## 1AC

Same as round 2 of Kentucky Clay

Bivens w/ sexual assault and convention against torture sceniaros

Counter-terrorism

## 2AC

### CT

#### Qualified immunity prevents overdeterrence

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

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

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

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

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

### 2AC Restriction

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

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

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

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

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

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

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

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

553 U.S. 723.

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

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

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

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

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

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

### 2AC – Counterplan

#### A. Line-drawing – aff explicitly removes the precedent of special factors which causes lower court confusion – that’s 1AC Loevy – makes arbitrary rejections inevitable – means it won’t be applied even in the sexual assault and CAT cases

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

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

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

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

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

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

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

#### **Absent accountability, interstate wars are inevitable**

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

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

#### Counter-terrorism – public doesn’t trust the executive

Shane 11/24/12 (SCOTT, staffwriter, “Election Spurred a Move to Codify U.S. Drone Policy” http://www.nytimes.com/2012/11/25/world/white-house-presses-for-drone-rule-book.html?pagewanted=all&\_r=0)

WASHINGTON — Facing the possibility that President Obama might not win a second term, his administration accelerated work in the weeks before the election to develop explicit rules for the targeted killing of terrorists by unmanned drones, so that a new president would inherit clear standards and procedures, according to two administration officials. The matter may have lost some urgency after Nov. 6. But with more than 300 drone strikes and some 2,500 people killed by the Central Intelligence Agency and the military since Mr. Obama first took office, the administration is still pushing to make the rules formal and resolve internal uncertainty and disagreement about exactly when lethal action is justified. Mr. Obama and his advisers are still debating whether remote-control killing should be a measure of last resort against imminent threats to the United States, or a more flexible tool, available to help allied governments attack their enemies or to prevent militants from controlling territory. Though publicly the administration presents a united front on the use of drones, behind the scenes there is longstanding tension. The Defense Department and the C.I.A. continue to press for greater latitude to carry out strikes; Justice Department and State Department officials, and the president’s counterterrorism adviser, John O. Brennan, have argued for restraint, officials involved in the discussions say. More broadly, the administration’s legal reasoning has not persuaded many other countries that the strikes are acceptable under international law. For years before the Sept. 11, 2001, attacks, the United States routinely condemned targeted killings of suspected terrorists by Israel, and most countries still object to such measures. But since the first targeted killing by the United States in 2002, two administrations have taken the position that the United States is at war with Al Qaeda and its allies and can legally defend itself by striking its enemies wherever they are found. Partly because United Nations officials know that the United States is setting a legal and ethical precedent for other countries developing armed drones, the U.N. plans to open a unit in Geneva early next year to investigate American drone strikes.

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### 2AC Warfighting

#### Soft power – judicial review establishes credibility which is critical to hard power flexibility – that’s Sidhu – AND material power is irrelevant without legitimacy and soft power

Mendelsohn, Ph.D polysci, 10 (Barak, assistant professor of political science at Haverford College and a senior fellow of FPRI. Author of Combating Jihadism: American Hegemony and Interstate Cooperation in the War on Terrorism, June 2010, "The Question of International Cooperation in the War on Terrorism", http://www.fpri.org/enotes/201006.mendelsohn.cooperationwarterror.html)

Going against common conceptions, I argue that the United States sought to advance more than what it viewed as simply its own interest. The United States stands behind multiple collaborative enterprises and should be credited for that. Nevertheless, sometimes it has overreached, sought to gain special rights other states do not have, or presented strategies that were not compatible with the general design of the war on terrorism, to which most states subscribed. When it went too far, the United States found that, while secondary powers could not stop it from taking action, they could deny it legitimacy and make the achievement of its objectives unattainable. Thus, despite the common narrative, U.S. power was successfully checked, and the United States found the limitations of its power, even under the Bush administration. Defining Hegemony Let me begin with my conception of hegemony. While the definition of hegemony is based on its material aspects—the preponderance of power—hegemony should be understood also a part of a social web comprised of states. A hegemon relates to the other states in the system not merely through the prism of power balances, but through shared norms and a system of rules providing an umbrella for interstate relations. Although interstate conflict is ubiquitous in international society and the pursuit of particularistic interests is common, the international society provides a normative framework that restricts and moderates the hegemon's actions. This normative framework accounts for the hegemon's inclination toward orderly and peaceful interstate relations and minimizes its reliance on power. A hegemon’s role in the international community relies on legitimacy. Legitimacy is associated with external recognition of the hegemon’s right of primacy, not just the fact of this primacy. States recognize the hegemon’s power, but they develop expectations that go beyond the idea that the hegemon will act as it wishes because it has the capabilities to do so. Instead, the primacy of the hegemon is manifested in the belief that, while it has special rights that other members of the international society lack, it also has a set of duties to the members of the international society. As long as the hegemon realizes its commitment to the collective, its position will be deemed legitimate. International cooperation is hard to achieve. And, in general, international relations is not a story of harmony. A state’s first inclination is to think about its own interests, and states always prefer doing less over doing more. The inclination to pass the buck or to free ride on the efforts of others is always in the background. If a hegemon is willing to lead in pursuit of collective interests and to shoulder most of the burden, it can improve the prospects of international cooperation. However, even when there is a hegemon willing to lead a collective action and when states accept that action is needed, obstacles may still arise. These difficulties can be attributed to various factors, but especially prominent is the disagreement over the particular strategy that the hegemon promotes in pursuing the general interest. When states think that the strategy and policies offered by the hegemon are not compatible with the accepted rules of “rightful conduct” and break established norms, many will disapprove and resist. Indeed, while acceptance of a hegemon’s leadership in international society may result in broad willingness to cooperate with the hegemon in pursuit of shared interests it does not guarantee immediate and unconditional compliance with all the policies the hegemon articulates. While its legitimacy does transfer to its actions and grants some leeway, that legitimacy does not justify every policy the hegemon pursues—particularly those policies that are not seen as naturally deriving from the existing order. As a result, specific policies must be legitimated before cooperation takes place. This process constrains the hegemon’s actions and prevents the uninhibited exercise of power.

