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#### Failure to specify their agent is illegitimate and a voting issue-the resolution was written to give you flexibility of choice but you need to pick one—it’s the core of all of our ground

Kurr et al 13 (Jeff Kurr—Baylor University Kevin D. Kuswa, PhD—Fresno State Paul E. Mabrey III—James Madison University “Agents Wording Paper: Passive Voice, the Judiciary, and Other Odds and Ends,” <http://www.cedadebate.org/forum/index.php?action=dlattach;topic=4848.0;attach=1690>)

In short, this topic is all about the agent of action. The “object to be reduced” is the power possessed by a particular agent (the President) and the controversy is how the other governmental agents can restrict the authority held by the executive. Who should do the restraining? Congress? The Court? Other entities? The Executive herself? These are key questions. This topic literature is uniquely about the agent/actor question surrounding the restraint of presidential war powers. The fact that the literature is so divided and diverse on possible ways that certain agents should restrict PWP, may mean that we should privilege the agent by not specifying. Furthermore, the problem concerning the ability to generate good solvency (i.e., the president will ignore, congress doesn't act, courts fail etc.) means we should err on the side aff choice/flexibility in terms of being able to choose the means of defending the resolution through the agent the aff selects.

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#### A. Restrictions are prohibitions on action --- excludes conditions

Jean Schiedler-Brown 12, Attorney, Jean Schiedler-Brown & Associates, Appellant Brief of Randall Kinchloe v. States Dept of Health, Washington, The Court of Appeals of the State of Washington, Division 1, http://www.courts.wa.gov/content/Briefs/A01/686429%20Appellant%20Randall%20Kincheloe%27s.pdf

3. The ordinary definition of the term "restrictions" also does not include the reporting and monitoring or supervising terms and conditions that are included in the 2001 Stipulation.

Black's Law Dictionary, 'fifth edition,(1979) defines "restriction" as;

A limitation often imposed in a deed or lease respecting the use to which the property may be put. The term "restrict' is also cross referenced with the term "restrain." Restrain is defined as; To limit, confine, abridge, narrow down, restrict, obstruct, impede, hinder, stay, destroy. To prohibit from action; to put compulsion on; to restrict; to hold or press back. To keep in check; to hold back from acting, proceeding, or advancing, either by physical or moral force, or by interposing obstacle, to repress or suppress, to curb.

In contrast, the terms "supervise" and "supervisor" are defined as; To have general oversight over, to superintend or to inspect. See Supervisor. A surveyor or overseer. . . In a broad sense, one having authority over others, to superintend and direct. The term "supervisor" means an individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but required the use of independent judgment.

Comparing the above definitions, it is clear that the definition of "restriction" is very different from the definition of "supervision"-very few of the same words are used to explain or define the different terms. In his 2001 stipulation, Mr. Kincheloe essentially agreed to some supervision conditions, but he did not agree to restrict his license.

#### B. Voting Issue---limits—they can read bidirectional affs that only stop the bad form of a practice and argue they make the executive stronger---their own adelsburg ev says they empower the executive

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

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

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#### FAST TRACK DA

#### Fast Track fight is on the top of the agenda-Strong push from Obama is key-Failure collapses global trade momentum

Good-Farm Policy-12/31/13

The FarmPolicy.com News Summary

HEADLINE: Farm Bill; Ag Economy; and, Biofuels- Tuesday

And with respect to trade, the Chicago Tribune editorial board[18] noted yesterday that, 'President Barack Obama wants the power to negotiate free-trade treaties on a fast track. With Trade Promotion Authority, he would have a good chance of clinching huge trade pacts now being hammered out with Europe and Asia. Yet Congress may not give him that authority — for all the wrong reasons.' The Tribune opinion item stated that, 'Within months the White House hopes to finish talks on a proposed Trans-Pacific Partnership with a group of Asia-Pacific nations. Talks with the European Union on the planned Transatlantic Trade and Investment Partnership are progressing too. Those deals would eliminate barriers and promote economic activity between the U.S. and key allies. The upside is huge: Billions of dollars in new business would be generated if these pacts come to pass. 'Yet given the special interests that oppose free trade, neither deal stands much of a chance in Congress without TPA. Consider farm tariffs, one of the most frustrating roadblocks to any free-trade pact with Europe or Asia. The agriculture lobby here and abroad has long succeeded in imposing some of the least competitive public policies of any industry. Although farm protectionism hurts the vast majority of the world's citizens, standing up to clout-heavy constituencies such as U.S. sugar magnates requires extraordinary political courage. TPA is essential for overcoming the inevitable fight against vested interests that are determined to advance themselves at the expense of the nation's good. 'Federal lawmakers and the president have to make their case with much more gusto than we have seen so far. Congress could OK a Trade Promotion Authority bill in the first few months of 2014. But that won't happen without leadership on Capitol Hill and, especially, from the White House. Now's the time.'

#### Restrictions on drone strikes drain capital-spills over to domestic agenda

Friedman-CATO Institute-13

Cato Journal Winter 2013

SECTION: BOOK REVIEWS; Pg. 171 Vol. 33 No. 1 ISSN: 0273-3072

HEADLINE: Kill or Capture: The War on Terror and the Soul of the , Obama Presidency

Obama's jilted dovish supporters may take some comfort from Kill or Capture. It suggests that this record results from the president sacrificing his true desires for political expedience and that a second term might improve matters. Klaidman calls the president a "civil libertarian by instinct" and claims that his opposition to Bush's fearmongering was heartfelt. , Obama is said to worry about how a Republican president will use the war powers he established. He apparently gave in on Gitmo largely at behest of his political aides, especially former White House chief of staff Rahm Emanuel, who believed that civilian trials for terrorism suspects were an electoral loser and a drain of political capital needed especially for health care reform. The president's enthusiasm for drone strikes appears more genuine, but there too electoral politics-the opportunity to look tough-pushed him in a hawkish direction.¶ Kill or Capture is clear and readable but suffers flaws typical of journalistic histories. For one, it seems somewhat skewed by its sources. We hear a lot about what Justice Department lawyers and White House political operatives thought but little about machinations in Congress, the National Security staff, and the Office of the Secretary of Defense. It seems that Klaidman focuses the narrative where his access was best.¶ Klaidman's best sources appear eager to show that White House politicos got the president to give up his civil libertarian convictions too easily. Klaidman, who does not include footnotes, says that he interviewed more than 200 people for the book. But the two that seem most valuable-former White House counsel Greg Craig and Holder-repeatedly took the civil liberties side in fights with White House staff, especially Emmanuel. They led the increasingly quixotic effort to close Gitmo and end the military tribunals for suspected terrorists. Craig, by Klaidman's account, was essentially fired, and Holder seems likely to leave office, one way or another, in the next year. Klaidman reports that both Craig and Holder believe that Emmanuel, by "playing footsie" with South Carolina Senator Lindsey Graham in the hopes of cutting a grand bargain of detainee matters, had "subcontracted" a key national security policy to a political opponent who could not even deliver Republican votes. Holder is also said to suspect that Emmanuel worked with Republicans against the administration's attempts to try Muhammed in Manhattan. Klaidman, perhaps channeling these sources, argues that the president's eagerness to compromise with Republicans only encouraged them to attack him more.¶ That last point is about all the evaluation Klaidman provides. Otherwise he relays the White House's political judgments without interrogation. That is an understandable journalistic practice but still intellectually unsatisfying. Klaidman might at least have asked whether the tradeoffs between political gain and principle were really so sharp. A vast political science literature tells us that most of the time, the public barely knows or cares what happens with these issues and that partisan battle cries tend to excite mostly alreadycommitted partisans. The president may have more discretion here than it seems.¶ There is a larger problem with Kill or Capture's story of betrayal, one that, to be fair, is hardly unique to this book. That is the futility of the search for true beliefs beneath elected leaders' political shrouds. Because political leadership, especially of a large democracy, is an enterprise uniquely dominated by the imperative to gather support, other experiences tell us little about how leaders will navigate their values once in office. When it comes to their presidential behavior, what , Barack Obama or Mitt Romney believes independent of their electoral ambitions is an interesting but mostly academic question. Far more important are their priorities-what they are willing to sacrifice for their preferences. That is revealed by their behavior as elected leaders and candidates.¶ So whether or not , Obama is a civil libertarian by instinct-I'd say he is a politician by instinct-is basically irrelevant. Whatever his instincts, his record shows that he is not willing to risk much of anything for civil liberties and, on national security issues, goes where the prevailing political winds blow. That is why this administration's security policies resemble Bush's, which is the general pattern in our country. A second term might give , Obama more freedom to defy political wisdom, but it seems unlikely to matter much. Richard Neustadt's argument that presidential popularity translates into presidential power suggests that even second-term presidents will avoid unpopular moves to horde political capital for their top priorities. And , Obama's do not seem to lie in the civil liberties arena.

Political capital key

Financial Times 5/19/13

<http://www.ft.com/intl/cms/s/0/bf25541a-bf18-11e2-87ff-00144feab7de.html#axzz2kZDgYVKX>

The big challenge in crafting TPA this year will be successfully reflecting the dramatic shift in the global economy since it was last passed in 2002. This means US lawmakers will have to decide how far they want to go in imposing “negotiating objectives” on Mr Obama with respect to the role of state-owned enterprises, cross-border data flows, intellectual property rights, and currency levels. “I would expect a lot of issues to get aired,” said Scott Paul, president of the Alliance for American Manufacturing. “There is still general unhappiness with the administration’s unwillingness to be aggressive with other countries on exchange rates,” he said, which could affect the talks with Japan on the TPP. “It’s going to take an extraordinary amount of political capital on the part of the administration to get this done. There are going to be a lot of battles,” Mr Paul added. Obama administration officials have said they are “ready to work” on TPA with Congress but have not presented their own legislation to jump-start the process, drawing criticism from Republicans who say it is a sign that they are not fully committed. But others say the White House skittishness has been purely tactical – that it wants to wait for the most politically advantageous moment to step into the debate.

#### Free trade prevents multiple scenarios for world war and WMD Terrorism

Panzner 2008

Michael, faculty at the New York Institute of Finance, 25-year veteran of the global stock, bond, and currency markets who has worked in New York and London for HSBC, Soros Funds, ABN Amro, Dresdner Bank, and JPMorgan Chase “Financial Armageddon: Protect Your Future from Economic Collapse,” pg. 136-138

Continuing calls for curbs on the flow of finance and trade will inspire the United States and other nations to spew forth protectionist legislation like the notorious Smoot-Hawley bill. Introduced at the start of the Great Depression, it triggered a series of tit-for-tat economic responses, which many commentators believe helped turn a serious economic downturn into a prolonged and devastating global disaster. But if history is any guide, those lessons will have been long forgotten during the next collapse. Eventually, fed by a mood of desperation and growing public anger, restrictions on trade, finance, investment, and immigration will almost certainly intensify. Authorities and ordinary citizens will likely scrutinize the cross-border movement of Americans and outsiders alike, and lawmakers may even call for a general crackdown on nonessential travel. Meanwhile, many nations will make transporting or sending funds to other countries exceedingly difficult. As desperate officials try to limit the fallout from decades of ill-conceived, corrupt, and reckless policies, they will introduce controls on foreign exchange. Foreign individuals and companies seeking to acquire certain American infrastructure assets, or trying to buy property and other assets on the cheap thanks to a rapidly depreciating dollar, will be stymied by limits on investment by noncitizens. Those efforts will cause spasms to ripple across economies and markets, disrupting global payment, settlement, and clearing mechanisms. All of this will, of course, continue to undermine business confidence and consumer spending. In a world of lockouts and lockdowns, any link that transmits systemic financial pressures across markets through arbitrage or portfolio-based risk management, or that allows diseases to be easily spread from one country to the next by tourists and wildlife, or that otherwise facilitates unwelcome exchanges of any kind will be viewed with suspicion and dealt with accordingly. The rise in isolationism and protectionism will bring about ever more heated arguments and dangerous confrontations over shared sources of oil, gas, and other key commodities as well as factors of production that must, out of necessity, be acquired from less-than-friendly nations. Whether involving raw materials used in strategic industries or basic necessities such as food, water, and energy, efforts to secure adequate supplies will take increasing precedence in a world where demand seems constantly out of kilter with supply. Disputes over the misuse, overuse, and pollution of the environment and natural resources will become more commonplace. Around the world, such tensions will give rise to full-scale military encounters, often with minimal provocation. In some instances, economic conditions will serve as a convenient pretext for conflicts that stem from cultural and religious differences. Alternatively, nations may look to divert attention away from domestic problems by channeling frustration and populist sentiment toward other countries and cultures. Enabled by cheap technology and the waning threat of American retribution, terrorist groups will likely boost the frequency and scale of their horrifying attacks, bringing the threat of random violence to a whole new level. Turbulent conditions will encourage aggressive saber rattling and interdictions by rogue nations running amok. Age-old clashes will also take on a new, more heated sense of urgency. China will likely assume an increasingly belligerent posture toward Taiwan, while Iran may embark on overt colonization of its neighbors in the Mideast. Israel, for its part, may look to draw a dwindling list of allies from around the world into a growing number of conflicts. Some observers, like John Mearsheimer, a political scientist at the University of Chicago, have even speculated that an “intense confrontation” between the United States and China is “inevitable” at some point. More than a few disputes will turn out to be almost wholly ideological. Growing cultural and religious differences will be transformed from wars of words to battles soaked in blood. Long-simmering resentments could also degenerate quickly, spurring the basest of human instincts and triggering genocidal acts. Terrorists employing biological or nuclear weapons will vie with conventional forces using jets, cruise missiles, and bunker-busting bombs to cause widespread destruction. Many will interpret stepped-up conflicts between Muslims and Western societies as the beginnings of a new world war.

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**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.

