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### Plan

#### Plan:  The United States Federal Judiciary should conduct judicial ex post review of United States’ targeted killing operations that use drones, with liability falling on the government for any constitutional violation, on the grounds that the political question doctrine should not bar justiciability of cases against the military.

### Allies

#### Advantage 1 is Allied Cooperation –

#### U.S. drone policy is more important than the spying and data scandal to European partners – it threatens the trans-atlantic relationship

Dworkin 7/17/13 (Anthony, Senior Policy Fellow at the European Council on Foreign Relations, “Actually, drones worry Europe more than spying” <http://globalpublicsquare.blogs.cnn.com/2013/07/17/actually-drones-worry-europe-more-than-spying/>)

Relations between the United States and Europe hit a low point following revelations that Washington was spying on European Union buildings and harvesting foreign email messages. Behind the scenes, though, it is not data protection and surveillance that produces the most complications for the transatlantic intelligence relationship, but rather America's use of armed drones to kill terrorist suspects away from the battlefield. Incidents such as the recent killing of at least 17 people in Pakistan are therefore only likely to heighten European unease. In public, European governments have displayed a curiously passive approach to American drone strikes, even as their number has escalated under Barack Obama’s presidency. Many Europeans believe that the majority of these strikes are unlawful, but their governments have maintained an uneasy silence on the issue. This is partly because of the uncomfortable fact that information provided by European intelligence services may have been used to identify some targets. It is also because of a reluctance to accuse a close ally of having violated international law. And it is partly because European countries have not worked out exactly what they think about the use of drones and how far they agree within the European Union on the question. Now, however, Europe’s muted stance on drone strikes looks likely to change. Why? For one thing, many European countries are now trying to acquire armed drones themselves, and this gives them an incentive to spell out clearer rules for their use. More importantly, perhaps, Europeans have noticed that drones are proliferating rapidly, and that countries like China, Russia and Saudi Arabia are soon likely to possess them. There is a clear European interest in trying to establish some restrictive standards on drone use before it is too late. For all these reasons, many European countries are now conducting internal reviews of their policy on drones, and discussions are also likely to start at a pan-European level. But as Europeans begin to articulate their policy on the use of drones, a bigger question looms. Can Europe and the United States come together to agree on when drone strikes are permissible? Until now, that would have seemed impossible. Since the September 11 attacks, the United States has based its counterterrorism operations on the claim that it is engaged in a worldwide armed conflict with al Qaeda and associated forces — an idea that President Obama inherited from President George W. Bush and has been kept as the basis for an expanded drone strike campaign. European countries have generally rejected this claim. However, the changes to American policy that President Obama announced in May could open the way to at least the possibility of a dialogue. Obama suggested that he anticipated a time in the not-too-distant future when the armed conflict against al Qaeda might come to an end. More substantially, he made clear that his administration was in the process of switching its policy so that, outside zones of hostilities, it would only use drone strikes against individuals who posed a continuing and imminent threat to the U.S. That is a more restrictive standard than the claim that any member of al Qaeda or an associated force could lawfully be killed with a drone strike at any time. European countries might be more willing to accept an approach based on this kind of “self-defense” idea. However, there remain some big stumbling blocks. First, a good deal about Obama’s new standards is still unclear. How does he define a “zone of hostilities,” where the new rules will not apply? And what is his understanding of an “imminent” threat? European countries are likely to interpret these key terms in a much narrower way than the United States. Second, Obama’s new approach only applies as a policy choice. His more expansive legal claims remain in the background so that he is free to return to them if he wishes. But if the United States is serious about working toward international standards on drone strikes, as Obama and his officials have sometimes suggested, then Europe is the obvious place to start. And there are a number of steps the administration could take to make an agreement with European countries more likely. For a start, it should cut back the number of drone strikes and be much more open about the reasons for the attacks it conducts and the process for reviewing them after the fact. It should also elaborate its criteria for determining who poses an imminent threat in a way that keeps attacks within tight limits. And, as U.S. forces prepare to withdraw from Afghanistan in 2014, it should keep in mind the possibility of declaring the war against al Qaeda to be over. All this said, Europe also has some tough decisions to make, and it is unclear whether European countries are ready to take a hard look at their views about drone strikes, addressing any weaknesses or inconsistencies in their own position. If they are, the next few years could offer a breakthrough in developing international standards for the use of this new kind of weapon, before the regular use of drones spreads across the globe.

#### Accountability over standards of imminence are impossible from executive internal measures – no one trusts Obama on drones – only the plans court action solves

Goldsmith 13 (Jack Goldsmith teaches at Harvard Law School and is a member of the Hoover Institution Task Force on National Security and Law, “How Obama Undermined the War on Terror,” http://www.newrepublic.com/article/112964/obamas-secrecy-destroying-american-support-counterterrorism)

For official secrecy abroad to work, the secrets must be kept at home as well. In speeches, interviews, and leaks, Obama's team has tried to explain why its operations abroad are lawful and prudent. But to comply with rules of classified information and covert action, the explanations are conveyed in limited, abstract, and often awkward terms. They usually raise more questions than they answer—and secrecy rules often preclude the administration from responding to follow-up questions, criticisms, and charges. ¶ As a result, much of what the administration says about its secret war—about civilian casualties, or the validity of its legal analysis, or the quality of its internal deliberations—seems incomplete, self-serving, and ultimately non-credible. These trust-destroying tendencies are exacerbated by its persistent resistance to transparency demands from Congress, from the press, and from organizations such as the aclu that have sought to know more about the way of the knife through Freedom of Information Act requests.¶ A related sin is the Obama administration's surprising failure to secure formal congressional support. Nearly every element of Obama's secret war rests on laws—especially the congressional authorization of force (2001) and the covert action statute (1991)—designed for different tasks. The administration could have worked with Congress to update these laws, thereby forcing members of Congress to accept responsibility and take a stand, and putting the secret war on a firmer political and legal foundation. But doing so would have required extended political efforts, public argument, and the possibility that Congress might not give the president precisely what he wants.¶ The administration that embraced the way of the knife in order to lower the political costs of counterterrorism abroad found it easier to avoid political costs at home as well. But this choice deprived it of the many benefits of public argumentation and congressional support. What Donald Rumsfeld said self-critically of Bush-era unilateralism applies to Obama's unilateralism as well: it fails to "take fully into account the broader picture—the complete set of strategic considerations of a president fighting a protracted, unprecedented and unfamiliar war for which he would need sustained domestic and international support." ¶ Instead of seeking contemporary congressional support, the administration has relied mostly on government lawyers' secret interpretive extensions of the old laws to authorize new operations against new enemies in more and more countries. The administration has great self-confidence in the quality of its stealth legal judgments. But as the Bush administration learned, secret legal interpretations are invariably more persuasive within the dark circle of executive branch secrecy than when exposed to public sunlight. On issues ranging from proper targeting standards, to the legality of killing American citizens, to what counts as an "imminent" attack warranting self-defensive measures, these secret legal interpretations—so reminiscent of the Bushian sin of unilateral legalism—have been less convincing in public, further contributing to presidential mistrust.¶ Feeling the heat from these developments, President Obama promised in his recent State of the Union address "to engage with Congress to ensure not only that our targeting, detention, and prosecution of terrorists remains consistent with our laws and system of checks and balances, but that our efforts are even more transparent to the American people and to the world." So far, this promise, like similar previous ones, remains unfulfilled. ¶ The administration has floated the idea of "[shifting] the CIA's lethal targeting program to the Defense Department," as The Daily Beast reported last month. Among other potential virtues, this move might allow greater public transparency about the way of the knife to the extent that it would eliminate the covert action bar to public discussion. But JSOC's non-covert targeted killing program is no less secretive than the CIA's, and its congressional oversight is, if anything, less robust. ¶ A bigger problem with this proposed fix is that it contemplates executive branch reorganization followed, in a best-case scenario, by more executive branch speeches and testimony about what it is doing in its stealth war. The proposal fails to grapple altogether with the growing mistrust of the administration's oblique representations about secret war. The president cannot establish trust in the way of the knife through internal moves and more words. Rather, he must take advantage of the separation of powers. Military detention, military commissions, and warrantless surveillance became more legitimate and less controversial during the Bush era because adversarial branches of government assessed the president's policies before altering and then approving them. President Obama should ask Congress to do the same with the way of the knife, even if it means that secret war abroad is harder to conduct.

#### Unrestrained drone policy results in collapse of NATO

Parker 9/17/12 (Tom, former policy director for Terrorism, Counterterrorism and Human Rights at Amnesty International USA. He is also a former officer in the British Security Service (MI5), “U.S. Tactics Threaten NATO” <http://nationalinterest.org/commentary/us-tactics-threaten-nato-7461?page=1>)

A growing chasm in operational practice is opening up between the United States and its allies in NATO. This rift is putting the Atlantic alliance at risk. Yet no one in Washington seems to be paying attention. The escalating use of unmanned aerial vehicles to strike terrorist suspects in an increasing number of operational environments from the Arabian Peninsula to Southeast Asia, coupled with the continued use of military commissions and indefinite detention, is driving a wedge between the United States and its allies. Attitudes across the Atlantic are hardening fast. This isn’t knee-jerk, man-on-the-street anti-Americanism. European governments that have tried to turn a blind eye to U.S. counterterrorism practices over the past decade are now forced to pay attention by their own courts, which will restrict cooperation in the future. As recently as last month, the German federal prosecutor’s office opened a probe into the October 2010 killing of a German national identified only as “Buenyamin E.” in a U.S. drone strike in Pakistan. There are at least four other similar cases involving German nationals and several reported strikes involving legal residents of the United Kingdom. In March, Polish prosecutors charged the former head of Polish intelligence, Zbigniew Siemiatkowski, with “unlawfully depriving prisoners of the their liberty” because of the alleged role he played in helping to establish a CIA secret prison in northeastern Poland in 2002–2003. Last December, British Special Forces ran afoul of the UK courts for informally transferring two Al Qaeda suspects detained in Iraq, Yunus Rahmatullah and Amanatullah Ali, to U.S. forces. The British government has been instructed to recover the men from U.S. custody or face legal sanctions that could result in two senior ministers being sent to prison. Perhaps the most dramatic example illustrating the gap that has opened up between the United States and its European allies concerns the 2009 in absentia conviction of twenty-three U.S. agents in an Italian court for the role they played in the extraordinary rendition of radical Imam Hassan Mustafa Osama Nasr from Milan to Cairo. Britain, Poland, Italy and Germany are among America’s closest military partners. Troops from all four countries are currently serving alongside U.S. forces in Afghanistan, but they are now operating within a very different set of constraints than their U.S. counterparts. The European Court of Human Rights established its jurisdiction over stabilization operations in Iraq, and by implication its writ extends to Afghanistan as well. The British government has lost a series of cases before the court relating to its operations in southern Iraq. This means that concepts such as the right to life, protection from arbitrary punishment, remedy and due process apply in areas under the effective control of European forces. Furthermore, the possibility that intelligence provided by any of America’s European allies could be used to target a terrorism suspect in Somalia or the Philippines for a lethal drone strike now raises serious criminal liability issues for the Europeans. The United States conducts such operations under the legal theory that it is in an international armed conflict with Al Qaeda and its affiliates that can be pursued anywhere on the globe where armed force may be required. But not one other member of NATO shares this legal analysis, which flies in the face of established international legal norms. The United States may have taken issue with the traditional idea that wars are fought between states and not between states and criminal gangs, but its allies have not. The heads of Britain’s foreign and domestic intelligence services have been surprisingly open about the “inhibitions” that this growing divergence has caused the transatlantic special relationship, telling Parliament that it has become an obstacle to intelligence sharing. European attitudes are not going to change—the European Court of Human Rights is now deeply embedded in European life, and individual European governments cannot escape its oversight no matter how well disposed they are to assist the United States. The United States has bet heavily on the efficacy of a new array of counterterrorism powers as the answer to Al Qaeda. In doing so it has evolved a concept of operations that has much more in common with the approach to terrorist threats taken by Israel and Russia than by its European partners. There has been little consideration of the wider strategic cost of these tactics, even as the Obama administration doubles down and extends their use. Meanwhile, some of America’s oldest and closest allies are beginning to place more and more constraints on working with U.S. forces. NATO cannot conduct military operations under two competing legal regimes for long. Something has to give—and it may just be the Atlantic alliance.

#### NATO prevents global nuclear war

Zbigniew Brzezinski 9, former U.S. National Security Adviser, Sept/Oct 2009, “An Agenda for NATO,” Foreign Affairs, 88.5, EBSCO

NATO's potential is not primarily military. Although NATO is a collective-security alliance, its actual military power comes predominantly from the United States, and that reality is not likely to change anytime soon. NATO's real power derives from the fact that it combines the United States' military capabilities and economic power with Europe's collective political and economic weight (and occasionally some limited European military forces). Together, that combination makes NATO globally significant. It must therefore remain sensitive to the importance of safeguarding the geopolitical bond between the United States and Europe as it addresses new tasks. The basic challenge that NATO now confronts is that there are historically unprecedented risks to global security. Today's world is threatened neither by the militant fanaticism of a territorially rapacious nationalist state nor by the coercive aspiration of a globally pretentious ideology embraced by an expansive imperial power. The paradox of our time is that the world, increasingly connected and economically interdependent for the first time in its entire history, is experiencing intensifying popular unrest made all the more menacing by the growing accessibility of weapons of mass destruction -- not just to states but also, potentially, to extremist religious and political movements. Yet there is no effective global security mechanism for coping with the growing threat of violent political chaos stemming from humanity's recent political awakening. The three great political contests of the twentieth century (the two world wars and the Cold War) accelerated the political awakening of mankind, which was initially unleashed in Europe by the French Revolution. Within a century of that revolution, spontaneous populist political activism had spread from Europe to East Asia. On their return home after World Wars I and II, the South Asians and the North Africans who had been conscripted by the British and French imperial armies propagated a new awareness of anticolonial nationalist and religious political identity among hitherto passive and pliant populations. The spread of literacy during the twentieth century and the wide-ranging impact of radio, television, and the Internet accelerated and intensified this mass global political awakening. In its early stages, such new political awareness tends to be expressed as a fanatical embrace of the most extreme ethnic or fundamentalist religious passions, with beliefs and resentments universalized in Manichaean categories. Unfortunately, in significant parts of the developing world, bitter memories of European colonialism and of more recent U.S. intrusion have given such newly aroused passions a distinctively anti-Western cast. Today, the most acute example of this phenomenon is found in an area that stretches from Egypt to India. This area, inhabited by more than 500 million politically and religiously aroused peoples, is where NATO is becoming more deeply embroiled. Additionally complicating is the fact that the dramatic rise of China and India and the quick recovery of Japan within the last 50 years have signaled that the global center of political and economic gravity is shifting away from the North Atlantic toward Asia and the Pacific. And of the currently leading global powers -- the United States, the EU, China, Japan, Russia, and India -- at least two, or perhaps even three, are revisionist in their orientation. Whether they are "rising peacefully" (a self-confident China), truculently (an imperially nostalgic Russia) or boastfully (an assertive India, despite its internal multiethnic and religious vulnerabilities), they all desire a change in the global pecking order. The future conduct of and relationship among these three still relatively cautious revisionist powers will further intensify the strategic uncertainty. Visible on the horizon but not as powerful are the emerging regional rebels, with some of them defiantly reaching for nuclear weapons. North Korea has openly flouted the international community by producing (apparently successfully) its own nuclear weapons -- and also by profiting from their dissemination. At some point, its unpredictability could precipitate the first use of nuclear weapons in anger since 1945. Iran, in contrast, has proclaimed that its nuclear program is entirely for peaceful purposes but so far has been unwilling to consider consensual arrangements with the international community that would provide credible assurances regarding these intentions. In nuclear-armed Pakistan, an extremist anti-Western religious movement is threatening the country's political stability. These changes together reflect the waning of the post-World War II global hierarchy and the simultaneous dispersal of global power. Unfortunately, U.S. leadership in recent years unintentionally, but most unwisely, contributed to the currently threatening state of affairs. The combination of Washington's arrogant unilateralism in Iraq and its demagogic Islamophobic sloganeering weakened the unity of NATO and focused aroused Muslim resentments on the United States and the West more generally.

#### Courts don’t leak intel methods or classified information—this fear has been repeatedly dispelled by hundreds of successfully tried terrorism cases

Jaffer-director ACLU’s National Security Project-12/9/08 <http://www.salon.com/2008/12/09/guantanamo_3/> Don’t replace the old Guantánamo with a new one

The contention that the federal courts are incapable of protecting classified information — “intelligence sources and methods,” in the jargon of national security experts — is another canard. When classified information is at issue in federal criminal prosecutions, a federal statute — the Classified Information Procedures Act (CIPA) — generally permits the government to substitute classified information at trial with an unclassified summary of that information. It is true that CIPA empowers the court to impose sanctions on the government if the substitution of the unclassified summary for the classified information is found to prejudice the defendant, and in theory such sanctions can include the dismissal of the indictment. In practice, however, sanctions are exceedingly rare, and of the hundreds of terrorism cases that have been prosecuted over the last decade, none has been dismissed for reasons relating to classified information. Proponents of new detention authority, including Waxman and Wittes, invoke the threat of exposing “intelligence sources and methods” as a danger inherent to terrorism prosecutions in U.S. courts, but the record of successful prosecutions provides the most effective rebuttal.

#### No over-deterrence of military operations- government liability is rooted in the FTCA and it avoids the chilling associated with individual liability.

Kent, Constitutional Law prof, 13 (Andrew, Faculty Advisor-Center on National Security at

Fordham Law School, prof @ Fordham University School of Law- constitutional law, foreign relations law, national security law, federal courts and procedure, “ARE DAMAGES DIFFERENT?: BIVENS AND NATIONAL SECURITY,” October 8, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2330476>) \*\* Evidence is gender paraphrased

Because of sovereign immunity, federal officials are sued under Bivens in their so-called personal rather than official capacities.43 In theory, persons injured by actions of a federal official could also seek compensation by suing the agent’s employer, the United States Government for damages, but the sovereign immunity of the federal government blocks this route.44 The Federal Tort Claims Act (FTCA), originally enacted in 1946 and frequently amended since,45 effects a partial waiver of sovereign immunity by allowing suits directly against the federal government instead of officers (who might be judgment proof) and making the United States liable for injuries caused by the negligent or wrongful act or omission of any federal employee acting within the scope of ~~his~~ employment, in accordance with the law of the state where the act or omission occurred.46 Under the Westfall Act of 1988, the FTCA is the exclusive remedy for torts committed by federal officials within the scope of their employment, except for suits brought for violations of the Constitution.47 In other words, state law tort claims against individual official defendants are now generally barred. The Supreme Court takes the prospect of individual liability in damages for officials very seriously and has crafted immunity doctrines to soften the blow. The Court’s rulings provide the President of the United States and certain classes of officials defined functionally—prosecutors doing prosecutorial work, legislators legislating, judges doing judicial work and certain persons performing “quasijudicial” functions—with absolute immunity from money damages suits, generally for the reason that such suits would be likely to be frequent, frequently meritless, and uniquely capable of disrupting job performance.48 All other government officials are entitled to only “qualified immunity” from money damages suits. Under the qualified immunity doctrine, officials are liable only when they violate “clearly established” federal rights, that is, when “[t]he contours of [a] right [are] sufficiently clear that every reasonable official would have understood that what ~~he is~~ [they are] doing violates that right.”49 Because qualified immunity is not just a defense to liability but also “a limited entitlement not to stand trial or face the other burdens of litigation,”50 the Court’s doctrine encourages speedy resolution of immunity questions by judges. The policy reasons for the Court’s active protection of federal officials through a robust immunity doctrine, including fear of dampening the zeal with which officials perform their jobs because of fear of personal liability, are discussed below in Section V.A.

### Imminence

#### Advantage 2- Imminence:

#### Executive control over the definition of “imminence” makes its scope totally unlimited- makes drone overuse and abuse inevitable.

Greenwald 13 (Glenn, J.D. from NYU, award-winning journalist, February 5th, 2013, "Chilling legal memo from Obama DOJ justifies assassination of US citizens," www.theguardian.com/commentisfree/2013/feb/05/obama-kill-list-doj-memo)

4. Expanding the concept of "imminence" beyond recognition The memo claims that the president's assassination power applies to a senior al-Qaida member who "poses an imminent threat of violent attack against the United States". That is designed to convince citizens to accept this power by leading them to believe it's similar to common and familiar domestic uses of lethal force on US soil: if, for instance, an armed criminal is in the process of robbing a bank or is about to shoot hostages, then the "imminence" of the threat he poses justifies the use of lethal force against him by the police. But this rhetorical tactic is totally misleading. The memo is authorizing assassinations against citizens in circumstances far beyond this understanding of "imminence". Indeed, the memo expressly states that it is inventing "a broader concept of imminence" than is typically used in domestic law. Specifically, the president's assassination power "does not require that the US have clear evidence that a specific attack . . . will take place in the immediate future". The US routinely assassinates its targets not when they are engaged in or plotting attacks but when they are at home, with family members, riding in a car, at work, at funerals, rescuing other drone victims, etc. Many of the early objections to this new memo have focused on this warped and incredibly broad definition of "imminence". The ACLU's Jameel Jaffer told Isikoff that the memo "redefines the word imminence in a way that deprives the word of its ordinary meaning". Law Professor Kevin Jon Heller called Jaffer's objection "an understatement", noting that the memo's understanding of "imminence" is "wildly overbroad" under international law. Crucially, Heller points out what I noted above: once you accept the memo's reasoning - that the US is engaged in a global war, that the world is a battlefield, and the president has the power to assassinate any member of al-Qaida or associated forces - then there is no way coherent way to limit this power to places where capture is infeasible or to persons posing an "imminent" threat. The legal framework adopted by the memo means the president can kill anyone he claims is a member of al-Qaida regardless of where they are found or what they are doing. The only reason to add these limitations of "imminence" and "feasibility of capture" is, as Heller said, purely political: to make the theories more politically palatable. But the definitions for these terms are so vague and broad that they provide no real limits on the president's assassination power. As the ACLU's Jaffer says: "This is a chilling document" because "it argues that the government has the right to carry out the extrajudicial killing of an American citizen" and the purported limits "are elastic and vaguely defined, and it's easy to see how they could be manipulated."

