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### Plan

#### Plan:  The United States Federal Judiciary should conduct judicial ex post review of United States’ targeted killing operations, 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.

#### Commanders are adapting to litigation to maintain unit cohesion – they will instill the rule of law to lower level officers in order to build a stable chain of command

Dunlap 9 (Charles J., Major General, USAF, is Deputy Judge Advocate General, Headquarters U.S. Air Force, “Lawfare: A Decisive Element of 21st-Century Conflicts?” Joint Force Quarterly – issue 54, 3d

 quarter 2009, www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA515192‎)

Of course, the availability of expert legal advice is absolutely necessary in the age of lawfare. The military lawyers (judge advocates) responsible for providing advice for combat operations need schooling not only in the law, but also in the characteristics of the weapons to be used, as well as the strategies for their employment. Importantly, commanders must make it unequivocally clear to their forces that they intend to conduct operations in strict adherence to the law. Helping commanders do so is the job of the judge advocate. Assuring troops of the legal and moral validity of their actions adds to combat power. In discussing the role of judge advo- cates, Richard Schragger points out: Instead of seeing law as a barrier to the exercise of the clients power, [military lawyers] understand the law as a prerequisite to the meaning- ful exercise of power.... Law makes just wars possible by creating a well-defined legal space within which individual soldiers can act without resorting to their own personal moral codes}\* That said, commanders should aim not to have a judge advocate at the elbow of every rifleman, but rather to imbue troops with the right behaviors so they instinctively do the right thing on the battlefield. The most effective way is to carefully explain the enemy's lawfare strategies and highlight the pragmatic, real-world impact of Abu Ghraib-type incidents on the overall success of the mission. One of the most powerful motivators of troop conduct is the desire to enhance the security of fellow soldiers. Making the connection between adherence to law and troop safety is a critical leader- ship task. Integral to defensive lawfare operations is the education of the host nation population and, in effect, the enemy themselves. In many 21\*-century battlespaces, these audiences are not receptive to what may appear as law imposed by the West. In 1999, for example, a Chinese colonel famously argued that China was "a weak country, so do we need to fight according to your rules? No. War has rules. but those rules arc set by the West……[I]f you use those rules, then weak countries have no chance." To counter such beliefs, it is an essential lawfare technique to look for touchstones within the culture of the target audience. For example, in the early 1990s, the International Committee of the Red Cross produced an illustrated paperback that matched key provi- sions of the Geneva Convention "with bits of traditional Arab and Islamic wisdom!\*" Such innovations ought to be reexamined, along with creative ideas that would get the messages to the target audience. One way might be to provide audio cassettes in local languages that espouse what arc really Geneva Convention values in a context and manner that tit with community religious and cultural imperatives. The point is to delegitimize the enemy in the eyes of the host nation populace. This is most effectively accomplished when respected indigenous authorities lead the effort. Consider Thomas Friedman's favor- able assessment to the condemnation by Indian Muslim leaders to the November 2008 Mumbai attacks: The only effective way to stop (terrorism) is tor "the village"—the Muslim community itself— to say "no more" When a culture and a faith community delegitimize this kind of behavior, openly, loudly and consistently, it is more impor- tant than metal detectors or extra police.\* Moreover, it should not be forgotten that much of the success in suppressing violence in Iraq was achieved when Sunnis in Anbar Province and other areas realized that al Qaeda operatives were acting contrary to Iraqi, and indeed Islamic, sensibilities, values, and law. It also may be possible to use educa- tional techniques to change the attitudes of enemy lighters as well. Finally, some critics believe that "lawfare\* is a code to condemn anyone who attempts to use the courts to resolve national security issues. For example, lawyer-turned- journalist Scott Horton charged in the luly 2007 issue ot Harper's Magazine that "lawfare theorists\* reason that lawyers who present war-related claims in court "might as well be terrorists themselves."™ Though there are those who object to the way the courts have been used by some litigants.\*0 it is legally and morally wrong to paint anyone legitimately using legal processes as the "enemy." Indeed, the courageous use of the courts on behalf of unpopular clients, along with the insistence that even our vilest enemies must be afforded due process of law. is a deeply embedded American value, and the kind of principle the Armed Forces exist to preserve. To be clear, recourse to the courts and other legal processes is to be encouraged: if there are abuses, the courts are well equipped to deal with them. It is always better to wage legal battles, however vicious, than it is to fight battles with the lives of young Americans. Lawfare has become such an indel- ible feature of 21st-century conflicts that commanders dismiss it at their peril. Key leaders recognize this evolution. General James Jones. USMC (Ret.), the Nation's new National Security Advisor, observed several years ago that the nature of war has changed. "It's become very legalistic and very complex." he said, adding that now "you have to have a lawyer or a dozen."\*' Lawfare. of course, is about more than lawyers, it is about the rule of law and its relation to war. While it is true, as Professor Eckhardt maintains, that adherence to the rule of law is a "center of gravity" for democratic societ- ies such as ours—and certainly there arc those who will try to turn that virtue into a vulnerability—we still can never forget that it is also a vital source of our great strength as a nation." We can—and must—meet the chal- lenge of lawfare as effectively and aggressively as we have met every other issue critical to our national security.

### 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 help restore confidence in military justice. The notion –that soldiers are superior to civilians was not, of course, invented in the late 20th-century, but historians and legal scholars alike have remarked on this recent trend. Robert L. Goldich casts the post-modern army as staffed with legionnaires rather than citizen-soldiers. Andrew J. Bacevich sees the relatively new “warrior-professional” as standing above, not with, his or her civilian counterpart. Diane H. Mazur considers judicial deference to the military a misguided constitutional doctrine that undermines military professionalism itself. To end the sexual assaults that have eroded confidence in military justice, we need to consider whether our service members, and our nation, are well served by leaving all decisions about crime and punishment entirely in the hands of those in uniform. Civilian authorities should help shoulder the burdens of having a professional armed force by participating in the process of investigating and prosecuting service members' misconduct. Shrinking military jurisdiction so that some crimes committed by service members are prosecuted by civilian courts could help disrupt the isolated culture of the military and educate civilians about military life. If an alleged rape, robbery, or drunk driving offense were prosecuted by civil authorities, military resources could be conserved for military operations, training, and discipline rather than spent on criminal investigation, prosecution and punishment. Even a modest shift in the direction of civil authority would signal the military's openness to change and progress, as well as its essential connection to civil law and government.

#### 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.

#### Advantage \_\_\_\_\_ 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.”

#### And we're reaching a tipping point, uncontrolled warming will annihilate all life if we allow the oceans to continue absorbing CO2.

Reuters 2010 "Oceans Choking on CO2, Face Deadly Changes: Study" http://www.reuters.com/article/idUSTRE65H0LI20100618?feedType=RSS&feedName=environmentNews&utm\_source=feedburner&utm\_medium=feed&utm\_campaign=Feed%3A+reuters%2Fenvironment+%28News+%2F+US+%2F+Environment%29

Oceans were rapidly warming and acidifying, water circulation was being altered and dead zones within the ocean depths were expanding, said the report. There has also been a decline in major ocean ecosystems like kelp forests and coral reefs and the marine food chain was breaking down, with fewer and smaller fish and more frequent diseases and pests among marine organisms. "If we continue down this pathway we get into conditions which have no analog to anything we've experienced," said Hoegh-Guldberg, director of the Global Change Institute at The University of Queensland. Hoegh-Guldberg said oceans were the Earth's "heart and lungs", producing half of the world's oxygen and absorbing 30 percent of man-made carbon dioxide. "We are entering a period in which the very ocean services upon which humanity depends are undergoing massive change and in some cases beginning to fail," said Hoegh-Guldberg. "Quite plainly, the Earth cannot do without its ocean. This is further evidence that we are well on the way to the next great extinction event." More than 3.5 billion people depend on the ocean for their primary source of food and in 20 years this number could double, the report's authors say. The world's climate has remained stable for several thousand years, but climate change in the past 150 years is now forcing organisms to change rapidly -- changes that through evolution would normally take a long time, said the report. "We are becoming increasingly certain that the world's marine ecosystems are approaching tipping points. These tipping points are where change accelerates and causes unrelated impacts on other systems," said co-author marine scientist John F. Bruno at the University of North Carolina. Last week, the head of the United Nations Environment Program, Achim Steiner, said it was crucial the world responded to the loss of coral reefs, forests and other ecosystems "that generate multi-trillion dollar services that underpin all life-including economic life-on Earth".

