### Adv 1

#### Advantage 1 Norms

#### Drone policy sets a dangerous legal precedent – lends to global conflict escalation – especcially in asia

Taylor, 11/10/13 [Guy, “U.S. intelligence warily watches for threats to U.S. now that 87 nations possess drones”, http://www.washingtontimes.com/news/2013/nov/10/skys-the-limit-for-wide-wild-world-of-drones/?page=all]

The age of the drone is here, and U.S. intelligence agencies are warily monitoring their proliferation around the globe. China uses them to spy on Japan near disputed islands in Asia. Turkey uses them to eyeball Kurdish activity in northern Iraq. Bolivia uses them to spot coca fields in the Andes. Iran reportedly has given them to Syria to monitor opposition rebels. The U.S., Britain and Israel are the only nations to have fired missiles from remote-controlled drones, but the proliferation of unmanned aerial vehicles has become so prevalent that U.S. intelligence sources and private analysts say it is merely a matter of time before other countries use the technology. “People in Washington like to talk about this as if the supposed American monopoly on drones might end one day. Well, the monopoly ended years ago,” said Peter W. Singer, who heads the Center for 21st Century Security and Intelligence at the Brookings Institution. What’s worse, clandestine strikes carried out by Washington in far-flung corners of the world have set a precedent that could be ugly. Mr. Singer said as many as 87 nations possess some form of drones and conduct various kinds of surveillance either over their own territories or beyond. Among those 87, he said, 26 have either purchased or developed drones equivalent in size to the MQ-1 Predator — the model made by San Diego-based General Atomics. While American Predators and their updated sister, the MQ-9 Reaper, are capable of carrying anti-armor Hellfire missiles, the clandestine nature of foreign drone programs makes it difficult to determine how many other nations have armed drones. Defense industry and other sources who spoke with The Washington Times said 10 to 15 nations are thought to be working hard on doing just that, and China and Iran are among those with the most advanced programs. “Global developments in the UAV arena are being tracked closely,” said one U.S. intelligence official, who spoke with The Times on the condition of anonymity. “Efforts by some countries to acquire armed UAV systems are concerning, not least because of the associated proliferation risk.” Other sources said that while the international media have focused on the controversy and political backlash associated with civilian casualties from U.S. drone strikes in Pakistan, Yemen and Somalia, Washington’s unprecedented success with the technology — both in targeting and killing suspected terrorists — has inspired a new kind of arms race. “It’s natural that other nations and non-state actors, seeing the many ways the U.S. has leveraged the technology, are keen to acquire remotely piloted aircraft,” said Lt. Gen. Robert P. Otto, Air Force deputy chief of staff for intelligence, surveillance and reconnaissance. Race to the skies The number of nations possessing drones nearly doubled from 41 to 76 from 2005 to 2011, according to a report last year by the Government Accountability Office, which highlighted the fact that U.S. companies are no longer alone in manufacturing and marketing the technology. “Many countries acquired their UAVs from Israel,” said the report. It said Germany, France, Britain, India, Russia and Georgia have either leased or purchased Israeli drones, including the Heron, a model that many foreign militaries see as a good alternative to the American-made Predators and Reapers. A report this year by Teal Group, a Virginia-based aerospace and defense industry analysis corporation, said UAVs have come to represent the “most dynamic growth sector” of the global aerospace industry, with spending on drones projected to more than double from roughly $5.2 billion a year today to more than $11 billion in 2022. China is widely seen as a potential powerhouse in the market. Chinese companies have “marketed both armed drones and weapons specifically designed for UAV use,” said Steven J. Zaloga, a top analyst at Teal Group. “It’s a case where if they don’t have the capability today, they’ll have it soon.” Although there is concern in Washington that China will sell the technology to American adversaries, sources say, the U.S. also is pushing ahead with development of its own secretive “next generation” drones. Today’s models emerged in the post-9/11 era of nonconventional conflict — a time when American use of both weaponized and surveillance-only drones has been almost exclusively over chaotic patches of the planet void of traditional anti-aircraft defenses. With little or no need to hide, relatively bulky drones such as the MQ-1 Predator dominated the market. But the “big secret,” Mr. Zaloga said, “is that the U.S. is already working on both armed and unarmed UAVs that can operate in defended airspace.” Another factor likely to fuel the proliferation of armed drones, he said, centers on a global push to make “very small weapons” that can be tailored to fit smaller aircraft. This matters because of the roughly 20,000 drones now in existence, only about 350 are large enough to carry the slate of weapons on the current market. “What the new munitions will do is mean that if you’re operating the smaller UAVs, you’ll be able to put weapons on them,” said Mr. Zaloga. “And those smaller UAVs are being manufactured now by quite a few countries.” In the wrong hands? One serious concern in Washington is that smaller drones could be used by groups such as al Qaeda or Hezbollah, the Iran-backed militant and political organization based in Lebanon that is engaged in a protracted war with Israel. The U.S. intelligence official who spoke with The Times on the condition of anonymity said it is “getting easier for non-state actors to acquire this technology.” Hezbollah leader Hassan Nasrallah made headlines by claiming his group flew a drone into Israeli airspace last year, after Israel announced that it had shot a UAV out of the sky. Although Mr. Nasrallah said the drone was made in Iran and assembled in Lebanon, little is known about precisely what type it was — or whether it was armed. Armed or not, U.S. officials are wary. “No one is turning a blind eye to the growing use of surveillance-only UAV systems — including by non-state actors — even if these systems have a host of beneficial civil applications,” said the official who spoke with The Times. “One problem is that countries may perceive these systems as less provocative than armed platforms and might use them in cross-border operations in a way that actually stokes regional tension.” That appears to be happening in Asia, where Japan recently threatened to shoot down Chinese drones flying near the disputed Senkaku Islands in the East China Sea. Northeast Asian countries are likely to invest heavily in drone technology, said Patrick M. Cronin, senior director of the Asia-Pacific Security Program at the Center for a New American Security in Washington. “But even before these investments are manifested in wider deployments, Japan will be relying on UAVs for wider and better surveillance, particularly around its southwest island chain, while China will be using them to variably challenge Japanese administrative control and, indirectly, pressure the United States to restrain its ally,” said Mr. Cronin. “This vital new technology is improving situational awareness. But, paradoxically, if used more offensively the same technology may also accelerate a maritime crisis in the East or even South China Sea.” U.S. precedents Others say the U.S. and its closest allies have set a precedent with clandestine drone strikes in foreign lands. Although British forces have carried out hundreds of drone strikes in Afghanistan and Israel has used drone-fired missiles to kill suspected terrorists in Egypt’s Sinai Peninsula, as well as Islamic militants in Gaza, the most widespread use has been directed by the U.S. military and CIA. In addition to strikes in Libya and Somalia, the U.S. has carried out more than 375 strikes in Pakistan and as many as 65 in Yemen over the past nine years, according to the London-based Bureau of Investigative Journalism. The concern, said the Brookings Institution’s Mr. Singer, is that adversaries will point to U.S. behavior as an excuse for carrying out cross-border targeting of “high-value” individuals. “That’s where you have the problem,” he said. “Turkey carries out a strike in northern Iraq and then cites U.S. precedent in Pakistan to justify it. Or Iran carries out a drone strike inside Syria that the Syrian government says it’s fine with because it’s a lawless area where what they call ‘terrorists’ are hanging out, and then they throw the precedent back at the U.S. “That would make it sticky for us,” said Mr. Singer. “That’s not the broader norm we want out there.”