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**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

#### **NON VIOLENCE**

#### Their technical solution to war powers prevents us from asking prior questions regarding national security interests and who is served by them

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This fearsome sort of legality is largely shielded from our view (that is, from the view of Americans---the ones wielding this legality) with the veil of democracy, knitted together with the thread of process jurisprudence. Within process jurisprudence, there is no inquiry into the fundamental question: allocation of power between the branches to accomplish . . . what? It is very easy to skip that question, and thus easy to slide into or accept circular argumentation.31 With the focus on the distribution of power, arguments about what to do in this so-called war on terror start off with assumptions about the nature of the problem (crudely expressed as violent Jihadists who hate our freedoms) and then appeal to those assumptions to justify certain actions that have come to constitute this “war.” The grip of this circularity, ironically enough, gains its strength from the ideology of legality, the very thing that the Court seeks to protect in this narrative drama, because that ideology fences out considerations of history, sociology, politics, and much else that makes up the human experience. What Judith Shklar observed over forty years ago captures the point here: the “legalism” mindset--which thoroughly infuses the process jurisprudence that characterizes the Hamdi analysis--produces the “urge to draw a clear line between law and nonlaw” which, in turn, leads to “the construction of ever more refined and rigid systems of formal definitions” and thus “serve[s] to isolate law completely from the social context within which it exists.” 32 The pretense behind the process jurisprudence--and here pretense is purpose--is the resilient belief that law can be, and ought to be, impervious to ideological considerations. And so, the avoidance of the “accomplish . . . what?” question is far from accidental; it is the quintessential act of legality itself.33 More than that, this “deliberate isolation of the legal system . . . is itself a refined political ideology, the expression of a preference” that masquerades as a form of judicial neutrality we find suitable in a democracy.34 If the Executive’s asserted prerogative to prosecute a war in a way that will assure victory is confronted with the prior question about what exactly we want to accomplish in that war--if, that is, we confront the question posed by Slavoj Zizek, noted at the outset of this article—then the idea of national security trumping “law” takes on an entirely different analytical hue. Professor Owen Fiss is probably right when he says that the Justices in Hamdi “searched for ways to honor the Constitution without compromising national interests.”35 But that is a distinctly unsatisfying observation if what we are concerned about is the identification of what exactly those “national interests” are.36 We may not feel unsatisfied because, in the context of Hamdi, it undoubtedly seems pointless to ask what we are trying to accomplish, since the answer strikes us as obvious. We are in a deadly struggle to stamp out the terrorist threat posed by Al Qaeda, and more generally, terrorism arising from a certain violent and nihilistic strain of Islamic fundamentalism. Our foreign policy is expressly fueled by the outlook that preemptive attacks is not merely an option, but is the option to be used. In the words of the Bush Administration’s 2002 National Security Strategy document, “In the world we have entered, the only path to safety is the path of action. And this nation will act.”37 O’Connor and the rest of the Court members implicitly understand our foreign policy and the goal to be pursued in these terms, which explains why the Hamdi opinion nowhere raises a question about what it is the so-called “war on terror” seeks to accomplish. After all, the stories we want to tell dictate the stories that we do tell. We want to tell ourselves stories about our own essential goodness and benevolence, our own fidelity to the rule of law; and that desire dictates the juridical story that ultimately gets told. Once one posits that our foreign policy is purely and always defensive, as well as benevolent in motivation,38 then whatever the juridical story—even one where the nation’s highest Court announces that the Executive has no blank check to prosecute a war on terror—the underlying reality inscribed upon the world’s inhabitants, the consequences real people must absorb somehow, is one where “the United States has established that its only limit on the world stage will be its military power.”39 As O’Connor sees it, the real problem here is that, given that the allocation-of-power issue is tied to the goal of eliminating the terrorist threat, we have to reckon with the probability that this allocation is not just an emergency provision, but one that will be cemented into our society, since the current emergency is likely to be, in all practicality, a permanent emergency. But to say we are in a struggle to stamp out a terrorist threat posed by Islamic fundamentalism, and to say that “the only path to safety is the path of action,” conceals--renders invisible, a postmodernist would likely put it--an even more fundamental, and more radical, question: the allocation of power that the Court is called upon to establish is in the service of eliminating a terrorist threat to accomplish . . . what? The standard answer is, our security, which most Americans would take to mean, to avert an attack on our homeland, and thus, as it was with Lincoln, to preserve the Union. And so, we accept as obvious that our dilemma is finding the right security-liberty balance. The problem with that standard answer is two-fold. First, it glosses over the fact that we face no true existential threat, no enemy that genuinely threatens to seize control over our state apparatus and foist upon us a form of government to which we would not consent. That fact alone distinguishes our current war on terrorism from Lincoln’s quest to preserve the Union against secession.40 Second, this we-must-protect-the-Homeland answer is far too convenient as a conversation stopper. When the Bush Administration=’ National Security Strategy document avers that “the only path to safety is the path of action,” we ought to ask what global arrangements are contemplated through that “path of action.” When that document announces that “this nation will act,” it surely cannot suffice to say that the goal is merely eliminating a threat to attain security. All empires and empire-seeking nations engage in aggression under the rubric of self-defense and the deployment of noble-aims rhetoric. These justifications carry no genuine meaning but are devices of the powerful and the privileged, with the acquiescence and often encouragement by a frightened populace, to quell unsettling questions from dissenters within the society.41 Stop and think for a moment, how is it that the nation with the most formidable military might--the beneficiary of the hugest imbalance in military power ever in world history--is also the nation that professes to be the most imperiled by threats throughout the world, often threatened by impoverished peasant societies (Vietnam, Nicaragua, El Salvador, Chile, Granada, etc.)?42 An empire must always cast itself as vulnerable to attack and as constantly being under attack in order to justify its own military aggression. This is most acutely true when the empire is a democracy that must garner the consent of the populace, which explains why so much of governmental rhetoric concerning global affairs is alarmist in tone. The point is that quandaries over constitutional interpretation--ought we be prudential, or are other techniques more closely tied to the text the only legitimate mode of constitutional adjudication--may very well mask what may be the most urgent issue of all, which concerns what exactly this nation’s true identity is at this moment in world history, what it is that we are pursuing. Whereas Sanford Levinson has courageously argued that “too many people >venerate= the Constitution and use it as a kind of moral compass,”43 which leads to a certain blindness, I raise for consideration an idea that Hamdi suppresses, through its narrative techniques, which is that too many people “venerate” this nation without any genuine consideration of the particular way we have, since World War II, manifested ourselves as a nation. I join Levinson’s suspicion that our Constitution is venerated as an idea, as an abstraction, without much thought given to its particulars. It is important to be open to the possibility that the same is true with regard to our nation--the possibility that we venerate the idea of America (undoubtedly worth venerating), but remain (willfully?) ignorant of the particulars of our actual responsibility for the health of the planet and its inhabitants.44 To openly consider such issues is not anti-American--an utterly absurd locution--for to suggest that it is amounts to a denial that U.S. actions (as opposed to rhetoric that leeches off of the promise and ideal of “America”) can be measured by some yardstick of propriety that applies to all nations.45 The very idea of a “yardstick of propriety” requires a prior acceptance of two ideas: one, that we are part of something larger, that we are properly accountable to others and to that larger circumstance; and two, that it is not a betrayal or traitorous for a people within a nation to look within itself.46 Issacharoff and Pildes, the most prominent process theorists, observe that process jurisprudence may be inadequate to address the risk that we “might succumb to wartime hysteria.”47 I would broaden that observation so as to be open to the possibility that the risk goes beyond just wartime hysteria, that our desire for security and military victory, rooted in our repudiation of a genuine universal yardstick of propriety that we willingly apply to ourselves (often called American exceptionalism48)--which means that security and military victory are not ipso facto the same thing--could easily slide us into sanctioning a form of sovereignty that is dangerously outmoded and far out of proportion to what circumstances warrant. Process jurisprudence supposedly has the merit of putting the balance of security and liberty into the hands of the democratic institutions of our government. But what it cannot bring into the field of vision--and what is absolutely banished from view in Hamdi--is the possibility that the democratic institutions themselves, and perhaps even the democratic culture generally, the public sphere of that culture, have been corrupted so severely as to reduce process jurisprudence to a shell game.49 More specifically, the formal processes of governmentality responding to crisis is judicially monitored, but the mythos of our national identity, particularly the idea that every international crisis boils down to the unquestioned fact that the United States at least endeavors to act solely in self defense and to promote some benevolent goal that the entire world ought to stand behind, is manufactured and thus some hegemonic pursuit in this global “war on terror” remains not just juridically ignored, but muted and marginalized in much of our public discussions about it.50 Under process jurisprudence, it is the wording of a piece of legislation, not the decoding of the slogan national security, that ultimately matters. And under process jurisprudence, fundamental decisions have already been made--fundamental decisions concerning the nature of our global ambitions and the way we will pursue them--before the judiciary can confront the so-called security-liberty balance, which means that the analytical deck has been stacked by the time the justiciable question---that is, what we regard as the justiciable question---is posed. Stacking the analytical deck in this way reduces the Court members to the role of technicians in the service of whatever pursuit the sovereign happens to choose.51 This is why it is worth asking what many might regard as a naive, if not tendentious, question: is it true that in the case of Hamdi and other post-9/11 cases, the judiciary’s quandary over allocation of power is actually in the service of genuine security, meaning physical safety of the populace? Does the seemingly obvious answer that we seek only to protect the safety of our communities against naked violence blind us to a deeper ailment within our culture? Is it possible that the allocation of power, at bottom, is rooted in a dark side of our Enlightenment heritage, an impulse within Legality that threatens us in a way similar to the Thanatos drive Freud identified as creating civilization’s discontent?52 Perhaps Hamdi itself, as a cultural document, signals yet another capitulation to the impulse to embrace a form of means-ends rationality that supports the Enlightenment drive to control and subdue.53 Perhaps what Hamdi shows is that 9/11 has not really triggered a need to recalibrate the security-liberty balance, but has actually unleashed that which has already filtered into and corrupted our culture—Enlightenment’s dark side, as the Frankfurt School understood it54’’and is thus one among many cultural documents that ought to tell us we are not averting a new dark age, but are already in it, or at least, to borrow a phrase from Wendell Berry, that we are “leapfrogging into the dark.” 55 It is impossible, without the benefit of historical distance, to answer these questions with what amounts to comforting certitude. But they are worth confronting, since the fate of so many people depends on it, given our unrivaled ability and frightening willingness to use military force. Our culture’s inability to ask such questions in any meaningful way, as opposed to marginalizing those who plead for them to be confronted, is somewhat reminiscent of how early Enlightenment culture treated scientific endeavors. “Science,” during the rise of Enlightenment culture, rebuffed the why question, banished it as a remnant of medieval darkness, because the why-ness of a certain scientific pursuit suggested that certain domains of knowledge were bad, off-limits, taboo. The whole cultural mindset of the Enlightenment was to jettison precisely such a suggestion. That cultural mindset produced a faith all its own, that all scientific pursuits, and by extension all human quests for knowledge, will in the end promote human flourishing. It has taken the devastation of our planet to reveal the folly of that faith, a blind-spot in the Western mind. It may turn out, as a sort of silver lining on a dark cloud, that the terrorism arising from Islamic jihadists may do something similar.

#### **Questioning the affirmatives ontology is a prior question to the advantages; the form of social relations their advocacy embodies rests on faulty epistemology and makes extinction inevitable---vote negative as a form of noncooperation with their political economy**

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I. Industrial civilization is on a collision course with life itself. Facilitating its collapse is a deserved and welcomed correction, long overdue. Collapse is inevitable whether we seek to facilitate it or not. Nonetheless, whatever we do, industrial civilization, based as it is on mining and burning finite and polluting fossil fuels, cannot last because it is destroying the ecosystem and the basis of local, cooperative life itself. It knows no limits in a physically finite world and thus is unsustainable. And the numbers of our human species on earth, which have proliferated from 1.6 billion in 1900 to 7 billion today, is the consequence of mindlessly eating oil – tractors, fertilizers, pesticides, herbicides – while destroying human culture in the process. Our food system itself is not sustainable. Dramatic die-off is part of the inevitable correction in the very near future, whether we like it or not. Human and political culture has become totally subservient to a near religion of economics and market forces. Technologies are never neutral, with some being seriously detrimental. Technologies come with an intrinsic character representing the purposes and values of the prevailing political economy that births it. The Industrialism process itself is traumatic. It is likely that only when we experience an apprenticeship in nature can we be trusted with machines, especially when they capital intensive & complicated. The nation-state, intertwined more than ever with corporate industrialism, will always come to its aid and rescue. Withdrawal of popular support enables new imagination and energy for re-creating local human food sufficient communities conforming with bioregional limits. II. The United States of America is irredeemable and unreformable, a Pretend Society. The USA as a nation state, as a recent culture, is irredeemable, unreformable, an anti-democratic, vertical, over-sized imperial unmanageable monster, sustained by the obedience and cooperation, even if reluctant, of the vast majority of its non-autonomous population. Virtually all of us are complicit in this imperial plunder even as many of us are increasingly repulsed by it and speak out against it. Lofty rhetoric has conditioned us to believe in our national exceptionalism, despite it being dramatically at odds with the empirically revealed pattern of our plundering cultural behavior totally dependent upon outsourcing the pain and suffering elsewhere. We cling to living a life based on the social myth of US America being committed to justice for all, even as we increasingly know this has always served as a cover for the social secret that the US is committed to prosperity for a minority thru expansion at ANY cost. Our Eurocentric origins have been built on an extraordinary and forceful but rationalized dispossession of hundreds of Indigenous nations (a genocide) assuring acquisition of free land, murdering millions with total impunity. This still unaddressed crime against humanity assured that our eyes themselves are the wool. Our addiction to the comfort and convenience brought to us by centuries of forceful theft of land, labor, and resources is very difficult to break, as with any addiction. However, our survival, and healing, requires a commitment to recovery of our humanity, ceasing our obedience to the national state. This is the (r)evolution begging us. Original wool is in our eyes: Eurocentric values were established with the invasion by Columbus: Cruelty never before seen, nor heard of, nor read of – Bartolome de las Casas describing the behavior of the Spaniards inflicted on the Indigenous of the West Indies in the 1500s. In fact the Indigenous had no vocabulary words to describe the behavior inflicted on them (A Short Account of the Destruction of the Indies, 1552). Eurocentric racism (hatred driven by fear) and arrogant religious ethnocentrism (self-righteous superiority) have never been honestly addressed or overcome. Thus, our foundational values and behaviors, if not radically transformed from arrogance to caring, will prove fatal to our modern species. Wool has remained uncleansed from our eyes: I personally discovered the continued vigorous U.S. application of the “Columbus Enterprise” in Viet Nam, discovering that Viet Nam was no aberration after learning of more than 500 previous US military interventions beginning in the late 1790s. Our business is killing, and business is good was a slogan painted on the front of a 9th Infantry Division helicopter in Viet Nam’s Mekong Delta in 1969. We, not the Indigenous, were and remain the savages. The US has been built on three genocides: violent and arrogant dispossession of hundreds of Indigenous nations in North America (Genocide #1), and in Africa (Genocide #2), stealing land and labor, respectively, with total impunity, murdering and maiming millions, amounting to genocide. It is morally unsustainable, now ecologically, politically, economically, and socially unsustainable as well. Further, in the 20th Century, the Republic of the US intervened several hundred times in well over a hundred nations stealing resources and labor, while imposing US-friendly markets, killing millions, impoverishing perhaps billions (Genocide #3). Since 1798, the US military forces have militarily intervened over 560 times in dozens of nations, nearly 400 of which have occurred since World War II. And since WWII, the US has bombed 28 countries, while covertly intervening thousands of times in the majority of nations on the earth. It is not helpful to continue believing in the social myth that the USA is a society committed to justice for all , in fact a convenient mask (since our origins) of our social secret being a society committed to prosperity for a few through expansion at ANY cost. (See William Appleman Williams). Always possessing oligarchic tendencies, it is now an outright corrupt corporatocracy owned lock stock and barrel by big money made obscenely rich from war making with our consent, even if reluctant. The Cold War and its nuclear and conventional arms race with the exaggerated “red menace”, was an insidious cover for a war preserving the Haves from the Have-Nots, in effect, ironically preserving a western, consumptive way of life that itself is killing us. Pretty amazing! Our way of life has produced so much carbon in the water, soil, and atmosphere, that it may in the end be equivalent to having caused nuclear winter. The war OF wholesale terror on retail terror has replaced the “red menace” as the rhetorical justification for the continued imperial plunder of the earth and the riches it brings to the military-industrial-intelligence-congressional-executive-information complex. Our cooperation with and addiction to the American Way Of Life provides the political energy that guarantees continuation of U.S. polices of imperial plunder. III. The American Way Of Life (AWOL), and the Western Way of Life in general, is the most dangerous force that exists on the earth. Our insatiable consumption patterns on a finite earth, enabled by but a one-century blip in burning energy efficient liquid fossil fuels, have made virtually all of us addicted to our way of life as we have been conditioned to be in denial about the egregious consequences outsourced outside our view or feeling fields. Of course, this trend began 2 centuries earlier with the advent of the industrial revolution. With 4.6% of the world’s population, we consume anywhere from 25% to nearly half the world’s resources. This kind of theft can only occur by force or its threat, justifying it with noble sounding rhetoric, over and over and over. Our insatiable individual and collective human demands for energy inputs originating from outside our bioregions, furnish the political-economic profit motives for the energy extractors, which in turn own the political process obsessed with preserving “national (in)security”, e.g., maintaining a very class-based life of affluence and comfort for a minority of the world’s people. This, in turn, requires a huge military to assure control of resources for our use, protecting corporate plunder, and to eliminate perceived threats from competing political agendas. The U.S. War department’s policy of “full spectrum dominance” is intended to control the world’s seas, airspaces, land bases, outer spaces, our “inner” mental spaces, and cyberspaces. Resources everywhere are constantly needed to supply our delusional modern life demands on a finite planet as the system seeks to dumb us down ever more. Thus, we are terribly complicit in the current severe dilemmas coming to a head due to (1) climate instability largely caused by mindless human activities; (2) from our dependence upon national currencies; and (3) dependence upon rapidly depleting finite resources. We have become addicts in a classical sense. Recovery requires a deep psychological, spiritual, and physical commitment to break our addiction to materialism, as we embark on a radical healing journey, individually and collectively, where less and local becomes a mantra, as does sharing and caring, I call it the Neolithic or Indigenous model. Sharing and caring replace individualism and competition. Therefore, A Radical Prescription Understanding these facts requires a radical paradigmatic shift in our thinking and behavior, equivalent to an evolutionary shift in our epistemology where our knowledge/thinking framework shifts: arrogant separateness from and domination over nature (ending a post-Ice Age 10,000 year cycle of thought structure among moderns) morphs to integration with nature, i.e., an eco-consciousness felt deeply in the viscera, more powerful than a cognitive idea. Thus, we re-discover ancient, archetypal Indigenous thought patterns. It requires creative disobedience to and strategic noncooperation with the prevailing political economy, while re-constructing locally reliant communities patterned on instructive models of historic Indigenous and Neolithic villages.

