state also have direct consequences for the legitimacy of its government. Following a meeting with General David Petraeus, Pakistani President Asif Ali Zardari described the political costs of drones succinctly, saying that ‘continuing drone attacks on our country, which result in loss of precious lives or property, are counterproductive and difficult to explain by a democratically elected government. It is creating a credibility gap.’75 Similarly, the Pakistani High Commissioner to London Wajid Shamsul Hasan said in August 2012 that¶ what has been the whole outcome of these drone attacks is that you have directly or indirectly contributed to destabilizing or undermining the democratic government. Because people really make fun of the democratic government—when you pass a resolution against drone attacks in the parliament and nothing happens. The Americans don’t listen to you, and they continue to violate your territory.76¶ The appearance of powerlessness in the face of drones is corrosive to the appearance of competence and legitimacy of the Pakistani government. The growing perception that the Pakistani civilian government is unable to stop drone attacks is particularly dangerous in a context where 87 per cent of all Pakistanis are dissatisfied with the direction of the country and where the military, which has launched coups before, remains a popular force.77

#### Pakistan collapse risks war with India and loose nukes

Twining 13 (Daniel Twining is Senior Fellow for Asia at the German Marshall Fund, Pakistan and the Nuclear Nightmare, Sept 4, http://shadow.foreignpolicy.com/posts/2013/09/04/pakistan\_and\_the\_nuclear\_nightmare)

The Washington Post has revealed the intense concern of the U.S. intelligence community about Pakistan's nuclear weapons program. In addition to gaps in U.S. information about nuclear weapons storage and safeguards, American analysts are worried about the risk of terrorist attacks against nuclear facilities in Pakistan as well as the risk that individual Pakistani nuclear weapons handlers could go rogue in ways that endanger unified national control over these weapons of mass destruction. These concerns raise a wider question for a U.S. national security establishment whose worst nightmares include the collapse of the Pakistani state -- with all its implications for empowerment of terrorists, a regional explosion of violent extremism, war with India, and loss of control over the country's nuclear weapons. That larger question is: Does Pakistan's nuclear arsenal promote the country's unity or its disaggregation? This is a complicated puzzle, in part because nuclear war in South Asia may be more likely as long as nuclear weapons help hold Pakistan together and embolden its military leaders to pursue foreign adventures under the nuclear umbrella. So if we argue that nuclear weapons help maintain Pakistan's integrity as a state -- by empowering and cohering the Pakistani Army -- they may at the same time undermine regional stability and security by making regional war more likely. As South Asia scholar Christine Fair of Georgetown University has argued, the Pakistani military's sponsorship of "jihad under the nuclear umbrella" has gravely undermined the security of Pakistan's neighborhood -- making possible war with India over Kargil in 1999, the terrorist attack on the Indian Parliament in 2001, the terrorist attack on Mumbai in 2008, and Pakistan's ongoing support for the Afghan Taliban, the Haqqani network, Lashkar-e-Taiba, and other violent extremists. Moreover, Pakistan's proliferation of nuclear technologies has seeded extra-regional instability by boosting "rogue state" nuclear weapons programs as far afield as North Korea, Libya, Iran, and Syria. Worryingly, rather than pursuing a policy of minimal deterrence along Indian lines, Pakistan's military leaders are banking on the future benefits of nuclear weapons by overseeing the proportionately biggest nuclear buildup of any power, developing tactical (battlefield) nuclear weapons, and dispersing the nuclear arsenal to ensure its survivability in the event of attack by either the United States or India. (Note that most Pakistanis identify the United States, not India, as their country's primary adversary, despite an alliance dating to 1954 and nearly $30 billion in American assistance since 2001.) The nuclear arsenal sustains Pakistan's unbalanced internal power structure, underwriting Army dominance over elected politicians and neutering civilian control of national security policy; civilian leaders have no practical authority over Pakistan's nuclear weapons program. Whether one believes the arsenal's governance implications generate stability or instability within Pakistan depends on whether one believes that Army domination of the country is a stabilizing or destabilizing factor. A similarly split opinion derives from whether one deems the Pakistan Army the country's most competent institution and therefore the best steward of weapons whose fall into the wrong hands could lead to global crisis -- or whether one views the Army's history of reckless risk-taking, from sponsoring terrorist attacks against the United States and India to launching multiple wars against India that it had no hope of winning, as a flashing "DANGER" sign suggesting that nuclear weapons are far more likely to be used "rationally" by the armed forces in pursuit of Pakistan's traditional policies of keeping its neighbors off balance. There is no question that the seizure of power by a radicalized group of generals with a revolutionary anti-Indian, anti-American, and social-transformation agenda within Pakistan becomes a far more dangerous scenario in the context of nuclear weapons. Similarly, the geographical dispersal of the country's nuclear arsenal and the relatively low level of authority a battlefield commander would require to employ tactical nuclear weapons raise the risk of their use outside the chain of command. This also raises the risk that the Pakistani Taliban, even if it cannot seize the commanding heights of state institutions, could seize either by force or through infiltration a nuclear warhead at an individual installation and use it to hold the country -- and the world -- to ransom. American intelligence analysts covering Pakistan will continue to lose sleep for a long time to come.

#### Miscalculation means this could escalate to nuclear winter and extinction- this answers their defense

Hundley 12 (TOM HUNDLEY, Senior Editor-Pulitzer Center, “Pakistan and India: Race to the End,” http://pulitzercenter.org/reporting/pakistan-nuclear-weapons-battlefield-india-arms-race-energy-cold-war)

Nevertheless, military analysts from both countries still say that a nuclear exchange triggered by miscalculation, miscommunication, or panic is far more likely than terrorists stealing a weapon -- and, significantly, that the odds of such an exchange increase with the deployment of battlefield nukes. As these ready-to-use weapons are maneuvered closer to enemy lines, the chain of command and control would be stretched and more authority necessarily delegated to field officers. And, if they have weapons designed to repel a conventional attack, there is obviously a reasonable chance they will use them for that purpose. "It lowers the threshold," said Hoodbhoy. "The idea that tactical nukes could be used against Indian tanks on Pakistan's territory creates the kind of atmosphere that greatly shortens the distance to apocalypse." Both sides speak of the possibility of a limited nuclear war. But even those who speak in these terms seem to understand that this is fantasy -- that once started, a nuclear exchange would be almost impossible to limit or contain. "The only move that you have control over is your first move; you have no control over the nth move in a nuclear exchange," said Carnegie's Tellis. The first launch would create hysteria; communication lines would break down, and events would rapidly cascade out of control. Some of the world's most densely populated cities could find themselves under nuclear attack, and an estimated 20 million people could die almost immediately. What's more, the resulting firestorms would put 5 million to 7 million metric tons of smoke into the upper atmosphere, according to a new model developed by climate scientists at Rutgers University and the University of Colorado. Within weeks, skies around the world would be permanently overcast, and the condition vividly described by Carl Sagan as "nuclear winter" would be upon us. The darkness would likely last about a decade. The Earth's temperature would drop, agriculture around the globe would collapse, and a billion or more humans who already live on the margins of subsistence could starve. This is the real nuclear threat that is festering in South Asia. It is a threat to all countries, including the United States, not just India and Pakistan. Both sides acknowledge it, but neither seems able to slow their dangerous race to annihilation.

### 3

#### 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.

### 4

#### 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- Contractors

#### The U.S. is withdrawing troops from Afghanistan now but private military contractors are filling in to resolve security gaps

Francis 5/10/13 (David, national correspondent for The Fiscal Times and is based in Washington, D.C.. “U.S. Troops Replaced by an Outsourced Army in Afghanistan” <http://www.thefiscaltimes.com/Articles/2013/05/10/US-Troops-Replaced-by-an-Outsourced-Army-in-Afghanistan>)

The United States is preparing to withdraw the majority of its troops from Afghanistan next year, ending more than a decade of war that has cost this country hundreds of billion of dollars and 2,126 lives to date. But the military withdrawal does not mean the United States is out of the country entirely. The country is leaving tens of thousands of contractors behind. According to the latest contractor census performed by the industry group Professional Overseas Contractors, there are currently 110,404 contractors still working in Afghanistan. Of these, 33,444 are Americans. The rest are either Afghan or from another country. These workers do everything from serve food to cut hair to provide security. They outnumber U.S. troops by nearly 40,000. For every one American soldier, there are 1.46 contractors. The vast majority of these contractors are in the private security business, working for the State Department to protect diplomats. This means they are armed to kill on behalf of the U.S. government. Once the military leaves completely, these contractors will be responsible for training Afghan police and troops, building Afghan infrastructure, conducting development projects, and protecting workers. Under the terms of the Afghan-American strategic partnership agreement signed last summer, just a small number of U.S. troops are going to remain in the country until 2024. Much of the work currently being done by the military will be left to contractors to complete . “It’s a de facto army, a de facto military presence there. They are a de facto logistic and supply chain,” Malou Innocent, a foreign policy analyst at the Cato Institute, told The Fiscal Times. “We’re going to be relying on contractors across the board. They will be doing all of the things that go into nation building.” MONEY SPENT QUIETLY Federal agencies do not publicly release the amounts they spend on contracting related to the war effort. But DOD, USAID, and the State Department all use private contractors to perform various critical services. According to an analysis by the Center for Strategic and International Studies, DOD spent $375 billion on contracts in 2011, up from $163 billion in 2000. “Between 2001 and 2011, dollars obligated to contract awards by DOD more than doubled, and contract spending outpaced growth in other DOD outlays,” CSIS found. The State Department and USAID also have experienced dramatic increases in contract spending over the last decade. In 2000, USAID spent just $1.6 billion on contracts – but $9 billion in 2011. The State Dept. contracted just $700 million in 2000, with $4 billion in contracts awarded in 2011. HISTORY LESSON If the U.S. experience after the Iraq War is any guide, the number of contractors and the size of contract budgets are not going to get smaller. If anything, the numbers will grow as contractors take on more and more work once done by the military. The United States completed its withdrawal from Iraq in 2011. At the height of the war, there were more than 150,000 contractors there. Some 8,500 remain today, including 2,356 Americans. “In Iraq, at its peak, we had at least as many, sometimes many more contractors as we did troops in battle areas,” said Stephen Schooner, a professor of government contract law at George Washington University. “As the troop level was reduced, the contractors didn’t reduce [their levels] at the same rate and became bigger than the military presence. As we continue to pull troops out of Afghanistan, I would assume that there would continue to be that inverse relationship.”

#### Removal of the political question doctrine is necessary to allow liability tort suits against private military contractors

Kuhn 12 (Kaelin, The Catholic University of America, Columbus School of Law; B.A., 2006., “COURTS HAVE ANSWERS TO THE MILITARY CONTRACTORS’ SO-CALLED POLITICAL QUESTIONS RAISED IN CARMICHAEL V. KELLOGG, BROWN & ROOT SERVICES, INC.” 61 Cath. U.L. Rev. 593, <http://iissonline.net/courts-have-answers-to-the-military-contractors-so-called-political-questions-raised-in-carmichael-v-kellogg-brown-root-services-inc/>)

III. ANSWERS EXIST TO THE POLITICAL QUESTIONS RAISED BY THE MILITARY CONTRACTOR’S ACTIONS IN CARMICHAEL Facially, the Eleventh Circuit’s rationale for its holding in Carmichael appears compelling. n148 The court, unable to devise a framework by which it could resolve the plaintiffs claims given the extent to which military decisions influenced the contractor’s challenged conduct, n149 sought to avoid second-guessing decisions requiring military expertise. n150 [\*614] However, the Eleventh Circuit’s decision in Carmichael raises serious concerns. n151 Most troubling is the implication that the court’s decision could preclude the legislative and the executive branches from making policy determinations as provided by the Constitution. The Eleventh Circuit should have followed the Supreme Court’s reasoning in Boyle v. United Technologies Corp. and avoided resolving Carmichael on the issue of the political question doctrine. n152 If the district court later needed to resolve the political-question issue, it could have directed the trier of fact to determine whether the contractor acted reasonably within the parameters of the military’s control. n153 Additionally, the court could have used tort law to adjudicate Carmichael’s claim on the merits. n154 A. Using the Political Question Doctrine to Exclude Cases Involving Military Contractors from Judicial Review Could Frustrate the Purpose of the Doctrine Each suit brought against military contractors performing services in Iraq and Afghanistan has the potential to implicate significant interests of the U.S. government. n155 For example, the government generally hopes to avoid any “second-guess[ing]” by the judiciary, and wants to ensure the safety of service members and contractors. n156 These interests must be balanced against those relating to contractors’ exercise of appropriate care when performing contracts. n157 The implications of the Eleventh Circuit’s decision in Carmichael could significantly undermine the ability of Congress and the President to create a fair system for military-contractor liability that appropriately takes into account the interests of the country. n158 The issue of whether the political question doctrine is a general constitutional constraint, n159 a prudential constraint, n160 or some combination of [\*615] the two therefore remains unsettled. n161 The source of the limitation has important implications: Congress may eliminate prudential constraints by legislation, but lacks the power to statutorily remove constitutional limitations. n162 In Carmichael, the Eleventh Circuit’s application of the doctrine upon finding a “textually demonstrable constitutional commitment of the issue to a coordinate political department” weighs heavily in favor of the doctrine being constitutional. n163 The court’s holding in Carmichael could potentially limit the ability of the political branches to determine how best to impose liability on military contractors. n164 To illustrate Carmichael’s potentially harmful implications, assume that the Supreme Court affirmed the Eleventh Circuit’s holding and rationale in Carmichael. Assume further that Congress considered it within the best interest of the country to override the Supreme Court’s decision by statutorily providing that any soldier injured by the negligent actions of a military contractor operating in a foreign country can sue that contractor for negligence in a federal court. Despite Congress’s intent to subject military contractors to liability, the political question doctrine–as a constitutional constraint–would require courts to dismiss all suits brought under the new statute that are factually similar to Carmichael. n165 This outcome would frustrate the most basic and compelling rationale for the political question doctrine in that it would preclude the legislative and the executive branches from making policy determinations as provided by the Constitution. n166 B. Courts Should Resolve Suits on the Basis of the Political Question Doctrine Only as a Last Resort In Boyle v. United Technologies Corp., although the case appeared to warrant a discussion of the political question doctrine, the Court avoided the [\*616] doctrine altogether, instead dismissing the case on statutory grounds. n167 Given the significant implications of resolving a suit on constitutional grounds, the Eleventh Circuit should have followed the Supreme Court’s decision in Boyle and remanded Carmichael with instructions to continue the litigation. n168 If the case settled, or if the trier of fact found for KBR, then the district court would not have had to address the political-question issue. Only if the trier of fact found in favor of the plaintiff would the district court have been required to consider the political question doctrine. As demonstrated below, even if the courts needed to resolve the political-question issue raised in Carmichael, they could have done so without dismissing the suit. n169 C. The Negligence Claim in Carmichael Should Have Been Decided Without Reviewing Decisions Constitutionally Committed to Other Branches The Eleventh Circuit’s decision in McMahon provides a sound framework for assessing the applicability of the first Baker test. n170 According to the court, for a contractor to invoke the first Baker test as a successful defense of nonjusticiability, the contractor must meet a double burden by showing that (1) [\*617] the case would “require reexamination of a decision by the military” n171 and (2) “the military decision at issue is . . . insulated from judicial review.” n172 Regarding the first prong of the “double burden,” courts can still entertain a case like Carmichael while avoiding having to judge the prudence of the military’s guidelines. n173 The United States, in its amicus brief, suggested: It may be possible for the trial court to factor military standards and orders into the inquiry as external facts to be taken as a given, such that the trier of fact would not be required to question the wisdom of military judgments. Under such an approach, the jury could conclude that Irvine failed to behave in a reasonable manner within the parameters established by the military. For example, one could envision such a result if [Carmichael] was able to prove that Irvine was not paying attention when he took the . . . curve. n174 The government’s suggested scope of analysis would be a prudent approach to examine cases like Carmichael, and would allow courts to avoid invoking the first Baker test in cases in which the contractor’s alleged wrongful conduct is intertwined with military decision making. D. Tort Law Provides Manageable Standards for Assessing the Plaintiff’s Claims in Carmichael The Fifth Circuit in Lane provided a sensible judicial framework that could have been used to render a decision in Carmichael. The Fifth Circuit assessed the elements of negligence to determine whether a court could adjudicate a case without calling into question decisions made by the military. n175 A typical negligence claim in Georgia n176 requires that plaintiffs satisfy the following four [\*618] elements: (1) a duty to meet a standard of care; (2) breach of that duty; (3) causation between the breach and injury; and (4) damages. n177 Regarding the applicable standard of care, the Carmichael court correctly identified the standard as “what a reasonable driver subject to military control over his exact speed and path would have done.” n178 Under that standard of care–which recognizes the parameters set by the military–a jury would be capable of determining whether Irvine acted in a reasonable manner. n179 The Eleventh Circuit determined that the trier of fact could not assess the reasonableness of the contractor’s action in light of the standard of care because the accident occurred in a war zone–a context outside of typical everyday experiences. n180 The court reasoned that this prevented the trier of fact from relying on familiar benchmarks to evaluate the case. n181 The court improperly assumed that just because the trier of fact may lack certain “touchstones,” the court also lacks standards to manage the case. n182 On the contrary, courts frequently grapple with questions of what a reasonable person would do under challenging circumstances, such as cases involving medical malpractice or complex patent litigation. n183 Like many other cases, attorneys can present these issues using appropriate evidence, such as expert witnesses’ [\*619] testimony, n184 in such a way as to assist the trier of fact in understanding and resolving the issues. n185 The Eleventh Circuit also suggested that the suit presented an unmanageable standard because “the dangerousness of the circumstances under which Irvine was driving . . . render[ed] problematic any attempt to answer basic questions about duty and breach.” n186 The court emphasized that the “potentially life threatening” circumstances surrounding the accident distinguished the case from an ordinary experience where ordinary negligent standards could be applied. n187 However, the court’s attempt to distinguish life-threatening activities as beyond the scope of judicial review stands juxtaposed to prior case law in which federal courts often reviewed tort actions involving potentially life-threatening actions in other contexts. n188 In addition to determining that no manageable standards existed to judge the contractor’s actions, the Eleventh Circuit in Carmichael also found that the plaintiffs would be unable to prove the causation element without raising a nonjusticiable political question, but failed to articulate why this would be the case. n189 State law allows a plaintiff to recover so long as at least one of multiple tortfeasors was the proximate cause of the plaintiffs injury. n190 Additionally, the court can “factor military standards and orders into the inquiry as external facts to be taken as a given.” n191 Therefore, no principled reason seems to exist to explain why the element of causation would necessarily raise political-question concerns. [\*620] IV. CONCLUSION Courts should only consider the political question doctrine as a last resort. Even assuming the Eleventh Circuit in Carmichael needed to resolve the issue, it should have found that the case did not present a political question. The court could have assessed the contractor’s actions within the military’s parameters without passing judgment on the prudence of those parameters themselves. Traditional tort law provides sufficient standards for the court to adjudicate the claims presented in Carmichael. The United States has many reasons to shield military contractors from some liability while they provide services in support of war efforts. However, deciding cases like Carmichael on constitutional grounds could severely limit the ability of the legislative and executive branches to weigh the interests of the country and determine how best to impose liability on military contractors.