#### Litigation is sufficient to solve effective energy regulation on carbon emissions

Osofsky 11 (Hari M., Ph.D. in Law @ the University of Minnesota Law School, “The Role of Climate Change Litigation in Establishing the Scale of Energy Regulation,” Annals of the Association of American Geographers, 101:4, 775-782)

Implications of Rescaling Through Litigation for the Challenges of Energy Regulation This section draws from the legal dynamic federal- ism literature and the geography literature on scale to explore how the rescaling function of climate change litigation can assist with energy' regulation's challenges. These two streams of scholarship have significant syn- ergies. The dynamic federalism literature argues that models that create more fluid allocation of regulatory authority grapple with complex problems like energy and climate change more effectively than rigid demar- cations do (Osofsky 2005; Engel 2006; Ruhl and Sab- man 2010). The geography literature focusing on issues of fixity and fluidity in scale engages the complex re- lationships that cross-cut particular levels (Delaney C\* Leitner 1997; Swyngedouw 1997; Brenner 1998; Cox 1998; Judd 1998; Smith 1998; Martin 1999; Paasi 2004; Wood 2005; Osofsky 2009, 2010a). Cox's exploration of a network theory of scale, in particular, helps to cap- ture the dynamic nature of relationships among the ties to a particular level and movement among levels (Cox 1998; Osofsky 2009). These dual insights regarding the need for fluid reg- ulatory approaches and the cross-scalar quality of be- havior taking place at particular levels illuminate the role that this litigation does and can play in advanc- ing more effective energy regulation. First, litigation provides a mechanism for bringing greater fluidity into legal interactions, which helps create needed move- ment across scales and spaces (Osofsky 2009, 2010a). Although the four case examples varied significantly, they all provided opportunities for scalar contestation among a wide range of actors and a moment at which legal scale disputes were resolved. Although this reso- lution might not always favor the proregulatory stance, as it did in these four cases, litigation's opportunity for contestation helps to overcome the scalar and spatial fixity of law that makes effective energy regulation so difficult. Second, the lawsuits allow for simultaneous inter- actions within and across levels of governance. In so doing, they create regulatory diagonals that assist in reordering a landscape dominated by horizontal inter- actions at a particular level and vertical interactions among key actors and institutions at different levels. As the four case examples demonstrate, these diag- onal interactions vary in different lawsuits and over time along the dimensions of size (large vs. small), axis (vertical vs. horizontal), hierarchy (top-down vs. bottom-up), and cooperativeness (cooperation vs. con- flict). For example, the first two conflicts evolved from small-scale actors uniting horizontally and pushing in a conflictual fashion vertically from the bottom up for legal change into larger scale, top-down, coopera- tive policy scheme (Osofsky forthcoming). This evolv- ing diagonal regulatory function makes these lawsuits a helpful tool in crafting more effective cross-cutting regulation. Moreover, the fluidity and diagonal interactions that these lawsuits bring to energy' regulation have broader implications for future executive and legislative action. The Obama administration has continuing opportu- nities as it attempts to green energy policy to create lawmaking processes that maximize fluidity and possi- bilities for diagonal interactions. It has already made strides on this score, such as through the process it used to craft the National Program or through the Clean Energy Leadership Group the EPA has established, but further opportunities abound (Osofsky forthcoming). Law and geography analyses, like the one in this arti- cle, help to frame how such approaches might be crafted most effectively within the constraints of law's fixity. Geography's deep engagement of fixity and fluidity, to- gether with dynamic federalism's rigorous exploration of institutional possibilities, can provide the basis for creative, cross-cutting policy approaches that engage the complexities of scale. Such creativity is needed in the face of the significant challenges facing green energy regulation.

## 2AC

### Jaffer

#### 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 have often said that** even the mere prospect of judicial review deters error and abuse.

### Sig Strikes

#### The plan would result in a balanced definition of imminence. The court would apply a standard that still allows decapitation of high value targets and out-of-battlefield operations– Hamdi proves

Kwoka 11 (Lindsay, J.D. UPenn, “TRIAL BY SNIPER: THE LEGALITY OF TARGETED KILLING IN THE WAR ON TERROR” Accessed at HeinOnline)

But this is not the end of the inquiry. Even if a targeted individual is not located on a field of battle, he may still be a threat, and tar- geted killing may potentially be necessary and appropriate in some circumstances. Applying the reasoning of" Hamdi here, a court would likely find that the use of targeted killing is only "necessary and ap- propriate" if it is the only way to prevent someone like Al-Awlaki from engaging in terrorist activity or otherwise harming the United States. The Hamdi Court was concerned with assuring that the executive used the least intrusive means in achieving its objective of preventing the enemy combatant from returning to battle. The Court made clear that the means used to achieve this objective should be no more intrusive than necessary.7\* It is consistent with the Court's concern to allow targeted killing only when it is the only means available to pre- vent harm to the United States. If the executive can demonstrate that an individual outside of a warzone will harm the United States unless he is killed, targeted kill- ing may be authorized. This is consistent with Hamdi, in which the main concern was preventing future harm to the United States while using the least intrusive means available. This is also consistent with U.S. criminal law, in which the executive branch is permitted to kill an individual if there is no peaceful means left to apprehend him. Such an approach is also consistent with the approach of the Su- preme Court. Even the most stalwart protectors of constitutional rights of alleged terrorists recognize that immediate action by the executive is at times necessary to prevent attacks.7'' An approach that al- lows the executive to use deadly force when it is the only available means of preventing harm effectively balances the need to protect citizen's constitutional rights while affording sufficient deference to the executive.

### Navy DA

#### Navy spending inevitable- Rising powers and budget cuts

Gibbons-Neff 13

[Thomas, Free Beacon, Expert: U.S. Naval Supremacy Is in Trouble, 8/1/13, <http://freebeacon.com/expert-u-s-naval-supremacy-is-in-trouble/>]

Former U.S. Deputy Undersecretary of the Navy Seth Cropsey told an audience at the Heritage Foundation Thursday afternoon that American sea power and global projection is “in trouble.” Cropsey appeared at Heritage to highlight the release of his new book Mayday: The Decline of American Naval Supremacy. Michaela Dodge, policy analyst of defense and strategic policy at the Heritage Foundation, highlighted the current plight of U.S. naval forces before Cropsey’s speech. Under current sequestration cuts, the Navy will be reduced from approximately 285 ships to 195 in the next thirty years, Dodge said. While Cropsey was quick to criticize sequestration’s effects on U.S. Naval power, his main focus was the looming threat posed by China. Cropsey highlighted the fact that the last Maritime strategic review was conducted over six years ago and did not mention China at all. “The 2007 strategy did not mention China, not once.” Cropsey said. “The Chinese have made it clear that its policy is to deny the United States access to the Western Pacific.” “China’s military budget continues to grow … in double percentage points each year,” Cropsey added. With countries in various stages of unrest, Cropsey pointed to the fact that countries **like** Iran, China, and Russia have already begun projecting naval power in various parts of the globe. Cropsey pointed to the fact that Russia is in the process of having a permanent twelve-ship presence in the Mediterranean Sea. With rival countries encroaching on American sea power Cropsey lamented the state of the U.S. 6th fleet—the group of ships responsible for Mediterranean operations. “The Eastern Med has reverted back to instability… and the U.S. 6th Fleet … that once composed of two carrier battle groups, today consists of a command ship based in Italy and three [surface ships],” Cropsey said. Cropsey also stressed the threat of the recently tested DF-21D a Chinese anti-ship ballistic missile designed to destroy large surface ships from over 1,200 miles away.

#### Specifically – takes out their training link

Carroll 13

[Chris, Stars and Stripes, A key to US power threatened by budget woes, Navy secretary says, 9/11/13, http://www.stripes.com/blogs/stripes-central/stripes-central-1.8040/a-key-to-us-power-threatened-by-budget-woes-navy-secretary-says-1.240607]

“Presence is what the Navy and Marine Corps are about,” he said. Toward Syria, “the nation had immediate options because of our immediate presence.” Federal budget problems, however, threaten the future of that presence, he warned. The automatic cuts known as sequestration, which could take $500 billion out of planned defense spending over a decade, are forcing the Navy to put off ship maintenance and may even halt much shipbuilding if elected officials don’t head off the cuts in coming years, Mabus said. Training is also being reduced, he said, and sailors will begin deploying without full training in 12 to 18 months. “Through no fault of their own, they will be less ready to face whatever comes over the horizon,” he said. “We’re rapidly reaching the point where no amount of hard work, no amount of innovation, no anything will allow us to get this training back and maintain the readiness that’s required.”

