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### 1AC Counterterror

#### 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.

### 1AC CMR

#### Advantage Two: Civil-military relations

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

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

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

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

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

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

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

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

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

#### 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.

### 1AC Bivens

#### Advantage Three: Bivens

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

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

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

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

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

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

#### 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.

#### Scenario One: Military Sexual Assault

#### Allowing court adjudication of Bivens suits against the military is critical to enforce Congressional standards for military justice. Only civilian Bivens suits can check rampant sexual assault in the military, which threatens unit cohesion and mission effectiveness.

Burke 12 (Susan, civil discrimination lawyer known for cases in which she has represented plaintiffs suing the American military, she has represented former detainees of Abu Ghraib and military translators, On Appeal from the United States District Court: APPELLANTS’ OPENING BRIEF, KORI CIOCA et al. Plaintiffs-Appellants, v. DONALD RUMSFELD et al., april 23, http://protectourdefenders.com/images/Burke\_Cicoa\_Appeal\_Brief.pdf)

It is clear that the District Court created a per se rule against servicemembers’ Bivens claims because it dismissed the lawsuit without any factfinding on whether adjudication would impact military discipline in any way, let alone in a negative way. The rape survivors allege Defendants substituted their own views on what should be done for the views of Congress. They allege former Secretaries Rumsfeld and Gates refused to cooperate with Congressional oversight and violated, among others, Public Law 105-85 and the National Defense Authorization Act for Fiscal Year 2009. They allege they were harmed by the Defendants’ intentional flouting of the Congressional rules and regulations designed to reduce unpunished rape and sexual assault in the military. J.A. 52-57 ¶¶ 319-340. The federal courts generally have a duty to adjudicate Constitutional claims, and should voluntarily abstain from such adjudication only in those rare instances when adjudication undermines, rather than strengthens, the democratic values enshrined in the Constitution. In the instant case, adjudication, not abstention, serves to ensure that the entity answerable to the electorate, Congress, controls military discipline, and that its efforts to do so are not intentionally thwarted by unelected Executive branch officials. Rapes and sexual assaults serve no military mission, as has been conclusively established by the military’s own statements. See J.A. 47¶ 304, quoting the 2009 Annual Report on Sexual Assaults in the Military: “In the armed forces sexual assault not only degrades individual resilience but also erodes unit integrity. Service members risk their lives for each other to keep fellow service members out of harm’s way. Sexual assault breaks this important bond and tears apart military units. An effective fighting force cannot tolerate sexual assault within its ranks. Sexual assault is incompatible with military culture, and the costs and consequences for mission accomplishments are unbearable.” It is for all these reasons that Congress acted, not once but repeatedly, to direct Defendants on what they should do to reduce the amount of unpunished sexual predation in the military. Yet Secretaries Rumsfeld and Gates intentionally violated these directives, and instead ushered in an era of an ever-greater number of unpunished rape and sexual assaults. Holding Defendants accountable for intentionally violating Congressional rules and regulations cannot possibly negatively impact military discipline. To the contrary, allowing wrongdoing to flourish at the very highest level of the military, and allowing Defendants to ignore the civilian control required by the Constitution, undermines not only military discipline but the Constitution itself. Our democracy has never elevated the military to a special status outside the reach of Congress and its laws. Yet these two men persuaded the District Court, and seek to persuade this Court, that they should be considered above the law of the land. This Court should reject this cynical and democracy-destroying effort, and hold that a jury of Americans should decide whether these two men should pay damages to the individuals irreparably harmed by their misconduct. The District Court erred by adopting a per se rule and concluding without any fact finding that permitting the rape survivors to bring Bivens claims would impair military discipline or impede a military mission. Such a per se rule contradicts, not adheres to, the Supreme Court’s Chappell decision. Permitting the rape survivors to seek Bivens damages from the former military leaders who viewed themselves as beyond the reach of Congressional rules and regulations will send a clear message of accountability and civilian control over the military.

#### Readiness is critical to signal resolve and prevent rivals from lashing out

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.

#### Decline causes nuclear war-only the US has the motive and capability to provide public goods that reduce incentive for war.

**Kagan, Brookings senior fellow, 2012**

(Robert, “Why the World Need America”, 2-11, <http://online.wsj.com/article/SB10001424052970203646004577213262856669448.html>, ldg)

With the outbreak of World War I, the age of settled peace and advancing liberalism—of European civilization approaching its pinnacle—collapsed into an age of hyper-nationalism, despotism and economic calamity. The once-promising spread of democracy and liberalism halted and then reversed course, leaving a handful of outnumbered and besieged democracies living nervously in the shadow of fascist and totalitarian neighbors. The collapse of the British and European orders in the 20th century did not produce a new dark age—though if Nazi Germany and imperial Japan had prevailed, it might have—but the horrific conflict that it produced was, in its own way, just as devastating. Would the end of the present American-dominated order have less dire consequences? A surprising number of American intellectuals, politicians and policy makers greet the prospect with equanimity. There is a general sense that the end of the era of American pre-eminence, if and when it comes, need not mean the end of the present international order, with its widespread freedom, unprecedented global prosperity (even amid the current economic crisis) and absence of war among the great powers. American power may diminish, the political scientist G. John Ikenberry argues, but "the underlying foundations of the liberal international order will survive and thrive." The commentator Fareed Zakaria believes that even as the balance shifts against the U.S., rising powers like China "will continue to live within the framework of the current international system." And there are elements across the political spectrum—Republicans who call for retrenchment, Democrats who put their faith in international law and institutions—who don't imagine that a "post-American world" would look very different from the American world. If all of this sounds too good to be true, it is. The present world order was largely shaped by American power and reflects American interests and preferences. If the balance of power shifts in the direction of other nations, the world order will change to suit their interests and preferences. Nor can we assume that all the great powers in a post-American world would agree on the benefits of preserving the present order, or have the capacity to preserve it, even if they wanted to. Take the issue of democracy. For several decades, the balance of power in the world has favored democratic governments. In a genuinely post-American world, the balance would shift toward the great-power autocracies. Both Beijing and Moscow already protect dictators like Syria's Bashar al-Assad. If they gain greater relative influence in the future, we will see fewer democratic transitions and more autocrats hanging on to power. The balance in a new, multipolar world might be more favorable to democracy if some of the rising democracies—Brazil, India, Turkey, South Africa—picked up the slack from a declining U.S. Yet not all of them have the desire or the capacity to do it. What about the economic order of free markets and free trade? People assume that China and other rising powers that have benefited so much from the present system would have a stake in preserving it. They wouldn't kill the goose that lays the golden eggs. Unfortunately, they might not be able to help themselves. The creation and survival of a liberal economic order has depended, historically, on great powers that are both willing and able to support open trade and free markets, often with naval power. If a declining America is unable to maintain its long-standing hegemony on the high seas, would other nations take on the burdens and the expense of sustaining navies to fill in the gaps? Even if they did, would this produce an open global commons—or rising tension? China and India are building bigger navies, but the result so far has been greater competition, not greater security. As Mohan Malik has noted in this newspaper, their "maritime rivalry could spill into the open in a decade or two," when India deploys an aircraft carrier in the Pacific Ocean and China deploys one in the Indian Ocean. The move from American-dominated oceans to collective policing by several great powers could be a recipe for competition and conflict rather than for a liberal economic order. And do the Chinese really value an open economic system? The Chinese economy soon may become the largest in the world, but it will be far from the richest. Its size is a product of the country's enormous population, but in per capita terms, China remains relatively poor. The U.S., Germany and Japan have a per capita GDP of over $40,000. China's is a little over $4,000, putting it at the same level as Angola, Algeria and Belize. Even if optimistic forecasts are correct, China's per capita GDP by 2030 would still only be half that of the U.S., putting it roughly where Slovenia and Greece are today. Although the Chinese have been beneficiaries of an open international economic order, they could end up undermining it simply because, as an autocratic society, their priority is to preserve the state's control of wealth and the power that it brings. They might kill the goose that lays the golden eggs because they can't figure out how to keep both it and themselves alive. Finally, what about the long peace that has held among the great powers for the better part of six decades? Would it survive in a post-American world? Most commentators who welcome this scenario imagine that American predominance would be replaced by some kind of multipolar harmony. But multipolar systems have historically been neither particularly stable nor particularly peaceful. Rough parity among powerful nations is a source of uncertainty that leads to **miscalculation**. Conflicts erupt as a result of fluctuations in the delicate power equation. War among the great powers was a common, if not constant, occurrence in the long periods of multipolarity from the 16th to the 18th centuries, culminating in the series of enormously destructive Europe-wide wars that followed the French Revolution and ended with Napoleon's defeat in 1815. The 19th century was notable for two stretches of great-power peace of roughly four decades each, punctuated by major conflicts. The Crimean War (1853-1856) was a mini-world war involving well over a million Russian, French, British and Turkish troops, as well as forces from nine other nations; it produced almost a half-million dead combatants and many more wounded. In the Franco-Prussian War (1870-1871), the two nations together fielded close to two million troops, of whom nearly a half-million were killed or wounded. The peace that followed these conflicts was characterized by increasing tension and competition, numerous war scares and massive increases in armaments on both land and sea. Its climax was World War I, the most destructive and deadly conflict that mankind had known up to that point. As the political scientist Robert W. Tucker has observed, "Such stability and moderation as the balance brought rested ultimately on the threat or use of force. War remained the essential means for maintaining the balance of power." There is little reason to believe that a return to multipolarity in the 21st century would bring greater peace and stability than it has in the past. The era of American predominance has shown that **there is no better recipe for** great-power **peace than certainty about who holds the upper hand**. President Bill Clinton left office believing that the key task for America was to "create the world we would like to live in when we are no longer the world's only superpower," to prepare for "a time when we would have to share the stage." It is an eminently sensible-sounding proposal. But can it be done? For particularly in matters of security, the rules and institutions of international order rarely survive the decline of the nations that erected them. They are like scaffolding around a building: They don't hold the building up; the building holds them up. Many foreign-policy experts see the present international order as the inevitable result of human progress, a combination of advancing science and technology, an increasingly global economy, strengthening international institutions, evolving "norms" of international behavior and the gradual but inevitable triumph of liberal democracy over other forms of government—forces of change that transcend the actions of men and nations. Americans certainly like to believe that our preferred order survives because it is right and just—not only for us but for everyone. We assume that the triumph of democracy is the triumph of a better idea, and the victory of market capitalism is the victory of a better system, and that both are irreversible. That is why Francis Fukuyama's thesis about "the end of history" was so attractive at the end of the Cold War and retains its appeal even now, after it has been discredited by events. The idea of inevitable evolution means that there is no requirement to impose a decent order. It will merely happen. But international order is not an evolution; it is an imposition. It is the domination of one vision over others—in America's case, the domination of free-market and democratic principles, together with an international system that supports them. The present order will last only as long as those who favor it and benefit from it retain the will and capacity to defend it. There was nothing inevitable about the world that was created after World War II. No divine providence or unfolding Hegelian dialectic required the triumph of democracy and capitalism, and there is no guarantee that their success will outlast the powerful nations that have fought for them. Democratic progress and liberal economics have been and can be reversed and undone. The ancient democracies of Greece and the republics of Rome and Venice all fell to more powerful forces or through their own failings. The evolving liberal economic order of Europe collapsed in the 1920s and 1930s. The better idea doesn't have to win just because it is a better idea. It requires great powers to champion it. If and when American power declines, the institutions and norms that American power has supported will decline, too. Or more likely, if history is a guide, they may collapse altogether as we make a transition to another kind of world order, or to disorder. We may discover then that the U.S. was essential to keeping the present world order together and that the alternative to American power was not peace and harmony but **chaos and catastrophe**—which is what the world looked like right before the American order came into being.

#### Scenario Two: Convention Against Torture

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

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

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

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

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

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

#### Global democracy solves extinction

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

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

### Plan

#### Plan: The United States Federal Judiciary should subject United States’ targeted killing operations to judicial ex post review by allowing a cause of action for damages arising directly out of the constitutional provision allegedly offended, on the basis that special factors do not preclude a right of action.