#### Lack of PMC accountability and liability undercuts counterinsurgency and withdrawal efforts in Afghanistan which results in instability

Schwartz 6/22/10 (Moshe, Specialist in Defense Acquisition, “The Department of Defense’s Use of Private Security Contractors in Iraq and Afghanistan: Background, Analysis, and Options for Congress” Can the Use of PSCs Undermine US Efforts?, Congressional Research Service)

According to the Army Field Manual on counterinsurgency, one of the fundamental tenets of counterinsurgency operations—such as those undertaken in Iraq and Afghanistan—is to establish and maintain security while simultaneously winning the hearts and minds of the local population. Abuses by security forces, according to the manual, can be a major escalating factor in insurgencies.46 Abuses committed by contractors, including contractors working for other U.S. agencies, can also strengthen anti-American insurgents.47 There have been published reports of local nationals being abused and mistreated by DOD contractors in such incidents as the summary shooting by a private security contractor of an Afghan who was handcuffed,48 the shooting of Iraqi civilians,49 and the abuse of prisoners at Abu Ghraib prison in Iraq.50 (It should be noted that there have also been reports of military personnel abusing and otherwise mistreating local nationals, including the abuses that took place at Abu Ghraib prison.51 CRS has not conducted an analysis to determine whether the incidence of abuses is higher among contractors than it is among military personnel.) Many of the high-profile reports of PSCs shooting local nationals or otherwise acting irresponsibly were committed by contractors working for the Department of State. Some of these incidents include the reported shooting of Iraqi civilians by Triple Canopy employees,52 the shooting of 17 Iraqi civilians at a Baghdad traffic circle in Nisoor Square by Blackwater employees,53 and the recent controversy over the behavior of security contractors from Armour Group who were hired to protect the U.S. embassy in Afghanistan.54 Of the six incidents listed above, five were committed by U.S. companies and U.S. nationals. Incidents of abuse still occur in Afghanistan. Private security contractors escorting supply convoys to coalition bases have been blamed for killing and wounding more than 30 innocent civilians during the past four years in Afghanistan’s Maywand district alone, leading to at least one confrontation with U.S. forces.55 And in May of this year, U.S. and Afghan officials reportedly stated that local Afghan security contractors protecting NATO supply convoys in Kandahar “regularly fire wildly into villages they pass, hindering coalition efforts to build local support.”56 One officer from a Stryker brigade deployed in Afghanistan was quoted as saying that these contractors “tend to squeeze the trigger first and ask questions later.”57 And unlike in Iraq, where a series of high-profile incidents involved U.S. security personnel, in Afghanistan, many of the guards causing the problems are Afghans. According to many analysts, these events have in fact undermined the U.S. mission in Iraq and Afghanistan.58 An Iraqi Interior Ministry official, discussing the behavior of private security contractors, said “Iraqis do not know them as Blackwater or other PSCs but only as Americans.”59 One senior military officer reportedly stated that the actions of armed PSCs “can turn an entire district against us.”60 Some analysts also contend that PSCs can be a direct threat to the legitimacy of the local government. These analysts argue that if counterinsurgency operations are a competition for legitimacy but the government is allowing armed contractors to operate in the country without the contractors being held accountable for their actions, then the government itself can be viewed as not legitimate in the eyes of the local population. These analysts point to the recent court decision dismissing the case against former Blackwater employees as a case in point where the legitimacy of the U.S. and local government is being undermined by the actions of PSCs.61 The extent to which the behavior of private security contractors in Afghanistan has hurt coalition efforts in Afghanistan was recently discussed by Major General Nick Carter (United Kingdom), International Security Assistance Force (ISAF) Afghanistan Regional Command South, who stated that the “culture of impunity” that exists around PSCs are a serious problem that needs to be dealt with and that this culture is to some degree “our own doing.”62 The perception that DOD and other government agencies are deploying PSCs who abuse and mistreat people can fan anti-American sentiment and strengthen insurgents, even when no abuses are taking place. There have been reports of an anti-American campaign in Pakistan, where stories are circulating of U.S. private security contractors running amok and armed Americans harassing and terrifying residents.63 U.S. efforts can also be undermined when DOD has ties with groups that kill civilians or government officials, even if the perpetrators were not working for DOD when the killings took place. In June 2009, the provincial police chief of Kandahar, Afghanistan, was killed by a group that worked as a private security contractor for DOD.64 Pointing to the example of the killing of the police chief in Kandahar, some analysts have also argued that the large-scale use of armed contractors in certain countries can undermine the stability of fragile governments. In a paper for the U.S. Army War College, Colonel Bobby A. Towery wrote After our departure, the potential exists for us to leave Iraq with paramilitary organizations that are well organized, financed, trained and equipped. These organizations are primarily motivated by profit and only answer to an Iraqi government official with limited to no control over their actions. These factors potentially make private security contractors a destabilizing influence in the future of Iraq. These and other considerations have led a number of analysts, government officials, and military officers to call for limiting the use of PSCs in combat and stability operations. Some analysts have called for completely barring the use of PSCs during such operations. The executive summary for the U.S. Naval Academy’s 9th Annual McCain Conference on Ethics and Military Leadership takes this position: We therefore conclude that contractors should not be deployed as security guards, sentries, or even prison guards within combat areas. APSCs should be restricted to appropriate support functions and those geographic areas where the rule of law prevails. In irregular warfare (IW) environments, where civilian cooperation is crucial, this restriction is both ethically and strategically necessary.65 Others have suggested a more targeted approach, such as limiting DOD’s use of PSCs to providing only static security in combat areas, leaving all convoy and personal security details to the military.66 Analysts calling for restrictions on the use of PSCs generally believe that contractors are more likely to commit abuses or other atrocities than military personnel. Some analysts believe that the culture of the military, which is focused on mission success and not on profit or contractual considerations, makes it less likely that uniformed personnel will behave inappropriately. Some analysts and DOD officials believe that lax contractor oversight has significantly contributed to contractor abuses.67 This sentiment was echoed by then Senator Barack Obama, who stated “we cannot win a fight for hearts and minds when we outsource critical missions to unaccountable contractors.”68 According to these analysts, improved oversight and accountability could mitigate the negative effects that the use of PSCs and other contractors has had on U.S. efforts in Iraq and Afghanistan, and could potentially bring the standard of behavior of PSCs on par with that of uniformed personnel.

Afghan instability produces Central Asian instability

Jack A. Smith 14, Foreign Policy Journal, “Why the US Wants to Stay in Afghanistan”, 1-7, http://www.foreignpolicyjournal.com/2014/01/07/why-the-us-wants-to-stay-in-afghanistan/

Afghanistan is especially important to Washington for two main reasons.¶ The obvious first reason is to have smaller but elite forces and surveillance facilities in Afghanistan to continue the fighting when necessary to protect U.S. interests, which include maintaining a powerful influence within the country. Those interests will become jeopardized if, as some suspect, armed conflict eventually breaks out among various forces contending for power in Kabul since the mid-1990s, including, of course, the Taliban, which held power from 1996 until the 2001 U.S. invasion.¶ The more understated second reason is that Afghanistan is an extremely important geopolitical asset for the U.S., particularly because it is the Pentagon’s only military base in Central Asia, touching Iran to the west, Pakistan to the east, China to the northeast, and various resource-rich former Soviet republics to the northwest, as well as Russia to the north.¶ A Dec. 30 report in Foreign Policy by Louise Arbour noted: “Most countries in [Central Asia] are governed by aging leaders and have no succession mechanisms — in itself potentially a recipe for chaos. All have young, alienated populations and decaying infrastructure… in a corner of the world too long cast as a pawn in someone else’s game.”¶ At this point, a continued presence in Afghanistan dovetails with Washington’s so-called New Silk Road policy first announced by then Secretary of State Hillary Clinton two years ago. The objective over time is to sharply increase U.S. economic, trade, and political power in strategic Central and South Asia to strengthen U.S. global hegemony and to impede China’s development into a regional hegemon.¶ As the State Department’s Robert O. Blake Jr. put it March 23: “The dynamic region stretching from Turkey, across the Caspian Sea to Central Asia, to Afghanistan and the massive South Asian economies, is a region where greater cooperation and integration can lead to more prosperity, opportunity, and stability.¶ “But for all of this progress and promise, we’re also clear-eyed about the challenges. Despite real gains in Afghan stability, we understand the region is anxious about security challenges. That’s why we continue to expand our cooperation with Afghanistan and other countries of the region to strengthen border security and combat transnational threats.”¶ Blake did not define what “security challenges” he had in mind. But both China and Russia are nearby seeking greater trade and influence in Central Asia — their adjacent backyard, so to speak — and the White House, at least, may consider this a security challenge of its own.

Central Asia escalates globally and results in great power conflict

Hooman **Peimani 2,** Senior Research Fellow at the Centre for International Cooperation and Security, Senior International Relations consultant with the United Nations in Geneva, PhD in International Relations, *Failed Transition, Bleak Future?,* p. 122-7

In the short run, the prospect for peace is not very great for the countries of the Caucasus and Central Asia. Many influences have paved the way for the rise of wars in different forms, ranging from civil wars to regional wars. The situation is ripe, and will remain so, for instability and war for a predictably long period of time. Only a drastic change in the state of affairs in the two regions could remove the possibility of such destructive developments, which is a highly unrealistic scenario in the near future. **The outbreak of any type of military conflict for any length of time will be disastrous** for the Caucasians and Central Asians, who have experienced sharp declines in their living standards since independence. Their limited resources and insignificant foreign assistance have prolonged the transitional period from the old Soviet social and economic system to a form of free-enterprise economy with its corresponding social system. Apart from the tragic cost of any military conflict in human lives, such an event will deplete their scarce resources and perpetuate the existing agonizing limbo between the two economic and social systems. In the absence of adequate resources to complete the already long transitional process, this limbo may well become their own economic and social system for an unpredictable period of time.¶ The impact of war and instability in the Caucasus or Central Asia **will not be confined to the countries immediately affected.** **Any local conflict could escalate and expand to its neighboring countries, only to destabilize its entire respective region.** Furthermore, certain countries with stakes in the stability of Central Asia and/or the Caucasus could well be dragged into such a conflict, intentionally or unintentionally. Regardless of the form or extent of their intervention in a future major war, **the sheer act of intervention could further escalate the war, increase the human suffering, and plant the seeds for its further escalation.** Needless to say, this could only further contribute to the devastation of all parties involved and especially of the “hosting” CA or Caucasian countries. In fact, certain factors could even kindle a military confrontation between and among the five regional and nonregional states with long-term interests in Central Asia and the Caucasus. This scenario could potentially destabilize large parts of Asia and Europe. The geographical location of the two regions as a link between Asia and Europe— shared to different extents by Iran, Turkey, and Russia— creates a “natural” geographical context for the expansion of any regional war involving those states to other parts of Asia and Europe. Added to this, Iran, China, Turkey, Russia, and the United States all have ties and influence in parts of Asia and Europe. They are also members of regional organizations such as the Economic Cooperation Organization (Iran and Turkey) or military organizations such as NATO (Turkey and the United States). These geographical, political, economic and military ties could help expand any conflict in which they are involved.

