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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.

### 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

#### No intent to define – your evidence says the judiciary didn’t want to “inhibit” with review – that’s neither a definition nor a word in the rez

#### A. Over limits-The core cases on the topic all revolve around regulating executive behavior not banning specific policies. Their interpretation would eliminate the role of most topic literature across the areas.

#### B. Affirmative Ground-Ban specific policies like drones are dead in the water to any type of agent counterplan. You should err affirmative because the range of good affirmatives is very small this year and the negative is strapped with an arsenal of generics.

#### ---Reasonability-competing interpretations causes substance crowd by encouraging debate over Topicality instead of war powers. Good is good enough when the topic is already limited by areas and our affirmative is squarely located in the literature over how to limit executive authority.

### Amendment

#### DOesn’t break the PQD on climate – only on military issues – that’s distinct – means it can’t solve warming

#### Permutation do both

#### Permutation do the counterplan – it’s plan plus, the plan text says the federal judiciary should conduct ex post judicial review, the counterplan only adds an amendment process with the states and Congress

#### Normal means of a constitutional amendment is delay – the neg must defend normal means, its key to aff offense

Barr 4(Bob, Washington Times. http://www.washtimes.com/commentary/20040418-102137-7612r.htm)

In the American political system, the Constitution was meant to operate like people who freeze their credit cards in a block of ice. That is, when faced with supremely important and emotional decisions involving things like the censorship of unpopular ideas or the seizure of firearms, the Constitution makes us walk to the corner and take a time out. Specifically, we have to get a two-thirds supermajority in both chambers of Congress and then three-quarters of the states to agree. It is an amazingly onerous process. The last amendment to the Constitution — the 27th — which set limits on congressional pay, was initially proposed in the states' petitions to the first Constitutional Congress in the 1780s but only started to move in the 1990s. It took more than two centuries to finally earn a spot alongside free speech and the right not to self-incriminate.

#### The counterplan is a voting issue for education and ground – it’s not predictable- no amendment has ever dealt with SOP, undermines affirmative research

Thomas O. Heuglin, Professor of Political Science at Wilfrid Laurier University, Waterloo, Canada and Alan Fenna, Professor of Politics and Government at Curtin University, Perth, Australia, 2006 (Comparative Federalism p )

More important than the actual numbers are the political change effected by constitutional amendments. In the American case, most have had to do with civil rights or functioning of the presidency, and only few with federalism and the division of powers. In contrast to Canada and Australia, the US Constitution has never been amended to alter the division of powers by transferring authority from one level of government to the other.

#### Only the plan solves operative legal effect, the counterplan is only symbolic

Strauss-prof law Chicago-01 114 Harv. L. Rev. 1457

One final implication is the most practical of all. If amendments are in fact a sidelight, then it will usually be a mistake for people concerned about an issue to try to address it by amending the Constitution. Their resources are generally better spent on legislation, litigation, or private-sector activities. It is true that the effort to obtain a constitutional amendment may serve very effectively as a rallying point for political activity. A constitutional amendment may be an especially powerful symbol, and it may be worthwhile for a group to seek an amendment for just that reason. But in this respect constitutional amendments are comparable to congressional resolutions, presidential proclamations, or declarations of national holidays. If they bring about change, they do so because of their symbolic value, not because of their operative legal effect. The claim that constitutional amendments under Article V are not a principal means of constitutional change is a claim about the relationship between supermajoritarian amendments and fundamental, constitutionayl change. It should not be confused with the very different claim that judicial decisions cannot make significant changes without help from Congress or the President; n25 and it certainly should not [\*1468] be confused with a global skepticism about the efficacy of political activity generally. The point is that changes of constitutional magnitude - changes in the small-"c" constitution - are not brought about by discrete, supermajoritarian political acts like Article V amendments. It may also be true that such fundamental change is always the product of an evolutionary process and cannot be brought about by any discrete political act - by a single statute, judicial decision, or executive action, or (at the state level) by a constitutional amendment, whether adopted by majoritarian referendum or by some other means. What is true of Article V amendments may be equally true of these other acts: either they will ratify (while possibly contributing to) changes that have already taken place, or they will be ineffective until society catches up with the aspirations of the statute or decision. Alternatively, it may be that majoritarian acts (or judicial decisions), precisely because they do not require that the ground be prepared so thoroughly, can force the pace of change in a way that supermajoritarian acts cannot. A coalition sufficient to enact legislation might be assembled - or a judicial decision rendered - at a point when a society for the most part has not changed, but the legislation, once enacted (or the decision, once made), might be an important factor in bringing about more comprehensive change. The difference between majoritarian legislation and a supermajoritarian constitutional amendment is that the latter is far more likely to occur only after the change has, for all practical purposes, already taken place.

#### The CP will be rolled back – the Court can review amendments

**Haddad, 96** (Marty, The Wayne Law Review. 42 Wayne L. Rev. 1685. Lexis)

While it is clear that the judiciary has no power in generating an amendment's text, such is not the case regarding judicial review of the amendment process. 97 While the Coleman case now governs and regards amendment procedures as political questions, this seems to go against the weight of authority in our Constitution's history. 98 The amendment process was found to be a political question in Coleman because of a lack of judicially manageable standards 99 and not because of a textual commitment to Congress. The Court therefore did not proclaim that the Constitution's text fully excluded them from any role in the amending process, despite the fact that Article V states that an amendment is valid for all intents and purposes when ratified by three-fourths of the state legislatures. 100 The Court was correct in balking on the idea of complete abstention from procedural issues, because some room must be left for judicial decision-making in the amendment process in order to remedy potential abuses by the legislatures. 101 That being the case, a ruling on the substance of amendments is undoubtedly within the Court's power. In playing this role, the Court is simply interpreting the Constitution, rather than second-guessing the legislature, which is often the case when the Court [\*1710] becomes entrenched in procedural issues. 102 Constitutional interpretation is a task which the judiciary has performed with unquestioned authority for nearly two hundred years. 103 Determinations of the constitutionality of amendments must remain a judicial function in order to maintain the validity of the [\*1711] Court's non-textualist method of constitutional explication.

#### The CP doesn’t solve the judicial review internal links and kills an independent judiciary

Sullivan 96, Professor of Law

[January, 1996, Kathleen M. Sullivan, Professor of Law, Stanford University, “CONSTITUTIONAL CONSTANCY: WHY CONGRESS SHOULD CURE ITSELF OF AMENDMENT FEVER”, 17 Cardozo L. Rev. 691]

How have we managed to survive over two hundred years of social and technological change with only twenty-seven constitutional amendments? The answer is that we have granted broad interpretive latitude to the Supreme Court. Narrow construction would necessitate more frequent resort to formal constitutional amendments. Broad construction eliminates the need. Thus, the Court has determined that eighteenth century restrictions on searches of our "papers and effects" apply to our twentieth century telephone calls, and that the command of equal protection forbids racially segregated schools even though such segregation was known to the Fourteenth Amendment's framers. Neither of these decisions - Katz v. United States and Brown v. Board of Education - required a constitutional amendment. Nor did the Court's "switch in time that saved nine" during the New Deal. In the early twentieth century, the Court struck down much federal economic legislation as exceeding Congress's power and invading the province of the states. Under President Roosevelt's threat to expand and pack the Court, the Court desisted, and started to defer to all legislation bearing some plausible relationship to interstate commerce. Some scholars have called the Court's decision to defer to national economic legislation revolutionary enough to count as an informal constitutional amendment, but most view it as within the broad contours of reasonable interpretive practice. Increasing the frequency of constitutional amendment would undermine the respect and legitimacy the Court now enjoys in this interpretive role. This danger is especially acute in the case of proposed constitutional amendments that would literally overturn Supreme Court decisions, such as amendments that would declare a fetus a person with a right to life, permit punishment of flag-burning, or authorize school prayer. Such amendments suggest that if you don't like a Court decision, you mobilize to overturn it. Justice Jackson once quipped that the Court's word is not final because it is infallible, but is infallible because it is final. That finality, though, has many salutary social benefits. For example, it allows us to treat abortion clinic bombers as terrorists rather than protesters. If every controversial Supreme Court decision resulted in plebiscitary overruling in the form of a constitutional amend- [\*703] ment, surely the finality of its word would be undermined, and with it the social benefits of peaceful conflict resolution. The fact that we have amended the Constitution only four times in order to overrule the Supreme Court is worth remembering.