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

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

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

### 2AC – Politics

#### Boehner has already given up on the debt ceiling

**Weber, theWeek senior editor, 10-4-13**

(Peter, “Has John Boehner already caved on the debt ceiling?”, <http://theweek.com/article/index/250643/has-john-boehner-already-caved-on-the-debt-ceiling>, ldg)

On the other hand, Boehner is under a lot of pressure to not tank the economy — not only from Democrats but also Republican governors and well-heeled GOP donors. Given those pressures, there's always the possibility that "some random Republican in the House is worried about Boehner caving and concocted this story for reporters in hopes that there'll be an uproar on the right over it and Boehner will get nervous," says Allahpundit at the conservative site Hot Air. But it's more likely that Boehner is waving the white flag: You'd need to have an unusually committed ideological warrior in charge for the House to stand firm as Treasury hits the ceiling, with media air-raid sirens about default blaring in the background. Boehner's not that guy.... I'd go so far as to bet that he'd agree to a clean debt-ceiling hike at the last minute even if he had every reason to believe that it would cost him his Speakership.... Boehner surely has 20 centrist House GOPers willing to vote with Democrats for a clean debt-ceiling hike; even a clean CR to end the much less significant government shutdown seems to be growing more popular in the caucus. The only obstacle to passing one is his own personal reluctance to face the political consequences from the right of bringing that hike to the floor. Show of hands: Who thinks that'll stop him after two more weeks of tremendous pressure from the center and the left? [Hot Air]

#### A. The court JUST ruled against the GOP congress YESTERDAY on an issue RELATED TO THE DEBT CEILING—they have no jive that distinguishes this ruling from the plan

Tillison 10-6 (Tom, Federal judge rules against Issa; reminds him he caused shutdown, http://www.bizpacreview.com/2013/10/06/federal-judge-rules-against-issa-reminds-him-he-caused-shutdown-84751)

A federal judge not only sided with the Obama administration in a request prompted by the government shutdown, but she seems to have taken sides on who’s at fault in the standoff with the Republican-led House. In the spirit of never allowing a crisis go to waste, Attorney General Eric Holder saw the shutdown as another opportunity to delay justice in the Fast and Furious gun-running case and asked for a time out in a lawsuit filed nearly two years ago by House Oversight Committee Chairman Darrell Issa, R-Calif. U.S. District Judge Amy Berman Jackson, appointed to the bench by President Obama, granted Holder’s motion, adding that while most people have no control over court delays, “that cannot be said of the House of Representatives, which has played a role in the shutdown that prompted” the request, according to Fox News.

#### No link – courts shield

#### A. Allows political cover

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

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

#### No chance of war from economic decline---best and most recent data

Daniel W. Drezner 12, Professor, The Fletcher School of Law and Diplomacy, Tufts University, October 2012, “The Irony of Global Economic Governance: The System Worked,” <http://www.globaleconomicgovernance.org/wp-content/uploads/IR-Colloquium-MT12-Week-5_The-Irony-of-Global-Economic-Governance.pdf>