#### Environmental restrictions don’t hurt the Navy – their impacts are overblown

London 9 -- J.D. Candidate, 2011 @ Denver Univ Law School (Ian K, 2009, "Comment: Winter v. National Resources Defense Council: Enabling the Military's Ongoing Rollback of Environmental Legislation," 87 Denv. U.L. Rev. 197, L/N)

First, the Court deferred to the Navy's claim that no evidence connected the forty years of SOCAL exercises with a single sonar-related injury to a marine mammal. n94 Yet, the Navy itself admitted that the exercises would affect approximately 80,000 marine mammals, some of which would be severely injured or killed. n95 In fact, in 2000, the Navy and NOAA Fisheries conducted an investigation into a mass marine mammal stranding event in the Bahamas. n96 The report concluded that the seventeen marine mammals were driven onto shore by injuries from underwater acoustic sources. n97 The report connected those injuries to a series of contemporaneous Navy MFA sonar exercises, and the Navy pledged to be more careful in the future. n98 The evidence that the use of MFA sonar causes mass marine mammal strandings and deaths is "overwhelming," and the Navy was well aware of it. n99 It is surprising, then, that the Court deferred to the Navy's assertion that there would be no irremediable damage to the environment. It is difficult to think of an injury less remediable than the death of any number of marine mammals. By contrast, the Navy's probable injuries in the case of a mid-training sonar shutdown are quite remediable. A mid-exercise MFA sonar shutdown would delay the completion of the exercise, and would undoubtedly raise costs, but it would not make completion of the exercise impossible. n100 The Navy mischaracterized this inconvenience as an irremediable injury, and the effect on marine mammals as negligible. The majority accepted this mischaracterization at face value. Second, the Court observed that the injunction's shutdown provision would amount to a hundredfold increase in the surface area of the shutdown zone. n101 However, at the Navy's urging, the Court disregarded the observation that this MFA sonar shutdown zone is roughly the same size as the Navy's existing long-frequency active ("LFA") sonar shutdown zone. n102 The Court, perhaps humbled by the Navy's chastisement [\*207] of the Ninth Circuit, declined to explore the effect on the training exercises of congruent MFA/LFA shutdown zones. n103 By deferring to the Navy's unsubstantiated claim that MFA sonar and LFA sonar are irreconcilably dissimilar in terms of the effect of the technology on marine mammals, n104 the Court failed to consider a range of factors that could have shown the burden to be smaller than the Navy asserted it to be. Third, the Court deferred to the Navy regarding the power-down provision. The Court correctly recognized the Navy's important interest in training under surface ducting conditions when they exist. n105 Presumably, however, the conditions that conceal enemy submarines also conceal marine mammals. In other words, when surface ducting conditions exist, the Navy must be just as vigilant in avoiding marine mammals as it is in looking for enemy submarines. As Justice Breyer argued, the Court could have imposed the Ninth Circuit's provisional injunction, requiring the Navy to power down the sonar in proportion to the proximity of marine mammals to the vessel. n106 Justice Breyer's compromise would allow the Navy to continue training, while mitigating the injury to nearby marine mammals. Fourth, the Court deferred to the Navy regarding the connection between the SOCAL training exercises and national security. The Navy asserted that the injunctions would jeopardize national security. n107 This conclusion was an exaggeration. The injunctions issued by the district court would not make training exercises impossible; they would merely cause delay and disruption. n108 Also, the injunctions applied to training exercises in SOCAL waters, and not to Navy actions generally. n109 The Navy also argued the injunction would create "an unacceptable risk to the Navy's ability to train for essential overseas operations at a time when the United States is engaged in war in two countries." n110 This assertion was also an exaggeration. While the United States was indeed at war in Iraq and in Afghanistan, none of the United States' adversaries in those countries fielded a naval force--let alone the advanced "silent submarines" that MFA sonar was designed to detect. The Navy failed to explain the connection between adequate sonar training and combat readiness against these land-based, non-state forces. The Navy failed to explain how a delay in sonar training presented an "unacceptable risk" to [\*208] ground forces in Iraq and Afghanistan. n111 The Navy also failed to explain how the injunction affected the combat readiness of already-deployed forces, other than underlining the importance of fleet-wide integration. n112 Professor Burke refers to such unsubstantiated claims as "thought-terminating cliches." n113

#### The plan opens the door to successful challenges of active Sonar-key internal link to whale and marine biodiversity

Times Tribune 11/24/13

http://thetimes-tribune.com/news/health-science/sonar-tests-hazardous-to-sea-life-1.1589369

Sonar tests hazardous to sea life

Q: I understand the Navy is doing sonar testing and training in the oceans and that their activities will likely kill hundreds, if not thousands, of whales and other marine mammals. What can be done to stop this? A: Active sonar is a technology used on ships to aid in navigation, and the Navy tests and trains with it extensively in American territorial waters. The Navy also conducts missile and bomb testing in the same areas. But environmentalists and animal advocates contend that this is harming whales and other marine wildlife, and are calling on the Navy to curtail such training and testing exercises accordingly. "Naval sonar systems work like acoustic floodlights, sending sound waves through ocean waters for tens or even hundreds of miles to disclose large objects in their path," reports the nonprofit Center for Biological Diversity. "But this activity entails deafening sound: even one low-frequency active sonar loudspeaker can be as loud as a twin-engine fighter jet at takeoff." According to the CBD, sonar and other military testing can have an especially devastating effect on whales, given how dependent they are on their sense of hearing for feeding, breeding, nursing, communication and navigation. The group adds that sonar can also directly injure whales by causing hearing loss, hemorrhages and other kinds of trauma, as well as drive them rapidly to the surface or toward shore. In 2007, a U.S. appeals court sided with the Natural Resources Defense Council, which had contended that Navy testing violated the National Environmental Policy Act, Marine Mammal Protection Act and Endangered Species Act. But within three months of this ruling, then-President George W. Bush exempted the Navy, citing national security reasons. The exemption was subsequently upheld by the Supreme Court upon challenge, and the Navy released estimates that its training exercises scheduled through 2015 could kill upward of 1,000 marine mammals and seriously injure another 5,000. But in September a federal court in California sided with green groups in a lawsuit charging that the National Marine Fisheries Service failed to protect thousands of marine mammals from Navy warfare training exercises in the Northwest Training Range Complex along the coasts of California, Oregon and Washington. As a result, the NMFS must reassess its permits to ensure that the Navy's activities comply with protective measures under the Endangered Species Act. The ruling will no doubt be challenged. Also, the Navy still has the green light to use sonar and do weapons testing off the East Coast.

#### Extinction

Cousteau-Ocean Futures Society-13

http://www.divermag.com/protecting-the-songs-of-the-sea/

Protecting the Songs of the Sea

The sea is not a silent world. There are songs in the ocean that must be heard. Some are just whispers, but meaningful ones. Listen to the diverse repertoire of sounds and songs as you dive beneath the surface of the sea. The haunting calls of the blue whales can travel across thousands of miles of ocean. This is only one of many songs of the seas, including passionate arias of humpback whales, the staccato survey of the dolphin and the territorial pounding of the drum fish. It is a world of aquatic operas, where animals must make sense of the sounds to find food and each other, and to avoid danger. Acoustic Holocaust But now the ocean is threatened by what has been called an “acoustic holocaust”: the blasting of the sea with sound. In addition to the high-intensity, mid-range sounds that military operations already produce, Navies of the world are now experimenting with Low Frequency Active sonar system (LFA). LFA generates extremely loud sounds to detect silent submarines at great distances. These sounds can flood entire ocean basins. Scientists claim that the noise from a single LFA test off of California coast was detected across the entire North Pacific Basin. Recent controversy also has been brewing off the central coast of California. Proposed underwater seismic testing on California’s Diablo Canyon Nuclear Power Plant has prompted widespread concern about the issue of global high-energy seismic testing and the implications of increasing noise pollution in the world’s oceans. The Diablo Canyon Nuclear Power Plant is an electricity-generating nuclear power plant that provides energy to nearly three million California residents. Built in the early 1970s along a geological fault line, the power plant has had a long history of controversy with respect to both environmental impact and residential safety. Numerous new fault lines running both onshore and offshore to the Diablo Canyon power plant have been identified, some as recently as 2008. After the devastating 2011 Fukushima earthquake and subsequent power plant failure, concerns have increased over the safety and necessity of the Diablo Canyon power plant. In an attempt to mitigate concerns, owners of the Diablo Canyon power plant, the Pacific Gas and Electric Company (PG&E), have chosen to mount an extensive seismic testing survey in the hopes of obtaining detailed 3D images of the fault zones near the plant. PG&E plans to submerge underwater air cannons that will detonate blasts of 250 decibels every 10 to 20 seconds in three areas of the Pacific over 33 days. These blasts are equivalent to the detonation of an atomic bomb and will kill or otherwise impact tens of thousands of marine animals, including Pacific Gray Whales. Considering the extent to which the marine world uses sound, particularly the twenty-five species of marine mammals that reside within California’s coastal waters, the air cannon blasts will have detrimental effects to animals within 250 square nautical miles of each of the air cannon sites. Whales, dolphins, porpoises, seals and sea lions that are not killed by the immediate blast will likely suffer slow deaths, as impairment to their extremely sensitive hearing will result in an inability to find food or navigate underwater. I have spent a great deal of time studying and learning about the lives of gray whales with my Ocean Futures Society team. Once hunted to the brink of extinction, these amazing animals have been able to recover, and now thrive within California’s waters. Ocean Futures Society, in co-production with KQED, spent a year filming gray whales for the PBS Special, ‘Gray Whale Obstacle Course’. This special offers insight into the lives of these beautiful animals. However, high energy seismic testing poses a huge risk to these whales, and all others that inhabit our coastal waters.The desire to produce more energy from oil and gas deposits beneath the sea floor has led large energy corporations to extend their search further into the ocean. As a result, high-energy seismic testing has become increasingly common throughout the ocean, and international concern about the potentially harmful effects on marine life has increased. Physical Trauma With the dawn of the industrial age and the subsequent spread of globalization, humans have been filling the oceans with more noise than ever before. The massive increase in the amount of commercial shipping traffic, high-energy seismic testing for underwater oil and gas reserves, as well as the military’s use of Low Frequency Active (LFA) sonar, have impacted and killed thousands of whales and dolphins throughout the world already. Locations as wide spread as the Bahamas, the Canary Islands, and Norway have all seen deaths that have been directly attributed to the use of high-intensity seismic testing or military sonar, as these animals have been found with trauma or brain injuries consistent with high-impact sounds. Numerous studies have also found bubbles in the tissues of beached whales and dolphins following exposure to active sonar testing and scientists suggest that the booming and explosive sounds of high-energy testing may be causing frightened marine mammals to ascend quickly to the surface, making them vulnerable to the harmful effects of decompression sickness and deadly gas bubbles in their bodies. Sound, which travels five times faster in water than in air, is one of the most vital and valuable sensory abilities used by marine mammals in the ocean. Many rely extensively on sound to hunt, navigate, and otherwise communicate with one another underwater. Sperm whales, for example, utilize their massive bulbous heads to emit low-frequency clicking noises to locate their prey thousands of feet below the surface. The increasing use of naval sonar and other high-energy testing by humans greatly interferes with the whale’s ability to hunt. Examination of the ear bones of dead sperm whales have been shown to contain pits and lesions, which have led scientists to believe that these animals likely suffered chronic decompression sickness during the course of their lives. After being on the brink of extinction from whalers in the 18th century, sperm whales, like the Gray whale and most other whale species, have slowly been making a comeback. The continued use of high-energy testing seriously threatens the future of these magnificent animals. Instant Devastation Fisheries around the world have also felt the devastating consequences of high-energy testing in the ocean. After a single air cannon array, fisheries along the Norwegian coast saw a 40% to 80% plummet in Pacific cod and haddock fisheries and had to seek monetary compensation in the wake of the noxious testing. Seismic testing has also been proposed along the U.S. east coast, and fears from commercial and recreational fisherman continue as the testing could have detrimental effects on the sustainability of their fisheries. Eve of Destruction Across the world, scientists are aiming to better understand the impact of high-intensity testing on the future of marine mammals, fish and other valuable organisms in our seas. High-intensity sonar, seismic air guns, and explosions related to industrial or military activities are the some of the loudest sounds humans have ever created. They threaten the sustainability of life in the ocean. The high-energy seismic testing proposed by the Diablo Canyon Power Plant poses an enormous risk to the lives of thousands of marine animals along California’s central coast and serves to illustrate the danger of allowing destructive high-intensity testing to continue. The enormous amount of noise pollution we are pumping into the ocean has far-reaching consequences, not only for the marine mammals, fish, and other organisms of the sea, but also for the entire marine ecosystem as a whole. It is our responsibility as citizens and stewards of our water planet to let our voices be heard in opposition against these destructive practices.