### Norms

#### Tech isn’t the key---no one has the human capital or intel to conduct wide scale drone operations

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.

#### U.S. drone use doesn’t set a precedent, restraint doesn’t solve it, and norms don’t apply to drones at all in the first place

Amitai Etzioni 13, professor of international relations at George Washington University, March/April 2013, “The Great Drone Debate,” Military Review, <http://usacac.army.mil/CAC2/MilitaryReview/Archives/English/MilitaryReview_20130430_art004.pdf>

Other critics contend that by the United States using drones, it leads other countries into making and using them. For example, Medea Benjamin, the cofounder of the anti-war activist group CODEPINK and author of a book about drones argues that, “The proliferation of drones should evoke reﬂection on the precedent that the United States is setting by killing anyone it wants, anywhere it wants, on the basis of secret information. Other nations and non-state entities are watching—and are bound to start acting in a similar fashion.”60 Indeed scores of countries are now manufacturing or purchasing drones. There can be little doubt that the fact that drones have served the United States well has helped to popularize them. However, it does not follow that United States should not have employed drones in the hope that such a show of restraint would deter others. First of all, this would have meant that either the United States would have had to allow terrorists in hardto-reach places, say North Waziristan, to either roam and rest freely—or it would have had to use bombs that would have caused much greater collateral damage.

Further, the record shows that even when the United States did not develop a particular weapon, others did. Thus, China has taken the lead in the development of anti-ship missiles and seemingly cyber weapons as well. One must keep in mind that the international environment is a hostile one. Countries—and especially non-state actors— most of the time do not play by some set of self constraining rules. Rather, they tend to employ whatever weapons they can obtain that will further their interests. The United States correctly does not assume that it can rely on some non-existent implicit gentleman’s agreements that call for the avoidance of new military technology by nation X or terrorist group Y—if the United States refrains from employing that technology.

I am not arguing that there are no natural norms that restrain behavior. There are certainly some that exist, particularly in situations where all parties beneﬁt from the norms (e.g., the granting of diplomatic immunity) or where particularly horrifying weapons are involved (e.g., weapons of mass destruction). However drones are but one step—following bombers and missiles—in the development of distant battleﬁeld technologies. (Robotic soldiers—or future ﬁghting machines— are next in line). In such circumstances, the role of norms is much more limited.

#### Diplomatic and political costs constrain their use---deterrence still applies

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.

#### US and China will never go to war-overwhelming mutual interest and history of conflict resolution prove.

**Wu, China Foundation for International Studies Center for American Studies executive director, 2013**

(Zurong, “China and America’s Innate Goal: Avoiding War Forever”, 7-30, <http://watchingamerica.com/News/217271/china-and-americas-innate-goal-avoiding-war-forever/>, ldg)

China and the U.S. are currently constructing a new kind of relationship between major powers, with several aims. One intrinsic aim is especially worthy of attention, namely that China and the U.S. will not go to war today, nor in the future, and will forever maintain a peaceful association. The Chinese and American governments and people are striving toward this goal unceasingly because it is in the best interests of the people of China, America and the whole world. To avoid conflict, to keep from fighting, to be mutually respectful and to embark upon a path of mutual cooperation — acting in these ways would benefit everyone. First of all, the globalization of the economy, information and other essential factors have created a global village, and the U.S. and China live and work together within this community; their interests are intertwined and neither can break the inseparable bond each has with the other. The global financial crisis of 2007 once again made clear the great extent to which the Chinese and American economies are linked and mixed, for when one sinks into a recession or depression, it is almost impossible for the other to recover and flourish alone. When it comes to international security, climate change, energy, counterterrorism, oceans and all sorts of other unprecedented areas, China and the U.S. share more common interests every day, and cooperative negotiations are unceasingly strengthened. Within this sort of atmosphere, discussing whether the U.S. and China want to go to war seems a little bit untimely and excessive. Second, the current period is fundamentally different than the era of the Cold War, for the development of peace is the theme of the present. People from countries around the world are all concentrating their energy on revitalizing the economy and improving quality of life. After the end of the Cold War, America launched several localized wars in smaller countries under the banner of the fight against terrorism, in the process bringing upon itself a heavy financial and economic burden. Perhaps it was upon consideration of the fact that large-scale conflicts could yield a level of suffering and destruction that would be difficult to endure that America has not launched any wars against the great powers that are in possession of nuclear arms. Even in the Cold War, during the Cuban missile crisis of 1962, America and the Soviet Union did not go to war. The experience of history tells us that the inherent goal of this new form of Sino-U.S. relations will have the support of the strength of the entire ranks of the world’s great powers; thus as long as both China and the U.S. have unflagging perseverance, it can be achieved. Third, for over 40 years, China and the U.S. have promoted a strategy of mutual trust, of the expansion of cooperation, of controlling differences of opinion. These lessons from experience are the U.S. and China’s most valuable treasure. Since Nixon visited the Chinese, Sino-American relations have gone through wind and rain but have always developed onward; moreover, the speed, breadth and depth of the development have far exceeded everyone’s expectations. Indeed, Sino-U.S. relations enjoy a great vitality. And since the foundations were laid fairly recently, Sino-U.S. relations continually make significant progress. The highest leaders communicate freely and military leaders exchange visits often. The two militaries are in the process of issuing plans for Chinese troops to participate in the 2014 Pacific Rim joint military exercises. Both sides have decided to actively investigate significant military activities, report mechanisms to each other and continue to research matters of security and issues regarding standards of conduct, which are relevant to the Chinese and American navies and air forces. These collaborations will give rise to a significant and far-reaching influence on world peace and international security and will vigorously promote the actualization of the inherent goal of the new form of Sino-U.S. great power relations.

#### No impact to Asian drones

**Sevastopulo, 10/28/13** (Demetri, “China-Japan relations take turn for worse” Financial Times, <http://www.ft.com/intl/cms/s/0/db42ec8e-3fab-11e3-8882-00144feabdc0.html#axzz2kkvx15JT>)

Sino-Japanese ties have been very tense since Tokyo last year bought three of the Senkaku Islands – a chain in the East China Sea that Japan controls but China claims – from their private owners. At the weekend, tensions flared again as Japan scrambled fighter jets to shadow Chinese jets in the area.

Last month, China flew a drone near the Senkaku, leading Japan to say it would consider shooting down unmanned aircraft that violate its airspace. China said that would be an “act of war” and that it would take “decisive action to strike back”.

Mike Green, an Asia expert at the Center for Strategic and International Studies, said the chance of an accidental confrontation near the Senkaku, which China calls the Diaoyu, was “higher than it has ever been, but it is not August 1914”.

“The Senkaku are not Sarajevo, the fuse waiting to light a highly combustible military confrontation across northeast Asia. Even an accidental military collision would be quickly contained, but it would also be very bad for business.”

The tensions over the weekend coincided with China unveiling its first nuclear submarine force for a detailed full show for the first time, in the latest sign of its growing military confidence.

Last December, a Chinese surveillance aircraft flew over the Senkaku in what Japan described as the first official Chinese breach of its airspace since 1958. Chinese ships and aircraft have since routinely tested Japanese control of the group, prompting concern about deliberate or accidental conflict.

On the surface, the Senkaku situation had cooled somewhat before this weekend. The Japanese coast guard says Chinese vessels have entered its territorial waters or the surrounding “contiguous zone” on five separate days this month, compared with 20 to 24 days in each of the previous four months.

And while Japan scrambled fighters 149 times in the April to September period, the high number was still 88 fewer than it did in the preceding six months. Trade relations between the countries have also improved from last year.

#### China won’t use drones offensively

Erickson and Strange 13 (ANDREW ERICKSON is an associate professor at the Naval War College and an Associate in Research at Harvard University’s Fairbank Center. Follow him on Twitter @andrewserickson. AUSTIN STRANGE is a researcher at the Naval War College’s China Maritime Studies Institute and a graduate student at Zhejiang University. “China Has Drones. Now What?,” http://www.foreignaffairs.com/articles/139405/andrew-erickson-and-austin-strange/china-has-drones-now-what?page=show)

Drones, able to dispatch death remotely, without human eyes on their targets or a pilot's life at stake, make people uncomfortable - even when they belong to democratic governments that presumably have some limits on using them for ill. (On May 23, in a major speech, US President Barack Obama laid out what some of those limits are.) An even more alarming prospect is that unmanned aircraft will be acquired and deployed by authoritarian regimes, with fewer checks on their use of lethal force.¶ Those worried about exactly that tend to point their fingers at China. In March, after details emerged that China had considered taking out a drug trafficker in Myanmar with a drone strike, a CNN blog post warned, "Today, it's Myanmar. Tomorrow, it could very well be some other place in Asia or beyond." Around the same time, a National Journal article entitled "When the Whole World Has Drones" teased out some of the consequences of Beijing's drone programme, asking, "What happens if China arms one of its remote-piloted planes and strikes Philippine or Indian trawlers in the South China Sea?"¶ Indeed, the time to fret about when China and other authoritarian countries will acquire drones is over: they have them. The question now is when and how they will use them. But as with its other, less exotic military capabilities, Beijing has cleared only a technological hurdle - and its behaviour will continue to be constrained by politics.¶ China has been developing a drone capacity for over half a century, starting with its reverse engineering of Soviet Lavochkin La-17C target drones that it had received from Moscow in the late 1950s. Today, Beijing's opacity makes it difficult to gauge the exact scale of the programme, but according to Ian Easton, an analyst at the Project 2049 Institute, an American think-tank devoted to Asia-Pacific security matters, by 2011 China's air force alone had over 280 combat drones. In other words, its fleet of unmanned aerial vehicles is already bigger and more sophisticated than all but the United States'; in this relatively new field Beijing is less of a newcomer and more of a fast follower. And the force will only become more effective: the Lijian ("sharp sword" in Chinese), a combat drone in the final stages of development, will make China one of the very few states that have or are building a stealth drone capacity.¶ This impressive arsenal may tempt China to pull the trigger. The fact that a Chinese official acknowledged that Beijing had considered using drones to eliminate the Myanmar drug trafficker, Naw Kham, makes clear that it would not be out of the question for China to launch a drone strike in a security operation against a non-state actor. Meanwhile, as China's territorial disputes with its neighbours have escalated, there is a chance that Beijing would introduce unmanned aircraft, especially since India, the Philippines and Vietnam distantly trail China in drone funding and capacity, and would find it difficult to compete. Beijing is already using drones to photograph the Senkaku/Diaoyu islands it disputes with Japan, as the retired Chinese major-general Peng Guangqian revealed earlier this year, and to keep an eye on movements near the North Korean border.¶ Beijing, however, is unlikely to use its drones lightly. It already faces tremendous criticism from much of the international community for its perceived brazenness in continental and maritime sovereignty disputes. With its leaders attempting to allay notions that China's rise poses a threat to the region, injecting drones conspicuously into these disputes would prove counterproductive. China also fears setting a precedent for the use of drones in East Asian hotspots that the United States could eventually exploit. For now, Beijing is showing that it understands these risks, and to date it has limited its use of drones in these areas to surveillance, according to recent public statements from China's Defence Ministry

### Accountability

#### A drone court wouldn’t solve U.S. credibility

**Johnson, former Pentagon general counsel, 2013**

(Jeh, “Keynote address at the Center on National Security at Fordham Law School: A “Drone Court”: Some Pros and Cons”, 3-18, <http://www.lawfareblog.com/2013/03/jeh-johnson-speech-on-a-drone-court-some-pros-and-cons/>, ldg)

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 envisioning the worst. They see dark images of civilian and military national security personnel in the basement of the White House – acting, as Senator Angus King put it, as “prosecutor, judge, jury and executioner” — going down a list of Americans, deciding for themselves who shall live and who shall die, pursuant to a process and by standards no one understands. Our government, in speeches given by the Attorney General,[2] John Brennan,[3] Harold Koh,[4] and myself,[5] makes official disclosures of large amounts of information about its efforts, and the legal basis for those efforts, but it is never enough, because the public doesn’t know what it doesn’t know, but knows there are things their government is still withholding from them. The revelation 11 days ago that the executive branch does not claim the authority to kill an American non-combatant – something that was not, is not, and should never be an issue – is big news, and trumpeted as a major victory for congressional oversight. A senator who filibusters the government’s secrecy is compared in iconic terms to Jimmy Stewart. At the same time, through continual unauthorized leaks of sensitive information, our government looks to the American public as undisciplined and hypocritical. One federal court has characterized the government’s position in FOIA litigation as “Alice in Wonderland,”[6] while another, this past Friday, referred to it as “neither logical nor plausible.”[7] An anonymous, unclassified white paper leaked to NBC News prompts more questions than it answers. Our government finds itself in a lose-lose proposition: it fails to officially confirm many of its counterterrorism successes, and fails to officially confirm, deny or clarify unsubstantiated reports of civilian casualties. Our government’s good efforts for the safety of the people risks an erosion of support by the people. It is in this atmosphere that the idea of a national security court as a solution to the problem — an idea that for a long time existed only on the margins of the debate about U.S. counterterrorism policy but is now entertained by more mainstream thinkers such as Senator Diane Feinstein and a man I respect greatly, my former client Robert Gates – has gained momentum. 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. 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?

