### Plan- Wake

#### Plan: The United States Federal Judiciary should subject United States’ targeted killing operations to judicial ex post review, including allowing a cause of action for damages arising directly out of the constitutional provision allegedly offended.

### 1AC Counterterror 1

#### Advantage One: Counter-terrorism

#### They are failing are failing; Overreliance on drones cause blowback; accountable use is key

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

Like any other weapon, armed drones can be tactically useful. But are they helping advance the strategic goals of U.S. counterterrorism? Although terrorism is a tactic, it can succeed only on the strategic level, by leveraging a shocking event for political gain. To be effective, counterterrorism must itself respond with a coherent strategy. The problem for Washington today is that its drone program has taken on a life of its own, to the point where tactics are driving strategy rather than the other way around. The main goals of U.S. counterterrorism are threefold: the strategic defeat of al Qaeda and groups affiliated with it, the containment of local conflicts so that they do not breed new enemies, and the preservation of the security of the American people. Drones do not serve all these goals. Although they can protect the American people from attacks in the short term, they are not helping to defeat al Qaeda, and they may be creating sworn enemies out of a sea of local insurgents. It would be a mistake to embrace killer drones as the centerpiece of U.S. counterterrorism. AL QAEDA'S RESILIENCE At least since 9/11, the United States has sought the end of al Qaeda -- not just to set it back tactically, as drones have surely done, but also to defeat the group completely. Terrorist organizations can meet their demise in a variety of ways, and the killing of their leaders is certainly one of them. Abu Sayyaf, an Islamist separatist group in the Philippines, lost its political focus, split into factions, and became a petty criminal organization after the army killed its leaders in 2006 and 2007. In other cases, however, including those of the Shining Path in Peru and Action Directe in France, the humiliating arrest of a leader has been more effective. By capturing a terrorist leader, countries can avoid creating a martyr, win access to a storehouse of intelligence, and discredit a popular cause. Despite the Obama administration's recent calls for limits on drone strikes, Washington is still using them to try to defeat al Qaeda by killing off its leadership. But the terrorist groups that have been destroyed through decapitation looked nothing like al Qaeda: they were hierarchically structured, characterized by a cult of personality, and less than ten years old, and they lacked a clear succession plan. Al Qaeda, by contrast, is a resilient, 25-year-old organization with a broad network of outposts. The group was never singularly dependent on Osama bin Laden's leadership, and it has proved adept at replacing dead operatives. Drones have inflicted real damage on the organization, of course. In Pakistan, the approximately 350 strikes since 2004 have cut the number of core al Qaeda members in the tribal areas by about 75 percent, to roughly 50-100, a powerful answer to the 2001 attacks they planned and orchestrated nearby. As al Qaeda's center of gravity has shifted away from Pakistan to Yemen and North Africa, drone strikes have followed the terrorists. In September 2011, Michael Vickers, the U.S. undersecretary of defense for intelligence, estimated that there were maybe four key al Qaeda leaders remaining in Pakistan and about ten or 20 leaders overall in Pakistan, Somalia, and Yemen. Drones have also driven down the overall level of violence in the areas they have hit. The political scientists Patrick Johnston and Anoop Sarbahi recently found that drone strikes in northwestern Pakistan from 2007 to 2011 resulted in a decrease in the number and lethality of militant attacks in the tribal areas where they were conducted. Such strikes often lead militants simply to go somewhere else, but that can have value in and of itself. Indeed, the drone threat has forced al Qaeda operatives and their associates to change their behavior, keeping them preoccupied with survival and hindering their ability to move, plan operations, and carry them out. The fighters have proved remarkably adaptable: a document found left behind in February 2013 by Islamist fighters fleeing Mali detailed 22 tips for avoiding drone attacks, including using trees as cover, placing dolls and statues outside to mislead aerial intelligence, and covering vehicles with straw mats. Nonetheless, the prospect of living under the threat of instant death from above has made recruitment more difficult and kept operatives from establishing close ties to local civilians, who fear they might also be killed. But the benefits end there, and there are many reasons to believe that drone strikes are undermining Washington's goal of destroying al Qaeda. Targeted killings have not thwarted the group's ability to replace dead leaders with new ones. Nor have they undermined its propaganda efforts or recruitment. Even if al Qaeda has become less lethal and efficient, its public relations campaigns still allow it to reach potential supporters, threaten potential victims, and project strength. If al Qaeda's ability to perpetuate its message continues, then the killing of its members will not further the long-term goal of ending the group. Not only has al Qaeda's propaganda continued uninterrupted by the drone strikes; it has been significantly enhanced by them. As Sahab (The Clouds), the propaganda branch of al Qaeda, has been able to attract recruits and resources by broadcasting footage of drone strikes, portraying them as indiscriminate violence against Muslims. Al Qaeda uses the strikes that result in civilian deaths, and even those that don't, to frame Americans as immoral bullies who care less about ordinary people than al Qaeda does. And As Sahab regularly casts the leaders who are killed by drones as martyrs. It is easy enough to kill an individual terrorist with a drone strike, but the organization's Internet presence lives on. A more effective way of defeating al Qaeda would be to publicly discredit it with a political strategy aimed at dividing its followers. Al Qaeda and its various affiliates do not together make up a strong, unified organization. Different factions within the movement disagree about both long-term objectives and short-term tactics, including whether it is acceptable to carry out suicide attacks or kill other Muslims. And it is in Muslim-majority countries where jihadist violence has taken its worst toll. Around 85

percent of those killed by al Qaeda's attacks have been Muslims, a fact that breeds revulsion among its potential followers. The United States should be capitalizing on this backlash. In reality, there is no equivalence between al Qaeda's violence and U.S. drone strikes -- under the Obama administration, drones have avoided civilians about 86 percent of the time, whereas al Qaeda purposefully targets them. But the foolish secrecy of Washington's drone program lets critics allege that the strikes are deadlier and less discriminating than they really are. Whatever the truth is, the United States is losing the war of perceptions, a key part of any counterterrorism campaign. Since 2010, moreover, U.S. drone strikes have progressed well beyond decapitation, now targeting al Qaeda leaders and followers alike, as well as a range of Taliban members and Yemeni insurgents. With its so-called signature strikes, Washington often goes after people whose identity it does not know but who appear to be behaving like militants in insurgent-controlled areas. The strikes end up killing enemies of the Pakistani, Somali, and Yemeni militaries who may not threaten the United States at all. Worse, because the targets of such strikes are so loosely defined, it seems inevitable that they will kill some civilians. The June 2011 claim by John Brennan, President Barack Obama's top counterterrorism adviser at the time, that there had not been a single collateral death from drone attacks in the previous year strained credulity -- and badly undermined U.S. credibility. The drone campaign has morphed, in effect, into remote-control repression: the direct application of brute force by a state, rather than an attempt to deal a pivotal blow to a movement. Repression wiped out terrorist groups in Argentina, Brazil, Peru, and tsarist Russia, but in each case, it sharply eroded the government's legitimacy. Repression is costly, not just to the victims, and difficult for democracies to sustain over time. It works best in places where group members can be easily separated from the general population, which is not the case for most targets of U.S. drone strikes. Military repression also often results in violence spreading to neighboring countries or regions, which partially explains the expanding al Qaeda footprint in the Middle East and North Africa, not to mention the Caucasus. KEEPING LOCAL CONFLICTS LOCAL Short of defeating al Qaeda altogether, a top strategic objective of U.S. counterterrorism should be to prevent fighters in local conflicts abroad from aligning with the movement and targeting the United States and its allies. Military strategists refer to this goal as "the conservation of enemies," the attempt to keep the number of adversaries to a minimum. Violent jihadism existed long before 9/11 and will endure long after the U.S. war on terrorism finally ends. The best way for the United States to prevent future acts of international terrorism on its soil is to make sure that local insurgencies remain local, to shore up its allies' capacities, and to use short-term interventions such as drones rarely, selectively, transparently, and only against those who can realistically target the United States. The problem is that the United States can conceivably justify an attack on any individual or group with some plausible link to al Qaeda. Washington would like to disrupt any potentially powerful militant network, but it risks turning relatively harmless local jihadist groups into stronger organizations with eager new recruits. If al Qaeda is indeed becoming a vast collective of local and regional insurgents, the United States should let those directly involved in the conflicts determine the outcome, keep itself out, provide resources only to offset funds provided to radical factions, and concentrate on protecting the homeland. Following 9/11, the U.S. war on terrorism was framed in the congressional authorization to use force as a response to "those nations, organizations, or persons" responsible for the attacks. The name "al Qaeda," which does not appear in the authorization, has since become an ill-defined shorthand, loosely employed by terrorist leaders, counterterrorism officials, and Western pundits alike to describe a shifting movement. The vagueness of the U.S. terminology at the time was partly deliberate: the authorization was worded to sidestep the long-standing problem of terrorist groups' changing their names to evade U.S. sanctions. But Washington now finds itself in a permanent battle with an amorphous and geographically dispersed foe, one with an increasingly marginal connection to the original 9/11 plotters. In this endless contest, the United States risks multiplying its enemies and heightening their incentives to attack the country.