#### This broad definition of imminence has increased the frequency of attacks and the scope of who can be targeted, which decreases the program’s effectiveness because it reduces the ratio of high-value decapitations to accidental kills

Hudson 11 (Leila Hudson is associate professor of anthropology and history in the School of Middle Eastern & North African Studies at the University of Arizona and director of the Southwest Initiative for the Study of Middle East Conflicts, “Drone Warfare: Blowback From the New American Way of War,” Middle East Policy, <http://www.mepc.org/journal/middle-east-policy-archives/drone-warfare-blowback-new-american-way-war>)

The Bush administration's increased reliance on the program started in 2008; however, it is with the Obama administration that we see the most rapid proliferation of attacks. The final phase of the drone program is characterized by an even greater increase in attack frequency and an expansion of the target list to include targets of opportunity and unidentified militants of dubious rank — and funerals.12 As of May 2011, the CIA under the Obama administration has conducted nearly 200 drone strikes. This suggests that the drone target list now includes targets of opportunity, likely including some selected in consultation with the Pakistani authorities in order to facilitate the increasingly unpopular program. This development, in turn, has now decreased the effectiveness of the program when assessed in terms of the ratio of high-value to accidental kills. As Figure 2 shows, the steady increase in drone attacks conducted in Pakistan between 2004 and 2010 has resulted in a far higher number of deaths overall, but a lower rate of successful killings of high-value militant leaders who command, control and inspire organizations. If we define a high-value target as an organizational leader known to intelligence sources and the international media prior to attack and not someone whose death is justified with a posthumous militant status, we see fewer and fewer such hits — the alleged killing of al-Qaeda commander Ilyas al-Kashmiri in 2009 and again in June 2011 notwithstanding.13 Data analysis shows that at the beginning of the drone program (2002-04), five or six people were killed for each defined high-value target. As part of that high-value target's immediate entourage, they were much more likely to be militants than civilians. By 2010, one high-value target was killed per 147 total deaths. The increased lethality of each attack is due to larger payloads, broader target sets such as funeral processions, and probable new targeting guidelines (including targets of opportunity).14 Over time, these more deadly drone attacks have failed to effectively decapitate the leadership of anti-U.S. organizations but have killed hundreds of other people subsequently alleged to be militants; many were civilians.15 The rapidly growing population of survivors and witnesses of these brutal attacks have emotional and social needs and incentives to join the ranks of groups that access and attack U.S. targets in Afghanistan across the porous border. Drone attacks themselves deliver a politically satisfying short-term "bang for the buck" for U.S. constituencies ignorant of and indifferent to those affected by drone warfare or the phenomenon of blowback. In the Pakistani and Afghan contexts, they inflame the populations and destabilize the institutions that drive regional development. In addition to taking on an unacceptable and extrajudicial toll in human life, the drone strikes in unintended ways complicate the U.S. strategic mission in Afghanistan, as well as the fragile relationship with Pakistan. As a result, the U.S. military's counterinsurgency project in Afghanistan becomes a victim of the first two forms of blowback.

#### Overuse of drones in Pakistan empowers militants and destabilizes the government

Michael J Boyle 13, Assistant Professor of Political Science at La Salle University, former Lecturer in International Relations and Research Fellow at the Centre for the Study of Terrorism and Political Violence at the University of St Andrews, PhD from Cambridge University, January 2013, “The costs and consequences of drone warfare,” International Affairs 89: 1 (2013) 1–29, <http://www.chathamhouse.org/sites/default/files/public/International%20Affairs/2013/89_1/89_1Boyle.pdf>

The escalation of drone strikes in Pakistan to its current tempo—one every few days—directly contradicts the long-term American strategic goal of boosting the capacity and legitimacy of the government in Islamabad. Drone attacks are more than just temporary incidents that erase all traces of an enemy. They have lasting political effects that can weaken existing governments, undermine their legitimacy and add to the ranks of their enemies. These political effects come about because drones provide a powerful signal to the population of a targeted state that the perpetrator considers the sovereignty of their government to be negligible. The popular perception that a government is powerless to stop drone attacks on its territory can be crippling to the incumbent regime, and can embolden its domestic rivals to challenge it through violence. Such continual violations of the territorial integrity of a state also have direct consequences for the legitimacy of its government. Following a meeting with General David Petraeus, Pakistani President Asif Ali Zardari described the political costs of drones succinctly, saying that ‘continuing drone attacks on our country, which result in loss of precious lives or property, are counterproductive and difficult to explain by a democratically elected government. It is creating a credibility gap.’75 Similarly, the Pakistani High Commissioner to London Wajid Shamsul Hasan said in August 2012 that¶ what has been the whole outcome of these drone attacks is that you have directly or indirectly contributed to destabilizing or undermining the democratic government. Because people really make fun of the democratic government—when you pass a resolution against drone attacks in the parliament and nothing happens. The Americans don’t listen to you, and they continue to violate your territory.76¶ The appearance of powerlessness in the face of drones is corrosive to the appearance of competence and legitimacy of the Pakistani government. The growing perception that the Pakistani civilian government is unable to stop drone attacks is particularly dangerous in a context where 87 per cent of all Pakistanis are dissatisfied with the direction of the country and where the military, which has launched coups before, remains a popular force.77

#### Pakistan collapse risks war with India and loose nukes

Twining 13 (Daniel Twining is Senior Fellow for Asia at the German Marshall Fund, Pakistan and the Nuclear Nightmare, Sept 4, http://shadow.foreignpolicy.com/posts/2013/09/04/pakistan\_and\_the\_nuclear\_nightmare)

The Washington Post has revealed the intense concern of the U.S. intelligence community about Pakistan's nuclear weapons program. In addition to gaps in U.S. information about nuclear weapons storage and safeguards, American analysts are worried about the risk of terrorist attacks against nuclear facilities in Pakistan as well as the risk that individual Pakistani nuclear weapons handlers could go rogue in ways that endanger unified national control over these weapons of mass destruction. These concerns raise a wider question for a U.S. national security establishment whose worst nightmares include the collapse of the Pakistani state -- with all its implications for empowerment of terrorists, a regional explosion of violent extremism, war with India, and loss of control over the country's nuclear weapons. That larger question is: Does Pakistan's nuclear arsenal promote the country's unity or its disaggregation? This is a complicated puzzle, in part because nuclear war in South Asia may be more likely as long as nuclear weapons help hold Pakistan together and embolden its military leaders to pursue foreign adventures under the nuclear umbrella. So if we argue that nuclear weapons help maintain Pakistan's integrity as a state -- by empowering and cohering the Pakistani Army -- they may at the same time undermine regional stability and security by making regional war more likely. As South Asia scholar Christine Fair of Georgetown University has argued, the Pakistani military's sponsorship of "jihad under the nuclear umbrella" has gravely undermined the security of Pakistan's neighborhood -- making possible war with India over Kargil in 1999, the terrorist attack on the Indian Parliament in 2001, the terrorist attack on Mumbai in 2008, and Pakistan's ongoing support for the Afghan Taliban, the Haqqani network, Lashkar-e-Taiba, and other violent extremists. Moreover, Pakistan's proliferation of nuclear technologies has seeded extra-regional instability by boosting "rogue state" nuclear weapons programs as far afield as North Korea, Libya, Iran, and Syria. Worryingly, rather than pursuing a policy of minimal deterrence along Indian lines, Pakistan's military leaders are banking on the future benefits of nuclear weapons by overseeing the proportionately biggest nuclear buildup of any power, developing tactical (battlefield) nuclear weapons, and dispersing the nuclear arsenal to ensure its survivability in the event of attack by either the United States or India. (Note that most Pakistanis identify the United States, not India, as their country's primary adversary, despite an alliance dating to 1954 and nearly $30 billion in American assistance since 2001.) The nuclear arsenal sustains Pakistan's unbalanced internal power structure, underwriting Army dominance over elected politicians and neutering civilian control of national security policy; civilian leaders have no practical authority over Pakistan's nuclear weapons program. Whether one believes the arsenal's governance implications generate stability or instability within Pakistan depends on whether one believes that Army domination of the country is a stabilizing or destabilizing factor. A similarly split opinion derives from whether one deems the Pakistan Army the country's most competent institution and therefore the best steward of weapons whose fall into the wrong hands could lead to global crisis -- or whether one views the Army's history of reckless risk-taking, from sponsoring terrorist attacks against the United States and India to launching multiple wars against India that it had no hope of winning, as a flashing "DANGER" sign suggesting that nuclear weapons are far more likely to be used "rationally" by the armed forces in pursuit of Pakistan's traditional policies of keeping its neighbors off balance. There is no question that the seizure of power by a radicalized group of generals with a revolutionary anti-Indian, anti-American, and social-transformation agenda within Pakistan becomes a far more dangerous scenario in the context of nuclear weapons. Similarly, the geographical dispersal of the country's nuclear arsenal and the relatively low level of authority a battlefield commander would require to employ tactical nuclear weapons raise the risk of their use outside the chain of command. This also raises the risk that the Pakistani Taliban, even if it cannot seize the commanding heights of state institutions, could seize either by force or through infiltration a nuclear warhead at an individual installation and use it to hold the country -- and the world -- to ransom. American intelligence analysts covering Pakistan will continue to lose sleep for a long time to come.

#### Miscalculation means this could escalate to nuclear winter and extinction

Hundley 12 (TOM HUNDLEY, Senior Editor-Pulitzer Center, “Pakistan and India: Race to the End,” http://pulitzercenter.org/reporting/pakistan-nuclear-weapons-battlefield-india-arms-race-energy-cold-war)

Nevertheless, military analysts from both countries still say that a nuclear exchange triggered by miscalculation, miscommunication, or panic is far more likely than terrorists stealing a weapon -- and, significantly, that the odds of such an exchange increase with the deployment of battlefield nukes. As these ready-to-use weapons are maneuvered closer to enemy lines, the chain of command and control would be stretched and more authority necessarily delegated to field officers. And, if they have weapons designed to repel a conventional attack, there is obviously a reasonable chance they will use them for that purpose. "It lowers the threshold," said Hoodbhoy. "The idea that tactical nukes could be used against Indian tanks on Pakistan's territory creates the kind of atmosphere that greatly shortens the distance to apocalypse." Both sides speak of the possibility of a limited nuclear war. But even those who speak in these terms seem to understand that this is fantasy -- that once started, a nuclear exchange would be almost impossible to limit or contain. "The only move that you have control over is your first move; you have no control over the nth move in a nuclear exchange," said Carnegie's Tellis. The first launch would create hysteria; communication lines would break down, and events would rapidly cascade out of control. Some of the world's most densely populated cities could find themselves under nuclear attack, and an estimated 20 million people could die almost immediately. What's more, the resulting firestorms would put 5 million to 7 million metric tons of smoke into the upper atmosphere, according to a new model developed by climate scientists at Rutgers University and the University of Colorado. Within weeks, skies around the world would be permanently overcast, and the condition vividly described by Carl Sagan as "nuclear winter" would be upon us. The darkness would likely last about a decade. The Earth's temperature would drop, agriculture around the globe would collapse, and a billion or more humans who already live on the margins of subsistence could starve. This is the real nuclear threat that is festering in South Asia. It is a threat to all countries, including the United States, not just India and Pakistan. Both sides acknowledge it, but neither seems able to slow their dangerous race to annihilation.

### Political Question Doctrine

#### Invocation of the political question doctrine in national security contexts unravels attempts to apply civilian justice to the military—line drawing fails, only a clear signal solves

Vladeck 12 (Stephen, Professor of Law and Associate Dean for Scholarship, American University,

Washington College of Law, “THE NEW NATIONAL SECURITY CANON,” June 14, http://www.aulawreview.org/pdfs/61/61-5/Vladeck.website.pdf)

But if what in fact has taken place over the last decade is a testament to a longer-term pattern, one that neither the political branches nor the Supreme Court disrupt in the near future, then we must confront a more alarming possibility: that as these “national security”-based exceptions increasingly become the rule in contemporary civil litigation against government officers—whether with regard to new “special factors” under Bivens, new bases for contractor preemption under Boyle, proliferation of the political question doctrine, or even more expansive reliance upon the qualified immunity defense—the line between the unique national security justifications giving rise to these cases and ordinary civil litigation will increasingly blur. Thus, wherever one comes down on the virtues and vices of this new national security canon, perhaps the most important point to take away is the need to carefully cabin its scope. Otherwise, exceptions articulated in the guise of such unique fact patternss could serve more generally to prevent civil liability for government misconduct and to thereby dilute the effectiveness of judicial review as a deterrent for any and all unlawful government action—not just those actions undertaken in ostensibly in defense of the nation.

#### And, the plan’s repudiation of the PQD will not be limited to targeted killing—judges will be able to apply that rationale in future cases

Tokaji 12 (Daniel, Professor in Law at The Ohio State University Michael E. Moritz College of Law, with Owen Wolfe†, BAKER, BUSH, AND BALLOT BOARDS: THE FEDERALIZATION OF ELECTION ADMINISTRATION, <http://law.case.edu/journals/lawreview/documents/62CaseWResLRev4.3.Tokaji.pdf>)

Bush can be understood as the new Baker, in the sense that it opened the federal courts to election administration litigation, just as its predecessor opened the federal courts to districting litigation. So as to avoid any misunderstanding, let us first state two qualifications to this claim. First, we are not talking about citation counts. Baker has been cited many times by the Supreme Court and the lower courts in subsequent years.49 By contrast, the Supreme Court has been exceedingly reluctant to cite Bush v. Gore, and there are not a huge number of lower court cases that have cited the case either.50 Second, we are not talking about the intent of the Supreme Court, which was quite different in these two sets of cases. The Baker Court was quite conscious of the fact that it was opening the door, if not the floodgates, to litigation over legislative districts.51 The Bush Court, by contrast, seemed intent on shutting the door behind it, by limiting the principle upon which it sought to rely. This is most clearly evident in the Court’s statement that: Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities. The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections.52 Some commentators have criticized these sentences for being unprincipled, in the sense of declaring a rule of law good for one day only.53 We disagree. What the Court did instead was to (1) assert an equal protection principle established by cases like Baker and Reynolds, variously characterized as “equal weight” to each vote and “equal dignity” to each voter and as valuing one person’s vote over another by "arbitrary and disparate treatment";54 (2) apply this principle to a new context, namely the recounting of punch card ballots in the State of Florida;55 and (3) conclude that this process contravened this basic equal protection principle, without clearly specifying its precise boundaries.56 In other words, the Court applied an established principle to a new area of law without specifying the precise legal test or how it will apply to future cases.57 The wording may be different, but the mode of analysis is not that unusual. In this respect. Bush bears comparison to what the Court did when it decided Baker and later Reynolds. The Court was certainly aware that it was entering the political thicket in Baker.58 It may have had a general rule of law in mind, but it did not specify its precise boundaries. And while Reynolds (like Bush) relies on a vaguely stated principle of law, variously defined as "one person, one vote"59 and an "equally effective voice in the election of members of [the] state legislature,"60 it too does not define the exact boundaries of this principle. The Court in Reynolds was aware that it was entering a new area without precisely specifying the bounds of the new equal protection rule it articulated. This is evident in Chief Justice Earl Warren's notes on the case. These notes, in the Chiefs handwriting, include thirty- four numbered, single sentence points on seven sheets of paper.61 The first reads: "There can be no formula for determining whether equal protection has been afforded."62 Another note, number twenty, reads: "Cannot set out all possibilities in any given case."63 In other words, the Court that decided Baker and Reynolds—like the Court that decided Bush—rested on a somewhat imprecisely stated principle, allowing for refinement in future cases presenting different facts. This also shows up in Chief Justice Warren’s opinion for the Reynolds majority, which declines to say exactly how close to numerical equality districts much be: For the present, we deem it expedient not to attempt to spell out any precise constitutional tests. . . . Developing a body of doctrine on a case-by-case basis appears to us to provide the most satisfactory means of arriving at detailed constitutional requirements in the area of state legislative apportionment.64 And later: We do not consider here the difficult question of the proper remedial devices which federal courts should utilize in state legislative apportionment cases. Remedial techniques in this new and developing area of the law will probably often differ with the circumstances of the challenged apportionment and a variety of local conditions.65 The similarity to Bush’s language is striking—and given that Reynolds is one of just four equal protection cases cited in Bush, 66 one wonders whether it was conscious. The Court stated a broad principle, declined to state precisely the test it was applying, and bracketed other cases presenting different circumstances, reserving them for another day. Of course, the Reynolds Court did provide some clarity in the one person, one vote cases that followed. So far, the current Court has failed to provide comparable clarity for election administration cases since Bush. And, in fact, in the most prominent election administration case to have arisen since then, Crawford v. Marion County Election Board, 67 the Court did not cite Bush at all. Again, we are not arguing that there is an exact parallel between Baker and Bush. Our claim is more modest: that there is an important similarity between the two cases in that both set the stage for an increased federal role in their respective realms, redistricting and election administration. While the Supreme Court has avoided Bush v. Gore like the plague—as others have noted, it has become the Voldemort of Supreme Court cases, “the case that must not be named”68—that does not mean the case has been without an impact. Indeed, the Supreme Court’s clear distrust of state institutions in Bush69 (which is also implicit in Baker) has apparently trickled down to the rest of the federal courts, who are now taking a more active role in state election disputes. As Professor Samuel Issacharoff has put it, Bush v. Gore declared that “federal courts were open for business when it came to adjudicating election administration claims.”70 Lower courts “relaxed rules regarding standing, ripeness, and . . . justiciability”71 in order to hear more election disputes. They allowed these cases to go to the front of the queue, often deciding them on an expedited basis in the weeks preceding an election. In some areas, like voting technology, election litigation led to changes in how elections are run, even in the absence of a binding decision on the merits.72

#### Scenario 1- Civil Military Relations

#### Military justice is at a crisis point due to the decline in civilian influence—continued deference undermines confidence in the military

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

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

#### Judicial review and ending deference is key to CMR- executive and congressional action is not sufficient to check the military