#### And, US non-compliance undermines global enforcement---other countries use as a justification for human rights violations including religious persecution

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

SPILL-OVER “JUSTIFICATIONS” AND DANGEROUS PRECEDENT When the United States engages in torture and abuse in the name of national security, it provides justifications for other governments and oppressive regimes to do the same against innocent civilians, journalists, democracy activists, people seeking to practice their own religion, and even puts U.S. troops in danger. CVT has seen strikingly similar patterns worldwide among different leaders – left and right- who rationalize the use of torture by dehumanizing the victim, citing national emergencies and security as justification, and assuming an ability to produce a desired outcome through fear and violence. When crises arise that prove beyond the scope of leaders’ imaginations and/or resources, desperate measures are often supposed necessary. Moreover, when the U.S. government openly violated its international legal obligations, it set a dangerous precedent not only on the issue of torture, but for the broader notion that those duties are optional. U.S. government policies and practices weakened international human rights instruments designed to end torture (the CAT and the Geneva Conventions). Flagrant disregard for treaties and conventions that the U.S. has ratified has profound implications for the global community’s efforts to secure support for international norms. By flouting these obligations, the United States also delivered an implicit message that torture, once seen as the tool of despotic regimes, could be shaped to look like legitimate component of a democratic government’s national defense. Furthermore, the United States’ practice of torture places U.S. troops in danger should they be captured. In remarks on the floor of the U.S. Senate, Senator John McCain cautioned, “… if America uses torture, it could someday result in the torture of American combatants.”52 He went on to warn that the United States should “…be careful that we do not set a standard that another country could use to justify their mistreatment of our prisoners.” 53 HEALING FOR TORTURE SURVIVORS AROUND THE WORLD Whenever laws banning torture are upheld, a message is transmitted to repressive governments and victims seeking an end to impunity wherever it exists. Leaders and ordinary citizens learn that, in some places, those who violate human rights are held responsible. By contrast, the cost of impunity for survivors is enormous. For CVT clients, accountability for perpetrators is intertwined with the healing process and their struggle to make sense of their suffering. The recovery process is made more challenging when the person who committed the violence against them still walks free. Any crack in the culture of impunity can bring victims tremendous strength. One CVT client told us about her reaction when she learned of the arrest in Atlanta of an Ethiopian man accused of murder and torture during a dictatorship in the 1970s. Despite the fact that this man was not her perpetrator, she felt empowered, remarking, “Now I know what to do should I come across the man who raped me.” The ripple effect is felt widely. Any progress helps other victims to feel safer wherever they may be living.

#### China uses US double standards on torture to justify human rights violations against the Uighurs in violation of the Convention Against Torture

Kan-Congressional Research Service-10

U. S. -China Counterterrorism Cooperation: Issues for U. S. Policy

http://www.fas.org/sgp/crs/terror/RL33001.pdf

Questions concern the U.S. stance on the PRC's policy toward the Uighur (Uyghur) people in the northwestern Xinjiang region that links them to what the PRC calls "terrorist" organizations. Congress has concerns about the human rights of Uighurs. China has accused the United States of using "double standards" in counterterrorism in disagreements over how to handle the Uighurs. Xinjiang has a history of unrest dating back before September 2001. particularly since the unrest in 1990. The PRC charges Uighurs with violent crimes and "terrorism," but Uighurs say they have suffered executions, torture, detentions, harassment, religious persecution, and racial profiling. Human rights and Uighur groups have warned that, after the 9/11 attacks, the PRC shifted to use the international counterterrorism campaign to justify the PRC's long-term cultural, religious, and political repression of Uighurs both in and outside of the PRC.1' Since 2002, the PLA has conducted military exercises in Xinjiang with Central Asian countries and Russia to fight what the PRC calls “East Turkistan terrorists" and what it combines as the threat of "three evil forces" (of separatism, extremism, and terrorism). Critics say China has compelled extraditions of Uighurs for execution and other punishment from countries such as Uzbekistan, KyrgyZStan, Kazahkstan, Nepal, and Pakistan, raising questions about violations of the international legal principle of non-refoulement and the United Nations Convention Against Torture.

#### That destabilizes China and pulls them into war with border states

Clarke, China analyst for the Bureau of Intelligence and Research, 2010 (Christopher, independent China consultant, China analyst for 25 years and head of the China Division of the state departments Bureau of Intelligence and Research, “Xinjiang – Where China’s Worry Intersects the World”, http://yaleglobal.yale.edu/content/xinjiang-where-chinas-worry-intersects-world)

The February 15 killing of militant Uighur leader Abdul Haq al-Turkistani by an American drone in the border regions of Pakistan highlights China’s continued sensitivity about its remote and vulnerable western region, Xinjiang. It also brings into focus the role of the Afghanistan-Pakistan region as an international sanctuary for Islamic militants and the reasons for China’s worries about social stability and potential terrorist threats in Xinjiang. China’s neuralgia about security in Xinjiang will continue – and perhaps even increase – as big power competition for influence and resources in Central Asia and its ties to the rest of the world continue to expand. China’s troubles with the minority Uighurs are not new. But with the break up of the Soviet Union and the rising Islamist Taliban in once Soviet-occupied Afghanistan, the regional dynamic has changed. Since the early 1990s, China has faced recurrent waves of unrest in Xinjiang and widespread acts of violence, some of which seem to have been terrorist acts by disgruntled Uighurs. The 2008 attempted hijacking of an airplane in China by three people armed with flammable liquid was one of the latest – and scariest – examples. There also have been several attacks against perceived Uighur collaborators in China and against Chinese interests outside the country. The capture of Uighurs fighting against coalition forces in Afghanistan, some two dozen of whom were imprisoned in Guantanamo, also indicate that China faces a real threat of terrorist acts against its interests at home and abroad. The Chinese, however, have aroused skepticism by dubiously attributing dozens of explosions and incidents of civil unrest to instigation by “East Turkistan terrorist forces.” Officials, for example, blamed an August 2008 attack on a military police unit out for its morning jog, in which 16 officers were killed, on a Uighur terrorist group, despite the fact that the officers apparently were run down by a truck and attacked by a taxi driver and a vegetable vendor, hardly the modus operandi of a sophisticated terrorist organization. Even last July’s massive race riot in Urumqi – set off by rumors that a Uighur woman had been raped and several Uighur men killed by Han Chinese in far-away Guangdong – was labeled as an “organized, violent action against the public” and an act of terrorism. So, while China does face periodic upsurges in politically motivated violence by Uighurs, one has to ask, why? The answer: Beijing has engaged in a systematic, multi-decade program of marginalizing Uighurs in their own homeland, fostering economic growth that favors the Han majority of eastern China and that encourages the exploitation of Xinjiang’s wealth of natural resources for Han areas. Beijing has organized and encouraged an influx of Han into Xinjiang, changing the ethnic ratio since 1949 from about 5 percent Han to more than 40 percent today. Moreover, Uighur culture and the Muslim religion are contained under tight restrictions. Beijing proudly points out that Xinjiang in recent years has been among the fastest growing economies in the country, with per capita income higher than all regions except China’s southeast coast. Most of that growth, however, has accrued to State-owned enterprises, Han entrepreneurs, or the government; not to Uighurs. And income inequalities there have actually expanded significantly in recent years. The region also suffers from some of the worst environmental degradation in China. It is hardly surprising that frustration occasionally boils over into civil unrest – or that such conditions breed terrorist groups intent on taking action against the regime. That many of China’s problems with terrorism and unrest are largely of its own making has reduced international trust and sympathy for the situation. China’s concerns also have both shaped its approach to the broader region and reduced China’s willingness to cooperate with the US in counter-terrorism, negatively affecting the overall US -China relationship. Xinjiang, more than any other area of China, is strategically vulnerable, partially as a result of its location in one of the most fractious neighborhoods outside the Middle East. Representing one-sixth of China’s territory, Xinjiang is rich in oil, gas, and mineral deposits and contains numerous sensitive military installations, including some of the country’s premier nuclear research and testing facilities. It borders the former Soviet republics of Kazakhstan, Kyrgyzstan, and Tajikistan, all of which are less than politically stable.\* Complicating China’s relations with the Central Asian states is the fact that as many as 500,000 Uighurs – and sizable populations of other Chinese “minorities” – live across relatively porous borders and engage in extensive trade and contacts. Several of these countries contain anti-China Uighur separatist organizations, both peaceful and terrorist. And China is very afraid of the potential contagion of “color revolutions” from Central Asia – like the 2005 “Tulip Revolution” in Kyrgyzstan – destabilizing China’s control in Xinjiang. Uighur activities – including violent attacks – have complicated China’s relations with Turkey, a country with which China seeks closer relations but where public and official sentiment is highly critical of China’s treatment of the ethnically-related Uighurs. To control this potentially chaotic situation and to manage Sino-Russian competition for influence, China launched the Shanghai Cooperation Organization (SCO), which includes Russia, China, the Central Asian republics, and a growing number of observers from around the region. China has pushed hard to keep the focus of the SCO on cooperative activities against the “three evils” of “separatism, fundamentalism, and terrorism,” a fear all the member states have in common. Along some of Xinjiang’s most remote and sensitive borders are Tibet, Afghanistan, Pakistan, and the disputed state of Kashmir – any one of which could quickly embroil China in an international crisis. China also tested its “all-weather” friendship with Pakistan pressuring Islamabad to crackdown on Uighur militants seeking refuge in Pakistan. Pakistan reportedly has responded by sending a number of Uighur militants to China for prosecution. Its recent stepped up attacks on terrorist groups – and especially the killing of Abdul Haq and more than a dozen other Uighur militants – has among other things assuaged relations with China. The US intervention in Afghanistan in October 2001 introduced another variable of vulnerability for China with regard to Xinjiang. In the conflict that followed, global support for Al Qaeda drew in more militants to the region, including some Uighurs (as Abdul Haq’s death proved) but it also changed the strategic landscape for China. The introduction of massive US forces into the region, and especially the use of bases such as Manas in Kyrgyzstan, raised visceral and long-standing fears of encirclement by a hostile US intent on “dividing and Westernizing” China. Beijing has put pressure on Central Asian neighbors to expel or severely limit any US military presence and has refused to allow US forces to use Chinese territory for staging or overflights in the war in Afghanistan. China is also working hard to enhance cooperation with its neighbors on energy exploration, exploitation, and transportation as a way of keeping the US and Russia from monopolizing Central Asia’s voluminous oil and natural gas resources. These competing interests, and the residual worry that the US and Russia seek to supplant or minimize Chinese influence in Central Asia will continue to contribute to Beijing’s neuralgia about assuring stability in its far Western extremity, even if the real terrorist threat to China has diminished.

#### Chinese instability and territorial fragmentation risks CCP collapse and nuclear war

Yee and Storey 2002 (Herbert Yee, Professor of Politics and International Relations at the Hong Kong Baptist University, and Ian Storey, Lecturer in Defence Studies at Deakin University, 2002, The China Threat: Perceptions, Myths and Reality, RoutledgeCurzon, pg 5)

The fourth factor contributing to the perception of a China threat is the fear of political and economic collapse in the PRC, resulting in territorial fragmentation, civil war and waves of refugees pouring into neighbouring countries. Naturally, any or all of these scenarios would have a profoundly negative impact on regional stability. Today the Chinese leadership faces a raft of internal problems, including the increasing political demands of its citizens, a growing population, a shortage of natural resources and a deterioration in the natural environment caused by rapid industrialisation and pollution. These problems are putting a strain on the central government's ability to govern effectively. Political disintegration or a Chinese civil war might result in millions of Chinese refugees seeking asylum in neighbouring countries. Such an unprecedented exodus of refugees from a collapsed PRC would no doubt put a severe strain on the limited resources of China's neighbours. A fragmented China could also result in another nightmare scenario - nuclear weapons falling into the hands of irresponsible local provincial leaders or warlords.'2 From this perspective, a disintegrating China would also pose a threat to its neighbours and the world.