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

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

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

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

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

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

#### And, they’ll use nuclear and biological weapons

Allison, IR Director @ Harvard, 12 (Graham, Director, Belfer Center for Science and International Affairs; Douglas Dillon Professor of Government, Harvard Kennedy School, "Living in the Era of Megaterror", Sept 7, http://belfercenter.ksg.harvard.edu/publication/22302/living\_in\_the\_era\_of\_megaterror.html)

Forty years ago this week at the Munich Olympics of 1972, Palestinian terrorists conducted one of the most dramatic terrorist attacks of the 20th century. The kidnapping and massacre of 11 Israeli athletes attracted days of around-the-clock global news coverage of Black September’s anti-Israel message. Three decades later, on 9/11, Al Qaeda killed nearly 3,000 individuals at the World Trade Center and the Pentagon, announcing a new era of megaterror. In an act that killed more people than Japan’s attack on Pearl Harbor, a band of terrorists headquartered in ungoverned Afghanistan demonstrated that individuals and small groups can kill on a scale previously the exclusive preserve of states. Today, how many people can a small group of terrorists kill in a single blow? Had Bruce Ivins, the U.S. government microbiologist responsible for the 2001 anthrax attacks, distributed his deadly agent with sprayers he could have purchased off the shelf, tens of thousands of Americans would have died. Had the 2001 “Dragonfire” report that Al Qaeda had a small nuclear weapon (from the former Soviet arsenal) in New York City proved correct, and not a false alarm, detonation of that bomb in Times Square could have incinerated a half million Americans. In this electoral season, President Obama is claiming credit, rightly, for actions he and U.S. Special Forces took in killing Osama bin Laden. Similarly, at last week’s Republican convention in Tampa, Jeb Bush praised his brother for making the United States safer after 9/11. There can be no doubt that the thousands of actions taken at federal, state and local levels have made people safer from terrorist attacks. Many are therefore attracted to the chorus of officials and experts claiming that the “strategic defeat” of Al Qaeda means the end of this chapter of history. But we should remember a deeper and more profound truth. While applauding actions that have made us safer from future terrorist attacks, we must recognize that they have not reversed an inescapable reality: The relentless advance of science and technology is making it possible for smaller and smaller groups to kill larger and larger numbers of people. If a Qaeda affiliate, or some terrorist group in Pakistan whose name readers have never heard, acquires highly enriched uranium or plutonium made by a state, they can construct an elementary nuclear bomb capable of killing hundreds of thousands of people. At biotech labs across the United States and around the world, research scientists making medicines that advance human well-being are also capable of making pathogens, like anthrax, that can produce massive casualties. What to do? Sherlock Holmes examined crime scenes using a method he called M.M.O.: motive, means and opportunity. In a society where citizens gather in unprotected movie theaters, churches, shopping centers and stadiums, opportunities for attack abound. Free societies are inherently “target rich.” Motive to commit such atrocities poses a more difficult challenge. In all societies, a percentage of the population will be homicidal. No one can examine the mounting number of cases of mass murder in schools, movie theaters and elsewhere without worrying about a society’s mental health. Additionally, actions we take abroad unquestionably impact others’ motivation to attack us. As Faisal Shahzad, the 2010 would-be “Times Square bomber,” testified at his trial: “Until the hour the U.S. ... stops the occupation of Muslim lands, and stops killing the Muslims ... we will be attacking U.S., and I plead guilty to that.” Fortunately, it is more difficult for a terrorist to acquire the “means” to cause mass casualties. Producing highly enriched uranium or plutonium requires expensive industrial-scale investments that only states will make. If all fissile material can be secured to a gold standard beyond the reach of thieves or terrorists, aspirations to become the world’s first nuclear terrorist can be thwarted. Capabilities for producing bioterrorist agents are not so easily secured or policed. While more has been done, and much more could be done to further raise the technological barrier, as knowledge advances and technological capabilities to make pathogens become more accessible, the means for bioterrorism will come within the reach of terrorists. One of the hardest truths about modern life is that the same advances in science and technology that enrich our lives also empower potential killers to achieve their deadliest ambitions. To imagine that we can escape this reality and return to a world in which we are invulnerable to future 9/11s or worse is an illusion. For as far as the eye can see, we will live in an era of megaterror.

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

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

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

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

#### And, the plan is goldilocks- Applying judicial review and application of due process standards to targeted killing increases the credibility of the program while not hampering our warfighting capabilities.

Murphy and Radsan 09 (Richard and Afsheen John, Richard Murphy is the AT&T Professor of Law, Texas Tech University School of Law. Afsheen John Radsan is a Professor, William Mitchell College of Law. He was assistant general counsel at the Central Intelligence Agency from 2002-2004, “DUE PROCESS AND TARGETED KILLING OF TERRORISTS,” 32 Cardozo L. Rev. 405, 2009, lexis)

This Article stays closer to home, arguing that American due process principles should control targeted killing of suspected terrorists and applying those principles to alleged CIA Predator strikes. One obvious spur to our inquiry is the text of the Fifth Amendment itself, which, without obvious limitation, bars the federal government from depriving "any person" of "life" without "due process of law." 21 Other spurs include recent blockbuster opinions - Hamdi v. Rumsfeld 22 and Boumediene v. Bush 23 - that use administrative law principles to limit executive authority to detain persons as enemy combatants. If due [\*410] process controls whom the executive may detain in the war on terror, then surely due process controls whom and how the executive may kill. But on another view, nothing could be more absurd than courts attempting to conform armed conflict to judicial norms. Justice Thomas has been a vocal proponent for this view. 24 Indeed, he used the 2002 Predator strike cited at the beginning of this Article to mount a reductio ad absurdum attack on his colleagues' efforts in Hamdi to impose due process on the detention of enemy combatants. 25 Dissenting, he contended that the controlling plurality's approach led to the absurd conclusion that the government should give terrorists notice and an opportunity to be heard before firing a missile at them. 26 More broadly, Justice Thomas asserted that the courts have neither the authority nor the competence to second-guess the executive's detention of enemy combatants. 27 Implicit is that courts should not second-guess the killing of enemy combatants either. Responding to Justice Thomas's challenge, we contend that the due process model of Hamdi/Boumediene does not break down when applied to the extreme case of targeted killing. Instead, this model supports adoption of procedures that would increase transparency and accountability for targeted killing while still respecting national security needs. To support this contention, we press two claims. The first responds directly to Justice Thomas's gibe that the logic of Hamdi implies an absurd level of judicial control of war. Together, Hamdi and Boumediene give detainees a due process right to judicial review of the government's decision to deprive them of their liberty after their imprisonment had started. On its face, this kind of judicial intervention does not suggest that the CIA must give terrorists notice and an opportunity to be heard before killing them. Rather, by analogy, it suggests that a proper plaintiff should be able to challenge the legality of a targeted killing after an attack. This challenge might take the form of a Bivens-style action. 28 If allowed, these lawsuits would face an [\*411] array of practical and legal obstacles - not the least that a proper plaintiff would need to be alive and willing to bring suit in the United States. Even so, judicial resolution of the merits of a lawsuit that survived these obstacles would increase accountability for targeted killing without posing a significant threat to national security. 29 Therefore, the principles of due process call for this minimal level of judicial intervention.

### CMR 1

#### Advantage Two: Civil-military relations

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

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

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

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

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

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

#### Unchecked military power over terrorism makes US CMR promotion in Latin America fail—sending a model of an independent judiciary is key.

