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### 1NC – Ex Post Counterplan

**EX POST Counterplan**

#### The United States Federal Judiciary, specifically the lower courts, should hold that United States’ targeted killing operations should be subject to judicial ex post review, including redress for family members and 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.

#### Solves – comparatively better than ex ante review

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.

### 1NC – Bond DA

**BOND DA**

#### Court will uphold treaty power in Bond now but it’s close.

Greve 2013

Michael S., professor at George Mason University School of Law, Straight Up, With Multiple Twists: Bond v. United States, January 21 2013, http://www.libertylawsite.org/2013/01/21/straight-up-with-multiple-twists-bond-v-united-states/

In truth, you don’t have to read Missouri so broadly. The treaty at issue dealt with things that cross international and national borders. There was no daylight between the treaty and the implementing legislation. And the state’s federalism argument was, as Holmes noted, a “thin reed.” There, in a nutshell, you have “proper” bounds of the treaty power. (For more on this, see the exchange between Rick Pildes, Nick Rosenkranz and Ilya Somin on the volokhconspiracy.) Having articulated those bounds, you could then say—as the Bond cert petition argues—that at the very least, courts should read treaties and implementing statutes to avoid constitutional doubts. The exemption for “peaceful” uses indicates that Congress intended to combat the spread of chemical weapons and materials for war-like purposes, as opposed to arming criminal prosecutors with yet another all-purpose club. The argument is more difficult than one might think. The government’s ready reply is that you can’t use a constitutional avoidance canon to create doubt where none exists. Holland isn’t really an issue here because Congress didn’t do anything that it could not also do under the Commerce Clause. Congress in its infinite wisdom decided that it needed a closed and complete regulatory system, just as it does for purposes of, say, the Controlled Substances Act. Under that statute, the plants on your window sill are fair game for the feds, see Raich. Well then: so is the stuff under your kitchen sink. No point in speculating about the outcome. This much, one can say with a tolerable degree of confidence: The justices know this case. Four justices on one side or the other voted to grant because they want to get to the grand themes of Missouri, and they would not have done so if they weren’t reasonably sure of a fifth vote on the merits. The difficulty of obtaining at least an implicit “fifth” precommitment is to my mind the readiest explanation for the multiple relists. (If someone has a better guess, let’s hear it.) If that’s right, the briefing and argument task is to shake or hold that vote, however it cuts. One more point of near-certainty: whichever way the case goes, what the justices say along the way will shape the contours of treaty law and its constitutional boundaries for many, many years to come.

#### Roberts would appoint judges for the drone court

KIRKLAND, UPI Senior Legal Affairs Correspondent-2/17/13

<http://www.upi.com/Top_News/US/2013/02/17/Under-the-US-Supreme-Court-Drones-over-America/UPI-97921361089800/>

"Now, in response to broad dissatisfaction with the hidden bureaucracy directing lethal drone strikes, there is an interest in applying the model of the Foreign Intelligence Surveillance Act court -- created by Congress so that [foreign and U.S.] surveillance had to be justified to a federal judge -- to the targeted killing of suspected terrorists, or at least of American suspects," The New York Times reported Feb. 8. Members of the FISA court are appointed by Chief Justice John Roberts.

Perceived as court stacking – controversial to the courts

Ruger-prof law Penn-4

THE JUDICIAL APPOINTMENT POWER OF THE CHIEF JUSTICE

<http://epstein.usc.edu/research/supctLawRuger.pdf>

In the foregoing pages, I have argued that the Chief Justice’s special appointment power is incongruous with several express and customary norms of Article III structure and practice. A related argument derives from the fact that the political nature of the power may ultimately be subversive of the judiciary’s stature and authority. A standard principle of the separation of powers discourse is that a reallocation of functions is particularly disfavored if it works as an “encroachment” on one or more branches of government.164 In policing separation of power boundaries, the Court has often expressed its role as providing a “safeguard against the encroachment or aggrandizement of one branch at the expense of the other.”165 It is perhaps counterintuitive to conceive of the Chief Justice’s additional power to appoint as a possible encroachment on the judiciary. At the most basic level, the net quantity of power reposed in Article III increases by virtue of this delegation to the Chief Justice. A congressional decision to vest the Chief Justice with additional authority to select special court judges hardly seems like encroachment; or if it is encroachment, it is of the President’s baseline judicial nomination authority.166 How, then, is this delegation perceived to “encroach” on the judiciary? The first point is a general one—the grant of a public law power is not purely gratuitous. The power to make an appointment choice carries with it a duty to make such a choice. To the extent such exercise entails difficult and controversial choices, there is a burden alongside the benefit of this additional power.167 If this burden is manifested in public criticism of specific appointment choices, at one general level it is no more troubling to the Chief Justice than to any other public official, and indeed may be less so given the Chief Justice’s life tenure. But at an institutional level there are features of this criticism that are more injurious to a judicial official, and derivatively to the judiciary generally, than similar attacks levied against the President or the Senate. The power and stature of the American judiciary is historically dependent on public acceptance of its role and function. Lacking the bureaucratic and enforcement mechanisms to impose its rules on noncompliant actors, the judiciary depends on voluntary acquiescence from other government officials and the American people. Judges cast their role as fundamentally different from, and above ordinary politics and through history have used this perception as the primary mechanism for securing and retaining such public stature.168 Judicial decisions are accepted in large part because they are seen as nonpolitical: they are more deliberative, more reasoned, more neutral than the stuff of ordinary politics. In this way the legal reasoning that Justices engage in is important—even if it is in fact malleable and indeterminate—because it makes judicial decisions seem less overtly political. Much of the academic criticism of the Supreme Court’s Bush v. Gore169 opinion is phrased in these terms, accusing the Court of squandering some of its prestige by engaging in a poorly-reasoned political decision.170 A judicial choice of a judge for a special court is, of course, of much less importance than the choice of a President. Whatever one’s view about the strength of Bush v. Gore’s rationale, there is certainly more there than what supports the Chief Justice’s unexpressed appointment choices. Although there is little public attention to the Chief Justice’s appointments when he makes them, there is often pointed criticism of his choices in the wake of important special court actions. It may be that such additional criticism is of little damage given the high stature of the current Supreme Court, even after Bush v. Gore. 171 But a general reduction in the Court’s prestige might render this extra ground for critique more meaningful. Chief Justice Rehnquist has presided over a Court at its apex in terms of public stature, and he has also shown no disinclination to exercise the appointment power robustly. The Chief Justice who presided over the Court at its most tenuous period in the twentieth century adopted a very different position. Chief Justice Hughes, who waited out the court-packing controversy of the 1930s and the attendant attacks on the Court, did not desire additional powers that might generate additional criticism. However, in his efforts to maintain judicial stature during and after that crisis, Hughes was adamant that he did not want additional authority like the appointment power. He said that he and the Justices “strongly opposed the imposition of that burden” of additional administrative authority, which would “possibly mak[e] the Chief Justice and the Court itself a center of attack.”172 Hughes objected, on the grounds that it was “undue centralization,” to the Chief Justice receiving sole appointment power of the administrator of a new office overseeing federal courts, and at his request that power was vested with the entire Supreme Court.173 Instead of Taftian centralization, he advocated “greater attention to local authority and local responsibility.”174 By decentralizing the system, Hughes sought to diminish the visibility of the Chief Justice and the Supreme Court, thereby warding off political attacks.175 His colleague Felix Frankfurter specifically praised Hughes’s approach, noting that it “avoided the temptations of a strong executive,” and “realized fully that elaboration of administrative machinery is deadening to the judicial process.”176 Such concern may seem less poignant now, given the Supreme Court’s high prestige, but that should not obscure the fact that the appointment authority carries with it at least some potential cost to the Chief Justice and to judicial stature more broadly.

#### Upholding Missouri v Holland is key to treaties but capital is key.

Spiro 2008

Peter J., Professor of Law, Temple University, Resurrecting Missouri v. Holland, Missouri Law Review http://law.missouri.edu/lawreview/files/2012/11/Spiro.pdf

Even with respect to the Children’s Rights Convention, the balance may change. At both levels, the game is dynamic. On the international plane, as more attention is focused on human rights regimes, the costs of nonparticipation rise. Other countries and other international actors (human rights NGOs, for example) will train a more focused spotlight on U.S. nonparticipation.28 From a human rights perspective, it’s low-hanging fruit; the mere fact that the United States finds itself alone with Somalia outside the regime suffices to demonstrate the error of the American stance as a leading example of deplored American exceptionalism. For progressive advocacy groups focusing on children’s rights, the Convention is emerging as an agenda item.29 More powerful actors, including states and such major human rights groups as Amnesty International and Human Rights Watch, may be unlikely to put significant political resources into the effort, but there is the prospect of a drumbeat effect and accompanying stress to U.S. decisionmakers. 30 In the wake of international opprobrium associated with post-9/11 antiterror strategies, U.S. conformity with human rights has come under intensive international scrutiny. That scrutiny is spilling over into other human rights-related issues; there will be no more free passes for the United States when it comes to rights.31 Human rights may present the most obvious flash point along the Holland front, but it will not be the only one. As Antonia Chayes notes, “resentment runs deep” against U.S. treaty behavior.32 International pressure on the United States to fully participate in widely-subscribed international treaty regimes, some of which could constitutionally ride on the Treaty Power alone, will grow more intense. At the same time that the international price of non-participation rises, a subtle socialization may be working to lower the domestic cost of exercising Holland-like powers. Globalization is massaging international law into the sinews of American political culture. The United States may not have ratified the Convention on the Rights of the Child, for example, but it has acceded to Hague Conventions on abduction33 and adoption,34 as well as optional protocols to the Children’s Rights Convention itself,35 and has enthusiastically pursued an agreement on the transboundary recovery of child support.36 As international law becomes familiar as a tool of family law, the Children’s Convention will inevitably look less threatening even against America’s robust sentiments regarding federalism. Regimes in other areas should be to similar effect and will span the political divide. It is highly significant, for instance, that conservative Americans have become vocal advocates of international regimes against religious persecution, a key factor in the aggressive U.S. stance on Darfur.37 To the extent that conservatives see utility in one regime they will lose traction with respect to principled category arguments against others. Which is not at all to say that Holland will be activated with consensus support. A clear assertion of the Treaty Power against state prerogatives would surely provoke stiff opposition in the Senate and among anti-internationalist conservatives, setting the scene for a constitutional showdown.38 The adoption of a treaty regime invading protected state powers would require the expenditure of substantial political capital. Any president taking the Treaty Power plunge would be well advised to choose a battle to minimize policy controversy on top of the constitutional one. A substantively controversial regime depending on Holland’s authority (say, relating to the death penalty) would increase the risk of senatorial rebuke. Perhaps the best strategy would be to plant the seeds of constitutional precedent in the context of substantively obscure treaties, ones unlikely to attract sovereigntist flak. If a higher profile treaty implicating Holland were then put on the table, earlier deployments would undermine opposition framed in constitutional terms. Such was the case with the innovation of congressional-executive agreements, which, before their use in adopting major institutional regimes in the wake of World War II, had been used with respect to minor agreements in the interwar years.39 In contrast to the story of congressional-executive agreements, advocates of an expansive Treaty Power will have the advantage of Holland itself, that is, a Supreme Court decision on point and not superseded by a subsequent ruling. That would lend constitutional credibility to the proposed adoption of any agreement requiring the Treaty Power by way of constitutional support. But it wouldn’t settle the question in the face of the consistent practice described above. Holland is an old, orphaned decision, creating ample space for contemporary rejection. An anti-Holland posture, the decision’s status as good law notwithstanding, would also be bolstered by the highly credentialed revisionist critique.40 That of course begs the question of what the Supreme Court would do with the question were it presented. The Court could reaffirm Holland, in which case its resurrection would be official and the constitutional question settled, this time (one suspects) for good. That result would comfortably fit within the tradition of the foreign affairs differential (in which Holland itself is featured).41 One can imagine the riffs on Holmes, playing heavily to the imperatives of foreign relations and the increasing need to manage global challenges effectively. The opinion might not write itself, but it would require minimal creativity. Recent decisions, Garamendi notably among them,42 would supply an updated doctrinal pedigree. And since the question would come to the Court only after a treaty had garnered the requisite two-thirds’ support in the Senate, the decision would not likely require much in the way of political fortitude on the Court’s part. It would also likely draw favorable international attention, reaffirming the justices’ membership in the global community of courts.43 IV. CONCLUSION:CONSTITUTIONAL LIFE WITHOUT MISSOURI V. HOLLAND Holland’s judicial validation would hardly be a foregone conclusion. The Supreme Court has grown bolder in the realm of foreign relations. Much of this boldness has been applied to advance the application of international norms to U.S. lawmaking, the post-9/11 terror cases most notably among them.44 The VCCR decisions, on the other hand, have demonstrated the Court’s continued resistance to the application of treaty obligations on the states. In Medellín, where the Court found the President powerless to enforce the ICJ’s Avena decision on state courts, that resistance exhibited itself over executive branch objections. The Court rebuffed the President with the result of retarding the imposition of international law on the states and at the risk of offending powerful international actors.

#### Treaties are key to cooperation on every issue – solves extinction

Koh and Smith 2003

Harold Hongju Koh, Professor of International Law, and Bernice Latrobe Smith, Yale Law School; Assistant Secretary of State for Democracy, Human Rights and Labor, “FOREWORD: On American Exceptionalism,” May 2003, 55 Stan. L. Rev. 1479

Similarly, the oxymoronic concept of "imposed democracy" authorizes top-down regime change in the name of democracy. Yet the United States has always argued that genuine democracy must flow from the will of the people, not from military occupation. 67 Finally, a policy of strategic unilateralism seems unsustainable in an interdependent world. For over the past two centuries, the United States has become party not just to a few treaties, but to a global network of closely interconnected treaties enmeshed in multiple frameworks of international institutions. Unilateral administration decisions to break or bend one treaty commitment thus rarely end the matter, but more usually trigger vicious cycles of treaty violation. In an interdependent world, [\*1501] the United States simply cannot afford to ignore its treaty obligations while at the same time expecting its treaty partners to help it solve the myriad global problems that extend far beyond any one nation's control: the global AIDS and SARS crises, climate change, international debt, drug smuggling, trade imbalances, currency coordination, and trafficking in human beings, to name just a few. Repeated incidents of American treaty-breaking create the damaging impression of a United States contemptuous of both its treaty obligations and treaty partners. That impression undermines American soft power at the exact moment that the United States is trying to use that soft power to mobilize those same partners to help it solve problems it simply cannot solve alone: most obviously, the war against global terrorism, but also the postwar construction of Iraq, the Middle East crisis, or the renewed nuclear militarization of North Korea.

### 1NC – Debt Ceiling DA

**DEBT CEILING DA**

#### Debt ceiling deal now – GOP will cave

**Klein, Washington Post, 9-28-13**

(Ezra, “The House GOP’s shutdown plan is great news”, <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/09/28/the-house-gops-shutdown-plan-is-great-news/>, ldg)

House Republicans plan to attach a one-year delay of Obamacare to the continuing resolution. That sharply increases the chances of a government shutdown beginning Monday night. Good. Speaker Boehner's original plan was to pass a clean bill to fund the government and then attach the one-year delay of Obamacare to the debt-ceiling bill. It was a strategy that would minimize the chances of a shutdown but maximize the chances of a default. Boehner wanted that strategy because he thought Republicans had more leverage on the debt limit than they do on the shutdown. A shutdown, after all, is just bad for the economy. A default is catastrophic for it. You'd have to be insanely reckless to permit the federal government to default on its debts. And Boehner believes that House Republicans are insanely reckless and that President Obama isn't. But that strategy failed. Boehner's members refused to wait for the debt ceiling. They want their showdown now. And that's all for the better. Moving the one-year delay of Obamacare to the CR maximizes the chances of a shutdown but makes a default at least somewhat less likely. If a shutdown begins Monday night, Republicans and Democrats will have more than two weeks to resolve it before hitting the debt ceiling. As Alec Phillips put it in a research note for Goldman Sachs, "If a shutdown is avoided, it is likely to be because congressional Republicans have opted to wait and push for policy concessions on the debt limit instead. By contrast, if a shutdown occurs, we would be surprised if congressional Republicans would want to risk another difficult situation only a couple of weeks later. The upshot is that while a shutdown would be unnecessarily disruptive, it might actually ease passage of a debt limit increase." One way a shutdown makes the passage of a debt limit increase easier is that it can persuade outside actors to come off the sidelines and begin pressuring the Republican Party to cut a deal. One problem in the politics of the fiscal fight so far is that business leaders, Wall Street, voters and even many pundits have been assuming that Republicans and Democrats will argue and carp and complain but work all this out before the government closes down or defaults. A shutdown will prove that comforting notion wrong, and those groups will begin exerting real political pressure to force a resolution before a default happens.

#### The plan is a loss that spills over to the debt ceiling

**Parsons, LA Times, 9-12-13**

(Christi, “Obama's team calls a timeout”, <http://www.latimes.com/nation/la-na-obama-congress-20130913,0,2959396.story>, ldg)

After a week in which President Obama narrowly averted a bruising defeat on Capitol Hill over a military strike on Syria, the decision had the feeling of a much-needed timeout. The messy debate over a resolution to authorize military force put a harsh light on the president's already rocky relationship with Congress. Despite a charm offensive earlier this year, complete with intimate dinners and phone calls, Obama faced contrary lawmakers in both parties, a climate that is certain to persist through the next round of legislative fights, if not to the end of his second term. In deciding to seek approval for military action, Obama banked on the long-standing deference to the commander in chief on matters of national defense. But by the time he pressed "pause" on the intense White House lobbying effort, he was finding as much defiance as deference. Although the White House cast the issue as a matter of national security and a crucial test of U.S. power, dozens of lawmakers from both parties were set to deliver a rare rebuke to a president on foreign policy. Even Democratic loyalists seemed unswayed by appeals to preserve the prestige of the presidency — and this president. Hawkish Republicans offering to reach across the aisle to support the president said they found the White House distant and uninterested. The canceled picnic punctuated a week of aggravated feelings. "We obviously have divided government. We have sometimes contentious, sometimes very effective relations with Congress. But we keep at it," said White House spokesman Jay Carney, who denied the picnic cancellation had anything to do with the state of relations between the two branches of government. On Capitol Hill, the week's episode strained Obama's traditional alliance with his fellow Democrats, many of whom were wary of another military involvement, unclear about the president's plans for a missile strike and surprised by his decision to ask them to vote on it. "Not only was it a hard ask, but it was not a well-prepared ask," said Sen. Sheldon Whitehouse (D-R.I.). "His willingness to back away from the ultimatum and pursue the disarmament proposal was extremely welcome, and I think that helped all of us in our relationship with him." Obama's relationship with his Republican critics was not helped. As lawmakers look ahead to the rest of the fall agenda, including the coming budget battles, the administration's performance this week will not be easy to forget, some said. "It's just more lack of confidence that they know what they're doing," said Sen. Tom Coburn (R-Okla.). "There's only so much political capital," said Sen. Rob Portman (R-Ohio). Democrats defended the president, blaming Republicans for a "knee-jerk" opposition to any initiative tied to this White House, a phenomenon that Obama aides regularly cite but that the president appears to have disregarded in his decision to put a use-of-force resolution before Congress. "Historically, when it comes to military force, Republicans and conservatives have led that. Now they're opposed to it," said Sen. Richard J. Durbin (D-Ill.). In a private meeting this week, Durbin said, Obama himself joked that "a lot of Republicans on Capitol Hill are discovering their inner doves on Syria." The next set of negotiations will be far more predictable and on familiar territory. By the end of the month, the president and Congress must agree on a plan to continue funding the government, or it will shut down. And by mid-October, they will have to agree to raise the debt limit, or risk a default. The White House has said it won't negotiate on the debt limit, as it did twice before, counting on the public and business groups to pressure Republicans. Democrats were hopeful the budget issues would put the White House back on more solid political footing. "I think the public has a heck of a lot more confidence in the president on economics and budget than [in] the House Republicans," said Sen. Carl Levin (D-Mich.). That may be wishful thinking, said Ross Baker, a political science professor at Rutgers University, who studies the Senate. "These things carry over. There's no firewall between issues," he said. "Failure in one area leads to problems in other areas." The debate over the war in Syria may be on an extended pause, although prospects of Obama returning to Congress to ask for a use-of-force authorization seem slim. A bipartisan group of senators is drafting an amended authorization, but the group is not expected to fully air its proposal until diplomatic talks conclude. There were some signs that the debate may have won the president some empathy, if not support. At a private lunch with Republican senators this week, Obama asked them not to undermine him on the world stage. Sen. Ron Johnson of Wisconsin, who is part of a group of GOP senators working with the White House on fiscal issues, said the appeal resonated.