#### Rejecting the “special factors” doctrine would end the case-by-case basis that currently plagues Bivens caselaw.

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

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

By approving of Bivens and making it the exclusive mode for vindicating constitutional rights, Congress has provided a solid legislative foundation for routine recognition of a Bivens remedy. Such congressional ratification, moreover, requires that the Court adjust its approach to the evaluation of constitutional claims for damages. The Court should no longer regard itself as creating rights of action on a case-by-case basis. Rather, the Court should simply recognize that Congress has authorized suits against federal officials for constitutional violations and has foreclosed all alternative remedies. Along with this recognition, the Court should no longer consider the possible existence of state common law remedies as a reason to proceed cautiously. Congress has eliminated the state common law option and has failed to replace it with suits under the FTCA to vindicate constitutional rights. It thus makes little sense for the Court in Wilkie v. Robbins to tout the possible existence of state common law remedies as the basis for proceeding cautiously in the recognition of a Bivens right of action.86 State common law, as such, no longer applies and no longer offers a way to present constitutional claims. One can imagine an argument that the Westfall Act’s reference to actions for violation of the Constitution operates not to approve an all-purpose Bivens action but to codify the case-by-case Bivens calculus that was in place in 1988 when the statute took effect. The text of the Westfall Act provides little basis for such a contention. The statute refers to a “civil action” “brought” against federal officers asserting a claim for “violation of the Constitution.” State common law, as such, no longer applies and no longer offers a way to present constitutional claims. 87 The unqualified references in the statute seemingly authorize the pursuit of all “civil actions[]” that assert constitutional claims, without suggesting that the federal courts may refrain from hearing certain claims. We explain below why Congress may have chosen to switch from the case-by-case approach to a more routinely available right of action. Finally, one can imagine a formal argument that the statute does nothing more than create an exception to the rule of immunity that the Westfall Act adopted to shield federal employees from common law claims. On such a view, the Act creates no affirmative right to sue, but simply prevents the statutory rule of immunity from displacing the Bivens action. As we have seen, however, the Westfall Act goes well beyond conferring a selective grant of immunity on federal officers; it forecloses pursuit of constitutional claims either by action predicated on state common law or by action against the government itself. Read against the backdrop of the wholesale withdrawal of alternative remedies, the saving reference operates less as a modest exception to immunity than as a congressional selection of the Bivens action as the only method individuals were authorized to use in pressing constitutional claims.88 The withdrawal of alternative remedies explains why Congress made the Bivens action routinely available, rather than dependent on case-by-case analysis. In pre-Westfall days, individual litigants had a right to sue federal officers for constitutional torts by relying on common-law theories of liability and filing suit in state court. Such suits were subject to removal and to the assertion of immunity defenses of varying stringency, but the right of action was available as a matter of course (assuming the plaintiff could identify a common law theory of liability).89 Having cut off that routinely available remedy in the Westfall Act, Congress understandably felt some obligation to provide a statutory alternative. The unqualified terms of the resulting ratification of Bivens suggest that the Westfall Act contemplates rights of action as a matter of course. IV. Rethinking Bivens: Toward a New Remedial Calculus Recognition of the routine availability of a Bivens action will require some changes in the way the federal courts approach constitutional litigation. But the adoption of our approach need not threaten a disruptive break with the past or a ruinous expansion of federal official liability. On the view we take in this Essay, the Westfall Act provides, as section 1983 does in suits against state actors, statutory recognition of a right to pursue constitutional tort claims against federal actors. The existence of an all-purpose right to sue federal officers would eliminate the threshold inquiry into the availability of a Bivens right of action. Constitutional litigation would focus instead on the sufficiency of the alleged constitutional violation, the clarity of constitutional rules, and the qualified immunity of government officials. Instead of the somewhat open-ended inquiry into “special factors” that may counsel hesitation, federal courts would conduct a more focused analysis to determine whether an alternative remedial scheme displaces the Bivens remedy, Such an approach would help clarify and simplify constitutional tort litigation without threatening federal officials with novel forms of personal liability or disrupting existing administrative law schemes. As noted earlier, constitutional tort litigation against state actors under section 1983 now proceeds without any threshold inquiry into the existence of a right of action. The Westfall Act suggests that Bivens claims against federal actors should be treated in precisely the same way.90 Such parallel treatment already prevails over a wide swath of constitutional tort law. When the Court defines the elements of a legally sufficient constitutional claim, the definition applies to constitutional claims against both state and federal actors.91 Similarly, the Court refines the rules of qualified immunity, it does so with the recognition that the same rules apply to officers at all levels of government.92 As the Court explained long ago, it would be “untenable to draw a distinction for purposes of immunity law between suits brought against state officials . . . and suits brought directly under the Constitution against federal officials.”93 With the recognition that Congress has approved routine suability under the Westfall Act, distinctions between the right to sue state and federal officials seem equally untenable.94

## \*\*\*2AC

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#### We meet- due process rights are restriction on executive authority

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

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

#### We meet-Ex post review is a restriction on targeting killing authority-Ex Ante review increases executive authority and links to all of their ground arguments

Jaffer-Director ACLU Center for Democracy-13 (Jameel Jaffer, Director of the ACLU's Center for Democracy, “Judicial Review of Targeted Killings,” 126 Harv. L. Rev. F. 185 (2013), <http://www.harvardlawreview.org/issues/126/april13/forum_1002.php>)

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

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

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

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

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

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

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

#### Their interpretation is flawed

#### A. Over limits-The core cases on the topic all revolve around regulating executive behavior not banning specific policies. Their interpretation would eliminate the role of most topic literature across the areas.

#### B. Aff ground – “Ban the Policy” affs are solved by agent counterplans – err aff because the range of good affs is small this year and the neg is strapped with many generics

#### Reasonability 1st – competing interpretations crowds out substance encouraging T debate over war powers education. Good is good enough when the topic is LIMITED BY AREAS and our aff is SQUARELY located in the literature

### 2AC Politics

#### No link uniqueness – Obama’s political capital is down now

**O’Brien, NBC News political reporter, 10-1-13**

(Michael, “Winners and losers of the government shutdown”, <http://nbcpolitics.nbcnews.com/_news/2013/10/01/20763839-winners-and-losers-of-the-government-shutdown?lite>, ldg)

The fiscal fight is a double-edged sword for Obama. Yes, the president won a short-term victory that revitalizes his pull within the Beltway after beating back Republicans and shifting blame primarily to them for a shutdown. But Obama is no less a symbol of Washington dysfunction than Ted Cruz or John Boehner. It might be simplistic, but any president shares in some of the broader opinion toward D.C. just by the very nature of the job. Put another way: as president, Obama is the most visible political leader in the U.S., if not the world. If Americans are dissatisfied with Washington, Obama will have to shoulder some of that burden. Obama's 2011 battles with Republicans over the debt ceiling saw his approval ratings sink to one of the lowest points of his presidency. There are signs this fight might be taking a similar toll: a CNN/ORC poll released Monday found that 53 percent of Americans disapprove of the way the president is handling his job, versus 44 percent who approve. Moreover, after the time and political capital expended on this nasty political fight — and with midterm elections on the docket for 2014 — Obama's top second-term priorities, like comprehensive immigration reform, are on life support.

#### No debt ceiling deal now

**James, NPR, 10-1-13**

(Frank, “No Talks Underway To Resolve Shutdown”, <http://www.npr.org/blogs/itsallpolitics/2013/10/01/228165602/no-talks-underway-to-resolve-shutdown>, ldg)

If you're wondering how long the shutdown will last, well, don't hold your breath. As of this writing, there are no indications that talks are underway — or even in the offing. Indeed, the Democratic-controlled Senate rejected House legislation Tuesday morning calling for a House-Senate conference to try to settle the disagreement behind the first federal government shutdown in 17 years. Senate Democrats spurned the House request because they reject Republican efforts to couple continued funding of the government to GOP attempts to hamstring the Affordable Care Act. Democrats insist they're not opposed to revising Obamacare; they're just not going to do it in the face of government-shutdown or debt-default threats. "No matter how many times they try to extort the American people and the Democrats here in the Senate, we're not going to re-litigate the health care issue," Sen. Harry Reid said on the Senate floor, explaining why his Democrats voted down the House request for a conference. "We're not going to do that. If they have problems with [Obamacare] we'll be happy to sit down and talk with them about a reasonable approach to do that. But we're not going to with a gun to the heads of the American people." It's unclear what the next move would be for Speaker John Boehner and his House Republican conference. When the House came to life Tuesday afternoon, Boehner didn't exactly offer a detailed path for escaping the current crisis. "Our country has big problems. Today our government has big problems," he told the House. "The only way these problems are going to be resolved is if we sit down amicably and keep the American people in mind and come to an agreement." Another uncertainty was how long the shutdown will last. Stan Collender, a partner at communications firm Qorvis and a former senior Capitol Hill aide, predicts the shutdown will last at least a week.

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

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

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

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

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

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

#### District court controversial now—EPA rulings

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

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

#### DA isn’t intrinsic – a logical policy maker could choose to push both debt ceiling and pass the plan

#### No impact to the economy

Michael Tanner 11, National Review, “No Surrender on Debt Ceiling”, Jan 19, <http://www.nationalreview.com/articles/257433/no-surrender-debt-ceiling-michael-tanner>

Of course the Obama administration is already warning of Armageddon if Congress doesn’t raise the debt ceiling. Certainly it would be a shock to the economic system. The bond market could crash. The impact would be felt at home and abroad. But would it necessarily be worse than the alternative? While Congress has never before refused to raise the debt ceiling, it has in fact frequently taken its time about doing so. In 1985, for example, Congress waited nearly three months after the debt limit was reached before it authorized a permanent increase. In 1995, four and a half months passed between the time that the government hit its statutory limit and the time Congress acted. And in 2002, Congress delayed raising the debt ceiling for three months. It took three months to raise the debt limit back in 1985 as well. In none of those cases did the world end. More important, what will be the consequences if the U.S. government fails to reduce government spending? What happens if we raise the debt ceiling then continue merrily on our way spending more and running up ever more debt? Already Moody’s and Standard & Poor’s have warned that our credit rating might be reduced unless we get a handle on our national debt. We’ve heard a lot recently about the European debt crisis, but, as one senior Chinese banking official recently noted, in some ways the U.S. financial position is more perilous than Europe’s. “We should be clear in our minds that the fiscal situation in the United States is much worse than in Europe,” he recently told reporters. “In one or two years, when the European debt situation stabilizes, [the] attention of financial markets will definitely shift to the United States. At that time, U.S. Treasury bonds and the dollar will experience considerable declines.” Moreover, unless we do something, federal spending is on course to consume 43 percent of GDP by the middle of the century. Throw in state and local spending, and government at all levels will take 60 cents out of every dollar produced in this country. Our economy will not long survive government spending at those levels.

### 2AC Political Question DA

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

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

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

#### No extinction-empirically denied

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

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

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

#### Not try or die

**Aikman, Australian correspondent, 2011**

(Amos, “Climate forecasts 'exaggerated': Science journal”, 11-25, <http://www.theaustralian.com.au/news/health-science/climate-forecasts-exaggerated-science-journal/story-e6frg8y6-1226205464958>, DOA: 3-16-13, ldg)

DRAMATIC forecasts of global warming resulting from a doubling of atmospheric carbon dioxide have been exaggerated, according to a peer-reviewed study by a team of international researchers. In the study, published today in the leading journal Science, the researchers found that while rising levels of CO2 would cause climate change, the most severe predictions - some of which were adopted by the UN's peak climate body in its seminal 2007 report - had been significantly overstated. The authors used a novel approach based on modelling the effects of reduced CO2 levels on climate, which they compared with proxy-records of conditions during the last glaciation, to infer the effects of doubling CO2 levels. They concluded that current worst-case scenarios for global warming were exaggerated. "Now these very large changes (predicted for the coming decades) can be ruled out, and we have some room to breathe and time to figure out solutions to the problem," the study's lead author, Andreas Schmittner, an associate professor at Oregon State University, said. Scientists have struggled for many years to understand how to quantify "climate sensitivity" - how Earth will respond to projected increases in atmospheric carbon dioxide. In 2007, the UN's peak climate body, the Intergovernmental Panel on Climate Change, warned that a doubling of CO2 from pre-industrial levels would warm the Earth's surface by an average of 2C to 4.5C, although some studies have claimed the impact could be 10C or higher. Professor Schmittner said it had been very difficult to rule out these extreme "high-sensitivity" scenarios, which were very important for understanding risks associated with climate change. The study found high-sensitivity models led to a "runaway effect" under which the Earth would have been covered in ice during the last glacial maximum, about 20,000 years ago, when CO2 levels were much lower. "Clearly that didn't happen, and that's why we are pretty confident that these high climate sensitivities can be ruled out," he said. Professor Schmittner said taking his results literally, the IPCC's average or "expected" value of a 3C average temperature increase for a doubling of CO2 ought to be regarded as an upper limit. "Many previous climate-sensitivity studies have looked at the past only from 1850 through to today, and not fully integrated paleoclimate data, especially on a global scale," he said. "If these paleoclimatic constraints apply to the future, as predicted by our model, the results imply less probability of extreme climatic change than previously thought."