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

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

#### Stable CMR is key to check nuclear proliferation and conserves nuclear cooperation efforts in Latin America

Finnochio 2 (Chris James, Lieutenant, United States Navy, “LATIN AMERICAN REGIONAL COOPERATIVE SECURITY: CIVIL-MILITARY RELATIONS AND ECONOMIC INTERDEPENDENCE” <http://www.dtic.mil/dtic/tr/fulltext/u2/a407008.pdf>)

V. CONCLUSION The Southern Cone developed into a democratic, civilian controlled, economically integrated region, where its members, specifically Argentina and Brazil, exist under the umbrella of cooperative security. The influences of this cooperation, although pervasive do not, as of yet, affect all aspects of the state. Southern Cone militaries, interdependent and collaborative are not integrated, and the proposal for a common defensive force for MERCOSUR by Argentina is potentially decades away from realization. Regardless, the nations of this area have progressed lightyears from their former existence as warring, distrustful neighbors. There is ample evidence to support the notion of an emergent cooperative security zone between Argentina and Brazil. Chapter II presented data showing a paradigm shift in foreign policy, a marked rise in multilateral peacekeeping missions and an increase in security agreements between Argentina and Brazil. Specific national security and foreign policy reversals ushered in the new era of cooperative security: (1) Argentine Presidents Alfonsín and Menem’s foreign policy statements, most critically, that Argentina has no foreign adversaries, and (2) Brazil’s defense industry reductions and foreign policy reversals under Franco and Cardoso, specifically on nuclear cooperation which enhanced regional peace. What then is the cause of this security community? Chapters III and IV addressed potential causes such as civilian control of the military and economic integration 57 respectively. These variables were examined because of their tremendous bearing on foreign policy and the apparent dissent in the literature about their relative significance in contributing to Southern Cone cooperative security. This thesis found that a high degree of military control in a government has adverse effects on regional security. The military mindset is often defensive, even distrustful, and typically aggressive. Interstate cooperation can diminish to the point of non-existence when the government espouses such attitudes because military personnel hold office or exercise a high degree of political control. Surely, this was the case in Latin America up until the 1980s. When the election of civilian leaders coincided with the apparent emergence of regional cooperative security in the Southern Cone, it become increasingly tempting for academics to attribute this to civilian control. While civil-military relations explain why the armed forces were no longer an obstacle to security cooperation, they do not explain civilian motivations for pursuing cooperative security. What were the civilian motivations that coalesced with democratic control of the military in order to increase security cooperation? Economic integration in response to hyperinflation and a shrinking share of the international market explains the civilian impetus toward security cooperation. The most telling example of this was the creation of MERCOSUR. Argentina and Brazil joined Paraguay and Uruguay in signing the Treaty of Asuncion creating the Southern Cone Common Market. The economic hardship of Argentina and Brazil forced the civilian leadership to take a different tact from the nationalistic stance of the former military regime. Chapter IV points out that economic considerations were the impetus behind the integration and that they were responsible for initial steps toward security cooperation and its continued deepening over time. The success of MERCOSUR in turn, has increased activity related to security cooperation. Neighboring countries whose economic fates have become inexorably intertwined realize that they must inhibit military provocation that could cause armed conflict and thereby undermine economic gains (Pion-Berlin 2000, 62). Most succeeding treaties between the two partners serve to deepen economic integration and foster hemispheric peace. Civil-military control and economic integration are not end-states, but rather exist in degrees along a continuum. For civil-military relations, this continuum stretches from total military autonomy, through a gradation of elected civilian leadership with military tutelage, to the aspiration of complete subjugation of the armed forces. Economic integration spans the range from a simple customs union to a common market, absent of any restrictions against member nations (Pion-Berlin 2000, 44). Argentina and Brazil have been and continue to progress along these linear developmental paths. Each continuum of development feeds off and contributes to the progression of the other. The beginnings of Southern Cone regional security rest with the initial diplomatic and political newly elected civilians of Argentina and Brazil. . The desire for economic stability resulted in the creation of the Southern Cone Common Market. Finally, security cooperation stemmed from a need to reduce any potential military threat to economic integration. In Argentina, where a discredited military totally lost public support, security cooperation progressed more rapidly. In Brazil, where the military was still powerful, cooperation moved more slowly. In Argentina, the military suffered two debilitating defeats in the early 1980s. The first was the loss of public support because of the “Dirty War” and the second their defeat by the British in the Falklands/Malvinas War in 1982. The result was twofold. Civilian leaders quickly expanded their influence in government policymaking and the military’s size and political control rapidly shrunk. Military subjugation to civilian control removed the armed forces as an obstacle to security cooperation and the civilian desires to improve the economy motivated the shift in policy toward economic and security cooperation. In Brazil, advances came at a significantly subdued rate, where the military was a principal architect of the transition from authoritarianism to democracy. Success or failure in subjugating the military depends in large part on the negotiations between authoritarian leaders and the emerging democratic opposition during the transition period. Alfred Stepan writes, In a democratic regime the degree of articulated contestation by the military is strongly affected by the extent to which there is intense dispute or substantial agreement between the military and the incoming government concerning a number of issues. When Brazil broke from authoritarian rule, the subsequent years proved difficult for civilian leaders in their effort to check military power. The Brazilian armed forces “succeeded in maintaining their tutelage over some of the political regimes that have arisen from the process of transformation” (Zaverucha, 283). The result, unlike in Argentina where the military lost most, if not all its political power, was a Brazilian military that maintained a prominent role in the formation of government policy. The leaders of the armed forces continued to hold, well after democratization, six seats in the cabinet, as well as positions on the National Security Council and state intelligence agency, and influence with the legislature. The extent of military prerogatives after the democratic transition slowed the pace at which Brazil accepted cooperative security initiatives compared to Argentina. 61 In sum, civilian controls over the military and economic integration are both necessary for a region of cooperative security, and neither of them alone is sufficient. Civilian economic theories and cooperative policy initiatives would never have come to fruition if military autonomy went unbroken because such initiatives ran contradictory to the geopolitical philosophy of the military and their rationale for staying in power. Nevertheless, military subordination alone would not have guaranteed interstate cooperative security for there are numerous nations that exist under democratic civilian control of the military without being members of a regional security block. It is necessary to understand civilian motives for pursuing regional security cooperation. In Argentina and Brazil, civilian leaders sought to cure economic crises through cooperation and integration with their neighbors sharing similar circumstances. ArgentineBrazilian economic integration was a goal pursued by civilian presidents. Cooperative security followed from this same goal as a way to defeat the political opposition to their cooperative theories from geopolitical thinkers, by changing the national mindset and ensuring continued economic success through increased ties and continued communication attributable to economic integration.

#### Cooperative security engagements check nuclear proliferation throughout Latin America and is a model that checks global proliferation

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

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

#### Proliferation moots US conventional superiority – guarantees escalating conflict and nuclear war

Sokolski, Executive Director of the Nonproliferation Policy Education Center and Member of the US Congressional Commission on the Prevention of Weapons of Mass Destruction Proliferation and Terrorism, ‘9 (Henry, June/July, “Avoiding a Nuclear Crowd: How to Resist the Weapon’s Spread” Policy Review, http://www.hoover.org/publications/policyreview/46390537.html)

There are limits, however, to what this approach can accomplish. Such a weak alliance system, with its expanding set of loose affiliations, risks becoming analogous to the international system that failed to contain offensive actions prior to World War I. Unlike 1914, there is no power today that can rival the projection of U.S. conventional forces anywhere on the globe. But in a world with an increasing number of nuclear-armed or nuclear-ready states, this may not matter as much as we think. In such a world, the actions of just one or two states or groups that might threaten to disrupt or overthrow a nuclear weapons state could check U.S. influence or ignite a war Washington could have difficulty containing. No amount of military science or tactics could assure that the U.S. could disarm or neutralize such threatening or unstable nuclear states.22 Nor could diplomats or our intelligence services be relied upon to keep up to date on what each of these governments would be likely to do in such a crisis (see graphic below): Combine these proliferation trends with the others noted above and one could easily create the perfect nuclear storm: Small differences between nuclear competitors that would put all actors on edge; an overhang of nuclear materials that could be called upon to break out or significantly ramp up existing nuclear deployments; and a variety of potential new nuclear actors developing weapons options in the wings. In such a setting, the military and nuclear rivalries between states could easily be much more intense than before. Certainly each nuclear state’s military would place an even higher premium than before on being able to weaponize its military and civilian surpluses quickly, to deploy forces that are survivable, and to have forces that can get to their targets and destroy them with high levels of probability. The advanced military states will also be even more inclined to develop and deploy enhanced air and missile defenses and long-range, precision guidance munitions, and to develop a variety of preventative and preemptive war options. Certainly, in such a world, relations between states could become far less stable. Relatively small developments — e.g., Russian support for sympathetic near-abroad provinces; Pakistani-inspired terrorist strikes in India, such as those experienced recently in Mumbai; new Indian flanking activities in Iran near Pakistan; Chinese weapons developments or moves regarding Taiwan; state-sponsored assassination attempts of key figures in the Middle East or South West Asia, etc. — could easily prompt nuclear weapons deployments with “strategic” consequences (arms races, strategic miscues, and even nuclear war). As Herman Kahn once noted, in such a world “every quarrel or difference of opinion may lead to violence of a kind quite different from what is possible today.”23 In short, we may soon see a future that neither the proponents of nuclear abolition, nor their critics, would ever want. None of this, however, is inevitable.