#### Farley says nothing about Yemen-no argument about how drones collapse it or how less solve it.

#### Hedberg just says yemen failed state is bad-no impact

**Patrick 4/15**

Senior Fellow and Director, Program on International Institutions and Global Governance, CFR (Stewart M., Council on Foreign Relations, Washington Post, “Why Failed States Shouldn’t Be Our Biggest National Security Fear,” April 15, 2011, <http://www.cfr.org/international-peace-and-security/why-failed-states-shouldnt-our-biggest-national-security-fear/p24689>)

In truth, while failed states may be worthy of America's attention on humanitarian and development grounds, most of them are irrelevant to U.S. national security. The risks they pose are mainly to their own inhabitants. Sweeping claims to the contrary are not only inaccurate but distracting and unhelpful, providing little guidance to policymakers seeking to prioritize scarce attention and resources.

In 2008, I collaborated with Brookings Institution senior fellow Susan E. Rice, now President Obama's permanent representative to the United Nations, on an index of state weakness in developing countries. The study ranked all 141 developing nations on 20 indicators of state strength, such as the government's ability to provide basic services. More recently, I've examined whether these rankings reveal anything about each nation's role in major global threats: transnational terrorism, proliferation of weapons of mass destruction, international crime and infectious disease.

The findings are startlingly clear. Only a handful of the world's failed states pose security concerns to the United States. Far greater dangers emerge from stronger developing countries that may suffer from corruption and lack of government accountability but come nowhere near qualifying as failed states.

#### Domestic political fights over secession trigger instability that spreads-AFF can’t resolve it

**Carvajal, Exeter Islamic and Arab studies PhD candidate, 2013**

(Fernando, “Military Restructuring in Yemen Opens a Second Power Vacuum: Part 2”, 4-26, <http://www.fairobserver.com/article/military-restructuring-yemen-opens-second-power-vacuum-part-2>, ldg)

Infighting within the armed forces goes beyond negotiations leading to presidential decrees. Conflicts extend to clashes among military units occupying the same military base or streets. Turf wars directly affect ordinary soldiers who fear losing their job or place in the hierarchy as a result of changes in command. Army units under commanders with links to Ali Abdullah Saleh increase their animosity toward troops from the Ministry of Interior, perceived as being under the influence of al-Islah. Conflicts are erupting between army units or military and law enforcement units in areas like Rada and Taiz. In the south, where jihadists seem to benefit from ongoing calls for secession, as recently commented by The Economist, the situation is increasingly ripe for a protracted armed conflict that may engulf Yemen and spread to neighboring countries. While secessionist leaders deal with increasing pressure from the population to escalate beyond protest and sit-ins, people in Abyan are growing dissatisfied by the government’s inability to fill the vacuum created after Ansar al-Shaira militants were defeated in June 2012. Even though Ansar al-Sharia lacks a strategy to recall its fighters and engage the tribal Popular Committees now guarding most of southern Abyan province, journalist Abd al-Razeq al-Jamal says residents of cities like Jaar and Zinjibar reminisce over perceptions of stability and order under the authority of Ansar al-Sharia from March 2011 to June 2012. This is of concern as militants are now present outside al-Anad in Lahj province, outside Rada in al-Baydha and spreading throughout Hadhramawt in the east. Such widespread presence by Sunni Islamist militants in southern territories will present a second front for secessionists who already experienced the conflict once — as Arab-Afghans were recruited to fight southerners during the 1994 Civil War. In northern areas, government forces remain unable to exercise authority in the Houthi-controlled Sadah province, militias clash in Hajja and tribes have moved toward the Saudi border to put further pressure on Sana’a and its relations with Saudi Arabia. In December 2012, Yemen’s army moved into Surwah, the Mareb province, against Sheikh al-Mu’alli and known al-Qaeda operatives living in the area. The operation led to violent clashes, with houses being destroyed and a number of foreign fighters captured. As it is common with such operations against tribal elements in Mareb, allies of al-Mu’alli joined the fight and continue to disrupt security in the province. In the same month, the army also moved against elements of Ansar al-Sharia in southern al-Baydha province. The initial motive behind this operation was a rescue attempt of foreigners kidnapped in Sana’a who were believed to be held in the area. Militants have gained strength in al-Baydha once again as a result of an alliance with the al-Dhahab family, involved in the attempt to establish an Islamic Emirate in Rada in early 2012. Growing instability now plagues areas previously without a history of such armed militancy or banditry. The resurgence of tribal forces in the southern province of Taiz is now blamed for increasing insecurity. The provincial governor, Shawqi Ahmed Anam, has been unable to deal with resistance from political forces, which grew from the 2011 crisis. Universities continue to be closed, the economy continues on a downward spiral and people fear vigilantism and revenge conflicts. Sources also indicate that the neighboring province of Ibb, a green and otherwise highly productive region of central Yemen, is now a point of gravity for Islamist militants. Unconfirmed reports by observers indicate military units now include recruits from among such elements in various areas of Ibb. The authority vacuum in such areas grows from internal fighting in the armed forces and a broken chain of command. In Taiz, insiders admit orders from the governor are often ignored and officers refuse to answers phone calls. Tribal elements, believed to have ‘guarded the revolution’ in 2011, are now demanding rewards for their role and obstruct the work of civil authorities.

#### Legitimacy isn’t key

**Brooks et al., Dartmouth government professor, 2009**

(Stephen, “Reshaping the world order: how Washington should reform international institutions”, Foreign Affairs, Marhc/April, ebsco, ldg)

FOR ANALYSTS such as Zbigniew Brzezinski and Henry Kissinger, the key reason for skepticism about the United States' ability to spearhead global institutional change is not a lack of power but a lack of legitimacy. Other states may simply refuse to follow a leader whose legitimacy has been squandered under the Bush administration; in this view, the legitimacy to lead is a fixed resource that can be obtained only under special circumstances. The political scientist G.John Ikenberry argues in After Victory that states have been well positioned to reshape the institutional order only after emerging victorious from some titanic struggle, such as the French Revolution, the Napoleonic Wars, or World War I or II. For the neoconservative Robert Kagan, the legitimacy to lead came naturally to the United States during the Cold War, when it was providing the signal service of balancing the Soviet Union. The implication is that today, in the absence of such salient sources of legitimacy, the wellsprings of support for U.S. leadership have dried up for good. But this view is mistaken. For one thing, it overstates how accepted U.S. leadership was during the Cold War: anyone who recalls the Euromissile crisis of the 1980s, for example, will recognize that mass opposition to U.S. policy (in that case, over stationing intermediaterange nuclear missiles in Europe) is not a recent phenomenon. For another, it understates how dynamic and malleable legitimacy is. Legitimacy is based on the belief that an action, an actor, or a political order is proper, acceptable, or natural. An action - such as the Vietnam War or the invasion of Iraq - may come to be seen as illegitimate without sparking an irreversible crisis of legitimacy for the actor or the order. When the actor concerned has disproportionately more material resources than other states, the sources of its legitimacy can be refreshed repeatedly. After all, this is hardly the first time Americans have worried about a crisis of legitimacy. Tides of skepticism concerning U.S. leadership arguably rose as high or higher after the fall of Saigon in 1975 and during Ronald Reagan's first term, when he called the Soviet Union an "evil empire." Even George W. Bush, a globally unpopular U.S. president with deeply controversial policies,oversaw a marked improvement in relations with France, Germany, and India in recent years - even before the elections of Chancellor Angela Merkel in Germany and President Nicolas Sarkozy in France. Of course, the ability of the United States to weather such crises of legitimacy in the past hardly guarantees that it can lead the system in the future. But there are reasons for optimism. Some of the apparent damage to U.S. legitimacy might merely be the result of the Bush administration's approach to diplomacy and international institutions. Key underlying conditions remain particularly favorable for sustaining and even enhancing U.S. legitimacy in the years ahead. The United States continues to have a far larger share of the human and material resources for shaping global perceptions than any other state, as well as the unrivaled wherewithal to produce public goods that reinforce the benefits of its global role. No other state has any claim to leadership commensurate with Washington's. And largely because of the power position the United States still occupies, there is no prospect of a counterbalancing coalition emerging anytime soon to challenge it. In the end, the legitimacy of a system's leader hinges on whether the system's members see the leader as acceptable or at least preferable to realistic alternatives. Legitimacy is not necessarily about normative approval: one may dislike the United States but think its leadership is natural under the circumstances or the best that can be expected. Moreover, history provides abundant evidence that past leading states - such as Spain, France, and the United Kingdom - were able to revise the international institutions of their day without the special circumstances Ikenberry and Kagan cite. Spainfashioned both normative and positive laws to legitimize its conquest of indigenous Americans in the early seventeenth century; France instituted modern concepts of state borders to meet its needs as Europe's preeminent land power in the eighteenth century; and the United Kingdom fostered rules on piracy, neutral shipping, and colonialism to suit its interests as a developing maritime empire in the nineteenth century. As Wilhelm Grewe documents in his magisterial The Epochs of International Law, these states accomplished such feats partly through the unsubtle use of power: bribes, coercion, and the allure oflucrative long-term cooperation. Less obvious but often more important, the bargaining hands of the leading states were often strengthened by the general perception that they could pursue their interests in even less palatable ways - notably, through the naked use of force. Invariably, too, leading states have had the power to set the international agenda, indirectly affecting the development of new rules by defining the problems they were developed to address. Given its naval primacy and global trading interests, the United Kingdom was able to propel the slave trade to the forefront of the world's agenda for several decades after it had itself abolished slavery at home, in 1833. The bottom line is that the UnitedStates today has the necessary legitimacy to shepherd reform of the international system.

#### Plan can’t solve-one shot solutions fail

**Miller, Wilson Center distinguished scholar, 2013**

(Aaron, “Speak No Evil”, 5-28, <http://www.foreignpolicy.com/articles/2013/05/28/speak_no_evil_obama_drone_speech>, ldg)

I'll take the word of those who argue that drones are the poster child for the anger Arabs and Muslims feel toward America. I can see why. But the grievances toward the United States in this region run deep, and the source of that anger is not only drones. Don't forget: The Middle East was exasperated with Washington long before droning, and it remains eager to blame America for just about everything. The list of the Arab world's grievances go on and on: America is blamed for supporting the authoritarian Arab kings, blindly backing Israel, not talking to Hamas, not intervening militarily in Syria, intervening militarily in Iraq and Afghanistan, and, according to Egyptian liberals, for supporting Egypt's Muslim Brotherhood. And that's even before we discuss the small but determined minority of Muslims who do, in fact, hate us because of who we are -- not just because of what we do. No nuanced modulation of our approach on drone strikes or the closure of Gitmo is going to change any of that.

#### US decline doesn’t cause war.

**Friedman et al., MIT political science PhD candidate, 2012**

(Benjamin, “Why the U.S. Military Budget is ‘Foolish and Sustainable”, Orbis, 56.2, Science Direct, ldg)

Standard arguments for maintaining the alliances come in two contradictory strains. One, drawn mostly from the run-up to World War II, says that without American protection, the ally would succumb to a rival power, either by force or threat of force, heightening the rival’s capability and danger to the United States. The other argument says that without the United States, the ally would enter a spiral of hostility with a neighbor, creating instability or war that disrupts commerce and costs America more than the protection that prevented it. The main problem with the first argument is that no hegemon today threatens to unify Europe or Asia. Europe is troubled by debt, not conquest. Russian GDP is today roughly equivalent to that of Spain and Portugal combined. Whatever Russia’s hopes, it has no ability to resurrect its Soviet Empire, beyond perhaps those nations in its near abroad that Americans have no good reason to defend. Even today, the military capabilities of Europe’s leading powers are sufficient to defend its eastern flank, and they could increase their martial exertions should a bigger threat arise. Asia is tougher case. South Korea’s military superiority over its northern neighbor is sufficient to deter it from an attempt at forcible reunification. By heightening North Korea’s security, nuclear weapons may reinforce its capacity for trouble-making, but they do not aid offensive forays. U.S. forces long ago became unnecessary to maintaining the peninsula’s territorial status quo. Chinese efforts to engage in old-fashioned conquest are unlikely, at least beyond Taiwan. Its more probable objective is a kind of Asian Monroe doctrine, meant to exclude the United States.6 China naturally prefers not to leave its maritime security at the whim of U.S. policymakers and, thus, has sought to improve its anti-access and area-denial capabilities. In the longer term, China’s leaders will likely pursue the ability to secure its trade routes by building up longer-range naval forces. They may also try to leverage military power to extract various concessions from nearby states. Washington’s defense analysts typically take those observations as sufficient to establish the necessity that U.S. forces remain in Asia to balance Chinese military power. But to justify a U.S. military presence there, one also needs to show both that Asian nations cannot or will not balance Chinese power themselves and that their failure to do so would greatly harm U.S. security. Neither is likely. Geography and economics suggest that the states of the region will successfully balance Chinese power—even if we assume that China’s economic growth allows it to continue to increase military spending.7 Bodies of water are natural defenses against offensive military operations. They allow weaker states to achieve security at relatively low cost by investing in naval forces and coastal defenses. That defensive advantage makes balances of power more stable. Not only are several of China’s Asian rivals islands, but those states have the wealth to make Chinese landings on their coast prohibitively expensive. India’s mountainous northern border creates similar dynamics. The prospects of Asian states successfully deterring future Chinese aggression will get even better if, as seems likely, threats of aggression provoke more formal security alliances. Some of that is already occurring. Note for example, the recent joint statement issued by the Philippines and Japan marking a new ‘‘strategic partnership’’ and expressing ‘‘common strategic interests’’ such as ‘‘ensuring the safety of sea lines of communication.’’8 This sort of multilateral cooperation would likely deepen with a more distant U.S. role. Alliances containing disproportionately large states historically produce free-riding; weaker alliance partners lose incentive to shore up their own defenses.9 Even if one assumes that other states in the region would fail to balance China, it is unclear exactly how U.S. citizens would suffer. China’s territorial ambitions might grow but are unlikely to span the Pacific. Nor would absorbing a few small export-oriented states slacken China’s hunger for the dollars of American consumers. The argument that U.S. alliances are necessary for stability and global commerce is only slightly more credible. One problem with this claim is that U.S. security guarantees can create moral hazard—emboldening weak allies to take risks they would otherwise avoid in their dealings with neighbors. Alliances can then discourage accommodation among neighboring states, heightening instability and threatening to pull the United States into wars facilitated by its benevolence. Another point against this argument is that even if regional balancing did lead to war, it would not obviously be more costly to the U.S. economy than the cost of the alliance said to prevent it. Neutrality historically pays.10 The larger problem with the idea that our alliances are justified by the balancing they prevent is that wars generally require more than the mutual fear that arms competition provokes. Namely, there is usually a territorial conflict or a state bent on conflict. Historical examples of arms races alone causing wars are few.11 This confusion probably results from misconstruing the causes of World War I—seeing it as a consequence of mutual fear alone rather than fear produced by the proximity of territorially ambitious states.12 Balances of power, as noted, are especially liable to be stable when water separates would-be combatants, as in modern Asia. Japan would likely increase defense spending if U.S. forces left it, and that would likely displease China. But that tension is very unlikely to provoke a regional conflagration. And even that remote scenario is far more likely than the Rube Goldberg scenario needed to argue that peace in Europe requires U.S. forces stationed there. It is not clear that European states would even increase military spending should U.S. troops depart. If they did do so, one struggles to imagine a chain of misperceived hostility sufficient to resurrect the bad old days of European history.