#### Obama’s capital is key

**Allen, Politico, 9-19-13**

(Jonathan, “GOP battles boost President Obama”,

dyn.politico.com/printstory.cfm?uuid=17961849-5BE5-43CA-B1BC-ED8A12A534EB)

There’s a simple reason President Barack Obama is using his bully pulpit to focus the nation’s attention on the battle over the budget: In this fight, he’s watching Republicans take swings at each other. And that GOP fight is a lifeline for an administration that had been scrambling to gain control its message after battling congressional Democrats on the potential use of military force in Syria and the possible nomination of Larry Summers to run the Federal Reserve. If House Republicans and Obama can’t cut even a short-term deal for a continuing resolution, the government’s authority to spend money will run out on Oct. 1. Within weeks, the nation will default on its debt if an agreement isn’t reached to raise the federal debt limit. For some Republicans, those deadlines represent a leverage point that can be used to force Obama to slash his health care law. For others, they’re a zero hour at which the party will implode if it doesn’t cut a deal. Meanwhile, “on the looming fiscal issues, Democrats — both liberal and conservative, executive and congressional — are virtually 100 percent united,” said Sen. Charles Schumer (D-N.Y.). Just a few days ago, all that Obama and his aides could talk about were Syria and Summers. Now, they’re bringing their party together and shining a white hot light on Republican disunity over whether to shut down the government and plunge the nation into default in a vain effort to stop Obamacare from going into effect. The squabbling among Republicans has gotten so vicious that a Twitter hashtag — #GOPvsGOPugliness — has become a thick virtual data file for tracking the intraparty insults. Moderates, and even some conservatives, are slamming Texas Sen. Ted Cruz, a tea party favorite, for ramping up grassroots expectations that the GOP will shut down the government if it can’t win concessions from the president to “defund” his signature health care law. “I didn’t go to Harvard or Princeton, but I can count,” Sen. Bob Corker (R-Tenn.) tweeted, subtly mocking Cruz’s Ivy League education. “The defunding box canyon is a tactic that will fail and weaken our position.” While it is well-timed for the White House to interrupt a bad slide, Obama’s singular focus on the budget battle is hardly a last-minute shift. Instead, it is a return to the narrative arc that the White House was working to build before the Syria crisis intervened. And it’s so important to the president’s strategy that White House officials didn’t consider postponing Monday’s rollout of the most partisan and high-stakes phase even when a shooter murdered a dozen people at Washington’s Navy Yard that morning. The basic storyline, well under way over the summer, was to have the president point to parts of his agenda, including reducing the costs of college and housing, designed to strengthen the middle class; use them to make the case that he not only saved the country from economic disaster but is fighting to bolster the nation’s finances on both the macro and household level; and then argue that Republicans’ desire to lock in the sequester and leverage a debt-ceiling increase for Obamacare cuts would reverse progress made. The president is on firm ground, White House officials say, because he stands with the public in believing that the government shouldn’t shut down and that the country should pay its bills.

#### No deal leads to economic decline

**Davidson, NPR’s Planet Money co-founder, 9-10-13**

(Adam, “Our Debt to Society”, http://www.nytimes.com/2013/09/15/magazine/our-debt-to-society.html?pagewanted=all&\_r=0, ldg)

If the debt ceiling isn’t lifted again this fall, some serious financial decisions will have to be made. Perhaps the government can skimp on its foreign aid or furlough all of NASA, but eventually the big-ticket items, like Social Security and Medicare, will have to be cut. At some point, the government won’t be able to pay interest on its bonds and will enter what’s known as sovereign default, the ultimate national financial disaster achieved by countries like Zimbabwe, Ecuador and Argentina (and now Greece). In the case of the United States, though, it won’t be an isolated national crisis. If the American government can’t stand behind the dollar, the world’s benchmark currency, then the global financial system will very likely enter a new era in which there is much less trade and much less economic growth. It would be, by most accounts, the largest self-imposed financial disaster in history. Nearly everyone involved predicts that someone will blink before this disaster occurs. Yet a small number of House Republicans (one political analyst told me it’s no more than 20) appear willing to see what happens if the debt ceiling isn’t raised — at least for a bit. This could be used as leverage to force Democrats to drastically cut government spending and eliminate President Obama’s signature health-care-reform plan. In fact, Representative Tom Price, a Georgia Republican, told me that the whole problem could be avoided if the president agreed to drastically cut spending and lower taxes. Still, it is hard to put this act of game theory into historic context. Plenty of countries — and some cities, like Detroit — have defaulted on their financial obligations, but only because their governments ran out of money to pay their bills. No wealthy country has ever voluntarily decided — in the middle of an economic recovery, no less — to default. And there’s certainly no record of that happening to the country that controls the global reserve currency. Like many, I assumed a self-imposed U.S. debt crisis might unfold like most involuntary ones. If the debt ceiling isn’t raised by X-Day, I figured, the world’s investors would begin to see America as an unstable investment and rush to sell their Treasury bonds. The U.S. government, desperate to hold on to investment, would then raise interest rates far higher, hurtling up rates on credit cards, student loans, mortgages and corporate borrowing — which would effectively put a clamp on all trade and spending. The U.S. economy would collapse far worse than anything we’ve seen in the past several years. Instead, Robert Auwaerter, head of bond investing for Vanguard, the world’s largest mutual-fund company, told me that the collapse might be more insidious. “You know what happens when the market gets upset?” he said. “There’s a flight to quality. Investors buy Treasury bonds. It’s a bit perverse.” In other words, if the U.S. comes within shouting distance of a default (which Auwaerter is confident won’t happen), the world’s investors — absent a safer alternative, given the recent fates of the euro and the yen — might actually buy even more Treasury bonds. Indeed, interest rates would fall and the bond markets would soar. While this possibility might not sound so bad, it’s really far more damaging than the apocalyptic one I imagined. Rather than resulting in a sudden crisis, failure to raise the debt ceiling would lead to a slow bleed. Scott Mather, head of the global portfolio at Pimco, the world’s largest private bond fund, explained that while governments and institutions might go on a U.S.-bond buying frenzy in the wake of a debt-ceiling panic, they would eventually recognize that the U.S. government was not going through an odd, temporary bit of insanity. They would eventually conclude that it had become permanently less reliable. Mather imagines institutional investors and governments turning to a basket of currencies, putting their savings in a mix of U.S., European, Canadian, Australian and Japanese bonds. Over the course of decades, the U.S. would lose its unique role in the global economy. The U.S. benefits enormously from its status as global reserve currency and safe haven. Our interest and mortgage rates are lower; companies are able to borrow money to finance their new products more cheaply. As a result, there is much more economic activity and more wealth in America than there would be otherwise. If that status erodes, the U.S. economy’s peaks will be lower and recessions deeper; future generations will have fewer job opportunities and suffer more when the economy falters. And, Mather points out, no other country would benefit from America’s diminished status. When you make the base risk-free asset more risky, the entire global economy becomes riskier and costlier.

#### Nuclear war

Kemp 2010

Geoffrey, Director of Regional Strategic Programs at The Nixon Center, served in the White House under Ronald Reagan, special assistant to the president for national security affairs and senior director for Near East and South Asian affairs on the National Security Council Staff, Former Director, Middle East Arms Control Project at the Carnegie Endowment for International Peace, 2010, The East Moves West: India, China, and Asia’s Growing Presence in the Middle East, pg. 233-4

The second scenario, called Mayhem and Chaos, is the opposite of the first scenario; everything that can go wrong does go wrong. The world economic situation weakens rather than strengthens, and India, China, and Japan suffer a major reduction in their growth rates, further weakening the global economy. As a result, energy demand falls and the price of fossil fuels plummets, leading to a financial crisis for the energy-producing states, which are forced to cut back dramatically on expansion programs and social welfare. That in turn leads to political unrest: and nurtures different radical groups, including, but not limited to, Islamic extremists. The internal stability of some countries is challenged, and there are more “failed states.” Most serious is the collapse of the democratic government in Pakistan and its takeover by Muslim extremists, who then take possession of a large number of nuclear weapons. The danger of war between India and Pakistan increases significantly. Iran, always worried about an extremist Pakistan, expands and weaponizes its nuclear program. That further enhances nuclear proliferation in the Middle East, with Saudi Arabia, Turkey, and Egypt joining Israel and Iran as nuclear states. Under these circumstances, the potential for nuclear terrorism increases, and the possibility of a nuclear terrorist attack in either the Western world or in the oil-producing states may lead to a further devastating collapse of the world economic market, with a tsunami-like impact on stability. In this scenario, major disruptions can be expected, with dire consequences for two-thirds of the planet’s population.

### 1NC – Alien Tort DA

**Alien TORT DA**

#### Ex ante judicial review necessitates rulings on international law grounds

Chehab 12 (Ahmad, Georgetown University Law Center, 3/30/12, “

Retrieving the Role of Accountability in the Targeted Killings Context: A Proposal for Judicial Review”, http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2031572)

Part I examines the current body of international humanitarian law that addresses the question of targeted assassinations. Part II in turn examines American domestic law with respect to targeted assassinations. Part III sets forth a proposed judicial review mechanism to challenge executive branch designations of “terrorist” eligibility for targeted assassinations. To be sure, employing force to prevent future harms can never be done in an optimal fashion. Errors are inevitable, for no military can choose the right target every time, nor can any military hit its target every time. With this basic recognition, I argue that an institutional review body could help assuage potential error rates while ensuring targeting remains with rule of law constraints. This section delineates two specific features of this judicial review body: First, it argues in favor of incorporating basic international law constraints into the adjudication process. On this understanding, in addition to imminence, the United States needs to account for the degree of expected harm, the probability of being attacked, the estimated collateral damage (including civilian life), the related requirement of military necessity (which in this context may preclude the possibility of safe arrest), the prohibitions against perfidy and treachery, and other pertinent norms of customary international and treaty law.

#### Even a single ruling causes a flood of future global ATS suits – ex-post ruling avoids this

Bates, 10 (John, United States District Judge for the US District Court for the District of Columbia, DC Circuit Court Decision, Civil Acton No. 10-1496, “Nasser Al-Aulaqui Vs Barack H. Obama et al: Memorandum Opinion”, <http://www.aclu.org/files/assets/2010-12-7-AulaqivObama-Decision.pdf>)

Plaintiff maintains that his alleged tort -- extrajudicial killing - - meets the high bar of Sosa, since there is a customary international law norm against state-sponsored extrajudicial killings, which has been "consistently recognized by U.S. courts" and " indeed codified in domestic law under the Torture Victim Protection Act." See Pl.'s Opp. a t 39. Plaintiff is 1 0 correct insofar as many U.S. courts have recognized a customary international law norm against past state-sponsored extrajudicial killings as the basis for an ATS claim. See, e.g ., Wiwa, 626 F Supp. 2d at 383 n.4; Mujica, 381 F . Supp. 2d at 1178-79; Kadic, 70 F .3d at 241-45; Forti v. Suarez-Mason, 672 F . Supp. 1531, 1542 (N.D. Cal. 1987), recons. granted in part on other grounds , 694 F. Supp. 707 (N.D . Cal. 1988). Significantly, however, plaintiff cites no case in which a court has ever recognized a "customary international law norm" against a threatened future extrajudicial killing, nor does he cite a sing lease in which a n alien has ever been permitted to rec over under the ATS for the extrajudicial killing of his U.S. citizen child. These two features of plaintiff's ATS claim -- that it is based on a threat of a future extrajudicial killing, not an actual extrajudicial killing , that is directed not to plaintiff or to his alien relative, but to his U.S. citizen son -- render plaintiff' s ATS claim fundamentally distinct from all extrajudicial killing claims that courts have previously held cognizable under the A TS. Even assuming that the threat at issue were directed to plaintiff (rather than to plaintiff' s U.S. citizen son), there is no basis for the assertion that the threat of a future state-sponsored extrajudicial killing -- as opposed to the commission of a past state- sponsored extrajudicial killing -- constitutes a tort in violation of the " law of nations." A threatened extrajudicial killing could possibly -- de pending on the precise nature of the threat -- for m the basis of a state tort law claim for assault, see R E S T . (S E C O N D ) O F T O R T S § 21 (1965) (explaining that an actor is subject to liability for assault if he acts "with the intent to cause a harmful or offensive contact, or a n imminent apprehension of such a contact," and the other person " is thereby put in such imminent apprehension" ), or f or intentional infliction of emotional distress, see id. § 46( 1) (stating that "[o]ne who by extreme and outrageous conduct intentionally or recklessly cause s sever e emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm" ). But common law tort claims for assault and intentional infliction of emotional distress do not rise to the level of inter national torts that are "sufficiently definite and accepted ' among civilized nations' to qualify for the A TS jurisdictional g rant." See Ali Shafi, 686 F . Supp. 2d at 29 (quoting Sosa, 542 U.S. at 732) . Plaintiff cites no treaty or international document that recognizes assault or intentional infliction of emotional distress as a violation of the "present-day law of nations," nor doe she cite any case in which a court ha s ever found such common law torts cognizable under the A TS. Indeed, there appear s to be only one case in which a court ha s even considered whether "fear " and "anguish" could form the basis of a n ATS claim. See Mujica, 381 F . Supp. 2d at 1183. There , the court expressly rejected the plaintiffs' contention that psychic, e motional harms were sufficient to state a claim under the ATS. As that court explained, " [i ]t would be impractical to recognize these allegations as constituting a n ATS claim because it would allow foreign plaintiffs to litigate claims in U.S. courts that bear a strong resemblance to intentional infliction of emotional distress." I d. Such a holding, the court noted, would make "broad swaths of conduct" actionable by aliens under the ATS, id., which is precisely what the Supreme Court in Sosa warned against. I n Sosa, the Supreme Court instructed federal courts to exercise " great caution" in recognizing new causes of action under the ATS as violations of the " present-day law of nations," and urged courts to consider " the practical consequences" of making such causes of action available to litigants worldwide . See Sosa, 542 U.S. at 728, 732-33. I f this Court were to conclude that alleged government threats -- no matter how plausible or severe the y may be -- constitute international torts committed in violation of the law of nations, federal courts could be flooded with ATS suits from persons a cross the g lobe who alleged that they were somehow place d in fear of danger as a result of contemplated government action. Surely, as interpreted in Sosa, the ATS was not intended to provide a federal forum for such speculative claims.

#### Excessive ATS litigation inflame relations and collapse the global economy

Hufbauer, ’03 (Gary, Reginald Jones Senior Fellow, formerly Marcus Wallenberg Professor of International Finance Diplomacy at Georgetown University, deputy director of the International Law Institute at Georgetown University, deputy assistant secretary for international trade and investment policy of the US Treasury, http://www.petersoninstitute.org/publications/newsreleases/newsrelease.cfm?id=94)

The Alien Tort Statute (ATS) of 1789, which allows foreign plaintiffs to use US courts to attack alleged wrongs occurring outside the United States, is becoming a major threat to world trade and investment. Existing and potential class action lawsuits under ATS could disrupt over 300,000 jobs in the United States and 2 million jobs in other countries, destroy over $300 billion in global trade and investment, and reduce world economic output by $70 billion. Moreover, the history of economic sanctions suggests that ATS cases would be unlikely to improve social conditions in targeted countries. Hence Congress needs to pass new legislation to clarify and limit the scope of the ATS. The ATS states: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." It was little used for nearly 200 years. Beginning in the 1980s, however, the ATS has been invoked in several class action lawsuits brought in US federal courts by foreign (alien) plaintiffs for alleged wrongs that occurred outside US territory. As of 2003, ATS plaintiffs have sued more than 50 multinational corporations doing business in developing countries, alleging more than $200 billion in actual and punitive damages. Awakening Monster: The Alien Tort Statute of 1789, by Gary Clyde Hufbauer and Nicholas K. Mitrokostas, foresees a nightmare scenario if Congress does not enact remedial legislation. While US circuit courts have yet to pass final judgment in a corporate case, firms doing business in countries that account for 5 billion people (including India and China) and half the world economy are potential targets. Within the next decade, 100,000 class action Chinese plaintiffs, organized by New York trial lawyers, could sue General Electric, Toyota, and a host of other blue-chip corporations in a US federal court for abetting China's denial of political rights, for observing China's restrictions on trade unions, and for impairing the Chinese environment. These plaintiffs might claim actual damages of $6 billion and punitive damages of $20 billion. Such blockbuster cases are already working their way through federal and state court systems. In another decade, ATS awards and settlements could rival asbestos litigation both in size and collateral damage (see box 4.1). After 20 years of expansive judicial rulings, federal district courts and two circuit courts have held that corporations may be held liable under the ATS: For violating treaty norms, even when the treaty in question was not ratified by the US Senate; For violating the "law of nations" as contemporaneously interpreted by the trial court; When either the corporation or its employees commit the violation; or When the corporation is found to aid and abet its host government or act under color of law. Judges in the Circuit Court for the District of Columbia, however, have held that the ATS confers jurisdiction only over violations recognized in 1789 plus those subsequently enumerated by Congress. The Justice Department has now put forward the same interpretation. This view may eventually prevail. For now, however, district courts are letting expansive ATS claims go to discovery and trial. Cases now in court (summarized in table A.1) allege a variety of wrongs. They range from "classic" violations of international law-slavery, war crimes, and torture—to contemporaneous offenses such as forcible displacement, religious persecution, environmental pollution, and pharmaceutical testing. The growing wave of litigation threatens to turn US federal courts into agents of judicial imperialism. This development carries several hazards: US court decisions will conflict with jurisdictional claims of other states, particularly when plaintiffs and defendants are both foreign; They will inflame relations with foreign states that are home to multinational firms hit with ATS suits; ATS class action awards will create another attorney-driven enrichment machine; and Court decisions will interfere with the separation of powers: the executive branch is responsible for US foreign affairs under the Constitution. Many developing countries are potential targets of ATS litigation because firms conducting trade with, or investing in, those countries will be sued. Important countries that have already been targets are profiled in table A4.4. The "at risk" category includes virtually all countries with unsatisfactory records—measured against contemporary standards—for political rights, civil liberties, economic freedom, and corruption. These nations have a combined population of about 5 billion people (including India and China) and a combined GDP of around $18 trillion. Compared with the United States, the countries at risk are mainly poor. In 2001, two-way US merchandise trade with countries at risk was about $630 billion and US foreign direct investment (FDI) was about $220 billion. ATS litigation will diminish this trade and investment. In addition, ATS litigation will cause some foreign firms to withdraw their investments from the United States (since investment here makes them a litigation target). Interruption of trade and investment will adversely affect US firms and their workers. Collateral damage to the US economy could be serious (see box 5.1): potential dislocation of 180,000 export-related jobs and as many as 130,000 jobs linked to inward FDI. Collateral damage to the economies of foreign target countries could be even more severe (see box 5.2): they could lose $60 billion of US merchandise trade, and $270 billion of world FDI, disrupting 1.9 million jobs and costing as much as $70 billion annually in lost GDP.