#### Courts are actually key to check climate

Deartherage, attorney, 12 (Scott D., partner with Patton Boggs LLP, “Climate Change Litigation: Federal Court Opens Door to EPA Regulation of Greenhouse Gases”, http://www.pattonboggs.com/ViewpointFiles/7a780134-ba7d-4ed8-b1b2-f14b6f013689/CA\_DEC\_Legal.pdf)

Federal courts have issued opinions that have assisted certain industries and business groups that are opposed to the courts stepping in to address climate change and greenhouse gas emissions. These cases have taken quite a bit of steam out of the individuals or entities that want to address climate change through the courts. However, another federal court decision opened the door to the U.S. Environmental Protection Agency’s (EPA) regulation of greenhouse gases under the federal Clean Air Act (CAA). This case has in general freed the EPA to issue regulation under what is known as the Prevention of Significant Deterioration program of the CAA. The EPA’s ability to regulate greenhouse gases was addressed by the U.S. Supreme Court in 2007, when the court considered a challenge to the EPA’s decision during the Bush administration not to grant a private petition to regulate greenhouse gases emitted from automobiles. The decision in that case opened the door and made it hard for the EPA not to regulate greenhouse gases under the CAA. Once the Obama administration came into power, the EPA moved forward with decisions and regulations to limit greenhouse gas emissions from automobiles, largely through increased fuel efficiency standards negotiated with the automobile manufacturer. This decision led to regulation of greenhouse gas emissions from larger industrial emitters, including coal-fired and natural-gas fired power plants, refineries, among others. Of course, litigation followed challenging those regulations. The EPA’s regulations focused on only the largest emitters, over 75,000 or 100,000 tons of greenhouse gases, depending on timing and other criteria—even though a reading of the act would suggest any emitter over 250 tons per year would be regulated. This limitation resulted in a nickname of the regulation as the “Tailoring Rule,” because it was “tailored” to the largest emitters. The EPA said it would look at smaller emitters over time and determine whether to address those sources. The litigation challenging the EPA rules was brought by various industry and non-governmental groups, states and companies. The case,Coalition for Responsible Regulation v. EPA, was decided by the D.C. Circuit Court of Appeals and a decision was handed down in June 2012. The decision upheld the EPA rules unanimously, by both Democratic and Republican appointed judges. The court decided the case largely on three grounds. The first relates to the EPA’s decision that the emission of greenhouse gases causes or contributes to air pollution that may be reasonably anticipated to endanger public health or welfare of human health—known as the “Endangerment Finding.” This was decision made with respect to mobile sources, such as cars, trucks or trains. The court concluded that it would defer to the EPA’s scientific decision. The court stated that the EPA “is not required to re-prove the existence of the atom every time it approaches a scientific question.” The decision was not surprising based on the historical Supreme Court precedent that directs courts to defer to administrative agencies on scientific and technical issues. Whatever one’s view of climate change and its occurrence or cause, the challenge to climate science itself was not a likely winner based on the conclusions of the scientific academies in the U.S. and other developed and major developing countries and the United Nations’ Intergovernmental Panel on Climate Change. Future challenges along these lines are not likely to succeed. The second ground was that the EPA then moved forward with regulating mobile sources. The court upheld the EPA’s decision because it concluded that the EPA did not have any discretion to not issue such rules once the agency made the Endangerment Finding. This is why the challengers first went after the basic scientific conclusions underpinning the EPA greenhouse gas mobile rules. Again, this decision was not surprising. The third ground was more surprising. The challengers had asserted that the decision not to regulate smaller sources was inconsistent with the clear language of the CAA. However, the court did not consider this argument. Instead, the court ruled that the challengers lacked standing to challenge the decision not to regulate the smaller sources. Standing here means the ability to bring a court action because the party is injured or harmed by a particular act or, here, regulation. This is a basic tenet of federal litigation under Article III of the U.S. Constitution. The court concluded that regulating fewer industries than more does not harm the plaintiffs (one would think this would be a decision supported by many of the groups challenging the rules) so that the plaintiffs had no standing to challenge the decision. While one would think there could be some basis for such an argument of economic harm where larger industries are regulated but smaller ones are not, but the parties had not addressed this issue, at least in the court’s opinion. Ironically, industry had been attempting in litigation to limit environmental groups’ and other plaintiffs’ ability to bring environmental suits under federal statutes or tort claims as one means of limiting those cases. In this case, the federal courts tightening of standing requirements resulted in the courts refusing to hear the complaint that the EPA failed to follow the CAA. The case may ultimately be heard by the Supreme Court, but it would not be surprising if the case were upheld by that court. If the issue of standing were reversed, the issue of the Tailoring Rule itself could be remanded to the D.C. Circuit for review. At this point, the litigation from an overall perspective in the federal courts appears to have moved out of the tort realm. What may happen to cases filed in state courts remains to be seen. The federal litigation may now be focused on challenges of EPA regulations. So far those cases have favored the EPA’s ability to regulate greenhouse gases. With the re-election of President Obama, it appears likely that the EPA will continue to pursue greenhouse gas regulation. The question is will the regulations issued beyond the Tailoring Rule present better opportunities for legal challenge than the Coalition for Responsible Regulation case.

### 2AC Big CP

#### --Doesn’t solve lower court confusion—the Court doesn’t APPLY remedies even when they do exist because lower courts are confused about how to apply the remedies- 1ac Loevy evidence

#### --doesn’t solve sexual assault—1ac Banner ev says that internal executive action has been trying for a QUARTER century to deal with sexual assault and their mandates ALWAYS fail- we have data on this question

#### ---CPs maintains unchecked Congressional and Executive control of the military, which is at the root of its legitimacy crisis- Judicial redress is key—1ac Gilbert evidence <wake>

#### --doesnt solve CMR--- only ending judicial footdragging solves- 1ac McCormick and Gilbert evidence

#### --permute- do both

#### ---The Executive cannot create remedies on its own- has to be passed as legislation by Congress

Bernstein, Law Prof-Chicago, 12 (ANYA BERNSTEIN, Bigelow Teaching Fellow and Lecturer in Law, The Universityof Chicago Law School, CONGRESSIONAL WILL AND THE ROLE OF THE EXECUTIVE IN BIVENS ACTIONS: WHAT IS SPECIAL ABOUT SPECIAL FACTORS, http://mckinneylaw.iu.edu/ilr/pdf/vol45p719.pdf)

Of course, the judiciary and the legislature are not the only branches that have a hand in crafting remedies. The modern executive branch, with its administrative remedial schemes and its prominent role in the process of legislation, also plays a part. However, as the Bivens case discussed throughout this Article indicates, the Executive’s role in remedy-creation is still subordinate to that of Congress. Administrative remedial schemes must be authorized through a delegation of congressional power to the Executive and are subject to legislative strictures and specifications. Although the President often plays a significant role in the crafting of legislation and must sign a bill into law, it is still Congress that debates and passes it. Responding to these realities, case law 16 regarding constitutional damages consistently looks to congressional will to ensure that judge-made remedies do not disturb the balance of authority between the judiciary and the legislature.

#### --Civilian oversight is critical – internal executive reform can ever solve the problem because sexual violence is normalized in the system

Hillman, prof of law, 13 (Elizabeth L., prof of law, UC – Hastings, Statement before theUS Commission on Civil Rights, Briefing 2013 Statutory Report: Sexual Assault in the Military, http://www.eusccr.com/Hillman%20statement.pdf)

The Exceptional Military Justice System of the United States. The U.S. has faced down its fair share of scandals and tragedies related to excessive violence in recent decades, including those related to crimes of war and those involving sexual assault. Other state militaries have faced similar challenges, but the U.S. model of addressing the crimes of service members has diverged from that of its sister nations: While other states have increasingly placed civilians in positions of authority within their military justice systems, most notably as judges and prosecutors, the United States has maintained its historical practice of relying on commanding officers, with the advice of staff judge advocates (senior military lawyers), to wield prosecutorial discretion and on military lawyers to serve as judges at courts-martial and military commissions. Military officers’ resistance to civilianization of U.S. military justice has combined with civilian judicial deference to the U.S. military to insulate U.S. military justice from reforms common in other states. Despite this divergence from worldwide military justice trends, the United States military has faced challenges similar to other state militaries in struggling to control military sexual violence. Military sex scandals began to appear in the U.S. regularly in 1991, when the Tailhook convention of naval aviators inaugurated the current era of military sexual violence. . . . Unlike the global trend toward sharp restriction of military jurisdiction, particularly in the realm of alleged human rights violations by military personnel, the United States has expanded the jurisdiction of its military justice system in recent years. In 2006, the U.S. Congress expanded military jurisdiction to subject to court martial “those serving with or accompanying an armed force in the field” during a “contingency operation” as well as during “a time of declared war.” Intended to enhance the accountability of private military contractors, this change sought to ensure that crimes committed by contractors in theaters of conflict and occupation could be tried in U.S. courts. Prosecutions under this provision have been extremely rare, just as there have been a vanishingly small number of prosecutions under the related Military Extraterritorial Jurisdiction Act (MEJA). Yet the adoption of these jurisdiction expanding statutes reflect high level concern not only with the general misconduct of private military contractors, but with the sexual violence, sexualized torture, and other infamous human rights violations that contractors committed in Iraq and Afghanistan, including at Abu Ghraib. Congress was finally spurred to close a long ignored gap in federal criminal jurisdiction because of a desire to increase state capacity to prosecute sexual violence. That capacity has not yet been fully utilized, as many critics have pointed out, but it exists only because of the pressure created on legislators by the existence of military related sexual violence. . . . Despite this progress, the U.S. military has stopped short of making more extensive sexual violence related reform to its military justice system. While Department of Defense policies and statutory reform has been adopted, proposals for structural reform of how sexual violence is prosecuted under U.S. military justice have not taken hold. For example, specialized prosecution units for sexual assault have been used with success in some U.S. civilian jurisdictions and could be a model for special military sexual violence units. A legislative proposal that would remove prosecutorial discretion from commanders in favor of a dedicated civilian expert was introduced by Congresswoman Jackie Speiers in November 2011 and has attracted considerable support as well as ardent critics. Especially doubtful of this proposal are judge advocates and commanding officers, not least because they are accustomed to a system in which prosecutorial discretion rests in the hands of ranking military officers rather than with civilians. More systemic reform in military justice overall would likely have a positive impact of the effectiveness of investigation and prosecution for military sexual violence as well. Centralization of prosecutorial authority would advance attempts to standardize and rationalize charging and sentencing in all military criminal prosecutions, not only those involving sexual violence. Given the frequency of allegations that commanders often fail to pursue claims of sexual assault, a high degree of institutional transparency would also improve the legitimacy of military justice by providing data to observers seeking to track the disposition of military cases. Yet U.S. military justice remains “opaque,” according to Yale law school professor Eugene R. Fidell, in part because of “the decentralized character of the system, in which commanders around the world” control investigation and prosecution.” Media coverage of military justice is likewise hindered by lack of access to update, coherent information. More robust theories of accountability for higher ranking officers who neglect or condone military sexual violence would also advance the prosecution of military sexual violence. When considering the legal mechanisms of a system as singular as the United States military justice system is among contemporary military justice regimes, advocates of human rights would do well to consider reforms that would alter the entire system, not only those aspects that bear on the investigation and prosecution of military sexual violence.3 The U.S. Military’s Record of Ineffectiveness. U.S. military leaders and judge advocates have not been able to solve this problem on their own, for a variety of reasons related to the special criminal justice system of the military and the nature of sexual assault itself. The practice of U.S. civilian leaders of deferring to military leaders’ expertise in matters of military operations and personnel management is well established and appropriate in some instances. But in the realm of rape and sexual assault in the military, self-government by commanding officers has been proven ineffective. Likewise, legislation that tinkers at the margins of military justice has failed as well.4 Note that the ineffectiveness of intra-military and legislative solutions is not for lack of trying: Military sexual violence has not persisted simply because commanders have ignored the allegations of their troops or military institutions have failed to initiate reforms. Rape has long been a much noticed and harshly punished—in some circumstances—crime of American soldiers. Since the feminism of the 1970s and the Vietnam War transformed rape into an issue of profound public importance, civilian officials and military commanders alike have taken the problem especially seriously. Perhaps most important, the end of conscription and the integration of women into the armed forces have made military rape a threat to recruiting and to the morale and effectiveness of the all-volunteer force; today, women make up about one sixth of military volunteers. . . . Sexual violence is a fundamental problem in warfare and in military culture, both historically and in contemporary military operations. It is a problem, however, to which the U.S. armed forces have responded: with good faith efforts to measure the damage, adapt lawand policy, educate service members and commanders, and prosecute criminals. But those responses have largely failed, in part because of resistance within military institutions to cultural change, but also because the very structure of law in which those reforms operated was built on cases that see women as vulnerable yet dangerous, soldiers as male and overpowering, and accountability as a slippery slope rather than a clear-cut principle. More aggressive criminal prosecution of military sexual violence through current models, which dramatically under-prosecute male-on-male assault, threatens to exacerbate this problem by portraying yet more women as victims and yet more soldiers as rapists. Prosecuting soldiers who rape in civilian rather than military courts could help to break the link between war, military service, and sexual violence. Treating soldiers who rape just like civilians who rape would allow military criminal law to focus on peculiarly military crime—and would undermine the normalization of sexual violence in the identity and behavior of the American soldier. The answer lies not in failing to prosecute rape, but in realizing that the effectiveness of military justice as a tool to fight military rape and sexual assault has been compromised by the very prevalence of sexual violence in legal precedent. Deterrence and compensation for sexual violence must happen beyond criminal justice—in recruiting, training, assignment, promotion, and civil affairs—with the same energy and resources that now attend to investigation and prosecution.5 Criminal law is but one of the legal regimes in which rape and sexual assault in the military must be addressed, but it is critically important that the investigation and prosecution of alleged sexual violence be managed with care and rigor. The 2012 U.S. armed forces are a well-provisioned, well-educated, widely respected military force in which women play vital roles and sexual orientation is no longer grounds for dismissal or criminal prosecution – and yet rape within the ranks persists as both a grim reality and cultural trope. As a former military officer, I can't help but see military leaders’ inability to stop the onslaught as an institutional failure of massive proportions within a profession that celebrates leadership, valorizes sacrifice, and serves as a path of opportunity for so many people. Bold action to change the way in which prosecutorial discretion is exercised in the military would be a step in the right direction.