#### Those deterrence breakdowns escalate

Boyle, 13 [“The costs and consequences of drone warfare”, MICHAEL J. BOYLE, International Affairs 89: 1 (2013) 1–29, assistant professor of political science at LaSalle University]

The emergence of this arms race for drones raises at least five long-term strategic consequences, not all of which are favourable to the United States over the long term. First, it is now obvious that other states will use drones in ways that are inconsistent with US interests. One reason why the US has been so keen to use drone technology in Pakistan and Yemen is that at present it retains a substantial advantage in high-quality attack drones. Many of the other states now capable of employing drones of near-equivalent technology—for example, the UK and Israel—are considered allies. But this situation is quickly changing as other leading geopolitical players, **such as Russia and China**, are beginning rapidly **to develop and deploy drones** for their own purposes. While its own technology still lags behind that of the US, Russia has spent huge sums on purchasing drones and has recently sought to buy the Israeli-made Eitan drone capable of surveillance and firing air-to-surface missiles.132 China has begun to develop UAVs for reconnaissance and combat and has several new drones capable of long-range surveillance and attack under development.133 China is also planning to use unmanned surveillance drones to allow it to monitor the disputed East China Sea Islands, which are currently under dispute with Japan and Taiwan.134 Both Russia and China will pursue this technology and develop their own drone suppliers which will sell to the highest bidder, presumably with fewer export controls than those imposed by the US Congress. Once both governments have equivalent or near-equivalent levels of drone technology to the United States, they will be similarly tempted to use it for surveillance or attack in the way the US has done. Thus, through its own over-reliance on drones in places such as Pakistan and Yemen, the US may be hastening the arrival of a world where its qualitative advantages in drone technology are eclipsed and where this technology will be used and sold by rival Great Powers whose interests do not mirror its own. A second consequence of the spread of drones is that many of the traditional concepts which have underwritten stability in the international system will be radically reshaped by drone technology. For example, much of the stability among the Great Powers in the international system is driven by deterrence, specifically nuclear deterrence.135 Deterrence operates with informal rules of the game and tacit bargains that govern what states, particularly those holding nuclear weapons, may and may not do to one another.136 While it is widely understood that nuclear-capable states will conduct aerial surveillance and spy on one another, overt military confrontations between nuclear powers are rare because they are assumed to be costly and prone to escalation. One open question is whether these states will exercise the same level of restraint with drone surveillance, which is unmanned, low cost, and possibly deniable. States may be more willing to engage in drone overflights which test the resolve of their rivals, or engage in ‘salami tactics’ to see what kind of drone-led incursion, if any, will motivate a response.137 This may have been Hezbollah’s logic in sending a drone into Israeli airspace in October 2012, possibly to relay information on Israel’s nuclear capabilities.138 After the incursion, both Hezbollah and Iran boasted that the drone incident demonstrated their military capabilities.139 One could imagine two rival states—for example, India and Pakistan—deploying drones to test each other’s capability and resolve, with untold consequences if such a probe were misinterpreted by the other as an attack. As drones get physically smaller and more precise, and as they develop a greater flying range, the temptation to use them to spy on a rival’s nuclear programme or military installations might prove too strong to resist. If this were to happen, drones might gradually erode the deterrent relationships that exist between nuclear powers, thus magnifying the risks of a spiral of conflict between them. Another dimension of this problem has to do with the risk of accident. Drones are prone to accidents and crashes. By July 2010, the US Air Force had identified approximately 79 drone accidents.140 Recently released documents have revealed that there have been a number of drone accidents and crashes in the Seychelles and Djibouti, some of which happened in close proximity to civilian airports.141 The rapid proliferation of drones worldwide will involve a risk of accident to civilian aircraft, possibly producing an international incident if such an accident were to involve an aircraft affiliated to a state hostile to the owner of the drone. Most of the drone accidents may be innocuous, but some will carry strategic risks. In December 2011, a CIA drone designed for nuclear surveillance crashed in Iran, revealing the existence of the spying programme and leaving sensitive technology in the hands of the Iranian government.142 The expansion of drone technology raises the possibility that some of these surveillance drones will be interpreted as attack drones, or that an accident or crash will spiral out of control and lead to an armed confrontation.143 An accident would be even more dangerous if the US were to pursue its plans for nuclear-powered drones, which can spread radioactive material like a dirty bomb if they crash.144 Third, lethal drones create the possibility that the norms on the use of force will erode, creating a much more dangerous world and pushing the international system back towards the rule of the jungle. To some extent, this world is already being ushered in by the United States, which has set a dangerous precedent that a state may simply kill foreign citizens considered a threat without a declaration of war. Even John Brennan has recognized that the US is ‘establishing a precedent that other nations may follow’.145 **Given this precedent**, there is nothing to stop other states from following the American lead and using drone strikes to eliminate potential threats. Those ‘threats’ need not be terrorists, but could be others— dissidents, spies, even journalists—whose behaviour threatens a government. One danger is that drone use might undermine the normative prohibition on the assassination of leaders and government officials that most (but not all) states currently respect. A greater danger, however, is that the US will have normalized murder as a tool of statecraft and created a world where states can increasingly take vengeance on individuals outside their borders without the niceties of extradition, due process or trial.146 As some of its critics have noted, the Obama administration may have created a world where states will find it easier to kill terrorists rather than capture them and deal with all of the legal and evidentiary difficulties associated with giving them a fair trial.147 Fourth, there is a distinct danger that the world will divide into two camps: developed states in possession of drone technology, and weak states and rebel movements that lack them. States with recurring separatist or insurgent problems may begin to police their restive territories through drone strikes, essentially containing the problem in a fixed geographical region and engaging in a largely punitive policy against them. One could easily imagine that China, for example, might resort to drone strikes in Uighur provinces in order to keep potential threats from emerging, or that Russia could use drones to strike at separatist movements in Chechnya or elsewhere. Such behaviour would not necessarily be confined to authoritarian governments; it is equally possible that Israel might use drones to police Gaza and the West Bank, thus reducing the vulnerability of Israeli soldiers to Palestinian attacks on the ground. The extent to which Israel might be willing to use drones in combat and surveillance was revealed in its November 2012 attack on Gaza. Israel allegedly used a drone to assassinate the Hamas leader Ahmed Jabari and