#### Global nuclear war

Miller, Pres—International Society for Indiv. Liberty, 1998 ([www.isil.org/resources/lit/free-trade-protectionism.html](http://www.isil.org/resources/lit/free-trade-protectionism.html))

WHEN GOODS DON'T CROSS BORDERS, ARMIES OFTEN DO

History is not lacking in examples of cold trade wars escalating into hot shooting wars: Europe suffered from almost non-stop wars during the 17th and 18th centuries, when restrictive trade policy (mercantilism) was the rule; rival governments fought each other to expand their empires and to exploit captive markets. British tariffs provoked the American colonists to revolution, and later the Northern-dominated US government imposed restrictions on Southern cotton exports - a major factor leading to the American Civil War. In the late 19th Century, after a half century of general free trade (which brought a half-century of peace), short-sighted politicians throughout Europe again began erecting trade barriers. Hostilities built up until they eventually exploded into World War I. In 1930, facing only a mild recession, US President Hoover ignored warning pleas in a petition by 1028 prominent economists and signed the notorious Smoot-Hawley Act, which raised some tariffs to 100% levels. Within a year, over 25 other governments had retaliated by passing similar laws. The result? World trade came to a grinding halt, and the entire world was plunged into the "Great Depression" for the rest of the decade. The depression in turn led to World War II.THE #1 DANGER TO WORLD PEACE The world enjoyed its greatest economic growth during the relatively free trade period of 1945-1970, a period that also saw no major wars. Yet we again see trade barriers being raised around the world by short-sighted politicians. Will the world again end up in a shooting war as a result of these economically-deranged policies? Can we afford to allow this to happen in the **nuclear age?** "What generates war is the economic philosophy of nationalism*: embargoes, trade and foreign exchange controls, monetary devaluation, etc. The philosophy of* protectionism is a philosophy of war."

### 1NC – Non-Violence K

**NONVIOLENCE K**

The plans attempt to use law to create a legitimate form of violence normalizes it

Gregory 11 (Derek, Ph.D., Prof Department of Geography, University of British Columbia, “The everywhere war,” http://www.lsa.umich.edu/UMICH/eihs/Home/Events/gregory\_everywhere\_war.pdf)

I have argued elsewhere that the American way of war has changed since 9/11, though not uniquely because of it (Gregory 2010), and there are crucial continuities as well as differences between the Bush and Obama administrations: ‘The man who many considered the peace candidate in the last election was transformed into the war president’ (Carter 2011, 4). This requires a careful telling, and I do not mean to reduce the three studies I have sketched here to a single interpretative narrative. Yet there are connections between them as well as contradictions, and I have indicated some of these en route. Others have noted them too. Pakistan’s President has remarked that the war in Afghanistan has grave consequences for his country ‘just as the Mexican drug war on US borders makes a difference to American society’, and one scholar has suggested that the United States draws legal authority to conduct military operations across the border from Afghanistan (including the killing of bin Laden, codenamed ‘Geronimo’) from its history of extra-territorial operations against non-state actors in Mexico in the 1870s and 1880s (including the capture of the real Geronimo) (Margolies 2011). Whatever one makes of this, one of the most persistent threads connecting all three cases is the question of legality, which runs like a red ribbon throughout the prosecution of late modern war. On one side, commentators claim that new wars in the global South are ‘non-political’, intrinsically predatory criminal enterprises, that cartels are morphing into insurgencies, and that the origins of cyber warfare lie in the dark networks of cyber crime; on the other side, the United States places a premium on the rule and role of law in its new counterinsurgency doctrine, accentuates the involvement of legal advisers in targeting decisions by the USAF and the CIA, and even as it refuses to conﬁrm its UAV strikes in Pakistan provides arguments for their legality. The invocation of legality works to marginalise ethics and politics by making available a seemingly neutral, objective language: disagreement and debate then become purely technical issues that involve matters of opinion, certainly, but not values. The appeal to legality – and to the quasi-judicial process it invokes – thus helps to authorise a widespread and widening militarisation of our world. While I think it is both premature and excessive to see this as a transformation from governmentality to ‘militariality’ (Marzec 2009), I do believe that Foucault’s (2003) injunction – ‘Society must be defended’ – has been transformed into an unconditional imperative since 9/11 and that this involves an intensifying triangulation of the planet by legality, security and war. We might remember that biopolitics, one of the central projects of late modern war, requires a legal armature to authorise its interventions, and that necropolitics is not always outside the law. This triangulation has become such a common place and provides such an established base-line for contemporary politics that I am reminded of an interview with Zizek soon after 9/11 – which for him marked the last war of the twentieth century – when he predicted that the ‘new wars’ of the twenty-ﬁrst century would be distinguished by a radical uncertainty: ‘it will not even be clear whether it is a war or not’ (Deichmann et al. 2002).

#### THIS DEBATE is about ethics-vote negative to condemn the killing of others in favor of being open to them

Darrell J. Fasching-prof religious studies, University of South Florida-93, Professor of Religious Studies of the University of South Florida in Tampa, holds a joint appointment in Special Education, has served as Associate Dean for Faculty Development in the College of Arts and Sciences and as Chair of the Department of Religious Studies, “The Ethical Challenge of Auschwitz and Hiroshima: Apocalypse or Utopia?” p. 1-7

Now the whole earth had one language and the same words. And as they migrated from the east, they came upon a plain in the land of Shinar and settled there. And they said to one another, "Come, let us make bricks, and burn them thoroughly." And they had brick for stone, and bitumen for mortar. Then they said, "Come, let us build ourselves a city, and a tower with its top in the heavens, and let us make a name for ourselves; otherwise we shall be scattered abroad upon the face of the whole earth." The Lord came down to see the city and the tower which mortals had built. And the Lord said, ''Look, they are one people, and they have all one language; and this is only the beginning of what they will do; nothing that they propose to do will now be impossible for them. Come, let us go down, and confuse their language there, so that they will not understand one another's speech." So the Lord scattered them abroad from there over the face of all the earth, and they left off building the city. Therefore it was called Babel, because there the Lord confused the language of all the earth; and from there the Lord scattered them abroad over the face of all the earth. Genesis 11:19 1 The story of Babel is a tale for our times. It is a parable through which we might come to understand our situation. The citizens of Babel, it seems, sought to build a perfect city, a utopia whose technological prowess would make their name known throughout the earth. These citizens, we are told, sought to seize control of transcendence through the ideology of a single language and the common technological project of building a tower to heaven. God, however, upset their efforts by confusing their tongues, so that they could not understand each other. They became strangers to one another and so could not complete their task. They had to abandon all "final solutions" and settle for an unfinished city. The popular interpretation of this story is that the confusion of tongues was a curse and a punishment for the Page 2 human sin of pride. But I am convinced that this is a serious misunderstanding of its meaning. For this story must be interpreted within the tradition of stories that make up the canon of the Tanakh (Old Testament), where the command to welcome the stranger appears more often than any other commandment. 2 In the light of that emphasis, I would suggest that the point of the story is that human beings misunderstood where transcendence lay, and God simply redirected them to the true experience of transcendence, which can occur only when there are strangers to be welcomed into our lives. The moral of this story, as I read it, is that utopian transcendence is to be found not in a "finished world" of technological and ideological conformity but in an "unfinished world" of diversity, a world that offers us the opportunity to welcome the stranger. Indeed, our attempts to define a world through technological prowess and ideological uniformity have led us, more than once, to the brink of MAD-ness (mutually assured destruction) the brink of an apocalyptic nuclear annihilation. Our hope lies in seeing the utopian possibilities of a world of diversity the latent possibilities that can be actualized through an ethic of welcoming the stranger. This book follows upon and expands the argument of my previous book, Narrative Theology After Auschwitz: From Alienation to Ethics (Fortress, 1992). It is intended to be an experiment in theology of culture as an approach to comparative religious ethics through narrative. In Narrative Theology After Auschwitz I attempted to restructure the Christian narrative tradition in the light of Auschwitz through a dialogue with that strand of post- Holocaust Jewish theology and ethics that draws on the Jewish narrative tradition of chutzpah.3 That volume culminated in an ethic of personal and professional responsibility proposed as a strategy for restraining the human capacity for the demonic. This volume, The Ethical Challenge of Auschwitz and Hiroshima: Apocalypse or Utopia? continues the narrative ethics approach but extends the ethical focus of the discussion to encompass religion, technology, and public policy in a cross-cultural perspective. In this work, I attempt to do what narrative ethicists have said cannot be done; namely, construct a cross-cultural ethic of human dignity, human rights, and human liberation that is rooted in and respects the diversity of narrative traditions. Moreover, I have tried to do this without succumbing to either ethical relativism or ethical absolutism, even as I seek to directly confront the dominant narrative of our technological civilization. That narrative, I am convinced, is the Janus-faced myth of "Apocalypse or Utopia." This mythic narrative tends to render us Page 3 ethically impotent, for, mesmerized by the power of technology, we become trapped in the manic-depressive rhythms of a sacral awe; that is, of fascination and dread. When we are caught up in the utopian euphoria created by the marvelous promises of technology we do not wish to change anything. And when, in our darker moments, we fear that this same technology is out of control and leading us to our own apocalyptic self-destruction, we feel overwhelmed and unable to do anything. The paradox is that the very strength of our literal utopian euphoria sends us careening toward some literal apocalyptic "final solution." In Narrative Theology After Auschwitz I argued that the demonic narrative theme that dominated Auschwitz was "killing in order to heal." In this book I argue that this theme became globalized when it was incorporated into the Janus-faced technological mythos that emerged out of Hiroshima. This mythic narrative underlies and structures much of public policy in our nuclear age. In response to this demonic narrative, I propose a cross-cultural coalition for an ethic of human dignity, human rights, and human liberation at the intersection of those holy communities whose narrative traditions emphasize the importance of welcoming the stranger. My goal is to construct a bridge not only over the abyss between religions, East and West, but also between religious and secular ethics. The total project, then, is about religion, ethics, and public policy after Auschwitz and Hiroshima. It is about (a) rethinking the meaning of civilization and public order in an emerging pluralistic world civilization as we approach the end of a millenniumthe year 2000 C.E.; (b) the need for a cross-cultural ethic in a world wracked by ethical relativism and ideological conflict; and (c) sacred and secular public narratives in a technological civilization and the appropriate role for religion in the shaping of public values in a "secular" world. The perspective from which this book is written is that of theology. However, it is not "Christian" theology, although it is most certainly theology written by a Christian. It is not "confessional theology," but theology understood as an academic discipline within the humanities, whose purpose is the illumination of the human experience (individual and communal) of transcendence as self-transcendence. Needless to say, the same subject matter would be treated differently had this project been written by a Buddhist or some other more "secular" a-theist, 4 or by a Hindu, Jew, or Muslim rather than a Christian. And yet I intend it to be a theology that has something to say not only to Christians but also to Jews, Buddhists, and otherseven to ''secular" humanistic a-theists. What I am engaged in is "theology of culture," a discipline first Page 4 introduced by Paul Tillich in his 1920 essay, "On the Idea of a Theology of Culture," with which he inaugurated his career. 5 Theology of culture is an appropriate discipline for the "secular" university in an emerging world civilization. For, as Tillich insists, the theologian of culture is no ''confessional theologian" but rather a "free agent" who takes as his or her task the identification and elucidation of the relationship between religion and culture in all its diversity. Theology of culture could equally be called "philosophy of religion," provided that discipline were able to break free of its nearly exclusive bias as a tradition of commentary on the logic of Western theism rather than on religion as a transcultural human phenomenon. Theology of culture, as I understand it, exists at the intersection of philosophy and the history of religions, as a form of comparative religious ethics. It separates itself from some forms of comparative religious ethics in that it goes beyond description to prescription. Its task is nothing less than a total critique of culture. Doing ethics requires not just philosophical reflection but also historical, sociological, and psychological reflection. Tillich's proposal for a theology of culture draws these diverse elements into a unified whole that replaces traditional ethics with the new and uniquely modern task of the critique of culture. The critique of culture "as a whole" presents a unique problem. For if we live, move, and have our being within culturehow is it possible to transcend it so as to critique it? From what vantage point can we "stand outside it" so to speak? Such a critique presupposes the identification of values that, in some sense, transcend the cultures in which they are embodied. I believe such values can be identified. However, they do not exist in a vacuum. They are embodied in particular types of narrative carried by specific types of communal traditions that, in some sense, stand apart from the cultures in which they find themselves. The ultimate goal of theology of culture is to identify those religious experiences, forms of religious community and narrative traditions that have transcended the historical epoch and cultural milieu of their origin to influence other times and places. For these narrative traditions will have proven themselves culturally transcendent allies and therefore may offer possible norms for the critique of both religions and cultures. Although I attempt to identify the positive and negative value of several types of religious experience in this book, I do not pretend to have written it from some neutral Archimedean vantage point. As Tillich insisted, no theologian of culture can escape his or her own religious and cultural history. Indeed, every scholar in the social sciences and humanities is a "participant observer" in the human condition Page 5 being studied. There is no neutral vantage point from which to begin. As Alasdair MacIntyre and Stanley Hauerwas have both argued, no scholar lives in a storyless world, not even the Enlightenment rationalist who pretends to. One must acknowledge one's starting position and work outward from there. This is as true for the psychologist or anthropologist as it is for the political scientist, philosopher, and theologian. If we wish to speak of (or to) other storied worlds we must find a way to stretch our own narrative worlds to make a place for their otherness. That is in fact what I shall attempt to do. My own starting point is that of an alienated Christian, alienated from my own narrative traditions by my encounter with the Holocaust and the history of anti-Judaism that paved the way to it and by the processes of secularization in a technical civilization that led not only to Auschwitz but also Hiroshima. Confessionally, my stand in Christianity, like Tillich's, is that of a Lutheran. But like Tillich, I seek to be an objective scholar, making philosophically fair statements and evaluations about a wide diversity of religious and cultural phenomenon in order to construct a social ethic that can sustain a total critique of modern culture. Nevertheless, I am only too aware how vulnerable are the arguments and methodologies that I use in this book. Many specialists will no doubt have serious questions about my grasp of materials that touch upon their areas. I too have such questions. But I see no point in playing it safe, I mean to provoke discussion, and I hope the dialogue that follows shall enrich and correct my perspective. Moreover, I confess my own perspective and its limitations at the outset because I believe that after Auschwitz and Hiroshima it is dangerous to write in the third person, as if no one in particular were having these thoughts. In our world we each need to take responsibility for our thoughts and their social consequences. I reflect further on these matters in the Epilogue, and some may find it helpful to read that concluding essay immediately after reading this Prologue to understand more clearly what I am attempting to do in the body of the text itself. The best way to describe the "style" of the theology of culture proposed in these books is to suggest that it is a "decentered" or "alienated theology." Alienated theology is the opposite of apologetic theology. Apologetic theology typically seeks to defend the "truth" and ''superiority" of one's own tradition against the "false," "inferior," and "alien" views of other traditions. Alienated theology, by contrast, is theology done "as if" one were a stranger to one's own narrative traditions, seeing and critiquing one's own traditions from Page 6 the vantage point of the other's narrative traditions. It is my conviction that alienated theology is the appropriate mode for theology in an emerging world civilizationa civilization tottering in the balance between apocalypse and utopia. There are two ways to enter world history, according to the contemporary author John Dunne: you can be dragged in by way of world war or you can walk in by way of mutual understanding. By the first path, global civilization emerges as a totalitarian project of dominance that risks escalating into a nuclear apocalypse. By the second path, we prevent the first, creating global civilization through an expansion of our understanding of what it means to be human. This occurs when we pass over to an other's religion and culture and come back with new insight into our own. Gandhi is an example, passing over to the Sermon on the Mount and coming back to the Hindu Bhagavad Gita to gain new insight into it as a scripture of nonviolence. Gandhi never seriously considered becoming a Christian but his Hinduism was radically altered by his encounter with Christianity. One could say the same (reversing the directions) for Martin Luther King Jr., who was deeply influenced by Gandhi's understanding of nonviolent resistance in the Gita. When we pass over (whether through travel, friendship, or disciplined study and imagination) we become "strangers in a strange land" as well as strangers to ourselves, seeing ourselves through the eyes of another. Assuming the perspective of a stranger is an occasion for insight and the sharing of insight. Such crosscultural interactions build bridges of understanding and action between persons and cultures that make cooperation possible and conquest unnecessary. "Passing over" short circuits apocalyptic confrontation and inaugurates utopian new beginningsnew beginnings for the "post-modern'' world of the coming third millennium. Gandhi and King are symbols of a possible style for a postmodern alienated theology. To be an alien is to be a stranger. To be alienated is to be a stranger to oneself. We live in a world of ideological conflict in which far too many individuals (whether theists or a-theists) practice a "centered theology" in which they are too sure of who they are and what they must do. Such a world has far too many answers and not nearly enough questions and selfquestioning. A world divided by its answers is headed for an inevitable apocalyptic destiny. However, when we are willing to become strangers to ourselves (or when we unwillingly become so), new possibilities open up where before everything was closed and hopeless. At the heart of my position is the conviction that the kairos of our time calls forth the badly neglected Page 7 ethic of "welcoming the stranger" that underlies the biblical tradition and analogously "welcoming the outcast" that underlies the Buddhist tradition. This care for the stranger and the outcast, I shall argue, provides the critical norm for identifying authentic transcendence as self-transcendence. Centered theologies, whether sacred or secular, theist or a-theist, are ethnocentric theologies that can tolerate the alien or other, if at all, only as a potential candidate for conversion to sameness. Centered theologies are exercises in narcissism that inevitably lead down apocalyptic paths like those that led to Auschwitz and Hiroshima. Why? Because such theologies, whether sacred or "secular," cannot permit there to be others in the world whose way of being might, by sheer contrast, cause self-doubt and self-questioning. When as a student I read Paul Tillich, I found it hard to believe him when he said that the questions were more important than the answers. I was so taken with his answers that I was sure he was just trying to be modest. What really mattered were the answers. Since then, I have come to realize that answers always seem more important and more certain to those who have come by them without wrestling with the questions. I know now that Tillich was quite serious and quite rightthe questions are indeed more important. I have come to find a fullness in the doubts and questions of my life, which I once thought could be found only in the answers. After Auschwitz and Hiroshima, I distrust all final answersall final solutions. Mercifully, doubts and questions have come to be so fulfilling that I find myself suspicious of answers, not because they are necessarily false or irrelevant, but because even when relevant and true they are, and can be, only partial. It is doubt and questioning that always lures me on to broader horizons and deeper insights through an openness to the infinite that leaves me contentedly discontent. Alienated theology understands doubt and the questions that arise from it as our most fundamental experience of the infinite. For, our unending questions keep us open to the infinite, continually inviting us to transcend our present horizon of understanding. In a like manner, the presence of the stranger continuously calls us into question and invites us to transcend the present horizon of the egocentric and ethnocentric answers that structure our personal and cultural identities. An alienated theology understands that only a faith which requires one to welcome the alien or stranger is truly a utopian faith capable of transforming us into "new beings" who are capable of creating a new world of pluralistic human interdependence.