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

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

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

#### The executive won’t release critical information

Wheeler 13 (Marcy, phd in comparative lit, “Did Administration Stall Congressional Oversight Just to Beat ACLU in Court?”, http://www.emptywheel.net/2013/02/08/did-administration-stall-congressional-oversight-just-to-beat-aclu-in-court/#sthash.E7wwj5gF.dpuf)

In an interview with WSJ last March, White House Counsel Kathryn Ruemmler said that publicly explaining the drone program would be “self-defeating.” White House Counsel Kathy Ruemmler acknowledged Mr. Obama has developed a broader view of executive power since he was a senator. In explaining the shift, she cited the nature of the office. “Many issues that he deals with are just on him, where the Congress doesn’t bear the burden in the same way,” she said. “Until one experiences that first hand, it is difficult to appreciate fully how you need flexibility in a lot of circumstances.” [snip] Ms. Ruemmler said Mr. Obama tries to publicly explain his use of executive power, but says certain counterterrorism programs like the drone campaign are exceptions. Opening them to public scrutiny would be “self-defeating,” she said. At the time, I thought she was treating the NYT and ACLU as “the public.” After all, in a debate over releasing the targeted killing memos in the situation room in November 2011, she had warned that releasing the memo might weaken the government’s position in litigation, presumably the FOIA battle with the two entities. The CIA and other elements of the intelligence community were opposed to any disclosures that could lift the veil of secrecy from a covert program. Others, notably the Justice and State departments, argued that the killing of an American citizen without trial, while justified in rare cases, was so extraordinary it demanded a higher level of public explanation. Among the proposals discussed in the fall: releasing a “white paper” based on the Justice memo, publishing an op-ed article in The New York Times under Holder’s byline, and making no public disclosures at all. The issue came to a head at a Situation Room meeting in November. At lower-level interagency meetings, Obama officials had already begun moving toward a compromise. David Petraeus, the new CIA director whose agency had been wary of too much disclosure, came out in support of revealing the legal reasoning behind the Awlaki killing so long as the case was not explicitly discussed. Petraeus, according to administration officials, was backed up by James Clapper, the director of national intelligence. (The CIA declined to comment.) The State Department, meanwhile, continued to push for fuller disclosure. One senior Obama official who continued to raise questions about the wisdom of coming out publicly at all was Janet Napolitano, the Homeland Security director. She argued that the calls for transparency had quieted down, as one participant characterized her view, so why poke the hornet’s nest? Another senior official expressing caution about the plan was Kathryn Ruemmler, the White House counsel. She cautioned that the disclosures could weaken the government’s stance in pending litigation. The New York Times has filed a lawsuit against the Obama administration under the Freedom of Information Act seeking the release of the Justice Department legal opinion in the Awlaki case. [my emphasis] But having now updated my timeline of the over 14 requests members of Congress have made for the targeted killing memos, she seems to lump Congress with the ACLU and NYT. More troubling, though: it appears the White House stalled its response to Congress for almost nine months simply to gain an advantage in the ACLU FOIA lawsuits. Here are the relevant dates: October 5, 2011: Chuck Grassley requests targeted killing memo. November, 2011, unknown date: Situation Room meeting regarding targeted killing memo. November 3, 2011: Arbitrary end date DOJ’s Office of Information Policy placed on FOIA request for targeted killing documents. November 8, 2011: In his opening statement for a DOJ Oversight hearing, Pat Leahy complained the Senate Judiciary Committee had not been given “the legal justification underlying drone strikes against an American citizen overseas.” November 8, 2011: According to House Judiciary Committee letter, the date on the white paper it later received. February 8, 2012: Ron Wyden follows up on his earlier requests for information on the targeted killing memo with Eric Holder. June 20, 2012: The government responds to NYT and ACLU lawsuits for memo and other documents related to targeted killing (though several of the declarations supporting that motion, including the one from DOJ OIP, were not submitted until June 21). June 22, 2012: According to House Judiciary Committee letter, the date the 7-month old white paper provided to Committee (Dianne Feinstein says both Senate Judiciary and Intelligence Committees received the memo in June 2012 too). August 10, 2012: Pat Leahy claims SJC received the white paper in response to his (and Grassley’s) initial requests from the previous year: “the Senators has been provided with a white paper we received back as an initial part of the request I made of this administration.” Grassley requested the memo(s) just 6 days after Anwar al-Awlaki was killed; over a week before 16-year old American citizen Abdulrahman was killed. By November, the White House determined that releasing a white paper would present a middle ground. At least according to Jerry Nadler and friends, that memo was completed on November 8, 2011. But then DOJ and the White House waited, ignoring Leahy’s renewed call for the memo that same day. The DOJ and the White House waited, ignoring Ron Wyden’s request the following February. DOJ only finally provided this woefully inadequate white paper to the committees overseeing DOJ and the CIA the day after the Administration had provided the NYT and ACLU with their FOIA request. And not only did they impose an arbitrary date on the ACLU’s request to ensure it would not return this white paper — which was an unclassified document clearly responsive to the ACLU request (the NYT request specified OLC memos, so the white paper might not have been included) — but it stamped it draft so when NYT’s Scott Shane asked for it specifically, they could deny it on deliberative grounds. Note, when DOJ responded to ACLU’s allegation that its search was inadequate, the FOIA officer blamed people who worked in Eric Holder and the Deputy Attorney’s offices (several of the key people involved have moved on; one of those may be — though I am not certain — Lisa Monaco, who will replace Brennan in the White House after he gets confirmed at CIA). Consider what this appears to mean. The White House and DOJ appear to have delayed the time when key oversight committees in Congress could begin to exercise oversight over the targeted killing of Americans — including Abdulrahman al-Awlaki, who was still alive when the first request was made — until such time as it had dealt with the ACLU. They appear to have stalled almost nine months because they didn’t want to respond in good faith to the ACLU FOIA lawsuit. Remember, one of the key John Brennan speeches in this whole process — one the white paper points to as public notice that people like Anwar al-Awlaki might be targeted under the twisted definition of “imminent threat” — also suggests that if the government doesn’t respond to FOIA requests with a presumption of disclosure it will help the terrorists win. Perhaps tellingly, while the speech bragged about Congress’ effort to impose new disclosure requirements on the Executive, Brennan said nothing about the value of Congressional oversight; on the contrary, he complained that Congress was reining in the Executive Branch’s “flexibility.”

#### ---Fiat abuse-Multi-Actor fiat is illegitimate and a voting issue-IT undermines reciprocity and destroys the affirmative’s ability to leverage offense by fiating out of what should be a solvency debate. It also undermines policy realism by putting the judge in a position that no real-world decision maker would ever be in thus negatively impacting topic education.

#### Public won’t trust congress – perception of corruption

Sager 6/16/2013 (Josh, “Congress’s Public Opinion Problem”, http://theprogressivecynic.com/2013/06/16/congresss-public-opinion-problem/)

According to a recent Gallup poll, the United States Congress currently has a 10% positive approval rating and an 83% disapproval rating. Approval ratings are essentially the same across all partisan affiliations (ranging from 9% approval from Democrats to 11% approval from Independents). These amazingly low polling ratings are tied for the record low in all of the 38 years that Gallup has been doing public-approval polling. While the Gallup pollsters admit that it is very difficult to attribute a single cause for this low approval rating, they theorized that it could be related to a combination of a poor economy and the currently divided government (Republicans controlling the House while Democrats control the Senate and presidency). In a follow-up poll by Gallup, they attempted to determine the reasons as to why the American people have lost faith in their federal legislature. Using an open-ended poll, Gallup asked a second group of Americans to list the reasons why they have lost faith in Congress—the results were largely unsurprising. By a wide margin, the American people listed “party gridlock” and “not getting anything done” In all due respect to the Gallup follow-up poll, I think that their open-ended follow-up failed to identify a very important meta-issue that could describe the low approval of Congress. The meta-issue of corruption due to campaign finance deregulation is a long-term background issue that has the potential to corrode public trust more subtly than a single act. Some issues are simply so pervasive that people take them for granted; people accept the situation as the status quo and the may not like it, but they are unlikely to point to it in such an open poll (they focus in the acute issues). The Perception of Corruption For years, the American government has had an increasing problem of being seen as corrupt or catering to special interests—the decision of Citizens United and the birth of the Super-PAC only accelerated this trend. When people see corporations and individuals handing out thousands, if not millions, of dollars to fund campaigns, they very-rightly have worries that such money will corrupt their politicians. Correlating well with Congress’s 10% approval rating, recent polls have indicated that approximately 90% of the American people believe that there is too much money in our politics. Given the similar results of these polls, it is entirely possible that many of the same people who believe that money has bought our politicians dislike the politicians who they see as corrupt. It stands to reason that somebody who believes that their politicians are being corrupted will have an overall negative view of the institutions that they see as corrupt. People may not immediately identify this as the root cause of their malaise—the symptoms are often more memorable than the underlying disease—but the fact remains that a statistically identical percentage of the American people have a low opinion of Congress and believe that Washington has been corrupted by money. Put plainly, the erosion of campaign finance laws brings about distrust in the public of their elected officials. This distrust has erupted in protests over the last few years, including both the right wing Tea Party and the left-leaning Occupy protests, and—in my opinion—has led to people losing faith in Congress. Just as how Gallup’s poll shows how people on both ends of the political spectrum have lost faith in Congress, people on both end of the political spectrum have begun to protest the perception of corruption in Washington. While there is no concrete evidence proving that campaign finance deregulation led corruption has led to the collapse of faith in Congress, the data shows a remarkable correlation. More study is certainly needed on whether this specific correlation is actually causation, but the theoretical evidence does show that this causation is both realistic and likely—multiple studies demonstrate how perceived corruption corrodes public trust in government, regardless of partisan affiliation. Conclusion Even if it is proven that campaign finance deregulation is a major causal factor in the decay of trust in Congress, there is little that the legislature can do to mitigate the problem. The Buckley v. Valeo SCOTUS decision ruled that money is speech, while the Citizens United v. FEC decision ruled that corporations can “speak” using their money in the political arena. As these decisions are binding, the legislature is unable to mitigate this corruption without passing a Constitutional amendment (which is difficult in the best of times, never mind that fact that corrupt politicians are unlikely to vote for an amendment which will stop their corruption). If my argument in this matter is correct, it is unlikely that Congress will be able to break out of its approval quagmire and return to a legislature that has high approval ratings in the near future—the inertia is on the wrong side of change and the perception of corruption is here to stay for the foreseeable future.