employed a number of armed drones for strikes in a way that was described as ‘unprecedented’ by senior Israeli officials.148 It is not hard to imagine Israel concluding that drones over Gaza were the best way to deal with the problem of Hamas, even if their use left the Palestinian population subject to constant, unnerving surveillance. All of the consequences of such a sharp division between the haves and have-nots with drone technology is hard to assess, but one possibility is that governments with secessionist movements might be less willing to negotiate and grant concessions if drones allowed them to police their internal enemies with ruthless efficiency and ‘manage’ the problem at low cost. The result might be a situation where such conflicts are contained but not resolved, while citizens in developed states grow increasingly indifferent to the suffering of those making secessionist or even national liberation claims, including just ones, upon them. Finally, drones have the capacity to strengthen the surveillance capacity of both democracies and authoritarian regimes, with significant consequences for civil liberties. In the UK, BAE Systems is adapting military-designed drones for a range of civilian policing tasks including ‘monitoring antisocial motorists, protesters, agricultural thieves and fly-tippers’.149 Such drones are also envisioned as monitoring Britain’s shores for illegal immigration and drug smuggling. In the United States, the Federal Aviation Administration (FAA) issued 61 permits for domestic drone use between November 2006 and June 2011, mainly to local and state police, but also to federal agencies and even universities.150 According to one FAA estimate, the US will have 30,000 drones patrolling the skies by 2022.151 Similarly, the European Commission will spend US$260 million on Eurosur, a new programme that will use drones to patrol the Mediterranean coast.152 The risk that drones will turn democracies into ‘surveillance states’ is well known, but the risks for authoritarian regimes may be even more severe. Authoritarian states, particularly those that face serious internal opposition, may tap into drone technology now available to monitor and ruthlessly punish their opponents. In semi-authoritarian Russia, for example, drones have already been employed to monitor pro-democracy protesters.153 One could only imagine what a truly murderous authoritarian regime—such as Bashar al-Assad’s Syria—would do with its own fleet of drones. The expansion of drone technology may make the strong even stronger, thus **tilting the balance of power in authoritarian regimes** **even more decisively towards** those who wield the coercive instruments of power and against those who dare to challenge them. Conclusion Even though it has now been confronted with blowback from drones in the failed Times Square bombing, the United States has yet to engage in a serious analysis of the strategic costs and consequences of its use of drones, both for its own security and for the rest of the world. Much of the debate over drones to date has focused on measuring body counts and carries the unspoken assumption that if drone strikes are efficient—that is, low cost and low risk for US personnel relative to the terrorists killed—then they must also be effective. This article has argued that such analyses are operating with an attenuated notion of effectiveness that discounts some of the other key dynamics—such as the corrosion of the perceived competence and legitimacy of governments where drone strikes take place, growing anti-Americanism and fresh recruitment to militant networks—that reveal the costs of drone warfare. In other words, the analysis of the effectiveness of drones takes into account only the ‘loss’ side of the ledger for the ‘bad guys’, without asking what America’s enemies gain by being subjected to a policy of constant surveillance and attack. In his second term, President Obama has an opportunity to reverse course and establish a new drones policy which mitigates these costs and avoids some of the long-term consequences that flow from them. A more sensible US approach would impose some limits on drone use in order to minimize the political costs and long-term strategic consequences. One step might be to limit the use of drones to HVTs, such as leading political and operational figures for terrorist networks, while reducing or eliminating the strikes against the ‘foot soldiers’ or other Islamist networks not related to Al-Qaeda. This approach would reduce the number of strikes and civilian deaths associated with drones while reserving their use for those targets that pose a direct or imminent threat to the security of the United States. Such a self-limiting approach to drones might also minimize the degree of political opposition that US drone strikes generate in states such as Pakistan and Yemen, as their leaders, and even the civilian population, often tolerate or even approve of strikes against HVTs. Another step might be to improve the levels of transparency of the drone programme. At present, there are no publicly articulated guidelines stipulating who can be killed by a drone and who cannot, and no data on drone strikes are released to the public.154 Even a Department of Justice memorandum which authorized the Obama administration to kill Anwar al-Awlaki, an American citizen, remains classified.155 Such non-transparency fuels suspicions that the US is indifferent to the civilian casualties caused by drone strikes, a perception which in turn magnifies the deleterious political consequences of the strikes. Letting some sunlight in on the drones programme would not eliminate all of the opposition to it, but it would go some way towards undercutting the worst conspiracy theories about drone use in these countries while also signalling that the US government holds itself legally and morally accountable for its behaviour.156 A final, and crucial, step towards mitigating the strategic consequences of drones would be to develop internationally recognized standards and norms for their use and sale. It is not realistic to suggest that the US stop using its drones altogether, or to assume that other countries will accept a moratorium on buying and using drones. **The genie is out of the bottle**: drones will be a fact of life for years to come. What remains to be done is to ensure that their use and sale are transparent, regulated and consistent with internationally recognized human rights standards. The Obama administration has already begun to show some awareness that drones are dangerous if placed in the wrong hands. A recent New York Times report revealed that the Obama administration began to develop a secret drones ‘rulebook’ to govern their use if Mitt Romney were to be elected president.157 The same logic operates on the international level. Lethal drones will eventually be in the hands of those who will use them with fewer scruples than President Obama has. Without a set of internationally recognized standards or norms governing their sale and use, drones will proliferate without control, be misused by governments and non-state actors, and become an instrument of repression for the strong. One remedy might be an international convention on the sale and use of drones which could establish guidelines and norms for their use, perhaps along the lines of the Convention on Certain Conventional Weapons (CCW) treaty, which attempted to spell out rules on the use of incendiary devices and fragment-based weapons.158 While enforcement of these guidelines and adherence to rules on their use will be imperfect and marked by derogations, exceptions and violations, the presence of a convention may reinforce norms against the flagrant misuse of drones and induce more restraint in their use than might otherwise be seen. Similarly, a UN investigatory body on drones would help to hold states accountable for their use of drones and begin to build a gradual consensus on the types of activities for which drones can, and cannot, be used.159 As the progenitor and leading user of drone technology, the US now has an opportunity to show leadership in developing an international legal architecture which might avert some of the worst consequences of their use.