#### Can’t leverage hegemony

**Maher, Brown political science professor, 2011**

(Richard, “The Paradox of American Unipolarity: Why the United States May Be Better Off in a Post-Unipolar World”, Orbis, 55.1, Science Direct, ldg)

At the same time, preeminence creates burdens and facilitates imprudent behavior. Indeed, because of America’s unique political ideology, which sees its own domestic values and ideals as universal, and the relative openness of the foreign policymaking process, the United States is particularly susceptible to both the temptations and burdens of preponderance. For decades, perhaps since its very founding, the United States has viewed what is good for itself as good for the world. During its period of preeminence, the United States has both tried to maintain its position at the top and to transform world politics in fundamental ways, combining elements of realpolitik and liberal universalism (democratic government, free trade, basic human rights). At times, these desires have conflicted with each other but they also capture the enduring tensions of America’s role in the world. The absence of constraints and America’s overestimation of its own ability to shape outcomes has served to weaken its overall position. And because foreign policy is not the reserved and exclusive domain of the president---who presumably calculates strategy according to the pursuit of the state’s enduring national interests---the policymaking process is open to special interests and outside influences and, thus, susceptible to the cultivation of misperceptions, miscalculations, and misunderstandings. Five features in particular, each a consequence of how America has used its power in the unipolar era, have worked to diminish America’s long-term material and strategic position. Overextension. During its period of preeminence, the United States has found it difficult to stand aloof from threats (real or imagined) to its security, interests, and values. Most states are concerned with what happens in their immediate neighborhoods. The United States has interests that span virtually the entire globe, from its own Western Hemisphere, to Europe, the Middle East, Persian Gulf, South Asia, and East Asia. As its preeminence enters its third decade, the United States continues to define its interests in increasingly expansive terms. This has been facilitated by the massive forward presence of the American military, even when excluding the tens of thousands of troops stationed in Iraq and Afghanistan. The U.S. military has permanent bases in over 30 countries and maintains a troop presence in dozens more.13 There are two logics that lead a preeminent state to overextend, and these logics of overextension lead to goals and policies that exceed even the considerable capabilities of a superpower. First, by definition, preeminent states face few external constraints. Unlike in bipolar or multipolar systems, there are no other states that can serve to reliably check or counterbalance the power and influence of a single hegemon. This gives preeminent states a staggering freedom of action and provides a tempting opportunity to shape world politics in fundamental ways. Rather than pursuing its own narrow interests, preeminence provides an opportunity to mix ideology, values, and normative beliefs with foreign policy. The United States has been susceptible to this temptation, going to great lengths to slay dragons abroad, and even to remake whole societies in its own (liberal democratic) image.14 The costs and risks of taking such bold action or pursuing transformative foreign policies often seem manageable or even remote. We know from both theory and history that external powers can impose important checks on calculated risk-taking and serve as a moderating influence. The bipolar system of the Cold War forced policymakers in both the United States and the Soviet Union to exercise extreme caution and prudence. One wrong move could have led to a crisis that quickly spiraled out of policymakers’ control. Second, preeminent states have a strong incentive to seek to maintain their preeminence in the international system. Being number one has clear strategic, political, and psychological benefits. Preeminent states may, therefore, overestimate the intensity and immediacy of threats, or to fundamentally redefine what constitutes an acceptable level of threat to live with. To protect itself from emerging or even future threats, preeminent states may be more likely to take unilateral action, particularly compared to when power is distributed more evenly in the international system. Preeminence has not only made it possible for the United States to overestimate its power, but also to overestimate the degree to which other states and societies see American power as legitimate and even as worthy of emulation. There is almost a belief in historical determinism, or the feeling that one was destined to stand atop world politics as a colossus, and this preeminence gives one a special prerogative for one’s role and purpose in world politics. The security doctrine that the George W. Bush administration adopted took an aggressive approach to maintaining American preeminence and eliminating threats to American security, including waging preventive war. The invasion of Iraq, based on claims that Saddam Hussein possessed weapons of mass destruction (WMD) and had ties to al Qaeda, both of which turned out to be false, produced huge costs for the United States---in political, material, and human terms. After seven years of war, tens of thousands of American military personnel remain in Iraq. Estimates of its long-term cost are in the trillions of dollars.15 At the same time, the United States has fought a parallel conflict in Afghanistan. While the Obama administration looks to dramatically reduce the American military presence in Iraq, President Obama has committed tens of thousands of additional U.S. troops to Afghanistan. Distraction. Preeminent states have a tendency to seek to shape world politics in fundamental ways, which can lead to conflicting priorities and unnecessary diversions. As resources, attention, and prestige are devoted to one issue or set of issues, others are necessarily disregarded or given reduced importance. There are always trade-offs and opportunity costs in international politics, even for a state as powerful as the United States. Most states are required to define their priorities in highly specific terms. Because the preeminent state has such a large stake in world politics, it feels the need to be vigilant against any changes that could impact its short-, medium-, or longterm interests. The result is taking on commitments on an expansive number of issues all over the globe. The United States has been very active in its ambition to shape the postCold War world. It has expanded NATO to Russia’s doorstep; waged war in Bosnia, Kosovo, Iraq, and Afghanistan; sought to export its own democratic principles and institutions around the world; assembled an international coalition against transnational terrorism; imposed sanctions on North Korea and Iran for their nuclear programs; undertaken ‘‘nation building’’ in Iraq and Afghanistan; announced plans for a missile defense system to be stationed in Poland and the Czech Republic; and, with the United Kingdom, led the response to the recent global financial and economic crisis. By being so involved in so many parts of the world, there often emerges ambiguity over priorities. The United States defines its interests and obligations in global terms, and defending all of them simultaneously is beyond the pale even for a superpower like the United States. Issues that may have received benign neglect during the Cold War, for example, when U.S. attention and resources were almost exclusively devoted to its strategic competition with the Soviet Union, are now viewed as central to U.S. interests. Bearing Disproportionate Costs of Maintaining the Status Quo. As the preeminent power, the United States has the largest stake in maintaining the status quo. The world the United States took the lead in creating---one based on open markets and free trade, democratic norms and institutions, private property rights and the rule of law---has created enormous benefits for the United States. This is true both in terms of reaching unprecedented levels of domestic prosperity and in institutionalizing U.S. preferences, norms, and values globally. But at the same time, this system has proven costly to maintain. Smaller, less powerful states have a strong incentive to free ride, meaning that preeminent states bear a disproportionate share of the costs of maintaining the basic rules and institutions that give world politics order, stability, and predictability. While this might be frustrating to U.S. policymakers, it is perfectly understandable. Other countries know that the United States will continue to provide these goods out of its own self-interest, so there is little incentive for these other states to contribute significant resources to help maintain these public goods.16 The U.S. Navy patrols the oceans keeping vital sea lanes open. During financial crises around the globe---such as in Asia in 1997-1998, Mexico in 1994, or the global financial and economic crisis that began in October 2008--- the U.S. Treasury rather than the IMF takes the lead in setting out and implementing a plan to stabilize global financial markets. The United States has spent massive amounts on defense in part to prevent great power war. The United States, therefore, provides an indisputable collective good---a world, particularly compared to past eras, that is marked by order, stability, and predictability. A number of countries---in Europe, the Middle East, and East Asia---continue to rely on the American security guarantee for their own security. Rather than devoting more resources to defense, they are able to finance generous social welfare programs. To maintain these commitments, the United States has accumulated staggering budget deficits and national debt. As the sole superpower, the United States bears an additional though different kind of weight. From the Israeli-Palestinian dispute to the India Pakistan rivalry over Kashmir, the United States is expected to assert leadership to bring these disagreements to a peaceful resolution. The United States puts its reputation on the line, and as years and decades pass without lasting settlements, U.S. prestige and influence is further eroded. The only way to get other states to contribute more to the provision of public goods is if the United States dramatically decreases its share. At the same time, the United States would have to give other states an expanded role and greater responsibility given the proportionate increase in paying for public goods. This is a political decision for the United States---maintain predominant control over the provision of collective goods or reduce its burden but lose influence in how these public goods are used. Creation of Feelings of Enmity and Anti-Americanism. It is not necessary that everyone admire the United States or accept its ideals, values, and goals. Indeed, such dramatic imbalances of power that characterize world politics today almost always produce in others feelings of mistrust, resentment, and outright hostility. At the same time, it is easier for the United States to realize its own goals and values when these are shared by others, and are viewed as legitimate and in the common interest. As a result of both its vast power but also some of the decisions it has made, particularly over the past eight years, feelings of resentment and hostility toward the United States have grown, and perceptions of the legitimacy of its role and place in the world have correspondingly declined. Multiple factors give rise toanti-American sentiment, and anti-Americanism takes different shapes and forms.17 It emerges partly as a response to the vast disparity in power the United States enjoys over other states. Taking satisfaction in themissteps and indiscretions of the imposing Gulliver is a natural reaction. In societies that globalization (which in many parts of the world is interpreted as equivalent to Americanization) has largely passed over, resentment and alienation are felt when comparing one’s own impoverished, ill-governed, unstable society with the wealth, stability, and influence enjoyed by the United States.18 Anti-Americanism also emerges as a consequence of specific American actions and certain values and principles to which the United States ascribes. Opinion polls showed that a dramatic rise in anti-American sentiment followed the perceived unilateral decision to invade Iraq (under pretences that failed to convince much of the rest of the world) and to depose Saddam Hussein and his government and replace itwith a governmentmuchmore friendly to the United States. To many, this appeared as an arrogant and completely unilateral decision by a single state to decide for itselfwhen---and under what conditions---military force could be used. A number of other policy decisions by not just the George W. Bush but also the Clinton and Obama administrations have provoked feelings of anti-American sentiment. However, it seemed that a large portion of theworld had a particular animus for GeorgeW. Bush and a number of policy decisions of his administration, from voiding the U.S. signature on the International Criminal Court (ICC), resisting a global climate change treaty, detainee abuse at Abu Ghraib in Iraq and at Guantanamo Bay in Cuba, and what many viewed as a simplistic worldview that declared a ‘‘war’’ on terrorism and the division of theworld between goodand evil.Withpopulations around theworld mobilized and politicized to a degree never before seen---let alone barely contemplated---such feelings of anti-American sentiment makes it more difficult for the United States to convince other governments that the U.S.’ own preferences and priorities are legitimate and worthy of emulation. Decreased Allied Dependence. It is counterintuitive to think that America’s unprecedented power decreases its allies’ dependence on it. During the Cold War, for example, America’s allies were highly dependent on the United States for their own security. The security relationship that the United States had with Western Europe and Japan allowed these societies to rebuild and reach a stunning level of economic prosperity in the decades following World War II. Now that the United States is the sole superpower and the threat posed by the Soviet Union no longer exists, these countries have charted more autonomous courses in foreign and security policy. A reversion to a bipolar or multipolar system could change that, making these allies more dependent on the United States for their security. Russia’s reemergence could unnerve America’s European allies, just as China’s continued ascent could provoke unease in Japan. Either possibility would disrupt the equilibrium in Europe and East Asia that the United States has cultivated over the past several decades. New geopolitical rivalries could serve to create incentives for America’s allies to reduce the disagreements they have with Washington and to reinforce their security relationships with the United States.