### Bivens 1

#### Advantage Three: Military Sexual Assault

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

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

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

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

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

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

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

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

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

#### Military sexual assault is skyrocketing in war zones like Afghanistan threatening to unravel mission effectiveness-Congressional and Executive action is a proven failure in this area-a judicial Bivens remedy is

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ARTICLE: IMMORAL WAIVER: JUDICIAL REVIEW OF INTRA-MILITARY SEXUAL ASSAULT CLAIMS

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In 2011, governmental officials estimate that approximately 19,000 sexual assaults took place in the United States military. 2 The vast majority of reported assaults were committed against enlisted personnel. 3 Fewer than 200 persons were convicted of crimes of sexual violence, and only 122 were discharged upon conviction. 4 Currently, two pending class [\*725] action lawsuits, Cioca v. Rumsfeld 5 and Klay v. Panetta, 6 seek to impose institutional accountability for sexual violence committed by servicemembers against fellow servicemembers. The lawsuits allege that, despite an official "zero tolerance" policy and repeated efforts to remedy the problem, sexual assault remains widespread across all branches of the military and military academies, fostered by a culture that rewards overt, ritualized displays of hyper-masculinity and severely penalizes victims for reporting incidents of sexual misconduct. 7 The plaintiffs in Cioca and Klay face a Sisyphean battle due to two significant and interrelated obstacles. The most prominent are the Feres 8 principles, which have been interpreted to bar actions by service personnel against military officials for torts committed "incident to service." Since the 1950s, Feres has been expansively interpreted to bar justiciability of claims by military personnel against superior officers not only for negligence and intentional torts, but also for blatant violations of constitutional rights. 9 Despite the strong disapproval of several Supreme Court justices and countless district and appellate courts, the Court has denied certiorari in recent cases challenging application of the doctrine, thus further entrenching it. 10 The other substantial obstacle to these lawsuits is the normative but no less significant specter of "judicial activism" and its mirror, "military deference," the reluctance of the judiciary to usurp Congressional responsibility for the conduct of military affairs. Signing up for the military has been interpreted by the courts to mean that plaintiffs can be administered psychotropic drugs, 11 exposed to toxic chemicals, 12 and sexually assaulted, 13 all without their consent and devoid of meaningful remedy beyond recourse available via the Uniform Code of Military [\*726] Justice (UCMJ) 14 and the chain of command. No matter how profound the injustice or disenfranchised the plaintiff, in case after case, courts are reluctant to disregard what they believe to be established precedent baring judicial review of intra-military claims. This hands-off position in regard to all things military is part and parcel of what other scholars have categorized as the Rehnquist and Roberts Courts' overarching "anti-litigation" stance. 15 As Chief Justice Roberts tellingly observes of the Court: "It is not our job to protect the people from the consequences of their political choices." 16 "Inactivist conduct" by the highest court has, in turn, led to a hands-off attitude in the appellate courts: "Judges are human, we might reasonably expect that some will take advantage of the increased opportunities to avoid decisions that they would prefer not to make." 17 When it comes to constitutional claims stemming from intra-military sexual assaults, this minimalist approach results in profound injustice. The first of the class actions to be filed, Cioca v. Rumsfeld, was dismissed by the district court in December 2011 18 and currently is on appeal to the U.S. Court of Appeals for the Fourth Circuit. 19 The dismissal is premised on the commonly accepted ground that precedent leaves no place for the judiciary in the resolution of intra-military claims. Although the vast majority of courts share this interpretation of Feres as barring the plaintiffs' claims for constitutional torts, the blind application of outdated caselaw in these cases is legally and morally unsound. Over the years, the Court has identified three core principles underlying Feres: (1) respect for supervisory decisions made in the context of intra-military supervision (the "incident to service" exception); (2) presence of an alternative compensation scheme that provides soldiers with a "generous" alternative to recovery in tort; and, (3) perhaps foremost, the belief that, were soldiers permitted to file lawsuits against superior officers in civilian courts, the military disciplinary structure [\*727] would be undermined. 20 None of these justifications suffice to waive the judiciary's obligation to resolve the Klay and Cioca plaintiffs' constitutional claims. Feres was decided just after World War II, a historical moment that differed dramatically from the one we now inhabit. Congress recently had enacted the Federal Tort Claims Act (FTCA), creating causes of action against federal officials for negligence. 21 While Congress may not have intended to subject itself to tort claims from every soldier injured in the line of duty, 22 when read against the current legal and political environment, the expansion of the doctrine to bar all claims by servicemembers against military officials does not make sense. Further, the judicial branch that advocated deference to military affairs in what have become seminal cases on constitutional separatism - Rostker v. Goldberg, 23 Goldman v. Weinberger, 24 United States v. Shearer 25 - faced a vastly different world than the judiciary faces today. This is not our grandparents' military, in which nearly 10% of the population volunteered or were drafted into service. 26 We inhabit the era [\*728] of the citizen-soldier. Forty percent of troops deployed to Iraq and Afghanistan are National Guard and Reserve volunteers. 27 Nearly half of these reservists suffer from issues such as post-traumatic stress disorder (PTSD), military sexual trauma (MST), or other psychological trauma and have difficulty accessing adequate treatment for these conditions. 28 The actions of "the troops" are not separate from those of civilians; the troops committing and suffering from sexual assaults are civilians. Unconvicted military perpetrators ultimately are released into the civilian population, are not subjected to sex offender registries, and are free to reoffend. 29 Perpetrators and victims return home to a system ill-equipped to offer redress for their grievances, contributing to concerning rates of divorce, 30 domestic violence, 31 even suicide. 32 Although soldiers comprise the heartland of America, military decisionmaking has been severed from civilian accountability. 33 The biggest hurdle to resolution of the Cioca and Klay plaintiffs' claims is the idea that battle readiness depends on autonomy in military decisionmaking, that civilian intervention will weaken the institution of [\*729] the U.S. military. However, there is a much greater threat of erosion of the military command structure if sexual violence is permitted to continue unabated. 34 The DoD itself admits that the "costs and consequences [of sexual assault] for mission accomplishment are unbearable." 35 As I discuss herein, the selfsame rhetoric of unit cohesion and combat readiness was deployed by the military to discourage judicial review of the discriminatory "Don't Ask, Don't Tell" (DADT) 36 policy. The result of judicial review in those cases? A stronger military. 37 In the case of serious, widespread, and unremedied constitutional violations, the biggest threat to democracy is not judicial intervention but judicial complacency. Chief Justice Earl Warren famously cautioned that "our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes." 38 However, this is precisely what is happening today in the case of victims of military sexual assault. As Jonathan Turley profoundly observes: There remains a striking discontinuity in the duty of our servicemembers to defend liberties and rights with which they are only partially vested... . When servicemembers encounter ... dangers, they do so as citizen-soldiers. It is the significance of the first part of the term citizen-soldier that demands greater attention from those of us who are the beneficiaries of the second part. 39 Turley observes, further, that the most essential time for civilians to step in and protect the rights of servicemembers is when they are "engaged in a new struggle against a hidden and dangerous enemy." 40 The "hidden and dangerous" enemy to which Turley refers is international terrorism, but the same can be said of the domestic and endemic issue of sexual assault. [\*730] As I describe below, and as Turley and Diane Mazur elsewhere have argued, what has become a widely accepted "doctrine" of constitutional separatism is in fact no more than a flexible policy created by the Court as a reflection of changing political times. 41 A close reading of precedent reveals that in assessing matters of constitutional concern, the caselaw does not mandate blanket non-intervention in military affairs but that the Court balance the harm of intervention against the injustice being perpetrated. Feres, which considered the narrow issue of military sovereign immunity from mere negligence claims, has been extended to the point of unrecognizability. The doctrine applied today is a policy of judicial deference that has been widely criticized as unjust by judge after judge, believing they are mandated to apply it. 42 In the field of history, scholars have identified what they label "conjunctures," periods in which competing narratives are made visible and the time is particularly ripe for change. 43 In recent decisions in favor of plaintiffs challenging the discriminatory DADT policy, Witt v. Department of the Air Force 44 and Log Cabin Republicans v. United States, 45 the [\*731] federal courts in the Ninth Circuit showed themselves willing to fulfill their role as constitutional arbiter when individual rights are infringed as a result of inaction by the other two branches. Rather than interpreting precedent to mandate a hands-off approach to the military, the Ninth Circuit reinterpreted existing caselaw as a call for judicial intervention where constitutional rights were circumscribed. The courts determined in those cases that the egregiousness of discriminatory practices under DADT and the obvious attenuation between the policy and unit cohesion, outweighed potential negative effects of intercession in military affairs. 46 In light of the harm that can result from the glacial pace of legislative action, judicial decisionmaking proved itself a vital engine of social change. According to the military's own statistics, thousands more servicemembers are sexually assaulted in one year than were discharged under the whole of the DADT policy. 47 Congress and the military have tried and failed for a quarter century to remedy the problem of intra-military sexual assault. 48 The only way to end intra-military rape is to radically alter the system of reporting, investigation, and prosecution of sexual assault claims. 49 The emphatic and relatively unanimous disapproval of the Feres doctrine by lower courts suggests that the question is not if the Court will revisit the doctrine, but when. With the filing of Cioca and Klay, the moment is ripe for the Supreme Court to revisit what has become an outdated and unworkable doctrine. Further, these cases provide an important opportunity for the Court to signal that it will not abdicate its responsibility to adjudicate worthy constitutional claims, particularly claims that otherwise are foreclosed. 