The final outcome addresses a dog that hasn’t barked: the effect of the Great Recession on cross-border conflict and violence. During the initial stages of the crisis, multiple analysts asserted that the financial crisis would lead states to increase their use of force as a tool for staying in power.37 Whether through greater internal repression, diversionary wars, arms races, or a ratcheting up of great power conflict, there were genuine concerns that the global economic downturn would lead to an increase in conflict. Violence in the Middle East, border disputes in the South China Sea, and even the disruptions of the Occupy movement fuel impressions of surge in global public disorder. The aggregate data suggests otherwise, however. The Institute for Economics and Peace has constructed a “Global Peace Index” annually since 2007. A key conclusion they draw from the 2012 report is that “The average level of peacefulness in 2012 is approximately the same as it was in 2007.”38 Interstate violence in particular has declined since the start of the financial crisis – as have military expenditures in most sampled countries. Other studies confirm that the Great Recession has not triggered any increase in violent conflict; the secular decline in violence that started with the end of the Cold War has not been reversed.39 Rogers Brubaker concludes, “the crisis has not to date generated the surge in protectionist nationalism or ethnic exclusion that might have been expected.”40 None of these data suggest that the global economy is operating swimmingly. Growth remains unbalanced and fragile, and has clearly slowed in 2012. Transnational capital flows remain depressed compared to pre-crisis levels, primarily due to a drying up of cross-border interbank lending in Europe. Currency volatility remains an ongoing concern. Compared to the aftermath of other postwar recessions, growth in output, investment, and employment in the developed world have all lagged behind. But the Great Recession is not like other postwar recessions in either scope or kind; expecting a standard “V”-shaped recovery was unreasonable. One financial analyst characterized the post-2008 global economy as in a state of “contained depression.”41 The key word is “contained,” however. Given the severity, reach and depth of the 2008 financial crisis, the proper comparison is with Great Depression. And by that standard, the outcome variables look impressive. As Carmen Reinhart and Kenneth Rogoff concluded in This Time is Different: “that its macroeconomic outcome has been only the most severe global recession since World War II – and not even worse – must be regarded as fortunate.”42

## 1AR

### T - 1AR-Lobel-Must Limit Discretion

#### Their evidence which cuts off before the paragraph ends shockingly concludes aff on the restriction, imminence, and ground question.

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

II. Drone Courts and the Separation of Powers

In my view, the adversity issue is the deepest legal flaw in “drone court” proposals. But the idea of an ex ante judicial process for signing off on targeted killing operations may also raise some serious separation of powers concerns insofar as such review could directly interfere with the Executive’s ability to carry out ongoing military operations… First, and most significantly, even though I am not a particularly strong defender of unilateral (and indefeasible) presidential war powers, I do think that, if the Constitution protects any such authority on the part of the President (another big “if”), it includes at least some discretion when it comes to the “defensive” war power, i.e., the President’s power to use military force to defend U.S. persons and territory, whether as part of an ongoing international or non-international armed conflict or not. And although the Constitution certainly constrains how the President may use that power, it’s a different issue altogether to suggest that the Constitution might forbid him for acting at all without prior judicial approval–especially in cases where the President otherwise would have the power to use lethal force. This ties together with the related point of just how difficult it would be to actually have meaningful ex ante review in a context in which time is so often of the essence. If, as I have to think is true, many of the opportunities for these kinds of operations are fleeting–and often open and close within a short window–then a requirement of judicial review in all cases might actually prevent the government from otherwise carrying out authority that most would agree it has (at least in the appropriate circumstances). This possibility is exactly why FISA itself was enacted with a pair of emergency provisions (one for specific emergencies; one for the beginning of a declared war), and comparable emergency exceptions in this context would almost necessarily swallow the rule. Indeed, the narrower a definition of imminence that we accept, the more this becomes a problem, since the time frame in which the government could simultaneously demonstrate that a target (1) poses such a threat to the United States; and (2) cannot be captured through less lethal measures will necessarily be a vanishing one. Even if judicial review were possible in that context, it’s hard to imagine that it would produce wise, just, or remotely reliable decisions.