#### And there is a high risk of spillover from Afghanistan – it emboldens radical elements throughout the region

Yafai 6/12/12 (Faisal Al, Journalist, “Central Asia fears a spillover of instability as Nato leaves” <http://www.thenational.ae/thenationalconversation/comment/central-asia-fears-a-spillover-of-instability-as-nato-leaves#page2>)

When Nato departs next year, Central Asia fears an American-shaped hole in Afghanistan. There is a likelihood that instability will find its way north. Nato's mission has largely failed. Although the decade-long campaign has severely injured Al Qaeda in the region, Nato's other objectives - to protect the population, provide security and promote effective government - have not been met. Heroin still makes its way through Central Asia, bringing not only drug addiction but the attendant criminal networks. The Taliban is resurgent and expected to increase its influence once Nato leaves. Afghans who helped the Americans may face retribution; and the same may apply in neighbouring countries. The militant Islamic Movement of Uzbekistan has been active in Afghanistan, and its members reportedly have fought alongside the Taliban. The IMU has largely been pushed out of Uzbekistan by a government crackdown, and out of Afghanistan by US troops, but has moved to other countries. The group maintains a base in Pakistan, where it has been targeted by US drones. The most vulnerable Central Asian country is Tajikistan, a small and fragile state with a long, porous border with Afghanistan. Two years ago, militants linked to the IMU staged a daring prison break in the capital Dushanbe. Days later, a military convoy was ambushed, killing about 40 personnel. It was reported earlier this year that an IMU leader was arrested in the country, possibly signalling a revival there. Central Asian countries are ill-prepared to handle resurgent Islamist militants. All have problems with radical (if not necessarily militant) Islam, and most have chosen to crack down even on peaceful forms of devotion. The combination of populations unable to express their faith and heavy repression of political activities leaves few safety valves for dissent. Religious expression in these Muslim countries has been suppressed since Soviet times. Today, that suppression looks counterproductive. Yet it is the only strategy most of these governments know (and the examples of neighbouring Pakistan and Iran cannot have filled them with confidence about political Islam). Expect this not to change. For all the talk from America, Russia and China about securing the borders of Central Asia and the economic link-ups of the "New Silk Road", the default posture of the region's governments has been repression.

#### And resolving contractor abuse during the transition post-2014 is critical to sustaining stability in Afghanistan

#### And resolving contractor abuse during the transition post-2014 is critical to sustaining stability in Afghanistan

CPMSC 11 (Control PMSCs calls for the adoption of binding international and national regulations to limit the privatization of warfare and security, to regulate the activities of private military and security companies and hold these companies accountable for their human rights abuses and violations of the law, “Corporate private armies in Afghanistan post-2014” <http://controlpmsc.org/corporate-private-armies-in-afghanistan-post-2014/>)

One of the most important conclusions in the research is that part of PMSCs will remain in Afghanistan as an armed element surviving the withdrawal of foreign military forces planned for 2014. These companies are important actors that perpetuate a militarized society model and can have potentially destabilizing effects in the transition stage of the country. PMSCs are only one of several armed groups operating in the Afghan conflict, and in many cases, their use and activities go unnoticed. However, most international actors in Afghanistan (NGOs, journalists…) claim that, even today, they would be unable to operate in the country without the help of PMSCs. Overall, international military forces in general (Coalition Forces and ISAF under NATO command), and military agencies, diplomatic and reconstruction from U.S. in particular have been the main employers of PMSCs in Afghanistan. In fact, in December 2008, contractors made up 69% of the staff of the U.S. Department of Defense (DoD), the highest percentage recorded by the DoD in a conflict in the U.S. history. New dimensions of the privatization of war The use of private contractors in conflict situations was not exactly a new policy by the time the war of Afghanistan began. However, the scale in their use and the scope of their activities experienced a drastic turn during the conflict. Being the greatest exponent of the global war on terrorism, the Afghan conflict (2001-present) is also, along with Iraq, one of the first examples of the contemporary privatization of war. The use of private contractors in conflict situations was not exactly a new policy by the time the war of Afghanistan began. However, the scale in their use and the scope of their activities experienced a drastic turn during the conflict. From 2001 to 2007, the estimated number of PMSCs present in Afghanistan ranged from 60 to 140 companies, with around 18,000 to 28,000 troops. In addition, these companies have done all kinds of military and security services. Such as training and restructuring of national armed forces – i.e. the Afghan National Army (ANA) –, operational support services including maintenance and operation of weapons and combat-related goods (including drones), as well as demining and eradication of poppy fields. “One of the peculiarities of the PMSCs industry in Afghanistan is the national component. In contrast to Iraq, when arriving in the country, this industry, which was eminently foreign in nature and concept, progressively became a business with a strong national component. And have also created complex relationships with the police, local militias and warlords. This has not only influenced local politics and economy but has hampered the demobilization of combatants. The output of troops and the current policy of dissolution of PMSCs threaten to leave a good number of unemployed armed population and impact the fragile political stability of the country, “says the director of research and PhD in international law, Leticia Armendariz. Human rights, distrust and insecurity Abuses committed by contractors also compose a substantial base of the impact PMSCs’ use and activities have had on human rights of local population in Afghanistan. In broad terms, PMSCs’ activities have had both a direct and an indirect impact on human rights. Several research field studies provide reliable information showing that although the services of PMSCs are generally related to safety, the use and activities of the companies has not led to a positive development in the field overall security of the country. Studies have indicated that the large number of armed individuals, vehicles and weapons, as well as the links between these companies and the national militia, has created a sense of mistrust, fear and insecurity among the local population and sends the message that security is a public good, but a limited option to foreigners and wealthy Afghans. In this regard, the report highlights the need for international regulation of PMSCs to serve for regulation at the time of their arrival in countries at war. From a human rights perspective, this could mean that regional states have a real commitment to fulfilling its obligations to protect human rights and ensure respect for humanitarian law under its jurisdiction.

## 2ac

### 2AC NSA

#### NSA spying doesn’t kill cooperation – new reforms solve

Monitor Frontier Markets 12/22/13 (“US signals it will weigh EU concerns over NSA spying” <http://monitorfrontiermarkets.com/news-story/us-signals-it-will-weigh-eu-concerns-over-nsa-spying/>)

A new White House panel report and remarks from President Obama suggest the US is taking European concerns into account as it considers curbs on National Security Agency cyber espionage. As European lawmakers weigh tough new measures to curb mass surveillance by US intelligence agencies, there are signs the US may be shifting its stance on cyber espionage abroad, bolstering privacy in new ways that may please Europeans. A successful US initiative would shore up the tarnished images of big US Internet companies and blunt the negative impact that the espionage scandal has had on their international sales. “If it’s packaged and presented the right way, it should calm the Europeans down,” says James Lewis, a national security expert who focuses on cyber issues at the Center for Strategic and International Studies in Washington. “If they essentially apply the principles of the Safe Harbor agreement we already have with Europe, that should go over well.” The impetus for the optimism comes from a new report by a White House panel, which recommends major changes in US cyber espionage aimed at enhancing privacy protections of non-US persons. The report was released Wednesday, Dec. 18, one month ahead of schedule. Two days later, President Obama acknowledged that the US would have to change the espionage programs of the National Security Agency (NSA) as well as set ground rules acceptable to long-time US allies, including France, Germany, and Spain. “We’ve got to provide more confidence to the international community,” the president said at a White House press conference. “We do have a lot of laws and checks and balances and safeguards and audits when it comes to making sure that the NSA and other intelligence agencies are not spying on Americans. We’ve had less legal constraint in terms of what we’re doing internationally. “But I think part of what’s been interesting about this whole exercise is recognizing that in a virtual world, some of these boundaries don’t matter anymore, and just because we can do something doesn’t mean we necessarily should,” he continued. “And the values that we’ve got as Americans are ones that we have to be willing to apply beyond our borders I think perhaps more systematically than we’ve done in the past.” The Obama administration has been on the defensive over the NSA since June, when top-secret documents leaked to the news media by former NSA contractor Edward Snowden revealed NSA mass-surveillance practices in the US and abroad. Those revelations have strained US ties with its allies in Europe, broadly pleased China and Russia, and ignited a firestorm of criticism from civil libertarians, privacy advocates, and lawmakers in Congress. Recent revelations that the NSA was also using Google tracking cookies to help it target individuals for online surveillance only made the situation worse. Europeans were infuriated over revelations that the NSA was bugging German Chancellor Angela Merkel’s phone, gathering French citizens’ metadata, and rounding up cellphone data across Europe. To address those concerns, the White House panel is recommending that protections be formalized for “non-US persons.” “Significant steps should be taken to protect the privacy of non-US persons,” the report said, and any order to conduct surveillance against these non-US persons should be required to satisfy six separate hurdles. The order must: be authorized by duly enacted laws or properly authorized executive orders; be directed exclusively at protecting national security interests of the US or allies; not be directed at illicit or illegitimate ends, such as the theft of trade secrets or obtaining commercial gain for domestic industries; not target any non-US person based solely on that person’s political views or religious convictions; not disseminate information about non-US persons if the information is not relevant to protecting the national security of the US or allies; and be subject to careful oversight and to the highest degree of transparency consistent with protecting the national security of the US and allies. The recommendations are a mixed bag from a national security standpoint, according to experts on US surveillance practices and national security. But several proposals would bolster privacy and stood a good chance of mollifying European anger. The 308-page report was also received favorably by some civil libertarians.

### 2AC A2: Budget Cuts

#### NATO solving budget cuts now with smart defense and connected forces programs

Eide 2/11/13 (Barth, defense minister of Norway, “Closing the gap: Keeping NATO strong in an era of austerity” <http://www.nato.int/cps/en/SID-21281BCB-2C102202/natolive/opinions_98350.htm?selectedLocale=en>)

The good news is that we already have a solid conceptual basis for keeping NATO strong. At our Summit in Lisbon two and a half years ago, we adopted a new Strategic Concept for our Alliance. It describes the risks and threats that we are up against. And it highlights three essential core tasks to meet the Allies’ individual and shared interests – collective defence, crisis management, and cooperative security. But in order to carry out these tasks successfully, we need the right forces and the right capabilities. And at a time of financial difficulties for many of our nations, acquiring those forces and capabilities has become a formidable challenge. At our most recent NATO Summit in Chicago last May, our Heads of State and Government set the goal of “NATO Forces 2020”: modern, tightly connected forces that are equipped, trained, exercised and commanded so that they can operate, together with other allies – and with partners – in any environment. To help us reach this goal, we also agreed at Chicago to pursue two separate initiatives: Connected Forces and Smart Defence. Smart Defence is meant to be a new guiding principle for capability development. The aim here is to encourage multinational solutions to both maintaining and acquiring defence capabilities – in other words, nations working together to deliver capabilities that they cannot afford alone. Connected Forces has garnered fewer headlines, but it’s just as important as Smart Defence. Its objective is to maintain and strengthen the readiness and interoperability of our forces, even as our operations draw down. We will place a greater emphasis on NATO-led training and exercises, taking into account the specific regional knowledge and expertise of countries, including that of Norway and its Nordic neighbours. We also want to make better use of computer-assisted training and simulation. And we will take advantage of the U.S. offer to rotate elements of a U.S.-based combat brigade to Europe on an annual basis for exercises that can help turn the NATO Response Force into an effective, deployable capability, one that has experience operating in different environments and addressing different scenarios. (In this regard, I applaud Norway’s efforts to focus NATO’s military command structure on the unique strategic challenges in this and other regions of the Alliance, rather than taking a one-size-fits-all approach.) We are off to a good start in implementing both Smart Defence and the Connected Forces Initiative. But it is vital that we maintain the momentum. Our Libya operation two years ago demonstrated that European Allies and Canada can take the lead in NATO-led combat operations – and Norway’s air force performed brilliantly. But Libya also confirmed the Alliance’s over-reliance on some critical U.S. capabilities, especially strategic enablers like Intelligence, Surveillance and Reconnaissance, and air-to-air refuelling. This transatlantic capability gap is simply not sustainable in the long term. First, the fiscal crisis has hit the United States as well, and it will be cutting defence expenditure in the coming years (although hopefully avoiding the meat-axe cuts required by “sequestration”). The U.S. also has a revised defence strategy that shifts the emphasis of its force posture from Europe to the Middle East and the Asia-Pacific region.

## PQD

### 2AC Deference DA

#### Judicial review results in better executive war-fighting decisions

Adelsberg 12 (Samuel S., \* J.D. Candidate 2013, Yale Law School, “Bouncing the Executive's Blank Check: Judicial Review and the Targeting of Citizens” Harvard Law & Policy Review 6 Harv. L. & Pol'y Rev. 437, Lexis)

[\*445] Rather, as recognized by the Founders in the Fourth Amendment, balancing the needs of security against the imperatives of liberty is a traditional role for judges to play. Two scholars of national security law recently highlighted the value of judicial inclusion in targeting decisions: "Judicial control of targeted killing could increase the accuracy of target selection, reducing the danger of mistaken or illegal destruction of lives, limbs, and property. Independent judges who double-check targeting decisions could catch errors and cause executive officials to avoid making them in the first place." n47 Judges are both knowledgeable in the law and accustomed to dealing with sensitive security considerations. These qualifications make them ideal candidates to ensure that the executive exercises constitutional restraint when targeting citizens. Reforming the decision-making process for executing American citizens to allow for judicial oversight would restore the separation of powers framework envisioned by the Founders and increase democratic legitimacy by placing these determinations on steadier constitutional ground. For those fearful of judicial encroachment on executive war-making powers, there is a strong argument that this will actually strengthen the President and empower him to take decisive action without worrying about the judicial consequences. As Justice Kennedy put it, "the exercise of [executive] powers is vindicated, not eroded, when confirmed by the Judicial Branch." n48 Now, we will turn to what this judicial involvement would look like.

#### Total executive speed and flexibility kills warfighting – restraint key

Deborah N. Pearlstein 9, lecturer in public and international affairs, Woodrow Wilson School of Public & International Affairs, July 2009, "Form and Function in the National Security Constitution," Connecticut Law Review, 41 Conn. L. Rev. 1549, lexis nexis

It is in part for such reasons that studies of organizational performance in crisis management have regularly found that "planning and effective [\*1604] response are causally connected." n196 Clear, well-understood rules, formalized training and planning can function to match cultural and individual instincts that emerge in a crisis with commitments that flow from standard operating procedures and professional norms. n197 Indeed, "the less an organization has to change its pre-disaster functions and roles to perform in a disaster, the more effective is its disaster [sic] response." n198 In this sense, **a decisionmaker with absolute flex**ibility **in an emergency-unconstrained by protocols or plans-may be systematically more prone to error than a decision-maker who is in some way compelled to follow procedures and guidelines, which have incorporated professional expertise, and which are set as effective constraints in advance**.¶ **Examples of excessive flexibility producing adverse consequences are ample**. Following Hurricane **Katrina**, one of the most important lessons independent analysis drew from the government response was the extent to which the disaster was made worse as a result of the lack of experience and knowledge of crisis procedures among key officials, the absence of expert advisors **replacing those rules with more than the most general guidance about custodial intelligence collection.** available to key officials (including the President), and the failure to follow existing response plans or to draw from lessons learned from simulations conducted before the fact. n199 Among the many consequences, [\*1605] basic items like food, water, and medicines were in such short supply that local law enforcement (instead of focusing on security issues) were occupied, in part, with breaking into businesses and taking what residents needed. n200¶ Or **consider the widespread abuse of prisoners at U.S. detention facilities such as Abu Ghraib**. Whatever the theoretical merits of applying coercive interrogation in a carefully selected way against key intelligence targets, n201 the systemic torture and abuse of scores of detainees was an outcome no one purported to seek. There is substantial agreement among security analysts of both parties that the prisoner abuse scandals have produced predominantly negative consequences for U.S. national security. n202 While there remain important questions about the extent to which some of the abuses at Abu Ghraib were the result of civilian or senior military command actions or omissions, one of the too often overlooked findings of the government investigations of the incidents is the unanimous agreement that the abuse was (at least in part) the result of structural organization failures n203 -failures that one might expect to [\*1606] produce errors either to the benefit or detriment of security.¶ In particular, military investigators looking at the causes of Abu Ghraib cited vague guidance, as well as inadequate training and planning for detention and interrogation operations, as key factors leading to the abuse. Remarkably, "pre-war planning [did] not include[] planning for detainee operations" in Iraq. n204 Moreover, **investigators cited failures at the policy level- decisions to lift existing detention and interrogation strictures without** n205 As one Army General later investigating the abuses noted: "**By October 2003, interrogation policy in Iraq had changed three times in less than thirty days and it became very confusing as to what techniques could be employed and at what level non-doctrinal approaches had to be approved**." n206 It was thus unsurprising that detention and interrogation operations were assigned to troops with grossly inadequate training in any rules that were still recognized. n207 The **uncertain effect of broad, general guidance**, coupled [\*1607] with the competing imperatives of guidelines that differed among theaters of operation, agencies, and military units, caused serious confusion among troops and led to decisionmaking that it is overly kind to call arbitrary. n208¶ Would the new functionalists disagree with the importance of government planning for detention operations in an emergency surrounding a terrorist nuclear attack? Not necessarily. Can an organization anticipate and plan for everything? Certainly not. But **such findings should at least call into question the inclination to simply maximize flex**ibility **and discretion in an emergency, without, for example, structural incentives that might ensure the engagement of professional expertise**. n209 Particularly if one embraces the view that the most potentially damaging terrorist threats are **nuclear and biological terrorism**, involving highly technical information about weapons acquisition and deployment, a security policy **structure based on nothing more than general popular mandate and political instincts is unlikely to suffice**; **a structure that systematically excludes knowledge of and training in emergency response will almost certainly result in mismanagement**. n210 In this light, a general take on role effectiveness might suggest favoring a structure in which the engagement of relevant expertise in crisis management is required, leaders have incentives to anticipate and plan in advance for trade-offs, and [\*1608] organizations are able to train subordinates to ensure that plans are adhered to in emergencies. Such **structural constraints could help increase the likelihood that something more than arbitrary attention has been paid before transcendent priorities are overridden.**