#### Nonviolence is the only political act—the aff is worse than the conservative status quo they critique because they actively empower it—try or die for an ethics of equality

May 7 (Todd May is Professor of Philosophy at Clemson University. He is the author of seven books of philosophy, most recently Gilles Deleuze: An Introduction (Cambridge, 2005) and The Philosophy of Foucault (Acumen, 2006), “Jacques Rancière and the Ethics of Equality,” Project Muse)

In political action, the tapestry of this weaving together of cognitive and affective elements around the presupposition of equality has a name, although that name is rarely reflected upon. It is solidarity. Political solidarity is nothing other than the operation of the presupposition of equality internal to the collective subject of political action. It arises in the ethical character of that collective subject, a subject that itself arises only on the basis of its action. When one joins a picket line, or speaks publicly about the oppression of the Palestinians or the Tibetans or the Chechnyans, or attends a meeting whose goal is to organize around issues of fair housing, or brings one's bicycle to a ride with Critical Mass, one is not—if one is engaged in what Rancière calls politics—doing so from a position above or outside those alongside whom one struggles. Rather, one joins the creation of a political subject (which does not mean sacrificing one's own being to it). One acts, in concert with others, on the presupposition of the equality of any and every speaking being. And here is where the justificatory character of the ethics of political action lies. It cannot lie, as we have seen, in an ethical framework that possesses an ultimate foundation. It lies instead in a principle—the presupposition of equality—that can ground and justify political action only to the extent to which it is accepted by those alongside whom and [End Page 33] against whom one struggles. It is, in that sense, an optional ethical principle. But, as we have also seen, this does not mean that it is an arbitrary one. In our world, the presupposition of equality is embedded deep within the ethical framework of most societies. Even when it is honored in the breach, it remains honored. Political action consists in narrowing the breach. There remain two questions to ask about this ethics. The first one is interpretive and can be answered quickly: What is the relationship of this ethics to a vision of contemporary anarchism? The second is normative, and can only be responded to, at least at this moment, with a theoretical gesture: What, if any, implications for the specifics of political action does this ethical framework have? The interpretive question concerns the relation of the ethics of Rancière's politics to anarchism. I hope that the bond between the two will be obvious to those who have either studied or acted within the framework of anarchism. Anarchism's rejection of an avant-garde politics, its concern with the process of political action, its sensitivity to various forms of domination both in society at large and in political communities themselves, and its orientation toward radical equality, are all accounted for in the ethics and politics of the presupposition of equality. What Rancière's work does politically and implies ethically is of a piece with the deepest concerns of much of contemporary anarchism. Moreover, he offers a coherent way to frame those concerns and to bring them forward theoretically. Unlike traditional Marxism, anarchism, in its concern for equality, has often been reluctant to engage in theoretical reflection. If what has been said here is correct, that reluctance is unwarranted. There is much to be understood in politics, and many who can contribute to that understanding. Among what is to be understood is the second question alluded to above: what, if anything, do the ethics of political action imply for the character of political action itself? I would suggest that the pre-supposition of equality among those who act cannot remain limited to those alongside whom one acts. It must also apply to one's adversaries. If those who have no part are to see themselves as equal to those who have a part, then they must also see those who have a part as equal to them. This has implications for political action. I would suggest that such a presupposition of equality among all parties must orient political action toward non-violent means. One must, insofar as possible, refrain from treating those against whom one struggles as beneath consideration, as open game, or as what Kant would call solely a means to one's own ends. This requires political action to be more than just a struggle for [End Page 34] suppression of the adversary, even where the adversary engages in cynical domination. It must be creative in its expression of the presupposition of equality. Nonviolence in politics is often confused with passivity. This is not the place to explain the nature and possibilities of nonviolent action,7 however it must be understood that nonviolence often lies at the opposite pole from political passivity, further away from it than violent resistance. Violent resistance remains in many cases the norm. One is dominated, so one dominates; one is oppressed, so one oppresses. In that sense, violence is always the easy political option. It reverses the power in a relationship. What nonviolence can achieve is something else: not a reversal of power, but an effacing of the terms in which a context of power has been conceived. In the framework of a political orientation whose task is to declassify, nonviolent action carries with it more radical possibilities for declassification than the simple inversion that is the standard consequence of violent resistance. If this line of thinking is right, or even if it is wrong in a fruitful way, then the perspective that Rancière has opened for us is not so much a framework within which we can fit our political thinking as it is a door through which we must walk in order better to reflect upon that thinking. The presupposition of equality opens political thought to new vistas—vistas that, given the history of the last century, should appear more attractive to us now than they might once have done. In this sense, anarchism lies before us rather than behind us, as a political task to be thought and engaged rather than as a historical footnote to be buried alongside other challenges to the pervasive and multifarious dominations of our world.

### 1NC Advantage 1

**DRONE PROLIF**

#### Alternatives to drones are worse

Byman 13 (Daniel L. Byman Research Director, Saban Center for Middle East Policy¶ Senior Fellow, Foreign Policy, Saban Center for Middle East Policy “Why Drones Work: The Case for Washington's Weapon of Choice,” http://www.brookings.edu/research/articles/2013/06/17-drones-obama-weapon-choice-us-counterterrorism-byman)

But even the most unfavorable estimates of drone casualties reveal that the ratio of civilian to militant deaths—about one to three, according to the Bureau of Investigative Journalism—is lower than it would be for other forms of strikes. Bombings by F-16s or Tomahawk cruise missile salvos, for example, pack a much more deadly payload. In December 2009, the United States fired Tomahawks at a suspected terrorist training camp in Yemen, and over 30 people were killed in the blast, most of them women and children. At the time, the Yemeni regime refused to allow the use of drones, but had this not been the case, a drone’s real-time surveillance would probably have spotted the large number of women and children, and the attack would have been aborted. Even if the strike had gone forward for some reason, the drone’s far smaller warhead would have killed fewer innocents. Civilian deaths are tragic and pose political problems. But the data show that drones are more discriminate than other types of force.¶ FOREIGN FRIENDS¶ It is also telling that drones have earned the backing, albeit secret, of foreign governments. In order to maintain popular support, politicians in Pakistan and Yemen routinely rail against the U.S. drone campaign. In reality, however, the governments of both countries have supported it. During the Bush and Obama administrations, Pakistan has even periodically hosted U.S. drone facilities and has been told about strikes in advance. Pervez Musharraf, president of Pakistan until 2008, was not worried about the drone program’s negative publicity: “In Pakistan, things fall out of the sky all the time,” he reportedly remarked. Yemen’s former president, Ali Abdullah Saleh, also at times allowed drone strikes in his country and even covered for them by telling the public that they were conducted by the Yemeni air force. When the United States’ involvement was leaked in 2002, however, relations between the two countries soured. Still, Saleh later let the drone program resume in Yemen, and his replacement, Abdu Rabbu Mansour Hadi, has publicly praised drones, saying that “they pinpoint the target and have zero margin of error, if you know what target you’re aiming at.”¶ As officials in both Pakistan and Yemen realize, U.S. drone strikes help their governments by targeting common enemies. A memo released by the antisecrecy website WikiLeaks revealed that Pakistan’s army chief, Ashfaq Parvez kayani, privately asked U.S. military leaders in 2008 for “continuous Predator coverage” over antigovernment militants, and the journalist Mark Mazzetti has reported that the United States has conducted “goodwill kills” against Pakistani militants who tshreatened Pakistan far more than the United States. Thus, in private, Pakistan supports the drone program. As then Prime Minister Yousaf Raza Gilani told Anne Patterson, then the U.S. ambassador to Pakistan, in 2008, “We’ll protest [against the drone program] in the National Assembly and then ignore it.”¶ Still, Pakistan is reluctant to make its approval public. First of all, the country’s inability to fight terrorists on its own soil is a humiliation for Pakistan’s politically powerful armed forces and intelligence service. In addition, although drones kill some of the government’s enemies, they have also targeted pro-government groups that are hostile to the United States, such as the Haqqani network and the Taliban, which Pakistan has supported since its birth in the early 1990s. Even more important, the Pakistani public is vehemently opposed to U.S. drone strikes.¶ A 2012 poll found that 74 percent of Pakistanis viewed the United States as their enemy, likely in part because of the ongoing drone campaign. Similarly, in Yemen, as the scholar Gregory Johnsen has pointed out, drone strikes can win the enmity of entire tribes. This has led critics to argue that the drone program is shortsighted: that it kills today’s enemies but creates tomorrow’s in the process.¶ Such concerns are valid, but the level of local anger over drones is often lower than commonly portrayed. Many surveys of public opinion related to drones are conducted by anti-drone organizations, which results in biased samples. Other surveys exclude those who are unaware of the drone program and thus overstate the importance of those who are angered by it. In addition, many Pakistanis do not realize that the drones often target the very militants who are wreaking havoc on their country. And for most Pakistanis and Yemenis, the most important problems they struggle with are corruption, weak representative institutions, and poor economic growth; the drone program is only a small part of their overall anger, most of which is directed toward their own governments. A poll conducted in 2007, well before the drone campaign had expanded to its current scope, found that only 15 percent of Pakistanis had a favorable opinion of the United States. It is hard to imagine that alternatives to drone strikes, such as seal team raids or cruise missile strikes, would make the United States more popular.

#### Deterrence still checks – diplomacy and political cost

Singh 12 (Joseph Singh is a researcher at the Center for a New American Security. “Betting Against a Drone Arms Race,” http://nation.time.com/2012/08/13/betting-against-a-drone-arms-race/)

Bold predictions of a coming drones arms race are all the rage since the uptake in their deployment under the Obama Administration. Noel Sharkey, for example, argues in an August 3 op-ed for the Guardian that rapidly developing drone technology — coupled with minimal military risk — portends an era in which states will become increasingly aggressive in their use of drones. As drones develop the ability to fly completely autonomously, Sharkey predicts a proliferation of their use that will set dangerous precedents, seemingly inviting hostile nations to use drones against one another. Yet, the narrow applications of current drone technology coupled with what we know about state behavior in the international system lend no credence to these ominous warnings. Indeed, critics seem overly-focused on the domestic implications of drone use. In a June piece for the Financial Times, Michael Ignatieff writes that “virtual technologies make it easier for democracies to wage war because they eliminate the risk of blood sacrifice that once forced democratic peoples to be prudent.” Significant public support for the Obama Administration’s increasing deployment of drones would also seem to legitimate this claim. Yet, there remain equally serious diplomatic and political costs that emanate from beyond a fickle electorate, which will prevent the likes of the increased drone aggression predicted by both Ignatieff and Sharkey. Most recently, the serious diplomatic scuffle instigated by Syria’s downing a Turkish reconnaissance plane in June illustrated the very serious risks of operating any aircraft in foreign territory. States launching drones must still weigh the diplomatic and political costs of their actions, which make the calculation surrounding their use no fundamentally different to any other aerial engagement. This recent bout also illustrated a salient point regarding drone technology: most states maintain at least minimal air defenses that can quickly detect and take down drones, as the U.S. discovered when it employed drones at the onset of the Iraq invasion, while Saddam Hussein’s surface-to-air missiles were still active. What the U.S. also learned, however, was that drones constitute an effective military tool in an extremely narrow strategic context. They are well-suited either in direct support of a broader military campaign, or to conduct targeted killing operations against a technologically unsophisticated enemy. In a nutshell, then, the very contexts in which we have seen drones deployed. Northern Pakistan, along with a few other regions in the world, remain conducive to drone usage given a lack of air defenses, poor media coverage, and difficulties in accessing the region. Non-state actors, on the other hand, have even more reasons to steer clear of drones: – First, they are wildly expensive. At $15 million, the average weaponized drone is less costly than an F-16 fighter jet, yet much pricier than the significantly cheaper, yet equally damaging options terrorist groups could pursue. – Those alternatives would also be relatively more difficult to trace back to an organization than an unmanned aerial vehicle, with all the technical and logistical planning its operation would pose. – Weaponized drones are not easily deployable. Most require runways in order to be launched, which means that any non-state actor would likely require state sponsorship to operate a drone. Such sponsorship is unlikely given the political and diplomatic consequences the sponsoring state would certainly face. – Finally, drones require an extensive team of on-the-ground experts to ensure their successful operation. According to the U.S. Air Force, 168 individuals are needed to operate a Predator drone, including a pilot, maintenance personnel and surveillance analysts. In short, the doomsday drone scenario Ignatieff and Sharkey predict results from an excessive focus on rapidly-evolving military technology. Instead, we must return to what we know about state behavior in an anarchistic international order. Nations will confront the same principles of deterrence, for example, when deciding to launch a targeted killing operation regardless of whether they conduct it through a drone or a covert amphibious assault team. Drones may make waging war more domestically palatable, but they don’t change the very serious risks of retaliation for an attacking state. Any state otherwise deterred from using force abroad will not significantly increase its power projection on account of acquiring drones. What’s more, the very states whose use of drones could threaten U.S. security – countries like China – are not democratic, which means that the possible political ramifications of the low risk of casualties resulting from drone use are irrelevant. For all their military benefits, putting drones into play requires an ability to meet the political and security risks associated with their use. Despite these realities, there remain a host of defensible arguments one could employ to discredit the Obama drone strategy. The legal justification for targeted killings in areas not internationally recognized as war zones is uncertain at best. Further, the short-term gains yielded by targeted killing operations in Pakistan, Somalia and Yemen, while debilitating to Al Qaeda leadership in the short-term, may serve to destroy already tenacious bilateral relations in the region and radicalize local populations. Yet, the past decade’s experience with drones bears no evidence of impending instability in the global strategic landscape. Conflict may not be any less likely in the era of drones, but the nature of 21st Century warfare remains fundamentally unaltered despite their arrival in large numbers.

#### No drone war – tech

Boyle 12 (Ashley, is an Adjunct Junior Fellow at the American Security Project, “The US and its UAVs: Addressing Legality and Overblown Scenarios,” http://americansecurityproject.org/blog/2012/the-us-and-its-uavs-addressing-legality-and-overblown-scenarios/)

While there is no question that the US has used drones, it is hardly alone in wielding the technology. Approximately fifty nations possess and use drones. However, Wikipedia informs us that of these nations, only twelve have lethal drones of which only three nations – China, Iran, and Russia – may be of concern. Possessing the technology is only one part of the picture. Nations must also have the capabilities to maintain and operate these aircraft, as well as an intelligence network that informs their surveillance or strike activities. The supporting systems required to operate drones is greatly underestimated, and it is difficult to see China, Iran, or Russia having the resources or desire to launch expansive drone programs in the short- to mid-term. While the long-term picture always requires discussion, alarmist messages about impending drone wars are just that: alarming and unfounded.

#### No Great power war

Lewis 11 (Michael W. Lewis teaches international law and the law of war at Ohio Northern University School of Law. He is a former Navy fighter pilot and is the coauthor of "The War on Terror and the Laws of War: A Military Perspective." “Unfounded drone fears,” http://articles.latimes.com/2011/oct/17/opinion/la-oe--lewis-drones-20111017)

Almost since the United States began using the unmanned aerial vehicles known as drones, their use has drawn criticism. The latest criticism, which has received considerable attention in the wake of the drone strike on Anwar Awlaki, is that America's use of drones has sparked a new international arms race. While it is true that some other nations have begun developing their own unmanned aerial vehicles, the extent of the alarm is unjustified. Much of it rests on myths that are easily dispelled. Myth 1: Drones will be a threat to the United States in the hands of other nations. Drones are surveillance and counter-terrorism tools; they are not effective weapons of conventional warfare. The unmanned aerial vehicles are slow and extremely vulnerable to even basic air defense systems, illustrated by the fact that a U.S. surveillance drone was shot down by a 1970s-era MIG-25 Soviet fighter over Iraq in 2002. Moreover, drones are dependent on constant telemetry signals from their ground controllers to remain in flight. Such signals can be easily jammed or disrupted, causing the drone to fall from the sky. It's even possible that a party sending stronger signals could take control of the drone. The drones, therefore, have limited usefulness. And certainly any drone flying over the U.S. while being controlled by a foreign nation could be easily detected and either destroyed or captured.

#### Norms fail

Lerner 13 (Ben, is Vice President for Government Relations at the Center for Security Policy in Washington, D.C. “Judging ‘Drones’ From Afar,” http://spectator.org/archives/2013/03/25/judging-drones-from-afar/1

Whatever the potential motivations for trying to codify international rules for using UAVs, such a move would be ill advised. While in theory, every nation that signs onto a treaty governing UAVs will be bound by its requirements, it is unlikely to play out this way in practice. It strains credulity to assume that China, Russia, Iran, and other non-democratic actors will not selectively apply (at best) such rules to themselves while using them as a cudgel with which to bash their rivals and score political points. The United States and its democratic allies, meanwhile, are more likely to adhere to the commitments for which they signed up. The net result: we are boxed in as far as our own self-defense, while other nations with less regard for the rule of law go use their UAVs to take out whomever, whenever, contorting said “rules” as they see fit. One need only look at China’s manipulation of the Law of the Sea Treaty to justify its vast territorial claims at the expense of its neighbors to see how this often plays out. And who would enforce the treaty’s rules — a third party tribunal? Would it be an apparatus of the United Nations, the same U.N. that assures us that it is not coming after the United States or its allies specifically, even as its investigation takes on as its “immediate focus” UAV operations recently conducted by those countries? The United States already conducts warfare under the norms of centuries of practice of customary international law in areas such as military necessity and proportionality, as well as the norms to which we committed ourselves when we became party to the 1949 Geneva Conventions and the United Nations Charter. These same rules can adequately cover the use of UAVs in the international context. But if the United States were to create or agree to a separate international regime for UAVs, we would subject ourselves to new, politicized “rules” that would needlessly hold back countries that already use UAVs responsibly, while empowering those that do not.

#### No South China conflict

**Thayer, New South Wales emeritus professor, 2013**

(Carlyle, “Why China and the US won’t go to war over the South China Sea”, 5-13, <http://www.eastasiaforum.org/2013/05/13/why-china-and-the-us-wont-go-to-war-over-the-south-china-sea/>, ldg)

China’s increasing assertiveness in the South China Sea is challenging US primacy in the Asia Pacific. Even before Washington announced its official policy of rebalancing its force posture to the Asia Pacific, the United States had undertaken steps to strengthen its military posture by deploying more nuclear attack submarines to the region and negotiating arrangements with Australia to rotate Marines through Darwin.Since then, the United States has deployed Combat Littoral Ships to Singapore and is negotiating new arrangements for greater military access to the Philippines. But these developments do not presage armed conflict between China and the United States. The People’s Liberation Army Navy has been circumspect in its involvement in South China Sea territorial disputes, and the United States has been careful to avoid being entrapped by regional allies in their territorial disputes with China. Armed conflict between China and the United States in the South China Sea appears unlikely. Another, more probable, scenario is that both countries will find a modus vivendi enabling them to collaborate to maintain security in the South China Sea. The Obama administration has repeatedly emphasised that its policy of rebalancing to Asia is not directed at containing China. For example, Admiral Samuel J. Locklear III, Commander of the US Pacific Command, recently stated, ‘there has also been criticism that the Rebalance is a strategy of containment. This is not the case … it is a strategy of collaboration and cooperation’. However, a review of past US–China military-to-military interaction indicates that an agreement to jointly manage security in the South China Sea is unlikely because of continuing strategic mistrust between the two countries. This is also because the currents of regionalism are growing stronger. As such, a third scenario is more likely than the previous two: that China and the United States will maintain a relationship of cooperation and friction. In this scenario, both countries work separately to secure their interests through multilateral institutions such as the East Asia Summit, the ASEAN Defence Ministers’ Meeting Plus and the Enlarged ASEAN Maritime Forum. But they also continue to engage each other on points of mutual interest. The Pentagon has consistently sought to keep channels of communication open with China through three established bilateral mechanisms: Defense Consultative Talks, the Military Maritime Consultative Agreement (MMCA), and the Defense Policy Coordination Talks. On the one hand, these multilateral mechanisms reveal very little about US–China military relations. Military-to-military contacts between the two countries have gone through repeated cycles of cooperation and suspension, meaning that it has not been possible to isolate purely military-to-military contacts from their political and strategic settings. On the other hand, the channels have accomplished the following: continuing exchange visits by high-level defence officials; regular Defense Consultation Talks; continuing working-level discussions under the MMCA; agreement on the ‘7-point consensus’; and no serious naval incidents since the 2009 USNS Impeccable affair. They have also helped to ensure continuing exchange visits by senior military officers; the initiation of a Strategic Security Dialogue as part of the ministerial-level Strategic & Economic Dialogue process; agreement to hold meetings between coast guards; and agreement on a new working group to draft principles to establish a framework for military-to-military cooperation. So the bottom line is that, despite ongoing frictions in their relationship, the United States and China will continue engaging with each other. Both sides understand that military-to-military contacts are a critical component of bilateral engagement. Without such interaction there is a risk that mistrust between the two militaries could spill over and have a major negative impact on bilateral relations in general. But strategic mistrust will probably persist in the absence of greater transparency in military-to-military relations. In sum, Sino-American relations in the South China Sea are more likely to be characterised by cooperation and friction than a modus vivendi of collaboration or, a worst-case scenario, armed conflict.