#### Asian conflict escalates due to drone use

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In the midst of this heightened tension, you could be forgiven for overlooking the news early in September that Japanese F-15s had again taken flight after Beijing graciously commemorated the one-year anniversary of Tokyo's purchase by sending an unmanned aerial vehicle (UAV) toward the islands. But this wasn't just another day at the office in the contested East China Sea: this was the first known case of a Chinese drone approaching the Senkakus. Without a doubt, China's drone adventure 100-miles north of the Senkakus was significant because it aggravated already abysmal relations between Tokyo and Beijing. Japanese officials responded to the incident by suggesting that Japan might have to place government personnel on the islands, a red line for Beijing that would have been unthinkable prior to the past few years of Chinese assertiveness. But there's a much bigger and more pernicious cycle in motion. The introduction of indigenous drones into Asia's strategic environment -- now made official by China's maiden unmanned provocation -- will bring with it additional sources of instability and escalation to the fiercely contested South and East China Seas. Even though no government in the region wants to participate in major power war, there is widespread and growing concern that military conflict could result from a minor incident that spirals out of control. Unmanned systems could be just this trigger. They are less costly to produce and operate than their manned counterparts, meaning that we're likely to see more crowded skies and seas in the years ahead. UAVs also tend to encourage greater risk-taking, given that a pilot's life is not at risk. But being unmanned has its dangers: any number of software or communications failures could lead a mission awry. Combine all that with inexperienced operators and you have a perfect recipe for a mistake or miscalculation in an already tense strategic environment. The underlying problem is not just the drones themselves. Asia is in the midst of transitioning to a new warfighting regime with serious escalatory potential. China's military modernization is designed to deny adversaries freedom of maneuver over, on, and under the East and South China Seas. Although China argues that its strategy is primarily defensive, the capabilities it is choosing to acquire to create a "defensive" perimeter -- long-range ballistic and cruise missiles, aircraft carriers, submarines -- are acutely offensive in nature. During a serious crisis when tensions are high, China would have powerful incentives to use these capabilities, particularly missiles, before they were targeted by the United States or another adversary. The problem is that U.S. military plans and posture have the potential to be equally escalatory, as they would reportedly aim to "blind" an adversary -- disrupting or destroying command and control nodes at the beginning of a conflict. At the same time, the increasingly unstable balance of military power in the Pacific is exacerbated by the (re)emergence of other regional actors with their own advanced military capabilities. Countries that have the ability and resources to embark on rapid modernization campaigns (e.g., Japan, South Korea, Indonesia) are well on the way. This means that in addition to two great powers vying for military advantage, the region features an increasingly complex set of overlapping military-technical competitions that are accelerating tensions, adding to uncertainty and undermining stability. This dangerous military dynamic will only get worse as more disruptive military technologies appear, including the rapid diffusion of unmanned and increasingly autonomous aerial and submersible vehicles coupled with increasingly effective offensive cyberspace capabilities. Of particular concern is not only the novelty of these new technologies, but the lack of well-established norms for their use in conflict. Thankfully, the first interaction between a Chinese UAV and manned Japanese fighters passed without major incident. But it did raise serious questions that neither nation has likely considered in detail. What will constrain China's UAV incursions from becoming increasingly assertive and provocative? How will either nation respond in a scenario where an adversary downs a UAV? And what happens politically when a drone invariably falls out of the sky or "drifts off course" with both sides pointing fingers at one another? Of most concern, how would these matters be addressed during a crisis, with no precedents, in the context of a regional military regime in which actors have powerful incentives to strike first? These are not just theoretical questions: Japan's Defense Ministry is reportedly looking into options for shooting down any unmanned drones that enter its territorial airspace. Resolving these issues in a fraught strategic environment between two potential adversaries is difficult enough; the United States and China remain at loggerheads about U.S. Sensitive Reconnaissance Operations along China's periphery. But the problem is multiplying rapidly. The Chinese are running one of the most significant UAV programs in the world, a program that includes Reaper- style UAVs and Unmanned Combat Aerial Vehicles (UCAVs); Japan is seeking to acquire Global Hawks; the Republic of Korea is acquiring Global Hawks while also building their own indigenous UAV capabilities; Taiwan is choosing to develop indigenous UAVs instead of importing from abroad; Indonesia is seeking to build a UAV squadron; and Vietnam is planning to build an entire UAV factory. One could take solace in Asia's ability to manage these gnarly sources of insecurity if the region had demonstrated similar competencies elsewhere. But nothing could be further from the case. It has now been more than a decade since the Association of Southeast Asian Nations (ASEAN) and China signed a declaration "to promote a peaceful, friendly and harmonious environment in the South China Sea," which was meant to be a precursor to a code of conduct for managing potential incidents, accidents, and crises at sea. But the parties are as far apart as ever, and that's on well-trodden issues of maritime security with decades of legal and operational precedent to build upon. It's hard to be optimistic that the region will do better in an unmanned domain in which governments and militaries have little experience and where there remains a dearth of international norms, rules, and institutions from which to draw. The rapid diffusion of advanced military technology is not a future trend. These capabilities are being fielded -- right now -- in perhaps the most geopolitically dangerous area in the world, over (and soon under) the contested seas of East and Southeast Asia. These risks will only increase with time as more disruptive capabilities emerge. In the absence of political leadership, these technologies could very well lead the region into war.