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

In February 1958, Army Master Sergeant James B. Stanley, who was stationed at Fort Knox, Kentucky, volunteered to participate in a program to test the effectiveness of protective clothing and equipment against chemical warfare. Unknown to Stanley, he was secretly administered four doses of LSD as part of an Army plan to study the effects of the drug on human subjects. Stanley then allegedly began suffering from hallucinations and periods of memory loss and incoherence, which impaired his ability to perform military service and which led to his discharge from the Army and later a divorce from his wife. He discovered what he had undergone when the Army sent him a letter soliciting his cooperation in a study of the long-term effects of LSD on "'volunteers who participated' in the 1958 tests." After exhausting his administrative remedies, Stanley filed suit against the government in federal district court. 81 Stanley argued that in this case, his superiors might not have been superior military officers, as in Chappell, but rather civilians, and further that his injuries were not incident to military service, as in Feres, because his injuries resulted from secret experimentation. The federal district and appellate courts held that Stanley was not preempted by United States v. Chappell in asserting a claim under Bivens by limiting Chappell to bar actions against superior officers for wrongs that involve direct orders in the performance of military duties. In other words, the lower courts limited the reach of Chappell to only matters involving the performance of military duties and the discipline and order necessary to carry out such orders, which did not include surreptitious testing of dangerous drugs on military members. 82 The Supreme Court summarily disregarded the lower courts' attempt to differentiate the instant case from precedent because Stanley was on active duty and was participating in a "bona fide" Army program, therefore, his injuries were incident to service. With regard to the attempt to differentiate his case from Chappell, the Supreme Court conceded that some of the language in Chappell focusing on the officer-subordinate relationship would not apply to Stanley's case, but nevertheless ruled that the basis for Feres also applied and controlled in Bivens actions. Accordingly, the test was not [\*219] so much that an officer-subordinate relationship was involved, but rather an "incident to service" test. 83 The Court thus transplanted the Feres doctrine to govern and limit Bivens actions by military members. In overturning the lower courts' ruling, the Supreme Court again discussed the special factors that mandate hesitation of judicial interference. They also discussed the explicit constitutional assignment of responsibility to Congress of maintaining the armed forces in ruling that even this most egregious misconduct and complete lack of concern of human rights is not a basis upon which the pl–aintiff can seek damages in a court of law. Based upon this case and previous cases, military members are totally extricated from the general population and are subject to a lower standard that is not even contemplated for the remaining citizenry in matters of constitutional import. The Court expressly declined to adopt a test that would determine whether a case is cognizable based upon military discipline and decision making. Believing that such a test would be an intrusion of judicial inquiry into military matters, thereby causing problems by making military officers liable for explaining in court proceedings the details of their military commands and disrupting "the military regime," the Court adopted a virtual blanket of protection for military commanders. Because Congress had not invited judicial review by passing a statute authorizing such a suit by a military member, the Court was not going to intrude into military affairs left to the discretion of Congress. 84 In essence, the Court has constructed a military exception to the Constitution. Had the Court actually reviewed the facts presented by the cases discussed above, applied the tests that are normally applied to the type of cases presented, and then ruled in favor the military, they possibly still could have been criticized, but at least respected for actually conducting a meaningful judicial review of the presented cases. Completely changing constitutional principles in order to provide great deference with little to no inquiry is an abdication of the Court's responsibility and surrenders the rights of military members to the complete subjugation by Congress and the President. The question now presented is whether such an exception is appropriate in terms of civil-military relations. [\*220] The Efficacy of a Military Exception To The Constitution In Civil-Military Relations Does the lack of judicial protection strengthen or erode democratic civilian control at a time when some commentators express concern over the state of civil-military relations? The current hands-off approach by the judiciary in cases concerning or impacting military affairs presents a paradoxical dilemma for civil-military relations. Did the framers of the Constitution intend to establish civilian control over the military by giving plenary authority to two branches of the government to the exclusion of the third branch? 85 Can the military develop its own professionalism, which is essential to an objective civilian control, if the military is totally removed from society's system of judicial protection? Are the Foxes Going To Take Care Of The Hens When The Farmer Is Not Watching? On one hand, the eschewal of becoming involved in military affairs through judicial review of lawsuits concerning the military more completely subordinates the military to the constitutional authority of Congress and the President and, in essence, creates a "split Constitution." 86 The Congress and President thus can control the military virtually without concern about judicial interference, which will occur only under the most egregious circumstances, and can be assured that the military will not attempt to overturn their decisions and orders through judicial review 87 After all, should not the judiciary trust the Congress, a co-equal branch of government sworn, as is the judiciary, to uphold the Constitution? 88 On the other hand, the Constitution establishes certain basic rights for all Americans, regardless of position within society. In fact, the Constitution and laws that support the Constitution serve as the ultimate protector for the weakest of society who have no other means by which to thwart infringement of their rights. By the U.S. Supreme Court stating that the military is a separate society with specialized and complex concerns, and that the Constitution grants plenary authority over the military to the legislative and executive branches, military members are excluded from the protection of a society that depends upon their service. Moreover, they [\*221] are left to the mercy of a power that can act with impunity, notwithstanding Supreme Court prescription that the Congress and the President fulfill their awesome positions of trust in upholding the Constitution and subordinate laws to the greatest extent possible while acting to protect our national security through military affairs. By excluding military members from the same protections that their civilian counterparts enjoy, military members are subject to a much more severe form of government that does not contain the checks and balances that restrict government infringement upon rights. Would it indeed be so bad if the judiciary reviewed and decided lawsuits brought by military members on their merits? Would such oversight be an unreasonable intrusion wreaking havoc in the minds of military leaders? Have any such problems evolved in the federal government in the civilian sector where employees may file suits against the government in court? Empowering Objective Control By Removing Judicial Oversight The increase of the power exercised by the legislative and executive branches of our federal government by the decrease in the power of review by the judicial branch supports Professor Huntington's model of objective civilian control. 89 Rather than making the military a mirror of the state, such as in subjective control, the removal of judicial oversight provides the military with the autonomy to control their profession. At the same time, the total dependence of the military upon their civilian and military leaders as judge and jury creates an independent military sphere. Nevertheless, Huntington completely ignores the role of the judiciary in civil-military relations. Even when he addresses the separation of powers, which traditionally includes the relationship of the judiciary to the other branches, he only examines the role of the executive branch vis-a-vis the legislative branch. 90 The weakening of the influence of the judiciary over matters concerning the military produces an equivalent concomitant strengthening of the two primary branches of government charged with establishing, maintaining, and running the armed forces. More than merely strengthening the control by Congress and the President over the military, 91 the judiciary, in its current position, protects ~~her [\*222] sister~~ branches of government from outside interference of those who want to change or affect the military, such as those who seek judicial overturn of the DoD homosexual conduct policy, and from inside interference of those who seek to challenge the authority of their superiors. 92 In this vein, the judicial self-restraint in becoming an ombudsman for aggrieved military members who seek either damages, redress, or reversal of orders can be argued to produce a correlating increase in the strictness of good order and discipline of the armed forces. 93 Dissension is reduced to the point of a member either accepting the supremacy of those superior or separating from the military service for which they volunteered. The unquestioning loyalty produced squelches dissension within the military ranks and portrays the military as a single unit of uniformity committed to serving without question the national civilian leadership, thereby preserving the delicate balance between freedom and order. 94 In a speech on the Bill of Rights and the military at the New York University Law School in 1962, then-Chief Justice of the Supreme Court, Earl Warren, discussed how our country was created in the midst of deep and serious distrust of standing military forces. He then described the debate on how best to preserve civilian control of the military in the Constitution so that the military could never reverse its subordination to civilian authority. Finally, he declared that the military has embraced this concept as part of our rich tradition that "must be regarded as an essential constituent of the fabric of our political life." 95 Former Chief Justice Warren was correct that the military culture in the United States is completely imbued with the idea of civilian control. Recent events strongly evidence this core understanding of military members. When the Chief of Staff of the Air Force, General Fogelman, resigned from his position and retired because of a disagreement with the civilian Secretary of the Air Force over appropriate action to take in a particular case, he did so because he could do nothing else in protest. There is no doubt that Congress maintains and regulates the armed forces and that the President is Commander-in-Chief. Unfortunately, civilian control of the military has been confused with the non-interference with Presidential and Congressional control of the military, yet the Supreme Court is no less "civilian" than these other branches. Ironically, because of the [\*223] extensive delegation of authority from Congress and the President to the military hierarchy, the military itself has become all powerful in relation to its members. Unless the judiciary branch becomes involved, there is no civilian oversight of the military in the way it treats its members. This important civilian check on the military has been forfeited by the Court. With these realizations, the judiciary is wrong in avoiding inquiry into cases brought by military members. The military is not a complex, separate and distinct society. If it were, the danger of losing control would be greater. By characterizing it as such and giving the military leadership complete reign over subordinates in all matters, the judiciary ignores their responsibility to provide a check to military commanders and balance the rights of those subject to orders, which if not followed may lead to criminal charges. 96 A professional military, as envisioned by our nation's leaders and written about by Professor Huntington, can operate efficiently in a system that allows judicial review of actions brought by military members. Their professionalism will deter wrongs and will accept responsibility when wrongs are committed. Removing the military from the society that they serve by denying them judicial protection alienates the military and frustrates those who have no protection from wrongs other than the independent judiciary. The proper role of the judiciary in civil-military relations is to ensure that neither the legislative branch, the executive branch, nor the military violate their responsibility to care for and treat fairly the sons and daughters of our nation who volunteer for military service. When federal prisoners can file lawsuits for often frivolous reasons, but military members cannot enter a courtroom after being subjected to secret experimentation with dangerous, illegal drugs, something is wrong. When military members cannot seek redress even for discrimination or injury caused by gross negligence, civil-military relations suffer because the judiciary is not ensuring that the balance of power is not being abused.

CMR erosion collapses hegemony

Barnes, Retired Colonel, 11 (Rudy Barnes, Jr., BA in PoliSci from the Citadel, Military Awards: Legion of Merit, Meritorious Service Medal, Army Commendation Medal, Army Achievement Medal with Oak Leaf Cluster, Army Reserve Component Achievement Medal, National Defense Service Medal, “An Isolated Military as a Threat to Military Legitimacy,” http://militarylegitimacyreview.com/?page\_id=159)

The legitimacy of the US military depends upon civil-military relations. In Iraq and Afghanistan conflicting religions and cultures have presented daunting challenges for the US military since mission success in counterinsurgency (COIN) operations depends upon public support in those hostile cultural environments; and even in the US, civil-military relations are fragile since the military is an authoritarian regime within a democratic society. This cultural dichotomy within our society creates the continuing potential for conflict between authoritarian military values and more libertarian civilian values that can undermine military legitimacy, especially when there are fewer bridges between the military and the civilian population it serves. The US military is a shield that protects our national security, but it can also be a sword that threatens our national security. After all, the US military controls the world’s most destructive weaponry. Our Founding Fathers understood this danger and provided for a separation of powers to prevent a concentration of power in the military. Still, if the US military were ever to become isolated from the civilian population it serves, then civil-military relations would deteriorate and US security would be at risk. Richard Cohen has opined that we are slowly but inexorably moving toward an isolated military: The military of today is removed from society in general. It is a majority white and, according to a Heritage Foundation study, disproportionately Southern. New England is underrepresented, and so are big cities, but the poor are no longer cannon fodder – if they ever were – and neither are blacks. We all fight and die just about in proportion to our numbers in the population. The all-volunteer military has enabled America to fight two wars while many of its citizens do not know of a single fatality or even of anyone who has fought overseas. This is a military conscripted by culture and class – induced, not coerced, indoctrinated in all the proper cliches about serving one’s country, honored and romanticized by those of us who would not, for a moment, think of doing the same. You get the picture. Talking about the picture, what exactly is wrong with it? A couple of things. First, this distant Army enables us to fight wars about which the general public is largely indifferent. Had there been a draft, the war in Iraq might never have been fought – or would have produced the civil protests of the Vietnam War era. The Iraq debacle was made possible by a professional military and by going into debt. George W. Bush didn’t need your body or, in the short run, your money. Southerners would fight, and foreigners would buy the bonds. For understandable reasons, no great songs have come out of the war in Iraq. The other problem is that the military has become something of a priesthood. It is virtually worshipped for its admirable qualities while its less admirable ones are hardly mentioned or known. It has such standing that it is awfully hard for mere civilians – including the commander in chief – to question it. Dwight Eisenhower could because he had stars on his shoulders, and when he warned of the military-industrial complex, people paid some attention. Harry Truman had fought in one World War and John Kennedy and Gerald Ford in another, but now the political cupboard of combat vets is bare and there are few civilian leaders who have the experience, the standing, to question the military. This is yet another reason to mourn the death of Richard Holbrooke. He learned in Vietnam that stars don’t make for infallibility, sometimes just for arrogance. (Cohen, How Little the US Knows of War, Washington Post, January 4, 2011) The 2010 elections generated the usual volume of political debate, but conspicuously absent were the two wars in which US military forces have been engaged for ten years. It seems that dissatisfaction with the wars in Iraq and Afghanistan has caused the American public to forget them and those military forces left to fight them. A forgotten military can become an isolated military with the expected erosion of civil-military relations. But the forgotten US military has not gone unnoticed: Tom Brokaw noted that there have been almost 5,000 Americans killed and 30,000 wounded, with over $1 trillion spent on the wars in Afghanistan and Iraq, with no end in sight. Yet most Americans have little connection with the all-volunteer military that is fighting these wars. It represents only one percent of Americans and is drawn mostly from the working class and middle class. The result is that military families are often isolated “…in their own war zone.” (See Brokaw, The Wars that America Forgot About, New York Times, October 17, 2010) Bob Herbert echoed Brokaw’s sentiments and advocated reinstating the draft to end the cultural isolation of the military. (Herbert, The Way We Treat Our Troops, New York Times, October 22, 2010) In another commentary on the forgotten military, Michael Gerson cited Secretary of Defense Robert Gates who warned of a widening cultural gap between military and civilian cultures: “There is a risk over time of developing a cadre of military leaders that politically, culturally and geographically have less and less in common with the people they have sworn to defend.” Secretary Gates promoted ROTC programs as a hedge against such a cultural divide. Gerson concluded that the military was a professional class by virtue of its unique skills and experience: “They are not like the rest of America—thank God. They bear a disproportionate burden, and they seem proud to do so. And they don’t need the rest of society to join them, just to support them.” (Gerson, The Wars We Left Behind, Washington Post, October 28, 2010) The Chairman of the Joint Chiefs of Staff, Admiral Mike Mullen, has seconded the observations of Secretary Gates and warned of an increasingly isolated military and “…a potentially dangerous gulf between the civilian world and men and women in uniform.” Mullen explained, “To the degree that we are out of touch I believe is a very dangerous force.” And he went on to observe that “Our audience, our underpinnings, our authority, everything we are, everything we do, comes from the American people…and we cannot afford to be out of touch with them.” (Charley Keyes, Joint Chiefs Chair Warns of Disconnect Between Military and Civilians, CNN.com, January 10, 2011) Gerson’s observation that the military are not like the rest of Americans goes to the heart of the matter. An isolated military that exacerbates conflicting military and civilian values could undermine civil-military relations and threaten military legitimacy. The potential for conflicting values is evident in the article by Kevin Govern on Higher Standards of Honorable Conduct Reinforced: Lessons (Re) Learned from the Captain Honors Incident (see article posted under this section) which highlights the “exemplary conduct” standard for military personnel and the need to enforce the unique standards of exemplary conduct to maintain good order and discipline in the military. The communal and authoritarian military values inherent in the standards of exemplary conduct often clash with more libertarian civilian values; but in the past that clash has been moderated by bridges between the military and civilian cultures, most notably provided by the draft, the National Guard and reserve components. The draft is gone and the National Guard and reserve components are losing ground in an all-volunteer military that is withdrawing from Iraq and Afghanistan. The Reserve Officer Training Program (ROTC) has provided most civilian-soldier leaders for the US military in the past, but it is doubtful that will continue in the future. If Coleman McCarthy speaks for our best colleges and universities, then ROTC is in trouble and so are civil-military relations: These days, the academic senates of the Ivies and other schools are no doubt pondering the return of military recruiters to their campuses. Meanwhile, the Pentagon, which oversees ROTC programs on more than 300 campuses, has to be asking if it wants to expand to the elite campuses, where old antipathies are remembered on both sides. It should not be forgotten that schools have legitimate and moral reasons for keeping the military at bay, regardless of the repeal of “don’t ask, don’t tell.” They can stand with those who for reasons of conscience reject military solutions to conflicts. ROTC and its warrior ethic taint the intellectual purity of a school, if by purity we mean trying to rise above the foul idea that nations can kill and destroy their way to peace. If a school such as Harvard does sell out to the military, let it at least be honest and add a sign at its Cambridge front portal: Harvard, a Pentagon Annex. (Coleman McCarthy, Don’t ask, don’t tell has been repealed. ROTC still shouldn’t be on campus, Washington Post, December 30, 2010) McCarthy’s attitude toward ROTC reflects a dangerous intellectual elitism that threatens civil-military relations and military legitimacy. But there are also conservative voices that recognize the limitations of ROTC and offer alternatives. John Lehman, a former Secretary of the Navy, and Richard Kohn, a professor of military history at the University of North Carolina at Chapel Hill, don’t take issue with McCarthy. They suggest that ROTC be abandoned in favor of a combination of military scholarships and officer training during summers and after graduation: Rather than expanding ROTC into elite institutions, it would be better to replace ROTC over time with a more efficient, more effective and less costly program to attract the best of America’s youth to the services and perhaps to military careers. Except from an economic perspective, ROTC isn’t efficient for students. They take courses from faculty almost invariably less prepared and experienced to teach college courses, many of which do not count for credit and cover material more akin to military training than undergraduate education. Weekly drills and other activities dilute the focus on academic education. ROTC was begun before World War I to create an officer corps for a large force of reservists to be mobilized in a national emergency. It has outgrown this purpose and evolved into just another source of officers for a military establishment that has integrated regulars and reservists into a “total force” in which the difference is between part-time and full-time soldiering. The armed services should consider a program modeled in part on the Marine Platoon Leaders Corps to attract the nation’s most promising young people. In a national competition similar to ROTC scholarships, students should be recruited for four years of active duty and four years of reserve service by means of all-expenses-paid scholarships to the college or university of their choice. Many would no doubt take these lucrative grants to the nation’s most distinguished schools, where they would get top-flight educations and could devote full attention on campus to their studies. Youths would gain their military training and education by serving in the reserve or National Guard during college (thus fulfilling their reserve obligation). Being enlisted would teach them basic military skills and give them experience in being led before becoming leaders themselves. As reservists during college, they would be obligated to deploy only once, which would not unduly delay their education or commissioned service. They could receive their officer education at Officer Candidate School summer camps or after graduation from college. This program could also be available to those who do not win scholarships but are qualified and wish to serve. Such a system would cost less while attracting more, and more outstanding, youth to military service, spare uniformed officers for a maxed-out military establishment, and reconnect the nation’s leadership to military service – a concern since the beginning of the all-volunteer armed force. (Lehman and Kohn, Don’t expand ROTC. Replace it. Washington Post, January 28, 2011) The system proposed by Lehman and Kohn would preserve good civil-military relations only if it could attract as many reserve component (civilian-soldier) military officers as has ROTC over the years. Otherwise the demise of ROTC will only hasten the isolation of the US military. As noted by Richard Cohen, Tom Brokaw, Bob Herbert, Michael Gerson, Secretary of Defense Bill Gates and Chairman of the Joint Chiefs Admiral Mike Mullen, the increasing isolation of the US military is a real danger to civil-military relations and military legitimacy. The trends are ominous: US military forces are drawing down as they withdraw from Iraq and Afghanistan and budget cuts are certain to reduce both active and reserve components, with fewer bridges to link a shrinking and forgotten all-volunteer military to the civilian society it serves. The US has been blessed with good civil-military relations over the years, primarily due to the many civilian-soldiers who have served in the military. But with fewer civilian-soldiers to moderate cultural differences between an authoritarian military and a democratic society, the isolation of the US military becomes more likely. Secretary Gates and Admiral Mullen were right to emphasize the danger of an isolated military, but that has not always been the prevailing view. In his classic 1957 work on civil-military relations, The Soldier and the State, Samuel Huntington advocated the isolation of the professional military to prevent its corruption by civilian politics. It is ironic that in his later years Huntington saw the geopolitical threat environment as a clash of civilizations which required military leaders to work closely with civilians to achieve strategic political objectives in hostile cultural environments such as Iraq and Afghanistan. (see discussion in Barnes, Military Legitimacy: Might and Right in the New Millennium, Frank Cass, 1996, at pp 111-115) Today, the specter of an isolated military haunts the future of civil-military relations and military legitimacy. With fewer civilian-soldiers from the National Guard and Reserve components to bridge the gap between our military and civilian cultures, an all-volunteer professional military could revive Huntington’s model of an isolated military to preserve its integrity from what it perceives to be a morally corrupt civilian society. It is an idea that has been argued before. (see Robert L. Maginnis, A Chasm of Values, Military Review (February 1993), cited in Barnes, Military Legitimacy: Might and Right in the New Millennium, Frank Cass, 1996, at p 55, n 6, and p 113, n 20) The military is a small part of our population—only 1 percent—but the Department of Defense is our largest bureaucracy and notorious for its resistance to change. Thomas Jefferson once observed the need for such institutions to change with the times: “Laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstance, institutions must advance also, and keep pace with the times.” Michael Gerson noted that the military remains a unique culture of warriors within a civilian culture, and that “it is not like the rest of America.” For that reason a forgotten and isolated military with values that do not keep pace with changing times and circumstances and conflict with civilian values would not only be a threat to military legitimacy but also be a threat to our individual freedom and democracy. In summary, the US military is in danger of becoming isolated from the civilian society it must serve. Military legitimacy and good civil-military relations depend upon the military maintaining close bonds with civilian society. In contemporary military operations military leaders must be both diplomats as well as warriors. They must be effective working with civilians in domestic and foreign emergencies and in civil-military operations such as counterinsurgency and stability operations, and they must be combat leaders who can destroy enemy forces with overwhelming force. Diplomat-warriors can perform these diverse leadership roles and maintain the close bonds needed between the military and civilian society. Such military leaders can help avoid an isolated military and insure healthy civil-military relations.