### 2AC Climate Turn

#### Turn – Climate change suits are absolutely critical to solving global warming, we cannot wait for congress to act – three warrants

Flynn 13 (James, J.D. Candidate, 2013, Georgia State University College of Law; Assistant Legislation Editor, Georgia State University Law Review; Visiting Student, Florida State University College of Law, “CLIMATE OF CONFUSION: CLIMATE CHANGE LITIGATION IN THE WAKE OF AMERICAN ELECTRIC POWER V. CONNECTICUT”, lexis, accessed 1/5/2014)

2. Turning Up the Heat on Congress: Litigating to Legislate The only solution to anthropogenic global warming is a concerted global effort. 264 Such an effort cannot succeed without the leadership, or at least support, of the United States. 265 Real change in the United States requires comprehensive legislation that covers all facets of global warming: greenhouse gas emissions, land use, efficiency, and sustainable growth. In addition to maximizing time until the EPA either issues regulations or is prevented from doing so by Congress, litigation advances the goal of such comprehensive legislation in three ways. First, litigation keeps the pressure on fossil fuel companies and other large emitters. Comprehensive legislation is a near impossibility as long as the largest contributors to global greenhouse gas emissions are able to exert powerful control over the nation's [\*862] energy policy and the climate change discussion. 266 While the companies have the financial resources to battle in court, it is imperative that advocates and states make them do so. One need only look at the tobacco litigation of the 1960s through the 1990s to understand that success against a major industry is possible. 267 Here, though, the stakes are even higher. The chances of obtaining a largescale settlement from the fossil fuel industry is likely smaller now that the Court has ruled that some federal common law nuisance claims are displaced, because lower courts may hold that nuisance claims for money damages are also displaced. 268 However, advocates of climate change legislation should keep trying to obtain such a settlement through other tort remedies. A substantially damaging settlement may encourage fossil fuel companies to reposition their assets into more sustainable technologies to avoid more settlements, thus minimizing future emissions. Alternatively, if the fossil fuel companies feel threatened enough, they may begin to use their clout to persuade Congress to pass comprehensive legislation to protect their industry from such wide-ranging suits. 269 Second, litigation keeps the issue in the public consciousness during a time when the media is failing at its responsibilities to the public. 270 The media's coverage of climate change has been both inadequate and misleading. 271 Indeed, some polls suggest Americans [\*863] believe less in climate change now than just a few years ago. 272 Litigation, especially high-profile litigation, forces the issue into the public sphere, even though it may receive a negative connotation in the media. The more the public hears about the issue, the greater chance that people will demand their local and state politicians take action. Finally, litigation sends a clear message to Congress that simple appeasements will not suffice. 273 Comprehensive legislation is needed--legislation that mandates consistently declining emissions levels while simultaneously propping up replacement sources of energy. 274 Fill-in measures, like the EPA's authority to regulate emissions from power plants, are not sufficient. Humans need energy, and there can be no doubt that we must strike a balance between energy needs and risks to the environment. Catastrophic climate change, however, is simply a risk that we cannot take; it overwhelms the short-term benefits we receive from the burning of fossil fuels. 275 Advocates and states must demonstrate to Congress [\*864] through continuing litigation that the issue is critical and that plaintiffs like those in Kivalina and Comer are suffering genuine losses that demand redress that current statutes do not currently provide. CONCLUSION American Electric proved less important for the precedent it set than for the questions it left unanswered. While courts wrestled over standing, the political question doctrine, and displacement in climate change nuisance cases in the years preceding American Electric, the Supreme Court relied only on the clear displacement path illuminated by its earlier decision in Massachusetts. While the decision in American Electric narrowed the litigation options that climate change advocates have at their disposal, it subtly sent a message to Congress that greater federal action is needed. In writing such a narrow ruling, Justice Ginsburg also sent a message to states and advocates--whether intentionally or not--that climate change litigation is not dead. Until Congress enacts comprehensive climate change legislation, global warming lawsuits will, and must, continue.

#### No offense – Congressional action and coordination fails –

#### A. Congress is undermining productive action on climate

Weatherford 11/5/2013 (Katie, regulatory policy analyst for the Center for Effective Government’s regulatory policy team, “Congress Continues Efforts to Thwart Climate Change Emissions Limits”, http://www.foreffectivegov.org/congress-continues-efforts-thwart-climate-change-emissions-limits)

Carbon Emissions Limits Are Central to President's Climate Action Plan The limits on CO2 from new power plants are a critical component of President Obama's action plan to address climate change. Carbon dioxide is the primary greenhouse gas contributing to global warming and climate changes that have occurred over the past several decades; fossil fuel combustion for electricity generation "is the largest single source of CO2 emissions in the nation." By EPA's calculations, CO2 emissions accounted for roughly "38% of total U.S. CO2 emissions and 32% of total U.S. greenhouse gas emissions in 2011." EPA first proposed emissions limits in April 2012 in response to a 2010 settlement agreement. But after receiving heavy criticism from the coal industry, the Obama administration decided to revise the rule. On Sept. 20 of this year, EPA announced a new proposal for new power plants. When finalized, the rule will require large gas-fired plants to limit carbon emissions to 1,000 pounds per megawatt-hour of electricity produced and require smaller gas-fired plants and all new coal-fired plants to meet a limit of 1,100 pounds of CO2 per megawatt-hour. The rule has yet to be published in the Federal Register, presumably because of a backlog of publications caused by the government shutdown during the first weeks of October. Once published, a 60-day comment period will officially begin and the docket will be made available online. Meanwhile, EPA has already posted the proposal on its website, scheduled public hearings across the U.S., and started accepting public comments. Legislative Efforts to Silence EPA Are Underway Even before EPA's initial proposal in 2012, anti-regulatory forces in Congress were seeking to undermine efforts to reduce carbon pollution. According to a database compiled by the House Energy and Commerce Committee minority staff, during the 112th Congress (January 2011 to January 2012), the House voted 53 times to block actions to address climate change. The 2011 Continuing Resolution (H.R. 1) prohibited EPA from using funds to issue or enforce any regulation on emissions of greenhouse gases due to climate change concerns. Rep. Ted Poe (R-TX) offered an amendment to the resolution that would have blocked EPA from regulating greenhouse gas emissions from stationary sources for any reason. Representatives also attached "riders" to both the FY 2012 and FY 2013 House Interior and Environment appropriations bills to prohibit or delay EPA from setting limits on carbon dioxide or other greenhouse gas emissions. The 113th Congress has continued efforts to prevent EPA action to address CO2 emissions. Just days before EPA announced its proposal to limit CO2 emissions from new power plants, Senate Minority Leader Mitch McConnell (R-KY) introduced legislation to prevent EPA from finalizing the standards. New Legislation: A Wolf in Sheep's Clothing On Oct. 28, Rep. Ed Whitfield (R-KY), joined by Sen. Joe Manchin (D-WV), released a discussion draft bill with the same prohibitive language of past efforts to prevent regulation of greenhouse gas emissions. However, upon releasing the draft text, Manchin called it "a consensus, middle, doable procedure that we can abide by." This bill is not moderate. The three major components of the bill would: Void EPA's Proposed Emissions Limits: The bill would repeal any proposed rule or guidance that EPA has issued to limit carbon emissions from new power plants. The bill says these "rules and guidelines shall be of no force or effect, and shall be treated as though such rules and guidelines had never been issued." Additionally, the bill prohibits EPA from proposing or finalizing a rule or guidance to limit emissions of any greenhouse gas from existing power plants. By requiring EPA to start again from scratch, the bill guarantees several more years of delay before EPA can move forward. Require Congress to Reauthorize EPA to Limit Emissions from Existing Plants and Set Deadline: Under the bill, EPA cannot limit emissions of any greenhouse gas from an existing or modified power plant until Congress enacts a law specifying the effective date of the rule or guidance. Further, no rule or guidance will become effective until EPA submits a report to Congress regarding the economic impact of the rule. Notably, this report would not be required to include any of the many benefits of limiting emissions. Impose an Unworkable Standard for Regulating Emissions of Any Greenhouse Gas: Before EPA can issue any emissions limits on new power plants, the agency would be required to establish a separate standard for gas-fired and coal-fired plants (as it has already done in its Sept. 20 proposal). Further, EPA must show that at least six commercial scale coal-fired power plants in different locations throughout the U.S. have achieved the proposed limits for a full year. For power plants fired with lignite coal, EPA must show that the standards were achieved for a full year by three units at different plants throughout the U.S. To ensure that EPA can never satisfy this standard, the law prevents the agency from using the results of "any demonstration project" in setting the standard. A demonstration project is defined as "a project to test or demonstrate the feasibility of carbon capture and storage technologies that has received government funding or financial assistance." EPA based its current proposal on projects across the country where carbon capture and storage technology has been installed to demonstrate that the standard is achievable. Under the new bill, these projects would not be valid evidence of the viability of the new standards. Instead, only efforts that industry undertakes voluntarily to use carbon capture and storage technology without any government assistance could be used to justify a new standard. Obviously, industry has no incentive to install this technology because doing so would subject it to regulation. Whitfield has even acknowledged this point. E&E News reports that when asked whether industry would invest in this technology without a mandate by EPA or financial assistance, Whitfield said "no." Rather, under this impossible standard, industry has a large incentive to continue emitting greenhouse gases so that EPA can never issue regulations to limit those emissions. The new legislation has not garnered the support of any prominent lawmakers or organizations that support stronger greenhouse gas emissions controls. Rep. Henry Waxman (D-CA) called it "scientific lunacy" in a statement opposing the bill. According to a recent poll, 74 percent of voters in swing Senate states support EPA's proposed emissions limits for coal-fired power plants, and 66 percent of all voters surveyed trusted EPA more than Congress to make decisions about issuing those regulations. If enacted, this bill would thwart efforts to reduce the nation's major source of climate change-causing carbon pollution. Conclusion When the president directed EPA to issue rules to cut carbon emissions from new and existing power plants, no one expected the task to be easy. Despite challenges from industry interests and climate-change deniers, EPA is moving forward; it needs to promptly finalize the limits it has proposed to cut CO2 emissions from new power plants. But the larger battle may be ahead. EPA is supposed to propose new emissions limits for existing power plants by the June 1, 2014 deadline set forth in Obama's Presidential Memorandum accompanying his climate action plan. Because the forthcoming rule will regulate the oldest and "dirtiest" facilities and will likely require new investments in carbon capture and storage technology, powerful interests will oppose tougher standards. But limits on both new and existing power plants are crucial if we are going to reduce the risks that carbon dioxide emissions pose to public health and to the environment. For the sake of future generations, this is a fight the EPA must win.

#### B. Anti-regulatory lobbies and **influence prevent action**

Mayer 13 (Jane, The New Yorker, July 1, “Kock Pledge Tied to Congressional Climate Inaction”, http://www.newyorker.com/online/blogs/newsdesk/2013/07/the-kochs-and-the-action-on-global-warming.html)

When President Obama unveiled his program to tackle climate change last month, he deliberately sidestepped Congress as a hopeless bastion of obstruction, relying completely on changes that could be imposed by regulatory agencies. A two-year study by the Investigative Reporting Workshop at American University, released today, illustrates what might be one of the reasons why he had to take this circuitous route. Fossil fuel magnates Charles and David Koch have, through Americans for Prosperity, a conservative group they back, succeeded in persuading many members of Congress to sign a little-known pledge in which they have promised to vote against legislation relating to climate change unless it is accompanied by an equivalent amount of tax cuts. Since most solutions to the problem of greenhouse-gas emissions require costs to the polluters and the public, the pledge essentially commits those who sign to it to vote against nearly any meaningful bill regarding global warning, and acts as yet another roadblock to action. The investigative study tracks the political influence wielded by the billionaire Koch brothers, who have harnessed part of the fortune generated by their company, Koch Industries, the second largest private corporation in the country, to further their conservative libertarian activism. Charles Lewis, the Executive Editor of the Investigative Reporting Workshop explained that the I.R.W., a non-profit news organization attached to American University, spent two years focussing on Koch Industries because, “There is no other corporation in the U.S. today, in my view, that is as unabashedly, bare-knuckle aggressive across the board about its own self-interest, in the political process, in the nonprofit-policy-advocacy realm, even increasingly in academia and the broader public marketplace of ideas.” Formerly head of the Center for Public Integrity in Washington, Lewis has focussed for years on the way money affects American politics. “The Kochs’ influence, without a doubt, is growing,” he believes. A spokeswoman for the Kochs declined to comment. In its multi-part report, “The Koch Club,” written by Lewis, Eric Holmberg, Alexia Campbell, and Lydia Beyoud, the Workshop found that between 2007 and 2011 the Kochs donated $41.2 million to ninety tax-exempt organizations promoting the ultra-libertarian policies that the brothers favor—policies that are often highly advantageous to their corporate interests. In addition, during this same period they gave $30.5 million to two hundred and twenty-one colleges and universities, often to fund academic programs advocating their worldview. Among the positions embraced by the Kochs are fewer government regulations on business, lower taxes, and skepticism about the causes and impact of climate change. Climate-change policy directly affects Koch Industries’s bottom line. Koch Industries, according to Environmental Protection Agency statistics cited in the study, is a major source of carbon-dioxide emissions, the kind of pollution that most scientists believe causes global warming. In 2011, according to the E.P.A.’s greenhouse-gas-reporting database, the company, which has oil refineries in three states, emitted over twenty-four million tons of carbon dioxide, as much as is typically emitted by five million cars. Starting in 2008, a year after the Supreme Court ruled that the Environmental Protection Agency could regulate greenhouse gasses as a form of pollution, accelerating possible Congressional action on climate change, the Koch-funded nonprofit group, Americans for Prosperity, devised the “No Climate Tax” pledge. It has been, according to the study, a component of a remarkably successful campaign to prevent lawmakers from addressing climate change. Two successive efforts to control greenhouse-gas emissions by implementing cap-and-trade energy bills died in the Senate, the latter of which was specifically targeted by A.F.P.’s pledge. By now, four hundred and eleven current office holders nationwide have signed the pledge. Signatories include the entire Republican leadership in the House of Representatives, a third of the members of the House of Representatives as a whole, and a quarter of U.S. senators. The 2010 mid-term elections were a high watermark for the pledge. The Kochs, like many other conservative benefactors, gave generously to efforts to help shift the majority in the House of Representatives from Democratic to Republican. Koch Industries’s political action committee spent $1.3 million on congressional campaigns that year. When Republicans did take control of the House, a huge block of climate-change opponents was empowered. Fully one hundred and fifty-six members of the House of Representatives that year had signed the “No Climate Tax Pledge.” Of the eighty-five freshmen Republican congressmen elected to the House of Representatives in 2010, seventy-six had signed the No Climate Tax pledge. Fifty-seven of those received campaign contributions from Koch Industries’s political action committee. The study notes that more than half of the House members who signed the pledge in the 112th Congress made statements doubting climate-change science, despite the fact that there is overwhelming scientific consensus on the subject. The study recounts that the Kochs have influenced the congressional climate-change debate in other ways, too, which include funding an array of nonprofit groups whose experts have testified in Congress questioning the cause, the severity, and the necessity of, acting on climate change. Since 2007, “Senior staff at more than a dozen Koch-funded nonprofit groups have made frequent trips to testify on Capitol Hill in favor of deregulation,” of the environment and energy sector, the study says. The No Climate Tax pledge has made inroads at the state level, as well. In just the three states of Missouri, Michigan, and Kansas, where Koch Industries has its headquarters, forty-eight office holders have now signed the pledge. Nationwide, it has penetrated even the most local levels. Signatories now include the Oklahoma superintendent of schools, the Idaho Treasurer, and three justices of the peace in Arkansas. Lewis concludes that “One of the overarching themes from what we have found is that,” when it comes to blocking action on climate change, “things obviously go better with Koch!”