#### Line drawing fails—any limits to Biven’s availability means that the remedies will be denied in any circumstance

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

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

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

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

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

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

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

#### Conditionlaity is a voting issue – no risk nature undermines 2AC strategy and promotes contradictory arguments and produces argumentative irrepsponsiblity that undermines real world decisionmaking

#### only external checks on the executive’s use of drones can create international norms of accountability and transparency

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

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

#### this status quo model of drone overreliance results in global interstate wars.

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)

Finally, the drone campaign presents a fundamental challenge to U.S. national security law, as evidenced by the controversial killing of four American citizens in attacks in Yemen and Pakistan. The president's authority to protect the United States does not supersede an individual's constitutional protections. All American citizens have a right to due process, and it is particularly worrisome that a secret review of evidence by the U.S. Department of Justice has been deemed adequate to the purpose. The president has gotten personally involved in putting together kill lists that can include Americans -- a situation that is not only legally dubious but also strategically unwise. PASS THE REMOTE The sometimes contradictory demands of the American people -- perfect security at home without burdensome military engagements abroad -- have fueled the technology-driven, tactical approach of drone warfare. But it is never wise to let either gadgets or fear determine strategy. There is nothing inherently wrong with replacing human pilots with remote-control operators or substituting highly selective aircraft for standoff missiles (which are launched from a great distance) and unguided bombs. Fewer innocent civilians may be killed as a result. The problem is that the guidelines for how Washington uses drones have fallen well behind the ease with which the United States relies on them, allowing short-term advantages to overshadow long-term risks. Drone strikes must be legally justified, transparent, and rare. Washington needs to better establish and follow a publicly explained legal and moral framework for the use of drones, making sure that they are part of a long-term political strategy that undermines the enemies of the United States. With the boundaries for drone strikes in Pakistan, Somalia, and Yemen still unclear, the United States risks encouraging competitors such as China, Iran, and Russia to label their own enemies as terrorists and go after them across borders. If that happens -- if counterterrorism by drone strikes ends up leading to globally destabilizing interstate wars -- then al Qaeda will be the least of the United States' worries.

#### Unfettered drone strikes are causing Yemeni instability-the plan solves

Greenfield and Kramer 13 (DANYA GREENFIELD & DAVID J KRAMER, Time to curb American drones, April 5,

<http://www.nation.com.pk/pakistan-news-newspaper-daily-english-online/international/05-Apr-2013/time-to-curb-american-drones>)

The US has played a significant role in Yemen’s transition, which ensured the exit of former president Ali Abdullah Saleh, in exchange for immunity, and inaugurated a unity government and consensus president overseeing a national dialogue launched last month. The US has pledged support for the dialogue, which will lead to a constitutional referendum and new elections. To many Yemenis, however, Washington is narrowly focused on the short-term security concerns and the fight against terrorism. The US, they think, cares little about real political change. As Yemen’s transition enters a critical stage, Washington has an opportunity to change this image by redirecting its policy to greater emphasis on stability, prosperity and democracy, which will advance both US and Yemeni interests. Despite considerable US humanitarian aid and development support to their government, most Yemenis associate US engagement with the ongoing drone campaign to destroy Al-Qaeda in the Arabian Peninsula (AQAP) and they see it as having little regard for its effect on civilians. A number of former US military and intelligence officials argue that the drone programme’s costs may exceed its benefits. Retired General Stanley McChrystal has articulated the hazards of overreliance on drones, and General James E Cartwright, former vice-chairman of the Joint Chiefs-of-Staff, cautioned last month against unintended consequences, arguing that no matter how precise drone strikes may be, they breed animosity among targeted communities and threaten US efforts to curb extremism. With drone attacks breeding discontent and anti-American sentiment, the Barack Obama administration must rethink how the US can advance its objectives without letting tactics dictate strategy. Washington seeks to balance multiple priorities in Yemen: Supporting stability in the Arabian Peninsula, disrupting terrorist networks, securing waterways and aiding Yemen’s transition to democracy. By focusing primarily on acute, short-term threats, the US risks the long-term security that benefits both nations and can be achieved only through a sustained investment in the humanitarian, economic and political development of the Yemeni people. Thirty-one foreign policy experts and former diplomats sent a letter to President Obama last week that said the administration’s expansive use of unmanned drones in Yemen is proving counterproductive to US security objectives: As faulty intelligence leads to collateral damage, extremist groups ultimately win more support. The lack of transparency and accountability behind the drone policy set a dangerous global precedent and damage Washington’s ability to influence positive change in Yemen and the region. Drone strikes heighten animosity towards the US and Yemen President Abd Rabbo Mansour Hadi’s government for compromising Yemeni sovereignty. The US, the letter counselled, should reduce its reliance on drone strikes and instead invest in a long-term security agenda. This will include strengthening institutions that enhance the capacity and professionalism of Yemen’s security forces - not only counterterrorism units - to address threats to internal security. Washington already supports the restructuring of Yemen’s military, a step mandated by the transition agreement, but the Defence and State departments should ensure that America’s military assistance does not repeat the mistakes made during Saleh’s tenure - such as ignoring power concentrated in the hands of elites or not prosecuting human rights abuses. And building a capable police force recruited from residents in partnership with local communities is essential to securing this territory. Americans and Yemenis have a strong shared interest in combating extremism, as Al-Qaeda and its local affiliate, Ansar Al Sharia, spread out in the south and pledge acts of terrorism against both Yemeni and US targets. The US should not ignore this threat, but beyond the security portfolio, Yemenis need to feel that Washington is committed to supporting democratic institutions and the prosperity of the Yemeni people. Although the State Department and the US Agency for International Development are engaging Hadi’s government on development and humanitarian issues, most Yemenis feel only the negative effects of US counterterrorism policy. Rather than the steady stream of military delegations, a more robust economic assistance programme and public diplomacy strategy - including a visit by Secretary of State John Kerry and other high-level diplomats - will signal support for Yemen’s transition and its democratic aspirations. Yemen’s national dialogue is an ideal opportunity to break with a legacy of corrupt leaders who sought personal gain at the nation’s expense. The Obama administration can encourage this process by providing international cover for the difficult decisions delegates must make to craft a new political system based on equitable power-sharing, active citizenship and tolerance. This requires the administration to examine its own policies and shift course where the status quo undermines America’s shared interests. Despite negative attitudes towards US policy, Yemenis are eager to have an authentic partnership with the US - built on transparency, accountability and a demonstrated commitment to their future.

#### This instability results in an AQAP safe haven, oil shocks, and closing of key sea lines

Sullivan Ph.D @ Georgetown 5/25/12 (Paul, Professor of Economics at the National Defense University, an adjunct professor of Security Studies and Science, Technology and International Affairs at Georgetown University and a United Nations Global Experts“Why we should worry about Yemen” <http://www.alarabiya.net/views/2012/05/25/216406.html>)

On Monday, there was a nightmarish suicide bombing in Yemen. Dozens died and hundreds were injured. I contacted a Yemeni friend from long ago to send him my condolences for his country. Indeed, Yemen needs condolences for many years of strife. He reminded me that nothing at this scale has happened before in Yemen. You would expect something like this in Iraq in 2004, but not in Yemen. This event marked an upturn in potential threats to Yemenis. It also increased potential threats to those outside of Yemen. When violence of this scale starts, something bigger is often at play. I have previously written on the potential for Yemen to be a failed state. Now, the country seems to be hurtling even faster toward that possibility. Yemen is a country of great beauty. It is a country of a vast and simply amazing history. It still has a culture that is tribal. Yemen’s people are known for hospitality and warmth. Conflict and poor leadership ravage this country. Yemen is the poorest country in the Arabian Peninsula. Close to half of its people live on less that two dollars per day, close to or below the international poverty line. Most of the country is under severe water stress. It is one of the most water stressed countries in the world. About 70 percent of its people live in villages and many only receive water through irregular truck deliveries every few days or so. The poor can end up paying more for water than richer people who have access to piped municipal water. Yemen’s population in 1990 was 12 million. It is now double that. Ninety percent of water consumption in Yemen is for agricultural use. And sixty percent of that goes to produce qat. Qat is not food; it is a plant native to the Horn of Africa that when chewed produces euphoric effects. In other words, most of Yemen’s arable land is being used to produce a recreational drug. Because of this fact, Yemen now imports about 75 to 80 percent of its food. The economy of Yemen has been in an increasingly vicious downward spiral since the start of the recent conflicts within the country. There is massive unemployment amidst the instability and violence of Yemen There are huge inequalities in the country. In these and other dreadful circumstances in Yemen, including an especially poor education system in the villages, recruiting by extremists groups has never been easier. Such groups can buy their anonymity and protection in the remote hills and mountains of Yemen. If this is beginning to sound like Afghanistan in the late 1990s, then you are starting to get it. However, Yemen is in a much more fragile and leveraged strategic geographic position than Afghanistan. One side of its shores faces Somalia. The other side faces Djibouti and Eritrea. The corner that connects the two shores is the Bab al-Mandab: The Gate of Tears. Trade between Asia and the European Union is hugely reliant on this narrow strait. About three to four million barrels of oil a day and about three to four billion cubic meters of liquefied natural gas goes via this sharp corner. If Yemen becomes a failed state, just like Somalia, the entire region could be put at huge risk. One of the most important sea-lanes of communications would become a seriously riskier place to be in. A large proportion of global trade could be affected. Oil and other markets could find themselves more at the whims and vicious capriciousness of pirates and terrorists alike. Yemen could also affect North Africa, a place already in some turmoil, the Arabian Peninsula, Asia, the EU and even beyond. This, by the way, is not just a matter of trade disruptions and increased costs in shipping. If al-Qaeda in the Arabian Peninsula establishes an even stronger foothold in a failing Yemen, a combination of extremist camps in Somalia and Yemen could be geographic centerpieces and bases for terror for decades to come. Now, why should we worry about Yemen?