## 1nr

### 1NC

#### 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.

### 1NR Impact Overview

#### Upholding Missouri v. Holland is critical to maintaining treaty credibility which resolves global conflict, environmental calamity, disease spread and U.S. legitimacy which turns their norms and hege advantage – International law is a controlling impact because it deescalates all conflicts and prevents their breakout

#### The plan kills the chemical weapons convention and treaty negotiation

Graham et al 2013

Thomas, served as Special Representative of the President for Arms Control, Non-Proliferation and Disarmament, senior negotiator at the CWC, writing with 9 other experts spanning academia, law, diplomacy, and the military, BRIEF OF AMICI CURIAE CHEMICAL WEAPONS CONVENTION NEGOTIATORS AND EXPERTS IN SUPPORT OF RESPONDENT http://sblog.s3.amazonaws.com/wp-content/uploads/2013/08/Amicus-Brief1.pdf

Ending the scourge of chemical weapons has long been a pressing humanitarian problem. The Chemical Weapons Convention, opened for signature in 1993, established for the ﬁrst time a comprehensive prohibition on the use, development, production, stockpiling, acquisition and transfer of chemical weapons, applicable in peacetime and in war, and applicable both to the states parties and to non-state actors. Because chemicals with commercial uses can readily be adapted to weapons use, the Convention takes a deliberately comprehensive approach. Under the Convention, all toxic chemicals constitute chemical weapons and must be banned for both state and nonstate use unless they are possessed and used for certain enumerated purposes and in quantities consistent with those purposes. The permitted uses listed in the Convention are ones considered necessary for science, commerce, or other purposes regarded as beneﬁcial or appropriate. The states parties did not negotiate, and would not have wanted to include, an exception allowing the use of toxic chemicals for private criminal purposes. For the CWC’s comprehensive ban to be effective, it had to be adopted with the aim of universal implementation. Currently, the Convention has been ratiﬁed by countries accounting for over 98% of the world’s land mass, population, and chemical industry. The United States has been active in pushing for worldwide accession and implementation. To that end, the United States, like numerous other nations, has enacted implementing legislation coextensive with the Convention’s requirements. Bond’s suggestion that the Convention’s reference to “other peaceful purposes” permits all “nonwarlike” uses is inconsistent with the Convention’s plain terms. An assault is not “peaceful” in any ordinary sense of the word. The context in which the phrase “other peaceful purposes” occurs—as well as the use of identical language elsewhere in the Convention and the recitals in the Convention’s preamble—further demonstrates that it is intended to encompass beneﬁcial purposes only. The history of the Convention conﬁrms that the negotiating parties carefully considered and deliberately rejected the idea of limiting the Convention’s prohibitions to warlike purposes. The fact that Bond’s crime was motivated by a desire for revenge is irrelevant. Nothing in the Convention turns on whether Bond was motivated by anger, greed, jealousy, political or religious zealotry, or any of the other complex human motives that can lead someone to commit a crime. Nor does it matter that Bond’s victim suffered only minor harm; the Convention prohibits unsuccessful as well as successful uses of chemical weapons and expressly applies even to chemicals that cause only temporary incapacitation. The fact that Bond targeted only one victim is likewise irrelevant. Nothing in the Convention limits its application to weapons of mass destruction; it prohibits targeted as well as broad-based chemical attacks. For example, the negotiators of the Convention speciﬁcally discussed the murder of a Bulgarian dissident with a poisoned umbrella in London in the 1970s as an example of a chemical weapons use that would be prohibited. Signiﬁcantly, Bond concedes that terrorism is within the scope of the CWC. But nothing in the CWC singles out terrorism; the negotiating history cites terrorism only to illustrate why private misuse of toxic chemicals could be a problem. Moreover, the ability to prosecute an individual’s stockpiling of dangerous chemicals can be critical to preventing a terrorist attack even if the government cannot prove the individual’s reason for stockpiling. Bond’s interpretation would open the door for anyone to stockpile potential chemical weapons on the pretext that they might be needed for a violent but nonterrorist purpose or for no disclosed purpose at all. Contrary to what Bond suggests, it is not problematic that a cabinet of household chemicals can potentially be a “weapons cache.” It already is familiar U.S. law that ordinary household items can constitute “dangerous weapons” if used as such. In any event, Bond used no ordinary household chemicals; she acquired dangerous industrial chemicals for the purpose of causing harm. Finally, reliance on the varying laws of the 50 U.S. states would be wholly inadequate to the task of implementing U.S. obligations under the CWC. The CWC requires states parties to enact criminal prohibitions that apply not only to use of chemical weapons but also development, manufacture, possession and transfer—acts that state law generally leaves unregulated. Even if all 50 states could be persuaded to enact compliant implementing legislation, the laws must apply not only within the country but to U.S. nationals located abroad. Moreover, the U.S. Congress saw uniform federal legislation as protecting legitimate commerce in chemicals and serving important national law-enforcement goals. Requiring the United States to rely on the laws and law-enforcement ofﬁ cials of the 50 states to implement the CWC and other arms control treaties could negatively impact public safety. It also would severely damage the United States’ ability to negotiate other important treaties serving its national interest in the future. The Convention’s comprehensive approach was designed to minimize the need for line-drawing to avoid circumvention by rogue states and private actors alike. It may reach what appear to be local acts, but it addresses a problem of global scope. Allowing judicially crafted exceptions to the CWC for perceived “local” criminal activities would undermine the Convention’s effectiveness in the United States and around the world.

#### CWC is key to global stability.

Pearson 1995

Graham, General Director of the Chemical and Biological Defense Establishment, PhD University of St Andrews, ‘The Chemical Weapons Treaty: Protective Measures are Essential’, Parameters Winter 94/95 http://strategicstudiesinstitute.army.mil/pubs/parameters/Articles/1994/1994%20pearson.pdf

Any relaxation in providing effective protective measures against chemical warfare agents would be destabilizing and would reduce security. Relaxation would increase the potential utility of chemical weapons to an aggressor and might lead such a state to judge that chemical weapons would provide sufficient tactical advantage over a potential enemy to justify the risk of the associated opprobrium. There is, therefore, no justification for any relaxation in pursuing protective measures against chemical weapons for the foreseeable future. It is important now to work with the Preparatory Commission to ensure that the provisions of the Chemical Weapons Convention are made as effective and strong as possible. The Convention needs to enter into force at the earliest possible date in 1995, and states have been encouraged to ratify the Convention as soon as possible. Following the Convention's entry into force, confidence needs to be gained that declarations are full and correct, that the verification regime is indeed effective, and that chemical weapons and chemical weapon production facilities have been declared and are being destroyed by all States Parties assessed to possess chemical weapons. There is at present no indication that the proliferation of chemical weapons has declined or ceased. Although to date over 150 states have now signed the Convention, not all nations assessed as having or seeking to acquire chemical weapons have signed it. At this writing only 14 nations have lodged their instruments of ratification to the Convention. There is a long way to go before all nations have become States Parties, and even then those possessing chemical weapons have ten to 15 years to destroy any declared chemical weapons or chemical weapon facilities. The verification regimes of the Convention need yet to be established and confidence gained in the effectiveness of those regimes and of the Convention. There remains therefore a continuing and compelling requirement for effective protective measures for the foreseeable future. The Chemical Weapons Convention and the maintenance of effec-tive protective measures are vital partners. Together they will enhance both national and international security by helping to rid the world of the threat of chemical weapons. Together these measures should cause potential aggres- sors to conclude that the acquisition and use of chemical weapons will be not only politically unacceptable but militarily ineffective.

### 1NR A2: Uniqueness

#### This card goes our way – we say that conservatives want to uphold Missouri v. Holland so the states do not have access to treaty powers because they understand that relegating authority to the states would create a patchwork system – only the plan undermines that by setting in a controversial policy – that’s Greives.

#### SCOTUS will likely rule against Bond now but it’s uncertain.

Bashman 2013

Howard J., nationally known attorney and appellate commentator, Looking Ahead: October Term 2013, Cato Supreme Court Review http://howappealing.law.com/BashmanCatoEssayFinal-091713.pdf

No lawyer worth his or her salt would ever advise a client to attempt to use dangerous chemicals to poison a rival for the romantic attention of the client’s spouse. Nevertheless, having a client who engaged in that legally prohibited conduct appears to be the recipe for periodic visits to address the justices in the Supreme Court’s courtroom—at least if you’re a superstar Supreme Court advocate. In the forthcoming term, the case captioned Bond v. United States makes its return visit to the Court.27 In its previous incarnation, the Supreme Court held that the woman charged with attempting to poison her romantic rival for her husband’s affections had standing to object to Congress’s enactment of legislation alleged to violate the Tenth Amendment’s limitations on federal power.28 On remand to the U.S. Court of Appeals for the Third Circuit, Bond argued that Congress had overstepped the bounds of its authority to make criminal the purely local poisoning attempt at the heart of the criminal charges against her. Relying on dictum from the Supreme Court’s ruling in Missouri v. Holland—which suggests that Congress has the power to enact implementing legislation in furtherance of a lawfully approved treaty even if that legislation broadens Congress’s constitutional power—the Third Circuit rejected Bond’s challenge.29 Now, on its return visit to the Supreme Court, Bond is asking the justices to hold that the federal government’s approval of a treaty— here an international chemical weapons convention—does not authorize it to assume police powers to turn what otherwise would have been an offense under state law—here, assault or attempted murder—into a federal crime. Although the structural limitations on federal power are important, as the Supreme Court recognized most recently in NFIB v. Sebelius, 30 this case appears to present an especially vexing question. State and local governments are of course powerless to enter into international treaties. Because the treaty power of necessity resides exclusively with the federal government, perhaps the states can be understood to have ceded to the federal government the ability to encroach on what would otherwise ordinarily be state prerogatives where necessary to implement a lawful treaty. Or perhaps the Supreme Court will hold that federalism principles render the federal government unable to fully implement treaties that require such encroachment on state power. One thing is for sure: the case is bound to be very well argued, as former Solicitor General Paul Clement will represent Bond in this appeal, just as he did in his client’s previous victorious visit to the Court. Although the outcome of this case is far from clear, my suspicion is that a majority consisting of the ordinarily pragmatic justices are likely to prevail in holding that the Constitution’s treaty power does give Congress the ability to encroach on state prerogatives where necessary to implement a treaty. Yet even such a holding, however broad, would do little to justify the seemingly aberrant decision of federal prosecutors to treat Mrs. Bond’s bizarre offenses as federal crimes.

### 1NR A2: No Link – Roberts

#### Our evidence indicates that normal means for a drone court would be modeled on the foreign intelligence ex ante court which requires that Roberts appoints judges – we are the only ones reading evidence on this question – this means we clarify which process occurs in the face of their ambiguous evidentiary standards. – that’s Kirkland

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:

#### This answers their arguments that the plan is limited – they’ve conceded the Ruger evidence that the plan is perceived as court stacking which is highly controversial, saps capital and undermines the legitimacy of the court – prefer this evidence because it uses empirics

#### 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.

#### And Roberts will pick conservatives – flips the case

New York Times 8/20/13

<http://www.nytimes.com/2013/08/21/us/roberts-varies-pattern-in-choice-for-spy-court.html?pagewanted=all&_r=1&>

Chief Justice Roberts, more than his predecessors, has tended to assign judges who were appointed by a Republican, as he was, or executive branch veterans like former prosecutors. Among the 14 judges on the FISA court or its review panel, two others were Democratic appointees, and both are also considered to be centrists or conservative-leaning. One was the favored choice of a Republican senator for a judgeship during a fight over nominations in Pennsylvania. The other was a career Justice Department official in the Reagan and first Bush administrations who urged the Supreme Court to overturn the 1973 Roe v. Wade abortion decision and to broaden exceptions to the Fourth Amendment warrant requirement. Philip Heymann, a Harvard law professor and a deputy attorney general in the Clinton administration, criticized Chief Justice Roberts for not doing more to restore public trust in the FISA court process, which he said was crucial if secret intelligence operations are to have credibility. Mr. Heymann declined to comment specifically on Judge Cabranes, citing personal ties. But as a broader matter, he said, the best choices for “a court that is not trusted in general and that has an overwhelming conservative bias” would be liberals who are outspoken on privacy issues. “The chief justice may not know it,” he said, “but his responsibility is to start to build up legitimate institutions in the area of intelligence gathering, and he can be credibly accused of having gone just the opposite direction over the years.”

#### Roberts is ideological about appointments

Wheeler-Brookings-8/8/13

John Roberts Appoints Judges to More Than the FISA Court

<http://www.brookings.edu/research/articles/2013/08/08-john-roberts-judges-appointees-wheeler>

Explaining the Party-of-Appointing President Variation As noted, numerous factors might explain Roberts’ choices for committee chairs—tenure, knowledge, connections, geographic balance, to name a few. Only a babe-in-the-woods would think that ideology-tinged approaches to how the judiciary should be administered—for which party of the appointing president can be a crude surrogate—played no role. Even though the overall party-of-appointing-president balance among Roberts’ chairs has been roughly in line with that of all circuit and district judges, Republican appointees nevertheless have dominated his appointments, especially today, when Republican appointees chair 16 of the 25 committees.

### 1NR A2: No Treaty Uniqueness

#### This evidence says that the U.S. does a lot of work with international law – that may be true but not ruling against Bond creates patchwork state interpretations of international law that kill compliance – that’s Spiro More evidence – we control uniqueness on treaties

Graham et al 2013

Thomas, served as Special Representative of the President for Arms Control, Non-Proliferation and Disarmament, senior negotiator at the CWC, writing with 9 other experts spanning academia, law, diplomacy, and the military, BRIEF OF AMICI CURIAE CHEMICAL WEAPONS CONVENTION NEGOTIATORS AND EXPERTS IN SUPPORT OF RESPONDENT http://sblog.s3.amazonaws.com/wp-content/uploads/2013/08/Amicus-Brief1.pdf

Bond argues that failure to prosecute her individual case would not bring down any international consequences on the United States. That might be true if her case were taken in isolation; after all, the Convention requires the adoption of suitable penal legislation, but it does not preclude the appropriate exercise of prosecutorial discretion in individual cases. See CWC art. VII(1). But judicially carving out a whole category of cases from the scope of the Convention’s implementing legislation, as Bond’s counsel proposes, would be another matter altogether. The strategy adopted by the CWC negotiators was to adopt broad, general prohibitions as much as possible to avoid the need for line-drawing in particular cases. The point of having an all-encompassing treaty was to minimize the existence of borderline cases and judgment calls that could lead to circumvention. As this Court has explained, where Congress has enacted a “comprehensive legislation”—in this case, to implement a globally-agreed prohibition—the Court cannot “excise individual components” without undermining the integrity of the larger scheme. Gonzales v. Raich, 545 U.S. 1, 22 (2005). The fact that any one defendant’s “own impact” may be “trivial by itself” is “not a sufﬁcient reason for removing [her] from the scope of federal regulation.” Id. at 20 (quoting Wickard v. Filburn, 317 U.S. 111, 127 (1942)). If this Court were to create an unwritten exception to the Convention’s implementing legislation for non-terrorists, revenge-takers or “local” criminals, then the Convention’s carefully negotiated and clear-cut test, and the statute that adopts that test, will be replaced with a difﬁcult line-drawing exercise that has no basis in the Convention or its implementing legislation. Perhaps even more damaging, allowing a judicially crafted exception in this case would open the door for parties to seek creative expansions of that exception, or wholly new exceptions, in future cases in the U.S. and abroad.