### T - 1AR-Targeting Killing-Imminence-McKelney

C. McKelvey votes aff-Judicial review over targeted killing is an on face restriction of executive authority

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

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

B. The Aulaqi Case in Federal Court In August 2010, Nasser al-Aulaqi, Anwar's father, filed suit in the District Court for the District of Columbia requesting an injunction against the targeted killing of his son. 36 Represented by the American Civil Liberties Union (ACLU), Nasser al-Aulaqi claimed that outside of the zone of armed conflict, the targeted killing of an American citizen represents an extrajudicial killing without due process of law. 37 The claim stated that under customary international law, the only circumstances allowing an exception to this general rule are those presenting a "concrete, specific, and imminent threat of death or serious physical injury." 38 The targeted killing of an American citizen outside of these circumstances is a violation of the Fourth and Fifth Amendments. 39 The complaint asserted three constitutional challenges to the targeted killing program. 40 By targeting an American for an extrajudicial killing outside of circumstances that present concrete, specific, and imminent threats of harm, the government had violated Aulaqi's Fourth Amendment right to be free from unreasonable seizure and his Fifth Amendment right not to be deprived of life without due process of law. 41 In addition, by refusing to disclose the standards used in determining that Aulaqi should be targeted for extrajudicial killing, the government violated the Fifth Amendment's notice requirement. 42 The complaint further asserted that by claiming this broad and unreviewable power, the Executive Branch permitted itself to conduct at-will extrajudicial killings of Americans, in secret, without any notice. 43 In the suit - filed against President Obama, then-Defense Secretary Robert Gates, and then-Director of the CIA Leon Panetta 44 - Nasser al-Aulaqi requested several forms of relief to [\*1360] prevent the targeted killing of his son. 45 He requested a preliminary injunction against the order to pursue Anwar al-Aulaqi with lethal force, and declaratory relief requiring the government to disclose the standards used for placing people on the targeted killing list. 46 In its brief in response, the DOJ moved for summary judgment on several alternative grounds, with emphasis on standing, the political question doctrine, and the state secrets privilege. 47 The DOJ argued that Nasser al-Aulaqi did not meet the requirements for next-friend standing for two reasons. 48 First, Aulaqi was not denied access to the courts. 49 Rather, Aulaqi seemed to be hiding in Yemen of his own accord. 50 Second, there was no evidence that Aulaqi desired to raise these claims in court to challenge the government's authority to conduct an extrajudicial killing against him. 51 Therefore, Nasser al-Aulaqi did not demonstrate that he was representing his son's interests or purpose. 52 The DOJ also challenged Nasser al-Aulaqi's complaint on grounds of executive authority, arguing that litigating this matter would violate established boundaries in the separation of judicial and executive power. 53 First, the government asserted that the decision to target Anwar al-Aulaqi was a nonjusticiable political question, and that conducting judicial review of this decision would require an infringement on textually committed executive authority. 54 Second, the government invoked the state secrets privilege, a rarely used but mostly successfully employed doctrine claiming that certain issues cannot be litigated because litigating them would require the disclosure of classified intelligence. 55 According to the state secrets doctrine, classified information cannot be disclosed through discovery and public trial because it would threaten national security and disrupt the Executive's ability to discharge its constitutional obligations. 56 The district court granted the defendant's motion to dismiss in December 2010. 57 The court held that Nasser al-Aulaqi did not have [\*1361] standing to raise these constitutional claims on his son's behalf. 58 By ruling on standing grounds the court focused on a narrow legal doctrine and avoided confrontation with the larger, more controversial issues in the suit. 59 However, the court also expressed discomfort with the outcome and its potential implications on due process rights and executive power. 60

### Warfighting – 1AR – Link

#### B. Government always pays the damages

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

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

[footnote 61 starts:]

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

[footnote 61 ends]

#### C. Judicial review increases military force power – it provides legitimacy and theres no evidence it undermines operational capacity

Banner, Law Prof-Phoenix, 12 (Francine Banner, Dr. Banner joined the Phoenix School of Law in 2010 and currently teaches Criminal Law. She holds a Ph.D. in Justice Studies from Arizona State University and a J.D. with honors from the New York University School of Law, IMMORAL WAIVER: JUDICIAL REVIEW OF INTRA-MILITARY SEXUAL ASSAULT CLAIMS, Aug 6, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=10&cad=rja&ved=0CHIQFjAJ&url=http%3A%2F%2Fwww.niu.edu%2Fwstudies%2Fnews%2FInvisibleWarResources%2FFeres%2520Doctrine--Immoral%2520Waiver-Judicial%2520Review%2520of%2520Intra-Military%2520Sexual%2520Assault%2520Claims--Francine%2520Banner--6%2520Aug%252012.doc&ei=7VIqUuj4Cbi-4AOI24HwAw&usg=AFQjCNGar8vi5XYG-4LYj94BRPqVpunwuw&sig2=w\_thN70i1LTgU4tTJ1\_xqA)

Today’s typical troops are not career soldiers. Nor are they so-called “weekend warriors.” They are young, economically disadvantaged, and often poorly-educated volunteers who serve multiple, extended tours of duty in conflict situations. Our longstanding failure to protect these volunteers from military sexual assault is an issue that literally cuts to our nation’s heartland. In case after case to address the Feres doctrine, courts highlight the injustices resulting from the policy of judicial non-intervention in military affairs. However, the justifications for sidestepping this political question—threat to good order, alternative systems of recovery, combat readiness—do not in any way support blatant inaction in the face of injustice. Further, there is no evidence that lawsuits brought challenging the Feres doctrine or alleging constitutional violations have harmed military discipline. The government’s own admissions about the costs of sexual assault mandate a directly contrary conclusion. The judicial “activism” that forced Congress’ hand in repealing DADT provides evidence that positive outcomes can result when the court fulfills its role as constitutional decisionmaker. Even the harshest critics of the DADT repeal now observe that the repeal has been a success.