## \*\*\*Offcase

### 2AC T Restrictions

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

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

Despite Defendants’ attempt to distinguish the habeas cases, Defs. Br. 12, claims alleging

unlawful deprivation of life under the Fifth Amendment’s Due Process Clause are as textually

committed to the courts as claims brought under the Suspension Clause. Both are fundamental

judicial checks on executive authority. Cf. Boumediene v. Bush, 476 F.3d 981, 993 (D.C. Cir.

1997) (rejecting distinction between the Suspension Clause and Bill of Rights amendments

because both are “restrictions on governmental power”), rev’d on other grounds by Boumediene,

553 U.S. 723.

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

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

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

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

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

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

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

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

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

### 2AC Congress

#### Cant solve PQD – Congress cant direct judicial review or independence

Grinsinger-Prof History NU-12

The Unwieldy American State: Administrative Politics Since the New Deal p.81

Congress was at least discontented with certain judicial practices. As the Senate Judiciary Committee suggested, the problem was not with the "substantial evidence" test itself, but with "the practice of agencies to rely upon (and of courts to tacitly approve) something less - to rely upon suspicion, surmise, implications, or plainly incredible evidence."'0' As a result, Congress directed courts to determine "in the exercise of their independent judgment, whether on the whole record the evidence in a given instance is sufficiently substantial to support a finding, conclusion, or other agency action as a matter of Iaw."'0i As one scholar suggested, "the difference in emphasis is not so much over what the Act requires, as over what the Courts have been really doing."10"' It was not at all clear that this problem extended beyond a few prominent cases, but the bill's drafters were able to use this opportunity to provide a new and clearly stated standard of review that asked all courts to reexamine how they reviewed agency decision making. However, by implicitly endorsing what most courts were already doing. Congress blunted the revolutionary impact of the new standard. One contemporary observer predicted that the APA "will not upset the rubric of judicial review which the federal judiciary has fashioned piecemeal, and from which it has no intention of deviating, even though its home- made precepts also now have been expressed, however opaquely, in statutory flapdoodle."104

#### --The Executive would effectively challenge the counterplan in Court

McKelvey-JD Candidate Vandy-11 44 Vand. J. Transnat'l L. 1353

NOTE: Due Process Rights and the Targeted Killing of Suspected Terrorists: The Unconstitutional Scope of Executive Killing Power

Alternatively, Congress could pass legislation that explicitly prohibits the targeted killing of Americans unless the circumstances present a concrete threat of imminent danger.236 As the analysis in Part II.A indicates, targeted killing is a premeditated offensive military strategy, not a defensive practice.237 Congress could exercise its own constitutional powers as the war-making body of government to ensure that no American may be targeted for extrajudicial lethal force by the Executive Branch.238 Similarly, Congress could amend the AUMF to include a prohibition of the targeted killing of Americans.239 Although this has the potential to limit the military in counterterrorism measures in circumstances such as the Aulaqi case, it would emphasize congressional commitment to fundamental constitutional rights even in the face of terrorist threats.240 The irony of the Aulaqi case is that based on the publicly available evidence, there is good reason to believe the DOJ’s assertion that Anwar al-Aulaqi presented significant danger to the country.241 But allowing the president to target Aulaqi for extrajudicial killing presents its own danger, as it establishes a broad and unreviewable killing power with potential for error and abuse.242 Americans must have more reassurance that the powers of the Executive Branch are limited and reasonable. Although a legislative solution is appealing given the success of the analogous FISA court, a statutory ban on the targeted killings of Americans is certainly the preferable option. When a government unilaterally assassinates one of its own citizens in circumvention of civil liberties, this raises profound questions about the legitimacy of that government, especially in a representative democracy. It also stands in contradiction to the American constitutional legacy, in which separate but coequal branches of government were created primarily to limit the possibility of tyranny and other government abuses of power. A congressional ban on the targeted killing of Americans would represent a legislative rebuke of executive excesses in protection of fundamental civil liberties. Congressional action of any kind, however, faces a very serious hurdle: as the DOJ made clear in the Aulaqi case, the executive branch position is that any infringement on the President's targeted killing authority is simply unconstitutional. Yet if congress were to prohibit targeted killing and a court found that such a law is an unconstitutional infringement on executive authority, there is still another and perhaps final option. In the event that a federal court interprets the constitution to actually permit the targeted killing of Americans by the Executive Branch, then it would be necessary to fix this constitutional flaw. A constitutional amendment prohibiting the practice of targeted killing would thus permanently extinguish the concerns over targeted killing. 243

#### --Can’t solve –

#### A. Court will ignore Congress

Devins, Law Prof- William&Mary, 12 (Neal, Professor of Law and Professor of Government, William & Mary Law School, PARTY POLARIZATION AND JUDICIAL REVIEW: LESSONS FROM THE AFFORDABLE CARE ACT†, http://www.law.northwestern.edu/lawreview/v106/n4/1821/LR106n4Devins.pdf)

Lawmakers have little incentive to independently interpret the Constitution. In particular, while all members of Congress have a stake in preserving Congress’s institutional authority to independently interpret the Constitution, lawmaker desires to seek reelection, gain status within their party, and serve interest group constituents overwhelm this “collective good.”65 In particular, a lawmaker who invests in constitutional interpretation “loses time for fundraising, casework, media appearances, and obtaining particularized spending projects in her district; she will thus be at a disadvantage [when seeking reelection].”66 In explaining why “Congress is designed to pass over constitutional questions,” former Congressman and D.C. Circuit Judge Abner Mikva remarked that “the constitutional principles involved in a bill, unlike its merits, are generally abstract, unpopular, and fail to capture the imagination of either the media or the public. The Constitution is often portrayed as an obstacle to a better society by Congressmen forced to confront its limitations.”67 Academic studies of lawmaker interest in constitutional interpretation bear this out. Consider, for example, the complementary work of Mitch Pickerell, Keith Whittington, and Bruce Peabody. Pickerell’s study of constitutional deliberation in Congress demonstrates that lawmakers typically advance a positive legislative agenda and, consequently, rarely have reason to discuss potential constitutional limitations; instead, lawmakers “first take their position on legislation based on their policy preferences, and then use all arguments possible to support that position.”68 Whittington likewise calls attention to how it is that lawmakers benefit by making judgmental statements pleasing to voters and other constituents.69 In particular, lawmakers “can always take credit for voting the right way on the issue” and, as such, are unlikely to raise constitutional or other objections that cut against such “position-taking” behavior.70 Peabody’s study (surveying lawmakers’ attitudes towards Court–Congress relations) highlights two related phenomena, namely, (1) the legal issues that matter to lawmakers concern “local and electorally salient matters” and (2) more than 70% of lawmaker respondents said the courts should give little or no weight to congressional judgments about the constitutionality of legislation.71 In other words, lawmakers care about reelection; they do not defend their institutional prerogatives to interpret the Constitution but, instead, defer to the courts.72

### 2AC Transparency CP

#### --And, cherry-picking dooms transparency efforts—no one will believe the CP because the executive continuously cherry picks releasing its legal rationales.

Jaffer 10-7-13 (Jameel, Selective Disclosure About Targeted Killing, Oct 7, http://justsecurity.org/2013/10/07/selective-disclosure-targeted-killing/)

For several years, the ACLU has been pressing the Obama administration to be more transparent about the targeted-killing program. I’m starting to wonder whether it understands what we mean. Last week, I argued a case before the Second Circuit involving the secrecy surrounding the program. The case involves a Freedom of Information Act request filed by the ACLU two years ago for records about the government’s killing of three Americans in Yemen. The CIA initially claimed it couldn’t disclose whether it had records responsive to the request without compromising national security. Later the CIA acknowledged that it had responsive records but argued that national-security concerns precluded it from enumerating or describing them. Earlier this year, the district court observed that the CIA’s so-called “no-number no-list” response was the stuff of Alice in Wonderland—but then ruled for the CIA anyway. In our appeal brief, we point to the many instances in which senior government officials have discussed the targeted killing program publicly. In media interviews and speeches, we write, officials have defended the program’s legality, effectiveness, and necessity. They’ve dismissed concerns about civilian casualties. And through not-for-attribution interviews with reporters, they’ve engaged in what one appeals-court judge called “a pattern of strategic and selective leaks at the highest level of government.” We argue that the administration shouldn’t be permitted to pretend that everything about the program is a secret while its most senior officials conduct a public-relations campaign about it. At oral argument last week, though, the government’s attorney turned our argument on its head. The disclosures cited by the ACLU, she said, were evidence that the government had made a genuine effort to be transparent about the targeted-killing program. By pointing to those disclosures, she said, the ACLU was trying to penalize the government for having been as transparent as it had been. (I’m paraphrasing because I don’t yet have the transcript.) The government’s attorney also warned the court against requiring the government to disclose more. If the court held that the government couldn’t disclose some information about a subject without waiving its right to withhold other information, she argued, the government would hesitate before releasing anything at all. The government fundamentally misunderstands our complaint—or it understands only half of it. Our complaint isn’t just that government officials are keeping too much information secret, though they are. It’s also that the government is releasing information selectively—that it’s cherry-picking its disclosures in a way that misleads the public about the targeted-killing program’s scope and nature and implications. Government officials release information about the killing of suspected terrorists but withhold information about bystander casualties. They tell the public that lethal force is used only when capture is infeasible, but they decline to say how feasibility is assessed. They release a Cliffs Notes version of their legal theory, but not the legal memos—let alone the factual ones—on the basis of which the killings actually take place. They release facts meant to reassure, but they withhold facts that might unsettle. Of course there’s nothing new about this kind of thing. Governments prefer to release information that presents their actions in a flattering light and suppress information that doesn’t. But this is why we have the FOIA. The Obama administration suggests that the FOIA is concerned only with excessive secrecy, but while the Congress that enacted the statute in 1966 was concerned with “transparency” in the narrow sense of that word, it was at least as troubled by selective disclosure. Here is the House Republican Policy Committee’s statement in support of the Act: In this period of selective disclosures, managed news, half-truths, and admitted distortions, the need for this legislation is abundantly clear. High officials have warned that our Government is in grave danger of losing the public’s confidence both at home and abroad. The credibility gap that has affected the Administration’s pronouncements on domestic affairs and Vietnam has spread to other parts of the world. The on-again, off-again, obviously less-than-truthful manner in which the reduction of American forces in Europe has been handled has made this country the subject of ridicule and jokes. “Would you believe?” has now become more than a clever saying. It is a legitimate inquiry. Americans have always taken great pride in their individual and national credibility. We have recognized that men and nations can be no better than their word. This legislation will help to blaze a trail of truthfulness and accurate disclosure in what has become a jungle of falsification, unjustified secrecy, and misstatement by statistic. Representative Donald Rumsfeld of Illinois, a champion of the proposed law, set expectations slightly lower but explained the law’s aims similarly: Certainly it has been the nature of Government to play down mistakes and to promote successes. This has been the case in past administrations. Very likely this will be true in the future. . . . [This bill] will not change this phenomenon. Rather, the bill will make it considerably more difficult for secrecy-minded bureaucrats to decide arbitrarily that the people should be denied access to information on the conduct of Government or how an individual Government official is handling his job. (Citations and a fuller discussion of the legislative history can be found at pages 17-19 of this brief.) The point is obvious: disclosure and transparency can be two very different things. If the government discloses that it doesn’t engage in “torture” but suppresses the memos that redefine the term, the disclosure hasn’t served transparency but undermined it. The same is true if the government discloses (or celebrates) the killing of “militants” but refuses to release information about the killing of innocent bystanders. Perhaps these disclosures shouldn’t be thought of as disclosures at all. If they’re disclosures, they’re disclosures that misinform or mislead rather than enlighten.

#### Either the counterplan opens up debate over imminence, hostilities and associated forces which means they link to warfighting or it doesn’t increase transparency

Knuckley 10-1-13 (Sarah Knuckey is Director of the Project on Extrajudicial Executions at New York University School of Law, and a Special Advisor to the UN Special Rapporteur on extrajudicial execution, “Transparency on Targeted Killings: Promises Made, but Little Progress,” http://justsecurity.org/2013/10/01/transparency-targeted-killings-promises-made-progress/)