### Contractors

#### Removal of the political question doctrine is necessary to allow liability tort suits against private military contractors

Kuhn 12 (Kaelin, The Catholic University of America, Columbus School of Law; B.A., 2006., “COURTS HAVE ANSWERS TO THE MILITARY CONTRACTORS’ SO-CALLED POLITICAL QUESTIONS RAISED IN CARMICHAEL V. KELLOGG, BROWN & ROOT SERVICES, INC.” 61 Cath. U.L. Rev. 593, <http://iissonline.net/courts-have-answers-to-the-military-contractors-so-called-political-questions-raised-in-carmichael-v-kellogg-brown-root-services-inc/>)

III. ANSWERS EXIST TO THE POLITICAL QUESTIONS RAISED BY THE MILITARY CONTRACTOR’S ACTIONS IN CARMICHAEL Facially, the Eleventh Circuit’s rationale for its holding in Carmichael appears compelling. n148 The court, unable to devise a framework by which it could resolve the plaintiffs claims given the extent to which military decisions influenced the contractor’s challenged conduct, n149 sought to avoid second-guessing decisions requiring military expertise. n150 [\*614] However, the Eleventh Circuit’s decision in Carmichael raises serious concerns. n151 Most troubling is the implication that the court’s decision could preclude the legislative and the executive branches from making policy determinations as provided by the Constitution. The Eleventh Circuit should have followed the Supreme Court’s reasoning in Boyle v. United Technologies Corp. and avoided resolving Carmichael on the issue of the political question doctrine. n152 If the district court later needed to resolve the political-question issue, it could have directed the trier of fact to determine whether the contractor acted reasonably within the parameters of the military’s control. n153 Additionally, the court could have used tort law to adjudicate Carmichael’s claim on the merits. n154 A. Using the Political Question Doctrine to Exclude Cases Involving Military Contractors from Judicial Review Could Frustrate the Purpose of the Doctrine Each suit brought against military contractors performing services in Iraq and Afghanistan has the potential to implicate significant interests of the U.S. government. n155 For example, the government generally hopes to avoid any “second-guess[ing]” by the judiciary, and wants to ensure the safety of service members and contractors. n156 These interests must be balanced against those relating to contractors’ exercise of appropriate care when performing contracts. n157 The implications of the Eleventh Circuit’s decision in Carmichael could significantly undermine the ability of Congress and the President to create a fair system for military-contractor liability that appropriately takes into account the interests of the country. n158 The issue of whether the political question doctrine is a general constitutional constraint, n159 a prudential constraint, n160 or some combination of [\*615] the two therefore remains unsettled. n161 The source of the limitation has important implications: Congress may eliminate prudential constraints by legislation, but lacks the power to statutorily remove constitutional limitations. n162 In Carmichael, the Eleventh Circuit’s application of the doctrine upon finding a “textually demonstrable constitutional commitment of the issue to a coordinate political department” weighs heavily in favor of the doctrine being constitutional. n163 The court’s holding in Carmichael could potentially limit the ability of the political branches to determine how best to impose liability on military contractors. n164 To illustrate Carmichael’s potentially harmful implications, assume that the Supreme Court affirmed the Eleventh Circuit’s holding and rationale in Carmichael. Assume further that Congress considered it within the best interest of the country to override the Supreme Court’s decision by statutorily providing that any soldier injured by the negligent actions of a military contractor operating in a foreign country can sue that contractor for negligence in a federal court. Despite Congress’s intent to subject military contractors to liability, the political question doctrine–as a constitutional constraint–would require courts to dismiss all suits brought under the new statute that are factually similar to Carmichael. n165 This outcome would frustrate the most basic and compelling rationale for the political question doctrine in that it would preclude the legislative and the executive branches from making policy determinations as provided by the Constitution. n166 B. Courts Should Resolve Suits on the Basis of the Political Question Doctrine Only as a Last Resort In Boyle v. United Technologies Corp., although the case appeared to warrant a discussion of the political question doctrine, the Court avoided the [\*616] doctrine altogether, instead dismissing the case on statutory grounds. n167 Given the significant implications of resolving a suit on constitutional grounds, the Eleventh Circuit should have followed the Supreme Court’s decision in Boyle and remanded Carmichael with instructions to continue the litigation. n168 If the case settled, or if the trier of fact found for KBR, then the district court would not have had to address the political-question issue. Only if the trier of fact found in favor of the plaintiff would the district court have been required to consider the political question doctrine. As demonstrated below, even if the courts needed to resolve the political-question issue raised in Carmichael, they could have done so without dismissing the suit. n169 C. The Negligence Claim in Carmichael Should Have Been Decided Without Reviewing Decisions Constitutionally Committed to Other Branches The Eleventh Circuit’s decision in McMahon provides a sound framework for assessing the applicability of the first Baker test. n170 According to the court, for a contractor to invoke the first Baker test as a successful defense of nonjusticiability, the contractor must meet a double burden by showing that (1) [\*617] the case would “require reexamination of a decision by the military” n171 and (2) “the military decision at issue is . . . insulated from judicial review.” n172 Regarding the first prong of the “double burden,” courts can still entertain a case like Carmichael while avoiding having to judge the prudence of the military’s guidelines. n173 The United States, in its amicus brief, suggested: It may be possible for the trial court to factor military standards and orders into the inquiry as external facts to be taken as a given, such that the trier of fact would not be required to question the wisdom of military judgments. Under such an approach, the jury could conclude that Irvine failed to behave in a reasonable manner within the parameters established by the military. For example, one could envision such a result if [Carmichael] was able to prove that Irvine was not paying attention when he took the . . . curve. n174 The government’s suggested scope of analysis would be a prudent approach to examine cases like Carmichael, and would allow courts to avoid invoking the first Baker test in cases in which the contractor’s alleged wrongful conduct is intertwined with military decision making. D. Tort Law Provides Manageable Standards for Assessing the Plaintiff’s Claims in Carmichael The Fifth Circuit in Lane provided a sensible judicial framework that could have been used to render a decision in Carmichael. The Fifth Circuit assessed the elements of negligence to determine whether a court could adjudicate a case without calling into question decisions made by the military. n175 A typical negligence claim in Georgia n176 requires that plaintiffs satisfy the following four [\*618] elements: (1) a duty to meet a standard of care; (2) breach of that duty; (3) causation between the breach and injury; and (4) damages. n177 Regarding the applicable standard of care, the Carmichael court correctly identified the standard as “what a reasonable driver subject to military control over his exact speed and path would have done.” n178 Under that standard of care–which recognizes the parameters set by the military–a jury would be capable of determining whether Irvine acted in a reasonable manner. n179 The Eleventh Circuit determined that the trier of fact could not assess the reasonableness of the contractor’s action in light of the standard of care because the accident occurred in a war zone–a context outside of typical everyday experiences. n180 The court reasoned that this prevented the trier of fact from relying on familiar benchmarks to evaluate the case. n181 The court improperly assumed that just because the trier of fact may lack certain “touchstones,” the court also lacks standards to manage the case. n182 On the contrary, courts frequently grapple with questions of what a reasonable person would do under challenging circumstances, such as cases involving medical malpractice or complex patent litigation. n183 Like many other cases, attorneys can present these issues using appropriate evidence, such as expert witnesses’ [\*619] testimony, n184 in such a way as to assist the trier of fact in understanding and resolving the issues. n185 The Eleventh Circuit also suggested that the suit presented an unmanageable standard because “the dangerousness of the circumstances under which Irvine was driving . . . render[ed] problematic any attempt to answer basic questions about duty and breach.” n186 The court emphasized that the “potentially life threatening” circumstances surrounding the accident distinguished the case from an ordinary experience where ordinary negligent standards could be applied. n187 However, the court’s attempt to distinguish life-threatening activities as beyond the scope of judicial review stands juxtaposed to prior case law in which federal courts often reviewed tort actions involving potentially life-threatening actions in other contexts. n188 In addition to determining that no manageable standards existed to judge the contractor’s actions, the Eleventh Circuit in Carmichael also found that the plaintiffs would be unable to prove the causation element without raising a nonjusticiable political question, but failed to articulate why this would be the case. n189 State law allows a plaintiff to recover so long as at least one of multiple tortfeasors was the proximate cause of the plaintiffs injury. n190 Additionally, the court can “factor military standards and orders into the inquiry as external facts to be taken as a given.” n191 Therefore, no principled reason seems to exist to explain why the element of causation would necessarily raise political-question concerns. [\*620] IV. CONCLUSION Courts should only consider the political question doctrine as a last resort. Even assuming the Eleventh Circuit in Carmichael needed to resolve the issue, it should have found that the case did not present a political question. The court could have assessed the contractor’s actions within the military’s parameters without passing judgment on the prudence of those parameters themselves. Traditional tort law provides sufficient standards for the court to adjudicate the claims presented in Carmichael. The United States has many reasons to shield military contractors from some liability while they provide services in support of war efforts. However, deciding cases like Carmichael on constitutional grounds could severely limit the ability of the legislative and executive branches to weigh the interests of the country and determine how best to impose liability on military contractors.