#### Strong judicial model prevents Russian loose nukes

Nagle, Independent Research Consultant Specializing in the Soviet Union, 1994 (Chad. “What America needs to do to help Russia avoid chaos” Washington Times, August 1, Lexis Nexis)

As things stand right now, there is indeed potential for danger and instability in Russia, as Mr. Criner notes. But this is not because America has failed to act as a "moral compass" in the marketplace. Rather, Russia's inherent instability at present stems from the fact that in all of its 1,000-year history, it never had a strong, independent judiciary to act as a check on political power. The overwhelming, monolithic power of the executive, whether czar or Communist Party, has always been the main guarantor of law and order. Now, as a fragile multiparty democracy, Russia has no more than an embryo of a judiciary. The useless Constitutional Court is gone, the Ministry of Justice is weak, and the court system is chaotic and ineffective. Hence, the executive determined the best safeguard against the recurrence of popular unrest, the kind that occurred in October 1993, to be the concentration of as much power as possible in its hands at the expense of a troublemaking parliament. Under a sane and benign president, Russia with a "super presidency" represents the best alternative for America and the West. The danger lies in something happening to cause Mr. Yeltsin's untimely removal from office. If Russia is ever to develop a respected legal system, it will need the protracted rule of a non-tyrannical head of state. In the meantime, the United States can provide a model to Russia of a system in which the judiciary functions magnificently. America, the world's only remaining superpower, can provide advice and technical expertise to the Russians as they try to develop a law-based society. We can also send clear signals to the new Russia instead of the mixed ones emanating from the Clinton administration. Now is the time for America to forge ahead with the "new world order," by promoting the alliance of the industrialized democracies of the Northern Hemisphere on American terms, not Russian. This constitutes the real "historical moment" to which Mr. Criner refers. Russia is not in a position to make threats to or demands of the United States any more so than when it ruled a totalitarian empire. It should learn to play by new rules as a first lesson in joining the family of nations. Coddling an aggressive Russia and giving it unconditional economic aid (as Alexander Rutskoi has called for) would be counterproductive, and might even encourage Russia to "manufacture" crises whenever it wanted another handout. Russia is indeed a dangerous and unstable place. The prospect of ordinary Third World political chaos in an economically marginal country with a huge stockpile of intercontinental ballistic missiles is a nightmare. However, Mr. Yeltsin is busily consolidating power, and the presidential apparatus is growing quickly. With his new team of gray, non-ideological figures intent on establishing order in the face of economic decline and opposition from demagogues (e.g. Vladimir Zhirinovsky and Mr. Rutskoi), Mr. Yeltsin is already showing signs of success. Under such circumstances, the best America can do is stand firm, extend the hand of friendship and pray for Mr. Yeltsin's continued good health.

Extinction

Helfand and Pastore 9 [Ira Helfand, M.D., and John O. Pastore, M.D., are past presidents of Physicians for Social Responsibility. March 31, 2009, “U.S.-Russia nuclear war still a threat”, http://www.projo.com/opinion/contributors/content/CT\_pastoreline\_03-31-09\_EODSCAO\_v15.bbdf23.html]

President Obama and Russian President Dimitri Medvedev are scheduled to Wednesday in London during the G-20 summit. They must not let the current economic crisis keep them from focusing on one of the greatest threats confronting humanity: the danger of nuclear war. Since the end of the Cold War, many have acted as though the danger of nuclear war has ended. It has not. There remain in the world more than 20,000 nuclear weapons. Alarmingly, more than 2,000 of these weapons in the U.S. and Russian arsenals remain on ready-alert status, commonly known as hair-trigger alert. They can be fired within five minutes and reach targets in the other country 30 minutes later.  Just one of these weapons can destroy a city. A war involving a substantial number would cause devastation on a scale unprecedented in human history. A study conducted by Physicians for Social Responsibility in 2002 showed that if only 500 of the Russian weapons on high alert exploded over our cities, 100 million Americans would die in the first 30 minutes.  An attack of this magnitude also would destroy the entire economic, communications and transportation infrastructure on which we all depend. Those who survived the initial attack would inhabit a nightmare landscape with huge swaths of the country blanketed with radioactive fallout and epidemic diseases rampant. They would have no food, no fuel, no electricity, no medicine, and certainly no organized health care. In the following months it is likely the vast majority of the U.S. population would die. Recent studies by the eminent climatologists Toon and Robock have shown that such a war would have a huge and immediate impact on climate world wide. If all of the warheads in the U.S. and Russian strategic arsenals were drawn into the conflict, the firestorms they caused would loft 180 million tons of soot and debris into the upper atmosphere — blotting out the sun. Temperatures across the globe would fall an average of 18 degrees Fahrenheit to levels not seen on earth since the depth of the last ice age, 18,000 years ago. Agriculture would stop, eco-systems would collapse, and many species, including perhaps our own, would become extinct.  It is common to discuss nuclear war as a low-probabillity event. But is this true? We know of five occcasions during the last 30 years when either the U.S. or Russia believed it was under attack and prepared a counter-attack. The most recent of these near misses occurred after the end of the Cold War on Jan. 25, 1995, when the Russians mistook a U.S. weather rocket launched from Norway for a possible attack.  Jan. 25, 1995, was an ordinary day with no major crisis involving the U.S. and Russia. But, unknown to almost every inhabitant on the planet, a misunderstanding led to the potential for a nuclear war. The ready alert status of nuclear weapons that existed in 1995 remains in place today.

### Inspect General CP

### Conditionality

#### Conditionality is a voting issue

#### -encourages arg irresonspibiltiy

#### -allows double turns without recourse,

#### -kills advocacy skills, and

#### -lets the 2nr goes for the least covered option

#### Permutation do both

#### Doesn’t solve the case—

#### A. Judicial Review – it’s critical to US credibility and trust in our counter-terrorism programs – only way the drone program won’t collapse – that’s Sidhu and Corey

#### B. The counterplan is the “trust us doctrine” – 1AC Brooks evidence says only external checks on the president will fix the credibility gap in US operations since this doctrine has empirically failed

#### C. Collateral damage – only judicial review stops it through double-checking drone strikes – civilian casualties cause drone program rollback – that’s Adelsburg and Zenko

#### No solvency – Public doesn’t trust the executive’s mandates will be transparent and public – secret evidence

Roach 13 (Kent, eds. Cole, D. Fabbrini, F. Vedaschi, A., David Cole, Federico Fabbrini, Arianna Vedaschi, “Managing Secrecy and its Migration in a Post-9/11 World,” Secrecy, National Security and the Vindication of Constitutional Law, google books pg 118-119)