#### Goes nuclear fast

**Goldstein, 13** – Avery, David M. Knott Professor of Global Politics and International Relations, Director of the Center for the Study of Contemporary China, and Associate Director of the Christopher H. Browne Center for International Politics at the University of Pennsylvania (“First Things First: The Pressing Danger of Crisis Instability in U.S.-China Relations,” International Security, vol. 37, no. 4, Spring 2013, Muse //Red)

Two concerns have driven much of the debate about international security in the post-Cold War era. The first is the potentially deadly mix of nuclear proliferation, rogue states, and international terrorists, a worry that became dominant after the terrorist attacks against the United States on September 11, 2001.1 The second concern, one whose prominence has waxed and waned since the mid-1990s, is the potentially disruptive impact that China will have if it emerges as a peer competitor of the United States, challenging an international order established during the era of U.S. preponderance.2 Reflecting this second concern, some analysts have expressed reservations about the dominant post-September 11 security agenda, arguing that China could challenge U.S. global interests in ways that terrorists and rogue states cannot. In this article, I raise a more pressing issue, one to which not enough attention has been paid. For at least the next decade, while China remains relatively weak, the gravest danger in Sino-American relations is the possibility the two countries will find themselves in **a crisis** that **could escalate to open military conflict.** In contrast to the long-term prospect of a new great power rivalry between the United States and China, which ultimately rests on debatable claims about the intentions of the two countries and uncertain forecasts about big shifts in their national capabilities, the danger of instability in a crisis involving these two nuclear-armed states is a tangible, near-term concern.3 Even if the probability of such a war-threatening crisis and its escalation to the use of significant military force is low, the **potentially catastrophic consequences** of this scenario provide good reason for analysts to better understand its dynamics and for policymakers to fully consider its implications. Moreover, events since 2010—especially those relevant to disputes in the East and South China Seas—suggest that **the danger of a military confrontation** in the Western Pacific **that could lead to a U.S.-China standoff may be on the rise.** In what follows, I identify not just pressures to use force preemptively that pose the most serious risk should a Sino-American confrontation unfold, but also related, if slightly less dramatic, incentives to initiate the limited use of force to gain bargaining leverage—a second trigger for potentially devastating instability during a crisis.4 My discussion proceeds in three sections. The first section explains why, during the next decade or two, a serious U.S.-China crisis may be more likely than is currently recognized. The second section examines the features of plausible Sino-American crises that may make them so dangerous. The third section considers general features of crisis stability in asymmetric dyads such as the one in which a U.S. superpower would confront an increasingly capable but still thoroughly overmatched China—the asymmetry that will prevail for at least the next decade. This more stylized discussion clarifies the inadequacy of focusing one-sidedly on conventional forces, as has much of the current commentary about the modernization of China's military and the implications this has for potential conflicts with the United States in the Western Pacific,5 or of focusing one-sidedly on China's nuclear forces, as a smaller slice of the commentary has.6 An assessment considering the interaction of conventional and nuclear forces indicates why **escalation resulting from crisis instability remains a devastating possibility.** Before proceeding, however, I would like to clarify my use of the terms "crisis" and "instability." For the purposes of this article, I define a crisis as a confrontation between states involving a serious threat to vital national interests for both sides, in which there is the expectation of a short time for resolution, and in which there is understood to be a sharply increased risk of war.7 This definition distinguishes crises from many situations to which the label is sometimes applied, such as more protracted confrontations; sharp disagreements over important matters that are not vital interests and in which military force seems irrelevant; and political disputes involving vital interests, even those with military components, that present little immediate risk of war.8 I define instability as the temptation to resort to force in a crisis.9 Crisis stability is greatest when both sides strongly prefer to continue bargaining; instability is greatest when they are strongly tempted to resort to the use of military force. Stability, then, describes a spectrum—from one extreme in which neither side sees much advantage to using force, through a range of situations in which the balance of costs and benefits of using force varies for each side, to the other extreme in which the benefits of using force so greatly exceed the costs that striking first looks nearly irresistible to both sides. Although the incentives to initiate the use of force may not reach this extreme level in a U.S. China crisis, the capabilities that the two countries possess raise concerns that escalation pressures will exist and that they may be highest **early in a crisis**, compressing the time frame for diplomacy to avert military conflict.