50 [\*732] Part Two of this Article discusses the issue of military-on-military sexual violence, focusing on the class actions currently pending, Cioca v. Rumsfeld and Klay v. Panetta. Part Three of the Article focuses on the policy of military deference and the Feres principles, examining the historical origins and continued expansion of these judge-made doctrines. Part Four of the Article makes three primary arguments in support of judicial resolution of constitutional claims resulting from intra-military sexual assault. First, I argue that the defense that intra-military rape is a hazard of service is unsupported, not only by Supreme Court caselaw but by the government's own admission. Military officials currently are permitted to take the paradoxical position of framing gender-based violence against civilians as a private crime and intra-military violence as incident to service. Second, I challenge the argument that the military provides adequate remedies in cases of sexual assault, particularly in regard to female servicemembers. Lastly, I argue that constitutional separatism is a creature of judicial policymaking that at long last is ripe for revision. I explore the DADT repeal cases as a roadmap for resolution of constitutional claims resulting from assault, and I conclude by outlining the normative reasons why the judiciary must take an active role in these cases in order to preserve confidence in not only the military, but the judiciary as well. II. Klay and Cioca: "Zero Tolerance," Moral Waivers, Institutional Responsibility Thirty-six plaintiffs in Cioca v. Rumsfeld and Klay v. Panetta seek recognition of the liability of military and executive officials for the constitutional harms they suffered as a result of being raped, assaulted, and harassed while serving in the military and the retaliation they experienced as a result of reporting the crimes. 51 They allege that, not only were their Fifth Amendment rights to bodily integrity violated when they suffered sexual assaults, but officials impeded the plaintiffs' exercise of their due process rights and First Amendment rights by unfairly terminating and otherwise mistreating them because they had reported the violence. Further, the suits allege equal protection violations, as government officials "subjected [the] Plaintiffs to a pattern of ... assault, and ... harassment ... on the basis of gender; and encouraged a culture of sexism and misogyny." 52 Kori Cioca chronicles a typical experience of escalating harassment, culminating in rape by a fellow servicemember. 53 Over the course of several months, Cioca's direct supervisor in the Coast Guard subjected her to numerous incidents of sexual harassment, culminating in his [\*733] sneaking into Cioca's room and masturbating and forcing her to touch his penis and physically assaulting her when she refused. Despite the fact that Cioca and two other women who witnessed the harassment promptly reported the assault, military command did not respond on any official basis. However, a different superior officer took her to his church, where he and other officers "prayed for her safety." 54 Shortly after this incident, Cioca was dragged into a closet and raped by the supervisor who had been harassing her. Command eventually transferred Cioca; however, they told her if she continued to pursue allegations of rape, she would be court-martialed for lying. 55 She was ordered to sign a paper stating she had an inappropriate consensual relationship with her attacker. Despite a promise of confidentiality, commanders openly discussed the incident. She was harassed at her new post, and eventually discharged on the basis that she had a "history of inappropriate relationships." 56 Two months shy of completing her service obligation at the time of discharge, Cioca is unable to obtain benefits for a chronic injury sustained during the assault. Her attacker faced no sanction. 57 Ariana Klay tells a similar story of escalating incidents and retaliation for reporting. Klay alleges she was sexually harassed by numerous superior officers while serving at the Marine Barracks in Washington D.C., an extremely prestigious post situated just a mile from the Capitol. The complaint chronicles Klay's harassment by not one but numerous high ranking Marine officials, including a major, a captain, and a lieutenant colonel. The captain spread numerous rumors, including that Klay had been involved in a "gang bang." She regularly was referred to as "slut," "whore," and "WM," for "walking mattress." Upon reporting what she deemed "pervasive hostility," she was told to "deal with it." In 2010, a senior officer and his civilian friend entered her residence without permission, where both raped Lieutenant Klay. 58 When Klay reported the incident, she was told she must have welcomed the attack, because she wore regulation issue skirts and makeup and exercised in tank tops. 59 One of the rapists was court-martialed; however, he was convicted of the much lesser crimes of adultery and indecent language. Klay lost a promising career. At least one of her harassers was promoted. 60These complaints chronicle not only individual harms but a "systemic failure to stop rape and sexual assault." 61 The ways in which the [\*734] military tacitly 62 and overtly promotes a culture of sexual assault begins with the recruitment process. Faced with a crisis in securing personnel in the face of impending wars, under Secretary of Defense Rumsfeld, the military instituted a policy of granting moral waivers, accepting recruits who had been arrested or convicted of offenses, including domestic assault, aggravated assault, and rape. 63 Between 2004 and 2007, over 125,000 recruits with criminal histories enlisted in the various branches. 64 In 2006, more than 10% of soldiers in the Army had criminal pasts. 65 A 2010 study of incoming recruits conducted on behalf of the Navy to evaluate the effectiveness of potential sexual assault prevention programs found that between 13% and 15% of new recruits self-reported perpetrating or attempting rape, more than three times the statistics estimated for the population in general. 66 The researchers who conducted the study caution that these numbers are likely low, as any [\*735] self-reporting study likely inspires respondents to under-report. 67 Commentators suggest that sexual predators are likely to be attracted to the armed forces in part because the service also recruits individuals who are particularly vulnerable to sexual assault. 68 "[A] startling number of women and men enlist in the military to escape abuse. Among army soldiers and marine recruits, half of the women and about one-sixth of the men report having been sexually abused as children, while half of both say they were physically abused[,]" much higher rates than among the civilian population. 69 The Cioca appeal chronicles repeated instances of former Secretaries of Defense Rumsfeld and Gates failing to comply with congressional mandates to remedy issues of sexual predation, assault, and harassment. 70 Under their watch, reported sexual assaults in the military increased by 25%, particularly in combat zones. 71 Until very recently, the DoD response to rising rates of sexual assault has been to engage in "soft" approaches, such as advertising campaigns and lighthearted presentations, including "Sex Signals" and "Can I Kiss You?" 72 Campaigns such as "Ask Her When She's Sober," 73 "What Rapists [\*736] Look Like," 74 and "Bystander Intervention" 75 perpetuate the perception that most sexual assaults occur in a "he said/she said" situation in which anyone could cross a line. "(Primarily male) troops are not encouraged to cease sexually pursuing (primarily female) co-workers but to become better at recognizing the "signals' those co-workers are sending." 76 As Helen Benedict notes, when confronted by the problem of sexual assault, many servicemembers respond that prostitution is not as widely available in Iraq and Afghanistan as it was in prior wars, characterizing rape as a crime of desire versus a crime of power and exploitation. 77 This portrayal of rape as a product of "pent-up lust," encouraged by the Sexual Assault Prevention and Response Office (SAPRO) itself, plays into an "anyone can rape" myth that is both inaccurate and dangerous. It also ignores the vital fact that, as pointed out in one recent Navy study, "men who have previously engaged in sexual aggression are likely to do so again." 78 The failure of recent institutional tactics to stem the tide of sexual assaults is evidenced by the fact that so few perpetrators in the military are convicted of crimes of sexual violence. 79 When one examines only reported offenses, fewer than 15% of those accused are prosecuted for rape or sexual assault versus 40% of the accused in the civilian community. 80 An attorney who has served in the Judge Advocate General's corps and former military criminal investigators describe a culture in which accusers regularly are interrogated and threatened with charges for giving false statements and where rape cases routinely are given to male military police officers to investigate, as women are deemed "too sympathetic." 81[\*737] Rather than being court-martialed, offenders frequently are penalized under Article 15 of the UCMJ, which permits non-judicial penalties, or Article 134, adultery. 82 Although SAPRO is in the process of implementing a centralized database to track incidents of sexual assault, to date, the military has been exceedingly lax in reporting such data. 83 Among plaintiffs, reports of incidents almost uniformly lead to derivation of opportunities for advancement, overt retaliation, or even death. 84 One-third of the 36 plaintiffs in the Klay and Cioca cases were officially reprimanded, sanctioned, or discharged in retaliation for making complaints. 85 Others resigned after having been ordered to continue to serve under direct command of alleged rapists or their friends and [\*738] protectors. 86 Many perpetrators were promoted, one was even featured in a Marine Corps calendar. 87 The experiences of Ariana Klay and Kori Cioca are not unique. In the past 30 years, numerous, similar cases have been brought in district courts around the United States, alleging a wide range of claims against military officials in connection with sexual assault and harassment. 88 Most have been dismissed based on the courts' application of the Feres principles. Last year, the District Court for the Eastern District of Virginia predictably dismissed Cioca's complaint on the grounds that, although the plaintiffs' complaints were "troubling," the "unique disciplinary structure of the military establishment" was a "special factor" that counseled against judicial intrusion. 89 Judge Liam O'Grady was apologetic in his dismissal. 90 Like his colleagues, he wanted to hear these cases, but believed precedent tied his hands. In Part Three, I delve more deeply into the stated grounds for dismissal, arguing that the law is not as cut and dried as the courts believe. Contributing to Diane Mazur's and Jonathan Turley's recent work, I hope to lay a foundation for the judiciary to re-evaluate the adherence to military deference in the context of claims of sexual assault. III. "Troubling," "Egregious," Dismissed "The humblest seaman or marine is to be sheltered under the aegis of the law from any real wrong, as well as the highest in office." 91 The ability of Cioca and Klay to bring their suits is located in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics. 92 Bivens involved an alleged Fourth Amendment violation, whereby several federal agents conducted a warrantless search of Bivens's apartment and subsequently [\*739] subjected him to a strip search. The Court held that, even if no specific statute provided it, a violation of the Constitution by a federal employee could provide a cause of action against that employee for money damages. 93 Bivens has been interpreted to provide causes of action for employment discrimination under the Fourteenth Amendment Due Process Clause and the Eight Amendment's prohibition on cruel and unusual punishment. 94 In Bivens, the Court "recognized the tremendous capacity for causing harm that one possesses when acting under the authority of the United States government." 95 In the context of suits by and against military personnel the ability of plaintiffs to obtain money damages under Bivens has been severely limited by the separate but interrelated principles propounded by the Court in Feres v. United States. 96 Feres involved three cases in which executors of estates of active duty military personnel sued military officials for damages based on negligence under the FTCA. 97 The Court held that, although the FTCA provided some causes of action against the military, the Act was not meant to create new causes of action but only to right "remediless wrongs - wrongs which would have been actionable if inflicted by an individual or a corporation but [are] remediless solely because their perpetrator was an officer or employee of the Government." 98 In the Feres plaintiffs' cases, because each harm was suffered in the course of active duty and there was no liability "under like circumstances" for private claims, the Court unanimously held that the suits were not justiciable. 99 Feres created an opportunity for Congress to clarify application of the FTCA and articulate the scope of its application [\*740] to service personnel. 100 However, Congress has not taken the opportunity to amend the statute.