Loss of mission effectiveness risks multiple nuclear wars

Kagan and O’Hanlon 7 Frederick, resident scholar at AEI and Michael, senior fellow in foreign policy at Brookings, “The Case for Larger Ground Forces”, April 2007, http://www.aei.org/files/2007/04/24/20070424\_Kagan20070424.pdf

We live at a time when wars not only rage in nearly every region but threaten to erupt in many places where the current relative calm is tenuous. To view this as a strategic military challenge for the United States is not to espouse a specific theory of America’s role in the world or a certain political philosophy. Such an assessment flows directly from the basic bipartisan view of American foreign policy makers since World War II that overseas threats must be countered before they can directly threaten this country’s shores, that the basic stability of the international system is essential to American peace and prosperity, and that no country besides the United States is in a position to lead the way in countering major challenges to the global order. Let us highlight the threats and their consequences with a few concrete examples, emphasizing those that involve key strategic regions of the world such as the Persian Gulf and East Asia, or key potential threats to American security, such as the spread of nuclear weapons and the strengthening of the global Al Qaeda/jihadist movement. The Iranian government has rejected a series of international demands to halt its efforts at enriching uranium and submit to international inspections. What will happen if the US—or Israeli—government becomes convinced that Tehran is on the verge of fielding a nuclear weapon? North Korea, of course, has already done so, and the ripple effects are beginning to spread. Japan’s recent election to supreme power of a leader who has promised to rewrite that country’s constitution to support increased armed forces—and, possibly, even nuclear weapons— may well alter the delicate balance of fear in Northeast Asia fundamentally and rapidly. Also, in the background, at least for now, Sino Taiwanese tensions continue to flare, as do tensions between India and Pakistan, Pakistan and Afghanistan, Venezuela and the United States, and so on. Meanwhile, the world’s nonintervention in Darfur troubles consciences from Europe to America’s Bible Belt to its bastions of liberalism, yet with no serious international forces on offer, the bloodletting will probably, tragically, continue unabated. And as bad as things are in Iraq today, they could get worse. What would happen if the key Shiite figure, Ali al Sistani, were to die? If another major attack on the scale of the Golden Mosque bombing hit either side (or, perhaps, both sides at the same time)? Such deterioration might convince many Americans that the war there truly was lost—but the costs of reaching such a conclusion would be enormous. Afghanistan is somewhat more stable for the moment, although a major Taliban offensive appears to be in the offing. Sound US grand strategy must proceed from the recognition that, over the next few years and decades, the world is going to be a very unsettled and quite dangerous place, with Al Qaeda and its associated groups as a subset of a much larger set of worries. The only serious response to this international environment is to develop armed forces capable of protecting America’s vital interests throughout this dangerous time. Doing so requires a military capable of a wide range of missions—including not only deterrence of great power conflict in dealing with potential hotspots in Korea, the Taiwan Strait, and the Persian Gulf but also associated with a variety of Special Forces activities and stabilization operations. For today’s US military, which already excels at high technology and is increasingly focused on re-learning the lost art of counterinsurgency, this is first and foremost a question of finding the resources to field a large-enough standing Army and Marine Corps to handle personnel intensive missions such as the ones now under way in Iraq and Afghanistan. Let us hope there will be no such large-scale missions for a while. But preparing for the possibility, while doing whatever we can at this late hour to relieve the pressure on our soldiers and Marines in ongoing operations, is prudent. At worst, the only potential downside to a major program to strengthen the military is the possibility of spending a bit too much money. Recent history shows no link between having a larger military and its overuse; indeed, Ronald Reagan’s time in office was characterized by higher defense budgets and yet much less use of the military, an outcome for which we can hope in the coming years, but hardly guarantee. While the authors disagree between ourselves about proper increases in the size and cost of the military (with O’Hanlon preferring to hold defense to roughly 4 percent of GDP and seeing ground forces increase by a total of perhaps 100,000, and Kagan willing to devote at least 5 percent of GDP to defense as in the Reagan years and increase the Army by at least 250,000), we agree on the need to start expanding ground force capabilities by at least 25,000 a year immediately. Such a measure is not only prudent, it is also badly overdue.

#### Scenario 2 is Warming –

#### The political question doctrine is killing climate litigation now

Koshofer 10/1/13 (Warren A., partner in the law firm of Michelman & Robinson, LLP and a member of the firm’s commercial and business litigation department, “Defending Climate Change Liability” <http://www.rmmagazine.com/2013/10/01/defending-climate-change-liability/>)

For almost a decade now, plaintiffs have tried to sue various industries for damages resulting from greenhouse gas emissions and climate change. In staving off such claims, defendants have employed two formidable primary defenses rooted in the doctrines of standing and political question. Through use of these and other defenses, defendants have been able to prevail time and again in climate change liability-related litigation. Flowing from Article III of the U.S. Constitution, the doctrine of standing limits the jurisdiction of federal courts to cases that, by necessity, must include: 1) an injury in fact to the plaintiff, 2) that was caused by the defendant, and 3) that is capable of being redressed by the court. If any of the conditions are not present, the plaintiff does not have standing to sue the defendant. The doctrine of standing thus focuses on whether there is a proper plaintiff before the court. The focus of the political question doctrine is different; it addresses whether a plaintiff presents a claim that can be adjudicated by the court without interfering with the business of any other branch or department of the U.S. government. Setting the stage for a defense rooted in the political question doctrine in climate change-related litigation was the 2007 U.S. Supreme Court decision in Massachusetts v. EPA. In that case, the Supreme Court ruled that the Environmental Protection Agency (EPA) is authorized to regulate greenhouse gas emissions through the Clean Air Act. Consequently, courts have since used the political question doctrine to bar plaintiff’s liability claims for damages allegedly resulting from climate change. For example, in 2011, the Supreme Court held in American Electric Power v. Connecticut that corporations cannot be sued for damages allegedly resulting from greenhouse gas emissions because, among other reasons, the Clean Air Act delegates the management of carbon dioxide and other greenhouse gas emissions to the EPA. Among the more noteworthy of the climate change litigation cases is Comer v. Murphy Oil. Brought by plaintiffs in the aftermath of Hurricane Katrina, Mississippi Gulf residents sued numerous energy companies alleging that their emissions of greenhouse gases exacerbated the severity of the hurricane. The district court dismissed the case, finding that the plaintiffs had no standing to bring the claims, which ranged from public and private nuisance to trespass and negligence to fraudulent misrepresentation and conspiracy. The plaintiffs tried to re-file the case, but it was dismissed by the U.S. Court of Appeals for the Fifth Circuit in May. The Supreme Court is currently considering a petition to review the case, but it is widely believed that there is little likelihood of the petition being granted. Part of this belief is rooted in the Supreme Court’s treatment of a another climate change litigation case. In Native Village of Kivalina v. ExxonMobil Corp., the Alaskan shore village of Kivalina sued a group of energy companies operating in the region, alleging that their greenhouse gas emissions were causing polar ice to melt, sea levels to rise and the shoreline land of the village to erode at a rapid pace. Similar to the Comer decision in 2012, a district court held that the plaintiffs lacked standing because they could not demonstrate that any of their alleged injuries could be traced back to the defendants’ actions. The U.S. Court of Appeals for the Ninth Circuit agreed, and also addressed the political question doctrine defense, ruling that, based on the Supreme Court precedent set in American Electric Power v. Connecticut, “We need not engage in complex issue and fact-specific analysis in this case, because we have direct Supreme Court guidance that has already determined that Congress has directly addressed the issue of domestic greenhouse gas emissions from stationary sources and has therefore displaced federal common law.” By all accounts, then, it seems the defendants in climate change litigation will continue to prevail in court. The bad news for defendants, however, is that climate change-related litigation still exists, and it is expensive to defend. Once named in climate change-related litigation, a defendant often turns to its commercial general liability insurer for defense and indemnification. The trouble is that the allegations made in climate change-related litigation do not always trigger an insurer’s defense and indemnification duties.

#### Climate change litigation is key to solving global warming – 3 warrants

Flynn 13 (James, J.D. Candidate, 2013, Georgia State University College of Law; Assistant Legislation Editor, Georgia State University Law Review; Visiting Student, Florida State University College of Law, “CLIMATE OF CONFUSION: CLIMATE CHANGE LITIGATION IN THE WAKE OF AMERICAN ELECTRIC POWER V. CONNECTICUT”, lexis, accessed 1/5/2014)

2. Turning Up the Heat on Congress: Litigating to Legislate The only solution to anthropogenic global warming is a concerted global effort. 264 Such an effort cannot succeed without the leadership, or at least support, of the United States. 265 Real change in the United States requires comprehensive legislation that covers all facets of global warming: greenhouse gas emissions, land use, efficiency, and sustainable growth. In addition to maximizing time until the EPA either issues regulations or is prevented from doing so by Congress, litigation advances the goal of such comprehensive legislation in three ways. First, litigation keeps the pressure on fossil fuel companies and other large emitters. Comprehensive legislation is a near impossibility as long as the largest contributors to global greenhouse gas emissions are able to exert powerful control over the nation's [\*862] energy policy and the climate change discussion. 266 While the companies have the financial resources to battle in court, it is imperative that advocates and states make them do so. One need only look at the tobacco litigation of the 1960s through the 1990s to understand that success against a major industry is possible. 267 Here, though, the stakes are even higher. The chances of obtaining a largescale settlement from the fossil fuel industry is likely smaller now that the Court has ruled that some federal common law nuisance claims are displaced, because lower courts may hold that nuisance claims for money damages are also displaced. 268 However, advocates of climate change legislation should keep trying to obtain such a settlement through other tort remedies. A substantially damaging settlement may encourage fossil fuel companies to reposition their assets into more sustainable technologies to avoid more settlements, thus minimizing future emissions. Alternatively, if the fossil fuel companies feel threatened enough, they may begin to use their clout to persuade Congress to pass comprehensive legislation to protect their industry from such wide-ranging suits. 269 Second, litigation keeps the issue in the public consciousness during a time when the media is failing at its responsibilities to the public. 270 The media's coverage of climate change has been both inadequate and misleading. 271 Indeed, some polls suggest Americans [\*863] believe less in climate change now than just a few years ago. 272 Litigation, especially high-profile litigation, forces the issue into the public sphere, even though it may receive a negative connotation in the media. The more the public hears about the issue, the greater chance that people will demand their local and state politicians take action. Finally, litigation sends a clear message to Congress that simple appeasements will not suffice. 273 Comprehensive legislation is needed--legislation that mandates consistently declining emissions levels while simultaneously propping up replacement sources of energy. 274 Fill-in measures, like the EPA's authority to regulate emissions from power plants, are not sufficient. Humans need energy, and there can be no doubt that we must strike a balance between energy needs and risks to the environment. Catastrophic climate change, however, is simply a risk that we cannot take; it overwhelms the short-term benefits we receive from the burning of fossil fuels. 275 Advocates and states must demonstrate to Congress [\*864] through continuing litigation that the issue is critical and that plaintiffs like those in Kivalina and Comer are suffering genuine losses that demand redress that current statutes do not currently provide. CONCLUSION American Electric proved less important for the precedent it set than for the questions it left unanswered. While courts wrestled over standing, the political question doctrine, and displacement in climate change nuisance cases in the years preceding American Electric, the Supreme Court relied only on the clear displacement path illuminated by its earlier decision in Massachusetts. While the decision in American Electric narrowed the litigation options that climate change advocates have at their disposal, it subtly sent a message to Congress that greater federal action is needed. In writing such a narrow ruling, Justice Ginsburg also sent a message to states and advocates--whether intentionally or not--that climate change litigation is not dead. Until Congress enacts comprehensive climate change legislation, global warming lawsuits will, and must, continue.

#### And climate litigation solves internationally – produces international norms and cooperation

Long 8 (Andrew Long, Professor of Law @ Florida Coastal School of Law “International Consensus and U.S. Climate Change Litigation,” 33 Wm. & Mary Envtl. L. & Pol'y Rev. 177)

1. Enhancing U.S. International Leadership In a time of unfavorable global opinion toward the United States, explicit judicial involvement with international norms will move the United States **closer to the international community** by acknowledging the relevance of international environmental norms for our legal system. As in other contexts, explicit **judicial internalization of climate change norms would "build**[ ] **U.S. 'soft power,**' [enhance] its moral authority, and strengthen[ ] U.S. capacity for global leadership"2 °3 on climate change, and other global issues. More specifically, domestic judicial consideration of the global climate regime would reaffirm that although the United States has rejected Kyoto, we take the obligation to respect the global commons seriously by recognizing that obligation as a facet of the domestic legal system. U.S. courts' overall failure to interact with the international climate regime, as in other issue areas, has "serious consequences for their roles in international norm creation."2" As judicial understandings of climate change law converge, the early and consistent contributors to the transnational judicial dialogue will likely play the strongest role in shaping the emerging international normative consensus.2"' As Justice L'Heureux- Dube of the Canadian Supreme Court noted in an article describing the decline of the U.S. Supreme Court's global influence, "[decisions which look only inward ... have less relevance to those outside that jurisdiction." °6 Thus, if U.S. courts hope to participate in shaping the normative position on climate change adopted by judiciaries throughout the world, explicit recognition of the relationship between domestic and international law is vital. With climate change in particular, norm development through domestic application should be an important aspect of global learning. The problem requires a global solution beyond the scope of any prior multilateral environmental agreements. This provides a situation in which U.S. judicial reasoning in applying aspects of climate regime thinking to concrete problems will fall into fertile international policy soil. Accordingly, the recognition of international norms in **domestic climate change litigation may play a strengthening role in the perception of U.S. leadership**, encourage U.S. development and exportation of effective domestic climate strategies, and promote international agreements that will enhance consistency with such approaches. In short, explicit judicial discussion of international climate change norms as harmonious with U.S. law can **enhance U.S. ability to regain** a **global leadership** position on the issue and, thereby, more significantly shape the future of the international climate regime. 2. Promoting the Effectiveness of the International Response Along with promoting U.S. interests and standing in the international community, climate change litigation has a direct role to play in developing the international regime if courts directly engage that regime." 7 Just as the United States as an actor may benefit from acknowledging and applying international norms, the regime in which the actions occur will benefit through application and acceptance. Indeed, a case such as Massachusetts v. EPA that directly engages only domestic law can nonetheless be understood to impact international lawmaking by considering its actors."' More important, however, will be cases in which the domestic judiciary gives life to international agreements through direct engagement-a "role [that] is particularly important as a check on the delegitimization of international legal rules that are not enforced."" 9 Assuming, as we must in the arena of climate change, that international law can only effect significant changes in behavior through penetration of the domestic sphere, domestic litigation that employs international law not only provides an instance in which the international appears effective but, more importantly, molds it into a shape that will enable further use in domestic cases or suggest necessary changes internationally. By engaging the international, domestic cases can also provide articulation for the norms that have emerged. The precise meaning of the UNFCCC obligation that nations take measures must be hammered out on the ground. In the United States, if Congress has not acted, it is appropriate for the courts to begin this process by measuring particular actions against the standard. 3. Encouraging Consistency in Domestic Law and Policy In the absence of national climate change law and policy, explicit discussion of international sources and norms in litigation will provide a well-developed baseline for a uniform judicial approach in the domestic realm. This could occur both within and beyond the United States. Within the United States, bringing international environmental law into the mix of judicial reasoning would provide common grounding that unifies the decisions and begins to construct a more systematic preference for development of an effective legal response to international threats. Specifically, if an international climate change norm is found relevant to interpretation of a domestic statute, reference will be appropriate to that norm when future questions of interpretation of the domestic statute arise.210 Thus, to the extent that climate change cases rely upon consensus concerning the scientific evidence of climate change, future cases should use that consensus as a measuring stick for claims of scientific uncertainty.2n The same can occur with norm development. For example, had the Court in Massachusetts tied its jurisdictional or substantive holding to an identifiable norm, the opinion would have greater clarity and value as a precedent in other contexts within the United States. Outside the United States, this approach would provide value to other, more transnationally oriented domestic courts.212 This would serve a norm entrepreneurship function and likely increase agreement among domestic courts on how to approach climate change issues raised under statutes designed for other purposes. 4. Enabling a Check at the Domestic-International Interface Finally, climate change litigation has something to offer for the growth of administrative law at the interface of domestic and international law. At least two points are noteworthy. First, U.S. courts can serve a unique function of providing legal accountability for U.S. failure to honor its UNFCCC commitments.213 Although this might be achieved implicitly, arguably the approach of Massachusetts, doing so explicitly would provide a check of a different magnitude. An explicit check here would serve the purposes identified above, as well as offering the practical benefit of increasing compliance. The dualist tradition, and perhaps concerns of domestic political backlash, weigh against grounding a decision solely in the UNFCC. However, looking to it as a major point in a narrative defining the development of a partly domestic obligation to take national action for the redress of climate change would serve the same beneficial purpose. This approach has the advantage of building a significant bridge over the dualist divide between domestic and international law without ripping the Court's analysis from traditional, dualist moorings. Pg. 212-216

#### Climate change ends all life – runaway climate hothouse earth.

Farley 2010

John, Professor of physics and astronomy @ UNLV, Monthly Review Vol 62 issue 4 september 2010 <http://monthlyreview.org/2010/09/01/our-last-chance-to-save-humanity>

If the sea level rises 70 meters (250 feet), it would not extinguish all human life. After all, hominids have existed on earth for several million years, and homo sapiens more than a hundred thousand, surviving numerous ice ages, during which ice sheets a mile thick covered areas that came to be Boston and New York City. But the world population during the last ice age, ten thousand years ago, has been estimated at five million. It is now six billion. It is human civilization that is unlikely to survive a flooding catastrophe. According to the penultimate chapter, The Venus Syndrome, it might be even worse. Hansen posits a possible future earth, in which a “runaway greenhouse effect” takes over: anthropogenic global warming from greenhouse gases causes increased water vapor in the atmosphere, which in turn causes further warming. The methane clathrate deposits are destabilized, releasing vast amounts of methane in the atmosphere. The oceans become acidified by dissolution of carbon dioxide from the atmosphere. This could eliminate all life on Earth. This is speculation, of course. But Venus, the planet most similar to earth, has a very strong greenhouse effect, much stronger than earth’s. In the absence of atmospheric greenhouse gases, the surface temperature of the earth would be -18°C (0°F). The actual observed temperature of the Earth is 15°C (59°F). Thus, the greenhouse effect on the Earth raises the temperature by 33°C (59°F). On Venus, the surface temperature, in the absence of the greenhouse effect, would be -41°C (-42°F), well below the melting point of ice. A very strong greenhouse effect raises the surface temperature to the observed temperature of 464°C (867°F). The greenhouse effect on Venus is a staggering 505°C (909°F), creating a planetary surface hot enough to melt lead (!!), which requires “only” 327°C (621°F).

#### Warming is real and anthropogenic, need to cut emissions adaptation can’t solve. Our science is watertight and theirs is garbage.

Harvey 2013

Fiona, Guardian Environment Reporter, IPCC climate report: human impact is 'unequivocal', September 27 2013, http://www.theguardian.com/environment/2013/sep/27/ipcc-climate-report-un-secretary-general

World leaders must now respond to an "unequivocal" message from climate scientists and act with policies to cut greenhouse gas emissions, the United Nations secretary-general urged on Friday. Introducing a major report from a high level UN panel of climate scientists, Ban Ki-moon said, "The heat is on. We must act." The world's leading climate scientists, who have been meeting in all-night sessions this week in the Swedish capital, said there was no longer room for doubt that climate change was occurring, and the dominant cause has been human actions in pouring greenhouse gases into the atmosphere. In their starkest warning yet, following nearly seven years of new research on the climate, the Intergovernmental Panel on Climate Change (IPCC) said it was "unequivocal" and that even if the world begins to moderate greenhouse gas emissions, warming is likely to cross the critical threshold of 2C by the end of this century. That would have serious consequences, including sea level rises, heatwaves and changes to rainfall meaning dry regions get less and already wet areas receive more. In response to the report, the US secretary of state, John Kerry, said in a statement: "This is yet another wakeup call: those who deny the science or choose excuses over action are playing with fire." "Once again, the science grows clearer, the case grows more compelling, and the costs of inaction grow beyond anything that anyone with conscience or commonsense should be willing to even contemplate," he said. He said that livelihoods around the world would be impacted. "With those stakes, the response must be all hands on deck. It's not about one country making a demand of another. It's the science itself, demanding action from all of us. The United States is deeply committed to leading on climate change." In a crucial reinforcement of their message – included starkly in this report for the first time – the IPCC warned that the world cannot afford to keep emitting carbon dioxide as it has been doing in recent years. To avoid dangerous levels of climate change, beyond 2C, the world can only emit a total of between 800 and 880 gigatonnes of carbon. Of this, about 530 gigatonnes had already been emitted by 2011. That has a clear implication for our fossil fuel consumption, meaning that humans cannot burn all of the coal, oil and gas reserves that countries and companies possess. As the former UN commissioner Mary Robinson told the Guardian last week, that will have "huge implications for social and economic development." It will also be difficult for business interests to accept. The central estimate is that warming is likely to exceed 2C, the threshold beyond which scientists think global warming will start to wreak serious changes to the planet. That threshold is likely to be reached even if we begin to cut global greenhouse gas emissions, which so far has not happened, according to the report. Other key points from the report are: • Atmospheric concentrations of carbon dioxide, methane and nitrous oxide are now at levels "unprecedented in at least the last 800,000 years." • Since the 1950's it's "extremely likely" that human activities have been the dominant cause of the temperature rise. • Concentrations of CO2 and other greenhouse gases in the atmosphere have increased to levels that are unprecedented in at least 800,000 years. The burning of fossil fuels is the main reason behind a 40% increase in C02 concentrations since the industrial revolution. • Global temperatures are likely to rise by 0.3C to 4.8C, by the end of the century depending on how much governments control carbon emissions. • Sea levels are expected to rise a further 26-82cm by the end of the century. • The oceans have acidified as they have absorbed about a third of the carbon dioxide emitted. Thomas Stocker, co-chair of the working group on physical science, said the message that greenhouse gases must be reduced was clear. "We give very relevant guidance on the total amount of carbon that can't be emitted to stay to 1.5 or 2C. We are not on the path that would lead us to respect that warming target [which has been agreed by world governments]." He said: "Continued emissions of greenhouse gases will cause further warming and changes in all components of the climate system. Limiting climate change will require substantial and sustained reductions of greenhouse gas emissions." Though governments around the world have agreed to curb emissions, and at numerous international meetings have reaffirmed their commitment to holding warming to below 2C by the end of the century, greenhouse gas concentrations are still rising at record rates. Rajendra Pachauri, chair of the IPCC, said it was for governments to take action based on the science produced by the panel, consisting of thousands of pages of detail, drawing on the work of more than 800 scientists and hundreds of scientific papers. The scientists also put paid to claims that global warming has "stopped" because global temperatures in the past 15 years have not continued the strong upward march of the preceding years, which is a key argument put forward by sceptics to cast doubt on climate science. But the IPCC said the longer term trends were clear: "Each of the last three decades has been successively warmer at the Earth's surface than any preceding decade since 1850 in the northern hemisphere [the earliest date for reliable temperature records for the whole hemisphere]." The past 15 years were not such an unusual case, said Stocker. "People always pick 1998 but [that was] a very special year, because a strong El Niño made it unusually hot, and since then there have been some medium-sized volcanic eruptions that have cooled the climate." But he said that further research was needed on the role of the oceans, which are thought to have absorbed more than 90% of the warming so far. The scientists have faced sustained attacks from so-called sceptics, often funded by "vested interests" according to the UN, who try to pick holes in each item of evidence for climate change. The experts have always known they must make their work watertight against such an onslaught, and every conclusion made by the IPCC must pass scrutiny by all of the world's governments before it can be published. Their warning on Friday was sent out to governments around the globe, who convene and fund the IPCC. It was 1988 when scientists were first convened for this task, and in the five landmark reports since then the research has become ever clearer. Now, scientists say they are certain that "warming in the climate system is unequivocal and since 1950 many changes have been observed throughout the climate system that are unprecedented over decades to millennia." That warning, from such a sober body, hemmed in by the need to submit every statement to extraordinary levels of scrutiny, is the starkest yet. "Heatwaves are very likely to occur more frequently and last longer. As the earth warms, we expect to see currently wet regions receiving more rainfall, and dry regions receiving less, although there will be exceptions," Stocker said. Qin Dahe, also co-chair of the working group, said: "As the ocean warm, and glaciers and ice sheets reduce, global mean sea level will continue to rise, but at a faster rate than we have experienced over the past 40 years." Prof David Mackay, chief scientific adviser to the Department of Energy and Climate Change, said: "The far-reaching consequences of this warming are becoming understood, although some uncertainties remain. The most significant uncertainty, however, is how much carbon humanity will choose to put into the atmosphere in the future. It is the total sum of all our carbon emissions that will determine the impacts. We need to take action now, to maximise our chances of being faced with impacts that we, and our children, can deal with. Waiting a decade or two before taking climate change action will certainly lead to greater harm than acting now."