#### Prior judicial review fosters sustainable norms

Wexler, 13 [The Role of the Judicial Branch during the Long War: Drone Courts, Damage Suits, and FOIA Requests, Lesley Wexler, Professor of Law and Thomas A. Mengler Faculty Scholar, 3rd Speaker and semifinalist 1998 National Debate Tournament, p. SSRN]

The current practice of using drones to engage in overseas killings raises difficult legal ques-tions with incredibly high stakes. The fate of potential targets and collateral damage hangs in the balance along with grave concerns about national and foreign security. Over the past decade, expansive deference to the executive branch has allowed a substantial increase in the number and rate of drone strikes. The use of drones for targeted killing is becoming a regular tool of the U.S. government and perhaps will become so for other governments as well. What role, if any, do courts have to play in regulating this practice? Critics of the status quo would like greater transparency and accountability in regards to tar-geted killings. In addition to constitutional concerns, some worry the executive branch is violating International Humanitarian Law (IHL). They want the executive branch to reveal its legal under-standings of IHL. They also seek greater information regarding review processes for targeted kill-ings as to both prospective listings and retrospective assessments of compliance. These skeptics contend that the lack of judicial oversight and the opacity of the government’s legal position risks the deaths of innocent foreign civilians, violates democratic accountability norms, erodes our compliance reputation with allies, and helps recruit a new generation of anti-American insurgents. Even if the current approach is lawful, many worry about future administrations or other governments that may adopt drone strikes without sufficient IHL protections. As this chapter describes, some of these critics have proposed the use of courts to foster either transparency or accountability or both. In contrast, many, including the executive and judicial branches themselves, believe that the judicial role regarding drone strikes and targeted killings should be a minimal one. They suggest that an active court reviewing names of those to be targeted, providing damages to victims of un-lawful strikes, or demanding agencies declassify information on drone strikes would compromise an effective strategy in the war on terror. They fear judicial intervention would pose great danger to U.S. soldiers, foreign civilians, and in worst case scenarios, to U.S. citizens at home without en-hancing IHL compliance. In particular, executive branch officials have argued that greater transpar-ency may compromise intelligence efforts, provide targets with additional opportunities to act stra- 3 tegically, and sour relations with states currently willing to provide sub rosa permission for strikes. Meanwhile, these court opponents suggest that sufficient internal and congressional oversight can prevent unlawful activity. They also push back on the opacity charge by noting the information pro-vided through a series of high-level administration speeches and unacknowledged leaks. The U.S. judiciary itself is often reluctant to aggressively intervene in national security mat-ters and other legal issues arising out of armed conflicts. Federal courts frequently employ a variety of procedural postures and substantive doctrines to avoid deciding live IHL controversies. But the judicial branch sometimes surprises, as when the Supreme Court spoke to detention policy and its relationship to IHL in the trio of war on terror cases Hamdi,1 Hamdan,2 and Boumediene.3 U.S. courts might look to other countries, like Israel, whose courts have ruled on targeted killings and issued guidelines informed by IHL to govern future behavior.4 This chapter suggests the judiciary may play an important role in the debate over the execu-tive branch’s decisions regarding IHL even if it declines to speak to the substance of such cases. First, advocates may use courts as a visible platform in which to make their arguments and spur conversations about alternative, non-judicially mandated transparency and accountability measures. As they did with the trio of detention cases, advocates can leverage underlying constitutional con-cerns about the treatment of citizens to stimulate interest in the larger IHL issues. Second, litigants may use courts to publicize and pursue Freedom of Information (FOIA) requests and thus enhance transparency. Even if courts decline to grant FOIA requests, the lawsuits can generate media atten-tion about what remains undisclosed. Third, and **most** robustly, Congress may pass legislation that would facilitate either prospective review of kill lists through a so-called drone court or remove procedural barriers to retrospective damage suits for those unlawfully killed by a drone strike. Even the threat of such a judicial role may influence executive branch behavior.