#### US is drawing down but remaining forces will be critical to a stable transition

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No plans for complete withdrawal from Afghanistan, ISAF general says

http://www.stripes.com/news/no-plans-for-complete-withdrawal-from-afghanistan-isaf-general-says-1.238952

KABUL — The commander of NATO ground forces in Afghanistan says there has been no discussions that the coalition would completely withdraw after 2014, despite continued uncertainty in political negotiations over the future of the international military effort. U.S. Army Lt. Gen. Mark Milley, the No. 2 commander for the NATO-led International Security Assistance Force, calls the term “withdrawal” a misnomer. “We have no indication whatsoever of a withdrawal completely from Afghanistan,” he told Stars and Stripes in a Monday interview at his headquarters in Kabul. “We are going to change our mission, and we are going to reduce in size and scope.” Frustrated with negotiations with the Afghan government over leaving international troops in the country, U.S. officials floated the idea over the summer of removing all troops. For his part, President Hamid Karzai suspended the negotiations in June and said in August that he is in no hurry to sign an agreement over future troop levels. Milley, who took command in May, acknowledged that he is still awaiting final guidance from the political leaders of NATO’s member counties, including the United States, but planning is ongoing for an advising and support mission after 2014. “The current NATO mandate ends on 31 December 2014, but there’s another mission that follows that called Resolute Support which is currently in planning,” he said. There have been no signals given that U.S. troop levels will drop to zero, Milley said. “We haven’t been told to plan for that.” Military leaders have been trying to assure the Afghans, and a skeptical American public, that the reduction in American troops is tied, as Milley insisted, to the capabilities of the Afghan security forces. “We’re only pulling out of areas where we think the Afghan security forces are capable of standing up and fighting on their own,” he said. “But even when they, ‘fight on their own,’ we are still going to provide limited [intelligence and reconnaissance] and close-air support, because those capabilities won’t be ready for several years.” That message of a conditional reduction is complicated by President Barack Obama’s pledge to cut the American presence in Afghanistan from nearly 70,000 troops earlier this year to 34,000 by February 2014. All “combat” troops are scheduled to leave at the end of next year. “All the national leaders of the various countries of NATO, to include our own, have publicly stated many times that we’re not going to abandon Afghanistan,” Milley said. Milley’s boss, ISAF commander U.S. Gen. Joseph Dunford, told The Guardian newspaper that Afghan forces may need up to five more years of international military support. Support for the war effort has dwindled among the American public, however, and military leaders calling for a continued military presence in Afghanistan are often finding little support among political leaders. For the first time this summer, Afghan forces took responsibility for security across the country. Milley, who called 2013 a “critical” year for the developing ANSF. On Monday, Afghanistan’s Interior Minister Umer Daudzai revealed that more than 1,700 Afghan police officers have been killed since March. The same number died in the preceding 12 months, according to Reuters. The Afghan government does not publish regular casualty numbers. Despite the rising death toll among Afghan forces as NATO has withdrawn from many areas, Milley said he still doesn’t anticipate a “general deterioration” in the security situation. He admitted that there is still significant fighting in certain regions, especially rural areas, but the Afghans are more than holding their own. “What is not solidified is yet is the institutional-level capabilities, the higher-end capabilities that are required to sustain tactical combat operations over time,” Milley said. “We still have a fair amount of work to do in that regard. But tactically, the Afghan security forces — both the army and the police — have acquitted themselves very well this summer.”

#### Failed transition risk Taliban takeover, civil war, and India-Pakistan confrontation

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NATO exit may trigger 'proxy war' in Afghanistan