At the same time, the taint of prior uses of secret evidence as well as public suspicion that secrecy will be used to cover up torture and other misconduct lingers. Although Congress decided at the end of 2011 to create a rebuttable presumption in favor of military detention and trial of alien terrorists suspected of involvement in al Qaeda, President Obama has indicated that he will waive this option when it might prevent other countries from extraditing or transferring terrorist suspects to the United States. Secret evidence as it was previously used at Guantanamo stands a potent and easily understood symbol of unfair counter-terrorism. The unfairness of secret evidence towards those targeted may have strategic as well as normative costs. Many believe that al Qaeda has morphed into an ideology that builds on grievances and a sense that Muslims are under attack throughout the world. In such a context, the public relations costs of using secret evidence should be taken seriously because it may promote a sense that innocent people have been unfairly detained, convicted or targeted as terrorists. Secret evidence is used by the US military and the CIA in decisions about targeted killing. Attorney General Holder has stressed that the evidence supporting such decisions is carefully reviewed within the government and has argued that the process satisfies due process because due process need not be judicial process." The problem with this approach is that it requires people to trust the government that the secret evidence has been thoroughly tested and vetted even though the executive has an incentive to err on the side of security. In contrast to the Israeli courts, American courts have taken a hands-off approach to review of targeted killing.12 The Israeli courts have in one prominent case reviewed targeted killings and have stressed the importance of both ex ante and ex post review within the military and involving the courts.0 To be sure. Israel has not gone as far as the United Kingdom in giving security cleared special advocates access to secret information, but it has provided a process that goes beyond the executive simply reviewing itself. The Obama administration does not seem to think that anyone could seriously challenge the legitimacy of their attempts to keep strategic military information behind targeted killings secret. In a sense, this is a return to a Cold War strategy where the need to preserve secrets from the other side was widely accepted. What has changed since 9/11, however, is that terrorism as opposed to invasion or nuclear war is widely accepted as the prime threat to national security. Terrorism is seen by many as a crime and the use of war-like secrecy is much more problematic in responding to a crime than to a threat of invasion or nuclear war. Hence, the legitimacy of the US's use of secrets to kill people in its controversial war against al Qaeda has been challenged. It may become a liability in the US's dealings with the Muslim world.

### \*AT: Inspector General Oversight

#### Not as good as review- they get sucked into the day-to-day operations.

Roach 07 (OVERSIGHT OF NATIONAL SECURITY, http://cardozolawreview.com/Joomla1.5/content/29-1/29.1\_roach.pdf)

Professors Heymann and Kayyem also fail to distinguish contemporaneous or real-time oversight from ex post review of national security activities. Oversight raises particular concerns about interference with ongoing operations and about reviewers being coopted by failures to object to secret national security activities. The distinction between oversight and review may also be related to the distinction between review to determine the propriety and the efficacy of the state’s national security activities. In my view, review for propriety is best conducted by reviewers who are independent and arms- length from those being reviewed and who assess conduct after the fact. Those involved in oversight can lose some of their independence as they are drawn into the ongoing day-to-day operations of the agency. At the same time, those involved in ongoing oversight of an agency may be in a good position to judge the efficacy and efficiency of its work. Although there may be some overlap, there may be much to be said for separating the processes of oversight and review with the former focusing on the efficacy of national security activities and the latter focusing on their propriety.

### McCutcheon

#### 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.

#### No Russia war-no motive or capability

**Betts, Columbia war and peace studies professor, 2013**

(Richard, “The Lost Logic of Deterrence”, Foreign Affairs, March/April, ebsco, ldg)

These continuities with the Cold War would make sense only between intense adversaries. Washington and Moscow remain in an adversarial relationship, but not an intense one. If the Cold War is really over, and the West really won, then continuing implicit deterrence does less to protect against a negligible threat from Russia than to feed suspicions that aggravate political friction. In contrast to during the Cold War, it is now hard to make the case that Russia is more a threat to NATO than the reverse. First, the East-West balance of military capabilities, which at the height of the Cold War was favorable to the Warsaw Pact or at best even, has not only shifted to NATO's advantage; it has become utterly lopsided. Russia is now a lonely fraction of what the old Warsaw Pact was. It not only lost its old eastern European allies; those allies are now arrayed on the other side, as members of NATO. By every significant measure of power -- military spending, men under arms, population, economic strength, control of territory -- NATO enjoys massive advantages over Russia. The only capability that keeps Russia militarily potent is its nuclear arsenal. There is no plausible way, however, that Moscow's nuclear weapons could be used for aggression, except as a backstop for a conventional offensive -- for which NATO's capabilities are now far greater. Russia's intentions constitute no more of a threat than its capabilities. Although Moscow's ruling elites push distasteful policies, there is no plausible way they could think a military attack on the West would serve their interests. During the twentieth century, there were intense territorial conflicts between the two sides and a titanic struggle between them over whose ideology would dominate the world. Vladimir Putin's Russia is authoritarian, but unlike the Soviet Union, it is not the vanguard of a globe-spanning revolutionary ideal.

#### The Court decides each case on the facts, not based on political calculations.

Rosen 12 (Jeffrey, legal affairs editor of The New Republic, “Welcome to the Roberts Court: How the Chief Justice Used Obamacare to Reveal His True Identity,” June 29, http://www.newrepublic.com/blog/plank/104493/welcome-the-roberts-court-who-the-chief-justice-was-all-along#)

Of course, it didn’t all come down to judicial temperament. In the most divisive constitutional cases, the substance of legal arguments will always play a part. Arguments by liberal scholars who care about constitutional text and history, such as Neil Siegel of Duke Law School, were reflected in Chief Justice Roberts’s opinion about the taxing power. Justice Ginsburg’s defense of Congress’s power to pass the mandate under the commerce clause adopted New Textualists arguments by Jack Balkin of Yale Law School about how the framers of Article VI of the Virginia Plan during the Constitutional Convention would have wanted Congress to coordinate economic action in areas where the states were powerless to act on their own. The majority opinion also vindicated Solicitor General Don Verrilli’s decision to emphasize the breadth of Congress’s taxing power. But in the end, there are good arguments on both sides of any constitutional question, and justices have broad discretion to pick and choose among competing legal arguments based on a range of factors—including concerns about text, history, precedent, or institutional legitimacy. The fact that Roberts chose to place institutional legitimacy front and center is the mark of a successful Chief. As Roberts recognized, faith in the neutrality of the law and the impartiality of judges is a fragile thing. When I teach constitutional law, I begin by telling students that they can’t assume that it’s all politics. To do so misses everything that is constraining and meaningful and inspiring about the Constitution as a framework for government. There will be many polarizing decisions from the Roberts Court in the future, and John Roberts will be on the conservative side of many of them. But with his canny performance in the health care case, Roberts has given the country a memorable example of what it means to be a successful Chief Justice.

#### Conservative ruling on campaign finance now

Blum 9-5-13

Bill, retired judge and death penalty defense attorney, Supreme Court Preview: A Storm Is on the Horizon, http://www.truthdig.com/report/item/supreme\_court\_preview\_a\_storm\_is\_on\_the\_horizon\_20130905/?ln

Dubbed by some commentators as Citizens United 2.0, this mean-spirited piece of litigation was generated by the Republican National Committee and Alabama businessman Scott McCutcheon. Together, they seek to overturn current federal law that limits the aggregate amount of money any single person can contribute directly to candidates for federal office, political parties and political committees to $123,000 in any two-year election cycle. As the New York-based Brennan Center for Justice has argued in an amicus (friend of the court) brief filed in the case, the aggregate contribution limits are designed to inhibit political corruption. But as the Roberts court demonstrated with the original Citizens United ruling in 2010, it views campaign contributions as a form of individual expression protected under the First Amendment. In 2012, the court signaled its intention to elevate this perverse interpretation of the First Amendment to a new level of rigidity as it overturned a 100-year-old Montana law that prohibited corporations from spending funds to influence the outcome of state elections (American Tradition Partnership v. Bullock). In the United States of Corporate America, under the judicial stewardship of Chief Justice John Roberts, money talks, as loudly as possible.