### 1NC Advantage 2

**TERRORISM**

#### No public or international backlash

Bellinger 13 (John, partner in the international and national security law practices at Arnold & Porter LLP in Washington, DC. He is also Adjunct Senior Fellow in International and National Security Law at the Council on Foreign Relations, “Peter Baker on Mounting Criticisms of Obama Administration CT Policies” <http://www.lawfareblog.com/2013/02/peter-baker-on-mounting-criticisms-of-obama-administration-ct-policies/>)

Peter Baker, who is finishing a book on the Bush Presidency, has a long front-page article in the New York Times today entitled “Obama’s Turn in Bush’s Bind” discussing how the mounting domestic and international criticism of the Obama Administration’s counter-terrorism policies (especially drones) is reminiscent of the criticisms leveled against the Bush Administration. One of Baker’s more interesting observations — and one of the first times I have seen this in print, although it is a subject of some discussion among Bush Administration officials — is that civil liberties groups have taken it easy on the Obama Administration: For four years, Mr. Obama has benefited at least in part from the reluctance of Mr. Bush’s most virulent critics to criticize a Democratic president. Some liberals acknowledged in recent days that they were willing to accept policies they once would have deplored as long as they were in Mr. Obama’s hands, not Mr. Bush’s. “We trust the president,” former Gov. Jennifer Granholm of Michigan said on Current TV. “And if this was Bush, I think that we would all be more up in arms because we wouldn’t trust that he would strike in a very targeted way and try to minimize damage rather than contain collateral damage.” Presumably for the same reason, European governments, who were unrelenting in their criticism of Guantanamo and other Bush Administration counterterrorism policies, have simply looked the other way as most of those same policies have continued (or, in the case of drones, dramatically increased). One does wonder whether the Nobel Prize Committee is suffering from at least a modicum of buyer’s remorse. As the Obama Administration begins its second term, the big question now is whether the domestic and international criticism will snowball and, if so, how the Administration will respond. Even if the Obama Administration does begin to face the same criticisms as its predecessor, fortunately its officials are unlikely to be subjected to the same ad hominem attacks as those directed at Bush Administration officials. Many critics seem to believe that President Bush and Bush Administration officials were inherently bad people (and hence were fair game for personal attacks), whereas Obama Administration officials are inherently more virtuous and have simply (albeit perplexingly) pursued misguided policies (or been stymied by the bureacuracy). My former NSC colleague Peter Feaver makes a similar point in Baker’s article, noting that Obama himself “believed the cartoon version of the Bush critique so that Bush wasn’t trying to make tough calls how to protect America in conditions of uncertainty. Bush actually was trying to grab power for nefarious purposes.” As a result, the new criticisms have been directed at the Obama Administration’s policies, rather than its officials. As someone who would like to see more personal civility and less partisanship in national security matters, I hope this remains true. The contrasts, however, are noteworthy.

#### No nuclear terrorism

**Mueller et al., OSU political science professor, 2012**

(John, “The Terrorism Delusion”, International Security, 37.1, politicalscience.osu.edu/faculty/jmueller//absisfin.pdf, ldg)

In 2009, the U.S. Department of Homeland Security (DHS) issued a lengthy report on protecting the homeland. Key to achieving such an objective should be a careful assessment of the character, capacities, and desires of potential terrorists targeting that homeland. Although the report contains a section dealing with what its authors call “the nature of the terrorist adversary,” the section devotes only two sentences to assessing that nature: “The number and high profile of international and domestic terrorist attacks and disrupted plots during the last two decades underscore the determination and persistence of terrorist organizations. Terrorists have proven to be relentless, patient, opportunistic, and flexible, learning from experience and modifying tactics and targets to exploit perceived vulnerabilities and avoid observed strengths.”8 This description may apply to some terrorists somewhere, including at least a few of those involved in the September 11 attacks. Yet, it scarcely describes the vast majority of those individuals picked up on terrorism charges in the United States since those attacks. The inability of the DHS to consider this fact even parenthetically in its fleeting discussion is not only amazing but perhaps delusional in its single-minded preoccupation with the extreme. In sharp contrast, the authors of the case studies, with remarkably few exceptions, describe their subjects with such words as incompetent, ineffective, unintelligent, idiotic, ignorant, inadequate, unorganized, misguided, muddled, amateurish, dopey, unrealistic, moronic, irrational, and foolish.9 And in nearly all of the cases where an operative from the police or from the Federal Bureau of Investigation was at work (almost half of the total), the most appropriate descriptor would be “gullible.” In all, as Shikha Dalmia has put it, would-be terrorists need to be “radicalized enough to die for their cause; Westernized enough to move around without raising red flags; ingenious enough to exploit loopholes in the security apparatus; meticulous enough to attend to the myriad logistical details that could torpedo the operation; self-sufficient enough to make all the preparations without enlisting outsiders who might give them away; disciplined enough to maintain complete secrecy; and—above all—psychologically tough enough to keep functioning at a high level without cracking in the face of their own impending death.”10 The case studies examined in this article certainly do not abound with people with such characteristics. In the eleven years since the September 11 attacks, no terrorist has been able to detonate even a primitive bomb in the United States, and except for the four explosions in the London transportation system in 2005, neither has any in the United Kingdom. Indeed, the only method by which Islamist terrorists have managed to kill anyone in the United States since September 11 has been with gunfire—inflicting a total of perhaps sixteen deaths over the period (cases 4, 26, 32).11 This limited capacity is impressive because, at one time, small-scale terrorists in the United States were quite successful in setting off bombs. Noting that the scale of the September 11 attacks has “tended to obliterate America’s memory of pre-9/11 terrorism,” Brian Jenkins reminds us (and we clearly do need reminding) that the 1970s witnessed sixty to seventy terrorist incidents, mostly bombings, on U.S. soil every year.12 The situation seems scarcely different in Europe and other Western locales. Michael Kenney, who has interviewed dozens of government officials and intelligence agents and analyzed court documents, has found that, in sharp contrast with the boilerplate characterizations favored by the DHS and with the imperatives listed by Dalmia, Islamist militants in those locations are operationally unsophisticated, short on know-how, prone to making mistakes, poor at planning, and limited in their capacity to learn.13 Another study documents the difficulties of network coordination that continually threaten the terrorists’ operational unity, trust, cohesion, and ability to act collectively.14 In addition, although some of the plotters in the cases targeting the United States harbored visions of toppling large buildings, destroying airports, setting off dirty bombs, or bringing down the Brooklyn Bridge (cases 2, 8, 12, 19, 23, 30, 42), all were nothing more than wild fantasies, far beyond the plotters’ capacities however much they may have been encouraged in some instances by FBI operatives. Indeed, in many of the cases, target selection is effectively a random process, lacking guile and careful planning. Often, it seems, targets have been chosen almost capriciously and simply for their convenience. For example, a would-be bomber targeted a mall in Rockford, Illinois, because it was nearby (case 21). Terrorist plotters in Los Angeles in 2005 drew up a list of targets that were all within a 20-mile radius of their shared apartment, some of which did not even exist (case 15). In Norway, a neo-Nazi terrorist on his way to bomb a synagogue took a tram going the wrong way and dynamited a mosque instead.15

#### No impact to oil shocks – market adaptation

**Gholz et al., Texas public affairs professor, 2010**

(Eugene, “Protecting “The Prize”: Oil and the U.S. National Interest”, Security Studies, Summer, ebsco, ldg)

Each day, twenty-four million barrels of crude are pumped from the Persian Gulf region, most of which are loaded onto supertankers to feed refineries around the world.8 The immediate effect of a major supply disruption in the Gulf would leave one or more consumers wondering where their next expected oil delivery will come from. But the oil market, like most others, adjusts to shocks via a variety of mechanisms. These adaptations do not require careful coordination, unusually wise stewardship, or benign motives. Individuals’ drive for profit triggers most of them. The details of each oil shock are unique, so each crisis triggers a different mix of adaptations. Some adjustments would begin within hours of a disruption; others would take weeks or longer to implement. Similarly, some could only supply the market for short periods of time, and others could be sustained indefinitely. But the net result of the adaptations softens the disruptions’ effects on consumers.

## \*\*\*2NC

### \*\*\*Nonviolence K

### 2NC FW

#### Nothing happens if you vote aff its just a question of your ethical orientation to the world, our fashing evidence says presuming interconnection over violence solves violence in the long term by embracing the other, the affirmatives politics which legalizes how to murder makes nuclear apocalypse inevitable

Felice 8 (William F. Felice is a professor of political science at Eckerd College and a former trustee of the Carnegie Council, “Moral Responsibility in a Time of War,” http://www.maihold.org/mediapool/113/1132142/data/Felice.pdf)

There is, however, a psychological dimension to citizenship during a time of war. State authority during war tends to extract obedience as individuals set aside personal doubts and accept the decisions of the national leadership. In addition, strong societal pressures to conform are difficult, but not impossible, to resist in a time of war. Loyalty and the support of one's country are expected of all citizens, and especially Foreign Service officers. Such pressures are strongest, of course, within the military and the government, and can lead individuals to participate in acts that, on their own, they would detest. Even beyond those employed by the state, all citizens are confronted with the difficulty of breaking with societal expectations to "rally around the flag" and unify during a time of war. In addition, it is difficult for many in the United States to prioritize the human rights of individuals in Iraq, halfway around the world on another continent. If one's moral universe is one's family and nation, what happens to the human rights of strangers is really a secondary issue. It is unfortunate that these individuals must suffer, but the priority must be our family and country. Finally, and perhaps most importantly, during warfare there is also a lack of a sense of individual responsibility. The responsibility for war is said to rest with the president, the cabinet, and the U.S. Congress. Other individuals in the govemment or the military did not participate in these decisions, and therefore feel little moral responsibility. In addition, the tasks of war are so fragmented that it breeds a sense that no one has individual responsibility. Such fragmentations allows individuals to deny the importance of their own contribution—whether it was through voting, providing infrastructure, keeping the business of govemment running smoothly, and so on. All of these explanations give us a rationale for turning inward and failing to speak out against acts carried out in our name that we consider unjust. In this situation, citizens and govemment officials can lose an overall sense of moral responsibility, and instead focus on individual and family needs. We gradually lose our "ethical autonomy." We suddenly lack the ability to judge the moral behavior of our government and are unable to protect our moral integrity.

### AT: Perm

#### 3.Systemic critique is the only way to limit sovereign violence, the affirmatives obsession with a particular subjective flashpoint distracts from a broader field of vision

Sass 12 (William, is a doctoral candidate in the Department of Communication Arts and Sciences at the Pennsylvania State University, “Critique of Charismatic Violence,” Project Muse.)

Hidden in plain sight: a sprawling bureaucracy designed to justify and deliver military violence—clothed in the new war lexicon—to the world. How might one critique this massive network of violence that has become so enmeshed in our contemporary geo-socio-political reality? Is there any hope for reversing the expansion of executive violence in the current political climate, in which the President enjoys minimal resistance to his most egregious uses of violence? How does exceptional violence become routine? Answers to these broad and difficult questions, derived as they are from the disorientingly vast and hyper-accelerated retrenchment of our current political situation, are best won through the broad strokes of what Slavoj Žižek calls "systemic" critique. For Žižek, looking squarely at interpersonal or subjective violences (e.g., torture, drone strikes), drawn as we may be by their gruesome and immediate appeal, distorts the critic's broader field of vision. For a fuller picture, one must pull one's critical focus back several steps to reveal the deep, objective structures that undergird the spectacular manifestations of everyday, subjective violence (

Žižek 2008, 1-2). Immediately, however, one confronts the limit question of Žižek's mandate: how does one productively draw the boundaries of a system without too severely dampening the force of objective critique? For practical purposes, this essay leaves off discussion of neoliberal economic domination, vital as it may be to a full accounting for the U.S.' latest and most desperate expressions of state solvency. Offered instead is a critique of the organizational violence of the U.S.' executive bureaucratic apparatus, an apparatus called into being by charismatic decree, made banal through quasi-legal codification, and guaranteed by popular disinterest. Considered also will be the peculiar, if also somewhat inevitable, continuity of the apparatus's growth under the Obama administration. Candidate Obama's pledge to transparency may now seem an example of truly "mere" [End Page 66] campaign rhetoric, but the extent to which his presidency has exceeded that of George W. Bush in terms of exceptional violence bears some attention. The central difference between the presidencies of Bush and Obama, I suggest, has been the discursive means by which their respective administrations have cultivated an image of charismatic rule. This essay proceeds in three steps. I begin by outlining a recent case of subjective violence, the assassination of Anwar al-Awlaki by drone strike, and then pull back to reveal the structural support for that strike. In the second section, taking Max Weber as my guide, I argue that bureaucratic domination is both the derivative speech act of, and the logic that underwrites, the violence of the modern liberal-democratic state. Under stable conditions, the state bureaucracy facilitates the hegemony of abstract, depersonalized, and mechanical Enlightenment legal-rationalism—what Foucault called liberal "governmentality"—by maintaining relative equilibrium between liberal autonomy and distributive justice among the citizenry. In other words, modern bureaucracy effectively mediates the two poles, "liberty" and "equality," that comprise what political theorists have called the liberal-democratic paradox (Mouffe 2009). When an event is framed as threatening to strip the state of its rhetorical power, however, the bureaucratic apparatus becomes the crucible for what I identify in the third section, with additional help from Carl Schmitt and Giorgio Agamben, as charismatic domination, or the rhetorical exploitation of a vulnerable population by a sovereign decider. Under these conditions, the state bureaucracy becomes a kind of "vanishing mediator" (Jameson 1988, 25-27), its energies redirected for exclusive and singular usage by the exceptional-charismatic sovereign. In the perpetual state of exception, the democratic paradox becomes subordinate to sovereign claims to total and indivisible control over the legitimate use of force. I conclude by outlining what I perceive as the best chances for stemming the growth of the national security bureaucracy, namely, relentless publicity.

### AT: Consequences First

#### 4.Their impact calculus is blackmail---your only concern should be with acting ethically; not speculating about third parties

Ulrich Beck, Professor of Sociology at the Ludwig-Maximilian University in Munich, World Risk Society, 1999, pp. 137-8

Believed risks are the whip used to keep the present day moving along at a gallop. The more threatening the shadows that fall on the present day from a terrible future looming 'in the distance, the more compelling the shock that can be provoked by dramatizing risk today. This can be demonstrated not only with the discourse on the environmental crisis, but also, and perhaps even more emphatically, with the example of the discourse on globalization. For instance, the globalization of paid labour does not (as yeti exist to a large degree; it threatens or, more accuratelyl transnational management threatens us with it. The exchange of (expensive) labour in Europe for (cheap) labour in India or Korea, after all, amounts to at most 10 per cent (in Germany) and primarily affects the lower wage and skilled groups (Kommission fdr Zukunftsfragen, 1997: ch. 7). The brilliantly staged risk of globalization, however, has already become an instrument for reopening the issue of power in society. By invoking the horrors of globalization, everything can be called into question: trade unions, of course, but also the welfare state, maxims of national policy and, it goes without saying, welfare assistance. Moreover, all of this is done with an expression of regret that it is - unfortunately - necessary to terminate Christian compassion for the sake of Christian compassion. Established risk definitions are thus a magic wand with which a stagnant society can terrify itself and thereby activate its political centres and become politicized from within. The public (mass media) dramatization of risk is in this sense an antidote to current narrow-minded 'more-of-the-same' attitudes. A society that conceives of itself as a risk society is, to use a Catholic metaphor, in the position of the sinner who confesses his or her sins in order to be able to contemplate the possibility and desirability of a 'better' life in harmony with nature and the world's conscience. However, few sinners actually want to repent and instigate a change. Most prefer for nothing to happen whilst complaining about that very fact, because then everything is possible. Profession of sins and the identification with the risk society allow us simultaneously to enjoy both the bad good life and the threats to it.

### \*\*\*Bond DA

### 2NC Roberts will pick

Roberts would select judges for the national security court

Vladeck-prof law American-9 45 Willamette L. Rev. 505

PRESIDENTIAL POWER IN THE 21ST CENTURY SYMPOSIUM: ARTICLE: THE CASE AGAINST NATIONAL SECURITY COURTS

Frustratingly, most of the proposals get this far, but go into very little additional detail, focusing instead on repetitive arguments for why the traditional models are inadequate. One of the more principled proposals is that offered by Katyal and Goldsmith, who argue that the [\*512] decision-makers should be life-tenured Article III judges, selected by the Chief Justice in the same way as the judges on various specialized Article III courts (including, as an important related example, the Foreign Intelligence Surveillance Court and Court of Review). 31 Although Katyal and Goldsmith believe that "traditional" procedural and evidentiary rules should be relaxed, they nevertheless trumpet that:

#### Roberts would appoint judges

KIRKLAND, UPI Senior Legal Affairs Correspondent-2/17/13

<http://www.upi.com/Top_News/US/2013/02/17/Under-the-US-Supreme-Court-Drones-over-America/UPI-97921361089800/>

"Now, in response to broad dissatisfaction with the hidden bureaucracy directing lethal drone strikes, there is an interest in applying the model of the Foreign Intelligence Surveillance Act court -- created by Congress so that [foreign and U.S.] surveillance had to be justified to a federal judge -- to the targeted killing of suspected terrorists, or at least of American suspects," The New York Times reported Feb. 8. Members of the FISA court are appointed by Chief Justice John Roberts.

#### Appointees are all conservative; can’t solve the signal

Wheeler 13 (Marcy, PhD, blogger “Why Would Jeh Johnson Suggest the Drone and/or Targeted Killing Court Would Be Bipartisan?,” http://www.emptywheel.net/2013/03/18/why-would-jeh-johnson-suggest-the-drone-andor-targeted-killing-court-would-be-bipartisan/)

As I understand it, the model under discussion is simply to give the existing FISA Court the additional task of reviewing kill decisions, not creating a new court.Yet the FISA Court — whose judges are appointed by the Chief Justice of the Supreme Court (and therefore, for the entire life of the FISA Court, by a Republican appointee) — is in no way bipartisan. Indeed, according to Secrecy News’ Steven Aftergood, there is not only no mandate that FISC be peopled by judges appointed by Presidents of both parties, but it is not bipartisan in fact. No, there is no such mandate in FISA law or policy. (And I couldn’t immediately identify any current FISC court members who were appointed to the bench by Dems.) In fact, in my layman’s opinion, the notion of partisan or bipartisan judges is incoherent. Judges are not supposed to be partisan operatives, though they may have identifiably liberal or conservative tendencies. Moreover, I’m not even sure why Johnson would suggest the Obama Administration would want a drone and/or targeted killing court to be bipartisan. It has done far, far better arguing its expansive understanding of the war on terror in front of mostly GOP nominees on the DC Circuit. The judges who have endorsed the Obama Administration view of its own power include quite a few — like Janice Rogers Brown or Laurence Silberman — who are not exactly “respected for their independence.” I mean, it might be nice to have people like Katherine Forrest or Susan Illston reviewing both targeted killing and wiretapping decisions. But that’s not going to happen anytime soon.