<http://www.dw.de/nato-exit-may-trigger-proxy-war-in-afghanistan/a-17085599>

NATO exit may trigger 'proxy war' in Afghanistan NATO's withdrawal from Afghanistan in 2014 is likely to have deep implications for South Asia. Experts say tensions between India and Pakistan might intensify, should the Afghan political reconciliation process fail. NATO soldiers board a Chinook helicopter after a security handover ceremony at a military academy outside Kabul on June 18, 2013. (Photo: AFP) Some 12 years after the NATO invasion of Afghanistan, combat troops are scheduled to leave the country by the end of 2014. But many questions linger about the nation's future. According to experts, there are four major aspects that will play a key role in determining the prospects of the war-torn South Asian nation. These involve the number of allied troops set to remain in the country, the success of negotiations with the Taliban, the upcoming presidential elections and the willingness of neighboring countries to facilitate the Afghan reconciliation process. But it all starts with the drawdown. According to a report by the US Congressional Research Service, the size of international forces remaining in Afghanistan post 2014 could be about 8,000-12,000 trainers plus an unspecified number of counterterrorism forces, the majority of which would be from the US. Fears of a Taliban resurgence "It is clear that it is going to be a very light physical footprint, with the Afghans leading the security," said Moeed Yusuf, a South Asia expert at the US Institute of Peace. He believes the Western nations will continue to invest money in Afghanistan to ensure the government in Kabul doesn't collapse and is able to hold at least the capital Kabul and other major urban areas. However, the US-Afghanistan security agreement that would keep this so-called residual force in the country is still under negotiation due to differences over how to deal with the Taliban. Flame splatters from both ends of 82mm recoilless rifle as a Taliban gunner fires at rival faction positions on the Kalakan frontlines 40 kilometres north of Kabul 04 December. (Photo: AFP) There are fears the Taliban will succeed in retaking control over the country after the NATO withdrawal In the meantime, the situation in Afghanistan seems to be deteriorating. "There are fears that the Taliban and other insurgents will achieve success against Afghan forces once the international force is reduced substantially by late 2014," the Congressional report stated. Some Afghan factions warn of civil war and are rearming as well as recruiting militiamen, the report added. Moreover, some elites are said to be moving their businesses and funds out of Afghanistan due to the fear of chaos and instability after the pullout. According to Afghan Interior Minister Umer Daudzai, police deaths have doubled since NATO troops handed over security responsibility to local troops. But the attacks of extremist groups such as the Taliban are not limited to security personnel. According to a UN report, Afghanistan's civilian casualty toll in the first six months of 2013 jumped by 23 percent, compared to the same period last year. The report stated that the insurgency was to blame for 74 percent of all civilian casualties. 'A recipe for disaster' Rolf Tophoven, director of the German-based Institute for Terrorism Research & Security Policy (IFTUS), told DW there is a large number of militants and drug lords in different parts of the country who are seeking to increase their influence by attacking Afghan security forces. "Without NATO support, Afghan troops will become incapable of dealing with these strikes," Tophoven added. This view is shared by Michael Kugelman, a South Asia expert at the Washington-based Woodrow Wilson International Center for Scholars: "Afghanistan's armed forces are afflicted by drug abuse, illiteracy, and desertion, yet they preside over one of the world's most volatile security environments, and continue to suffer from combat-related incapacities. This is all one big recipe for disaster, no matter how much Afghanistan and its allies around the world try to sugarcoat the issue." Crucial elections This is why most experts believe that in order to achieve long-term stability and peace in the country, an agreement has to be reached on how to include the Taliban in the existing political system. Afghan President Hamid Karzai speaks during a joint press conference with NATO Secretary General Anders Fogh Rasmussen following a security handover ceremony at a military academy outside Kabul on June 18, 2013. (Photo: AFP) There is still no favorite to succeed President Hamid Karzai after the April poll "No one is talking about whether to involve Taliban politically or not. That discussion is over. The real question is in what form and under what terms and conditions will they participate in the political process and what sort of concessions and incentives are put on the table for negotiations with the extremists," Pakistan-born analyst Yusuf said. Analysts argue that the upcoming Afghan presidential elections are crucial for the reconciliation process with the Taliban to succeed. If the vote takes place as scheduled on April 5, it would be the country's first handover of power since the US-led invasion. But there is still no favorite to succeed President Hamid Karzai, who is constitutionally barred from running for a third term. DW.DE The Taliban's killer tactics As ISAF troops prepare to leave Afghanistan next year, a new UN report blames insurgents for a sharp rise in civilian deaths. Experts say the Taliban are employing increasingly bold and deadly tactics. (08.08.2013) Taliban 'unlikely to retake power' in Afghanistan Karzai seeks Pakistani help in Taliban peace talks India, Pakistan: An 'antagonistic' relationship Smruti Pattanaik, a research fellow at the New-Delhi based Institute for Defense Studies and Analyses, believes that the different ethnic groups will remain politically fragmented even after the poll, making political consolidation difficult. "If the Taliban gain the upper hand, the Afghan army will split along ethnic lines, possibly sparking a civil war," she said. Overlapping conflicts Analysts are of the opinion such a development would have a major impact on South Asia. According to historian and journalist William Dalrymple, most observers in the West view the Afghanistan conflict as a battle between the US and its partners on one hand, and al Qaeda and the Taliban on the other. But in reality, he states, NATO troops are now caught up in a complex war shaped by two pre-existing and overlapping conflicts: one local between the different ethnic groups in Afghanistan, the other regional between the nuclear powers India and Pakistan. The Taliban government of Afghanistan between 1996 and 2001 was never recognized by India. However, after the Taliban were ousted from power by the US following the 9/11 attacks, a major strategic shift occurred resulting in the new Afghan government becoming close to India, Dalrymple writes in an essay published by the Brookings Institution. "With Karzai in office, India seized the opportunity to increase its political and economic influence in Afghanistan." Vying for influence However, the Pakistani military has always viewed the Indian presence, in what it regards as its "strategic Afghan backyard," as an "existential threat," the expert pointed out. This has led to efforts by the Pakistani intelligence agency ISI to restore the Taliban to power "so that it can oust Karzai and his Indian friends." Political analyst Yusuf fears that if the terror activities persist in Afghanistan after 2014, they are likely to spill over into neighboring countries, and warns that Afghanistan could become "a staging ground for an Indo-Pakistani proxy war." Afghan security forces keep watch as smoke rises from the site of an attack in Kabul, July 2, 2013. Insurgents including a suicide bomber in a truck launched an attack on Tuesday in an area in the north of the Afghan capital used by foreign firms supplying NATO forces in Afghanistan, police said, the latest in a string of raids in Kabul. Four employees of a foreign logistics and supply company were wounded in the attack, a driver for the company and a witness said. Police said at least two attackers were killed. REUTERS/Omar Sobhani (AFGHANISTAN - Tags: CIVIL UNREST TPX IMAGES OF THE DAY POLITICS) Analysts say Afghanistan may become the staging ground for a proxy war between India and Pakistan Imtiaz Gul, director of the Islamabad-based independent Centre for Research and Security Studies agrees. He is of the opinion that the decade-long struggle between the two countries for strategic influence and foothold in Afghanistan will further intensify. "Bilateral relations are already plagued with mistrust, and if both countries cannot get on the same page on Afghanistan, ties will see further tensions and acrimony, ultimately hampering the Afghan reconciliation process."

#### Afghanistan instability threatens global stability and broader Asian economic security-2014 is key

UN News Centre 9/27/13

Central Asian countries cite instability in Afghanistan as serious threat

http://www.un.org/apps/news/story.asp?NewsID=46100&Cr=general+debate&Cr1=#.UkkevIakpEI

The war in Afghanistan remains one of the serious threats to regional and global security, two Central Asian officials today told the United Nations General Assembly, urging a political solution to the conflict that could very well escalate in 2014, stirring up terrorism, extremism, drug trafficking and illegal migration. Addressing the Assembly’s 68th high-level debate, Uzbek Minister of Foreign Affairs Abdulaziz Kamilov, stressed the only way to end the Afghan crisis is through a political solution based on negotiations with the main confronting forces and achievement of consensus “regardless of how difficult it might be and given the active assistance on the part of the international community and the United Nations.” Mr. Kamilov noted that as the International Security Assistance Force (ISAF) draws down next year, the conditions could lead to an escalation of the confrontation in the country which could have a negative impact on Central Asia and neighbouring regions. Uzbekistan, the Foreign Minister noted, will continue to adhere to an “open and clear” policy with respect to Afghanistan based on principles of good neighbourliness and non-interference in its internal affairs. In his statement, Mr. Kamilov also stressed the importance of water resource management, and particularly the problem of the drying up of the Aral Sea. Erlan A. Idrissov, Minister for Foreign Affairs of Kazakhstan. UN Photo/Evan Schneider Meanwhile, the Minister of Foreign Affairs of Kazakhstan, Erlan Idrissov, stressed his country’s commitment to sustainable and stable development of Afghanistan, in keeping with the Istanbul progress and the Almaty forum. “The Asian continent is transforming itself into a global power house for the 21st century, with its production of more than 57 per cent of global GDP - and this trend is expected to increase,” Mr. Idrissov said. “However, this growth could be jeopardized by an aggravation of existing conflicts, illegal migration, drug trafficking, territorial claims, separatism, religious extremism and terrorism.” To counter these, the Foreign Minister called for a regional security architecture to more effectively make joint decisions related to security and cooperation in Asia. Mr. Idrissov also urged nuclear abolition, noting that when the Semipalatinsk nuclear site closed shortly after the country’s independence in 1991 and renounced the fourth largest nuclear arsenal in the world, Kazakhstan “made a unique contribution in the multilateral effort to achieve a world free of nuclear weapons.”