#### Capital not finite- they can build it up again.

Balkin, constitutional law prof-Yale, 11 (JM, Knight Professor of Constitutional Law and the First Amendment, Director, The Information Society Project at Yale Law School, Constitutional Redemption, google books, p 80-1)

Nor are the tragic heroes judges or members of the Supreme Court who make unwise and unjust decisions.11 To be sure, legal academics may like to think of judges in heroic terms. But judges usually do not suffer a reversal of fortune because of their bad decisions. They may have to make "tragic" choices between unpalatable alternatives, but they are not necessarily undone by them. When judges hold that homosexuals have no constitutional rights that heterosexuals are bound to respect, judges are not subsequently beaten up by drunken homophobes. When judges deny habeas relief to a person suspected of terrorist connections, they are not thrown into a military prison and subjected to enhanced interrogation techniques. When judges deny poor people rights of subsistence, their homes are not seized and they are not forced to live on the streets. Indeed, the salaries of federal judges arc constitutionally guaranteed. Judges may be the most obvious vehicles of constitutional evil, but they are not the heroes of the story. Judges work within an existing political consensus about what is politically possible and impossible. They are hemmed in by the work of their predecessors; previous precedents and doctrinal categories shape their legal imaginations and push them in directions they might otherwise not wish to go. Judges often face difficult decisions when they interpret the Constitution. But these "tragic choices" are usually the result of previous actions; not merely those taken by their judicial predecessors, but by the political culture as a whole. The courts—and particularly the Supreme Court of the United States— can squander their political capital by making unwise decisions. They can create insoluble dilemmas for themselves by their previous holdings, and they can cause other political actors to despise them. But this is a far cry from the fate of a tragic hero. Most Supreme Court justices die in their beds. True, they receive bushels of hate mail; they are regularly castigated in the press by unhappy litigants and activists. But they are also continually lauded and praised by the political and legal establishment, invited to inaugural balls and asked to speak at judicial conferences and bar association dinners. If they are fated to be subject to anything, it is to an almost unending stream of toadying. No matter what damage they may eventually cause to the country or suffer to their reputations, they hardly deserve the name of tragic hero. Moreover, even after Supreme Court justices have squandered the Court’s political capital, it is usually replenished with little effort. America has lived through Dred Scott v. Sanford, Korematsu v. United States,14 and many other dark days, and still the Supreme Court is respected and revered and its opinions obeyed. This is at most the story of the ebb and flow of political clout. It is not the stuff of tragedy. At least not yet.

#### Winners win --- judicial review boosts court capital

Little 00 (Laura, Professor of Law – Temple University, Beasley School of Law, November, 52 Hastings L.J. 47, Lexis)

Other scholars bolster Redish's position by pointing out that judicial review of both federalism and separation of powers questions presents something of a self-fulfilling prophesy. Through review of these sensitive issues of power, the judiciary bolsters its own position or amasses "political capital" and, thereby, legitimates its own power to engage in such review . 237 The judiciary has therefore established [\*98] itself as an effective watchdog to ensure that governmental structures are functioning appropriately. n237. Perry, supra note 11, at 57 (Supreme Court has "amassed a great deal of the political capital it now enjoys ... precisely by resolving problems arising under the doctrines of federalism and of the separation-of-powers "); see also Archibald Cox, The Role of the Supreme Court in American Government 30 (1972) (explaining that "history legitimated the power [of judicial review], and then habit took over to guide men's actions so long as the system worked well enough").

#### No capital loss

Gibson 8/12/2013 (James L., Sidney W. Souers Professor of Government, Director of the Program on Citizenship and Democratic Values, Washington University in St. Louis, “IS THE U.S. SUPREME COURT’S LEGITIMACY GROUNDED IN

PERFORMANCE SATISFACTION AND IDEOLOGY?”)

The overwhelming weight of the evidence we present in this paper is that the legitimacy of the U.S. Supreme Court is not much dependent upon the Court making decisions that are pleasing to the American people. The Court’s legitimacy seems not to be grounded in policy agreement with its decisions, nor is it connected to the ideological and partisan cross-currents that so wrack contemporary American politics. Whether desirable or undesirable, it seems that the current Supreme Court has a sufficiently deep reservoir of goodwill that allows it to rise above the contemporary divisions in the American polity. These empirical conclusions have enormous theoretical importance. It seems that the Court as currently configured is unlikely to consistently disappoint either the left or the right. As we have documented above, the current Supreme Court makes fairly conservative policy, but it clearly does not make uniformly conservative policy. Thus, even the Rehnquist and Roberts Courts have made many decisions that should be pleasing to liberals, even if conservatives should be slightly more pleased with the Court. Perhaps a court closely divided on ideology cannot produce the consistent decisional fuel needed to ignite a threat to the institution’s legitimacy. Some worry that an ideologically divided Court undermines the institution’s legitimacy (e.g. Liptak 2011). Perhaps the truth is exactly the opposite: an ideologically divided Court is able to please both liberals and conservatives with its decisions, and therefore decisional displeasure does not build to the point of challenging the institution’s legitimacy.

#### **Link non-unique**

#### A. The Supreme Court has statistically ruled against Obama more than any other president

McLaughlin, Washington Times, 6/26 (Seth, “Obama administration has lost two-thirds of Supreme Court cases”, http://www.washingtontimes.com/news/2013/jun/26/obama-administration-lost-two-thirds-of-cases-duri/?page=all)

President Obama celebrated the Supreme Court’s decisions Wednesday on gay marriage, but overall it has been a rocky term before the court for his administration, winning just more than a third of the cases in which it was involved. Lawyers said the government traditionally averages about a 70 percent winning percentage before the high court. Its advantages are so great that the Justice Department’s chief Supreme Court attorney, the solicitor general, is dubbed the “10th Justice.” But during the 2012-13 term, which began in October and ended Wednesday, the court rejected Mr. Obama’s arguments on property rights, affirmative action, voting rights and other issues. “Despite some notable victories, the Obama administration has had an unusually poor batting average at the high court,” said Adam Winkler, a constitutional law professor at UCLA. “Like last year, the Obama administration lost more cases than it won.” By Mr. Winkler’s count, the Obama administration has won 39 percent of the cases in which it has been a party in the litigation, and won 50 percent of the cases in which the government filed a “friend of the court” brief backing one side or the other. Mr. Winkler said a good portion of the administration’s poor batting average can be traced to ideological differences between the Obama administration and the five conservative-leaning Supreme Court justices. Indeed, the administration backed the losing argument in 11 cases that were decided 5-4, and one case that was decided 5-3. “What arguments can you make to a court that is determined to overturn the Voting Rights Act?” Mr. Winkler said. “The court is hostile to the administration’s arguments and the administration is not presenting the best arguments. So there is lot of blame to go around.” Still, not all of the cases were ideological battles. The Obama administration was on the losing end of several 9-0 decisions, including last year when the court held that churches have the right to make employment decisions free from government interference over discrimination laws, and said an Idaho couple could challenge the Environmental Protection Agency over government claims that they could not build a home on private property that was deemed a protected wetland. The nine justices also agreed this month to clear the way for California raisin growers to challenge the constitutionality of a Depression-era farming law that makes them keep part of their annual crop off the market. The losses continued to pile up for Mr. Obama this week after the court went against the wishes of the White House in cases that involved affirmative action in Texas, private property rights in Florida and a challenge to the Voting Rights Act of 1965. Ilya Somin, a constitutional law professor at George Mason University, said it is striking to take into account the number of times the Obama administration has been on the losing end of unanimous decisions. “When the administration loses significant cases in unanimous decisions and cannot even hold the votes of its own appointees — Justices Sonia Sotomayor and Elena Kagan — it is an indication that they adopted such an extreme position on the scope of federal power that even generally sympathetic judges could not even support it,” said Mr. Somin, adding that presidents from both parties have a tendency to make sweeping claims of federal power. “This is actually something that George W. Bush and Obama have in common.” The president scored at least a partial victory Wednesday in perhaps the biggest cases of the term when the court invalidated the 1996 Defense of Marriage Act, which defines marriage for the purpose of federal law as a legal union between one man and one woman. The court also ruled that the supporters of California’s Proposition 8, the ban on gay marriage that voters passed by referendum in 2008, did not have the standing to argue the case in court. Relaying Mr. Obama’s reaction, White House spokesman Jay Carney said the president described the DOMA ruling as “historic” and the Proposition 8 ruling as a “tremendous victory.” The rulings, though, were not complete victories for Mr. Obama’s stances. The court did not decide whether same-sex marriage is a constitutional right or address whether the California law is unconstitutional. “They made an argument in the Prop 8 case; it was rejected,” Mr. Winkler said. “They made an argument in the DOMA case; it was rejected. So they are happy with the results of today’s cases, but their arguments were not accepted by the court.”