### 2NC Link-Appointment Power

#### Appointment process creates a firestorm

Epps-prof con law Baltimore-8/12/13

<http://www.theatlantic.com/national/archive/2013/08/does-the-chief-justice-have-too-much-power/278547/>

In 1983, Chief Justice Warren Burger lobbied Congress to create a new national Court of Appeals, made up of already-confirmed sitting judges. In different proposals, the power of appointment would either be held by the chief alone, or by the Supreme Court as a whole. Officials at the Reagan White House had little use for the idea. Appointment by the chief justice, or by the Court as a whole, one wrote, "constitutes an unprecedented infringement on the President's appointment power . . . ." Appointment by the chief alone would be likely to produce a solidly conservative court, but "liberal members of Congress, the courts, and the bar are likely to object." Even worse, if Democratic nominees were named, they might reverse the judgments of Reagan appointees on the lower courts. "[T]he new court would be qualitatively different" than specialized panels appointed by the Chief, "and its members would have significantly great powers than regular circuit judges." If the project went forward, "we should scrupulously guard the President's appointment powers." It was a shrewd assessment. The power to name judges to any important court is an important one, one that involves the president's power, the appearance of integrity and impartiality on the nation's courts, and the crucial issue of which judges get the last word on important questions. The author of those memos was 28 years old when he opposed the new court. Today he is the Chief Justice of the United States.

Plan makes Roberts a lightning rod for criticism

Ruger-prof law Penn-4

THE JUDICIAL APPOINTMENT POWER OF THE CHIEF JUSTICE

<http://epstein.usc.edu/research/supctLawRuger.pdf>

This special appointment power is functionally similar to, and historically derivative of, the general judicial designation power that the Chief Justice has exercised in various degrees at least since the beginning of the twentieth century, and which is employed often today when one federal judge temporarily sits on another court. But there is an important conceptual difference between the two powers. Although the act in both cases is the same (a temporary appointment of an existing judge to a different court), the substantive choice antecedent to the act is fundamentally different when the transferee court is specialized in nature—where, in other words, the Chief Justice knows precisely the type of matter the designated judge will rule upon. Most courts in the federal system have generalized jurisdiction and systematic case assignment mechanisms, meaning that the basic reassignment authority poses only indirect danger of strategic impact on case outcomes. This is not so with the special court appointment power studied here, which vests the Chief Justice with the unilateral discretion to select certain kinds of judges to hear certain kinds of matters, thereby potentially affecting results. Although typically made with scant public attention—perhaps an additional problematic feature of the power—the Chief Justice’s appointment choices have occasionally been noticed and criticized in the aftermath of high profile actions by particular special courts. Many observers in the late 1990s criticized Chief Justice William Rehnquist’s selection of Judge David Sentelle, a former Republican Party official, to head the Special Division of the D.C. Circuit that appointed Kenneth Starr as Independent Counsel to investigate President Clinton.10 More recently, some media commentators noted Chief Justice Rehnquist’s choice of three Republican-appointed judges to staff the Foreign Intelligence Surveillance Act (“FISA”) Court of Review in the wake of that body’s ruling in favor of the government, reversing the lower FISA Court’s denial of surveillance authority.11

#### The plan uniquely politicizes the Chief Justice

Ruger-prof law Penn-4

THE JUDICIAL APPOINTMENT POWER OF THE CHIEF JUSTICE

<http://epstein.usc.edu/research/supctLawRuger.pdf>

To speak of the wrong “kind” of power in the separation of powers context can suggest a formal categorical analysis, but my claim here is not of that sort. The problem is not that the Chief Justice’s act of appointing a special court judge is executive in nature, although it unquestionably is. This is the type of executive act that American judges have exercised almost from the beginning, and is expressly contemplated in the text of Article II’s Appointments Clause.140 The concern is not with the character of the act itself but in the nature of the substantive choice that precedes it: the selection of which judge among hundreds will sit on a given special court. Because the choice is made with foreknowledge that the appointee will rule on a particular kind of matter, it is a more meaningful exercise of discretion than that which accompanies other judicial appointment acts that look superficially much the same (such as that of choosing a clerk or marshall, or transferring a judge from one generalist court to another where case assignments are random). Of course, federal judges exercise meaningful discretion all the time in their regular adjudicative role, however these jurisprudential choices are distinguishable for good reasons, which will be explored below. Conversely, the appointment choice is generally not the kind of decision that the Constitution presumptively allocates to a single unelected judge—particularly where, as here, the choice is freighted with the potential to affect specific outcomes. It is, both in its nature and in terms of its conceptual placement within the constitutional structure, a fundamentally political choice inappropriately allocated to a single judicial official.

### \*\*\*Ex Post CP

### AT: Perm Do Both

#### A) Current precedent authorizes courts to defer authority – especially in cases where they’re hesitant to create a precedent

Rolfs 2011, Colin, J.D. UCLA Law / Editor UCLA Law Review, “Qualified Immunity After *Pearson v. Callahan*,” 59 UCLA L. Rev. 468, 472-74, 501-02 (2011)

**For most government officials, qualified immunity provides the defense** to a section 1983 or Bivens action.27 In its present form, **qualified immunity protects officials from financial liability for constitutional violations as long as the officials did not violate a clearly established constitutional right** of which a reasonable person would have known.28 Three policy motivations underlie the qualified immunity defense: the questionable fairness of holding officials liable for violations of unclear constitutional rights standards; the possibility that fear of liability could overly constrain government action; and the substantial cost of litigation for government officials even if no violation occurred.29 When the qualified immunity defense is asserted, liability for a constitutional tort depends on two inquiries: (1) whether a right was violated;30 and (2) whether the right was clearly established such that a reasonable person would have known that his actions violated the right.31 These are separate inquiries, and negating either prong precludes liability.32 **A central and contentious question in the development of qualified immunity has been whether courts must determine if a constitutional right was violated after it has already precluded liability by holding** that, even if there were a violation, **the right was not clearly established** at the time.33 Since section 1983 is the primary means of remedying constitutional violations,34 and since qualified immunity is the primary defense to these actions,35 **the answer to this question has a substantial effect on the development of constitutional law**. In 2001, the Supreme Court in Saucier v. Katz36 required that courts approach qualified immunity by first making the constitutional determination— a practice known as “sequencing.”37 Under this approach, a court was required to make a constitutional determination whenever qualified immunity was asserted, but was obligated to determine whether the law was clearly established only if it had found a constitutional violation.38 Mandatory sequencing was heavily criticized,39 and recently, in **Pearson v. Callahan**, the Supreme Court overruled Saucier and abandoned mandatory sequencing.40 Pearson **gives courts the discretion to avoid a constitutional determination if a claim could be dismissed because the right was not clearly established**.41 As a result, the Tramell court could choose to avoid a constitutional analysis, while the Cordova court could still choose to create constitutional precedent. And the Tramell and Cordova decisions are only a small part of the picture. Federal courts have had to make that same choice thousands of times since Pearson was decided.42 To understand the effect of Pearson on qualified immunity determinations and on the development of constitutional law, we need a broader view of how courts are choosing to use their newfound discretion. Through an empirical investigation, this Comment measures how federal courts have responded to Pearson. It begins with a history of qualified immunity in Part I. This Part provides historical context and defines the time periods important for the empirical analysis, which compares qualified immunity determinations after Pearson to those made in earlier periods. Part II reviews the various positions of those involved in the sequencing debate and offers an analysis of the strengths and weaknesses of these positions. It then demonstrates how Pearson balanced the competing interests articulated in the sequencing debate. Part III describes the methodology and findings of an empirical study of the effects of Pearson. I hypothesized that both district and circuit courts would avoid making a constitutional determination when the law was not clearly established more frequently after Pearson than in the period before Pearson but after Saucier. The empirical study yielded unexpected results. **Circuit courts have begun to use the discretion granted by Pearson to avoid constitutional determinations** far more than they did under the Saucier sequencing rule. District courts, on the other hand, are avoiding constitutional determinations at a level similar to the Saucier period. Part IV evaluates the implications of these findings. The response of the district courts is troubling given the problems with mandatory sequencing articulated in Pearson and elsewhere. Why district courts have responded in this way is a difficult question, but their divergence from circuit courts offers a unique opportunity to understand what might motivate a court to avoid a constitutional determination. I argue that institutional differences between circuit and district courts result in different motivations: Circuit courts are more concerned with the precedential value of their decisions, while district courts are more concerned with case management. Building on this explanation, I argue that these differing motivations, which help elucidate the differing reactions to Pearson, indicate that whether courts use their Pearson discretion has less to do with judicial efficiency and more to do with whether a court is interested in producing constitutional law. In other words, courts will likely base the use of their Pearson discretion on their interest in promulgating particular types of precedent. Therefore, by granting courts substantial control over whether precedent concerning constitutional violations is created at all in section 1983 and Bivens actions, Pearson promises to give courts substantially greater control over the articulation of constitutional law, both in the positive ways Pearson intended and in other ways yet unknown. . . . . What will be the result of the greater control courts now exercise over the direction of constitutional law? Further study is required before any definite answer can be given. However, the important implication of the study—**that a court’s willingness to engage in a constitutional analysis depends on its interest in creating precedent**—does allow some predictions to be made. Despite having some foundation, these predictions remain speculative. They should be taken not as established consequences, but as guides for future investigation The first possible consequence is reminiscent of the fears that, without mandatory sequencing, there would be insufficient constitutional articulation.179 **Without sufficient articulation, law can never become clearly established, and officials can repeatedly violate rights and claim qualified immunity**.180 Pearson discretion should avoid this possibility for the most part. If courts are particularly concerned with the value of their precedent, they can consider when repeated abuse is likely and make constitutional rulings in those cases.181 However, **there may be certain sorts of cases in which courts have little interest in establishing precedent**.182 These sorts of cases would become **constitutional blind spots, with little constitutional development and the possibility of repeated abuse**. While large scale constitutional stagnation is unrealistic, stagnation in particular areas could still occur after Pearson

#### B) Prior approval will create a qualified immunity op-out

Harvard Law Review 2012 (“Leading Supreme Court Cases” [addressing *Messerschmidt v. Millender* (132 S.Ct. 1235 (2012)] 126 Harv. L. Rev. 216, 219, 223-24 (2012))

The Supreme Court reversed. Writing for the Court, Chief Justice Roberts32 explained that “the threshold for establishing [that officials’ actions were objectively unreasonable] is a high one, and it should be,” and that Millender had not reached that threshold.33 Several possible explanations showed that the warrant’s provisions were not unreasonable. The firearms search, for instance, could be justified by the fact that Bowen was a known gang member who had fired a presumably illegal gun in public in an attempted murder; police therefore could reasonably conclude that he had other illegal guns or that he might make another attempt on Kelly’s life with another gun.34 And the gang evidence search could be justified by the possibility that an officer could have believed that Bowen’s true motive was to keep Kelly from telling the police about his gang activity,35 or that gang paraphernalia could help to link Bowen to any other evidence found in the home,36 or that evidence of gang membership could be used to impeach Bowen at trial.37 Importantly, these possibilities could be inferred from the warrant itself and did not depend on the officers’ personal knowledge of the case.38 Furthermore, **the Chief Justice explained, the approval of the warrant by both supervisors and a magistrate**, though not a perfect guarantee, **was at least a significant factor suggesting that the relevant officials acted reasonably**.39 Finally, Chief Justice Roberts distinguished the defective warrant at issue from that in Groh v. Ramirez40 by observing that Messerschmidt’s warrant was not facially defective such that “just a simple glance” could have revealed the constitutional flaw.41 Since the warrant’s flaw was apparent only “upon a close parsing” of its language, this case was not one of those “rare” instances in which a reasonable official would have found the warrant facially defective, and the officers remained entitled to qualified immunity.42 . . . . The Messerschmidt Court had two main options for classifying those inferences. It could have declared that factual inferences are part of the officer’s knowledge, so a warrant unsupported by those inferences would be unreasonable and the officer would not be entitled to qualified immunity.66 Alternatively, it could have declared that factual inferences are an officer’s subjective beliefs, meaning that they have no bearing on whether the officer retains immunity. The majority adopted the latter approach.67 In so doing, **the Court gave clearer definition to the scope of “objective” reasonability, and that clearer definition will have substantial impacts on other aspects of qualified immunity jurisprudence**. For example, **the classification of an officer’s inferences explains the disagreement between the majority and the dissent regarding the relevance of a magistrate’s approval, which suggests that the distinction may have some bearing on the weight courts give to such approval in future cases**.

For the dissent, the officers’ actions were objectively unreasonable because the officers themselves knew (or should have known) as much: Messerschmidt requested a warrant to search for all evidence of gang paraphernalia, for instance, even though he admitted that there was no “reason to believe that the assault on Kelly was any sort of gang crime.”68 Similarly, the approval by superiors and a magistrate had no bearing on objective reasonability because Messerschmidt already knew (or should have known) that the warrant was unreasonable.69 **For the majority**, however, the officers’ subjective personal knowledge was merely a “conclusion” irrelevant to the reasonability inquiry.70 Instead, the majority effectively imagined a reasonable officer confronted with only the objective facts of the case — namely, the warrant and attached affidavits — and concluded that this officer could reasonably have believed the warrant to be valid for any number of reasons.71 For such an officer, **the various approvals would provide strong additional evidence of reasonability, because they would represent independent judgments concurring in the conclusion that the warrant is valid**.72 **In such a case, it is sensible to grant the officer qualified immunity, since that officer relied on the approval of experts with substantially more legal training than he or she had, which is precisely the result that courts seek to encourage**.73 **When an officer’s factual inferences are discounted, approval by magistrates and superiors provides a very strong indication of objectively reasonable behavior**.

### AT: Hurdles

#### Ex post can get through the political question doctrine and rule effectively – numerous empirics prove

Taylor, Senior Fellow-Center for Policy & Research, 13 (Paul, Senior Fellow at the Center for Policy & Research and an alumnus of Seton Hall Law School and the Whitehead School of Diplomacy and International Relations, and is veteran of the Army’s 82nd Airborne Division, with deployments to both Afghanistan and to Iraq, “DOJ Targeted Killing White Paper,” February, http://transparentpolicy.org/2013/02/doj-targeted-killing-white-paper/)

On Monday, NBC obtained an unsigned Justice Department white paper outlining the Obama administration’s legal position on circumstances under which the United States could lawfully kill a U.S. citizen in a counter-terror operation. Unfortunately, the 16-page document is not the full OLC memo that has been requested by several members of Congress, but an abbreviated version of it that was provided last summer to members of the Senate Intelligence and Judiciary committees. The white paper expressly limits its scope to those citizens who are a senior al-Qaeda member or an “associated force” in a foreign country, outside an area of active hostilities. In brief, it asserts it would be legal to use lethal force against a U.S. citizen in such cases if three conditions are met: 1) an informed, high-level government official has determined that the targeted individual poses an imminent threat to the U.S.; 2) capture is infeasible; and 3) the operation complied with applicable laws of war. The while this white paper is as yet the most detailed public account of the Obama administration’s legal justification for the targeted killing of Americans, it is unfortunately short on details of the decision-making process. As pointed out by Steve Vladeck at Lawfare, most Americans understand that there may be occasions in which U.S. citizens who engage in terrorist activities must be targeted in the same way that foreign terrorists are. What matters is the process for coming to that decision. We have due process protections because we are concerned no only about government overreach, but also to adequately protect us from erroneous determinations and unnecessary reliance on force. This helps ensure that, for example, they really are an active member of al Qaeda, that they cannot they be arrested, and that we cannot simply wait until capture is feasible. The criteria listed above clearly attempt to ensure that these issues are addressed, but this is not nearly enough. A constitutional lawyer like President Obama should not need reminding that unchecked executive power is very dangerous to liberty. And there is nothing in this white paper to suggest that any outside check or review has been placed on the Executive’s ability to conduct these lethal operations against its own citizens. In fact, it suggests that judicial review is inappropriate. Its reasoning for this is that it would require ex ante review of targeting decisions, which are inherently predictive and not amenable to judicial determination. This would be quite astute, were it true. However, most critics who have called for judicial involvement in targeted killing decisions, myself included, have clearly stipulated that the courts review the governments actions ex post, and at least partly ex parte. Additionally, as Steve points out, the white paper’s suggestion that targeted killing decisions are non-justiciable political questions is absurd. These determinations are in many ways no different than those made in law enforcement situations, as when a sniper shoots a hostage-taker. Such cases are often reviewed (ex post) by the courts. Even in those ways in which they are different, the courts have already been involved, as with the spate of recent habeas litigation. It is because of these issues that the white paper does nothing to satisfy the concerns over executive power. Many have claimed that this document displays the Obama administration’s backslid into something resembling the “Bush Doctrine.” But rather than the nitpicking over the legal conclusions of the white paper as many analysts have (Mary Ellen O’Connell is still ranting about “zones” of conflict—see my analysis), it is this refusal to allow any review of the decision-making process that raises the most severe concerns over President Obama’s targeted killing program.

### Intel Turn/Good Tartegs-2NC

#### Solves blowback better---intelligence leads to reassessment preventing bad strikes

Taylor 13 (Paul, is a Senior Fellow, Center for Policy & Research. Focus on national security policy, international relations, targeted killings, and drone operations. “A FISC for Drones?,” http://centerforpolicyandresearch.com/2013/02/09/a-fisc-for-drones/)

Chesney also noted that executive officials involved in the nomination process would prefer an ex ante review to shield them from unexpected civil liability by the victims or their families. I’m sure that it is true that administration officials would like to have “certainty ex ante that they would not face a lawsuit.” However, this is not a guarantee that the courts can provide to the executive. As noted above, as with search and seizure warrants, there are issues to consider after the approval of the executive action. Ex ante review does not allow for inquiry into important ancillary issues, such as the balancing of risk to civilian bystanders. Also, it provides no assurances that new, exculpatory intelligence forces a reassessment of the targeting decision. Only ex post review would achieve this.

The plan gives a perverse incentive to not collect information---the CP corrects that

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/)

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

**Effective Intel gathering is key to solve nuclear terrorism**

**Yoo, Berkley law professor, 2004**

(John, “War, Responsibility, and the Age of Terrorism”, UC-Berkeley Public Law and Legal Theory Research Paper Series, <http://works.bepress.com/cgi/viewcontent.cgi?article=1015&context=johnyoo>, ldg)

Third, the nature of warfare against such unconventional enemies may well be different from the set-piece battlefield matches between nation-states. Gathering intelligence, from both electronic and human sources, about the future plans of terrorist groups may be the only way to prevent September 11-style attacks from occurring again. Covert action by the Central Intelligence Agency or unconventional measures by special forces may prove to be the most effective tool for acting on that intelligence. Similarly, the least dangerous means for preventing rogue nations from acquiring WMD may depend on secret intelligence gathering and covert action, rather than open military intervention. A public revelation of the means of gathering intelligence, or the discussion of the nature of covert actions taken to forestall the threat by terrorist organizations or rogue nations, could render the use of force ineffectual or sources of information useless. Suppose, for example, that American intelligence agencies detected through intercepted phone calls that a terrorist group had built headquarters and training facilities in Yemen. A public discussion in Congress about a resolution to use force against Yemeni territory and how Yemen was identified could tip-off the group, allowing terrorists to disperse and to prevent further interception of their communications.