### 1NR A2: Legitimacy Theory False

#### Begs the question of the link – they conceded it which means that the single decision will cause a firestorm because it is court stacking – that’s Ruger

#### Incorrect-courts will react if they perceive their popularity is in jeopardy

Clark 2009

Tom, Assistant Professor of Political Science at Emory, The Separation of Powers, Court Curbing, and Judicial Legitimacy, American Journal of Political Science, Vol. 53, No. 4, October 2009 http://userwww.service.emory.edu/~tclark7/constitutional.pdf

This theoretical model and empirical analyses presented in this article provide a new interpretation of the separation of-powers model that has been the focus of much scholarship in the area of judicial-congressional relations. The evidence from interviews with Supreme Court justices and former law clerks suggests students of Court-Congress relations must account for the role of judicial legitimacy in the Court’s decision calculus. Judicial legitimacy is an important mechanism that drives judicial sensitivity to congressional preferences. Moreover, it can be a condition that gives rise to constrained judicial decision making. Indeed, scholars have long recognized the importance of institutional legitimacy for the Supreme Court (Baum 2006; Caldeira 1987; Caldeira and Gibson 1992; Lasser 1988; see also Staton 2006; Vanberg 2005); however, this study unites this literature with scholarship on congressional constraints on judicial behavior in a previously unappreciated way. By recasting the separation-of-powers model as a strategic interaction in which responses to Supreme Court decisions are not limited to congressional overrides but also include consequences for the Court’s institutional integrity, this model of judicial independence presents a fuller, more nuanced and dynamic interpretation of the judicial decision-making environment. The analysis of judicial-congressional relations as an interaction in which concerns for institutional legitimacy are integral to the Court’s decision-calculus unites two important bodies of judicial politics scholarship, and may reorient empirical scholarship that has focused largely on the relative explanatory power of the two dominant models of judicial decision making (the attitudinal model and the SOP model). As a first step in this empirical direction, the analysis of Court curbing and its relationship to the use of judicial review to invalidate federal legislation provides promising evidence. As the analysis above demonstrates, the relationship between the frequency of judicial review and congressional hostility provides strong, direct support for the theoretical model. When the Court fears it will lose public support, it will adjust its behavior in light of congressional signals about the Court’s level of public support. However, the magnitude of that effect is mediated by the political context in which those signals are sent. Instead of responding to Court curbing more strongly when it is facing its ideological opponents, the Court responds most strongly when the Court curbing comes from its ideological allies. Moreover, the constraining effect of Court curbing increases as the Court becomes more pessimistic about its public support. Notably, these interactive relationships run against the intuition following from the conventional wisdom that Court curbing’s effect on the Court is due to its threat of enactment. They are, however, predicted by the public-Congress-Court interaction analyzed here.

#### Even if legitimacy is inevitable in the long term the link is enough to stop short term decisions.

Bazelon 2009

Emily Bazelon is a founding editor of Slate’s women’s Web site, DoubleX, and the Truman Capote law and media fellow at Yale Law School, Supreme Courtship, NYT Sunday Book Review, http://www.nytimes.com/2009/09/27/books/review/Bazelon-t.html?\_r=0

That observation captures Friedman’s thesis about the influence of public opinion on the Supreme Court. He sees the justices and the people as partners in a “marriage” that bypasses the elected legislature and the president. “It frequently is the case that when judges rely on the Constitution to invalidate the actions of the other branches of government, they are enforcing the will of the American people,” he says. The marriage between the court and the people, like many enduring ones, has gradually mellowed. At first, there were occasions when the two sides clashed mightily, but over the years they’ve learned to come into equilibrium. These days, when the court gets into trouble with the public, it’s often on an issue it’s confronting for the first time. (The eminent domain case Kelo v. City of New London, for instance, provoked a populist outcry in 2005.) “What history shows,” Friedman argues, “is assuredly not that Supreme Court decisions always are in line with popular opinion, but rather that they come into line with one another over time.” How well does this claim hold up against the historical record? Friedman’s best evidence is that the people and the court are still married. To be sure, a divorce in the form of diminished authority for the justices would be hard to bring off, given the legal obstacles. And particularly early on, a few marital spats led to serious rifts and estrangement. McCulloch v. Maryland, the 1819 decision upholding the power of Congress to charter a national bank, infuriated states’ rights advocates and brought that century’s fight over federalism to a head. A decade later, when the court ruled in favor of Cherokee sovereignty over Georgia’s assertion of authority to remove the tribe, the state refused to comply, or to appear before the court at all. In the reaction to Dred Scott, the divisive 1857 decision to deny citizenship rights to black people, Friedman sees an “evolution in the nation’s commitment to judicial review,” because the ruling was not met with defiance. But since the country cracked apart four years later in a civil war that the Dred Scott ruling hastened, the fact that the court emerged tarnished but otherwise unharmed seems a bit beside the point. Friedman’s case strengthens in the 20th century. The Warren Court expanded the rights of criminal defendants — and then stopped after the decisions provoked support for Nixon’s law and order campaign, along with disapproving poll numbers. In 1972, the court came close to abolishing the death penalty. In response, the polls registered a spike in support for capital punishment, and the justices backed down. The road to compromise on abortion has been longer and rougher. Sometimes, when its footing with the public has been shaky, the court has weathered sharp opposition by tolerating concerted resistance (school desegregation) or low-grade noncompliance (the ban on school prayer). But Friedman is certainly right that over time, the court has proved itself the Teflon branch of government. In a 1994 Gallup poll, more than 80 percent of people expressed “some” support for the court. The level was about the same six months after Bush v. Gore, the court’s biggest modern-era misstep. Current Gallup numbers show the court with a 59 percent approval rating compared with President Obama’s rating of 51 percent, and Congress way behind at 31 percent.

#### Judges follow strategic imperatives

Ouyang 2012

Yu, PhD student in PoliSci @ the University of Kentucky (go cats), How Public Opinion Constrains Presidential Unilateral Action SSRN

Students of the judicial decision-making literature argue that Supreme Court justices follow a strategic behavior model, which states that justices rationally anticipate the potential responses from Congress, the president, and the public (Caldeira and Gibson 1992; Casillas, Enns, and Wohlfarth 2011; Epstein and Knight 1998; McGuire and Stimson 2004). Specifically, McGuire and Stimson (2004) assert that what impel the justices to follow public opinion are the Court's expectations about the future consequences of its decisions. In other words, the justices themselves take notice of public opinion, assess the potential impact of their decisions on future attitudes and evaluations of the Court, and alter their behaviors accordingly. However, recognizing that they . . .must on occasions stand against the winds of public opinion" (Caldeira and Gibson 1992, 635), Supreme Court justices must take caution in how they craft their decisions so as not to lose their broad base of support from the public. Judicial scholars assert that, by maintaining some minimal level of diffuse support, the Supreme Court then has the political capital to stand against public opinion, if necessary. The question I examine is how does diffuse support relate to unilateral actions.

#### Elites pay attention which is sufficient for the link – median justice.

Baum and Devins 2010

Lawrence and Neal, Law Profs at Ohio St and William & Mary, Why the Supreme Court Cares About Elites, Not the American People http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=2149&context=facpubs

As we have suggested already, legal academics may be an especially salient audience within the legal profession. The news media may also be a salient audience, and the impact of these two groups is parallel in some important respects. The potential salience of academics and the news media has three different sources. First, the news media and academia play an important role in deﬁning the Justices’ status and reputation within their own inner circles. Supreme Court Justices read the newspapers, as do their family and friends. Their clerks and the advocates who appear before them typically served as the editors of the nation’s leading law reviews, and many of their clerks will become academics—writing journal articles and books about their handiwork. Supreme Court Justices, moreover, are part of the larger law school culture. They frequently travel to law schools and have strong ties to the elite schools that they and their clerks attended.143 Second, the news media and academia also deﬁne the Justices’ status and reputation to society at large.144 Political elites in general and the news media in particular play a signiﬁcant role in opinion formation among the mass public. Indeed, on issues “that are not ideologized in the mass public,” there is a convergence between elite opinion (typically reinforced by Supreme Court decision making) and public opinion—as “media discussion [of a Court decision] and elite behavior” change public norms in ways that “reduce the differences between the pattern of elite and mass opinion on an issue.”145 Third, whereas the mass public knows very little about the speciﬁc decisions of the Court,146 elites are far more likely to pay attention to reports on Court decision making. In other words, elites are the principal consumers of media reports about the Court, especially in specialized media such as legal newspapers and blogs. The media’s inﬂuence in shaping the Justices’ decision making is something that we will take up in Part III, when we discuss whether there is empirical evidence backing the so-called Greenhouse effect, whereby Justices shift their views to reﬂect the left-leaning values of media and academic elites.147 At this point, two observations are in order: First, there is little question that Justices pay attention to reports about the Court and about themselves personally in the news media. Although the Justices interact with reporters far less than their counterparts in the other branches, such interactions are not rare148 and they are becoming more common. Justices may engage in those interactions for several reasons, but it is likely that an interest in shaping news coverage is one of those reasons.149 Second, there is good reason to think that the Court’s swing Justices are especially sensitive to their reputations among academic and media elites. Swing Justices typically have comparatively weak legal policy preferences, and as such, are more likely to engage in externally focused impression management.150 In particular, rather than seeking to win the esteem of some ideologie cally identiﬁable group, swing Justices are often drawn to the norm of judicial independence and the idea that a neutral, impartial arbiter would not join one or another faction that regularly favors liberal or conservative outcomes.151 For example, Justice Anthony Kennedy—the super median on today’s Roberts Court—seems particularly concerned with his public persona. According to one of his law clerks, Justice Kennedy “‘would constantly refer to how it’s going to be perceived, how the papers are going to do it, [and] how it’s going to look.’”152 On the very day that the Court reafﬁrmed Roe in Planned Parenthood v. Casey, Justice Kennedy told a reporter that “‘[s]ometimes you don’t know if you’re Caesar about to cross the Rubicon or Captain Queeg cutting your own tow line.’”153 No doubt, Justice Kennedy may be an extreme case. Nevertheless, there is good reason to think that swing Justices are more apt to be externally focused and, as such, more interested in press and academic commentary about the Court. D. SUMMARY Social psychology provides important insights into Supreme Court decision making. Unlike political science models which emphasize the pursuit of legal policy preferences, social psychology highlights how issues of self presentation also contribute to the choices Justices make. In so doing, social psychology takes into account both the legal policy preferences of Justices (by recognizing that a Justice will only back up legal or policy positions that are roughly in sync with their personal preferences) and a Justice’s interest in power and reputation (by recognizing that a Justice’s preferences and votes—consciously or unconsciously—are inﬂuenced by audiences they care about). By highlighting how Justices take audiences into account, this Part has called attention to divergences between the social psychology and political science models. At the same time, it is important to recognize that both models anticipate that Justices will diverge from favored policy positions to pursue other objectives. Political science models that argue that the Court accommodates itself to public opinion, for example, anticipate that Justices will calibrate their decision making to stave off public disapproval. The social psychology model, on the other hand, highlights the pivotal role that personal motivation plays in judicial decision making. There is reason to think that political science models that view public opinion as a signiﬁcant inﬂuence on the Justices anticipate greater divergence by the Justices from positions that reﬂect their policy preferences than does the social psychology model. Social psychology anticipates that the formation of legal policy preferences is driven by both ideological and personal motivations, so there is likely to be considerable agreement between Justices’ preferences and the preferences of the audiences that are most important to them. In contrast, any mechanisms that lead to agreement in preferences between the Justices and the general public are likely to be weaker. Social psychology is important for three other related reasons. First, even though the Supreme Court Justices are members of a single Court, it is wrong to describe the Court as a unitary body. Not only do the Justices have different legal policy preferences, they also place different values on power and reputation—including their willingness to be associated with ideologically identiﬁable groups. Second, in looking at the Supreme Court as a conglomeration of individual preferences, social psychology—consistent with the political science models— calls attention to the often pivotal role that median Justices play in Court decision making.154Unlike the political science models, however, social psychology calls attention to the important role that audiences play in the decision making of median Justices. Third, and ﬁnally, social psychology is instructive in understanding which audiences matter most to Justices. Supreme Court Justices are elites whose reference groups are also elites. And although there are both liberal and conservative elite audiences—so that highly ideological Justices are likely to garner praise from the interest groups they identify with so long as they generally support the positions of those groups—the Court’s swing Justices are especially likely to look to the media, law professors, and lawyers’ groups like the American Bar Association. These are the very audiences that will dissect and write about the Justices’ opinions, both in specialty journals for the legal profession and in books and articles that reach across elite audiences (and ultimately ﬁlter to the mass public).155 As it turns out, these audiences are left-leaning, at least on civil liberties issues, in the current era.156 For that reason, it is to be expected that Supreme Court decision making will sometimes favor these elite preferences over the preferences of the American people.157

## 2nc

## CP

### 1NC

#### 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.

### S

#### The plan solves---creates less strikes with more accuracy

Dragu 13 (Tiberiu Dragu, prof of politics at NYU, and Oliver Board, On Judicial Review in a Separation of Powers System, https://files.nyu.edu/tcd224/public/papers/judicial.pdf)