Since President Barack Obama’s May 2013 counter-terrorism speech, attention to and criticism of US targeted killings practice and policy has notably dropped off inside the US. But the secrecy that drove criticism of the program still exists today in key legal, policy, factual, and process areas. This post outlines the focus of criticism in early 2013, the government’s response, and the core areas of continuing secrecy. Early 2013: Growing Pressure for More Transparency Public criticism of the targeted killing program had its peak in February-May this year. The burst of attention followed years of work and advocacy by many actors in the US and abroad, much of which was directed at the program’s excessive secrecy. By early 2013, the US targeted killing program’s lack of transparency had become the central and most widely shared criticism, uniting diverse actors with otherwise conflicting views of the program’s ethics, legality, and strategic effectiveness. Amidst this unprecedented intensive focus on drone strikes by the press, members of Congress, and American public, President Obama pledged in his February 2013 State of the Union address to be “more transparent to the American people and to the world” about the US targeted killings program. Following further NGO pressure for more transparency, the promise was repeated in April by National Security Council spokesperson Caitlin Hayden, who added that while sensitive operational details would not be discussed, explaining drone policies was something to which the Administration was “committed,” and would do “as soon as we can.” More specifically, John Brennan, during his nomination for the position of CIA Director, stated that he believed – “in the interest of transparency” – that the US “should acknowledge” if it kills “the wrong person,” and he stressed the seriousness with which government post-strike assessments of civilian harm were pursued. As public and political pressure continued to build, White House officials announced that President Obama would give a major counter-terrorism speech at the end of May. Many close observers hoped the speech would mark a significant turning point, and that the President would at last lay out the program’s basic facts, legal authorities, and policies. The President’s May 2013 speech did directly address the targeted killings program, arguing in broad terms that it is legal, effective, wise, and moral. Concurrently, the government also took two important concrete transparency steps. First, Attorney General Eric Holder published a letter acknowledging that four US citizens had been killed, and provided some information about why the US believed it was lawful to target one of those citizens, Anwar al-Alwaki. Second, the government published Presidential Policy Guidance on targeted killings, briefly setting out policies (not law) for when the US could target individuals outside areas of “active hostilities.” The Policy Guidance states that strikes are not carried out unless there is a “near-certainty” of no civilian harm, a standard also referred to in the President’s speech (and hinted at in earlier Brennan statements). Shortly afterwards, Secretary of State John Kerry stated that the US simply does “not fire” if it concludes that there would be collateral harm. Some interpreted these efforts and the President’s speech to mark the beginning of improved transparency. But despite transparency promises and expectations, many of the same, core concerns regarding undue secrecy remain. The President’s speech, the Policy Guidance, and Holder’s letter – because of textual ambiguities within each, and combined with events since – have largely failed to address these longstanding concerns, and in some important respects aggravated them.Continuing Secrecy on Core Issues Key areas in which transparency has not yet been forthcoming include: Who can be killed, where, and on what basis. Demands for legal and policy information on who and when the US believes it can kill have long been at the center of calls for more transparency. Senior US officials, before 2013, delivered important speeches outlining the government’s views on the applicable legal frameworks for targeting. But the speeches lacked detail, and left crucial legal questions unanswered. Legal concepts key to understanding the scope of US targeting – like “imminence,” “associated forces,” and “directly participating in hostilities” – remain unclear (see this and this). The relevant legal memos have still not been published, even in redacted form. In addition, although President Obama’s speech and the published Policy Guidance set out strict rules for the use of force – stricter, in numerous respects, than the laws of war – they are not legally binding, and we do not know when they began to apply, or when the strict policy limits on killing may be relaxed (and if we will ever be told when they are). And, crucially, we don’t know where the new guidelines actually apply (original assumptions by many outside government that they applied in Pakistan were later called into question). Since Obama’s May 2013 speech, confusion about who can be targeted has at times increased (e.g. a “senior American official” stated in August that a security threat had “expanded the scope” of who could be targeted in Yemen). Basic program facts, overall casualties, and statistical strike information. The President admitted in his May speech that some civilian casualties have occurred. But the government refuses to release even basic statistical information about the numbers of strikes or of those killed, or to disclose its own civilian casualty estimates, or strike locations. Specific strikes. The US continues to say nothing at all, officially, about the facts of most strikes. When questioned about specific strikes since May 2013, senior officials have generally continued simply to decline to comment, refusing even to acknowledge whether the US was involved. Given that the US publicly acknowledged in 2012 that it uses force in Yemen, it is not clear why the US continues to refuse to provide details on, at least, Yemen strikes. During the July-August 2013 surge in Yemen strikes, public information (limited as it was) came largely from news reports quoting anonymous US and Yemeni officials. Adding to confusion, the accounts in different outlets at times appeared contradictory (compare NYT, NBC, and ABC). Reports of civilian casualties called into question the government’s “near-certainty” standard, but were left unaddressed by officials. And although President Obama stated that the declassified information in Holder’s letter was to “facilitate transparency,” the letter does not explain why US citizens Samir Khan, Abdulrahman al-Awlaki, and Jude Kenen Mohammed were killed, saying only that they were “not specifically targeted.” Civilian harm – investigations, acknowledgment, redress. There has been no public information on any government efforts this year to acknowledge civilian harm and provide redress. I have previously listed just some of the strikes that raise particular concerns, none of which have been publicly acknowledged by the government; nor have the findings of any government investigations been released. And despite assurances about post-strike investigations, I am not aware of US officials seeking testimony from alleged victims, their lawyers, or from NGOs or journalists who have investigated specific strikes. Transfer to DOD. Despite expectations in May 2013 that Administration efforts to promote transparency would include moving the program from the CIA to DOD, one of the last officials to publicly address this said that it may not happen “for years.” The US government’s public statements and limited disclosures to date have been welcome steps towards transparency. But they fall far short of what is necessary, and important core questions remain unanswered.Last week, I posted on some of the targeted killings related advocacy efforts taking place over the next few months. Those include the possible visit of alleged drone strike victims (currently on hold because their lawyer’s visa application to the US has not been approved), and major NGO and UN reports expected in the weeks ahead. As these put the spotlight back on the program, raising specific and credible concerns about individuals strikes, the government should renew its commitment to transparency and outline the tangible steps it will now take to be more transparent to the American people and the world.

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

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.

### 2AC Warfighting

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

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

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

## 1ar Case

### Blowback UQ---Pakistan---1AR

#### Yes Pakistan blowback---Dengler cites a consensus of quantitative and qualitative research including ethnographies, psychological studies, and polling data---drone strikes piss off the population---creates an obligation for revenge which enflames terrorist recruiting

#### Casualties have increased---the problem is the internal ecology of the executive---this is a solvency def to the cp

**Watson, Nottingham IR masters, 11-26-13**

(Steve, “Report: More Drone Strike Deaths Since Obama Announced New “Constraint”, <http://www.infowars.com/report-more-drone-strike-deaths-since-obama-announced-new-constraint/>, ldg)

A new report from a leading watchdog on drone missile use concludes that there have been more deaths from strikes in the six months AFTER president Obama announced a new “constraint” on use of the technology than there were in the six months before. The Bureau of Investigative Journalism in London says that their new analysis calls into question the promise by Obama to limit the use of drones in targeted killings of suspected terrorists overseas. Obama made the remarks in an address at the National Defense University back in May, stating that “The same human progress that gives us the technology to strike half a world away also demands the discipline to constrain that power – or risk abusing it.” The president even called into question the morality of drone missile use, and briefed the media on a potential overhaul of targeted killing policy and so called ‘signature strikes’. The headlines that followed suggested that there was to be “important shifts in the policy of using unmanned drones to kill citizens of other countries.” The Mainstream media reported that the US military would be exclusively handed responsibility for all drone strikes outside of Afghanistan, and that deaths from the attacks would likely be significantly reduced. None of that has happened. Indeed, as the Bureau reports, While the number of covert strikes fell in Yemen and Pakistan in the six months after the speech, “the overall death toll has increased.” “In Yemen, civilians have reportedly been killed in drone strikes after the speech.” the report notes. “Between six and seven civilians were reported killed, two of whom were said to be children.” “It also emerged this month that the US knew it had killed civilians in strikes after the speech.” the report continues. “The LA Times reported that the CIA briefed Congress about civilian casualties, including a child aged 6-13 who had been riding in a car with his older brother, an alleged militant, when the drones attacked. The CIA reportedly did not know he was in the car at the time.” The Bureau notes that every single drone strike in Yemen in the six months since Obama’s speech came during one intense two week period in late July and August. Eight strikes were carried out in response, we were told, to intelligence that a Yemeni terrorist plot was about to go live. In the same period, the US temporarily closed over 20 embassies and consulates in Africa and the Middle East, fearing a repeat of the Benghazi attack of 2012. It is thought that at least 29 people were killed by the drone strikes, “but only three of them were described in reports as significant leaders in the group.” the Bureau notes. In Pakistan, the prevailing trend of fewer deaths from drone strikes since 2009 has been reversed since Obama promised more restraint. “In the six months before the speech, an average of 3.5 people were killed in each strike. Since the speech this has risen to almost five.” the report notes. Many of the strikes in Pakistan were thought to have targeted Hakimullah Mehsud, leader of the Pakistan Taliban, who is now reported to have been killed three times already. Amnesty International has declared that the drone strikes in Pakistan and Yemen are responsible for unlawful killings, some of which could amount to war crimes. In October, a 97-page report by Human Rights Watch came to the conclusion that drone strikes against suspected members of Al-Qaeda in the Arabian Peninsula (AQAP) in Yemen are killing more civilians than suspected terrorists. The report noted that out of 82 people killed in 6 HRW case study attacks, 57 were civilians.

## Deference

### 1AR COC Link

#### Ruined in the skwo because the military feels over used and like second class citizens, wrecks warfighting and their willingness to operate, that’s Barnes, Gillman and Brooks, commanders think that law in national security is nessecary and so do troops, the sq results in worse CNC crisis, troops feel like they are in a legal grey area and act according to personal morals instead of orders, makes hesitation inev, that’s Dunlap, absent effective CMR the foundations of heg collapses

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

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

### Smart

#### Not like the court can veto every military decision ever

#### Court expertise is sufficient—their link is blown out of proportion

Knowles 9 [Spring, 2009, Robert Knowles is a Acting Assistant Professor, New York University School of Law, “American Hegemony and the Foreign Affairs Constitution”, ARIZONA STATE LAW JOURNAL, 41 Ariz. St. L.J. 87]

A common justification for deference is that the President possesses superior competence due to expertise, information gathering, and political savvy in foreign affairs. These conclusions flow from the realist tenet that the external context is fundamentally distinct from the domestic context. The domestic realm is hierarchical and legal; the outside world is anarchical and political. The international realm is thus far more complex and fluid than the domestic realm. The executive is a political branch, popularly-elected and far more attuned to politics than are the courts. n258 Judges are, for the most part, generalists who possess no special expertise in foreign affairs. n259 Courts can only receive the information presented to them and cannot look beyond the record. n260 The President has a vast foreign relations bureaucracy to obtain and process information from around the world. Executive agencies such as the State Department and the military better understand the nature of foreign countries - their institutions and culture - and can predict responses in ways that courts cannot. n261 In the context of the political question doctrine, this rationale often appears when courts conclude that an issue lacks "judicially discoverable and manageable standards." n262 A stronger, related rationale is that the political branches are better suited for tracking dynamic and evolving norms in the anarchic international environment. n263 The meaning of international law changes over time and nations do not agree today on its meaning. Moreover, the relationships among nations in many instances will be governed by informal norms that do not correspond to international law. n264 In addition, many foreign affairs provisions in the Constitution had fixed meanings under international law in the Eighteenth Century - what it meant, for example, to "declare war" or to issue "letters of marquee and [\*129] reprisal" - but subsequent practice has substantially altered their meaning or rendered them irrelevant. n265 Courts are not adept at tracking these shifts. As many critics have observed, the "lack of judicially-manageable standards" argument is weak. Courts create rules to govern disputes regarding vague constitutional provisions such as the Due Process Clause. n266 Furthermore, if courts were to adjudicate foreign affairs disputes more often, they would have the opportunity to create clearer standards, making them more manageable. n267 Thus the lack-of-standards argument does not alone explain why foreign affairs should be off-limits. The argument regarding courts' limited access to information and lack of expertise seem persuasive at first, but it loses its force upon deeper inspection. For instance, expertise is also a rationale for Chevron deference in the domestic context. n268 Generalist judges handle cases involving highly complex and obscure non-foreign affairs issues while giving appropriate deference to interpretations of agencies charged with administering statutory schemes. n269 What makes foreign affairs issues so different that they justify even greater deference? n270 Perhaps foreign affairs issues are just an order of magnitude more complex than even the most complex domestic issues. However, this line of thinking very quickly leads to boundary problems. Economic globalization, rapid global information flow, and increased transborder movement have "radically increased the number of cases that directly implicate foreign relations" and have made foreign parties and conduct, as well as international law questions, increasingly [\*130] common in U.S. litigation. n271 If courts were to cabin off all matters touching on foreign relations as beyond their expertise, it would result in an ever-increasing abdication of their role. The political norm-tracking argument reveals the second major problem with using anarchy as a basis for special deference: it fails to account for the degree of deference that should be afforded to the President. Under the anarchy-based argument, the meaning of treaties and other concepts in foreign affairs depend entirely on politics and power dynamics, which the President is especially competent (and the courts especially incompetent) in tracking. If this is so, the courts must give total deference to the executive branch. If one does not wish to take the position that the courts should butt out altogether in foreign affairs, there must be other reasons for the courts' involvement. Even proponents of special deference generally acknowledge that some of the courts' strengths lie in protecting individual rights and "democracy-forcing." n272 But what is the correct balance to strike between competing functional goals of the separation of powers?

## CMR

### uq

#### Executive overreliance on the military is counterproductive and sparks military backlash

Brooks 11/1/13 (Rosa Brooks, a law professor at Georgetown University, served as an Obama appointee at the Defense Department from 2009 to 2011, “Obama vs. the Generals,” http://www.politico.com/magazine/story/2013/11/obama-vs-the-generals-99379\_Page3.html

The military and the White House are not supposed to be on different “sides,” but there’s a long history of mutual recriminations; it’s practically an American tradition. Recall President Harry Truman’s theatrical firing of Gen. Douglas MacArthur amid the dispute over whether to escalate the Korean War; Dwight Eisenhower’s condemnation of the “military-industrial complex,” John F. Kennedy’s struggles with military leaders during the Cuban Missile Crisis; and Bill Clinton’s failed effort to end the ban on gay people serving openly in the military. And that’s just in the post-World War II era. Dubik argues that critics of Obama’s relationship with the military have short memories. “This administration seems more inclusive and willing to listen than the last few,” he says dryly. And, he adds, if anyone imagines that military leaders are more comfortable with Republican administrations, “that’s baloney.” Charles J. Dunlap, an Air Force major general who retired in 2010, agrees: “The longer you’re in the military, the more you realize that there’s not all that much difference between administrations.” Disputes between military leaders and the White House can be healthy for a democratic society. After all, senior commanders have a legal and ethical obligation to provide the president and Congress with honest military advice, and although Dempsey’s openly expressed concerns about Syria may not have sat well with White House officials, says retired Lt. Gen. David Barno, “the chairman does have to say, ‘Here are the risks in that course of action.’” In any case, warns another retired general, the only thing worse than an overtly dissenting military is a covertly dissenting military. “Beware the silence of the generals,” he quips. “Public silence doesn’t mean private inaction.” It is far better, he argues, to have top brass be “out in the open and accountable for what they’re thinking” than for them to be “speaking through proxies and doing back-channel manipulations.” Meanwhile, the president is “right to ask his generals tough questions,” says Dunlap. Every administration prefers to present a united front with the military, but, as another retired senior military leader told me, the president needs to be comfortable if that proves impossible: “There’s nothing wrong with the president saying, ‘The military wanted something, but as president, I decided different, and here’s why.’ The president shouldn’t be afraid of that.” That’s easier said than done. For this White House, the military is the proverbial 800-pound gorilla—more so than ever. After the Sept. 11, attacks, resources and authorities flowed lavishly to the Pentagon, which saw its budget almost double in the following decade. President George W. Bush’s administration “always wanted military guys between themselves and whatever the problem was,” recalls a retired general who served in senior positions during that period. And Bush was more than willing to spend the money needed to make that happen. Meanwhile, budgets for civilian agencies and programs remained largely stagnant. “Ten to 15 years ago, the military was much smaller and less holistic,” notes another retired officer. Today’s military is doing more with more: It sponsors radio and television shows in Afghanistan, operates health clinics in Africa, provides technical assistance to courts and parliaments, engages in cyberdefense, carries out drone strikes in far-flung places, and collects data from our telephone calls and emails. “It’s just the easiest way out of any problem,” says Eaton. “Give money to the military and let them deal with it.” The relentlessly expanding U.S. military, Barno says, is becoming “like a super-Walmart with everything under one roof.” Like Walmart, the military can marshal vast resources and exploit economies of scale in ways impossible for mom-and-pop operations. And like Walmart, the tempting one-stop-shopping convenience the military offers has a devastating effect on smaller, more traditional enterprises—in this case, the outnumbered diplomats of Foggy Bottom. Or the boutique national security shop at the White House, where power lives but resources don’t. And yet no one—least of all Obama—seems to know how to cope with the military’s relentless Walmartization. However committed the president is, in theory, to rebalancing civilian and military roles, Obama has found himself repeatedly turning to the Pentagon in times of crisis, whether in Libya, Syria or Yemen. That, in the end, may be the real story of Obama and his uneasy relationship with a military he came to office determined to rein in. “When the shit hits the fan,” says a former White House official, he’s “racing for that super-Walmart every single bloody time.”