#### Lack of PMC accountability and liability undercuts counterinsurgency and withdrawal efforts in Afghanistan which results in instability

Schwartz 6/22/10 (Moshe, Specialist in Defense Acquisition, “The Department of Defense’s Use of Private Security Contractors in Iraq and Afghanistan: Background, Analysis, and Options for Congress” Can the Use of PSCs Undermine US Efforts?, Congressional Research Service)

According to the Army Field Manual on counterinsurgency, one of the fundamental tenets of counterinsurgency operations—such as those undertaken in Iraq and Afghanistan—is to establish and maintain security while simultaneously winning the hearts and minds of the local population. Abuses by security forces, according to the manual, can be a major escalating factor in insurgencies.46 Abuses committed by contractors, including contractors working for other U.S. agencies, can also strengthen anti-American insurgents.47 There have been published reports of local nationals being abused and mistreated by DOD contractors in such incidents as the summary shooting by a private security contractor of an Afghan who was handcuffed,48 the shooting of Iraqi civilians,49 and the abuse of prisoners at Abu Ghraib prison in Iraq.50 (It should be noted that there have also been reports of military personnel abusing and otherwise mistreating local nationals, including the abuses that took place at Abu Ghraib prison.51 CRS has not conducted an analysis to determine whether the incidence of abuses is higher among contractors than it is among military personnel.) Many of the high-profile reports of PSCs shooting local nationals or otherwise acting irresponsibly were committed by contractors working for the Department of State. Some of these incidents include the reported shooting of Iraqi civilians by Triple Canopy employees,52 the shooting of 17 Iraqi civilians at a Baghdad traffic circle in Nisoor Square by Blackwater employees,53 and the recent controversy over the behavior of security contractors from Armour Group who were hired to protect the U.S. embassy in Afghanistan.54 Of the six incidents listed above, five were committed by U.S. companies and U.S. nationals. Incidents of abuse still occur in Afghanistan. Private security contractors escorting supply convoys to coalition bases have been blamed for killing and wounding more than 30 innocent civilians during the past four years in Afghanistan’s Maywand district alone, leading to at least one confrontation with U.S. forces.55 And in May of this year, U.S. and Afghan officials reportedly stated that local Afghan security contractors protecting NATO supply convoys in Kandahar “regularly fire wildly into villages they pass, hindering coalition efforts to build local support.”56 One officer from a Stryker brigade deployed in Afghanistan was quoted as saying that these contractors “tend to squeeze the trigger first and ask questions later.”57 And unlike in Iraq, where a series of high-profile incidents involved U.S. security personnel, in Afghanistan, many of the guards causing the problems are Afghans. According to many analysts, these events have in fact undermined the U.S. mission in Iraq and Afghanistan.58 An Iraqi Interior Ministry official, discussing the behavior of private security contractors, said “Iraqis do not know them as Blackwater or other PSCs but only as Americans.”59 One senior military officer reportedly stated that the actions of armed PSCs “can turn an entire district against us.”60 Some analysts also contend that PSCs can be a direct threat to the legitimacy of the local government. These analysts argue that if counterinsurgency operations are a competition for legitimacy but the government is allowing armed contractors to operate in the country without the contractors being held accountable for their actions, then the government itself can be viewed as not legitimate in the eyes of the local population. These analysts point to the recent court decision dismissing the case against former Blackwater employees as a case in point where the legitimacy of the U.S. and local government is being undermined by the actions of PSCs.61 The extent to which the behavior of private security contractors in Afghanistan has hurt coalition efforts in Afghanistan was recently discussed by Major General Nick Carter (United Kingdom), International Security Assistance Force (ISAF) Afghanistan Regional Command South, who stated that the “culture of impunity” that exists around PSCs are a serious problem that needs to be dealt with and that this culture is to some degree “our own doing.”62 The perception that DOD and other government agencies are deploying PSCs who abuse and mistreat people can fan anti-American sentiment and strengthen insurgents, even when no abuses are taking place. There have been reports of an anti-American campaign in Pakistan, where stories are circulating of U.S. private security contractors running amok and armed Americans harassing and terrifying residents.63 U.S. efforts can also be undermined when DOD has ties with groups that kill civilians or government officials, even if the perpetrators were not working for DOD when the killings took place. In June 2009, the provincial police chief of Kandahar, Afghanistan, was killed by a group that worked as a private security contractor for DOD.64 Pointing to the example of the killing of the police chief in Kandahar, some analysts have also argued that the large-scale use of armed contractors in certain countries can undermine the stability of fragile governments. In a paper for the U.S. Army War College, Colonel Bobby A. Towery wrote After our departure, the potential exists for us to leave Iraq with paramilitary organizations that are well organized, financed, trained and equipped. These organizations are primarily motivated by profit and only answer to an Iraqi government official with limited to no control over their actions. These factors potentially make private security contractors a destabilizing influence in the future of Iraq. These and other considerations have led a number of analysts, government officials, and military officers to call for limiting the use of PSCs in combat and stability operations. Some analysts have called for completely barring the use of PSCs during such operations. The executive summary for the U.S. Naval Academy’s 9th Annual McCain Conference on Ethics and Military Leadership takes this position: We therefore conclude that contractors should not be deployed as security guards, sentries, or even prison guards within combat areas. APSCs should be restricted to appropriate support functions and those geographic areas where the rule of law prevails. In irregular warfare (IW) environments, where civilian cooperation is crucial, this restriction is both ethically and strategically necessary.65 Others have suggested a more targeted approach, such as limiting DOD’s use of PSCs to providing only static security in combat areas, leaving all convoy and personal security details to the military.66 Analysts calling for restrictions on the use of PSCs generally believe that contractors are more likely to commit abuses or other atrocities than military personnel. Some analysts believe that the culture of the military, which is focused on mission success and not on profit or contractual considerations, makes it less likely that uniformed personnel will behave inappropriately. Some analysts and DOD officials believe that lax contractor oversight has significantly contributed to contractor abuses.67 This sentiment was echoed by then Senator Barack Obama, who stated “we cannot win a fight for hearts and minds when we outsource critical missions to unaccountable contractors.”68 According to these analysts, improved oversight and accountability could mitigate the negative effects that the use of PSCs and other contractors has had on U.S. efforts in Iraq and Afghanistan, and could potentially bring the standard of behavior of PSCs on par with that of uniformed personnel.