#### Warming will happen faster than they think, makes adaptation impossible and extinction likely.

Jamail 2013

Dahr, independent journalist, is the author of the just-published Beyond the Green Zone: Dispatches from an Unembedded Journalist in Occupied Iraq, citing tons of super qualified people, “The Great Dying” redux? Shocking parallels between ancient mass extinction and climate change, Salon, December 2013, http://www.salon.com/2013/12/17/the\_great\_dying\_redux\_shocking\_parallels\_between\_ancient\_mass\_extinction\_and\_climate\_change\_partner/

Climate-change-related deaths are already estimated at five million annually, and the process seems to be accelerating more rapidly than most climate models have suggested. Even without taking into account the release of frozen methane in the Arctic, some scientists are already painting a truly bleak picture of the human future. Take Canadian Wildlife Service biologist Neil Dawe, who in August told a reporter that he wouldn’t be surprised if the generation after him witnessed the extinction of humanity. All around the estuary near his office on Vancouver Island, he has been witnessing the unraveling of “the web of life,” and “it’s happening very quickly.” “Economic growth is the biggest destroyer of the ecology,” Dawe says. “Those people who think you can have a growing economy and a healthy environment are wrong. If we don’t reduce our numbers, nature will do it for us.” And he isn’t hopeful humans will be able to save themselves. “Everything is worse and we’re still doing the same things. Because ecosystems are so resilient, they don’t exact immediate punishment on the stupid.” The University of Arizona’s Guy McPherson has similar fears. “We will have very few humans on the planet because of lack of habitat,” he says. Of recent studies showing the toll temperature increases will take on that habitat, he adds, “They are only looking at CO2 in the atmosphere.” Here’s the question: Could some version of extinction or near-extinction overcome humanity, thanks to climate change — and possibly incredibly fast? Similar things have happened in the past. Fifty-five million years ago, a five degree Celsius rise in average global temperatures seems to have occurred in just 13 years, according to a study published in the October 2013 issue of the Proceedings of the National Academy of Sciences. A report in the August 2013 issue of Science revealed that in the near-term Earth’s climate will change 10 times faster than at any other moment in the last 65 million years. “The Arctic is warming faster than anywhere else on the planet,” climate scientist James Hansen has said. “There are potential irreversible effects of melting the Arctic sea ice. If it begins to allow the Arctic Ocean to warm up, and warm the ocean floor, then we’ll begin to release methane hydrates. And if we let that happen, that is a potential tipping point that we don’t want to happen. If we burn all the fossil fuels then we certainly will cause the methane hydrates, eventually, to come out and cause several degrees more warming, and it’s not clear that civilization could survive that extreme climate change.” Yet, long before humanity has burned all fossil fuel reserves on the planet, massive amounts of methane will be released. While the human body is potentially capable of handling a six to nine degree Celsius rise in the planetary temperature, the crops and habitat we use for food production are not. As McPherson put it, “If we see a 3.5 to 4C baseline increase, I see no way to have habitat. We are at .85C above baseline and we’ve already triggered all these self-reinforcing feedback loops.” He adds: “All the evidence points to a locked-in 3.5 to 5 degree C global temperature rise above the 1850 ‘norm’ by mid-century, possibly much sooner. This guarantees a positive feedback, already underway, leading to 4.5 to 6 or more degrees above ‘norm’ and that is a level lethal to life. This is partly due to the fact that humans have to eat and plants can’t adapt fast enough to make that possible for the seven to nine billion of us — so we’ll die.” If you think McPherson’s comment about lack of adaptability goes over the edge, consider that the rate of evolution trails the rate of climate change by a factor of 10,000, according to a paper in the August 2013 issue of Ecology Letters. Furthermore, David Wasdel, director of the Apollo-Gaia Project and an expert on multiple feedback dynamics, says, “We are experiencing change 200 to 300 times faster than any of the previous major extinction events.” Wasdel cites with particular alarm scientific reports showing that the oceans have already lost 40% of their phytoplankton, the base of the global oceanic food chain, because of climate-change-induced acidification and atmospheric temperature variations. (According to the Center for Ocean Solutions: “The oceans have absorbed almost one-half of human-released CO2 emissions since the Industrial Revolution. Although this has moderated the effect of greenhouse gas emissions, it is chemically altering marine ecosystems 100 times more rapidly than it has changed in at least the last 650,000 years.”) “This is already a mass extinction event,” Wasdel adds. “The question is, how far is it going to go? How serious does it become? If we are not able to stop the rate of increase of temperature itself, and get that back under control, then a high temperature event, perhaps another 5-6 degrees [C], would obliterate at least 60% to 80% of the populations and species of life on Earth.”

## 2AC

### Allied Coop

#### Ex Post review of drone strikes would effectively constrain executive action

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 haveoften said that even the mere prospect of judicial review deters error and abuse.

#### Even if some of our representations about NATO are flawed, if we win a risk of an impact you should vote affirmative – overfocusing on discourse makes our impacts inevitable

Tuathail 96 (Gearoid, Department of Georgraphy at Virginia Polytechnic Institute, Political Geography, 15(6-7), p. 664, science direct)

While theoretical debates at academic conferences are important to academics, the discourse and concerns of foreign-policy decision- makers are quite different, so different that they constitute a distinctive problem- solving, theory-averse, policy-making subculture. There is a danger that academics assume that the discourses they engage are more significant in the practice of foreign policy and the exercise of power than they really are. This is not, however, to minimize the obvious importance of academia as a general institutional structure among many that sustain certain epistemic communities in particular states. In general, I do not disagree with Dalby’s fourth point about politics and discourse except to note that his statement-‘Precisely because reality could be represented in particular ways political decisions could be taken, troops and material moved and war fought’-evades the important question of agency that I noted in my review essay. The assumption that it is representations that make action possible is inadequate by itself. Political, military and economic structures, institutions, discursive networks and leadership are all crucial in explaining social action and should be theorized together with representational practices. Both here and earlier, Dalby’s reasoning inclines towards a form of idealism. In response to Dalby’s fifth point (with its three subpoints), it is worth noting, first, that his book is about the CPD, not the Reagan administration. He analyzes certain CPD discourses, root the geographical reasoning practices of the Reagan administration nor its public-policy reasoning on national security. Dalby’s book is narrowly textual; the general contextuality of the Reagan administration is not dealt with. Second, let me simply note that I find that the distinction between critical theorists and post- structuralists is a little too rigidly and heroically drawn by Dalby and others. Third, Dalby’s interpretation of the reconceptualization of national security in Moscow as heavily influenced by dissident peace researchers in Europe is highly idealist, an interpretation that ignores the structural and ideological crises facing the Soviet elite at that time. Gorbachev’s reforms and his new security discourse were also strongly self- interested, an ultimately futile attempt to save the Communist Party and a discredited regime of power from disintegration. The issues raised by Simon Dalby in his comment are important ones for all those interested in the practice of critical geopolitics. While I agree with Dalby that questions of discourse are extremely important ones for political geographers to engage, there is a danger of fetishizing this concern with discourse so that we neglect the institutional and the sociological, the materialist and the cultural, the political and the geographical contexts within which particular discursive strategies become significant. Critical geopolitics, in other words, should not be a prisoner of the sweeping ahistorical cant that sometimes accompanies ‘poststructuralism nor convenient reading strategies like the identity politics narrative; it needs to always be open to the patterned mess that is human history.

### PQD

#### Decline causes every scenario for extinction and is empirically confirmed – our studies are true

**Brzezinski, John Hopkins American Foreign Policy professor, 2012**

(Zbigniew, Strategic Vision: America and the Crisis of Global Power, google books, ldg)

An American decline would impact the nuclear domain most profoundly by inciting a crisis of confidence in the credibility of the American nuclear umbrella. Countries like South Korea, Taiwan, Japan, Turkey, and even Israel, among others, rely on the United States’ extended nuclear deterrence for security. If they were to see the United States slowly retreat from certain regions, forced by circumstances to pull back its guarantees, or even if they were to lose confidence in standing US guarantees, because of the financial, political, military, and diplomatic consequences of an American decline, then they will have to seek security elsewhere. That “elsewhere” security could originate from only two sources: from nuclear weapons of one’s own or from the extended deterrence of another power—most likely Russia, China, or India. It is possible that countries that feel threatened by the ambition of existing nuclear weapon states, the addition of new nuclear weapon states, or the decline in the reliability of American power would develop their own nuclear capabilities. For crypto-nuclear powers like Germany and Japan, the path to nuclear weapons would be easy and fairly quick, given their extensive civilian nuclear industry, their financial success, and their technological acumen. Furthermore, the continued existence of nuclear weapons in North Korea and the potentiality of a nuclear-capable Iran could prompt American allies in the Persian Gulf or East Asia to build their own nuclear deterrents. Given North Korea’s increasingly aggressive and erratic behavior, the failure of the six-party talks, and the widely held distrust of Iran’s megalomaniacal leadership, the guarantees offered by a declining America’s nuclear umbrella might not stave off a regional nuclear arms race among smaller powers. Last but not least, even though China and India today maintain a responsible nuclear posture of minimal deterrence and “no first use,” the uncertainty of an increasingly nuclear world could force both states to reevaluate and escalate their nuclear posture. Indeed, they as well as Russia might even become inclined to extend nuclear assurances to their respective client states. Not only could this signal a renewed regional nuclear arms race between these three aspiring powers but it could also create new and antagonistic spheres of influence in Eurasia driven by competitive nuclear deterrence. The decline of the United States would thus precipitate drastic changes to the nuclear domain. An increase in proliferation among insecure American allies and/or an arms race between the emerging Asian powers are among the more likely outcomes. This ripple effect of proliferation would undermine the transparent management of the nuclear domain and increase the likelihood of interstate rivalry, miscalculation, and eventually even perhaps of international nuclear terror. In addition to the foregoing, in the course of this century the world will face a series of novel geopolitical challenges brought about by significant changes in the physical environment. The management of those changing environmental commons—the growing scarcity of fresh water, the opening of the Arctic, and global warming—will require global consensus and mutual sacrifice. American leadership alone is not enough to secure cooperation on all these issues, but a decline in American influence would reduce the likelihood of achieving cooperative agreements on environmental and resource management. America’s retirement from its role of global policeman could create greater opportunities for emerging powers to further exploit the environmental commons for their own economic gain, increasing the chances of resource-driven conflict, particularly in Asia. The latter is likely to be the case especially in regard to the increasingly scarce water resources in many countries. According to the United States Agency for International Development (USAID), by 2025 more than 2.8 billion people will be living in either water-scarce or water-stressed regions, as global demand for water will double every twenty years.9 While much of the Southern Hemisphere is threatened by potential water scarcity, interstate conflicts—the geopolitical consequences of cross-border water scarcity—are most likely to occur in Central and South Asia, the Middle East, and northeastern Africa, regions where limited water resources are shared across borders and political stability is transient. The combination of political insecurity and resource scarcity is a menacing geopolitical combination. The threat of water conflicts is likely to intensify as the economic growth and increasing demand for water in emerging powers like Turkey and India collides with instability and resource scarcity in rival countries like Iraq and Pakistan. Water scarcity will also test China’s internal stability as its burgeoning population and growing industrial complex combine to increase demand for and decrease supply of usable water. In South Asia, the never-ending political tension between India and Pakistan combined with overcrowding and Pakistan’s heightening internal crises may put the Indus Water Treaty at risk, especially because the river basin originates in the long-disputed territory of Jammu and Kashmir, an area of ever-increasing political and military volatility. The lingering dispute between India and China over the status of Northeast India, an area through which the vital Brahmaputra River flows, also remains a serious concern. As American hegemony disappears and **regional competition intensifies**, disputes over natural resources like water have the potential to develop into full-scale conflicts. The slow thawing of the Arctic will also change the face of the international competition for important resources. With the Arctic becoming increasingly accessible to human endeavor, the five Arctic littoral states—the United States, Canada, Russia, Denmark, and Norway—may rush to lay claim to its bounty of oil, gas, and metals. This run on the Arctic has the potential to cause severe shifts in the geopolitical landscape, particularly to Russia’s advantage. As Vladimir Radyuhin points out in his article entitled “The Arctic’s Strategic Value for Russia,” Russia has the most to gain from access to the Arctic while simultaneously being the target of far north containment by the other four Arctic states, all of which are members of NATO. In many respects this new great game will be determined by who moves first with the most legitimacy, since very few agreements on the Arctic exist. The first Russian supertanker sailed from Europe to Asia via the North Sea in the summer of 2010.10 Russia has an immense amount of land and resource potential in the Arctic. Its territory within the Arctic Circle is 3.1 million square kilometers—around the size of India—and the Arctic accounts for 91% of Russia’s natural gas production, 80% of its explored natural gas reserves, 90% of its offshore hydrocarbon reserves, and a large store of metals.11 Russia is also attempting to increase its claim on the territory by asserting that its continental shelf continues deeper into the Arctic, which could qualify Russia for a 150-mile extension of its Exclusive Economic Zone and add another 1.2 million square kilometers of resource-rich territory. Its first attempt at this extension was denied by the UN Commission on the Continental Shelf, but it is planning to reapply in 2013. Russia considers the Arctic a true extension of its northern border and in a 2008 strategy paper President Medvedev stated that the Arctic would become Russia’s “main strategic resource base” by 2020.12 Despite recent conciliatory summits between Europe and Russia over European security architecture, a large amount of uncertainty and distrust stains the West’s relationship with Russia. The United States itself has always maintained a strong claim on the Arctic and has continued patrolling the area since the end of the Cold War. This was reinforced during the last month of President Bush’s second term when he released a national security directive stipulating that America should “preserve the global mobility of the United States military and civilian vessels and aircraft throughout the Arctic region.” The potentiality of an American decline could embolden Russia to more forcefully assert its control of the Arctic and over Europe via energy politics; though much depends on Russia’s political orientation after the 2012 presidential elections. All five Arctic littoral states will benefit from a peaceful and cooperative agreement on the Arctic—similar to Norway’s and Russia’s 2010 agreement over the Barents Strait—and the geopolitical stability it would provide. Nevertheless, political circumstances could rapidly change in an environment where control over energy remains Russia’s single greatest priority. Global climate change is the final component of the environmental commons and the one with the greatest potential geopolitical impact. Scientists and policy makers alike have projected catastrophic consequences for mankind and the planet if the world average temperature rises by more than two degrees over the next century. Plant and animal species could grow extinct at a rapid pace, large-scale ecosystems could collapse, human migration could increase to untenable levels, and global economic development could be categorically reversed. Changes in geography, forced migration, and global economic contraction layered on top of the perennial regional security challenges could create a geopolitical reality of unmanageable complexity and conflict, especially in the densely populated and politically unstable areas of Asia such as the Northeast and South. Furthermore, any legitimate action inhibiting global climate change will require unprecedented levels of self-sacrifice and international cooperation. The United States does consider climate change a serious concern, but its lack of both long-term strategy and political commitment, evidenced in its refusal to ratify the Kyoto Protocol of 1997 and the repeated defeat of climate-change legislation in Congress, deters other countries from participating in a global agreement. The United States is the second-largest global emitter of carbon dioxide, after China, with 20% of the world’s share. The United States is the number one per capita emitter of carbon dioxide and the global leader in per capita energy demand. Therefore, US leadership is essential in not only getting other countries to cooperate, but also in actually inhibiting climate change. Others around the world, including the European Union and Brazil, have attempted their own domestic reforms on carbon emissions and energy use, and committed themselves to pursuing renewable energy. Even China has made reducing emissions a goal, a fact it refuses to let the United States ignore. But none of those nations currently has the ability to lead a global initiative. President Obama committed the United States to energy and carbon reform at the Copenhagen Summit in 2009, but the increasingly polarized domestic political environment and the truculent American economic recovery are unlikely to inspire progress on costly energy issues. China is also critically important to any discussion of the management of climate change as it produces 21% of the world’s total carbon emissions, a percentage that will only increase as China develops the western regions of its territory and as its citizens experience a growth in their standard of living. China, however, has refused to take on a leadership role in climate change, as it has also done in the maritime, space, and cyberspace domains. China uses its designation as a developing country to shield itself from the demands of global stewardship. China’s tough stance at the 2009 Copenhagen Summit underscores the potential dangers of an American decline: no other country has the capacity and the desire to accept global stewardship over the environmental commons. Only a vigorous Unites States could lead on climate change, given Russia’s dependence on carbon-based energies for economic growth, India’s relatively low emissions rate, and China’s current reluctance to assume global responsibility. The protection and good faith management of the global commons—sea, space, cyberspace, nuclear proliferation, water security, the Arctic, and the environment itself—**are imperative to** the long-term growth of the global economy and **the continuation of** basic geopolitical **stability**. But in almost every case, the potential absence of constructive and influential US leadership would fatally undermine the essential communality of the global commons.     The argument that America’s decline would generate global insecurity, endanger some vulnerable states, produce a more troubled North American neighborhood, and make cooperative management of the global commons more difficult is not an argument for US global supremacy. In fact, the strategic complexities of the world in the twenty-first century—resulting from the rise of a politically self-assertive global population and from the dispersal of global power—make such supremacy unattainable. But in this increasingly complicated geopolitical environment, an America in pursuit of a new, timely strategic vision is crucial to helping the world avoid a dangerous slide into international turmoil.

#### Our representations of climate are good and aren’t a product of white culture--- Mobilizes international action & transforms security into a focus on collective energy cooperation without the nationalism or enemy creation.

Trombetta 2008

Maria Julia, Environmental security and climate change: analyzing the discourse, Cambridge Review of International Affairs, 21:4, 585-602

How can these developments be read through the lens of the framework previously elaborated? Can this be considered as a securitization which is transforming security practices? The renewal of the debate on climate change and security appears as an attempt to transform it into an existential threat, requiring urgent measures. It has mobilized political action, emergency measures and even attempts to institutionalize the debate at an international level. So far the securitization of climate has succeeded in persuading even the reluctant Bush administration to undertake discussion on emissions reduction. It has also contributed to the formulation of the Bali Roadmap to set a strategy for the postKyoto period. The UN Security Council, at the initiative of the UK, discussed the potential impact of climate change on peace and security for the first time ever (UK Mission to the UN 2007). The most impressive results have been within the EU, since it has contributed to the EU developing a common energy policy—an issue that has previously been delayed for decades. Traditionally energy issues have been considered a prerogative of member states and security of supply has been considered a national security issue. The EU Commission is promoting a nonantagonistic approach that relies on liberalization and cooperation to promote a common energy policy and to secure energy supply and climate stability. The impact of this strategy is evident in the reaction to the Ukrainian gas crisis in 2006. When Russia cut the gas supply to Ukraine, due to their dispute over gas prices, the amount of gas transiting through Ukraine and destined for European countries fell dramatically (Jon Stern 2006). Despite the rapid solution of the crisis it was considered a wakeup call which prompted a significant debate on energy security. Within NATO the point was discussed in terms of new roles for the alliance, including the possibility of military involvement to patrol the supply routes, suggesting an antagonistic approach (Shea 2006), but within the EU the crisis provided an opportunity to expedite the development of a common energy policy. The common energy policy set ambitious targets, mobilizing consensus through the double lever of climate security and energy security. In January 2007 the Commission presented the ‘Energy and Climate package’ (Commission of the European Communities 2007). It included a Strategic Energy Review which focused on both internal and external aspects of EU energy policy. In March 2007, EU leaders approved the plan, agreeing on a binding target of 20 per cent reduction of greenhouse gas emissions by the EU by 2020, compared to 1990 levels. Central to the agreement was the recognition that energy and environment should go hand in hand. The plan committed member states to raising the European share of renewable energy to 20 per cent, increasing energy efficiency, completing the internal market for electricity and gas, and the development of a common external energy policy. Although the focus is on the EU interest and security, the means to achieve them are market mechanisms, promotion of liberal order and multilateralism. Thus far appeals to climate security have mobilized actions even if the emergency measures have not exceeded the ordinary policy debate. Hence these appeals can be considered as proper securitization rather than failed securitizing moves.9 The securitization of climate change has avoided the identification of enemies and has involved actors other than states, both in the securitizing moves and in the security provisions.