#### B. The bond case triggers review of executive and congressional treaty authority – the justices are split and oral arguments are being heard now

Mears 13 (Bill, 11/5, “Justices divided over ‘toxic love’ case involving states’ rights”, http://edition.cnn.com/2013/11/05/us/supreme-court-poisoned-paramour/)

Washington (CNN) -- A woman on the wrong end of a love triangle received a measure of support from the Supreme Court on Tuesday in an unusual case involving a domestic dispute, global agreements and local sovereignty. At issue is whether Congress may criminalize conduct -- under its treaty ratification power -- that is otherwise the domain of the states. Carol Anne Bond was given a long prison sentence in the federal system after being convicted of violating an international agreement on the use of chemical weapons. She would have gotten a much shorter sentence under state law. The case of toxic love has soap-opera elements, but Bond's lawyers argued she was being treated like a foreign terrorist instead of someone caught up in a domestic dispute. Beyond this fact-specific dispute, the case touches on larger concerns about the strength and purpose of the Constitution's 10th Amendment, designed to preserve state power. It is also a question roiling the current political debate, especially among tea party conservatives in this post-9/11, security-conscious environment. The justices are using this case to explore the limits of congressional and presidential authority, with timely, far-reaching implications. "It would be deeply ironic that we have expended so much energy criticizing Syria," for its government's alleged use of chemical weapons in an ongoing civil war, said Justice Sonia Sotomayor, "when if this court were now to declare that our joining or creating legislation to implement the treaty was unconstitutional. We're putting aside the impact that we could have on foreign relations." "I just would like a fairly precise answer whether there are or are not limitations on what Congress can do with respect to the police power," Chief Justice John Roberts asked of the Obama administration's top lawyer. "If their authority is asserted under a treaty, is their power to intrude upon the police power unlimited?" Bond, a native of Barbados, lived outside Philadelphia and worked as a microbiologist. As a federal appeals court succinctly summarized the relevant facts in the case: "Bond was excited when her closest friend, Myrlinda Haynes, announced she was pregnant. Bond's excitement turned to rage when she learned that her husband, Clifford Bond, was the child's father. She vowed revenge." The woman, known to her family as Betty, struck back by stealing dangerous a chemical -- arsenic-based 10-chloro-10H-phenoxarsine -- from her company. She also obtained potassium dichromate over the Internet. Both substances in heavy doses can cause toxic, even lethal harm with very little physical contact. The 42-year-old then tried to poison Haynes some two dozen times over several months, secretly sprinkling small amounts of the chemicals on an apartment doorknob, car door handles, and a mailbox. While suffering no more than a chemical burn on her thumb, Haynes grew suspicious -- one of the chemicals was a bright orange powder. After getting little help from local police, in 2007 she called postal inspectors, who set up surveillance cameras. Bond was videotaped stealing mail and placing chemicals inside the mailbox and a car muffler, court records show. She was soon arrested. Bond admitted her guilt early on and claimed she never meant to kill Haynes, but only wanted to cause her "an uncomfortable rash." The defendant also said her friend's betrayal caused an "emotional breakdown" that made her respond in such a shocking fashion. Instead of being charged with simple assault, which may have gotten her six months to a year or two in state prison, Bond was indicted in federal court on two counts of mail fraud and -- the bombshell -- two counts of violating a federal law and international treaty on the possession and use of "chemical weapons." When a judge denied her motions to transfer the case to state court, Bond pleaded guilty and immediately appealed. She received a sentence of six years behind bars and nearly $12,000 in fines and restitution. She was released in August 2012. During Tuesday's lively hour of arguments, Bond's lawyer, Paul Clement, called the Chemical Weapons Convention Implementation Act an "odd statute" that clearly exceeds congressional authority. He said the treaty was designed to deal with "warlike" behavior, not "ordinary" poisoning cases. "I don't think that nation-states poison romantic rivals, attempt to commit suicide, or try to get rodents out of their houses" using chemicals that might have everyday non-criminal uses, he said, like vinegar. Justice Elena Kagan was unconvinced. "You are imagining a world in which judges day-to-day try to get inside the head of treaty makers," where judges might say: "We understand that there's a national interest in regulating sarin gas, but we don't think that there's a sufficient interest in regulating some other chemical down the line. It seems to me a completely indeterminate test" for judges to delineate "what is in the national and international interest." Solicitor General Donald Verrilli agreed, defending the treaty and law by saying, "There can't be a 'too local' exception to the treaty power." The Justice Department says federal law broadly prohibits a person from knowingly using a chemical weapon in a way that can "cause death, temporary incapacitation, or permanent harm" to another person, which prosecutors said Bond admittedly did. Verrilli dismissed a "parade of horribles"-- hypothetical suggestions that a sweeping treaty could be authorized giving the federal government complete police power over the states. "It seems unimaginable that a convention of that kind would be ratified by two-thirds of the Senate, which it would have to be," he said. "It also seems unimaginable that you would bring this prosecution," against Bond, said Justice Anthony Kennedy. "But let's leave it at that." The remark brought laughter in the courtroom, but Kennedy clearly was not joking. Justice Antonin Scalia used the issue to delve into another controversial issue. "Let's assume that an international treaty is approved by two-thirds of the Senate and the President, which requires states to approve same-sex marriage. All right?" he said. "Now, if that were a self-executing treaty, same sex marriage would have to be approved by every state. If it is not self-executing, however, it will be up to Congress to produce that result, and Congress would do it by having a federal marriage law." The conservative Scalia said to do so would be "dragging the Congress into areas where it has never been before." "If you told ordinary people that you were going to prosecute Ms. Bond for using a chemical weapon, they would be flabbergasted," said Justice Samuel Alito. "This statute has an enormous breadth -- anything that can cause death or injury to a person or an animal. Would it shock you if I told you that a few days ago my wife and I distributed toxic chemicals to a great number of children? On Halloween we gave them chocolate bars. Chocolate is poison to dogs, so it's a toxic chemical under the chemical weapons convention." Again there was audience laughter, but no smiles from the bench. Justice Stephen Breyer also worried about the scope of federal power. "In principle your position constitutionally would allow the President and the Senate, not the House, to do anything through a treaty that is not specifically within the prohibitions of the rights protections of the Constitution," he told Verrilli, citing a 1920 high court precedent giving Congress the power to enact treaties, even if it steps outside its traditional constitutional authority by usurping state laws. "And I doubt that in that document the Framers (of the Constitution) intended to allow the President and the Senate to do anything." "I am worried about that and I think others are, too," the left-leaning Breyer added. Among those attending the arguments was former Justice Sandra Day O'Connor. There are about a thousand treaties signed by the United States currently on the books. Many academics and lawmakers hope the majority right-leaning bench will use this opportunity to delve further into the scope of the 10th Amendment, which states, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." In the broader political context, a bipartisan sphere of Americans worry the federal government and Congress have been overly aggressive in staking claims to disputes they believe are best left to states, especially in the criminal arena. And it is not just felonies. Areas like gun ownership, zoning laws, environmental regulations, taxation, health care, and education standards all could be re-examined in the wake of this high court decision. Some of Bond's supporters argue that some federal prosecutions are novel and the penalties are often more harsh, creating conflict and confusion with local efforts to ensure public safety. They see Bond as an unexpected hero in the fight to return "the power back to the people." "The proposition that the Treaty Clause is a trump card that defeats all of the remaining structural limitations on the federal government is not a proposition that is logically defensible." Sen. Ted Cruz, R-Texas, said last week. Bond had won an earlier Supreme Court appeal, with a unanimous ruling she had "standing," or legal authority, to pursue her claims in the courts. That allowed her to continue trying to have her federal conviction tossed out, which is the current issue before the justices. Her lawyers say she had been trying in recent years to repair her shaken marriage, and has come to terms with her husband's betrayal. The case is Bond v. U.S. (12-158). A ruling is expected by the spring.