#### And resolving contractor abuse during the transition post-2014 is critical to sustaining stability in Afghanistan

CPMSC 11 (Control PMSCs calls for the adoption of binding international and national regulations to limit the privatization of warfare and security, to regulate the activities of private military and security companies and hold these companies accountable for their human rights abuses and violations of the law, “Corporate private armies in Afghanistan post-2014” <http://controlpmsc.org/corporate-private-armies-in-afghanistan-post-2014/>)

One of the most important conclusions in the research is that part of PMSCs will remain in Afghanistan as an armed element surviving the withdrawal of foreign military forces planned for 2014. These companies are important actors that perpetuate a militarized society model and can have potentially destabilizing effects in the transition stage of the country. PMSCs are only one of several armed groups operating in the Afghan conflict, and in many cases, their use and activities go unnoticed. However, most international actors in Afghanistan (NGOs, journalists…) claim that, even today, they would be unable to operate in the country without the help of PMSCs. Overall, international military forces in general (Coalition Forces and ISAF under NATO command), and military agencies, diplomatic and reconstruction from U.S. in particular have been the main employers of PMSCs in Afghanistan. In fact, in December 2008, contractors made up 69% of the staff of the U.S. Department of Defense (DoD), the highest percentage recorded by the DoD in a conflict in the U.S. history. New dimensions of the privatization of war The use of private contractors in conflict situations was not exactly a new policy by the time the war of Afghanistan began. However, the scale in their use and the scope of their activities experienced a drastic turn during the conflict. Being the greatest exponent of the global war on terrorism, the Afghan conflict (2001-present) is also, along with Iraq, one of the first examples of the contemporary privatization of war. The use of private contractors in conflict situations was not exactly a new policy by the time the war of Afghanistan began. However, the scale in their use and the scope of their activities experienced a drastic turn during the conflict. From 2001 to 2007, the estimated number of PMSCs present in Afghanistan ranged from 60 to 140 companies, with around 18,000 to 28,000 troops. In addition, these companies have done all kinds of military and security services. Such as training and restructuring of national armed forces – i.e. the Afghan National Army (ANA) –, operational support services including maintenance and operation of weapons and combat-related goods (including drones), as well as demining and eradication of poppy fields. “One of the peculiarities of the PMSCs industry in Afghanistan is the national component. In contrast to Iraq, when arriving in the country, this industry, which was eminently foreign in nature and concept, progressively became a business with a strong national component. And have also created complex relationships with the police, local militias and warlords. This has not only influenced local politics and economy but has hampered the demobilization of combatants. The output of troops and the current policy of dissolution of PMSCs threaten to leave a good number of unemployed armed population and impact the fragile political stability of the country, “says the director of research and PhD in international law, Leticia Armendariz. Human rights, distrust and insecurity Abuses committed by contractors also compose a substantial base of the impact PMSCs’ use and activities have had on human rights of local population in Afghanistan. In broad terms, PMSCs’ activities have had both a direct and an indirect impact on human rights. Several research field studies provide reliable information showing that although the services of PMSCs are generally related to safety, the use and activities of the companies has not led to a positive development in the field overall security of the country. Studies have indicated that the large number of armed individuals, vehicles and weapons, as well as the links between these companies and the national militia, has created a sense of mistrust, fear and insecurity among the local population and sends the message that security is a public good, but a limited option to foreigners and wealthy Afghans. In this regard, the report highlights the need for international regulation of PMSCs to serve for regulation at the time of their arrival in countries at war. From a human rights perspective, this could mean that regional states have a real commitment to fulfilling its obligations to protect human rights and ensure respect for humanitarian law under its jurisdiction.

### 2AC Restriction

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

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

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

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

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

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

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

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

553 U.S. 723.

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

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

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

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

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

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

#### Their interpretation is flawed

#### A. Over limits- core cases revolve around regulating behavior not banning policies. Their interp eliminates topic lit.

#### B. Affirmative Ground-Ban policies are dead against agent counterplans. Err aff because the range of good affs is small and the neg is strapped with generics.

#### ---Reasonability-competing interpretations causes substance crowd. Good is good enough when the topic is already limited and our aff is squarely in the lit

### K

#### Perm do both

#### ---Climate security is good --- 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.

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.

#### Don't focus on representations

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.

### TPA 2AC

#### No link – we’re the DC Court

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

This is why the establishment of a specialized court would more likely institutionalize the existing program, with its elision of the imminence requirement, than narrow it. Second, judicial engagement with the targeted killing program does not actually require the establishment of a new court. In a case pending before Judge Rosemary Collyer of the District Court for the District of Columbia, the ACLU and the Center for Constitutional Rights represent the estates of the three U.S. citizens whom the CIA and JSOC killed in Yemen in 2011.

#### Court action shields Obama from controversy

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

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

#### And Obama won’t backlash

#### A. distancing himself from the program now

McDuffee 1/16 (Allen, “Congress Blocks Plan to Transfer Drone Control From CIA to Pentagon”, http://www.wired.com/dangerroom/2014/01/drone-strikes-likely-stay-cia/)

An effort by President Obama to transfer America’s lethal, highly classified drone program from the CIA to the Pentagon appears to have been thwarted by lawmakers wielding a secret weapon of their own. The Washington Post reported Wednesday that members of Congress inserted a provision in a classified annex to the $1.1 trillion government spending bill introduced this week that would restrict funding or authorization to transfer from one to the other. The move is an unusual one for Congress, and the debate over it will be closed to a small circle because of the classified nature of the addendum. President Obama, under considerable pressure from the left over the program’s civilian deaths and potential violations of international law, has for some time sought a way to distance himself from the controversial program that has come to be seen as his signature foreign policy and national security tool. However, many members of Congress, even some in the president’s own party, are not in agreement with the transfer of authority. Sen. Dianne Feinstein (D-Calif.), chairman of the Senate Intelligence Committee and a member of the Appropriations Committee, declined to offer comment in the Post report, but said last year that she had seen the CIA “exercise patience and discretion specifically to prevent collateral damage” and that she “would really have to be convinced that the military would carry it out that well.” In Beltway circles, experts say that while the U.S. drone program will have minor adjustments as needed, major debate over the direction of the program concluded years ago. “Realistically, the policy window for reforming how the U.S. conducts lethal counterterrorism strikes is closed in Washington,” says Council on Foreign Relations fellow Micah Zenko. However, during his nomination hearings last February, CIA Director John Brennan said that lethal operations are a “last resort” and could distract from the agency’s core mission of intelligence gathering. Over the course of the spring, following Brennan’s hearings, President Obama began laying the groundwork for the shift. In a May 2013 speech on counterterrorism at National Defense University, Obama opaquely signaled that he would minimize the number of lethal strikes and that he was transferring the program from the CIA to the Pentagon — a move that some observers understood as an attempt to make the program more transparent. Just weeks before Obama’s speech, when the Obama administration declined to send a representative to a Senate hearing on drone operations, Sen. Dick Durbin (D-Ill.) said “more transparency is needed to maintain the support of the American people and the international community.” He added that the White House should provide details on its claim to “its legal authority to engage in targeted killings and the internal checks and balances involved in U.S. drone strikes.”

#### Internal link turn – fast track collapses trade negotiations

Roh and Posner 2/17/14 (Chip, Ted, partners at Weil, Gotshal & Manges and former counsel to US trade negotiators and trade committees in the US Congress, “‘Fast track’ is a slow route to a trade deal” <http://www.ft.com/intl/cms/s/0/65c402a2-97e1-11e3-ab60-00144feab7de.html#axzz2tjgq3Aq0>)