#### ---Debating and advocating action against global warming shapes and impacts policy discussion even if we don’t have our hands on the levels of power – giving up makes the impact inevitable

Hoerner & Robinson 2008

J. Andrew, Nia, A Climate of Change: African Americans, Global Warming, and a Just Climate Policy for the U.S., Environmental Justice and Climate Change Initiative, http://www.wholecommunities.org/pdf/Climate%20of%20Change\_Final\_6-29-08.pdf

We are at a crucial moment in the ﬁght against climate change. There is a signiﬁcant likelihood of passing federal climate legislation within years, if not months. We must be a voice for just climate policies because, as this paper has shown, only just policies will be eﬀective. Climate change cannot be truly solved, either domestically or internationally, without policies that address racial and economic inequities. When faced with the challenge of changing history’s course and the planet’s temperature while opposed by some of the world’s largest corporations, many of us struggle with a sense of futility and hopelessness. We ask whether it makes sense to worry about such large aﬀairs, when, as individuals and as a community we often do not have the resources to waste on ﬁghts we seemingly cannot win. But there are reasons to believe that, with determined and united action, this particular ﬁght can be won: • The need is urgent. The scientiﬁc community is essentially unanimous in its assertion that prompt and eﬀective action is needed to avert catastrophe. • The people are with us. Polling results show a substantial majority of people in the U.S. believe global warming is real and that additional action should be taken to prevent it. • The problem is solvable. Policies and technologies to cut global warming with a net economic beneﬁt are known and established. • The time to act is now. Majorities in both houses of Congress and all three major presidential candidates have pledged to take strong action to reduce global warming. For the ﬁrst time, a solution to global warming appears to be on the horizon. Our energy must be concentrated on assuring that a just solution is adopted. In this ﬁght, every voice is needed, and every voice could be the deciding voice. Whether you are a high school student or a U.S. Senator, there are speciﬁc, concrete steps that you can take to put the U.S. on a path to achieving positive and signiﬁcant legislation for climate justice.

### K

#### Framework – weigh the fiated implications of the plan versus the criticism – only way to engage in cost-benefit analysis between competing options – mooting the aff puts us a speech behind and makes the neg a moving target – and debating the intricacies of war powers are independently important – allow us to change the future

Kurr-Ph.D. student Communication, Penn State-9/5/13

Bridging Competitive Debate and Public Deliberation on Presidential War Powers

http://public.cedadebate.org/node/14

The second major function concerns the specific nature of deliberation over war powers. Given the connectedness between presidential war powers and the preservation of national security, deliberation is often difficult. Mark Neocleous describes that when political issues become securitized; it “helps consolidate the power of the existing forms of social domination and justifies the short-circuiting of even the most democratic forms.” (2008, p. 71). Collegiate debaters, through research and competitive debate, serve as a bulwark against this “short-circuiting” and help preserve democratic deliberation. This is especially true when considering national security issues. Eric English contends, “The success … in challenging the dominant dialogue on homeland security politics points to efficacy of academic debate as a training ground.” Part of this training requires a “robust understanding of the switch-side technique” which “helps prevent misappropriation of the technique to bolster suspect homeland security policies” (English et. al, 2007, p. 224). Hence, competitive debate training provides foundation for interrogating these policies in public. Alarmism on the issues of war powers is easily demonstrated by Obama’s repeated attempts to transfer detainees from Guantanamo Bay. Republicans were able to launch a campaign featuring the slogan, “not in my backyard” (Schor, 2009). By locating the nexus of insecurity as close as geographically possible, the GOP were able to instill a fear of national insecurity that made deliberation in the public sphere not possible. When collegiate debaters translate their knowledge of the policy wonkery on such issues into public deliberation, it serves to cut against the alarmist rhetoric purported by opponents. In addition to combating misperceptions concerning detainee transfers, the investigative capacity of collegiate debate provides a constant check on governmental policies. A new trend concerning national security policies has been for the government to provide “status updates” to the public. On March 28, 2011, Obama gave a speech concerning Operation Odyssey Dawn in Libya and the purpose of the bombings. Jeremy Engels and William Saas describe this “post facto discourse” as a “new norm” where “Americans are called to acquiesce to decisions already made” (2013, p. 230). Contra to the alarmist strategy that made policy deliberation impossible, this rhetorical strategy posits that deliberation is not necessary. Collegiate debaters researching war powers are able to interrogate whether deliberation is actually needed. Given the technical knowledge base needed to comprehend the mechanism of how war powers operate, debate programs serve as a constant investigation into whether deliberation is necessary not only for prior action but also future action. By raising public awareness, there is a greater potential that “the public’s inquiry into potential illegal action abroad” could “create real incentives to enforce the WPR” (Druck, 2010, p. 236). While this line of interrogation could be fulfilled by another organization, collegiate debaters who translate their competitive knowledge into public awareness create a “space for talk” where the public has “previously been content to remain silent” (Engels & Saas, 2013, p. 231). Given the importance of presidential war powers and the strategies used by both sides of the aisle to stifle deliberation, the import of competitive debate research into the public realm should provide an additional check of being subdued by alarmism or acquiescent rhetorics. After creating that space for deliberation, debaters are apt to influence the policies themselves. Mitchell furthers, “Intercollegiate debaters can play key roles in retrieving and amplifying positions that might otherwise remain sedimented in the policy process” (2010, p. 107). With the timeliness of the war powers controversy and the need for competitive debate to reorient publicly, the CEDA/Miller Center series represents a symbiotic relationship that ought to continue into the future. Not only will collegiate debaters become better public advocates by shifting from competition to collaboration, the public becomes more informed on a technical issue where deliberation was being stifled. As a result, debaters reinvigorate debate.

#### Vote aff despite prior questions—impact timeframe means you gotta act on the best info available

Kratochwil, professor of international relations – European University Institute, 2008 (Friedrich, “The Puzzles of Politics,” pg. 200-213)

The lesson seems clear. Even at the danger of “fuzzy boundaries”, when we deal with “practice” ( just as with the “pragmatic turn”), we would be well advised to rely on the use of the term rather than on its reference (pointing to some property of the object under study), in order to draw the bounds of sense and understand the meaning of the concept. My argument for the fruitful character of a pragmatic approach in IR, therefore, does not depend on a comprehensive mapping of the varieties of research in this area, nor on an arbitrary appropriation or exegesis of any specific and self-absorbed theoretical orientation. For this reason, in what follows, I will not provide a rigidly specified definition, nor will I refer exclusively to some prepackaged theoretical approach. Instead, I will sketch out the reasons for which a pragmatic orientation in social analysis seems to hold particular promise. These reasons pertain both to the more general area of knowledge appropriate for praxis and to the more specific types of investigation in the field. The follow- ing ten points are – without a claim to completeness – intended to engender some critical reflection on both areas. Firstly, a pragmatic approach does not begin with objects or “things” (ontology), or with reason and method (epistemology), but with “acting” (prattein), thereby preventing some false starts. Since, **as historical beings placed in a** specific situations**, we do not have the luxury** of deferring decisions **until we have** found the “truth”, **we have to act and must do so always under time pressures and in the face of incomplete information.** Pre- cisely because the social world is characterised by strategic interactions, what a situation “is”, is hardly ever clear ex ante, because it is being “produced” by the actors and their interactions, and the multiple possibilities are rife with incentives for (dis)information. This puts a premium on quick diagnostic and cognitive shortcuts informing actors about the relevant features of the situ- ation, and on leaving an alternative open (“plan B”) in case of unexpected difficulties. Instead of relying on certainty and universal validity gained through abstraction and controlled experiments, we know that completeness and attentiveness to detail, rather than to generality, matter. To that extent, likening practical choices to simple “discoveries” of an already independently existing “reality” which discloses itself to an “observer” – or relying on optimal strategies – is somewhat heroic. These points have been made vividly by “realists” such as Clausewitz in his controversy with von Bülow, in which he criticised the latter’s obsession with a strategic “science” (Paret et al. 1986). While Clausewitz has become an icon for realists, only a few of them (usually dubbed “old” realists) have taken seriously his warnings against the misplaced belief in the reliability and use- fulness of a “scientific” study of strategy. Instead, most of them, especially “neorealists” of various stripes, have embraced the “theory”-building based on the epistemological project as the via regia to the creation of knowledge. A pragmatist orientation would most certainly not endorse such a position. Secondly, since acting in the social world often involves acting “for” someone, special responsibilities arise that aggravate both the incompleteness of knowledge as well as its generality problem. Since we owe special care to those entrusted to us, for example, as teachers, doctors or lawyers, we cannot just rely on what is generally true, but have to pay special attention to the particular case. Aside from avoiding the foreclosure of options, we cannot refuse to act on the basis of incomplete information or insufficient know- ledge, and the necessary diagnostic will involve typification and comparison, reasoning by analogy rather than generalization or deduction. Leaving out the particularities of a case, be it a legal or medical one, in a mistaken effort to become “scientific” would be a fatal flaw. Moreover, **there still remains the crucial element of “timing” –** of knowing when to act. Students of crises have always pointed out the importance of this factor but, in attempts at building a general “theory” of international politics analogously to the natural sci- ences, such elements are neglected on the basis of the “continuity of nature” and the “large number” assumptions. Besides, “timing” seems to be quite recalcitrant to analytical treatment.

#### Not constitutive of drone strikes – the impact is inevitable through other instances

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

Critics of US drone policy also decry the fact that drones enable US personnel to kill from a safe distance, which seems to be viewed as somehow “unsavory.” But long-distance killing” is neither something to automatically condemn nor something unique to drone technologies. Military commanders naturally seek ways to kill enemies without risking the lives of our own troops – and if drone technologies enable us to reduce the danger to our own personnel, all things being equal this is surely a good thing, not a bad thing. No one would argue that we should strip troops of body armor just to level the playing field. It is also important to consider drone strikes in the context of the evolution of warfare. After all, drones are hardly the only technology that has facilitated killing from a distance. In this sense, drones don't present any "new" issues not already presented by aerial bombing -- or by guns or bows and arrows, for that matter. The crossbow and later the long bow were considered immoral in their day. In 1139, the Second Lateran Council of Pope Innocent II is said to have "prohibit[ed] under anathema that murderous art of crossbowmen and archers, which is hateful to God.” 10 In the early 1600s, Cervantes took a similar view of artillery, which he called a "devilish invention" allowing "a base cowardly hand to take the life of the bravest gentleman," with bullets coming –like drones-- “nobody knows how or from whence." 11 Other critics have decried "the PlayStation mentality" created by drone technologies. I cannot see, however, that drones any more "video game-like" than, say, having cameras in the noses of cruise missiles. Regardless, there's little evidence that drone technologies "reduce" their operators' awareness of human suffering. If anything, drone operators may be far more keenly aware of the suffering they help inflict than any sniper or bomber pilot could be, precisely because the technology enables such clear visual monitoring. Increasingly, there is evidence that drone pilots, just like combat troops, can suffer from post-traumatic stress disorder. A recent Air Force study found that 29 percent of drone pilots suffered from "burnout," with 17 percent "clinically distressed." 12

#### The law works to minimize abuse in determining who gets to live and die

William E. Scheuerman 6, Professor of Political Science at Indiana University, Carl Schmitt and the Road to Abu Ghraib, Constellations, Volume 13, Issue 1

Yet this argument relies on Schmitt’s controversial model of politics, as outlined eloquently but unconvincingly in his famous Concept of the Political. To be sure, there are intense conflicts in which it is naïve to expect an easy resolution by legal or juridical means. But the argument suffers from a troubling circularity: Schmitt occasionally wants to define “political” conflicts as those irresolvable by legal or juridical devices in order then to argue against legal or juridical solutions to them. The claim also suffers from a certain vagueness and lack of conceptual precision. At times, it seems to be directed against trying to resolve conflicts in the courts or juridical system narrowly understood; at other times it is directed against any legal regulation of intense conflict. The former argument is surely stronger than the latter. After all, legal devices have undoubtedly played a positive role in taming or at least minimizing the potential dangers of harsh political antagonisms. In the Cold War, for example, international law contributed to the peaceful resolution of conflicts which otherwise might have exploded into horrific violence, even if attempts to bring such conflicts before an international court or tribunal probably would have failed.22¶ Second, Schmitt dwells on the legal inconsistencies that result from modifying the traditional state-centered system of international law by expanding protections to non-state fighters. His view is that irregular combatants logically enjoyed no protections in the state-centered Westphalian model. By broadening protections to include them, international law helps undermine the traditional state system and its accompanying legal framework. Why is this troubling? The most obvious answer is that Schmitt believes that the traditional state system is normatively superior to recent attempts to modify it by, for example, extending international human rights protections to individuals against states. 23 But what if we refuse to endorse his nostalgic preference for the traditional state system? Then a sympathetic reading of the argument would take the form of suggesting that the project of regulating irregular combatants by ordinary law must fail for another reason: it rests on a misguided quest to integrate incongruent models of interstate relations and international law. We cannot, in short, maintain core features of the (state-centered) Westphalian system while extending ambitious new protections to non-state actors.¶ This is a powerful argument, but it remains flawed. Every modern legal order rests on diverse and even conflicting normative elements and ideals, in part because human existence itself is always “in transition.” When one examines the so-called classical liberal legal systems of nineteenth-century England or the United States, for example, one quickly identifies liberal elements coexisting uneasily alongside paternalistic and authoritarian (e.g., the law of slavery in the United States), monarchist, as well as republican and communitarian moments. The same may be said of the legal moorings of the modern welfare state, which arguably rest on a hodgepodge of socialist, liberal, and Christian and even Catholic (for example, in some European maternity policies) programmatic sources. In short, it is by no means self-evident that trying to give coherent legal form to a transitional political and social moment is always doomed to fail. Moreover, there may be sound reasons for claiming that the contemporary transitional juncture in the rules of war is by no means as incongruent as Schmitt asserts. In some recent accounts, the general trend towards extending basic protections to non-state actors is plausibly interpreted in a more positive – and by no means incoherent – light.24¶ Third, Schmitt identifies a deep tension between the classical quest for codified and stable law and the empirical reality of a social world subject to permanent change: “The tendency to modify or even dissolve classical [legal] concepts…is general, and in view of the rapid change of the world it is entirely understandable” (12). Schmitt’s postwar writings include many provocative comments about what contemporary legal scholars describe as the dilemma of legal obsolescence. 25 In The Partisan, he suggests that the “great transformations and modifications” in the technological apparatus of modern warfare place strains on the aspiration for cogent legal norms capable of regulating human affairs (17; see also 48–50). Given the ever-changing character of warfare and the fast pace of change in military technology, it inevitably proves difficult to codify a set of cogent and stable rules of war. The Geneva Convention proviso that legal combatants must bear their weapons openly, for example, seems poorly attuned to a world where military might ultimately depends on nuclear silos buried deep beneath the surface of the earth, and not the success of traditional standing armies massed in battle on the open field. “Or what does the requirement mean of an insignia visible from afar in night battle, or in battle with the long-range weapons of modern technology of war?” (17).¶ As I have tried to show elsewhere, these are powerful considerations deserving of close scrutiny; Schmitt is probably right to argue that the enigma of legal obsolescence takes on special significance in the context of rapid-fire social change.26 Unfortunately, he seems uninterested in the slightest possibility that we might successfully adapt the process of lawmaking to our dynamic social universe. To be sure, he discusses the “motorization of lawmaking” in a fascinating 1950 publication, but only in order to underscore its pathological core.27 Yet one possible resolution of the dilemma he describes would be to figure how to reform the process whereby rules of war are adapted to novel changes in military affairs in order to minimize the danger of anachronistic or out-of-date law. Instead, Schmitt simply employs the dilemma of legal obsolescence as a battering ram against the rule of law and the quest to develop a legal apparatus suited to the special problem of irregular combatants.

#### “No value to life” doesn’t outweigh---prioritize existence because value is subjective

Torbjörn Tännsjö 11, the Kristian Claëson Professor of Practical Philosophy at Stockholm University, 2011, “Shalt Thou Sometimes Murder? On the Ethics of Killing,” online: http://people.su.se/~jolso/HS-texter/shaltthou.pdf

I suppose it is correct to say that, if Schopenhauer is right, if life is never worth living, then according to utilitarianism we should all commit suicide and put an end to humanity. But this does not mean that, each of us should commit suicide. I commented on this in chapter two when I presented the idea that utilitarianism should be applied, not only to individual actions, but to collective actions as well.¶ It is a well-known fact that people rarely commit suicide. Some even claim that no one who is mentally sound commits suicide. Could that be taken as evidence for the claim that people live lives worth living? That would be rash. Many people are not utilitarians. They may avoid suicide because they believe that it is morally wrong to kill oneself. It is also a possibility that, even if people lead lives not worth living, they believe they do. And even if some may believe that their lives, up to now, have not been worth living, their future lives will be better. They may be mistaken about this. They may hold false expectations about the future.¶ From the point of view of evolutionary biology, it is natural to assume that people should rarely commit suicide. If we set old age to one side, it has poor survival value (of one’s genes) to kill oneself. So it should be expected that it is difficult for ordinary people to kill themselves. But then theories about cognitive dissonance, known from psychology, should warn us that we may come to believe that we live better lives than we do.¶ My strong belief is that most of us live lives worth living. However, I do believe that our lives are close to the point where they stop being worth living. But then it is at least not very far-fetched to think that they may be worth not living, after all. My assessment may be too optimistic.¶ Let us just for the sake of the argument assume that our lives are not worth living, and let us accept that, if this is so, we should all kill ourselves. As I noted above, this does not answer the question what we should do, each one of us. My conjecture is that we should not commit suicide. The explanation is simple. If I kill myself, many people will suffer. Here is a rough explanation of how this will happen: ¶ ... suicide “survivors” confront a complex array of feelings. Various forms of guilt are quite common, such as that arising from (a) the belief that one contributed to the suicidal person's anguish, or (b) the failure to recognize that anguish, or (c) the inability to prevent the suicidal act itself. Suicide also leads to rage, loneliness, and awareness of vulnerability in those left behind. Indeed, the sense that suicide is an essentially selfish act dominates many popular perceptions of suicide. ¶ The fact that all our lives lack meaning, if they do, does not mean that others will follow my example. They will go on with their lives and their false expectations — at least for a while devastated because of my suicide. But then I have an obligation, for their sake, to go on with my life. It is highly likely that, by committing suicide, I create more suffering (in their lives) than I avoid (in my life).