### Drone DA

#### No leaks – empirics of over 100 terror cases proves –

#### Plan opens door to active sonar

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.

#### And, LFAS undermines sub stealth

White-Maine Mammal Project-2000 (Maine Mammal Project, Spring)

<http://www.thefreelibrary.com/_/print/PrintArticle.aspx?id=59211572>

“There is one final problem with LFAS technology…obliterate the LFAS itself.”

LFAS' real purpose may be to find enemy subs lying in wait for ballistic-missile-bearing US Trident submarines. In a time of "heightened tensions," the LFAS could be ordered deployed at full power without any environmental "mitigations." An LFAS ship could blast away in the middle of a right-whale migration without asking permission from anyone. So much for prudent controls. There is one final problem with LFAS technology: It won't work. The LFAS is designed to send out a sound so loud that it can read the echo of an enemy sub hiding 30 miles away. Problem is, it will be like turning on a light in a dark room. The Navy's own subs also will be lit up and exposed to anyone able to read the echoes. If there were any enemy submarines lurking nearby, their first torpedoes would target our subs, the second wave would take out our carriers, and the third would obliterate the LFAS itself.

This collapses naval power

Crippen-former Director CBO-2K

Alternative Structures of Future Naval Forces

http://www.fas.org/man/congress/2000/cbo-n/s4.htm

The stealthiness of submarines makes them an ideal platform from which to project military power. A major advantage of a fleet that emphasized submarines would be that credible threats of military violence against potential enemies could be made without fear that the means to carry out those threats would be preemptively destroyed. If military action was subsequently required, submarines on station would be able to execute it quickly. Moreover, because they would not be vulnerable to a country's air-defense system, they could use their precision weapons immediately to attack whatever targets U.S. political and military leaders chose in support of a particular policy. Thus, as the threats to surface ships multiply and become increasingly difficult to counter, it may be time for the submarine to become the true capital ship of the Navy. As the Naval Studies Board put it: Over the next 40 years rapid proliferation of high-technology systems will render nonstealthy platforms and weapons systems increasingly vulnerable. The inexorable global spread of modern technology will allow hostile nations to increase their sea-denial capabilities through improved surveillance, enhanced reconnaissance, rapidly expanding information technology and precision weapons. This growing ability to inflict significant casualties on forces that can be detected and tracked easily places a premium on the value of stealth. U.S. forces, required to establish and maintain sea control when and wherever the national interest requires, will need maximum stealth capabilities. The increased value of, and emphasis on, stealth will likely result in increased reliance on submarines in future naval operations.(12)

### 2AC – Chilling Turn

#### Turn – judicial deference dissuades opponents of risky policies – makes uninformed risk-seeking inevitable, which will create a worse backlash in the future – chills all operations

Marguilies ‘10 Peter, Professor of Law, Roger Williams University, “Judging Myopia in Hindsight: Bivens Actions, National Security Decisions, and the Rule of Law” IOWA LAW REVIEW Vol. 96:195

Deferential decisions also reinforce myopia because they view policy decisions made without court intervention as a unitary, optimal baseline. In reality, decisionmaking is often a group process,160 with a spectrum of inputs that are sensitive to either judicial intervention or deference. An official considering a move such as extraordinary rendition of a suspected terrorist will receive input from internal champions and opponents of this course. Officials in the latter camp may argue that extraordinary rendition is a myopic policy that will increase violence by alienating important global audiences. Members of those constituencies will decide against working with the United States or engaging in peaceful dissent, and will throw in their lot with groups already allied against us.161 Deferential courts tend to assume that their stance will permit the policy debate to proceed unimpaired.162 However, the dynamics of executive-branch decisionmaking spur doubts. Despite common assertions that lawsuits chill vigorous responses to threats,163 deferential decisions may impose a deeper chill on myopia’s internal opponents. Bureaucratic opponents already face intra-institutional costs, particularly in the aftermath of crisis. Hawks within the agency may question opponents’ regard for the public’s safety.164 They may also label opponents as captives of an antiquated precrisis mentality. As a result, opponents may be taken out of the loop on sensitive questions or abstain from the debate, even when the institution would be better off heeding their advice.165 Viewed in this light, a deferential court decision is not “neutral”; it serves to hinder internal dissent.166 The result is a mix of inputs that tilts toward unduly risk-seeking behavior. Over time, behavior of this kind will exacerbate volatility by triggering a backlash toward undue risk-aversion.168 In contrast, a decision that denies policymakers categorical impunity may strengthen internal dissenters’ resolve and enhance overall deliberation.169

#### Operational secrecy is not unique- Obama is moving towards more DOD operations which are not covert and include public criminal trials.

Goldsmith 10-13 (Jack, Thoughts About the Obama Administration’s Counterterrorism Paradigm in Light of the Al-Liby and Ikrima Operations, Sunday, October 13, 2013, http://www.lawfareblog.com/2013/10/thoughts-about-the-obama-administrations-counterterrorism-paradigm-in-light-of-the-al-liby-and-ikrima-operations/)

It is also possible that (8) represents a new step, or emphasis. After all these were DOD and probably Title 10 operations, and the administration could have conducted drone str bnikes, but instead attempted capture operations. I have no doubt that the administration is trying, as it has been saying for a while, to shift responsibility for counterterrorism operations to DOD, and to make them non-covert to the extent possible. Perhaps this is a beginning of a trend of accepting greater risk to troops and potentially greater risk to civilians inherent in on-the-ground capture operations in exchange for the benefits that come with DOD operations followed by criminal process. We will see. But the resistance to and ultimate failure of the mission in Somalia – and indeed the inability to incapacitate Ikrima in Somalia without injuries or death to civilians or troops – might be a cautionary tale

#### Judicial review is insulated from intelligence leaks

Vladeck 13 (Steve Vladeck is a professor of law and the associate dean for scholarship at American University Washington College of Law. “Why a Drone Court Won’t Work –But Nominal Damages Might…” http://www.lawfareblog.com/2013/02/why-a-drone-court-wont-work/) IV. Why Damages Actions Don’t Raise the Same Legal Concerns

 At first blush, it may seem like many of these issues would be equally salient in the context of after-the-fact damages suits. But as long as such a regime was designed carefully and conscientiously, I actually think virtually all of these concerns could be mitigated. For starters, retrospective review doesn’t raise anywhere near the same concerns with regard to adversity or judicial competence. Re: adversity, presumably those who are targeted in an individual strike could be represented as plaintiffs in a post-hoc proceeding, whether through their next friend or their heirs. And as long as they could state a viable claim for relief (more on that below), it’s hard to see any pure Article III problem with such a suit for retrospective relief. As for competence, judges routinely review whether government officers acted in lawful self-defense under exigent circumstances (this is exactly what Tennessee v. Garner contemplates, after all). And if the Guantánamo litigation of the past five years has shown nothing else, it demonstrates that judges are also more than competent to resolve not just whether individual terrorism suspects are who the government says they are (and thus members of al Qaeda or one of its affiliates), but to do so using highly classified information in a manner that balances–albeit not always ideally–the government’s interest in secrecy with the detainee’s ability to contest the evidence against him. Just as Guantánamo detainees are represented in their habeas proceedings by security-cleared counsel who must comply with court-imposed protective orders and security procedures, so too, the subjects of targeted killing operations could have their estates represented by security-cleared counsel, who would be in a far better position to challenge the government’s evidence and to offer potentially exculpatory evidence / arguments of their own. More to the point, it should also follow that courts would be far more able to review the questions that will necessary be at the core of these cases after the fact. Although the pure membership question can probably be decided in the abstract, it should stand to reason that the imminence and infeasibility-of-capture issues will be much easier to assess in hindsight–removed from the pressures of the moment and with the benefit of the dispassionate distance on which judicial review must rely

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#### --N/U and TURN---Court deference on targeted killing in the Squo DECIMATES legitimacy