To some, the prospects for the proposed transatlantic and transpacific trade pacts appear to have dimmed. Harry Reid, who leads the Democratic majority in the Senate, announced his opposition to taking up proposed legislation to restore a “fast-track” process for congressional approval of such agreements. At a retreat last Friday, Democrats in the House of Representatives are reported to have expressed similar reservations. The previous legislation, which had been instrumental in almost every significant trade agreement signed by the US since 1974, expired six years ago and has not been replaced. This has caused consternation among advocates of trade agreements. It should not. The fast track has become so congested with conditions and bureaucracy that it now offers few benefits over the conventional legislative process. Fast-track negotiating authority was devised in the mid-1970s to help deal with the risk that the constitutional separation of powers would lead to stalemate in trade talks. Only the president can negotiate with foreign governments. But implementing an agreement involves passing laws, which only Congress has the power to do. The fast track was supposed to solve this. Congress would put forward a list of objectives and the president would pursue them, consulting lawmakers and business leaders along the way. Legislation to implement the resulting treaties would then be subject to a vote, with no possibility of amendment or filibuster. This ensured that the president could deliver on promises, providing the credibility needed to negotiate with foreign leaders. That arrangement worked well for the Tokyo round of the General Agreement on Tariffs and Trade, a multilateral deal that was concluded in 1979. It worked well, too, when agreements were signed with Israel in 1985 and Canada in 1988. All passed Congress by overwhelming majorities. But starting with the North American Free Trade Agreement, and the treaty that established the World Trade Organisation in the mid-1990s, the political consensus on which this process was founded began to erode, and agreements were passed by Congress by much narrower margins. In the past decade trade agreements with Colombia, Peru, South Korea and five Central American countries plus the Dominican Republic all encountered hurdles in Congress of the very sort that the fast track was meant to prevent. Significant changes had to be made long after the negotiations had formally concluded. When the agreement with Colombia was first presented to Congress by President George W Bush, the House went so far as to amend its rules to take the agreement’s implementing legislation off the fast track. Against this backdrop, the caution of Mr Reid and other Democratic leaders should not have been a surprise. These days trade agreements deal with far more than just import duties. They involve undertakings on intellectual property rights, financial services regulations, food safety standards and much, much more. These commitments constrain not only federal law but the actions of state and local governments, too. It is understandable that legislators want to scrutinise such measures carefully – and unrealistic to expect them to be waved through. The fast-track procedure is a means, not an end. It may now be more trouble than it is worth. To secure special negotiating authority from Congress, the president would probably have to agree in advance to a long list of constraints. These would be public knowledge, weakening his negotiating position. It may be better to negotiate without special authority than to accept conditions that hobble the president’s efforts to negotiate a good deal for the American people. Any deal is likely to face hurdles in Congress. But these will be easier to clear when the details of an agreement are known, and Americans can see what they stand to gain by approving it. By contrast, a fight with Congress over fast-track authority would probably be bloody. It would also be pointless, since the issue would have to be revisited once an agreement has been reached. If President Barack Obama wants to make progress on trade, he should start work on negotiating a deal that Americans will support.

#### McCain has promised fights over drone transparency – triggers the link

Bennett 2/19 (John T., “McCain Vows New Fight Over Control of US Armed Drone Program”, http://www.defensenews.com/article/20140219/DEFREG02/302190025/McCain-Vows-New-Fight-Over-Control-US-Armed-Drone-Program)

WASHINGTON — A senior US lawmaker intends to renew his fight to require the Obama administration to fully shift its armed drone program from the CIA to the Defense Department. Sen. John McCain, R-Ariz., a senior Armed Services Committee member, told Defense News on Wednesday, just before Congress left for a weeklong recess, that he will push the issue when the panel crafts its 2015 Pentagon policy bill in coming months. “We’re going to have that debate,” McCain said in a brief interview. “There is no doubt about it.” McCain’s comments come weeks after he expressed disgust with language reportedly inserted into the classified portion of a Pentagon-funding section of an omnibus spending bill blocking the shift of the drone program from the CIA to the military. The administration of President Barack Obama last year signaled it wanted to move most — or all — of the program from the spy agency to the military. But that plan hit a number of legal and operational snags, and was not fully completed before Congress passed the omnibus. But McCain says the fight isn’t over. “I would like to make sure they are cooperating with other countries,” McCain said, referring to concerns among some lawmakers and analysts that the Obama administration avoids getting clearance from leaders of countries before flying drones into their airspace. “Mostly, I want to see it moved over to DoD. That’s my primary goal,” McCain said. Many analysts say that other than possibly taking up a new immigration reform measure, Congress likely is finished with major legislation this year. The mid-term election cycle is in full swing, and both parties seem content to battle it out back home after five years of bitter partisan fights here. But Congress is expected, as it has for 52 consecutive years, to pass a defense authorization bill. And McCain’s intentions will revive a battle between two powerful camps on Capitol Hill. Lawmakers on both sides of the debate have strong opinions about whether it is the job of the military or intelligence community to kill al-Qaida leaders and operatives. And behind the issue of whether the CIA should be firing missiles from remotely piloted aircraft is a simmering congressional turf war between the chambers’ Armed Services and Intelligence committees. If the Defense Department is handed control of the CIA’s armed drone fleet and strike missions against al-Qaida targets, it would also gain what intelligence analysts say is the program’s sizable budget and control over one of the White House’s primary tactics for combating the terrorist group. On one side are pro-military lawmakers like McCain. They believe the military should be the US entity charged with killing America’s foes, and that the CIA should get back to collecting and analyzing intelligence. On the other side are members like Senate Intelligence Committee Chairwoman Sen. Dianne Feinstein, D-Calif. These members, largely Democrats, are skeptical of the military’s ability to use what they see as the CIA’s rigorous decision process before carrying out armed strikes. ■

### Counterplan

#### The PQD kills treaty leadership – executive aggrandizement

Adler 4 (David, Gray, Ph.D in polysci @ Idaho State University, “The Law: Termination of the ABM Treaty and the Political Question Doctrine: Judicial Succor for Presidential Power” Presidential Studies Quarterly 34, no. 1 – March, Accessed @ Jstor)

President George W. Bush's unilateral termination of the 1972 ABM Treaty between the United States and Russia,1 an act overshadowed by the trauma, chaos, and confusion that gripped the nation in the weeks and months following the September 11 outrage, renewed the long-standing and largely unresolved controversy over the consti tutional repository of the authority to terminate treaties. President Bush's announcement on December 13, 2001 that he had given to Russia the requisite six-month notice of the United States' intention to withdraw from the ABM Treaty in accordance with the treaty2 triggered a lawsuit, Kucinich v. Bush, in which 32 members of the House of Representa tives challenged the constitutionality of Bush's action on grounds that the president may not terminate a treaty without congressional approval. The Federal District Court however, refused to reach the merits of the case. It held that the congressional plaintiffs lacked standing and dismissed the case as a nonjusticiable political question.3 The court's unwillingness to reach the merits in Kucinich reflects a troubling and increasing tendency among courts to elide the substantive issues involved in foreign affairs cases in which plaintiffs assert executive abuse of power and usurpation. The result of this judicial abstention, typified by the invocation of the political question doctrine, is that presidential aggrandizement of foreign affairs powers remains uncurbed and unchecked. Worse, it lends, if not the imprimatur of law and authority, a certain unwholesome encouragement of the tendencies of the "Imperial Presidency" (Schlesinger 1973). Professor Louis Henkin has rightly stated: "By calling a claim a political ques tion courts foster the perception that it is not a constitutional question and encourage the exercise of political power without regard to constitutional prescriptions and restraints" (Henkin 1990, 87).

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

Koh and Smith 2003

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

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

## 1AR

### Megapohone

#### Solves – they get a megaphone

Murphy and Radsan 13 (Richard W. Murphy Texas Tech University School of Law Afsheen John Radsan William Mitchell College of Law “Notice and an Opportunity to Be Heard Before the President Kills You,” http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2293686)

On many occasions, the federal courts have intoned that the core of due process is notice and an opportunity to be heard before the government deprives a person of life, liberty, or property.187 The central idea is to “ensure that the person threatened with loss has an opportunity to present his side of the story to a neutral decisionmaker at a time when the deprivation can still be prevented.”188 This promotes accuracy insofar as it enables a targeted person to provide pertinent information about adjudicative facts. It also appeals to the deep-seated intuition that fairness and justice require the government to let persons subject to its power “have their say” before that power is deployed against them.189 Promoting accuracy, fairness, and legitimacy, in addition to serving the private interests of the targets, also serves obvious public interests. The government should base its actions—especially those that will harm targeted individuals—on an accurate understanding of the adjudicative facts. Holding other factors equal, it is better to live under a government that is both fair and appears to be fair than to live under a government that either wields coercive power arbitrarily or appears to do so. Even so, process carries obvious costs. As Justice Thomas intimated in his Hamdi dissent,190 extending notice and an opportunity to be heard to a suspected terrorist poses problems. Notice might allow the target of a missile strike to “get away.” Notice might also endanger sensitive sources and methods of intelligence if the target is able to track down how the United States discovered his identity and his activities. Further, the “opportunity to be heard” could prove counterproductive if poorly designed to fit the issues and concerns of targeting. Importing hearsay limitations into the proceedings, for example, might put undue strain on the government’s ability to make its case and might lead to excessive false negatives.191 These sorts of problems highlight that many forms of formal process for targeted killing would be impracticable and unreasonable. Due process is nothing if not flexible, however. The requirement, for instance, of a pre-deprivation hearing is commonly characterized as a prime element of due process. The Court nonetheless sidesteps this element in a variety of emergency situations, approving procedures that lack pre-deprivation hearings for seizure of enemy property in wartime,192 seizure and destruction of food unfit for human consumption,193 and suspension from public school of students “whose presence poses a continuing danger to persons or property.”194 Where a pre-deprivation hearing poses too many problems, post-deprivation procedures may suffice. With this sort of flexibility, the question is not whether some forms of process for targeted killing would be unreasonable and thus “undue.” No, the real due-process question is whether any forms of notice and an opportunity to be heard might be practicable, reasonable, and beneficial. Consider the following possibility: The United States should maintain a public list of members of QTA whom the United States has concluded pose a severe enough threat to merit targeting. To the extent security concerns reasonably permit, the United States should also provide public justifications for placements on the list. Ayman al-Zawahiri, the leader of al Qaeda, would presumably be the first name. In our interconnected age, publication on the Internet would give notice to listed persons that they may be targeted as well as partial notice of the grounds supporting their selection. And a statement in the Federal Register might be added for good measure. One can think of this proposal as formalizing and generalizing the approach to notice that the United States government informally extended to al-Awlaki himself. Somebody in government leaked the highly classified information that al-Awlaki was on the kill list. One motive may have been to provide a form of notice consistent with his due process rights. If that was a reason for the government’s disclosure, it provides tacit support from the United States that the kill list could and should be published. Along with notice by publication would come at least an informal opportunity to be heard. As Judge Bates noted in his al Aulaqi opinion, al-Awlaki knew perfectly well that he had been targeted by the United States. If he had wished, he could have contested this targeting himself: either in court after turning himself in or via video-conferencing or some other means.195 Building on Judge Bates’ point, it bears repeating that the United States’ conflict with QTA is a highly public matter in many respects. The impact of a drone strike, unlike a brush pass between an intelligence officer and a human source, cannot be hidden from all eyes. Persons who appear on the proposed list would have a megaphone for responding to eager audiences among journalists and human rights workers. This opportunity to respond would not be a perfect substitute for formal proceedings before a neutral judge, but it would foster a form of public accountability that the United States could not ignore.