#### Extinction

Greg Chaffin 11, Research Assistant at Foreign Policy in Focus, July 8, 2011, “Reorienting U.S. Security Strategy in South Asia,” online: http://www.fpif.org/articles/reorienting\_us\_security\_strategy\_in\_south\_asia

The greatest threat to regional security (although curiously not at the top of most lists of U.S. regional concerns) is the possibility that increased India-Pakistan tension will erupt into all-out war that could quickly escalate into a nuclear exchange. Indeed, in just the past two decades, the two neighbors have come perilously close to war on several occasions. India and Pakistan remain the most likely belligerents in the world to engage in nuclear war. ¶ Due to an Indian preponderance of conventional forces, Pakistan would have a strong incentive to use its nuclear arsenal very early on before a routing of its military installations and weaker conventional forces. In the event of conflict, Pakistan’s only chance of survival would be the early use of its nuclear arsenal to inflict unacceptable damage to Indian military and (much more likely) civilian targets. By raising the stakes to unacceptable levels, Pakistan would hope that India would step away from the brink. However, it is equally likely that India would respond in kind, with escalation ensuing. Neither state possesses tactical nuclear weapons, but both possess scores of city-sized bombs like those used on Hiroshima and Nagasaki. ¶ Furthermore, as more damage was inflicted (or as the result of a decapitating strike), command and control elements would be disabled, leaving individual commanders to respond in an environment increasingly clouded by the fog of war and decreasing the likelihood that either government (what would be left of them) would be able to guarantee that their forces would follow a negotiated settlement or phased reduction in hostilities. As a result any such conflict would likely continue to escalate until one side incurred an unacceptable or wholly debilitating level of injury or exhausted its nuclear arsenal. ¶ A nuclear conflict in the subcontinent would have disastrous effects on the world as a whole. In a January 2010 paper published in Scientific American, climatology professors Alan Robock and Owen Brian Toon forecast the global repercussions of a regional nuclear war. Their results are strikingly similar to those of studies conducted in 1980 that conclude that a nuclear war between the United States and the Soviet Union would result in a catastrophic and prolonged nuclear winter, which could very well place the survival of the human race in jeopardy. In their study, Robock and Toon use computer models to simulate the effect of a nuclear exchange between India and Pakistan in which each were to use roughly half their existing arsenals (50 apiece). Since Indian and Pakistani nuclear devices are strategic rather than tactical, the likely targets would be major population centers. Owing to the population densities of urban centers in both nations, the number of direct casualties could climb as high as 20 million. ¶ The fallout of such an exchange would not merely be limited to the immediate area. First, the detonation of a large number of nuclear devices would propel as much as seven million metric tons of ash, soot, smoke, and debris as high as the lower stratosphere. Owing to their small size (less than a tenth of a micron) and a lack of precipitation at this altitude, ash particles would remain aloft for as long as a decade, during which time the world would remain perpetually overcast. Furthermore, these particles would soak up heat from the sun, generating intense heat in the upper atmosphere that would severely damage the earth’s ozone layer. The inability of sunlight to penetrate through the smoke and dust would lead to global cooling by as much as 2.3 degrees Fahrenheit. This shift in global temperature would lead to more drought, worldwide food shortages, and widespread political upheaval.

#### Judicial redress is key-- Bivens suits are fundamental to civilian confidence in the military—their agent CPs maintain unchecked Congressional and Executive control of the military, which is at the root of its legitimacy crisis

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 plaintiff 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.

#### --Independent unit cohesion turn to the CP-- Civilian oversight of the military is critical –

Parrish, founding co-chair of Human Rights Watch, 13 (Nancy, Protect Our Defenders, “Testimony of Protect Our Defenders President Nancy Parrish Before Senate Armed Services Committee”, http://www.protectourdefenders.com/testimony-of-protect-our-defenders-president-nancy-parrish-before-senate-armed-services-committee/)

Civilian oversight of our military is a founding principle of our democracy. Yet, for decades we have seen Congress approach reform efforts with great deference, to what military leaders would like to accept. This has remained the case, even after it became painfully evident the reforms to date were not sufficient and that the failure is quite damaging. This failure has come at great cost to our service members, our military, and our national security. The rising numbers of unreported cases of rapes and sexual assault, coupled with unacceptably low prosecution rates have left victims discouraged, intimidated, disdained, retaliated against, and all too often, broken. They are dismissed by a legal system, tightly controlled within the chain of command. Many victims are coerced to keep their complaints unrecorded and officially unheard. In sum, the criminals are not prosecuted and victims are persecuted. There are three fundamental issues regarding this crisis plaguing the military: The broken justice system, which is biased toward retaliating against the victim,  while protecting the often higher-­‐ranking perpetrator; A culture of objectifying and denigrating women and refusal to recognize male  victims; and, A failure of military leadership to exhibit resolve and forcefully and effectively  address this issue. On May 22nd, 2013, former General Counsel to the Pentagon, Mr. Jeh Johnson said, “I have recently come to the conclusion…the problem, I believe has become so pervasive. The bad behavior so pervasive, we need to look at fundamental change in the military justice system itself.” These are powerful words from the nation’s former top military legal official.  Congress must assume its responsibility and no longer approach reform based on what military leaders would like to accept. We cannot afford to simply continue to make marginal changes.  The military leadership has long insisted that absolute command discretion is required in order to maintain good order and discipline, and to ensure mission readiness and unit cohesion. Yet, when victims are punished and perpetrators go free and everyone knows it to be the case, trust, the essential ingredient to an effective, functioning military is undermined. It would also undermine unit cohesion and trust, if as defense counsels frequently argue, commanders, in response to political pressure, simply pursue witch-­‐ hunts against anyone accused. Why have the commander in a position where so many people may question their objectivity, both those that believe the victim and those that support the accused? We need to remove from the process all those with a personal interest or even an appearance of potential conflict of interest and bias.  Our military leaders have consistently failed to specifically explain how or why removing the convening authority from commanders and placing it in the hands of capable and trained prosecutors would cause this alleged break down in the system. They said the same about repealing Don’t Ask Don’t Tell. Commanders would still have a multitude of tools at their disposal to maintain good order and discipline. We need only look to our closest ally, the United Kingdom in this regard. For commanders, administering justice and referring cases to court-­‐martial is only a small part of their job. The Convening Authority has many other high priority, non-­‐judicial responsibilities that consume the majority of their time and attention. Why should a legal decision be left to a non-­‐lawyer, particularly someone often directly connected with those involved and with an inherent interest in the outcome? How could one expect this to consistently produce unbiased justice? Taking administration of the legal process out of the chain will increase accountability. Many members of the military have stressed that it is critical that commanders remain accountable for the climate within their command. We agree. After taking legal decisions out of the Chain, Commanding officers will still be required and able to create and maintain a command climate that will minimize the occurrences of these incidences. With the responsibility to administer the legal process out of their hands, the reality and perception of victims will be that the system is more legitimate and fair. More victims will report, more prosecutions will occur and Commanders will be held more accurately accountable for the climate they maintain. The current system produces a perverse consequence. There is no good way to know which commander is doing a better job. Which is better, a commander who has 20 victims come forward in his unit or a commander who has zero reports. Today the truth is not knowable. Victims have little or no faith in the system and the system lacks transparency. The commander with 20 reports may be doing a good job, encouraging and fairly dealing with reports. The commander with no reports may not tolerate reporting and his unit may actually have a much greater incidence of sexual assault. Taking responsibility and authority for administering the legal process out of the chain will increase accountability. Victims will understand that they will more likely get a fair shake. More victims will report. As more report, it will become clearer which commanders are creating a good climate, strong unit cohesion, and good order and discipline and which are not. Congress must face reality. For justice to prevail, you must end commanders’ unfettered authority over the legal aspects of military justice. Nothing less will end the damaging cycle of scandal and continued incidence.

#### Readiness key to global war

Spencer 2000(Jack, Research Fellow at Thomas A. Roe Institute for Economic Policy Studies, “The Facts About Military Readiness”, Heritage Foundation, September 15th, <http://www.heritage.org/Research/Reports/2000/09/BG1394-The-Facts-About-Military-Readiness>)

America's national security requirements dictate that the armed forces must be prepared to defeat groups of adversaries in a given war. America, as the sole remaining superpower, has many enemies. Because attacking America or its interests alone would surely end in defeat for a single nation, these enemies are likely to form alliances. Therefore, basing readiness on American military superiority over any single nation has little saliency. The evidence indicates that the U.S. armed forces are not ready to support America's national security requirements. Moreover, regarding the broader capability to defeat groups of enemies, military readiness has been declining. The National Security Strategy, the U.S. official statement of national security objectives,3 concludes that the United States "must have the capability to deter and, if deterrence fails, defeat large-scale, cross-border aggression in two distant theaters in overlapping time frames."4According to some of the military's highest-ranking officials, however, the United States cannot achieve this goal. Commandant of the Marine Corps General James Jones, former Chief of Naval Operations Admiral Jay Johnson, and Air Force Chief of Staff General Michael Ryan have all expressed serious concerns about their respective services' ability to carry out a two major theater war strategy.5 Recently retired Generals Anthony Zinni of the U.S. Marine Corps and George Joulwan of the U.S. Army have even questioned America's ability to conduct one major theater war the size of the 1991 Gulf War.6 Military readiness is vital because declines in America's military readiness signal to the rest of the world that the United States is not prepared to defend its interests. Therefore, potentially hostile nations will be more likely to lash out against American allies and interests, inevitably leading to U.S. involvement in combat. A high state of military readiness is more likely to deter potentially hostile nations from acting aggressively in regions of vital national interest, thereby preserving peace.