#### Oil shocks to Middle Eastern SLOCs causes great power conflict and economic decline

Sterne 11 (Paul, Managing Partner at Sterne and Co, “Egypt's Second Suez Canal Crisis” Ground Report, Jaunary 30, http://www.groundreport.com/World/Second-Suez-Crisis/2933579)

Egypt matters for one reason — the Suez Canal. The Suez Canal carries 10% of world trade and 4.5% of world oil production. Shut down the Canal and the world economy takes a tumble. Right now, the world economy can’t handle such an exogenous shock. The global economy would sink back into recession and the fiscal crisis would re-ignite. Governments would default in Europe. States would declare insolvency in the United States. Food prices and energy would sky rocket in the emerging markets. Stock markets will collapse. A wave of political upheaval would sweep the Mideast and then the world. Hosni Mubarak should not step down and flee Egypt like Ben Ali did in Tunisia. If he does, the Egypt unrest will immediately radicalize. Witness today’s jail break of Muslim militants by armed men. To prevent bloodshed and protect his legacy, Mubarak needs to declare a transition to democracy and free elections under United Nations supervision. Otherwise the Muslim Brotherhood will control of Egypt and the Suez Canal within a few months. The Muslim Brotherhood is the only well-organized opposition group in Egypt and they will have no qualms about using unbounded violence to seize and hold power. With the Muslim Brotherhood in power, they will have access to the huge arsenal of weapons that the United States has provided Egypt over the past thirty years. Sources on the Internet estimate that the US has provided $50 billion of military aid since 1978. For example, The Egyptian Air Force has 438 aircraft and 155 armed helicopters, according to Wikipedia; 220 of these aircraft are F-16’s. The United States has also sold the Egyptian 700 M-60A1 main battle tanks and 500 Hellfire anti-tank missiles as part of the First Gulf War. With such an arsenal and a huge population, seizing and securing the Suez Canal to protect world trade will involve a major war. Such a conflict will involve destruction and bloodshed of historic dimensions as Islamic fundamentalists and Al-Queda gain access to real firepower and battle the international community and try the wreck the global economy. The weakness in the stock market on Friday as the unrest in Egypt began will look tame.

#### Economic decline increases the propensity for conventional and nuclear conflict

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Mathew, and Jennifer “Revisiting the Future: Geopolitical Effects of the Financial Crisis” <http://www.ciaonet.org/journals/twq/v32i2/f_0016178_13952.pdf>

Of course, the report encompasses more than economics and indeed believes the future is likely to be the result of a number of intersecting and interlocking forces. With so many possible permutations of outcomes, each with ample Revisiting the Future opportunity for unintended consequences, there is a growing sense of insecurity. Even so, history may be more instructive than ever. While we continue to believe that the Great Depression is not likely to be repeated, the lessons to be drawn from that period include the harmful effects on fledgling democracies and multiethnic societies (think Central Europe in 1920s and 1930s) and on the sustainability of multilateral institutions (think League of Nations in the same period). There is no reason to think that this would not be true in the twenty-first as much as in the twentieth century. For that reason, the ways in which the potential for greater conflict could grow would seem to be even more apt in a constantly volatile economic environment as they would be if change would be steadier. In surveying those risks, the report stressed the likelihood that terrorism and nonproliferation will remain priorities even as resource issues move up on the international agenda. Terrorism’s appeal will decline if economic growth continues in the Middle East and youth unemployment is reduced. For those terrorist groups that remain active in 2025, however, the diffusion of technologies and scientific knowledge will place some of the world’s most dangerous capabilities within their reach. Terrorist groups in 2025 will likely be a combination of descendants of long established groups\_inheriting organizational structures, command and control processes, and training procedures necessary to conduct sophisticated attacks\_and newly emergent collections of the angry and disenfranchised that become self-radicalized, particularly in the absence of economic outlets that would become narrower in an economic downturn. The most dangerous casualty of any economically-induced drawdown of U.S. military presence would almost certainly be the Middle East. Although Iran’s acquisition of nuclear weapons is not inevitable, worries about a nuclear-armed Iran could lead states in the region to develop new security arrangements with external powers, acquire additional weapons, and consider pursuing their own nuclear ambitions. It is not clear that the type of stable deterrent relationship that existed between the great powers for most of the Cold War would emerge naturally in the Middle East with a nuclear Iran. Episodes of low intensity conflict and terrorism taking place under a nuclear umbrella could lead to an unintended escalation and broader conflict if clear red lines between those states involved are not well established. The close proximity of potential nuclear rivals combined with underdeveloped surveillance capabilities and mobile dual-capable Iranian missile systems also will produce inherent difficulties in achieving reliable indications and warning of an impending nuclear attack. The lack of strategic depth in neighboring states like Israel, short warning and missile flight times, and uncertainty of Iranian intentions may place more focus on preemption rather than defense, potentially leading to escalating crises. 36 Types of conflict that the world continues to experience, such as over resources, could reemerge, particularly if protectionism grows and there is a resort to neo-mercantilist practices. Perceptions of renewed energy scarcity will drive countries to take actions to assure their future access to energy supplies. In the worst case, this could result in interstate conflicts if government leaders deem assured access to energy resources, for example, to be essential for maintaining domestic stability and the survival of their regime. Even actions short of war, however, will have important geopolitical implications. Maritime security concerns are providing a rationale for naval buildups and modernization efforts, such as China’s and India’s development of blue water naval capabilities. If the fiscal stimulus focus for these countries indeed turns inward, one of the most obvious funding targets may be military. Buildup of regional naval capabilities could lead to increased tensions, rivalries, and counterbalancing moves, but it also will create opportunities for multinational cooperation in protecting critical sea lanes. With water also becoming scarcer in Asia and the Middle East, cooperation to manage changing water resources is likely to be increasingly difficult both within and between states in a more dog-eat-dog world.

### 2AC DA

#### The plan still allows us to kill citizens post-plan, it only allows for a civilian course of action that doesn’t necessarily mean that we will no longer target citizens

#### Unique link turn – Drone program collapses now without more accountability

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

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

#### Base kickout now because of unaccountability

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

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

#### This isn’t hypothetical – US is drawing down in Pakistan and Yemen due to backlash

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

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

#### Judicial review is critical to accountability on drone policy

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

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

#### Overreach inevitable – only accountable and transparent drone program solves

Rushforth JD candidate 12 (Elinor June, J.D. candidate, University of Arizona, James E. Rogers College of Law, “THERE'S AN APP FOR THAT: IMPLICATIONS OF ARMED DRONE ATTACKS AND PERSONALITY STRIKES BY THE UNITED STATES AGAINST NON-CITIZENS, 2004-2012” Arizona Journal of International and Comparative Law 29 Ariz. J. Int'l & Comp. Law 623, Lexis)

G. Arguments Made by Proponents of the Drone Program The drone program is a fixture in the Obama administration's fight against terror n163 and the moral and legal defense the administration offers serves as an indication that these attacks will continue. n164 Further, proponents of the drone program argue their use reduces risk to U.S. service members, decreases American weariness at foreign intervention, and minimizes civilian casualties during attacks and missions. First, because asymmetric warfare has increased, the United States has sought out creative ways to fight terrorists, insurgents, and asymmetric wars more generally. n165 Despite controversy surrounding the drone program, it allows surveillance and lethal missions without putting U.S. troops in harm's way. n166 This is an almost incontrovertible positive factor when considering American public support for a new and technologically incredible program. n167 Due to the lingering Overseas Contingency Operations, Americans are eager for some good news, and this program can deliver. Drone operators are on the front lines of a new and more sophisticated type of war and the information their surveillance missions provide can prove invaluable to service members on the ground. n168 This dual benefit weighs heavily in favor of drone proliferation. Drones can be [\*649] deployed to survey and attack where it would otherwise be impractical for troops, and a single pilot, to venture. n169 However, the analysis of this benefit must be separated between the two organizations employing drones: the military and the CIA. n170 Drones are used for surveillance and killing by both organizations but usually with different purposes in mind. n171 The military has focused its drones primarily on tactical support of ground forces, n172 either by providing information about enemy tactics or eliminating combatants entrenched in defended positions. n173 The CIA uses drones to eliminate specific targets in remote areas in which conventional U.S. military action would be impossible. n174 During Operation Southern Watch, the military used drones to police no-fly zones in Iraq and they were eventually used to target Iraqi radar systems during the second Iraq War. n175 In Operation Enduring Freedom, the military has expanded its use of armed drones to provide air support to ground operations and to act as "killer scouts." n176 By providing immediate battle damage assessment, drones enable commanders to determine if further action is necessary, and provide a new perspective on the field. n177 In Operation Iraqi Freedom, the armed drone retained and expanded its roles targeting anti-aircraft vehicles, performing as a decoy revealing enemy positions, and aiding in a rescue mission. n178 Based on these successes, military leaders maintain the value of drones. n179 The CIA's use [\*650] of drones facilitates U.S. attacks in environments where it is deemed too dangerous for ground troops to have a physical presence. n180 The ability to protect American lives, keep military costs down, and damage terrorist infrastructure and leadership is central to proponents' view of this program. Second, the American public has grown tired of drawn-out conflicts and foreign intervention, and the drone program offers a more palatable form of foreign involvement. n181 President Obama claims that "it is time to focus on nation-building here at home" and, presumably, the drone program allows the government to operate without deployment of ground troops to areas in which intervention is deemed necessary, be it for humanitarian or military purposes. n182 Lethal operations, surveillance for U.S. military operations, and less costly intervention all become possible when robots are the actual tools. With a weary electorate, the Executive can maintain a presence abroad militarily, while remaining able to argue that its full focus is on protecting and growing our nation at home.

#### Overreach collapses hegemony and warfighting

Florig, prof International Studies, 10 (Dennis, Professor- Division of International Studies- Hankuk (Korean) University of Foreign Studies, Review of International Studies, vol 36, issue 4, October, 2010, http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=1548783)