## Navy

### AT: Bioterror

#### The worst case scenario happened – no extinction

**Dove, PhD in Microbiology, 2012**

(Alan, “Who’s Afraid of the Big, Bad Bioterrorist?”, 1-24, <http://alandove.com/content/2012/01/whos-afraid-of-the-big-bad-bioterrorist/>, DOA: 3-14-13, ldg)

The second problem is much more serious. Eliminating the toxins, we’re left with a list of infectious bacteria and viruses. With a single exception, these organisms are probably near-useless as weapons, and history proves it. There have been at least three well-documented military-style deployments of infectious agents from the list, plus one deployment of an agent that’s not on the list. I’m focusing entirely on the modern era, by the way. There are historical reports of armies catapulting plague-ridden corpses over city walls and conquistadors trying to inoculate blankets with Variola (smallpox), but it’s not clear those “attacks” were effective. Those diseases tended to spread like, well, plagues, so there’s no telling whether the targets really caught the diseases from the bodies and blankets, or simply picked them up through casual contact with their enemies. Of the four modern biowarfare incidents, two have been fatal. The first was the 1979 Sverdlovsk anthrax incident, which killed an estimated 100 people. In that case, a Soviet-built biological weapons lab accidentally released a large plume of weaponized Bacillus anthracis (anthrax) over a major city. Soviet authorities tried to blame the resulting fatalities on “bad meat,” but in the 1990s Western investigators were finally able to piece together the real story. The second fatal incident also involved anthrax from a government-run lab: the 2001 “Amerithrax” attacks. That time, a rogue employee (or perhaps employees) of the government’s main bioweapons lab sent weaponized, powdered anthrax through the US postal service. Five people died. That gives us a grand total of around 105 deaths, entirely from agents that were grown and weaponized in officially-sanctioned and funded bioweapons research labs. Remember that. Terrorist groups have also deployed biological weapons twice, and these cases are very instructive. The first was the 1984 Rajneeshee bioterror attack, in which members of a cult in Oregon inoculated restaurant salad bars with Salmonella bacteria (an agent that’s not on the “select” list). 751 people got sick, but nobody died. Public health authorities handled it as a conventional foodborne Salmonella outbreak, identified the sources and contained them. Nobody even would have known it was a deliberate attack if a member of the cult hadn’t come forward afterward with a confession. Lesson: our existing public health infrastructure was entirely adequate to respond to a major bioterrorist attack. The second genuine bioterrorist attack took place in 1993. Members of the Aum Shinrikyo cult successfully isolated and grew a large stock of anthrax bacteria, then sprayed it as an aerosol from the roof of a building in downtown Tokyo. The cult was well-financed, and had many highly educated members, so this release over the world’s largest city really represented a worst-case scenario. Nobody got sick or died. From the cult’s perspective, it was a complete and utter failure. Again, the only reason we even found out about it was a post-hoc confession. Aum members later demonstrated their lab skills by producing Sarin nerve gas, with far deadlier results. Lesson: one of the top “select agents” is extremely hard to grow and deploy even for relatively skilled non-state groups. It’s a really crappy bioterrorist weapon. Taken together, these events point to an uncomfortable but inevitable conclusion: our biodefense industry is a far greater threat to us than any actual bioterrorists.

### A2: Navy DA

#### Navy spending inevitable- Rising powers and budget cuts

Gibbons-Neff 13

[Thomas, Free Beacon, Expert: U.S. Naval Supremacy Is in Trouble, 8/1/13, <http://freebeacon.com/expert-u-s-naval-supremacy-is-in-trouble/>]

Former U.S. Deputy Undersecretary of the Navy Seth Cropsey told an audience at the Heritage Foundation Thursday afternoon that American sea power and global projection is “in trouble.” Cropsey appeared at Heritage to highlight the release of his new book Mayday: The Decline of American Naval Supremacy. Michaela Dodge, policy analyst of defense and strategic policy at the Heritage Foundation, highlighted the current plight of U.S. naval forces before Cropsey’s speech. Under current sequestration cuts, the Navy will be reduced from approximately 285 ships to 195 in the next thirty years, Dodge said. While Cropsey was quick to criticize sequestration’s effects on U.S. Naval power, his main focus was the looming threat posed by China. Cropsey highlighted the fact that the last Maritime strategic review was conducted over six years ago and did not mention China at all. “The 2007 strategy did not mention China, not once.” Cropsey said. “The Chinese have made it clear that its policy is to deny the United States access to the Western Pacific.” “China’s military budget continues to grow … in double percentage points each year,” Cropsey added. With countries in various stages of unrest, Cropsey pointed to the fact that countries **like** Iran, China, and Russia have already begun projecting naval power in various parts of the globe. Cropsey pointed to the fact that Russia is in the process of having a permanent twelve-ship presence in the Mediterranean Sea. With rival countries encroaching on American sea power Cropsey lamented the state of the U.S. 6th fleet—the group of ships responsible for Mediterranean operations. “The Eastern Med has reverted back to instability… and the U.S. 6th Fleet … that once composed of two carrier battle groups, today consists of a command ship based in Italy and three [surface ships],” Cropsey said. Cropsey also stressed the threat of the recently tested DF-21D a Chinese anti-ship ballistic missile designed to destroy large surface ships from over 1,200 miles away.

#### Environmental restrictions don’t hurt the Navy – their impacts are overblown

London 9 -- J.D. Candidate, 2011 @ Denver Univ Law School (Ian K, 2009, "Comment: Winter v. National Resources Defense Council: Enabling the Military's Ongoing Rollback of Environmental Legislation," 87 Denv. U.L. Rev. 197, L/N)

First, the Court deferred to the Navy's claim that no evidence connected the forty years of SOCAL exercises with a single sonar-related injury to a marine mammal. n94 Yet, the Navy itself admitted that the exercises would affect approximately 80,000 marine mammals, some of which would be severely injured or killed. n95 In fact, in 2000, the Navy and NOAA Fisheries conducted an investigation into a mass marine mammal stranding event in the Bahamas. n96 The report concluded that the seventeen marine mammals were driven onto shore by injuries from underwater acoustic sources. n97 The report connected those injuries to a series of contemporaneous Navy MFA sonar exercises, and the Navy pledged to be more careful in the future. n98 The evidence that the use of MFA sonar causes mass marine mammal strandings and deaths is "overwhelming," and the Navy was well aware of it. n99 It is surprising, then, that the Court deferred to the Navy's assertion that there would be no irremediable damage to the environment. It is difficult to think of an injury less remediable than the death of any number of marine mammals. By contrast, the Navy's probable injuries in the case of a mid-training sonar shutdown are quite remediable. A mid-exercise MFA sonar shutdown would delay the completion of the exercise, and would undoubtedly raise costs, but it would not make completion of the exercise impossible. n100 The Navy mischaracterized this inconvenience as an irremediable injury, and the effect on marine mammals as negligible. The majority accepted this mischaracterization at face value. Second, the Court observed that the injunction's shutdown provision would amount to a hundredfold increase in the surface area of the shutdown zone. n101 However, at the Navy's urging, the Court disregarded the observation that this MFA sonar shutdown zone is roughly the same size as the Navy's existing long-frequency active ("LFA") sonar shutdown zone. n102 The Court, perhaps humbled by the Navy's chastisement [\*207] of the Ninth Circuit, declined to explore the effect on the training exercises of congruent MFA/LFA shutdown zones. n103 By deferring to the Navy's unsubstantiated claim that MFA sonar and LFA sonar are irreconcilably dissimilar in terms of the effect of the technology on marine mammals, n104 the Court failed to consider a range of factors that could have shown the burden to be smaller than the Navy asserted it to be. Third, the Court deferred to the Navy regarding the power-down provision. The Court correctly recognized the Navy's important interest in training under surface ducting conditions when they exist. n105 Presumably, however, the conditions that conceal enemy submarines also conceal marine mammals. In other words, when surface ducting conditions exist, the Navy must be just as vigilant in avoiding marine mammals as it is in looking for enemy submarines. As Justice Breyer argued, the Court could have imposed the Ninth Circuit's provisional injunction, requiring the Navy to power down the sonar in proportion to the proximity of marine mammals to the vessel. n106 Justice Breyer's compromise would allow the Navy to continue training, while mitigating the injury to nearby marine mammals. Fourth, the Court deferred to the Navy regarding the connection between the SOCAL training exercises and national security. The Navy asserted that the injunctions would jeopardize national security. n107 This conclusion was an exaggeration. The injunctions issued by the district court would not make training exercises impossible; they would merely cause delay and disruption. n108 Also, the injunctions applied to training exercises in SOCAL waters, and not to Navy actions generally. n109 The Navy also argued the injunction would create "an unacceptable risk to the Navy's ability to train for essential overseas operations at a time when the United States is engaged in war in two countries." n110 This assertion was also an exaggeration. While the United States was indeed at war in Iraq and in Afghanistan, none of the United States' adversaries in those countries fielded a naval force--let alone the advanced "silent submarines" that MFA sonar was designed to detect. The Navy failed to explain the connection between adequate sonar training and combat readiness against these land-based, non-state forces. The Navy failed to explain how a delay in sonar training presented an "unacceptable risk" to [\*208] ground forces in Iraq and Afghanistan. n111 The Navy also failed to explain how the injunction affected the combat readiness of already-deployed forces, other than underlining the importance of fleet-wide integration. n112 Professor Burke refers to such unsubstantiated claims as "thought-terminating cliches." n113

#### The navy would just move out of the way

Gillespie 12 -- Prof @ Univ of Waikato, has advised the Ministry of Foreign Affairs and Trade and the Department of Conservation, provides commissioned work for the United Nations and the Commonwealth Secretariat, has been awarded a Rotary International Scholarship, a Fulbright Fellowship, a Rockefeller Fellowship (Alexander, Winter 2012, "ARTICLE: The Limits of International Environmental Law: Military Necessity v. Conservation," 23 COLO. J. INT'L ENVTL. L. & POL'Y 1, L/N)

The examination of alternatives is a key consideration with impact assessments in general. In the cases pertaining to sonar, the adoption of alternative sites where there would be the least impact, has become standard. This practice first arose in the 1994 case of NRDC v. the United States Department of the Navy, which turned on the Navy's failure to examine meaningfully the possibility of alternative sites for the planned ship-shock trial, which would have resulted in taking fewer marine mammals and other animals. This was juxtaposed against evidence that suggested the planned site was a "uniquely populous nature of the Southern California Bight." n90 Similar considerations, whereby the importance of looking at all suitable alternative sites - and choosing the one which would result in the least impact on cetaceans - available to [\*22] test the new technologies, were reiterated in the cases of NDRC v. United States Navy n91 and NRDC v. Evans. n92 In Evans, after reviewing the Navy's SURTASS LFAS Program, the Northern District of California imposed an injunction that permitted the Navy to train and test LFAS in a wide range of oceanic conditions as needed, "while restricting it from operating in certain sensitive areas when marine mammals are particularly abundant there." n93 Particular areas, identified as "Offshore Biologically Important Areas," were later added to this list. n94 Following this case, the Navy and the Natural Resources Defense Council ("NRDC") settled their lawsuit over global deployment of LFAS by the Navy agreeing to limit ongoing training missions to a region of the West Pacific, which is of great strategic importance to the Navy, yet relatively free of cetacean populations. In 2008, as attempts were made for a further roll-out of this technology, the Navy and NRDC agreed to a settlement in which both training and operational use of LFAS would continue to be limited to defined areas of the Pacific Ocean (although there were broad exemptions to these limits when Naval commanders deemed LFAS necessary in the search for potentially hostile submarines). n95

#### Pre-9/11 restrictions disprove the DA – no significant effect on readiness

Dycus 05

[Stephen, Professor, Vermont Law School, Osama's Submarine: National Security and

Environmental Protection After 9/11, William & Mary Environmental Law and Policy Review, <http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1112&context=wmelpr>]

The evidence that compliance with environmental laws has seriously impaired U.S. preparations for war is, however, far from conclusive. After all, the U.S. military's successes in Afghanistan and Iraq were achieved using troops trained and weapons tested under pre-September 11th environmental statutes and regulations. A Navy Admiral, testifying before Congress in support of RRPI in 2003, declared that "the readiness of the Navy is excellent. 32 According to a General Accounting Office report in 2002, "[d]espite the loss of some capabilities, service readiness data do not indicate the extent to which encroachment has significantly affected reported training readiness.” 33 In fact, the report concluded, "Training readiness, as reported in official readiness reports, remains high for most units.,34 Environmental Protection Agency ("EPA") Administrator Christine Todd Whitman went further in early 2003, stating, "I don't believe that there is a training mission anywhere in the country that is being held up or not taking place because of environmental protection regulation."35 A more recent study by the Congressional Research Service noted that "[a]lthough DOD has cited some examples of training restrictions or delays at certain installations and has used these as the basis for seeking legislative remedies, the department does not have a system in place to comprehensively track these cases and determine their impact on readiness.' "36 Some have taken a dimmer view of DOD's protests. EPA complained that the definition of "military readiness activities" in the DOD proposal was "broad and unclear and could be read to encompass more than the Department intends."37 Congressman John Dingell, a Democrat from Michigan, was much more emphatic: "I have dealt with the military for years and they constantly seek to get out from under environmental laws. But using the threat of 9-11 and al Qaeda to get unprecedented environmental immunity is despicable. 38

## Climate

### 2AC Courts Key

#### Courts are key to solve climate change – other actors are too slow or deploy watered down policy

Howe 10 (Nathan, “The Political Question Doctrine’s Role in Climate Change Nuisance Litigation: Are Power Utilities the First of Many Casualties?” <http://endangeredlaws.org/pdf/howe.pdf>)

While there is controversy amongst commentators over whether courts serve as the appropriate fora to resolve these issues, even in the absence of legislation,"4 one of the promi- nent arguments against them is that they are not politically accountable to the public.11S Applied here, this argument holds more theoretical prestige than practical accuracy, because in our democratic system of government, it is the people that should ultimately control decisions of policy through their power in the electorate. But in the climate change context, there seems to be a choice between the lesser of two evils between policymakers and the judiciary. The judiciary needs some mechanism of enforcement when an industry seeks to take advantage of scientifically complex issues by spreading misinformation to the public and promoting political bias. As witnessed by the frequent frustration of proposed legisla- tion and combative advertising, legislators are prone to politi- cal bias and easily succumb to the persuasive force of lobbyist efforts.'"' Where private interest groups once created coali- tions to undermine scientific studies over whether climate change exists, they now seek to stall less-favorable emissions policies. Comparatively, judges enjoy a position somewhat removed from these influences. The question is more aptly phrased: do we wish for regulation that favors lawyers or lobbyists?'" The answer to this is a matter of preference, but the point of this discourse is to give effect to the idea that courts may not be ideal, but in a problem as multidimen- sional as climate change with murky political affiliations and polarized public opinion, they may be the most effective, especially where the legislature has accepted the ramifications of climate change, but political stagnation has slowed any movement toward a legislative solution.