#### Drone court key

Chow, 13 [Droning On: The Need to Establish a New Norm, Eugene K. Chow Former Executive Editor, Homeland Security NewsWire, http://www.huffingtonpost.com/eugene-k-chow/establish-new-constitutional-norm\_b\_2683131.html]

Contrary to what some have argued that the president requires full and unadjudicated control of the CIA's drone program for the swift execution of military operations to safeguard the nation, the proposed drone court or some form of Congressional oversight would not necessarily slow down the government's ability to wage war. Before that fateful button is pressed and Hellfire missiles go streaking toward an enemy combatant, thousands of man-hours are poured into gathering intelligence, assessing threats, and monitoring their movements. In all that time building up to that final moment, why can we not spare a few extra minutes for a Congressional committee, a judge, or a panel to determine if an American ought to be killed or not? Let us remember that the measure of a democratic society is not how it treats its best, but its worst. In the war against violent extremism, our government has already established a precedent for additional oversight. Following the Hamdi v. Rumsfeld decision, the Pentagon created Combatant Status Review Tribunals to determine if captured enemies on the battlefield had been properly designated as "enemy combatants." So it is not a question of whether the government can establish additional layers of oversight to ensure transparency, accountability, and the protection of Constitutional rights, but rather do we have the will. Now that a perpetual war, waged on an omnipresent battlefield, and drones capable of automatically monitoring every single moving object within 65 square miles and firing death-dealing missiles with a click of the button have become commonplace - it is high time we put into place laws and parameters that clearly define this new norm.

### Adv 2

#### Advantage 2 Accountability

#### Ex ante judicial oversight key to neutral decision making, accountability and legitimacy

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

The relevance of these precedents to the targeting of citizens is clear: the constitutional right to due process is alive and well--regardless of geographic location. We now turn to what type of process is due.

III. BRING IN THE COURTS: BRINGING JUDICIAL LEGITIMACY TO TARGETED KILLINGS

The function of this Article is not to argue that targeted killing should be removed from the toolbox of American military options. Targeted killing as a military tactic is here to stay. n34 Targeting strikes have robust bipartisan political support and have become an increasingly relied upon weapon as the United States decreases its presence in Iraq and Afghanistan. n35 The argument being asserted here, therefore, is that in light of the protections the Constitution affords U.S. citizens, there must be a degree of inter-branch process when the government targets such individuals.

The current intra-executive process afforded to U.S. citizens is not only unlawful, but also dangerous. n36 Justice O'Connor acknowledged the danger inherent in exclusively intra-branch process in Hamdi when she asserted that an interrogator is not a neutral decision-maker as the "even purportedly fair adjudicators are disqualified by their interest in the controversy." n37 In rejecting the government's argument that a "separation of powers" analysis mandates a heavily circumscribed role for the courts in these circumstances, Justice O'Connor contended that, in times of conflict, the Constitution "most assuredly envisions a role for all three branches when individual liberties are at stake." n38 Similarly, Justice Kennedy was unequivocal in Boumediene about the right of courts to enforce the Constitution even in times of war. Quoting Chief Justice Marshall in Marbury v. Madison, n39 Kennedy argued that holding "that the political branches may switch the constitution on or off at will would lead to a regime in which they, not this Court, say 'what the law is.'" n40 This sentiment is very relevant to our targeted killing analysis: in the realm of targeted killing, where the deprivation is of one's life, the absence of any "neutral decision-maker" outside the executive branch is a clear violation of due process guaranteed by the Constitution.

Justices O'Connor and Kennedy are pointing to a dangerous institutional tension inherent in any intra-executive process regime. Targeting decisions are no different; indeed, the goal of those charged with targeting citizens like al-Awlaki is not to strike a delicate balance between security [\*444] and liberty but rather, quite single-mindedly, to prevent attacks on the United States. n41 In describing the precarious nature of covert actions, James Baker, a distinguished military judge, noted, "the twin necessities of secrecy and speed may pull as they do against the competing interests of deliberate review, dissent, and informed accountable decision-making." n42 While Judge Baker concluded that these risks "magnify the importance of a meaningful process of ongoing executive appraisal," he overlooked the institutional tension, seized upon by Justices O'Connor and Kennedy, which would preclude the type of process that he was advocating. n43

Although there may be a role for Congress in such instances, a legislative warrant for specific cases would likely be cumbersome, carry significant security risks, and may violate the spirit of the Bill of Attainder Clause, which prohibits the legislature from performing judicial or executive functions. The current inter-branch process for covert actions, in which the President must make a finding and notify the leaders of Congress and the intelligence committees, is entirely ex post and also has not been proven to provide a meaningful check on executive power. n44 Moreover, most politicians are unqualified to make the necessary legal judgments that these situations require.

Solutions calling for the expatriation of citizens deemed to be terrorists are fraught with judicial complications and set very dangerous precedents for citizenship revocation. n45 Any post-deprivation process, such as a Bivens-style action, for a targeted attack would also be problematic. n46 Government officials charged with carrying out these attacks might be hesitant to do so if there were a threat of prosecution. Moreover, post-deprivation process for a target would be effectively meaningless in the wake of a successful attack.

 [\*445] Rather, as recognized by the Founders in the Fourth Amendment, balancing the needs of security against the imperatives of liberty is a traditional role for judges to play. Two scholars of national security law recently highlighted the value of judicial inclusion in targeting decisions: "Judicial control of targeted killing could increase the accuracy of target selection, reducing the danger of mistaken or illegal destruction of lives, limbs, and property. Independent judges who double-check targeting decisions could catch errors and cause executive officials to avoid making them in the first place." n47 Judges are both knowledgeable in the law and accustomed to dealing with sensitive security considerations. These qualifications make them ideal candidates to ensure that the executive exercises constitutional restraint when targeting citizens.

Reforming the decision-making process for executing American citizens to allow for judicial oversight would restore the separation of powers framework envisioned by the Founders and increase democratic legitimacy by placing these determinations on steadier constitutional ground. For those fearful of judicial encroachment on executive war-making powers, there is a strong argument that this will actually strengthen the President and empower him to take decisive action without worrying about the judicial consequences. As Justice Kennedy put it, "the exercise of [executive] powers is vindicated, not eroded, when confirmed by the Judicial Branch." n48 Now, we will turn to what this judicial involvement would look like.