### Rubber Stamp-2NC

#### Judges won’t want to wade into national security measures – they would defer to the executive if it is an issue of imminence – ex post comparatively solves – allows for an objective review of evidence because its after the fact – that’s Jaffer

The cp leads to better risk assessment than the aff

Vladeck, editor- Journal of National Security Law & Policy, 13 (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, Why a “Drone Court” Won’t Work–But (Nominal) Damages Might…, Sunday, February 10, 2013, <http://www.lawfareblog.com/2013/02/why-a-drone-court-wont-work/>)

III. Drone Courts and the Legitimacy Problem That brings me to perhaps the biggest problem we should all have with a “drone court”–the extent to which, even if one could design a legally and practically workable regime in which such a tribunals could operate, its existence would put irresistible pressure on federal judges to sign off even on those cases in which they have doubts. As a purely practical matter, it would be next to impossible meaningfully to assess imminence, the existence of less lethal alternatives, or the true nature of a threat that an individual suspect poses ex ante. Indeed, it would be akin to asking law enforcement officers to obtain judicial review before they use lethal force in defense of themselves or third persons–when the entire legal question turns on what was actually true in the moment, as opposed to what might have been predicted to be true in advance. At its core, that’s why the analogy to search warrants utterly breaks down–and why it would hardly be surprising if judges in those circumstances approved a far greater percentage of applications than they might have on a complete after-the-fact record. Judges, after all, are humans. In the process, the result would be that such ex ante review would do little other than to add legitimacy to operations the legality of which might have otherwise been questioned ex post. Put another way, ex ante review in this context would most likely lead to a more expansive legal framework within which the targeted killing program could operate, one sanctioned by judges asked to decide these cases behind closed doors; without the benefit of adversary parties, briefing, or presentation of the facts; and with the very real possibility that the wrong decision could directly lead to the deaths of countless Americans. Thus, even if it were legally and practically possible, a drone court would be a very dangerous idea.

They institutionalize killing without imminent threats

Jaffer 13 (Jameel Jaffer, Director of the ACLU's Center for Democracy, presents his reaction to the recent calls to establish a "drone court" to provide ex ante review of targeted killings. “Judicial Review of Targeted Killings,” http://www.harvardlawreview.org/issues/126/april13/forum\_1002.php)

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.

### Responsible Targeting-2NC

#### Bivens-style remedies change the normative behavior of agency officials

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

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

#### 4. Holding officials personally liable solves even if that specific official never gets challenged

Vladeck, editor- Journal of National Security Law & Policy, 13 (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, Why a “Drone Court” Won’t Work–But (Nominal) Damages Might…, Sunday, February 10, 2013, <http://www.lawfareblog.com/2013/02/why-a-drone-court-wont-work/>)

First, if nothing else, the specter of damages, even nominal damages, should have a deterrent effect on future government officers, such that, if a targeted killing operation ever was carried out in a way that violated the relevant legal rules, there would be liability–and, as importantly, precedent–such that the next government official in a similar context might think twice, and might make sure that he’s that much more convinced that the individual in question is who the government claims, and that there’s no alternative to the use of lethal force.

#### Data and statistics proves that Bivins cases are successful – they don’t have evidence that substantiates this

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

*Bivens* nonetheless remains a potent cause of action, although most commentators view it as being more powerful in theory than in practice. Indeed, the working assumption in both the academy and the judiciary has been that Bivens litigation is remarkably unsuccessful.8 Commentators offer many explanations for the relative lack of success of *Bivens* litigation, but most agree that *Bivens* plaintiffs are disadvantaged because the personal defense of qualified immunity9 is an imposing barrier to recovery from federal officers.10 These assumptions about the outcome of *Bivens* litigation—that it is highly unsuccessful and that the availability of qualified immunity is a substantial reason for that lack of success—have never been empirically tested. Many researchers have evaluated the success of civil rights litigation in general, but no detailed empirical study has focused on *Bivens* litigation exclusively.11 The numbers that are bandied about—for instance, the ubiquitous assertion that 12,000 claims were filed between 1971 and 1985 with only four judgments sustained for plaintiffs12—border on the apocryphal. To the extent any hard numbers reflecting success are mentioned, they are supported by statements made at legislative hearings or even more informal reports, they define “success” in a much narrower way than most empirical studies,13 and they are not transparent enough to indicate what is even considered a *Bivens* claim.14 And while this Article builds on the work of scholars such as Margo Schlanger, Theodore Eisenberg, and Stewart Schwab, who have conducted extensive studies of the relative success of civil rights claims in general, those scholars have not considered the success (or lack thereof) of *Bivens* litigation in particular.15 This Article represents the first attempt to systematically study the success of *Bivens* litigation, and its results challenge longstanding assumptions about the outcomes of these claims. After conducting a detailed study of case dockets over three years in five district courts, I conclude here that *Bivens* cases are much more successful than has been assumed by the legal community, and that in some respects they are nearly as successful as other kinds of challenges to governmental misconduct. Depending on the procedural posture, presence of counsel, and type of case, success rates for *Bivens* suits range from 16% to more than 40%, which is at least an order of magnitude greater than has previously been estimated. In addition, by specifically reporting how *Bivens* claims are resolved when they do fail, the data reported here show that the availability of qualified immunity plays a limited role in *Bivens* failures. This sharply contrasts with estimates of the role of qualified immunity based solely on published case studies,16 demonstrating the hazards of overlooking unpublished case reports and dockets. This Article thus adds a substantial contribution to our knowledge about the outcomes of *Bivens* litigation, while suggesting avenues for further research.

## \*\*\*1NR

### \*\*\*Ex Post Counterplan

### Special Factors Clarification

#### 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

### AT: Legitimacy

#### Drone court doesn’t create credibility; no one trusts it-the cp allows judges to be publically critical

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

Last week Jeh Johnson, the general council for the Department of Defense during President Obama’s first term, warned at a conference at Fordham Law School that the President’s targeted killing policies breeds mistrust among the public:“The problem is that the American public is suspicious of executive power shrouded in secrecy. In the absence of an official picture of what our government is doing, and by what authority, many in the public fill the void by imagining the worst.”However, he was skeptical about recent calls for a “drone court” to review and approve or deny targeted killing decisions: “To be sure, a national security court composed of a bipartisan group of federal judges with life tenure, to approve targeted lethal force, would bring some added levels of credibility, independence and rigor to the process, and those are worthy goals.”… “But, we must be realistic about the degree of added credibility such a court can provide. Its proceedings would necessarily be ex parte and in secret, and, like a FISA court, I suspect almost all of the government”s applications would be granted, because, like a FISA application, the government would be sure to present a compelling case. … [While] the New York Times editorial page promotes a FISA-like court for targeted lethal force, it derides the FISA court as a ‘rubber stamp’ because it almost never rejects an application. How long before a ‘drone court’ operating in secret is criticized in the same way?” Apparently not long, since I have already raised this criticism in a previous post. However, I coupled this criticism with a proposed solution: using ex post review, rather than ex ante. By removing from the judge’s consideration the concern for the pressing national security need involved in deciding whether a proposed target is an imminent threat, ex post review would allow the judge to be more critical of the Administration’s case, and make the court less likely to become another “rubber stamp.”

#### Their ev is too optimistic-they don’t create credibility bc of the perception or rubber stamping

Johnson 13 (Jeh, Former Pentagon General Counsel Keynote address at the Center on National Security at Fordham Law School: A “Drone Court”: Some Pros and Cons <http://www.lawfareblog.com/2013/03/jeh-johnson-speech-on-a-drone-court-some-pros-and-cons/>)

In the eyes of the American public, judges are for the most part respected for their independence. In the eyes of the international community, a practice that is becoming increasingly controversial would be placed on a more credible footing. A national security court would also help answer the question many are asking: what do we say to other nations who acquire this capability? A group of judges to approve targeted lethal force would set a standard and an example. Further, as so-called “targeted killings” become more controversial with time, I believe there are some decision-makers within the Executive Branch who actually wouldn’t mind the added comfort of judicial imprimatur on their decisions. But, we must be realistic about the degree of added credibility such a court can provide. Its proceedings would necessarily be ex parte and in secret, and, like a FISA court, I suspect almost all of the government’s applications would be granted, because, like a FISA application, the government would be sure to present a compelling case.

So, at the same time the New York Times editorial page promotes a FISA-like court for targeted lethal force, it derides the FISA court as a “rubber stamp” because it almost never rejects an application.[8] How long before a “drone court” operating in secret is criticized in the same way? Meanwhile, what about the views of the judiciary itself? I know a number of federal judges who would accept this unpleasant job if asked out of a sense of duty. But many, I suspect, want the judiciary to have nothing to do with this. Former Judges Mukasey and Robertson have publicly articulated this view in emphatic terms.[9] I can hear many in the judicial branch saying that courts exist to resolve cases and controversies between parties, not to issue death warrants based on classified, ex parte submissions. Judges don’t like arms-length ex parte submissions, because they know they are not getting two sides of the story. I’m sure they would like them even less if the decision they must make is final and irreversible. Put in a more cynical way, I can imagine many federal judges thinking “we don’t exist to provide top cover to the Executive branch for difficult decisions; foist this responsibility on us and you diminish both our branches of government.”

### AT: Modeling

#### Creates a better model, you can’t determine compliance unless you review after the fact

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/)

Johnson also notes that even the determination of the facts is fraught with problems. The first three of Holder’s criteria for the legality of a targeted killing operation, feasibility of capture, imminence of threat, and senior leadership in an enemy organization, are time-sensitive determinations. Feasibility, Johnson notes from personal experience, can change several times in one night. That imminence may change over time is obvious to anyone with a dictionary. And while a target’s position as a senior leader in al-Qaeda is unlikely to change very often, it does on occasion (take the case of Mokhtar Belmokhtar). Requiring a court to determine these facts in advance would also require that the executive would have to notify the court when any change has occurred that might effect that determination. Meanwhile, use of ex post review would allow the court to look at a single point in time, when the executive “pulled the trigger” on the operation, thus crystallizing the facts and obviating this problem. The last of the Holder criteria, too, causes problems. This criterion requires that the operation be executed in compliance with the law of war. Of course, this is capable of determination only after the fact. Thus, no ex ante review will be able to determine if this requirement is satisfied. An ex post review, however, could.

### 1NR A2: CP Links to ATS DA

#### Ex-post review means that cases will be decided explicitly on constitutional grounds – avoids the i-law links

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

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

#### **Au-Aulaqi proves –**

Chavla 12 (Leah, J.D. Candidate at American University, interested in working in international and human rights law, “Aulaqi Round Two”, National Security Law Brief, <http://www.nationalsecuritylawbrief.com/aulaqi-round-two/>, \*\*Bill of Attainder claim = 9th Amendment)

Plaintiffs name three specific causes of action. The first claim of relief is for the alleged Fifth Amendment violation the deceased suffered, as both their substantive and procedural due process rights were violated by the defendants’ authorization of their subordinates to use lethal force against Anwar and Abdulrahman al-Aulaqi and Samir Khan. The second claim is that of a Fourth Amendment violation, namely the right to be free from unreasonable seizure, again through the authorization and use of lethal force against the victims. Finally, the third claim of relief is a bill of attainder with respect to Anwar al-Aulaqi because the defendants designated Anwar to a “hit list” in the absence of a judicial trial.

#### Avoids the imminence question –

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 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.)

#### Avoids legal ambiguities – this card is comparative ((Point 2 on Spillover debate))

Roth 13 (Kenneth, executive director of Human Rights Watch, one of the world's leading international human rights organizations, “What Rules Should Govern US Drone Attacks?”, http://www.nybooks.com/articles/archives/2013/apr/04/what-rules-should-govern-us-drone-attacks/?pagination=false)

Whatever the rules governing drone attacks, many object to the covert, unilateral way the administration decides who should be killed. In the heat of battle, that is a necessity. But drone targets are typically selected over lengthy periods, with more than enough time for independent scrutiny. Under US law, the executive branch cannot even secure a wiretap without court oversight, so why should it be allowed to select drone targets unilaterally? Senator Dianne Feinstein has thus put forward the idea of a drone court similar to the courts that review wiretap applications under the Foreign Intelligence Surveillance Act (FISA). But replicating the FISA courts would provide little by way of effective control because, by their nature, they must be kept secret from the target, so they provide no opportunity for an independent attorney to challenge the government’s claims. At least for wiretaps the law is reasonably settled. But the administration, as we have seen, seems to accept in only vague terms the law governing drone attacks. In the absence of an adversarial process, a judge cannot be counted on to challenge the administration’s permissive interpretation of the law. Moreover, a drone court could at most approve placing someone on a kill list, not whether the circumstances of a prospective attack, including the risk to civilians in a changing situation, would be lawful. That would require a determination of the sort that a court can’t possibly undertake in advance. In any event, most proposals for drone courts envision them being used only for targeted US citizens—not much help to the great majority of targets from other nationalities. Though of no help to those killed, permitting after-the-fact lawsuits against the government would be a better way to allow the courts to define the limits of the law. But the administration has blocked such suits through various claims of secrecy.

### \*\*\*Alien Tort DA

### 1NR Impact Overview

ATS suits threaten drone program

Bellinger-CFR, National Security Law-2/23/12

Why the Supreme Court should curb the Alien Tort Statute

<http://articles.washingtonpost.com/2012-02-23/opinions/35444954_1_kiobel-alien-tort-statute-human-rights>

On Tuesday, the Supreme Court will hear arguments in Kiobel v. Royal Dutch Petroleum, which will decide whether corporations may be sued in U.S. courts for violations of international law under a peculiar 223-year-old federal law, the Alien Tort Statute. The Obama administration argues that corporations should be subject to lawsuits under the Alien Tort Statute for alleged human rights violations in other countries. But foreign governments contend that allowing U.S. courts to judge actions with no connection to the United States violates international law. To avoid this conflict and the diplomatic friction the Alien Tort Statute was intended to prevent, the Supreme Court should limit the law’s extraterritorial reach. First enacted as part of the Judiciary Act of 1789, the Alien Tort Statute (ATS) authorizes U.S. federal courts to hear civil lawsuits by “aliens” for acts that violate the “law of nations.” The law was apparently intended by its 18th-century drafters to allow ambassadors and other foreign nationals to sue in federal courts for assaults or other offenses committed in violation of international law — acts that might cause diplomatic friction for the new American republic if left unaddressed by state courts. The law was virtually forgotten for its first 200 years — until 1980, when human rights lawyers used it to sue a Paraguayan official over the torture of a Paraguayan citizen. As reinvented, the ATS has become the fountainhead for human rights lawsuits against foreign government officials for actions in their own countries. In the 1990s, plaintiffs’ lawyers began to use the ATS to sue multinational corporations for violations of international law. More than 120 lawsuits have been filed in federal courts against 59 corporations for alleged wrongful acts in 60 foreign countries. Multinational corporations in almost every industry have been sued, including Coca-Cola (accused of aiding murders by Colombian paramilitary groups), ExxonMobil (accused of aiding human rights abuses by the Indonesian military), General Motors (accused of aiding South Africa’s apartheid government) and Yahoo (accused of sharing subscriber data with the Chinese government). Almost all of these suits have been over “aiding and abetting” abuses by foreign governments, rather than over direct offenses. Few ATS lawsuits have resulted in judgments, but most cases have dragged on for years, and some companies have settled rather than submit to protracted and reputation-damaging litigation. The Kiobel case was filed against Shell Oil by Ni­ger­ian villagers who accused the company of aiding human rights abuses by Nigeria’s military. In 2010, an appellate court in New York ruled that corporations may not be held liable under the Alien Tort Statute, citing the grounds that international law binds only nations and individuals. In a brief to the Supreme Court, the Obama administration urges the justices to reverse the lower-court decision. The administration’s goal of promoting accountability for serious human rights abuses committed by foreign governments is laudable, but its position here reflects a desire to change existing international law, rather than adhere to it. International law does not allow courts of one country to exercise jurisdiction in civil cases over offenses in other countries. For this reason, foreign governments, including many close U.S. allies, have filed more than 20 protests with the State Department and federal courts in Alien Tort Statute suits over the past decade. The British, Dutch and German governments — all strong advocates of human rights — have filed briefs in the Kiobel case, arguing that applying the ATS to acts that take place in other countries and have no connection to the United States is a violation of international law. (I submitted a brief on behalf of several corporations in support of Shell, describing the objections filed by foreign governments in other cases.) Ironically, the modern application of the Alien Tort Statute has caused the very diplomatic tensions it was enacted to prevent. Moreover, the Obama administration should be concerned about reciprocity: It would certainly object if foreign governments were to encourage lawsuits in their courts against U.S. companies for perceived violations of international law, such as against the manufacturers of drone aircraft.

#### ATCA suits jeopardize cooperation on terrorism – turns nuclear terrorism advantage

Griswold 2003 (Daniel, associate director of the Center for Trade Policy Studies at the Cato Institute, “Abuse of 18th Century Law Threatens U.S. Economic and Security Interests,” January 25, <http://www.usaengage.org/legislative/2003/alientort/cato_griswold.html>)

Misuse of the Alien Tort Claims Act constitutes bad law, bad economics, and bad foreign policy. The law was never intended to confer a new private right of action to aliens. Yet under the law as some courts have interpreted it, foreigners allegedly harmed by other foreigners on foreign soil can sue for damages in U.S. courts. In most cases, the defendant companies have violated no laws, either our own or the laws of the foreign country. Yet they are being sued because of nothing more than guilt by association. The unjust wielding of the ATCA threatens to damage the U.S. economy and the often-underdeveloped economies of the host countries. If those cases move forward and ultimately result in damages, it could put a chill on profitable foreign investment, jeopardizing jobs and investment capital in the United States while retarding development in poor countries. Hundreds of millions of poor people around the world will find it more difficult to escape poverty. Abuse of the ATCA is complicating U.S. foreign policy at a time when the United States needs to win friends and influence nations in the war against terrorism. Suits filed under the ATCA breed resentment abroad that the U.S. legal system is attempting to interfere in the internal affairs of other nations. In one case involving Indonesia and Exxon Mobil Corporation, the U.S. State Department warned in a July 2002 friend-of-the-court letter that, “U.S. counter-terrorism initiatives could be imperiled in numerous ways if Indonesia and its officials curtailed cooperation in response to perceived disrespect for its sovereign interests.” American interest would be further jeopardized if the lawsuits lead to worsening economic conditions and instability in countries the United States is trying to cultivate as allies. As the State Department noted in the Indonesia case, “increasing opportunities for U.S. business abroad is an important aspect of U.S. foreign policy.”