McCormack, law prof-Utah, 13 (Wayne McCormack is the E. W. Thode Professor of Law at the University of Utah S.J. Quinney College of Law, U.S. Judicial Independence: Victim in the “War on Terror”, Aug 20, https://today.law.utah.edu/projects/u-s-judicial-independence-victim-in-the-war-on-terror/)

One of the principal victims in the U.S. so-called “war on terror” has been the independence of the U.S. Judiciary. Time and again, challenges to assertedly illegal conduct on the part of government officials have been turned aside, either because of overt deference to the Government or because of special doctrines such as state secrets and standing requirements. The judiciary has virtually relinquished its valuable role in the U.S. system of judicial review. In the face of governmental claims of crisis and national security needs, the courts have refused to examine, or have examined with undue deference, the actions of government officials. The U.S. Government has taken the position that inquiry by the judiciary into a variety of actions would threaten the safety of the nation. This is pressure that amounts to intimidation. When this level of pressure is mounted to create exceptions to established rules of law, it undermines due process of law. Perhaps one or two examples of Government warnings about the consequences of a judicial decision would be within the domain of legal argument. But a long pattern of threats and intimidation to depart from established law undermines judicial independence. That has been the course of the U.S. “war on terror” for over a decade now. Here are some of the governmental actions that have been challenged and a brief statement of how the Courts responded to Government demands for deference. 1. Guantanamo. In Boumediene v. Bush,1 the Supreme Court allowed the U.S. to detain alleged “terrorists” under unstated standards to be developed by the lower courts with “deference” to Executive determinations. The intimidation exerted on the Court was reflected in Justice Scalia’s injudicious comment that the Court’s decision would “surely cause more Americans to be killed.” 2. Detention and Torture Khalid El-Masri2 claimed that he was detained in CIA “black sites” and tortured – case dismissed under the doctrine of “state secrets privilege.” (SSP) Maher Arar3 is a Canadian citizen who was detained at Kennedy Airport by U.S. authorities, shipped off to Syria for imprisonment and mistreatment, and finally released to Canadian authorities – case dismissed under “special factors” exception to tort actions for violations of law by federal officials – awarded $1 million by Canadian authorities. Jose Padilla4 was arrested deplaning at O’Hare Airport, imprisoned in the U.S. for four years without a hearing and allegedly mistreated in prison – case dismissed on grounds of “good faith” immunity. Binyam Mohamed5 was subjected to “enhanced interrogation techniques” at several CIA “black sites” before being repatriated to England, which awarded him £1 million in damages – U.S. suit dismissed under SSP. 1 553 U.S. 723 (2008). 2 El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007). 3 Arar v. Ashcroft, 414 F. Supp. 2d 250 (E.D.N.Y. 2005), aff’d by 585 F.3d 559 (2009). 4 Padilla v. Yoo, 678 F.3d 748 (9th Cir. 2012). 5 Mohamed v. Jeppesen Dataplan, 614 F.3d 1070 (9th Cir. en banc 2010) damages – U.S. suit dismissed under SSP. 3. Unlawful Detentions Abdullah Al-Kidd6 arrested as a material witness, held in various jails for two weeks, and then confined to house arrest for 15 months – suit dismissed on grounds of “qualified immunity” and apparent validity of material witness warrant. Ali Al-Marri was originally charged with perjury, then detained as an enemy combatant, for a total detention of four years before the Fourth Circuit finally held that he must be released or tried.7 Javad Iqbal8 was detained on visa violations in New York following 9/11 and claimed he was subjected to mistreatment on the basis of ethnic profiling – suit dismissed on grounds that he could not prove Attorney General authorization of illegal practices and court’s unwillingness to divert attention of officials away from national security. Osama Awadallah9 was taken into custody in Los Angeles after his name and phone number were found on a gum wrapper in the car of one of the 9/11 hijackers – charged with perjury before grand jury and held as material witness – Second Circuit reversed district court ruling on abuse of the material witness statute 4. Unlawful Surveillance Amnesty International10 is one of numerous organizations that brought suit believing that its communications, especially with foreign clients or correspondents had been monitored by the National Security Agency – suit dismissed because the secrecy of the NSA spying program made it impossible to prove that any particular person or group had been monitored. The validity of the entire Foreign Surveillance Act (FISA) rests on the “special needs” exception to the Fourth Amendment, a conclusion that was rejected by one district court although accepted by others. 5. Targeted Killing Anwar Al-Awlaki (or Aulaqi)11 was reported by press accounts as having been placed on a “kill list” by President Obama – suit by his father dismissed on grounds that Anwar himself could come forward and seek access to U.S. courts – not only Anwar but his son were then killed in separate drone strikes. 6. Asset Forfeiture 6 Al-Kidd v. Ashcroft, 580 F.3d 949, 951-52 (9th Cir. 2009). 7Al-Marri v. Wright, 487 F.3d 160 (4th Cir. 2007). 8 Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009) 9 United States v. Awadallah, 349 F.3d 42 (2d Cir. 2003); see also In re Grand Jury Material Witness Detention, 271 F. Supp. 2d 1266 (D. Or. 2003); In re Application of U.S. for a Material Witness Warrant, 213 F. Supp. 2d 287 (S.D. N.Y. 2002). 10 Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138 (2013). 11 Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010) Both Al Haramain Islamic Foundation12 and KindHearts for Charitable Humanitarian Development13 have been found by the Department of Treasury to be fronts for raising money for Hamas, and their assets have been blocked – despite findings of due process violations by the lower courts, the blocking of assets has been upheld on the basis that their support for terrorist activities is public knowledge. Avoiding Accountability The “head in the sand” attitude of the U.S. judiciary in the past decade is a rather dismal record that does not fit the high standard for judicial independence on which the American public has come to rely. Many authors have discussed these cases from the perspective of civil rights and liberties of the individual. What I want to highlight is how undue deference to the Executive in “time of crisis” has undermined the independent role of the judiciary. Torture, executive detentions, illegal surveillance, and now killing of U.S. citizens, have all escaped judicial review under a variety of excuses. To be clear, many of the people against whom these abuses have been levied are, or were, very dangerous if not evil individuals. Khalid Sheikh Muhamed and Anwar al-Aulaqi should not be allowed to roam free to kill innocent civilians. But hundreds of years of history show that there are ways of dealing with such people within the limits of restrained government without resort to the hubris and indignity of unreviewed executive discretion. The turning of blind eyes by many, albeit not all, federal judges is a chapter of this history that will weigh heavily against us in the future. No judge wants to feel responsible for the deaths of innocents. But moral responsibility for death is with those who contribute to the act. Meanwhile the judge has a moral responsibility for abuses by government of which the judiciary is a part. There is nothing “new” in the killing of innocents for religious or political vengeance. This violence has always been with us and will unfortunately continue despite our best efforts to curb it. Pleas for executive carte blanche power are exactly what the history of the writ of habeas corpus were developed to avoid,14 and what many statements in various declarations of human rights are all about. The way of unreviewed executive discretion is the way of tyranny.