#### Courts must be the starting point – key to effective energy regulation and emissions caps

Osofsky 11 (Hari M., Ph.D. in Law @ the University of Minnesota Law School, “The Role of Climate Change Litigation in Establishing the Scale of Energy Regulation,” Annals of the Association of American Geographers, 101:4, 775-782)

Implications of Rescaling Through Litigation for the Challenges of Energy Regulation This section draws from the legal dynamic federal- ism literature and the geography literature on scale to explore how the rescaling function of climate change litigation can assist with energy' regulation's challenges. These two streams of scholarship have significant syn- ergies. The dynamic federalism literature argues that models that create more fluid allocation of regulatory authority grapple with complex problems like energy and climate change more effectively than rigid demar- cations do (Osofsky 2005; Engel 2006; Ruhl and Sab- man 2010). The geography literature focusing on issues of fixity and fluidity in scale engages the complex re- lationships that cross-cut particular levels (Delaney C\* Leitner 1997; Swyngedouw 1997; Brenner 1998; Cox 1998; Judd 1998; Smith 1998; Martin 1999; Paasi 2004; Wood 2005; Osofsky 2009, 2010a). Cox's exploration of a network theory of scale, in particular, helps to cap- ture the dynamic nature of relationships among the ties to a particular level and movement among levels (Cox 1998; Osofsky 2009). These dual insights regarding the need for fluid regulatory approaches and the cross-scalar quality of be- havior taking place at particular levels illuminate the role that this litigation does and can play in advanc- ing more effective energy regulation. First, litigation provides a mechanism for bringing greater fluidity into legal interactions, which helps create needed move- ment across scales and spaces (Osofsky 2009, 2010a). Although the four case examples varied significantly, they all provided opportunities for scalar contestation among a wide range of actors and a moment at which legal scale disputes were resolved. Although this reso- lution might not always favor the proregulatory stance, as it did in these four cases, litigation's opportunity for contestation helps to overcome the scalar and spatial fixity of law that makes effective energy regulation so difficult. Second, the lawsuits allow for simultaneous inter- actions within and across levels of governance. In so doing, they create regulatory diagonals that assist in reordering a landscape dominated by horizontal inter- actions at a particular level and vertical interactions among key actors and institutions at different levels. As the four case examples demonstrate, these diag- onal interactions vary in different lawsuits and over time along the dimensions of size (large vs. small), axis (vertical vs. horizontal), hierarchy (top-down vs. bottom-up), and cooperativeness (cooperation vs. con- flict). For example, the first two conflicts evolved from small-scale actors uniting horizontally and pushing in a conflictual fashion vertically from the bottom up for legal change into larger scale, top-down, coopera- tive policy scheme (Osofsky forthcoming). This evolv- ing diagonal regulatory function makes these lawsuits a helpful tool in crafting more effective cross-cutting regulation. Moreover, the fluidity and diagonal interactions that these lawsuits bring to energy' regulation have broader implications for future executive and legislative action. The Obama administration has continuing opportu- nities as it attempts to green energy policy to create lawmaking processes that maximize fluidity and possi- bilities for diagonal interactions. It has already made strides on this score, such as through the process it used to craft the National Program or through the Clean Energy Leadership Group the EPA has established, but further opportunities abound (Osofsky forthcoming). Law and geography analyses, like the one in this arti- cle, help to frame how such approaches might be crafted most effectively within the constraints of law's fixity. Geography's deep engagement of fixity and fluidity, to- gether with dynamic federalism's rigorous exploration of institutional possibilities, can provide the basis for creative, cross-cutting policy approaches that engage the complexities of scale. Such creativity is needed in the face of the significant challenges facing green energy regulation.

## WF

### ! Calc Dumb

#### Nuclear war doesn’t cause extinction- bad physics

**Seitz, Harvard University Center for International Affairs visiting scholar, 6**

(Russell, "The' Nuclear Winter ' Meltdown; Photoshopping the Apocalypse," adamant.typepad.com/seitz/2006/12/preherein\_honor.html, accessed 9-25-11, mss)

The recent winter solstice witnessed a 'Carl Sagan Blog-a-thon' . So in celebration of Al Gore's pal, the late author of The Cold And The Dark there follows The Wall Street Journal's warmly cautionary Cold War reminder of how a campaign for the Nobel Peace prize on the Nuclear Freeze ticket devolved into a joke played at the expense of climate modeling's street cred on the eve of the global warming debate :The Melting of 'Nuclear Winter' All that remains of Sagan's Big Chill are curves such as this , but history is full of prophets of doom who fail to deliver, not all are without honor in their own land. The 1983 'Nuclear Winter " papers in Science were so politicized that even the eminently liberal President of The Council for a Liveable World called "The worst example of the misrepesentation of science to the public in my memory." Among the authors was Stanford President Donald Kennedy. Today he edits Science , the nation's major arbiter of climate science--and policy. Below, a case illustrating the mid-range of the ~.7 to ~1.6 degree C maximum cooling the 2006 studies suggest is superimposed in color on the Blackly Apocalyptic predictions published in Science Vol. 222, 1983 . They're worth comparing, because the range of soot concentrations in the new models overlaps with cases assumed to have dire climatic consequences in the widely publicized 1983 scenarios – "Apocalyptic predictions require, to be taken seriously,higher standards of evidence than do assertions on other matters where the stakes are not as great." wrote Sagan in Foreign Affairs , Winter 1983 -84. But that "evidence" was never forthcoming. 'Nuclear Winter' never existed outside of a computer except as air-brushed animation commissioned by the a PR firm - Porter Novelli Inc. Yet Sagan predicted "the extinction of the human species " as temperatures plummeted 35 degrees C and the world froze in the aftermath of a nuclear holocaust. Last year, Sagan's cohort tried to reanimate the ghost in a machine anti-nuclear activists invoked in the depths of the Cold War, by re-running equally arbitrary scenarios on a modern interactive Global Circulation Model. But the Cold War is history in more ways than one. It is a credit to post-modern computer climate simulations that they do not reproduce the apocalyptic results of what Sagan oxymoronically termed "a sophisticated one dimensional model." The subzero 'baseline case' has melted down into a tepid 1.3 degrees of average cooling- grey skies do not a Ragnarok make . What remains is just not the stuff that End of the World myths are made of. It is hard to exaggerate how seriously " nuclear winter "was once taken by policy analysts who ought to have known better. Many were taken aback by the sheer force of Sagan's rhetoric Remarkably, Science's news coverage of the new results fails to graphically compare them with the old ones Editor Kennedy and other recent executives of the American Association for the Advancement of Science, once proudly co-authored and helped to publicize. You can't say they didn't try to reproduce this Cold War icon. Once again, soot from imaginary software materializes in midair by the megaton , flying higher than Mount Everest . This is not physics, but a crude exercise in ' garbage in, gospel out' parameter forcing designed to maximize and extend the cooling an aeosol can generate, by sparing it from realistic attrition by rainout in the lower atmosphere. Despite decades of progress in modeling atmospheric chemistry , there is none in this computer simulation, and ignoring photochemistry further extends its impact. Fortunately , the history of science is as hard to erase as it is easy to ignore. Their past mastery of semantic agression cannot spare the authors of "Nuclear Winter Lite " direct comparison of their new results and their old. Dark smoke clouds in the lower atmosphere don't last long enough to spread across the globe. Cloud droplets and rainfall remove them. rapidly washing them out of the sky in a matter of days to weeks- not long enough to sustain a global pall. Real world weather brings down particles much as soot is scrubbed out of power plant smoke by the water sprays in smoke stack scrubbers Robock acknowledges this- not even a single degree of cooling results when soot is released at lower elevations in he models . The workaround is to inject the imaginary aerosol at truly Himalayan elevations - pressure altitudes of 300 millibar and higher , where the computer model's vertical transport function modules pass it off to their even higher neighbors in the stratosphere , where it does not rain and particles linger.. The new studies like the old suffer from the disconnect between a desire to paint the sky black and the vicissitudes of natural history. As with many exercise in worst case models both at invoke rare phenomena as commonplace, claiming it prudent to assume the worst. But the real world is subject to Murphy's lesser known second law- if everything must go wrong, don't bet on it. In 2006 as in 1983 firestorms and forest fires that send smoke into the stratosphere rise to alien prominence in the modelers re-imagined world , but i the real one remains a very different place, where though every month sees forest fires burning areas the size of cities - 2,500 hectares or larger , stratospheric smoke injections arise but once in a blue moon. So how come these neo-nuclear winter models feature so much smoke so far aloft for so long? The answer is simple- the modelers intervened. Turning off vertical transport algorithms may make Al Gore happy- he has bet on reviving the credibility Sagan's ersatz apocalypse , but there is no denying that in some of these scenarios human desire, not physical forces accounts for the vertical hoisting of millions of tons of mass ten vertical kilometers into the sky.to the level at which the models take over , with results at once predictable --and arbitrary. This is not physics, it is computer gamesmanship carried over to a new generation of X-Box.

### AT: Imminence

#### The court would not restrict imminence to the point of banning TKs-- still allows decapitation and out-of-battlefield TK ops – Hamdi precedent proves

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

But this is not the end of the inquiry. Even if a targeted individual is not located on a field of battle, he may still be a threat, and targeted 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 killing 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 al- lows the executive to use deadly force when it is the only available means of preventing harm effectively balances the need to protect citizen's constitutional rights while affording sufficient deference to the executive.

#### Overkilling is net worse---the AUMF will allow us to kill the people who are plotting the attacks who is all we need to solve their impact, we just stop killing the people that will blowback.

Hafetz 13 (Jonathan HafetzAssociate Professor of Law, Seton Hall University School of Law, “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.

### 1AR Link D

The link is so hopelessly non-unique its been empirically denied, Boumediene injected con law into national security, and soldiers have so much other shit to worry about this will not over deter them

Kent 10/14/13 (Andrew, is a Professor, Fordham Law School; Faculty Advisor, Center on National Security at Fordham Law School, “ARE DAMAGES DIFFERENT?: BIVENS AND NATIONAL SECURITY,” http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2330476)

Though Goldsmith lists “civil trials” as part of his detailed description of the post-9/11 accountability, the book barely addresses them, and for good reason. As we have seen, Bivens suits have played a relatively small role in the national security area because the courts of appeals have not allowed them to go forward. Goldsmith’s account of the effectiveness of this new ecology of transparency provides interesting context for thinking about the way the courts have equilibrated doctrine in the national security area. On the one hand, it might be said that his account undermines one of the Supreme Court’s most potent arguments against monetary liability for federal officials—the fear that it will “over-deter,” cause excessive caution that damages the public interest, especially in the national security area where boldness is arguably more necessary.208 It might seem farfetched to think that a civil tort suit will by itself cause significant over-deterrence for, say, a senior CIA official who is also worried about investigations by the inspector general, DOJ prosecutors and an internal accountability board; congressional scrutiny; foreign civil and criminal trials ginned up by NGOs; and public scrutiny and calumny in the press or NGO reports. This is especially the case if, as seems likely,209 the official has personal liability insurance or can request reimbursement of costs and indemnification from his agency, or both. It is likely true, as Goldsmith suggests, that all of these accountability mechanisms put together have caused some over-deterrence. But it does not seem credible that civil torts suits would alone tip the balance from appropriate deterrence to overdeterrence.

#### Their link evidence is about battlefield ops, not targeted killing, which is all the plan applies to, there is no reason a grunt will be worried at TK operaters getting sued

## 2ar

### No bioterror

#### No deliver mechanism can ensure their spread.

**Hurlbert, USC Bacteriology PhD, 2000**

(Ronald e., “Microbiology 101 internet text Chapter xv, addendum: biological weapons; malignant biology,” <http://www.slic2.wsu.edu:82/hurlbert/micro101/pages/101biologicalweapons.html#BWdelivery>, ldg)

Currently, because of the recent confrontations with Iraq with their suspected missile capability, the world is concerned about rockets being used to deliver BWs. However, considering the crude nature of the SCUD missiles, they are probably more useful in a publicity capacity than as a credible military threat. The SCUD missiles have a range of between 400 and 500 miles. They lack a sophisticated guidance system, so their chances of hitting a target are limited. Further, the warhead must explode at the proper height to create an aerosol capable of dispersing effective quantities of BW agent over a wide area, but it appears they lack this capacity as they apparently only explode on contact. The explosion would likely destroy much of the BW. Any BW material that survives the explosion would be dependant on low level air currents to disperse it. If the wind was not blowing, most of the MW material would settle near the site of impact, severely limiting its efficacy. Finally, it is clearly understood that if the Israelis are the target of such a SCUD attack, Iraq would suffer nuclear retaliation almost certainly designed to forever eliminate an Iraqi threat.

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

**Stratfor, 2007**

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

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

#### Even if material is gathered it can’t be weaponized or dispersed.

**Burton et al., STRATFOR analyst, 2008**

(Fred, “Busting the Anthrax Myth,” 7-30, <http://www.stratfor.com/weekly/busting_anthrax_myth>, ldg)

While it is certainly true that there are many different types of actors who can easily gain access to rudimentary biological agents, there are far fewer actors who can actually isolate virulent strains of the agents, weaponize them and then effectively employ these agents in a manner that will realistically pose a significant threat of causing mass casualties. While organisms such as anthrax are present in the environment and are not difficult to obtain, more highly virulent strains of these tend to be far more difficult to locate, isolate and replicate. Such efforts require highly skilled individuals and sophisticated laboratory equipment. Even incredibly deadly biological substances such as ricin and botulinum toxin are difficult to use in mass attacks. This difficulty arises when one attempts to take a rudimentary biological substance and then convert it into a weaponized form — a form that is potent enough to be deadly and yet readily dispersed. Even if this weaponization hurdle can be overcome, once developed, the weaponized agent must then be integrated with a weapons system that can effectively take large quantities of the agent and evenly distribute it in lethal doses to the intended targets. During the past several decades in the era of modern terrorism, biological weapons have been used very infrequently and with very little success. This fact alone serves to highlight the gap between the biological warfare misconceptions and reality. Militant groups desperately want to kill people and are constantly seeking new innovations that will allow them to kill larger numbers of people. Certainly if biological weapons were as easily obtained, as easily weaponized and as effective at producing mass casualties as commonly portrayed, militant groups would have used them far more frequently than they have. Militant groups are generally adaptive and responsive to failure. If something works, they will use it. If it does not, they will seek more effective means of achieving their deadly goals. A good example of this was the rise and fall of the use of chlorine in militant attacks in Iraq.

### NO Navy

#### It doesn’t distract them, they can move around, they can comply very easily, Pre-9/11 restrictions disprove the DA – no significant effect on readiness

Dycus 05

[Stephen, Professor, Vermont Law School, Osama's Submarine: National Security and

Environmental Protection After 9/11, William & Mary Environmental Law and Policy Review, <http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1112&context=wmelpr>]

The evidence that compliance with environmental laws has seriously impaired U.S. preparations for war is, however, far from conclusive. After all, the U.S. military's successes in Afghanistan and Iraq were achieved using troops trained and weapons tested under pre-September 11th environmental statutes and regulations. A Navy Admiral, testifying before Congress in support of RRPI in 2003, declared that "the readiness of the Navy is excellent. 32 According to a General Accounting Office report in 2002, "[d]espite the loss of some capabilities, service readiness data do not indicate the extent to which encroachment has significantly affected reported training readiness.” 33 In fact, the report concluded, "Training readiness, as reported in official readiness reports, remains high for most units.,34 Environmental Protection Agency ("EPA") Administrator Christine Todd Whitman went further in early 2003, stating, "I don't believe that there is a training mission anywhere in the country that is being held up or not taking place because of environmental protection regulation."35 A more recent study by the Congressional Research Service noted that "[a]lthough DOD has cited some examples of training restrictions or delays at certain installations and has used these as the basis for seeking legislative remedies, the department does not have a system in place to comprehensively track these cases and determine their impact on readiness.' "36 Some have taken a dimmer view of DOD's protests. EPA complained that the definition of "military readiness activities" in the DOD proposal was "broad and unclear and could be read to encompass more than the Department intends."37 Congressman John Dingell, a Democrat from Michigan, was much more emphatic: "I have dealt with the military for years and they constantly seek to get out from under environmental laws. But using the threat of 9-11 and al Qaeda to get unprecedented environmental immunity is despicable. 38