IV. Potential Sources of Hegemonic Breakdown and Future Challenges to Hegemony Despite the belief of some in the U.S. in the divine sanction of U.S. hegemony, hegemons do not stand forever any more than the houses of absolute monarchs of earlier ages who claimed celestial legitimation. Theory of hegemonic cycles focuses on the macro-historical process of the rise and decline of hegemonic powers. However, within any one of the long cycles, there are lesser periods of hegemonic weakening and regeneration. The loss of the Vietnam War followed by the oil shock induced recessions of the 1970s and the early 1980s led some to predict the imminent breakdown of U.S. hegemony. The decisive victory in the first Iraq war and the revival of the U.S. economy in the 1990s led others to talk of a second American century. Both were premature. Similarly, the short term outcome of the war in Iraq, whether it is the stabilization of a pro-American regime, the coming to power of a government unfriendly to the U.S. or on-going civil war will almost certainly lead either to new euphoric pronouncements about the 21st century belonging to the U.S. or claims that the end of U.S. hegemony are nigh. Again, either conclusion will most likely be premature. However, the outcome on the main battlefield so far in the Terrorism Wars will indicate much about the future direction of the global system. Hegemonic states and even hegemonic systems do have life spans, however hard it is to gauge them. On the home front, the Iraq War, like the Vietnam War before it, has laid bare one of the key problems of U.S. missionary hegemony—the fervor of elites is not always matched by the willingness of the population to sacrifice. The expansive, messianic conception of the U.S. role in the world predominates in American thinking, but it is not without challenge. The image of the U.S. as a “shining city on a hill” is rarely disputed, but the need for the U.S. to engage in military conflict abroad to spread its principles does come into question when the costs become too high and the benefits are not apparent.24 After World War I the ideology of American mission was not strong enough to overcome the resistance of ordinary citizens at being conscripted to fight in distant conflicts overseas and political elites not yet accommodated to the multilateralism hegemony entails. Thus there was a period of renunciation of hegemonic ambitions. Certainly since World War II the missionary ideology has held sway among policymaking elites. However, the political unpopularity of the long Vietnam War and the second Iraq War show that the average American citizen does not share the elite’s taste for battle overseas if the sacrifice in blood and treasure becomes steep. There is a cycle of hegemonic overreach, political reaction to the costs of failed policies, and then rebuilding of the ideology of messianic intervention. American sense of exceptionalism does not disappear at any time during this process. However, in the reactive part of the cycle the “city on the hill” tends to try to turn inward, wanting more to avoid contamination from the impure world outside than to take on new challenges. But since that conception of America is not adequate to sustain U.S. hegemony, the sense of America’s world historic mission must be painstaking rebuilt through political rhetoric, spoon feeding the mass media the right pictures of the world, and infusing civil society with political messianism. Someday either the overreach may be too costly and/or the public resistance may be too great to effectively rebuild the American missionary ideology. But that day does not seem just around the corner. There is an even larger question than whether the U.S. will remain the hegemonic state within a western dominated system. How long will the West remain hegemonic in the global system?25 Since Spengler the issue of the decline of the West has been debated. It would be hard to question current western dominance of virtually every global economic, political, military, or ideological system today. In some ways the domination of the West seems even more firm than it was in the past because the West is no longer a group of fiercely competing states but a much more cohesive force. In the era of western domination, breakdown of the rule of each hegemonic state has come because of competition from powerful rival western states at the core of the system leading to system-wide war. The unique characteristic of the Cold War and particularly the post-Cold War system is that the core capitalist states are now to a large degree politically united and increasingly economically integrated. In the 21st century, two factors taking place outside the West seem more of a threat to the reproduction of the hegemony of the American state and the western system than conflict between western states: 1. resistance to western hegemony in the Muslim world and other parts of the subordinated South, and 2. the rise of newly powerful or reformed super states. Relations between the core and periphery have already undergone one massive transformation in the 20th century—decolonization. The historical significance of decolonization was overshadowed somewhat by the emergence of the Cold War and the nuclear age. Recognition of its impact was dampened somewhat by the subsequent relative lack of change of fundamental economic relations between core and periphery. But one of the historical legacies of decolonization is that ideological legitimation has become more crucial in operating the global system. The manufacture of some level of consent, particularly among the elite in the periphery has to some degree replaced brute domination. Less raw force is necessary but in return a greater burden of ideological and cultural legitimation is required. Now it is no longer enough for colonials to obey, willing participants must believe. Therefore, cultural and ideological challenges to the foundations of the liberal capitalist world view assume much greater significance. Thus the resurgence of Islamic fundamentalism, ethnic nationalism, and even social democracy in Latin America as ideologies of opposition have increasing significance in a system dependent on greater levels of willing consent. As Ayoob suggests, the sustained resistance within the Islamic world to western hegemony may have a “demonstration effect” on other southern states with similar grievances against the West.26 The other new dynamic is the re-emergence of great states that at one time or another have been brought low by the western hegemonic system. China, in recent centuries low on the international division of labor, was in some ways a classic case of a peripheral state, or today a semi-peripheral state. But its sheer size, its rapid growth, its currency reserves, its actual and potential markets, etc. make it a major power and a potential future counter hegemon. India lags behind China, but has similar aspirations. Russia has fallen from great power to semi-peripheral status since the collapse of the Soviet empire, but its energy resources and the technological skills of its people make recovery of its former greatness possible. No one knows exactly what the resurgence of Asia portends for the future. However, just as half a century ago global decolonization was a blow to western domination, so the shift in economic production to Asia will redefine global power relations throughout the 21st century. Classical theory of hegemonic cycle is useful if not articulated in too rigid a form. Hegemonic systems do not last forever; they do have a life span. The hegemonic state cannot maintain itself as the fastest growing major economy forever and thus eventually will face relative decline against some major power or powers. The hegemon faces recurrent challenges both on the periphery and from other major powers who feel constrained by the hegemon’s power or are ambitious to usurp its place. Techniques of the application of military force and ideological control may become more sophisticated over time, but so too do techniques of guerilla warfare and ideological forms of resistance such as religious fundamentalism, nationalism, and politicization of ethnic identity. World war may not be imminent, but wars on the periphery have become quite deadly, and the threat of the use of nuclear weapons or other WMD by the rising number of powers who possess them looms.

#### Link turn – Counter-Terrorism –

#### A. Allied cooperation – failing now because of a lack of legitimacy surrounding the drone program, only by increasing legitimacy and external checks can we reassure allies and gain intel necessary for targeted procedure – that’s McGill and HRT

#### B. Blowback – Dreyfuss says terrorism is increasing as a result of blowback from overreliance on drones – only by constraining the executive through judicial review does it produce less civilian casualties and induce caution that reduces backlash – that’s Murphy

#### C. Readiness – we can’t fight wars if military personnel is concerned with sexual assault– that’s Banner

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

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

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

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

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

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

#### We maintain speed because we’re after the fact

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

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

#### Too much flexibility collapses war-fighting capability

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

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

#### Courts successfully protect classified information—statistical evidence proves

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

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

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

#### And the plan still allows TARGETED KILLING TO OCCUR and makes them BETTER

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

[\*445] Rather, as recognized by the Founders in the Fourth Amendment, balancing the needs of security against the imperatives of liberty is a traditional role for judges to play. Two scholars of national security law recently highlighted the value of judicial inclusion in targeting decisions: "Judicial control of targeted killing could increase the accuracy of target selection, reducing the danger of mistaken or illegal destruction of lives, limbs, and property. Independent judges who double-check targeting decisions could catch errors and cause executive officials to avoid making them in the first place." n47 Judges are both knowledgeable in the law and accustomed to dealing with sensitive security considerations. These qualifications make them ideal candidates to ensure that the executive exercises constitutional restraint when targeting citizens. Reforming the decision-making process for executing American citizens to allow for judicial oversight would restore the separation of powers

framework envisioned by the Founders and increase democratic legitimacy by placing these determinations on steadier constitutional ground. For those fearful of judicial encroachment on executive war-making powers, there is a strong argument that this will actually strengthen the President and empower him to take decisive action without worrying about the judicial consequences. As Justice Kennedy put it, "the exercise of [executive] powers is vindicated, not eroded, when confirmed by the Judicial Branch." n48 Now, we will turn to what this judicial involvement would look like.

#### Qualified and soviergn immunity solves special forces impact

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

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

## \*\*\*1AR

### \*\*\*A2: Counterplan

### 1AR Lower Court Confusion

#### Lower courts wont hear Bivens cases- citing “special factors” exceptions

Vladeck 13 (Stephen, and Carlos Valesquez, “State Law, the Westfall Act, and the Nature of the Bivens Question,” Georgetown Public Law Research Paper No. 12-059, http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2038641)

Bivens and Post-9/11 National Security Litigation Although the Supreme Court has not veered from this understanding of the Bivens question, the lower courts appear to be operating under a very different conception in some notable recent cases alleging constitutional violations committed in the war on terror (and in some nonterrorism cases, as well). For example, in its widely noticed decision in Arar v. Ashcroft, the en bane Court of Appeals for the Second Circuit found "special factors" that counseled against recognition of a Bivens claim that would have allowed Maher Arar to seek damages from the various federal officials he had sued.38 His suit alleged that those officials had detained him and subjected him to coercive interrogation in New York before transporting him against his will and without his knowledge to Syria, where he was detained and tortured by Syrian officials.39 Arar argued that these federal officers violated his substantive due process rights under the Fifth Amendment.40 As discussed in greater detail in Part II, the alleged acts of the federal officials would also have stated colorable claims under state tort law. In considering whether Arar had stated a Bivens claim, all of the judges viewed the question before them as whether any cause of action for damages existed. The judges in the majority declined to recognize a Bivens claim, citing as "special factors counseling hesitation" the sensitive foreign policy concerns raised by the action,41 as well as the difficulties that would be posed by the classified nature of some of the evidence that would necessarily have to be presented.42 Their reasoning shows that they viewed the alternative to recognition of a Bivens claim as the denial of any claim, as the concerns that led them to deny a Bivens claim would have been equally implicated had Arar brought a state tort claim against the defendants for false imprisonment or assault. Although the four dissenters would have recognized a Bivens claim, they too seemed to regard the options as "Bivens or nothing. "43 Arar is perhaps the most notable of the cases adopting this approach to the Bivens question, but it is not alone. Other lower courts have deployed similar analyses, both in cases raising national security concerns44 and in cases not raising such concerns.45 Perhaps the most detailed analysis of the justification for declining to recognize a Bivens remedy came from the Fourth Circuit, which held in Lebron v. Rumsfeld that Jose Padilla could not pursue a Bivens action against the federal officials who ordered his detention and alleged torture. 46 As Judge Wilkinson explained, Padilla's complaint seeks quite candidly to have the judiciary review and disapprove sensitive military decisions made after extensive deliberations within the executive branch as to what the law permitted, what national security required, and how best to reconcile competing values. It takes little enough imagination to understand that a judicially devised damages action would expose past executive deliberations affecting sensitive matters of national security to the prospect of searching judicial scrutiny. It would affect future discussions as well, shadowed as they might be by the thought that those involved would face prolonged civil litigation and potential personal liability. 47

#### No uncertainty for the individual—conclusively no chance the gov’t wont pay the damages

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

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

[footnote 61 starts:]

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

[footnote 61 ends]

### \*\*\*A2: DA

### 1AR Kickout UQ

#### Base kickout now because of unaccountability

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

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

#### This isn’t hypothetical – US is drawing down in Pakistan and Yemen due to backlash

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

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

### 1AR Judicial Review Good

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

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

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

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

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

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

### 1AR A2: Secrecy/Intel

#### Courts successfully protect classified information—statistical evidence proves

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

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

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

### Friv

#### Bivens doesn’t allow ALL cases- qualified immunity still protects the military from frivolous suits

Vladeck, editor- Journal of National Security Law & Policy, 12 (Steve Vladeck, professor of law and the associate dean for scholarship at American University Washington College of Law, senior editor of the Journal of National Security Law & Policy, “Bivens and/as Immunity: Richard Klingler Responds on Al-Aulaqi–and I Reply,” July 25, <http://www.lawfareblog.com/2012/07/bivens-andas-immunity-richard-klingler-responds-on-al-aulaqi-and-i-reply/>)

In any event, Richard’s central critique is that my (“faculty lounge”) understanding of Bivens fails adequately to account for the very real-world separation of powers and litigation interests implicated in these suits. In so arguing, Richard quite helpfully proves the very point I was trying to make in my initial post–that too many commentators (and lower court judges) have increasingly conflated the Bivens question with other considerations that may militate against relief in suits like Aulaqi. Just to reiterate what I wrote on Monday, the cause-of-action question should assume that these concerns are not present, because holding that there is no Bivens claim in cases like Aulaqi is to categorically reject the possibility that a meritorious claim might ever arise under remotely similar facts. Richard may be comfortable with a world in which the government can never be held liable for anything it does under the guise of national security, but I’m not–and you shouldn’t be. To be clear, that doesn’t mean Aulaqi should win; it just means I don’t think these concerns go to the existence vel non of a cause of action under Bivens–the first of a veritable smorgasbord of procedural issues raised by the suit. Richard thinks that this understanding makes me naive. But a closer reading of both my original post and the forthcoming article by Carlos Vazquez and me to which it linked should make abundantly clear that I take these concerns very seriously–I just think they come into play in other places. Qualified immunity, for example, allows government officers to move to terminate suits like Aulaqi long before any discovery takes place, and the denial thereof is immediately appealable (case in point: Padilla v. Yoo). So in a case in which the defendant’s conduct did not violate “clearly established” law, the concerns Richard articulated will quickly and readily be disposed of at the motion-to-dismiss stage even with recognition of a Bivens cause of action, with minimal intrusion into sensitive military affairs. The same can be said for the amorphous separation-of-powers concerns Richard identified (which are usually handled through either qualified immunity or, in appropriate cases, the political question doctrine), and the state secrets privilege (and “potentially adverse security consequences”). Indeed, what’s wholly missing from Richard’s critique (and all of these lower-court opinions) is any explanation for why these other doctrines don’t adequately account for the government’s (and government officer’s) interests on a case-specific basis. If such arguments are out there, I’m all ears… Instead, what Richard is ultimately arguing in his response is that Bivens should effectively be understood as an absolute immunity doctrine in suits implicating military affairs. It’s not just that this isn’t what Stanley held (see above); it’s that this fundamentally misunderstands not just the Court’s original decision in Bivens itself, but the analytical approach it has taken even in the subsequent cases narrowing Justice Brennan’s original reasoning.

#### We maintain speed because we’re after the fact

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

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

### 1AR A2: Flex Key

#### Too much flexibility collapses war-fighting capability

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

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