### Warming

#### CO2 in the atmosphere doesn’t make warming inevitable, we can still keep it below 2 degrees.

Hansen and Kharecha et al 2013

James, adjunct professor in the Department of Earth and Environmental Sciences at Columbia University, and Pushker, Ph.D. Geosciences and Astrobiology, NASA Goddard, Assessing "Dangerous Climate Change": Required Reduction of Carbon Emissions to Protect Young People, Future Generations and Nature, 12-3-13, http://www.columbia.edu/~jeh1/mailings/2013/20131202\_PopularSciencePlosOneE.pdf

We conclude that the widely accepted target of limiting human-made global climate warming to 2 degrees Celsius (3.6 degrees Fahrenheit) above the preindustrial level is too high and would subject young people, future generations and nature to irreparable harm. Carbon dioxide (CO2) emissions from fossil fuel use must be reduced rapidly to avoid irreversible consequences such as sea level rise large enough to inundate most coastal cities and extermination of many of today's species. Unabated global warming would also worsen climate extremes. In association with summer high pressure systems, warming causes stronger summer heat waves, more intense droughts, and wildfires that burn hotter. Yet because warming causes the atmosphere to hold more water vapor, which is the fuel that drives thunderstorms, tornadoes and tropical storms, it also leads to the possibility of stronger storms as well as heavier rainfall and floods. Observational data reveal that some climate extremes are already increasing in response to warming of several tenths of a degree in recent decades; these extremes would likely be much enhanced with warming of 2°C or more. We use evidence from Earth's climate history and measurements of Earth's present energy imbalance as our principal tools for inferring climate sensitivity and the safe level of global warming. The inferred warming limit leads to a limit on cumulative fossil fuel emissions. It is assessed that humanity must aim to keep global temperature close to the range occurring in the past 10,000 years, the Holocene epoch, a time of relatively stable climate and stable sea level during which civilization developed. The world cooled slowly over the last half of the Holocene, but warming of 0.8°C (1.4°F) in the past 100 years has brought global temperature back near the Holocene maximum. We note that policies should emphasize fossil fuel carbon, not mixing in carbon from forest changes as if it were equivalent. Most of the carbon from fossil fuel burning will stay in the climate system for of order 100,000 years. Of course carbon dioxide from deforestation also causes warming and policies must address that carbon source, but good land use policies could restore most of that carbon to the biosphere on a time scale of decades to centuries. However, maximum biospheric restoration is likely to be only comparable to the past deforestation source, so fossil fuel sources must be strictly limited. We conclude that human-made warming could be held to about 1°C (1.8°F) if cumulative industrial-era fossil fuel emissions are limited to 500 GtC (gigatons of carbon, where a gigaton is one billion metric tons) and if policies are pursued to restore 100 GtC into the biosphere, including the soil. This scenario leads to reduction of atmospheric CO2 to 350 ppm by 2100, as needed to restore Earth's energy balance and approximately stabilize climate. In contrast, we conclude that the target to limit global warming to 2°C, confirmed by the 2009 Copenhagen Accord of the 15th Conference of the Parties of the United Nations Framework Convention on Climate Change, would lead to disastrous consequences. For example, Earth's history shows that 2°C global warming is likely to result in eventual sea level rise of the order of six meters (20 feet). Moreover, we note that such a warming level would induce "slow amplifying feedbacks". These amplifying feedbacks include a reduction of ice sheet area, vegetation changes including growth of forests in high latitudes of Asia and North America that are now sparsely vegetated, and an increase of atmospheric gases such as nitrous oxide and methane. These slow feedbacks are small if climate stays within the Holocene range, but substantial if warming reaches 2°C or more.

### Congress can’t do PQD

#### --Congress cant effectively direct judicial review-APA proves

Grinsinger-Prof History NU-12

The Unwieldy American State: Administrative Politics Since the New Deal p.81

Congress was at least discontented with certain judicial practices. As the Senate Judiciary Committee suggested, the problem was not with the "substantial evidence" test itself, but with "the practice of agencies to rely upon (and of courts to tacitly approve) something less - to rely upon suspicion, surmise, implications, or plainly incredible evidence."'0' As a result, Congress directed courts to determine "in the exercise of their independent judgment, whether on the whole record the evidence in a given instance is sufficiently substantial to support a finding, conclusion, or other agency action as a matter of Iaw."'0i As one scholar suggested, "the difference in emphasis is not so much over what the Act requires, as over what the Courts have been really doing."10"' It was not at all clear that this problem extended beyond a few prominent cases, but the bill's drafters were able to use this opportunity to provide a new and clearly stated standard of review that asked all courts to reexamine how they reviewed agency decision making. However, by implicitly endorsing what most courts were already doing. Congress blunted the revolutionary impact of the new standard. One contemporary observer predicted that the APA "will not upset the rubric of judicial review which the federal judiciary has fashioned piecemeal, and from which it has no intention of deviating, even though its home- made precepts also now have been expressed, however opaquely, in statutory flapdoodle."104

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#### B. Judicial review is authority not process-The CP delegates authority to the courts which is an increase in Judicial Review.

Legal Dictionary

[http://legal-dictionary.thefreedictionary.com/judicial+review](http://legal-dictionary.thefreedictionary.com/judicial%2Breview)

A court's authority to examine an executive or legislative act and to invalidate that act if it is contrary to constitutional principles. The power of courts of law to review the actions of the executive and legislative branches is called judicial review. Though judicial review is usually associated with the U.S. Supreme Court, which has ultimate judicial authority, it is a power possessed by most federal and state courts of law in the United States. The concept is an American invention. Prior to the early 1800s, no country in the world gave its judicial branch such authority. In the United States, the supremacy of national law is established by Article VI, Clause 2, of the U.S. Constitution.

### Da

#### No log rolling – internal norms, Kennedy, merit based decisions.

Coy 2012

Peter, Anthony Kennedy, the Justice Everyone Is Watching, BusinessWeek, http://www.businessweek.com/articles/2012-06-27/anthony-kennedy-the-justice-everyone-is-watching

In Congress, log-rolling is business as usual: If you vote for my bill, I’ll vote for yours. So observers were quick to spot evidence of log-rolling on the Supreme Court in the big rulings that came on June 25—and to extrapolate what those votes might mean for the decision on the Patient Protection and Affordable Care Act. Not so fast, says Cornell Law School professor Michael Dorf, who clerked for Justice Anthony Kennedy: Log-rolling is not how the high court works. Dorf makes two key points about the pending health-care ruling. First, justices on the Supreme Court strive to make decisions on the merits, although like all humans, they are affected by interpersonal dynamics. Second, Kennedy, the court’s swing voter, is an independent thinker and not merely a split-the-difference compromiser. The theory that justices voted strategically in Monday’s cases to affect the Affordable Care Act vote is expressed in a Bloomberg View column by Harvard Law School professor Noah Feldman. He notes that liberal justices Sonia Sotomayor, Stephen Breyer, and Ruth Bader Ginsburg voted with Kennedy in the majority decision that upheld a key feature of the Arizona immigration law while striking down others. Writes Feldman: “The three liberals may have been willing to give Justice Kennedy more room to maneuver than usual because they wanted to keep him close for the health-care decision.” Chief Justice John Roberts, who generally doesn’t vote with the court’s liberals, also joined Kennedy’s majority opinion. It’s possible, Feldman writes, that “Roberts, too, was hoping to bring Kennedy to his side in the health-care decision.” Dorf, who blogs at Dorf on Law, is skeptical of that theory. “It violates the court’s internal norms for the justices to engage in log-rolling,” Dorf tells me. “It is virtually inconceivable that there was any kind of a deal in which the liberals go along with Kennedy on the Arizona case in exchange for his vote on the ACA.” (Dorf says Harvard’s Feldman never made such a strong claim; he came close, though.)

### Delay

#### 5. Even if it got to the SC- it would be on next year’s docket, this one is already full

Wermiel, fellow @ American Law school, 12 (Stephen, Fellow in Law & Government at American University Washington College of Law, was the Wall Street Journal Supreme Court correspondent from 1979 to 1991, “A foot in two Terms,” June 1, http://www.scotusblog.com/2012/06/scotus-for-law-students-a-foot-in-two-terms-sponsored-by-bloomberg-law/)

Beginning in January each year, the Supreme Court officially becomes schizophrenic. But don’t worry, there is no treatment required.¶ At some point in mid- to late-January, the Court stops setting cases for argument in the remaining months of the current Term and shifts to filling up the slots for the next Term. As a result, the Justices are working on their active docket and planning for what lies ahead.¶ The main reason for this practice is simply one of timing. The Court hears oral arguments in seven sessions, each spanning two weeks, from October through April. The Court’s rules spell out a 105-day schedule for parties to file briefs: forty-five days after the case is granted for the petitioner, thirty days after that for the respondent, and thirty more days for a reply brief by the petitioner. By January, it becomes difficult as a matter of simple mathematics to grant a petition for certiorari and still be able to schedule that case for argument in April on a normal briefing schedule.