### 1NR A2: No Link

#### The aff spurs ATS review --

#### A) Ex ante review necessitates review of international law – requires ATS consideration

Bates, 10 (John, United States District Judge for the US District Court for the District of Columbia, DC Circuit Court Decision, Civil Acton No. 10-1496, “Nasser Al-Aulaqui Vs Barack H. Obama et al: Memorandum Opinion”, <http://www.aclu.org/files/assets/2010-12-7-AulaqivObama-Decision.pdf>)

On August 30, 2010, plaintiff Nasser Al-Aulaqi (" plaintiff") filed this action, claiming that the President, the Secretary of Defense , and the Director of the CI A (collectively , "defendants") have unlawfully authorized the targeted killing of plaintiff' s son, Anwar Al-Aulaqi, a dual U.S.-Yemeni citizen currently hiding in Ye men who has alleged ties to al Qaeda in the Arabian Peninsula (" AQAP" ). Plaintiff seeks an injunction prohibiting defendants from intentionally killing Anwar Al-Aula qi "unless he presents a concrete, specific, and imminent threat to life or physical safety, and there are no mea ns other than lethal force that could reasonably be employed to neutralize the threat." See Compl., Prayer for Relief ( c). Defendants have responded with a motion to dismiss plaintiff' s complaint on five threshold grounds: standing, the political question doctrine, the Court' s exercise of its "equitable discretion," the Department' s Office of Foreign Assets Control ("O FAC" ) designated Anwar A l-Aulaqi as a Specially Designated Global Terrorist (" SDGT" ) in light of evidence that he was "acting for or on behalf of al-Q a'ida in the Arabian Peninsula (AQA P)" and "providing financial, material or technological support for, or other services to or in support of, acts of terrorism[ .]" See Defs.' Mem. at 6-7 ( quoting Designation of ANWAR AL -AUL AQI Pursuant to Executive Order 13224 and the Global Terrorism Sanctions Regulations, 31 C.F.R. P art 594, 75 F ed. Reg . 43233 (Jul y 16, 2010)) ( here inafter , "O FAC Designation"). I n its designation, OFAC explained that Anwar Al-Aulaqi had "taken on an increasingly operational role" in AQAP since late 2009, as he "facilitated training camps in Yemen in support of acts of terrorism" and provided "instructions" to Umar Farouk Abdulmutallab, the man accused of attempting to detonate a bomb aboard a Detroit-bound Northwest Airlines flight on Christmas Day 2009. See OF AC Designation. Media sources have also reported ties between Anwar Al-Aula qi and Nidal Malik Ha san, the U.S. Army Major suspected of killing 13 people in a November 2009 shooting at For t Hood, Texas. See, e.g ., Wizner Decl., Exs. E, F, H, J, L , M, V, W. According to a January 2010 Los Angeles Times article, unnamed " U.S. officials" have disc overe d that Anwar Al-Aulaqi a nd Hasa n exchang ed as ma ny as eig hteen e -mails prior to the F ort Hood shootings. See id., Ex . E. Rece ntly , Anwar Al-Aulaqi ha s made numer ous public statements ca lling for "jihad ag ainst the West," pra ising the a ctions of " his students" Abdulmutallab and H asan, a nd asking others to " follow suit." See, e .g ., Wiz ner D ecl., Ex. V; Defs.' Reply to Pl.'s Opp. to Def s.' Mot. to Dismiss ("De fs.' Reply ") [Docket Entry 29], Ex s. 1-2; Def s.' Mem., Ex. 1, Unclassified Dec l. of J ames R. Clapper, D ir. of Na t'l I ntellige nce ( "Clappe r De cl." ) ¶ 16. Micha el L eiter, D irec tor of the National Counterte rror ism Center, has explained that Anwa r Al-Aula qi's " familiarity with the West" is a " key conce rn[] " f or the United States, se e De fs.' Mem., Ex. 3, and media source s have simil arly cited Anwa r Al-Aula qi's a bility to communicate with an E ng lish-speaking audienc e as a source of " particula r conc ern" to U.S. officials, see Wiz ner D ecl., Ex. V. But despite the United States' s expressed " concern" regarding Anwar Al-Aulaqi' s "f amiliarity with the West" and his "r ole in AQAP," see D efs.' Mem., Ex. 3, t he United States ha s not y et publicly charged Anwa r Al-Aulaqi with any crime. See Pl.'s Mem. in Opp. to Def s.' Mot. to Dismi ss (" Pl.'s Opp." ) [Docket Entry 25], at 9. For his part, Anw ar A l-Aulaqi has made clear that he has no intention of making himself available for criminal prosecution in U.S. courts, remarking in a May 2010 AQAP video intervie w that he " will never surrender" to the United States, and that " [i ]f the Americ ans wa nt me, [t hey can] come look for me." See Wiz ner D ecl., Ex. V; see also Clapper Dec l. ¶ 16; Defs.' Mem. at 14 n.5 (quoting Anwar Al-Aulaqi a s stating, " I have no intention of turning my self in to [t he Amer icans]. I f they want me, let them se arc h for me." ). Plaintiff does not deny his son's a ffiliation with AQAP or his desig nation as a SDGT. Rather, plaintiff c halleng es his son' s alleg ed unlawf ul inclusion on so-called " kill li sts" that he contends a re ma intained by the CI A and the Joint S pecia l Opera tions Com mand (" J SOC"). See Pl.'s Mem. at 5; see also Compl. ¶¶ 3, 19. I n support of his claim that the United States ha s place d Anwar Al-Aulaqi on " kill li sts," plaintiff c ites a number of media re ports, which attribute their informa tion to anony mous U.S. mi litary and intellige nce sour ces. See , e.g ., Compl. ¶ 19; Pl.'s Mem. at 5; Wiz ner D ecl., Exs. F, H, L . For example, in J anuar y 2010, The Washing ton Post repor ted that, ac cording to unnamed military officia ls, Anwar A l-Aulaqi wa s on "a shortlist of U.S. citiz ens" that J SOC was authorized to kill or capture . See Wiz ner D ecl., Ex. F. A fe w months later, The Washing ton Post cited an a nony mous U.S. official as stating that Anwar Al Aulaqi had be come " the first U.S. citizen added to a list of suspec ted terr orists the CI A is authorized to kill." See id., Ex. L . And in J uly 2010, National Public Radio announce d -- on the basis of unidentified " [i ]nt ellige nce sour ces" -- that the U nited States had alre ady order ed " almost a dozen" unsucce ssful drone a nd air-strike s targ eting Anwar Al-Aulaqi in Ye men. See id., Ex. S . Ba sed on these ne ws repor ts, plaintiff claims that the United States has plac ed Anwa r Al- Aulaqi on the CI A and JS OC "kill lists" without "c harg e, trial, or c onviction." See Compl. ¶ 1. Plaintiff alleg es that individuals like his son are plac ed on " kill li sts" af ter a "c losed executive proce ss" in which de fenda nts and other e x ecutive of ficials dete rmine that " secr et cr iteria" have been sa tisfied. See id. ¶ 21; Pl.'s Me m. at 5-6. Plaintiff further avers " [u]pon information and belief" that once a n individual is placed on a " kill list," he remains there for " months at a time." See Compl. ¶ 22; see a lso Pl .' s Mem. at 6; Wiz ner D ecl., Ex. E (quoting unna med U.S. officia ls as stating that "kill lists" are re viewed e very six months and names ar e re moved from the list if there is no longer intelligence linking the per son to "known terrorists or [ terrorist] plans" ). Consequently , plaintiff ar g ues, Anwa r Al-Aula qi is "now subjec t to a standing order that permits the CI A and JS OC to kill him . . . without regard to whether, a t the time lethal force will be used, he presents a concrete , specific , and imminent threat to life, or whether there are rea sonable means short of le thal forc e that could be used to addre ss any such threa t." See Compl. ¶¶ 21, 23. The United States ha s neither c onfirmed nor denied the a lleg ation that it has issued a "sta nding or der" authorizing the CI A and JS OC to kill plaintiff' s son. See Def s.' Mem. at 36; see also Mot. Hr' g Tr. [Docket Entry 30] 17: 24-18:1, Nov. 8, 2010. Additionally , the United States has neither confirme d nor denie d whether -- if it has, in fa ct, authorized the use of lethal forc e ag ainst plaintiff' s son -- the authorization was made with regard to whether Anwar A l-Aulaqi presents a concrete , specific , and imminent threat to life, or whether there wer e reasonable means short of lethal for e that could be used to address any such threat. See Def s.' Mem. at 36. The United States has, howe ver, repeatedly stated that if Anwa r Al-Aula qi "we re to surrender or otherwise present himself to the proper authorities in a pe ace ful and a ppropriate manner , le al principles with which the U nited States has traditionally and uniformly complied would prohibit using lethal force or other violence against him in such circumstance s." I d. at 2; see a lso Mot. Hr' g Tr. 15:2-9. Neve rtheless, plaintiff a lleg es that due to his son' s inclusion on the CI A and JS OC "kill lists," Anwar Al-Aulaqi is in "hiding under thre at of de ath and c annot ac cess c ounsel or the courts to asser t his constitut ional rig hts without di sclosing his whe rea bouts and exposing himself to possible attack by Def endants." Compl. ¶ 9; see also id. ¶ 26; Al-Aulaqi De cl. ¶ 10 (sta ting that "[b]ecause the U.S. government is seeking to kill m y son, as re ported, he cannot a cce ss leg al assistance or a court without risking his life" ). Plaintiff there fore bring s four claims -- three constitutional, and one statutory -- on his son' s behalf. H e asse rts that the United States' s alleged policy of authorizing the targeted killing of U.S. citizens, including plaintiff' s son, outside of arme d conflict, " in circumstanc es in which they do not present c oncre te, spec ific, and imminent threa ts to li fe or phy sical saf ety , and whe re the re a re me ans other tha n lethal forc e that could rea sonably be employ ed to neutra liz e any such threa t," violates ( 1) Anwa r Al-Aula qi's Fourth Amendment rig ht to be fre e fr om unrea sonable seizures a nd (2) his F ifth Amendment rig ht not to be depr ived of life w ithout due process of law. See Compl. ¶¶ 27-28. Plaintiff further claims that (3) the U nited States' s ref usal to disclose the cr iteria by which it selects U.S. citizens like plaintiff' s son for targeted killing inde pendently violates the notice requirement of the F ifth Amendment Due Process Clause. See id. ¶ 30. Finally , plaintiff bring s (4) a statutory claim under the Alien Tort Statute (" ATS") , 28 U.S.C. § 1350, alleging that the United States' s "policy of targeted killings violates treaty and customary international law ."

#### B) Question of imminence in targeted killing revolves around international law

Heller, 13 (Kevin, Associate Professor & Reader at Melbourne Law School, teaches international criminal law and criminal law, Project Director for International Criminal Law at the Asia Pacific Centre for Military Law, a joint project of Melbourne Law School and the Australian Defence Force, “The DoJ White Paper’s Confused Approach to Imminence (and Capture)”, http://opiniojuris.org/2013/02/05/the-doj-white-papers-confused-approach-to-imminence-and-capture/)

According to the White Paper (p. 6), a US citizen “who is located outside the United States and is an operational leader continually planning attacks against US persons or interests” cannot lawfully be killed unless, inter alia, “an informed, high-level official of the US government has determined that the targeted individual poses an imminent threat of attack against the United States.” Early criticism of the White Paper has focused on how it defines imminence. The ACLU’s Jameel Jaffer, for example, says that it “redefines the word imminence in a way that deprives the word of its ordinary meaning.” That’s actually something of an understatement; as I’ll discuss in this post, the White Paper’s entire approach to the concept of imminence is deeply confused — and deeply problematic from the standpoint of international law.

#### C) A drone court specifically would over rely on international law in targeted killing decisions

Calabresi 13 (Massimo, Washington correspondent for TIME, “Another Voice Against A Secret Drone Court”, http://swampland.time.com/2013/02/19/another-voice-against-a-secret-drone-court/)

In the Wall Street Journal today, former Attorney General Michael Mukasey argues against giving secret, unelected courts the authority to oversee summary war time executions of American citizens. Instead, he says Congress should take action to clarify the commander-in-chief’s powers in the war on al Qaeda. Mukasey focuses a fair amount of criticism at the Obama administration for what he says is hypocrisy in drone use and misguided reliance on international law. But he also advances and refines arguments others on the left and right have made against a secret drone court. The heart of his argument is that drone courts would be impractical and that Congress should take its Constitutionally-mandated responsibility for declaring and defining the war. Mukasey says the secret drone court, championed by the New York Times editorial board, is a bad idea because Judges have no basis or background that suits them to review targeting decisions and no way to gather facts independently. Because they may serve for life, there is no way to hold them politically accountable for a decision—how best to defend the country—on which elected politicians are supposed to rise or fall. If it is simply a matter of introducing into the process some figure in whom the public has unreasoning trust, we might just as plausibly have the president’s targeting decisions reviewed by Oprah.

### 1NR A2: Kiobel

#### They’ve conceded that the FISA court will break the Sosa ruling on extra-judicial killing and alien tort statute – that means Kiobel will not overwhelm the link – the plan sets precedent

Metlitsky 13 (Anton, counsel to Rio Tinto, which filed an amicus brief in support of the respondents in this case, 4/18/2013, “Commentary: What’s left of the Alien Tort Statute?”, http://www.scotusblog.com/2013/04/commentary-whats-left-of-the-alien-tort-statute/)

Kiobel was the Court’s second opportunity to articulate the limits that apply to federal-common-law actions authorized by the ATS. While certiorari was originally granted to determine whether corporations could be sued under the ATS, the Court after oral argument ordered supplemental briefing and argument on a new question: to what extent could courts recognize a cause of action under the ATS for conduct that occurred within the territory of a foreign sovereign? In answering that question, the Court stayed true to Sosa’s admonition that courts approach questions concerning the scope of ATS actions with “great caution.” Notably, the Court unanimously concluded that courts may not recognize an action in the circumstances of this case, viz., a suit by aliens against foreign corporations for allegedly aiding and abetting the commission of human rights abuses on foreign soil. The Chief Justice’s opinion for the Court and Justice Breyer’s concurrence in the judgment did, however, disagree on the proper mode of analysis for reaching that conclusion. And while their debate was principally methodological, the distinction between the the Chief Justice’s and Justice Breyer’s approaches will have important practical consequences for ATS litigation going forward.

#### The plan is novel and extraordinary expansion – directly contradicts the constraints of Sosa and explodes ATS

Bates, 10 (John, United States District Judge for the US District Court for the District of Columbia, DC Circuit Court Decision, Civil Acton No. 10-1496, “Nasser Al-Aulaqui Vs Barack H. Obama et al: Memorandum Opinion”, <http://www.aclu.org/files/assets/2010-12-7-AulaqivObama-Decision.pdf>)

The precise relief that plaintiff seeks here -- a n injunction against the President, the Secre tary of De fense , and the Dir ector of the CI A pre venting them from carrying out specific national security measures abroad -- is, as de fenda nts point out , both "novel" and "extraordinary ." See De fs.' Mem. at 40. The Supreme Court in Sosa did not call upon the federal courts to recognize such novel, extraordinary claims under the ATS, but rather merely "opened the door a crack to the possible recognition of new causes of action under international law ( such as, perha ps, torture) if they wer e firmly g rounded on a n international c onsensus." Saleh, 580 F.3d a t 14; see a lso Sosa, 542 U.S. at 738 (declining to rec og nize a cause of ac tion for " arbitra ry " detentions under the ATS since " [c] rea ting a private c ause of action to furthe r that aspira tion would g o bey ond any residual c ommon law discretion we think it appropriate to exerc ise" ). Her e, it would be an abuse of this Court' s discretion, prope rly constraine d by Sosa, to recog nize a cause of ac tion under the ATS for alleged threats of state-sponsored extrajudicial killings, given that no court has ever found that the threat of a future extrajudicial killing is a recognized tort, much less one that violates the prese nt-day law of na tions. Because plaintiff cannot point to a single case rec og nizi ng such a c laim, his ATS claim cannot possibly be held to violate a "nor m of customary international law so well define d as to support the creation of a federal remedy

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#### Any legal ambiguity will be exploited – advocacy groups will cause a flood of ATS cases

Bradley 2001 (Curtis, Law Professor at the University of Virginia, “The Costs of International Human Rights Litigation”, 2 Chicago Journal of International Law 457, Fall, lexis)

There are a number of reasons why this litigation has been difficult to contain. Perhaps most importantly, it is subject to the decentralized control of private plaintiffs and their counsel. Under such circumstances, there will always be lawyers seeking to push the boundaries of the law. Even strategically sensitive advocacy groups, which might have more of a long-term interest in this litigation, cannot be counted on to exercise significant caution. The Center for Constitutional Rights, for example, which represented the plaintiffs in the Filartiga case and has been involved in many of the subsequent Alien Tort Statute cases, undoubtedly is concerned with the long-term viability of this litigation. But it also has continually attempted to expand the boundaries of this litigation. For example, it represents the plaintiffs in the Li Peng case, a case that has posed significant foreign relations difficulties for the United States. It also has been involved in several cases attempting to extend international human rights law to private companies. These efforts are not at all surprising or even blameworthy--advocacy groups naturally will seek to expand upon their successes and take advantage of legal ambiguities to achieve their ends.

### 1NR A2: State Secrets

#### Any new standards for targeted killing will be applied within international law – means the plan necessitates it

Zenko 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)

Beyond the United States, drones are proliferating even as they are becoming increasingly sophisticated, lethal, stealthy, resilient, and autonomous. At least a dozen other states and nonstate actors could possess armed drones within the next ten years and leverage the technology in unforeseen and harmful ways. It is the stated position of the Obama administration that its strategy toward drones will be emulated by other states and nonstate actors. In an interview, President Obama revealed, “I think creating a legal structure, processes, with oversight checks on how we use unmanned weapons is going to be a challenge for me and for my successors for some time to come—partly because technology may evolve fairly rapidly for other countries as well.”71 History shows that how states adopt and use new military capabilities is often influenced by how other states have—or have not—used them in the past. Furthermore, norms can deter states from acquiring new technologies.72 Norms—sometimes but not always codified as legal regimes—have dissuaded states from deploying blinding lasers and landmines, as well as chemical, biological, and nuclear weapons. A well-articulated and internationally supported normative framework, bolstered by a strong U.S. example, can shape armed drone proliferation and employment in the coming decades. Such norms would not hinder U.S. freedom of action; rather, they would internationalize already-necessary domestic policy reforms and, of course, they would be acceptable only insofar as the limitations placed reciprocally on U.S. drones furthered U.S. objectives. And even if hostile states do not accept norms regulating drone use, the existence of an international normative framework, and U.S. compliance with that framework, would preserve Washington’s ability to apply diplomatic pressure. Models for developing such a framework would be based in existing international laws that emphasize the principles of necessity, proportionality, and distinction—to which the United States claims to adhere for its drone strikes—and should be informed by comparable efforts in the realms of cyber and space. In short, a world characterized by the proliferation of armed drones—used with little transparency or constraint—would undermine core U.S. interests, such as preventing armed conflict, promoting human rights, and strengthening international legal regimes. It would be a world in which targeted killings occur with impunity against anyone deemed an “enemy” by states or nonstate actors, without accountability for legal justification, civilian casualties, and proportionality. Perhaps more troubling, it would be a world where such lethal force no longer heeds the borders of sovereign states. Because of drones’ inherent advantages over other weapons platforms, states and nonstate actors would be much more likely to use lethal force against the United States and its allies.

#### International law is the dominant force restricting targeted killing in the status quo – only legal basis for rulings

Radsan and Murphy, 11 (Afsheen John Radsan, Professor of Law, William Mitchell College of Law, Professor Radsan was assistant general counsel at the Central Intelligence Agency from 2002 to 2004, and Richard Murphy, AT&T Professor of Law, Texas Tech University School of Law, “Measure Twice, Shoot Once: Higher Care for CIA-Targeted Killing, 11 U Illinois LR 1201, 2011)

Analyzing the legality of targeted killing can be difficult because this practice falls between the two do minant legal models that generally are understood to control the state’s use of force: human rights law and IHL. 27 Human rights law controls civil law enforcement, sharply limiting state authority to kill—out side the full process of a trial—to situations where the target poses an imminent ri sk of death or serious injury to others. 28 IHL, by contrast, controls killing in an armed conflict and grants broad authority to kill opposin g combatants (as well as civilians directly taking part in hostilities). 29 These two models overlap when ap- plied to targeting a person who is an imminent and direct threat. For in- stance, either model would permit killing an Al Qaed a leader shooting on a crowd of civilians at a soccer game. Human rights law would not, however, permit targeting this person if he were unarmed and far away from any armed hostilities. IHL likely would. IHL is a compilation of treaties, case law, and customary interna- tional law that seeks to prevent unjusti fied death, destruction, and suffer- ing in war. 31 Ideas about limiting the horrors of war are as old as humani- ty itself. 32 The codification of IHL, however, began in earnest around the turn of the nineteenth century with the Hague Conventions in 1899 and 1907, when world powers met to write down the laws and customs of war.