#### Threats aren’t psychological projections -- political engagement key

Hoffman, 86 [Stanley, Center for European Studies at Harvard, “On the Political Psychology of Peace and War: A Critique and an Agenda,” Political Psychology 7.1 JSTOR]

The traditionalists, even when, in their own work, they try scrupulous-ly to transcend national prejudices and to seek scientific truth, believe that it is unrealistic to expect statesmen to stand above the fray: By definition, the statesmen are there to worry not only about planetary survival, but — first of all—about national survival and safety. To be sure, they ought to be able to see how certain policies, aimed at enhancing security, actually increase in-security all around. But there are sharp limits to how far they can go in their mutual empathy or in their acts (unlike intellectuals in their advice), as long as the states' antagonisms persist, as long as uncertainty about each other's intentions prevails, and as long as there is reason to fear that one side's wise restraint, or unilateral moves toward "sanity," will be met, not by the rival's similar restraint or moves, but either by swift or skillful political or military exploitation of the opportunity created for unilateral gain, or by a for-midable domestic backlash if national self-restraint appears to result in ex-ternal losses, humiliations or perceptions of weakness. There is little point in saying that the state of affairs which imposes such limits is "anachronistic" or "unrational." To traditionalists, the radicals' stance — condemnation from the top of Mount Olympus — can only impede understanding of the limits and possibilities of reform. To be sure, the fragmentation of mankind is a formidable obstacle to the solution of many problems that cannot be handled well in a national framework, and a deadly peril insofar as the use of force, the very distinctive feature of world politics, now entails the risk of nuclear war. But one can hardly call anachronistic a phenomenon—the assertion of national identity — that, to the bulk of [HU]mankind, appears not only as a necessity but also as a positive good, since humanity's fragmentation results from the very aspiration to self-determination. Many people have only recently emerged from foreign mastery, and have reason to fear that the alternative to national self-mastery is not a world government of assured fairness and efficiency, but alien domination. As for "unrationality," the drama lies in the contrast between the ra-tionality of the whole, which scholars are concerned about—the greatest good of the greatest number, in utilitarian terms — and the rationality or greatest good of the part, which is what statesmen worry about and are responsible for. What the radicals denounce as irrational and irresponsible from the viewpoint of mankind is what Weber called the statesman's ethic of responsibility. What keeps ordinary "competitive conflict processes" (Deutsch, 1983)— the very stuff of society — from becoming "unrational" or destructive, isprecisely what the nature of world politics excludes: the restraint of the partners either because of the ties of affection or responsibility that mitigate the conflict, or because of the existence of an outsider — marriage counselor, arbitrator, judge, policeman or legislator— capable of inducing or imposing restraints. Here we come to a third point of difference. The very absence of such safeguards of rationality, the obvious discrepancy between what each part intends, and what it (and the whole world) ends with, the crudeness of some of the psychological mechanisms at work in international affairs—as one can see from the statements of leaders, or from the media, or from inflamed publics—have led many radicals, especially among those whose training or profession is in psychoanalysis or mental health, to treat the age-old contests of states in terms, not of the psychology of politics, but of individual psychology and pathology. There are two manifestations of this. One is the tendency to look at nations or states as individuals writ large, stuck at an early stage of development (similarly, John Mack (1985) in a recent paper talks of political ideologies as carrying "forward the dichotomized structures of childhood"). One of my predecessors writes about "the correspondence between development of the individual self and that of the group or nation," and concludes "that intergroup or international conflict contains the basic elements of the conflict each individual experiences psychologically" (Volkan, 1985). Robert Holt, from the viewpoint of cognitive psychology, finds "the largest part of the American public" immature, in a "phase of development below the Conscientious" (Holt, 1984). The second related aspect is the tendency to look at the notions statesmen or publics have of "the enemy," not only as residues of childhood or adolescent phases of development, but as images that express "disavowed aspects of the self" (Stein, 1985), reveal truths about our own fears and hatreds, and amount to masks we put on the "enemy," because of our own psychological needs. Here is where the clash between traditionalists and radicals is strongest. Traditionalists do not accept a view of group life derived from the study of individual development or family relations, or a view of modern society derived from the simplistic Freudian model of regressed followers identifying with a leader. They don't see in ideologies just irra-tional constructs, but often rationally selected maps allowing individuals to cope with reality. They don't see national identification as pathological, as an appeal to the people's baser instincts, more aggressive impulses or un-sophisticated mental defenses; it is, as Jean-Jacques Rousseau so well understood, the competition of sovereign states that frequently pushes people from "sane" patriotism to "insane" nationalism (Rousseau's way of preventing the former from veering into the latter was, to say the least, im-practical: to remain poor in isolation). Nor do they see anything "primitive" in the nation's concern for survival: It is a moral and structural requirement. Traditionalists also believe that the "intra-psychic" approach distorts reality. Enemies are not mere projections of negative identities; they are often quite real. To be sure, the Nazis' view of the Jews fits the metaphor of the mask put on the enemy for one's own needs. But were, in return, those Jews who understood what enemies they had in the Nazis, doing the same? Is the Soviet domination of Eastern Europe, is the Soviet regime's treatment of dissidents, was the Gulag merely a convenient projection of our intrapsychic battles? Clichés such as the one about how our enemy "understands only force" may tell us a great deal about ourselves; but sometimes they contain half-truths about him, and not just revelations about us. Our fears flow not only from our private fantasies but also from concrete realities and from the fantasies which the international state of nature generates. In other words, the psychology of politics which traditionalists deem adequate is not derived from theories of psychic development and health; it is derived from the logic of the international milieu, which breeds the kind of vocabulary found in the historians and theorists of the state of nature: fear and power, pride and honor, survival and security, self-interest and reputation, distrust and misunderstanding, commitment and credibility. It is also derived from the social psychology of small or large groups, which resorts to the standard psychological vocabulary that describes mental mechanisms or maneuvers and cognitive processes: denial, projection, guilt, repression, closure, rigidity, etc.... But using this vocabulary does not imply that a group whose style of politics is paranoid is therefore composed of people who, as private individuals, are paranoid. Nor does it relieve us of the duty to look at the objective reasons and functions of these mental moves, and of the duty to make explicit our assumptions about what constitutes a "healthy," wise, or proper social process. Altogether, traditionalists find the mental health approach to world affairs unhelpful. Decisions about war and peace are usually taken by small groups of people; the temptation of analyzing their behavior either, literal-ly, in terms of their personalities, or, metaphysically, in terms borrowed from the study of human development, rather than in those of group dynamics or principles of international politics is understandable. But it is misleading. What is pathological in couples, or in a well-ordered community, is, alas, frequent, indeed normal, among states, or in a troubled state. What is malignant or crazy is usually not the actors or the social process in which they are engaged: it is the possible results. The grammar of motives which the mental health approach brands as primitive or immature is actually rational for the actors. to the substitution of labels for explanations, to bad analysis and fanciful prescriptions. Bad analysis: the tendency to see in group coherence a regressive response to a threat, whereas it often is a rational response to the "existential" threats entailed by the very nature of the international milieu. Or the tendency to see in the effacement or minimization of individual differences in a group a release of unconscious instincts, rather than a phenomenon that can be perfectly adaptive—in response to stress or threats—or result from governmental manipulation or originate in the code of conduct inculcated by the educational system, etc.. . The habit of comparing the state, or modern society, with the Church or the army, and to analyze human relations in these institutions in ways that stress the libidinal more than the cognitive and superego factors, or equate libidinal bonds and the desire for a leader. The view that enemies are above all products of mental drives, rather than inevitable concomitants of social strife at every level. Or the view that the contest with the rival fulfills inter-nal needs, which may be true, but requires careful examination of the nature of these needs (psychological? bureaucratic? economic?), obscures the objective reasons of the contest, and risks confusing cause and function. Indeed, such analysis is particularly misleading in dealing with the pre-sent scene. The radicals are so (justifiably) concerned with the nuclear peril that the traditional ways in which statesmen and publics behave seem to vindicate the pathological approach. But this, in turn, incites radicals to overlook the fundamental ambiguity of contemporary world politics. On the one hand, there is a nuclear revolution—the capacity for total destruction. On the other hand, many states, without nuclear weapons, find that the use of force remains rational (in terms of a rationality of means) and beneficial at home or abroad—ask the Vietnamese, or the Egyptians after October 1973, or Mrs. Thatcher after the Falklands, or Ronald Reagan after Grenada. The superpowers themselves, whose contest has not been abolished by the nuclear revolution (it is the stakes, the costs of failure that have, of course, been transformed), find that much of their rivalry can be conducted in traditional ways — including limited uses of force —below the level of nuclear alarm. They also find that nuclear weapons, while—perhapsunusable rationally, can usefully strengthen the very process that has been so faulty in the prenuclear ages: deterrence (this is one of the reasons for nuclear proliferation). The pathological approach interprets deterrence as expressing the deterrer's belief that his country is good, the enemy's is bad. This is often the case, but it need not be; it can also reflect the conviction that one's country has interests that are not mere figments of the imagination, and need to be protected both because of the material costs of losing them, and because of the values embedded in them. As for war planning, it is not a case of "psychological denial of unwelcome reality" (Montville, 1985). but a — perhaps futile, perhaps dangerous—necessity in a world where deterrence may once more fail. The prescriptions that result from the radicals' psychological approach also run into traditionalist objections. Even if one accepts the metaphors of collective disease or pathology, one must understand that the "cure" can only be provided by politics. All too often, the radicals' cures consist of perfectly sensible recommendations for lowering tensions, but fail to tell us how to get them carried out —they only tell us how much better the world would be, if only "such rules could be established" (Deutsch, 1983). Sometimes, they express generous aspirations — for common or mutual security—without much awareness of the obstacles which conflict-ing interests, fears about allies or clients, and the nature of the weapons themselves, continue to erect. Sometimes, they too neglect the ambiguity of life in a nuclear world: The much lamented redundancy of weapons, a calamity if nuclear deterrence fails, can also be a cushion against failure. Finally, many of the remedies offered are based on an admirable liberal model of personality and politics: the ideal of the mature, well-adjusted, open-minded person (produced by liberal education and healthy family relations) transposed on the political level, and thus accompanied by the triumph of democracy in the community, by the elimination of militarism and the spread of functional cooperation abroad. But three obstacles remain unconquered: first, a major part of the world rejects this ideal and keeps itself closed to it (many of the radicals seem to deny it, or to ignore it, or to believe it doesn't matter). Second, the record shows that real democracies, in their behavior toward non-democratic or less "advanced" societies, do not conform to the happy model (think of the US in Central America). Third, the task of reform, both of the publics and of the statesmen, through consciousness raising and education is hopelessly huge, incapable of being pursued equally in all the important states, and — indeed — too slow if one accepts the idea of a mortal nuclear peril. These, then, are the dimensions of a split that should not be minimized or denied

#### No risk of endless warfare

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7. A policy that favors preventive warfare expresses a futile quest for absolute security. It could do so. Most controversial policies contain within them the possibility of misuse. In the hands of a paranoid or boundlessly ambitious political leader, prevention could be a policy for endless warfare. However, the American political system, with its checks and balances, was designed explicitly for the purpose of constraining the executive from excessive folly. Both the Vietnam and the contemporary Iraqi experiences reveal clearly that although the conduct of war is an executive prerogative, in practice that authority is disciplined by public attitudes. Clausewitz made this point superbly with his designation of the passion, the sentiments, of the people as a vital component of his trinitarian theory of war. 51 It is true to claim that power can be, and indeed is often, abused, both personally and nationally. It is possible that a state could acquire a taste for the apparent swift decisiveness of preventive warfare and overuse the option. One might argue that the easy success achieved against Taliban Afghanistan in 2001, provided fuel for the urge to seek a similarly rapid success against Saddam Hussein’s Iraq. In other words, the delights of military success can be habit forming. On balance, claim seven is not persuasive, though it certainly contains a germ of truth. A country with unmatched wealth and power, unused to physical insecurity at home—notwithstanding 42 years of nuclear danger, and a high level of gun crime—is vulnerable to demands for policies that supposedly can restore security. But we ought not to endorse the argument that the United States should eschew the preventive war option because it could lead to a futile, endless search for absolute security. One might as well argue that the United States should adopt a defense policy and develop capabilities shaped strictly for homeland security approached in a narrowly geographical sense. Since a president might misuse a military instrument that had a global reach, why not deny the White House even the possibility of such misuse? In other words, constrain policy ends by limiting policy’s military means. This argument has circulated for many decades and, it must be admitted, it does have a certain elementary logic. It is the opinion of this enquiry, however, that the claim that a policy which includes the preventive option might lead to a search for total security is **not at all convincing**. Of course, folly in high places is always possible, which is one of the many reasons why popular democracy is the superior form of government. It would be absurd to permit the fear of a futile and dangerous quest for absolute security to preclude prevention as a policy option. Despite its absurdity, this rhetorical charge against prevention is a stock favorite among prevention’s critics. It should be recognized and dismissed for what it is, a debating point with little pragmatic merit. And strategy, though not always policy, **must be nothing if not pragmatic**.

#### Dismissing our reforms as tokenism creates a precedent that will be used by future presidents to implement more violent policies---creating norms within the rule of law is good.

Cole 10 (David Cole is a professor at Georgetown University Law Center, “Breaking Away,” http://www.newrepublic.com/article/magazine/politics/79752/breaking-away-obama-bush-aclu-guantanamo-war-on-terror)

To dismiss the changes Obama has introduced as merely rhetorical, however, as Goldsmith and others have done, is to miss the critical difference between lawless and law-abiding exercises of state power. The Constitution, domestic law, and international law permit democracies to take aggressive action to defend themselves against attacks like the ones we suffered on September 11. But they insist that when the state employs coercion to achieve security, it must abide by rules designed to forestall government abuse and respect human rights. Bush blatantly disregarded this principle; Obama has embraced it. It is true that, by the end of his term, Bush had been compelled to curtail his most aggressive assertions of power. Waterboarding was out, many of the disappeared prisoners had been transferred to Guantánamo and identified, the military commissions had been improved, and courts were reviewing Guantánamo detentions. But Bush adopted these changes grudgingly, after losing before the courts, Congress, and public opinion. And as the declassified torture memos illustrate, his administration continued to obstinately reinterpret the laws against torture and cruel, inhuman, and degrading treatment in order to permit the CIA to do precisely what Congress, the courts, and international law had forbade. By contrast, Obama has willingly accepted the limits of law. Critics on all sides undermine their credibility if they fail to acknowledge the significant differences between Obama and Bush. Liberals risk sounding as if no national security policy short of ordinary criminal law enforcement will suffice, while conservatives and moderates appear tone-deaf to the difference that the rule of law makes to the legitimacy of state power. For both advocates of civil liberties and defenders of Bush, it is tempting to accuse the Obama administration of being no better than its predecessor. But if we fail to recognize the changes he has instituted, we run the risk of contributing to a misleading historical narrative that will support future presidents who might choose to repeat Bush’s errors. On issues of executive power, history can play an important role. Even if Obama himself is unlikely to unleash the tactics of the previous administration, a future president might justify doing so by pointing to the fact that observers from across the political spectrum agreed that both Bush and Obama had embraced the same policy. There are, however, two areas in which Obama has come up painfully short, and that is on issues of transparency and accountability. These failures threaten to undermine the good that Obama has otherwise done, because if U.S. counterterrorism policy is to succeed, it is critical to restore the trust that Bush’s policies so recklessly squandered.

#### Casualties are way down and drones are far more precise than alternatives---our ev uses the best data

Michael Cohen 13, Fellow at the Century Foundation, 5/23/13, “Give President Obama a chance: there is a role for drones,” The Guardian, http://www.theguardian.com/commentisfree/2013/may/23/obama-drone-speech-use-justified

Drone critics have a much different take. They are passionate in their conviction that US drones are indiscriminately killing and terrorizing civilians. The Guardian's own Glenn Greenwald argued recently that no "minimally rational person" can defend "Obama's drone kills on the ground that they are killing The Terrorists or that civilian deaths are rare". Conor Friedersdorf, an editor at the Atlantic and a vocal drone critic, wrote last year that liberals should not vote for President Obama's re-election because of the drone campaign, which he claimed "kills hundreds of innocents, including children," "terrorizes innocent Pakistanis on an almost daily basis" and "makes their lives into a nightmare worthy of dystopian novels".

I disagree. Increasingly it appears that arguments like Friedersdorf makes are no longer sustainable (and there's real question if they ever were). Not only have drone strikes decreased, but so too have the number of civilians killed – and dramatically so.

This conclusion comes not from Obama administration apologists but rather, Chris Woods, whose research has served as the empirical basis for the harshest attacks on the Obama Administration's drone policy.

Woods heads the covert war program for the Bureau of Investigative Journalism (TBIJ), which maintains one of three major databases tabulating civilian casualties from US drone strikes. The others are the Long War Journal and the New America Foundation (full disclosure: I used to be a fellow there). While LWJ and NAJ estimate that drone strikes in Pakistan have killed somewhere between 140 and 300 civilians, TBIJ utilizes a far broader classification for civilians killed, resulting in estimates of somewhere between 411-884 civilians killed by drones in Pakistan. The wide range of numbers here speaks to the extraordinary challenge in tabulating civilian death rates.

There is little local reporting done on the ground in northwest Pakistan, which is the epicenter of the US drone program. As a result data collection is reliant on Pakistani news reporting, which is also dependent on Pakistani intelligence, which has a vested interest in playing up the negative consequences of US drones.

When I spoke with Woods last month, he said that a fairly clear pattern has emerged over the past year – far fewer civilians are dying from drones. "For those who are opposed to drone strikes," says Woods there is historical merit to the charge of significant civilian deaths, "but from a contemporary standpoint the numbers just aren't there."

While Woods makes clear that one has to be "cautious" on any estimates of casualties, it's not just a numeric decline that is being seen, but rather it's a "proportionate decline". In other words, the percentage of civilians dying in drone strikes is also falling, which suggests to Woods that US drone operators are showing far greater care in trying to limit collateral damage.

Woods estimates are supported by the aforementioned databases. In Pakistan, New America Foundation claims there have been no civilian deaths this year and only five last year; Long War Journal reported four deaths in 2012 and 11 so far in 2013; and TBIJ reports a range of 7-42 in 2012 and 0-4 in 2013. In addition, the drop in casualty figures is occurring not just in Pakistan but also in Yemen.

These numbers are broadly consistent with what has been an under-reported decline in drone use overall. According to TBIJ, the number of drone strikes went from 128 in 2010 to 48 in 2012 and only 12 have occurred this year. These statistics are broadly consistent with LWJ and NAF's reporting. In Yemen, while drone attacks picked up in 2012, they have slowed dramatically this year. And in Somalia there has been no strike reported for more than a year.

Ironically, these numbers are in line with the public statements of CIA director Brennan, and even more so with Senator Dianne Feinstein of California, chairman of the Select Intelligence Committee, who claimed in February that the numbers she has received from the Obama administration suggest that the typical number of victims per year from drone attacks is in "the single digits".

Part of the reason for these low counts is that the Obama administration has sought to minimize the number of civilian casualties through what can best be described as "creative bookkeeping". The administration counts all military-age males as possible combatants unless they have information (posthumously provided) that proves them innocent. Few have taken the White House's side on this issue (and for good reason) though some outside researchers concur with the administration's estimates.

Christine Fair, a professor at Georgetown University has long maintained that civilian deaths from drones in Pakistan are dramatically overstated. She argues that considering the alternatives of sending in the Pakistani military or using manned aircraft to flush out jihadists, drone strikes are a far more humane method of war-fighting.

#### Perm do both – policy is responsive and even if the alt is coopted it’s the only way to solve.

Kurki 2011

Milja, The Limitations of the Critical Edge: Reflections on Critical and Philosophical IR Scholarship Today, Principal Investigator of ‘Political Economies of Democratisation’, a European Research Council-funded project based at the International Politics Department, Aberystwyth University, Millennium: Journal of International Studies 40(1) 129–146 September 2011

We have yet another call to a new beginning, another meta-theoretical debate for the consumers of international relations theory. This is the easy part, and I support it as far as it goes. However, now it is time to move beyond introductions and openings to concrete applications, to the construction and illustration of viable alternatives. It is important that we proceed in this manner not because these alternatives are necessarily going to be ‘better’, closer to ‘truth’ or more ‘real’ in some sense than prevailing theoretical explanations; but in order to demonstrate the possibility of alternative – possibly, but not necessarily, superior – conceptualisations, that are otherwise widely held to be self-evident by the vast majority of scholars of IR.53 There have been many calls for more critical and philosophical debate in IR; yet, just how critical are all these debates and what effects do they have? What is the purpose of critical IR theory or philosophical reflection, and what is the purpose of the supposed theoretical diversity that the critical voices bring into IR? Many, in my view, misunderstand their purpose. Biersteker summarises my own view perfectly. The point of philosophical reflectionand post-positivism, he argues, is not to provide ‘pluralism without purpose, but a critical pluralism, designed to reveal embedded powerand authority structures, provoke critical scrutiny of dominant discourses, engage marginalised peoples and perspectives and provide a basis for alternative conceptualisations’.54 There is a purpose to critical theory that needs to be acknowledged, reflected upon and ‘practised’; both inside and outside academia. At present, it seems to me that relatively little such engagement takes place; not because critical theorists are ‘lazy’ or wrong-headed, butbecause the disciplinary environment and professional structures favour disassociation and depoliticisation even of these strands of thought. Strategic thinking of critical theorists is not missing, but it is oriented in such a way that does not facilitate real-world political changes. In the era of the expansion of the image of homo oeconomicus in academia too, much remains to be done in reinvigorating critical theoretical thought. At present, we have many theoretically sophisticated but practically disinvested scholars. This renders IR, and especially philosophical and critical theory within it, ratheruseless in challenging global structures and paradigms of domination. But what can we do about this? Arguably, revisions of conceptual categories and their political underpinnings, as well as spaces to think about alternatives, are needed more than ever. But how do we generate them, or, in Cox’s or Murphy’s words, how can IR academics help in generating such alternatives? We can do so in a few ways. We can do so by passing on the torch by continuing to teach critical theory: as Hoffman usefully reminds us, theorising itself (and passing it on through teaching) is a critical practice in itself.55 We can also do so today by continuing to fight the cuts to social science research in universities and the constriction of space for free thought within universities. We can also seek to obtain, but also seek to reshape, the kind of research funding that is provided by funding councils or states. This takes some perseverance, for it is not easy to argue for conceptual or philosophical engagement, let alone critical praxaeology, at a time of crisis or for reform within bureaucratic and conservative structures. Yet, this brings in another core aspect of the challenge faced by critical theorists, which is that we must also seek to engage with the world: to act in it as well as analyse it. We must engage the social groups and NGOs, but also the elites and bureaucrats. We can do so and we must try and do so; partly because these elites (and also NGO elites) are actually more well-meaning and evenreflective than many academics give them credit for; and because, in my experience, they are very capable of understanding both the pros and cons, limits and possibilities, of alternative frameworks and actions when concretely presented with them. This is not to say that significant structural and ideological constraints do not exist to generating alternative political scenarios – they do – but the structures are only partly, and in many cases only secondarily, supported, even by governmental or intergovernmental elites. These elites may be a good ally, rather than an enemy, in re-shifting international political and economic paradigms. The result of a new kind of engagement with the empirical and the practical is not necessarily a victory of critical theory; critical theory rarely – indeed never, it would seem – ‘wins’, that much is a clear lesson of history. Yet, it can occasionally activate, motivate and, indeed, ‘enthral’ people, as well as giving them hope and impetus to achieve change.Despite its sceptical outlook, critical and philosophical theory is still valuable in reminding us that, while it does not seem so, we do not live in a world without any alternatives.