### Oceans --- Environment (!)

#### ---Ocean collapse causes extinction.

Craig 2003

Robin Kundis, Associate Prof Law, Indiana U School Law, Lexis

Biodiversity and ecosystem function arguments for conserving marine ecosystems also exist, just as they do for terrestrial ecosystems, but these arguments have thus far rarely been raised in political debates. For example, besides significant tourism values - the most economically valuable ecosystem service coral reefs provide, worldwide - coral reefs protect against storms and dampen other environmental fluctuations, services worth more than ten times the reefs' value for food production. n856 Waste treatment is another significant, non-extractive ecosystem function that intact coral reef ecosystems provide. n857 More generally, "ocean ecosystems play a major role in the global geochemical cycling of all the elements that represent the basic building blocks of living organisms, carbon, nitrogen, oxygen, phosphorus, and sulfur, as well as other less abundant but necessary elements." n858 In a very real and direct sense, therefore, human degradation of marine ecosystems impairs the planet's ability to support life. Maintaining biodiversity is often critical to maintaining the functions of marine ecosystems. Current evidence shows that, in general, an ecosystem's ability to keep functioning in the face of disturbance is strongly dependent on its biodiversity, "indicating that more diverse ecosystems are more stable." n859 Coral reef ecosystems are particularly dependent on their biodiversity. [\*265] Most ecologists agree that the complexity of interactions and degree of interrelatedness among component species is higher on coral reefs than in any other marine environment. This implies that the ecosystem functioning that produces the most highly valued components is also complex and that many otherwise insignificant species have strong effects on sustaining the rest of the reef system. n860 Thus, maintaining and restoring the biodiversity of marine ecosystems is critical to maintaining and restoring the ecosystem services that they provide. Non-use biodiversity values for marine ecosystems have been calculated in the wake of marine disasters, like the Exxon Valdez oil spill in Alaska. n861 Similar calculations could derive preservation values for marine wilderness. However, economic value, or economic value equivalents, should not be "the sole or even primary justification for conservation of ocean ecosystems. Ethical arguments also have considerable force and merit." n862 At the forefront of such arguments should be a recognition of how little we know about the sea - and about the actual effect of human activities on marine ecosystems. The United States has traditionally failed to protect marine ecosystems because it was difficult to detect anthropogenic harm to the oceans, but we now know that such harm is occurring - even though we are not completely sure about causation or about how to fix every problem. Ecosystems like the NWHI coral reef ecosystem should inspire lawmakers and policymakers to admit that most of the time we really do not know what we are doing to the sea and hence should be preserving marine wilderness whenever we can - especially when the United States has within its territory relatively pristine marine ecosystems that may be unique in the world. We may not know much about the sea, but we do know this much: if we kill the ocean we kill ourselves, and we will take most of the biosphere with us.

### Wood Straw solves erosion, and there are multiple alt causes

**Science Daily 07** (10/15, “Controlling Soil Erosion,” *Science News,* http://www.sciencedaily.com/releases/2007/10/071014192741.htm)

The patented WoodStraw brand wood-based erosion control material is highly effective. An American Society of Agricultural and Biological Engineers study in California and Washington indicated application of the WoodStraw product reduced erosion by 98 percent compared to bare soil. In addition, a field experiment by the USDA Forest Service in Colorado noted WoodStraw outperformed all other mulch treatments. WoodStraw is naturally weed-free and long-lasting. Since its introduction, WoodStraw has achieved regulatory approval by the Washington State Department of Transportation for use on transportation projects across the state and is recognized by the Washington Department of Ecology as an effective erosion control material. Research and scientific progress continue to shed light on new benefits of WoodStraw. The product is currently being evaluated to see how it would perform for wind erosion and dust control on construction sites and for controlling blowing ash on burned areas such as rangelands.

### Perm

#### Even if you can solve warming, your cases need standing – means the perm solves best – your evidence

**Davidson 3** – John Edward, J.D., Professor of Constitutional Law, Pioneer Pacific College; Senior Research Fellow, Constitutional Law Foundation

The doctrine just described, however elegant and well grounded it may be, will make little difference if it is not conjoined with practical procedural mechanisms for asserting posterity's constitutional interests in court. 24 The pragmatic lawyer needs more than principles and statements of right; she needs jurisdiction and standing. [\*194] Should the proposed doctrine be adopted, federal court jurisdiction can be readily established.

### Biodiversity --- Environment (!)

#### ---Biodiversity loss causes extinction.

Diner 1994

David N., Judge Advocate General’s Corps of US Army, Military Law Review, Winter, 143 Mil. L. Rev. 161

No species has ever dominated its fellow species as man has. In most cases, people have assumed the God-like power of life and death -- extinction or survival -- over the plants and animals of the world. For most of history, mankind pursued this domination with a single-minded determination to master the world, tame the wilderness, and exploit nature for the maximum benefit of the human race. n67 In past mass extinction episodes, as many as ninety percent of the existing species perished, and yet the world moved forward, and new species replaced the old. So why should the world be concerned now? The prime reason is the world's survival. Like all animal life, humans live off of other species. At some point, the number of species could decline to the point at which the ecosystem fails, and then humans also would become extinct. No one knows how many [\*171] species the world needs to support human life, and to find out -- by allowing certain species to become extinct -- would not be sound policy. In addition to food, species offer many direct and indirect benefits to mankind. n68 2. Ecological Value. -- Ecological value is the value that species have in maintaining the environment. Pest, n69 erosion, and flood control are prime benefits certain species provide to man. Plants and animals also provide additional ecological services -- pollution control, n70 oxygen production, sewage treatment, and biodegradation. n71 3. Scientific and Utilitarian Value. -- Scientific value is the use of species for research into the physical processes of the world. n72 Without plants and animals, a large portion of basic scientific research would be impossible. Utilitarian value is the direct utility humans draw from plants and animals. n73 Only a fraction of the [\*172] earth's species have been examined, and mankind may someday desperately need the species that it is exterminating today. To accept that the snail darter, harelip sucker, or Dismal Swamp southeastern shrew n74 could save mankind may be difficult for some. Many, if not most, species are useless to man in a direct utilitarian sense. Nonetheless, they may be critical in an indirect role, because their extirpations could affect a directly useful species negatively. In a closely interconnected ecosystem, the loss of a species affects other species dependent on it. n75 Moreover, as the number of species decline, the effect of each new extinction on the remaining species increases dramatically. n76 4. Biological Diversity. -- The main premise of species preservation is that diversity is better than simplicity. n77 As the current mass extinction has progressed, the world's biological diversity generally has decreased. This trend occurs within ecosystems by reducing the number of species, and within species by reducing the number of individuals. Both trends carry serious future implications. Biologically diverse ecosystems are characterized by a large number of specialist species, filling narrow ecological niches. These ecosystems inherently are more stable than less diverse systems. "The more complex the ecosystem, the more successfully it can resist a stress. . . . [l]ike a net, in which each knot is connected to others by several strands, such a fabric can resist collapse better than a simple, unbranched circle of threads -- which if cut anywhere breaks down as a whole." n79 By causing widespread extinctions, humans have artificially simplified many ecosystems. As biologic simplicity increases, so does the risk of ecosystem failure. The spreading Sahara Desert in Africa, and the dustbowl conditions of the 1930s in the United States are relatively mild examples of what might be expected if this trend continues. Theoretically, each new animal or plant extinction, with all its dimly perceived and intertwined affects, could cause total ecosystem collapse and human extinction. Each new extinction increases the risk of disaster. Like a mechanic removing, one by one, the rivets from an aircraft's wings, mankind may be edging closer to the abyss.