Whether judicial review should be limited for epistemic reasons has been particularly salient in recent years, as courts have been repeatedly called to determine the meaning of statutes and constitutional provisions on executive officials' powers to prevent terrorist attacks. Some scholars argue that terrorism prevention, just like other national security matters, is an area of questionable judicial competence where executive officials should be afforded considerable discretion to devise counterterrorism policies not only because the pres- ident is elected, but also because the president's agents have superior information about how best to address the terrorist threat (Sunstein 2005; Tushnet 2005; Posner 2006). Similar arguments for limiting judicial review because of asymmetric institutional competence are often voiced in the scholarship on administrative rulemaking (Sunstein 2006). Judicial in-tervention in rulemaking can he at odds, so the argument goes, with the very rationale of creating administrative agencies: to have an institutional repository of expertise in realms in which elected officials lack the necessary information required by complexity of the modern- day governance (Landis 1938). Such arguments approach the question of whether judicial review is desirable or not as a balancing exercise between the rule-of-law ideal of checking the legality of policies and the separat ion-of-powers principle of dispensing policy-making authority to those institutions with superior expertise. As such, the expertise rationale for limiting the scope of judicial review seems simple and intuitive: When questions of law are intertwined with matters of fact and policy choice and when the courts are unsure what consequences will follow from a particular decision, judicial second-guessing can throw governmental policies off course. And if the harm to public policy caused by potentially erroneous judicial decisions outweighs the rule-of-law benefits of assessing the legality of policies, it is allegedly desirable to limit judicial review on grounds of institutional competence, especially in technical and complex policy areas such as national security and administrative action. Notwithstanding the foregoing, restraining the exercise of judicial review for epistemic reasons, some argue, is bound to create a zone of legal unaccountability where governmental power can be deployed in an arbitrary and illegal manner, with potentially deleterious effects for the effectiveness of public law. Because even the most expert body can act unlawfully, foreclosing legal review in certain policy areas amounts to an abdication of the judicial duty to enforce relevant legal limits (Allan 2011). The pressing question then is this: Can we reconcile the review of expert policy decisions by non-expert courts in a manner that is consistent with both the rule-of-law ideal of checking the legality of policies and the separation-of-powers concern for policy expertise? To this end, we develop a game-theoretic analysis to illustrate how the exercise of judicial review can have a beneficial effect on expertise, even if the courts are relatively ill-equipped to evaluate the likely effects of various policies. That is, our analysis proposes a novel ratio-nale for the institution of judicial review. The conventional argument for such institutional arrangement is that it ensures consistency between the actions of governmental officials and preexisting legal provisions. Without disputing the importance of judicial review as a mech-anism of legal accountability, the analysis here underscores another, perhaps less intuitive virtue: judicial review by non-expert courts can foster policy expertise. Our analysis takes as its point of departure the fact that policymakers, those with for-mal power to make decisions, have to rely on expert agents for information regarding the likely consequences of various courses of action. Nothing about this argument is profound: that policymakers depend on experts for policy advice is an institutional fact of modern government. For example, the president relies on the White House staff, bureaucrats and non-governmental experts for policy advice; the House and the Senate depend on staff mem- bers, congressional committees, bureaucrats and lobbyists for valuable information when drafting legislation; the heads of administrative agencies depend on lower-level bureaucrats and the regulated industry, among others, for information regarding the consequences of various regulations; and so on. At the same time, this separation between policy-making and policy expertise implies that the amount of information available for decision-making is endogenous to the institutional structure under which policy-making takes place, observation which leads to, as we shall show, a novel assessment of judicial review expertise perspective. To illustrate the conditions under which judicial review fosters policy expertise, we com-pare a baseline model of an interaction between a policymaker and an expert in the absence of judicial review with an institutional setting in which a court can assess the legality of policies. This analysis shows that the judiciary can be better off without its review power if judicial checks dilute the amount of information available for policy-making, which implies that there are endogenous judicial incentives to limit the detrimental effect of judicial review on expertise. More importantly, the institutional analysis underscores that judicial review can enhance the amount of information available for policy-making, while, under those con- ditions, the judiciary prefers to exercise legal review, even though it lacks the knowledge to precisely assess the likely effects of various policies. In other words, not only that it can be desirable solely on expertise grounds to subject governmental policy to the muster of judi-cial review, but non-expert courts have endogenous incentives to employ judicial review in a manner consistent with both the principle of checking the legality of policies and institutional concern for policy expertise. These results have policy implications for public and scholarly debates regarding how to design the structure of liberal governments to fight terrorism (Cole 2003; Posner 2006). Whether counterterrorism policy should be subjected to the muster of judicial review has been a contentious matter, especially in the aftermath of 9/11 as various liberal democracies made terrorism prevention a pressing objective. The contending views on the appropriate- ness of judicial review of counterterrorism policy are sharply articulated in the recent debate on drone strikes. Some say that judicial review of targeted killings is necessary to put the policy on a better legal foundation, while others argue that it is inappropriate because judges lack the required expertise to review expert executive decisions.1 Our results suggest that non-expert judicial review has the potential to induce more informed policies, an observation that is missing from current discussions on judicial review of drone strikes and other coun- terterrorism policies. In section 7, we discuss in more detail the application of our theory and its policy implications, in the context of counterterrorism policy.

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

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.)

### AT: Perm Do Both

Qualified immunity means officials can’t lose suits if they are doing their job. Ex ante approval would overwhelm the ex post corrective since any unjust action could be justified using the plans rubber stamping court

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

#### 2. Ex ante will overwhelm ex post review-

Vladeck 13 (Stephen I. Vladeck Professor of Law and Associate Dean for Scholarship, American University Washington College of Law, “DRONES AND THE WAR ON TERROR: WHEN CAN THE U.S.TARGET ALLEGED AMERICAN TERRORISTS OVERSEAS?,” http://judiciary.house.gov/hearings/113th/02272013\_2/Vladeck%2002272013.pdf)

In the process, the result would be that such ex ante review would do little other than to add the vestiges of 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.

### AT: DP

### AT: Due Process=before hand

The cp prevents reckless errors it’s a double check

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

V. Due Process and Targeted Killing In this Part, we make two basic claims on how the due process model of Hamdi/Boumediene might extend to targeted killing. The first relates to judicial control. Recall that in his Hamdi dissent, Justice Thomas said the absurdity of applying due process principles to a Predator strike demonstrated the absurdity of courts using these principles to second-guess executive detentions of enemy combatants. 187 We claim that to the contrary, Hamdi/Boumediene suggests a sound model for judicial control of targeted killings under which courts, applying duly deferential standards, might - on rare occasions - determine the legality of attacks after they occur. Due process requires at least this minimal level of judicial control. The second claim relates to executive self-control. Given the limited role of courts in national security, it is imperative for the executive to develop internal procedures to ensure accuracy of targeted killings and accountability for the officials who order them. Both the Supreme Court of Israel and the European Court of Human Rights have ruled that targeted killings conducted in counter-terrorism operations must receive close, independent review within the executive branch. 188 We explain why due process demands the same of American authorities. If the CIA has not already done so, it should put these procedures in place to help bring Predator strikes within the rule of law. A. Identifying One Very Limited Role for the Courts Where the paradigm of war applies, the executive dominates in deciding who lives or dies. Justice O'Connor nonetheless claimed in [\*438] Hamdi that the war on terror does not give the executive a "blank check" to do as it pleases in the name of security. 189 If one accepts this premise, then the question becomes how to control the executive's war power without unduly hampering it. Under a Mathews-style approach, to determine whether due process demands a particular procedural control over targeted killing, one should: (a) identify the range of legitimate interests that the procedure might protect; (b) assess the degree to which adoption of the procedure actually would protect these interests; and (c) weigh these marginal benefits against the damage the procedure may cause other legitimate interests. 190 Judicial control of targeted killing could increase the accuracy of target selection, reducing the danger of mistaken or illegal destruction of lives, limbs, and property. Independent judges who double-check targeting decisions could catch errors and cause executive officials to avoid making them in the first place.More broadly, judicial control of targeted killing could serve the interests of all people - targets and non-targets - in blocking the executive from exercising an unaccountable, secret power to kill. 191 If possible, we should avoid a world in which the CIA or other executive officials have unreviewable power to decide who gets to live and who dies in the name of a shadow war that might never end. Everyone has a cognizable interest in stopping a slide into tyranny. Yet - in favor of executive autonomy - we live in an imperfect world where judicial obstacles to killing could hinder national security. It would be silly, for instance, to require the military to use the full procedures of the law enforcement model to decide what to bomb in the midst of a war. Likewise, given the conflict with al Qaeda, it may be silly to judicialize the process for killing its committed members. Moreover, not only does judicialization threaten national security, it might not deliver countervailing benefits because courts lack the competence to improve military and national security decisions. 192 Reasonable minds can and do differ on how to balance such concerns. That said, one possible balance is to reject virtually all judicial control of targeted killing, a position that comports with Justice Thomas's treatment of executive detentions in his Hamdi dissent. 193 A [\*439] hands-off approach, however, is impossible to square with the historical fact that courts can and do judge whether military actions constitute war crimes. Indeed, the Geneva Conventions require states to prosecute or extradite persons who have committed "grave breaches," a category that includes, among other crimes, willful, wanton, unjustified killing or infliction of great suffering. 194 The United States has codified this requirement in the War Crimes Act. 195 Besides legal barriers, there are many practical barriers to prosecutions under the laws of war. Primary among them, a prosecuting authority must see enough evidence to conclude that a war crime occurred. Such information will often be buried under the rubble of war or surrounded in secrecy. Also, the prosecuting authority must have the political will to bring an action. As a general rule, no government wishes to prosecute one of its own officials for war crimes. Still, a war criminal from one country - especially a weak or defeated one - just might find himself facing prosecution in the courts of another country or an international authority. For these and related reasons, it is beyond doubt that many more war crimes occur than are prosecuted. Nonetheless, even if a CIA official who authorizes a Predator strike faces little threat of criminal liability, the potential for criminal prosecution proves our point: It is common - indeed, obvious - that courts do have a role to play in identifying the limits of acceptable warfare. But might due process require courts to play a more expansive role in controlling targeted killing than adjudicating a war crime prosecution that may never come? Justice Thomas mocked this possibility in Hamdi as leading to the conclusion that executive officials must give notice and an opportunity to be heard to a person before killing him with a missile. 196 This reductio ad absurdum does not stand up to scrutiny, however, for the simple reason that due process does not always demand notice and an opportunity to be heard before a deprivation occurs. Where such pre-deprivation procedures would be impracticable, due process may take the form of post-deprivation procedures. North American Cold Storage Co. v. City of Chicago provides a canonical example. 197 In this case, local authorities seized and destroyed meat [\*440] they had determined was putrid and unfit for sale. 198 The Court held that, because of health concerns, immediate destruction was acceptable to prevent the meat from being sold on the sly during the pendency of any hearings. 199 The owners of the meat were not left without a remedy, though; they were free to sue the local officials in tort for the value of their destroyed meat. 200 In application, Hamdi and Boumediene fit rather neatly into this paradigm of requiring post-deprivation review when pre-deprivation process is impracticable. Enemy forces in the conflicts after 9/11 were not neatly arrayed in uniforms and units that made for easy identification. As a result, American forces found themselves in custody of thousands of persons whose status was unclear. By definition, every one of these detainees was deprived of their liberty immediately upon detention. Obviously, the military cannot provide notice and an opportunity to be heard before detaining these suspects, and any process that occurs immediately after capture will be constrained by the conditions of war. 201 As Hamdi and Boumediene make plain, however, due process may nonetheless demand that a detainee receive meaningful notice and an opportunity to be heard at a later time. 202 The Hamdi/Boumediene model of judicial control therefore does not suggest the odd prospect of holding hearings where a terrorist gets to argue that he ought not be killed by a Predator strike. Rather, a more direct analogy suggests that targeted killings should be subject to some form of judicial review in civil proceedings initiated by private parties. The vehicle for this review cannot be habeas, the thousand-year-old vehicle for testing the legality of detentions. But the vehicle might take the form of a Bivens-style action in which the plaintiff - who might be a survivor of an attempted targeted killing or an appropriate next friend - claims that the attack was unconstitutional either because it violated the Fifth Amendment on a "shock the conscience" theory or because it constituted excessive force under the Fourth Amendment. 203

#### 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.

### 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.

### Lower Court—2NC

#### MORE EV – SUPREME COURT KEY ARGS ARE A MYTH

BRANNON AND REYNOLDS 2003 **–** PROF’S LAW TENNESSEE AND SIU

*RULINGS AND RESISTANCE*, 55 ARLR 1253

IV. CONCLUSION

The Supreme Court is the highest court in the land. Lower courts follow its precedents. The makeup of the Supreme Court is thus the most important influence on American constitutional law. These are statements so taken for granted that they are seldom even examined**. But in fact, reality seems to be more complex than that.**

That complexity holds a number of lessons. One is that the way we teach constitutional law is simplistic: the way that Supreme Court opinions affect the system is far more complex and indeterminate than the casebooks suggest. That complexity exists in a variety of forms, but the way in which Supreme Court precedents do (or do not) percolate down through the lower courts is surely more important than the standard tale would make it seem. [[FN293]](http://web2.westlaw.com/result/documenttext.aspx?service=Find&rs=LAWS2.0&cnt=DOC&n=1&fn=_top&sv=Split&cxt=DC&rlt=CLID_FQRLT311723111&fcl=False&docsample=False&ss=CNT&vr=1.0&rp=%2fFind%2fdefault.wl&cite=55+ARLR+1253#FN;F293) Another is that the lower courts simply are not living up to the general expectations we have had for them, in terms of thoughtfulness, fairness, and a willingness to give a hearing to litigants regardless of their stature or of the crimes of which they are accused. This failure is a serious one, not only for justice but for the very legitimacy of the system. [[FN294]](http://web2.westlaw.com/result/documenttext.aspx?service=Find&rs=LAWS2.0&cnt=DOC&n=1&fn=_top&sv=Split&cxt=DC&rlt=CLID_FQRLT311723111&fcl=False&docsample=False&ss=CNT&vr=1.0&rp=%2fFind%2fdefault.wl&cite=55+ARLR+1253#FN;F294) We hope ***\*1311*** that our examination of this issue will spark greater concern and scrutiny in the future.

### 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.

#### Not credible-Johnson, people think it’s too secretive, same thing as the status quo

#### 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.”

### 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.

#### They gloss over details

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/)

I do share Chesney’s suspicion that a tort-based process in which victims seek damages is not the appropriate means of reviewing targeted killing decisions. However, I am certain that regardless of whether an ex ante review is used, some ex post review must be available. There are simply too many variables between the initial nomination and the final execution of the mission that should be subject to some independent review. Indeed, as a veteran, I know the value of lessons learned in after action reviews, but I also know how often these reviews are shortchanged or skipped altogether. An ex post judicial review will ensure that this does not happen here.

### AT: Hurdles

#### Fiat checks – ruling that judicial ex post review of targeted killings is necessary establishes standing for plaintiffs and creates a precedent – means we fiat through hurdles like the state secrets and political question doctrine

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

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

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

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

#### 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.

### S – Public Confidence

#### Only judicial review provides the due process necessary to solve public confidence in targeting—key to viability of the program

Corey, Army Colonel, 12 (Colonel Ian G. Corey, “Citizens in the Crosshairs: Ready, Aim, Hold Your Fire?,” http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA561582)

Alternatively, targeted killing decisions could be subjected to judicial review. 103 Attorney General Holder rejected ex ante judicial review out of hand, citing the Constitution’s allocation of national security operations to the executive branch and the need for timely action.104 Courts are indeed reluctant to stray into the realm of political questions, as evidenced by the district court’s dismissal of the ACLU and CCR lawsuit. On the other hand, a model for a special court that operates in secret already exists: the Foreign Intelligence Surveillance Court (FISC) that oversees requests for surveillance warrants for suspected foreign agents. While ex ante judicial review would provide the most robust form of oversight, ex post review by a court like the FISC would nonetheless serve as a significant check on executive power.105 Regardless of the type of oversight implemented, some form of independent review is necessary to demonstrate accountability and bolster confidence in the targeted killing process. Conclusion The United States has increasingly relied on targeted killing as an important tactic in its war on terror and will continue to do so for the foreseeable future.106 This is entirely reasonable given current budgetary constraints and the appeal of targeted killing, especially UAS strikes, as an alternative to the use of conventional forces. Moreover, the United States will likely again seek to employ the tactic against U.S. citizens assessed to be operational leaders of AQAM. As demonstrated above, one can make a good faith argument that doing so is entirely permissible under both international and domestic law as the Obama Administration claims, the opinions of some prominent legal scholars notwithstanding. The viability of future lethal targeting of U.S. citizens is questionable, however, if the government fails to address legitimate issues of transparency and accountability. While the administration has recently made progress on the transparency front, much more remains to be done, including the release in some form of the legal analysis contained in OLC’s 2010 opinion. Moreover, the administration must be able to articulate to the American people how it selects U.S. citizens for targeted killing and the safeguards in place to mitigate the risk of error and abuse. Finally, these targeting decisions must be subject to some form of independent review that will both satisfy due process and boost public confidence.