## 1AR

### Heg

#### Opposition to how the international system has been constructed does not deny the truth-value of our case advantages. Personal dislike of the history, ontology, and epistemology of International Relations is irrelevant to the question of whether actions taken within the system we currently live in would be beneficial or not

Jarvis, 2000 (Darryl, Senior Lecturer in International Relations at the University of Sydney, INTERNATIONAL RELATIONS AND THE CHALLENGE OF POSTMODERNISM, p. 130)

Just because we acknowledge that the state is a socially fabricated entity, or that the division between domestic and international society is arbitrar­ily inscribed does not make the reality of the state disappear or render Invisible international politics. Whether socially constructed or objectively given, the argument over the ontological status of the state is of no par­ticular moment. Does this change our experience of the state or somehow diminish the political-economic-juridical-rnilitary functions of the state? To recognize that states are not naturally inscribed but dynamic entities continually in the process of being made and reimposed and are therefore culturally dissimilar, economically different, and politically atypical, while perspicacious to our historical and theoretical understanding of the state, in no way detracts from its reality, practices, and consequences. Similarly, few would object to Ashley's hermeneutic interpretivist understanding of the international sphere as an artificially inscribed demarcation. But, to paraphrase Holsti again, so what? This does not make its effects any less real, diminish its importance in our lives, of excuse us from paying serious attention to it. That intemational politics and states would not exist without subjectivities is a banal tautology. The point, surely, is to move beyond this and study these processes. Thus, while intellectualiy interesting, con-structivist theory is not an end point as Ashley seems to think, where we all throw up our hands and announce there are no foundations and all real­ity is an arbitrary social construction. Rather, it should be a means or rec­ognizing the structurated nature of our being and the reciprocity between subjects and structures through history. Ashley, however, seems not to want to do this, but only to deconstruct the state, international politics, and international theory on the basis that none of these is objectively given but fictitious entities that arise out of modernist pactices of representa­tion. While an interesting theoretical enterprise, it is of no great conse­quence to the study of international politics. Indeed, structuration theory has long taken care of these ontological dilemmas that otherwise seem to preoccupy Ashley.40

### GW

#### ---Apocalyptic framing is critical to mobilize climate activism.

Veldman 2012

Robin Globus, doctoral candidate in the Religion and Nature program at the University of Florida, Narrating the Environmental Apocalypse, Ethics & the Environment, Volume 17, Number 1, Spring

Some of the strongest evidence of a connection between environmental apocalypticism and activism comes from a national survey that examined whether Americans perceived climate change to be dangerous. As part of his analysis, Anthony Leiserowitz identified several “interpretive communities,” which had consistent demographic characteristics but varied in their levels of risk perception. The group who perceived the risk to be the greatest, which he labeled “alarmists,” described climate change [End Page 5] using apocalyptic language, such as “Bad…bad…bad…like after nuclear war…no vegetation,” “Heat waves, it’s gonna kill the world,” and “Death of the planet” (2005, 1440). Given such language, this would seem to be a reasonable way to operationalize environmental apocalypticism. If such apocalypticism encouraged fatalism, we would expect alarmists to be less likely to have engaged in environmental behavior compared to groups with moderate or low levels of concern. To the contrary, however, Leiserowitz found that alarmists “were significantly more likely to have taken personal action to reduce greenhouse gas emissions” (ibid.) than respondents who perceived climate change to pose less of a threat. Interestingly, while one might expect such radical views to appeal only to a tiny minority, Leiserowitz found that a respectable eleven percent of Americans fell into this group (ibid). Further supporting Leiserowitz’s findings, in a separate national survey conducted in 2008, Maibach, Roser-Renouf, and Leiserowitz found that a group they labeled “the Alarmed” (again, due to their high levels of concern about climate change) “are the segment most engaged in the issue of global warming. They are very convinced it is happening, human-caused, and a serious and urgent threat. The Alarmed are already making changes in their own lives and support an aggressive national response” (2009, 3, emphasis added). This group was far more likely than people with lower levels of concern over climate change to have engaged in consumer activism (by rewarding companies that support action to reduce global warming with their business, for example) or to have contacted elected officials to express their concern. Additionally, the authors found that “[w]hen asked which reason for action was most important to them personally, the Alarmed were most likely to select preventing the destruction of most life on the planet (31%)” (2009, 31)—a finding suggesting that for many in this group it is specifically the desire to avert catastrophe, rather than some other motivation, that encourages pro-environmental behavior. Taken together, these and other studies (cf. Semenza et al. 2008 and DerKarabetia, Stephenson, and Poggi 1996) provide important evidence that many of those who think environmental problems pose a severe threat practice some form of activism, rather than giving way to fatalistic resignation. National surveys give a good overview of the association between apocalypticism and activism among the general public, but they do not [End Page 6] provide sufficient ethnographic detail. To complement this broader picture I now turn to case studies, which provide greater insight into how adherents themselves understand what motivates their environmental behavior. When seeking a subset of environmentalists with apocalyptic beliefs, the radical wing is an obvious place to look. For example, many Earth First!ers believe that the collapse of industrial society is inevitable (Taylor 1994). At the same time, the majority are actively committed to preventing ecological disaster. As Earth First! co-founder Howie Wolke acknowledged, the two are directly connected: “As ecological calamity unravels the living fabric of the Earth, environmental radicalism has become both common and necessary” (1989, 29).3 This logic underlies efforts to preserve wilderness areas, which many radical environmentalists believe will serve as reservoirs of genetic diversity, helping to restore the planet after industrial society collapses (Taylor 1994). In addition to encouraging activism to preserve wilderness, apocalyptic beliefs also motivate practices such as “monkeywrenching,” or ecological sabotage, civil disobedience, and the more conventional “paper monkeywrenching” (lobbying, engaging in public information campaigns to shift legislative priorities, or using lawsuits when these tactics fail). Ultimately, while there are disagreements over what strategies will best achieve their desired goals, for most radical environmentalists, apocalypticism and activism are bound closely together. The connection between belief in impending disaster and environmental activism holds true for Wiccans as well. During fieldwork in the southeastern United States, for example, Shawn Arthur reported meeting “dozens of Wiccans who professed their apocalyptic millenarian beliefs to anyone who expressed interest, yet many others only quietly agreed with them without any further elaboration” (2008, 201). For this group, the coming disaster was understood as divine retribution, the result of an angry Earth Goddess preparing to punish humans for squandering her ecological gifts (Arthur 2008, 203). In light of Gaia’s impending revenge, Arthur found that Wiccans advocated both spiritual and material forms of activism. For example, practices such as Goddess worship, the use of herbal remedies for healing, and awareness of the body and its energies were considered important for initiating a more harmonious relationship with the earth (Arthur 2008, 207). As for material activism, Arthur notes [End Page 7] that the notion of environmental apocalypse played a key role in encouraging pro-environmental behavior: images of immanent [sic] ecological crisis and apocalyptic change often were utilized as motivating factors for developing an environmentally and ecologically conscious worldview; for stressing the importance of working for the Earth through a variety of practices, including environmental activism, garbage collecting, recycling, composting, and religious rituals; for learning sustainable living skills; and for developing a special relationship with the world as a divine entity. (2008, 212) What these studies and my own experiences in the environmentalist milieu4 suggest is that people who make a serious commitment to engaging in environmentally friendly behavior, people who move beyond making superficial changes to making substantial and permanent ones, are quite likely to subscribe to some form of the apocalyptic narrative. All this is not to say that apocalypticism directly or inevitably causes activism, or that believing catastrophe is imminent is the only reason people become activists. However, it is to say that activism and apocalypticism are associated for some people, and that this association is not arbitrary, for there is something uniquely powerful and compelling about the apocalyptic narrative. Plenty of people will hear it and ignore it, or find it implausible, or simply decide that if the situation really is so dire there is nothing they can do to prevent it from continuing to deteriorate. Yet to focus only on the ability of apocalyptic rhetoric to induce apathy, indifference or reactance is to ignore the evidence that it also fuels quite the opposite—grave concern, activism, and sometimes even outrage. It is also to ignore the movement’s history. From Silent Spring (Carson [1962] 2002) to The Limits to Growth (Meadows et al 1972) to The End of Nature (McKibben 1989), apocalyptic arguments have held a prominent place within environmental literature, topping best-seller lists and spreading the message far and wide that protecting the environment should be a societal priority. Thus, while it is not a style of argument that will be effective in convincing everyone to commit to the environmental cause (see Feinberg and Willer 2011), there does appear to be a close relationship between apocalyptic belief and activism among a certain minority. The next section explores the implications of that relationship further. [End Page 8]

### FW

#### The policymaking framework should come first – simulation is key to influence state policy and is key to agency

Eijkman 12 (The role of simulations in the authentic learning for national security policy development: Implications for Practice / Dr. Henk Simon Eijkman. [electronic resource] <http://nsc.anu.edu.au/test/documents/Sims_in_authentic_learning_report.pdf>. Dr Henk Eijkman is currently an independent consultant as well as visiting fellow at the University of New South Wales at the Australian Defence Force Academy and is Visiting Professor of Academic Development, Annasaheb Dange College of Engineering and Technology in India)

However, whether as an approach to learning, innovation, persuasion or culture shift, **policy simulations derive their power from** two central features: **their combination of simulation and gaming** (Geurts et al. 2007). 1. The simulation element: **the unique combination of simulation with role-playing.The unique simulation/role-play mix enables participants to create possible futures relevant to the topic being studied**. **This is diametrically opposed to the more traditional**, teacher-centric **approaches in which a future is produced for them. In policy simulations, possible futures are much more than an object of tabletop discussion** and verbal speculation. ‘**No other technique allows a group of participants to engage in collective action in a safe environment to create** and analyse **the futures they want to explore’** (Geurts et al. 2007: 536). 2. **The game element:** the interactive and tailor-made modelling and design of the policy game. The actual run of the policy simulation is only one step, though a most important and visible one, in a collective process of investigation, communication, and evaluation of performance. In the context of a post-graduate course in public policy development, for example**, a policy simulation is a dedicated game constructed in collaboration with practitioners to achieve a high level of proficiency** in relevant aspects of the policy development process. To drill down to a level of finer detail, policy development simulations—as forms of interactive or participatory modelling— **are particularly effective in developing participant knowledge** and skills in the five key areas of the policy development process (and success criteria), namely: Complexity, Communication, Creativity, Consensus, and Commitment to action (‘the five Cs’). The capacity to provide effective learning support in these five categories has proved to be particularly helpful in strategic decision-making (Geurts et al. 2007). Annexure 2.5 contains a detailed description, in table format, of the synopsis below.

#### Best data confirms our argument

Eijkman 12 (The role of simulations in the authentic learning for national security policy development: Implications for Practice / Dr. Henk Simon Eijkman. [electronic resource] <http://nsc.anu.edu.au/test/documents/Sims_in_authentic_learning_report.pdf>. Dr Henk Eijkman is currently an independent consultant as well as visiting fellow at the University of New South Wales at the Australian Defence Force Academy and is Visiting Professor of Academic Development, Annasaheb Dange College of Engineering and Technology in India)

This is where simulations have come into their own. The operative word is ‘have’, as **there is a substantive record of success**, which will be shown below. The point is that **simulations have demonstrated the capacity** either singularly, or in combination with other learning methods, **for dealing effectively with the learning demands posed by public policy development**; and this is **not just** at post-graduate level **in universities, but at the highest echelons of American military leaders and policymaker**s (see for example Brewer, 1984; Beriker & Druckman, 1996; Babus, Hodges & Kjonnerod, 1997; Andreozzi, 2002McCown, 2005 and attached reading list in Annexure 2.10). **Policy development simulations are effective in meeting the learning needs of both early career and highly experienced practitioners. Simulations help them to deal more proficiently with a complex mix of** highly adaptive, interdependent, and **interactive** socio-technical, political, and economic **systems; their often** uncertain systemic reactions; and their **unpredictable** unexpected and undesired **effects** (Glouberman & Zimmerman, 2002; Jacobsen, & Wilensky, 2006; Bekebrede, 2010; van Bilsen, Bekerede & Mayer, 2010)

### Law

#### Law good

#### --Hegemony of the rule of law is inevitable- only a question of if we strive to make it more just for others

Williams 09 (Daniel R. Williams, Associate Professor, Northeastern University School of Law, AVERTING A LEGITIMATION CRISIS AND THE PARADOX OF THE WAR ON TERROR, 17 Mich. St. J. Int'l L. 493)

But more importantly, regardless how one reacts to the particulars of Mattei and Nader's analysis of the historical and contemporary record, [\*550] or to the thesis about the dark side of the rule of law that is generated by that analysis, we are reminded, just by encountering the arguments in Plunder, of the crucial need, as we struggle against terrorism, to attend to issues of global distributional justice. The War on Terror may demand the integration of law and strategy, as Bobbitt rightly argues, with due attention to all the technical matters associated with that endeavor. But the War on Terror is ultimately not a matter for the experts. Global justice is everyone's concern, especially now. No discussion of the War on Terror can even pretend to be comprehensive without some reckoning with the fact that "[n]inety percent of the total wealth of the planet remains in the hands of just one percent of the planet's inhabitants," and the situation is worsening without any signs of abating. 297 With the global free flow of capital that makes this distributional nightmare possible comes the equally potent reality that "there is nowhere one can escape to." 298 Bobbitt's impressively scholastic treatment of the problems associated with the War on Terror fails to give even a nod to the ancient formulation, "If you want peace, care for justice." 299 And that is no accident, for Bobbitt's agenda, which is slow to emerge in the 600-plus pages of his book, is to portray terrorism as a deadly virus threatening states of consent like the United States and to offer ways of improving our immunization defenses. 300 This flawed and simplistic imagery obscures the fact that his proposals are calculated to improve the ability of the United States to prosecute this War on Terror so that it can achieve unchallengeable domination in the neoliberal world order populated with "market states of consent." There is good reason to believe--and the other books considered here are warnings of this--that such an agenda will only set the stage for catastrophe.

#### ---Judicial review is good and solves the k --- Lays bear the inevitable workings of sovereignty while the alternative masks it behind a new philosopher king.

Borislavov 2005

Rad, Ph.D. Candidate at Syracuse, August 2005, Debatte, Vol. 13, No. 2, p. 181-183

I would like to take a step back and consider what Agamben has implicitly silenced in this overarching and totalizing genealogy of modernity. In a recent article in the Boston Review, Larry Kramer points to the falling fortunes of popular constitutionalism in the US. While the history of popular constitutionalism in the US is quite rich and complex it also allows us to glimpse at how liberal constitutionalism deals with the problem of sovereignty. The division of powers in the liberal state notwithstanding, in recent years it has become the rule that the Supreme Court has assumed the role of interpreting the constitution for everyone else. In Kramer’s words, ‘‘The president, Congress, the states, and ordinary citizens can all express opinions about the meaning of the Constitution. But the Justices decide whether those opinions are right or wrong, and the Justices’ judgments are supposed to settle matters for everyone’’ (14). The doctrine of judicial supremacy, which was historically opposed to the departmentalist view, summarizes this state of affairs, and might be usefully approximated to what Schmitt defined as the effective and only apparent emptying out of the political in liberal democracy while the need for eminently political decisions remains very much in force. The fundamental question is: Who interprets the constitution? Kramer points out that the debates about the relative advantages of departmentalism and judicial supremacy go back to the 1790s and only recently has judicial supremacy come to dominate interpretations of the constitution. If we assume that, barring Agamben’s fundamentally new ontology, sovereignty still plays an important role, then we need to attend to the difficulties associated with this predicament. The more mundane question would be who and how exercises power. Liberalism is certainly not toothless, nor is it incapable of decision (as US interventions amply show), it simply presents its intentions in the garb of universalism and good will but the problem of sovereignty is by no means wished away in the doctrine of the separation of powers. That no social order can sustain itself without a sovereign was clear enough to conservative thinkers since the Enlightenment. Thus, in an effort to put in perspective Agamben’s teleology and his apocalyptic messianic language, we might offer the following objection: ‘‘a liberal theory of sovereign power understands full well the paradoxical relation between law and fact, norm and exception; and, precisely in light of such an understanding constructs an institutional system that cannot resolve the paradox but nonetheless attempts to prevent it from reaching an intensified and catastrophic conclusion’’ (501). Agamben will insist, of course, as Nasser Hussain rightly observes, that we are stuck with the very same assumption with which we began: ‘‘the source of the problem is not the institutional operation of sovereign power, but its object—bare life—so too the solution is not a proliferation of institutional safeguards but a rethinking of that mode of being’’ (501). My argument so far has been informed by the assumption that we need to read Schmitt both selectively and against many of his assertions, and despite the efforts of critics like Heinrich Meier who have attempted to present an essentially religious Schmitt, Schmitt retains only a very attenuated form of theology in his conceptual framework. For the Schmitt of Political Theology and the Verfassungslehre, it is of utmost importance who makes the decision on the exception, and not the ontological structure of the decision that Agamben tries to explicate. The necessity for a strong sovereign in Schmitt is indeed buttressed on a theological reference that acts by analogy (the miracle as analogous to the sovereign decision) but the thrust of the argument is concerned with the prosaic and immediate effects of power. It is conceivable that the rulings of the Supreme Court, to the extent that they remain unchallenged, approximate the decisions of a sovereign, of the one who decides on the exception, behind the veil of a broadly determined consensus, or Schmitt’s favorite image of the bourgeoisie as the clasa discutidora, the class that endlessly discusses. Agamben himself would not be averse to such a view because the rulings certainly bring out the zone of indistinction between law and fact, as well as the groundlessness of decision making constitutive of modernity. The question, however, is what is to be done about it? In his zeal to reveal the essence of potentiality and the role of constituting power, to bare the origins of an ontology that has defined the experience of power in the West but also to work toward the coming of a new one, Agamben inadvertently casts himself in the role of a philosopher king. The paradoxical conclusion, given Agamben’s insistence on ontology (he complains about ‘‘the meager propensity of our time for ontology’’) (The Coming Community 89) and the equation of ontology with biopolitics, is that we must make the guardians philosophers after they have duly internalized Agamben’s delphic pronouncements. How else is one to move from the oppression of ubiquitous sovereignty to whatever singularity without invoking the compromised potentiality of constituting power as revolution? It is interesting, and again paradoxical, that Agamben’s philosopher appeals to a sovereign on behalf of his new ontology, that is, to the developed Western democracies. If power continues to be exercised sovereignly what difference would a new ontology really make? Isn’t that what Heidegger attempted to do in his Rectoral address, although of course with a completely different political purpose? But for Agamben, a thinker who has chosen to dwell in uncertainties and ambiguities, the proximity of a disastrous outcome authorized by a possible new ontology and a truly new beginning is what is most intellectually satisfying.

### Agamben

#### --Simulating the law is good- key to confront disciplinary power

Kulynych 97, Professor of Political Science at Winthrop University, ‘97 (Jessica, Winter, “Performing Politics: Foucault, Habermas, and Postmodern Participation” Polity, Vol 30 No 2, p 315-346, JSTOR)

Performative resistance recognizes disciplinary power, enables action in the face of that power, enables innovation in deliberation, and thus allows us to see the world of political action differently. Consequently, it is possible, and more meaningful, to conceptualize contemporary participation as a performative rather than a representative action. The failure to reconceptualize political participation as resistance furthers an illusion of democratic control that obscures the techniques of disciplinary power and their role in global strategies of domination. Fundamentally missing the real, although much more humble, opportunities for citizens to "take part" in their own "governance." Accepting the idea of participation as resistance has two broad implications that fundamentally transform the participation debate. First, it widens the parameters of participation to include a host of new actors, activities, and locations for political action. A performative concept redirects our attention away from the normal apparatus of government and economy, and therefore 'allows us to see a much broader range of political actions. Second, it requires that we look anew at traditional participatory activities and evaluate their performative potential.

#### Agamben’s rejection of all law as inherently violent is based on misreadings of political theory and false generalizations – not all law is violent, and we shouldn’t assume that it is

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28. All this explains why Agamben chooses to focus on the decisionistic tradition (Hobbes, Heidegger, Schmitt). With it, he wants to isolate the pure essences of all juridical orders and thus highlight the essential violence structuring traditional politics. Since the law essentially appears as a production and capture of bare life, the political order that enunciates and maintains the law is essentially violent, always threatening the bare life it has produced with total annihilation. Auschwitz is the real outcome of all normative orders. 29. The problem with this strategic use of the decisionistic tradition is that it does not do justice to the complex relationship that these authors establish between violence and normativity, that is, in the end the very normative nature of their theories. In brief, they are not saying that all law is violent, in essence or in its core, rather that law is dependent upon a form of violence for its foundation. Violence can found the law, without the law itself being violent. In Hobbes, the social contract, despite the absolute nature of the sovereign it creates, also enables individual rights to flourish on the basis of the inalienable right to life (see Barret-Kriegel 2003: 86). 30. In Schmitt, the decision over the exception is indeed "more interesting than the regular case", but only because it makes the regular case possible. The "normal situation" matters more than the power to create it since it is its end (Schmitt 1985: 13). What Schmitt has in mind is not the indistinction between fact and law, or their intimate cohesion, to wit, their secrete indistinguishability, but the origin of the law, in the name of the law. This explains why the primacy given by Schmitt to the decision is accompanied by the recognition of popular sovereignty, since the decision is only the expression of an organic community. Decisionism for Schmitt is only a way of asserting the political value of the community as homogeneous whole, against liberal parliamentarianism. Also, the evolution of Schmitt’s thought is marked by the retreat of the decisionistic element, in favour of a strong form of institutionalism. This is because, if indeed the juridical order is totally dependent on the sovereign decision, then the latter can revoke it at any moment. Decisionism, as a theory about the origin of the law, leads to its own contradiction unless it is reintegrated in a theory of institutions (Kervégan 1992). 31. In other words, Agamben sees these authors as establishing a circularity of law and violence, when they want to emphasise the extra-juridical origin of the law, for the law’s sake. Equally, Savigny’s polemic against rationalism in legal theory, against Thibaut and his philosophical ally Hegel, does not amount to a recognition of the capture of life by the law, but aims at grounding the legal order in the very life of a people (Agamben 1998: 27). For Agamben, it seems, the origin and the essence of the law are synonymous, whereas the authors he relies on thought rather that the two were fundamentally different.