#### Accountable use key to legitimacy

Kennedy, 13 [“Drones: Legitimacy and Anti-Americanism”, Greg Kennedy is a Professor of Strategic Foreign Policy at the Defence Studies Department, King's College London, based at the Joint Services Command and Staff College, Defence Academy of the United Kingdom, in Shrivenham, Parameters 42(4)/43(1) Winter-Spring 2013]

The exponential rise in the use of drone technology in a variety of military and non-military contexts represents a real challenge to the framework of established international law and it is both right as a matter of principle, and inevitable as a matter of political reality, that the international community should now be focusing attention on the standards applicable to this technological development, particularly its deployment in counterterrorism and counter-insurgency initiatives, and attempt to reach a consensus on the legality of its use, and the standards and safeguards which should apply to it.4 deliver deadly force is taking place in both public and official domains in the United States and many other countries.5 The four key features at the heart of the debate revolve around: who is controlling the weapon system; does the system of control and oversight violate international law governing the use of force; are the drone strikes proportionate acts that provide military effectiveness given the circumstances of the conflict they are being used in; and does their use violate the sovereignty of other nations and allow the United States to disregard formal national boundaries? Unless these four questions are dealt with in the near future the impact of the unresolved legitimacy issues will have a number of repercussions for American foreign and military policies: “Without a new doctrine for the use of drones that is understandable to friends and foes, the United States risks achieving near-term tactical benefits in killing terrorists while incurring potentially significant longer-term costs to its alliances, global public opinion, the war on terrorism and international stability.”6 This article will address only the first three critical questions. The question of who controls the drones during their missions is attracting a great deal of attention. The use of drones by the Central Intelligence Agency (CIA) to conduct “signature strikes” is the most problematic factor in this matter. Between 2004 and 2013, CIA drone attacks in Pakistan killed up to 3,461—up to 891 of them civilians.7 Not only is the use of drones by the CIA the issue, but subcontracting operational control of drones to other civilian agencies is also causing great concern.8 Questions remain as to whether subcontractors were controlling drones during actual strike missions, as opposed to surveillance and reconnaissance activities. Nevertheless, the intense questioning of John O. Brennan, President Obama’s nominee for director of the CIA in February 2013, over drone usage, the secrecy of their controllers and orders, and the legality of their missions confirmed the level of concern America’s elected officials have regarding the legitimacy of drone use. Furthermore, perceptions and suspicions of illegal clandestine intelligence agency operations, already a part of the public and official psyche due to experiences from Vietnam, Iran-Contra, and Iraq II and the weapons of mass destruction debacle, have been reinforced by CIA management of drone capability. Recent revelations about the use of secret Saudi Arabian facilities for staging American drone strikes into Yemen did nothing to dissipate such suspicions of the CIA’s lack of legitimacy in its use of drones.9 The fact that the secret facility was the launching site for drones used to kill American citizens Anwar al-Awlaki and his son in September 2011, both classified by the CIA as al-Qaeda-linked threats to US security, only deepened such suspicions. Despite the fact that Gulf State observers and officials knew about American drones operating from the Arabian peninsula for years, the existence of the CIA base was not openly admitted in case such knowledge should “ . . . damage counter-terrorism collaboration with Saudi Arabia.”10 The fallout from CIA involvement and management of drone strikes prompted Senator Dianne Feinstein, Chairwoman of the Senate Intelligence Committee, to suggest the need for a court to oversee targeted killings. Such a body, she said, would replicate the Foreign Intelligence Surveillance Court, which oversees eavesdropping on American soil.11 Most importantly, such oversight would go a long way towards allaying fears of the drone usage lacking true political accountability and legitimacy. In addition, as with any use of force, drone strikes in overseas contingency operations can lead to increased attacks on already weak governments partnered with the United States. They can lead to retaliatory attacks on local governments and may contribute to local instability. Those actions occur as a result of desires for revenge and frustrations caused by the strikes. Feelings of hostility are often visited on the most immediate structures of authority—local government officials, government buildings, police, and the military.12 It can thus be argued that, at the strategic level, drone strikes are fuelling anti-American resentment among enemies and allies alike. Those reactions are often based on questions regarding the legality, ethicality, and operational legitimacy of those acts to deter opponents. Therefore, specifically related to the reaction of allies, the military legitimacy question arises if the use of drones endangers vital strategic relationships.13 One of the strategic relationships being affected by the drone legitimacy issue is that of the United States and the United Kingdom. Targeted killing, by drone strike or otherwise, is not the sole preserve of the United States. Those actions, however, attract more negative attention to the United States due to its prominence on the world’s stage, its declarations of support for human rights and democratic freedoms, and rule-of-law issues, all which appear violated by such strikes. This complexity and visibility make such targeted killings important for Anglo-American strategic relations because of the closeness of that relationship and the perception that Great Britain, therefore, condones such American activities. Because the intelligence used in such operations is seen by other nations as a shared Anglo-American asset, the use of such intelligence to identify and conduct such killings, in the opinion those operations.14 Finally, the apparent gap between stated core policies and values and the ability to practice targeted killings appears to be a starkly hypocritical and deceitful position internationally, a condition that once again makes British policymakers uncomfortable with being tarred by such a brush.15 The divide between US policy and action is exacerbated by drone technology, which makes the once covert practice of targeted killing commonplace and undeniable. It may also cause deep-rooted distrust due to a spectrum of legitimacy issues. Such questions will, therefore, undermine the US desire to export liberal democratic principles. Indeed, it may be beneficial for Western democracies to achieve adequate rather than decisive victories, thereby setting an example of restraint for the international order.16 The United States must be willing to engage and deal with drone-legitimacy issues across the entire spectrum of tactical, operational, strategic, and political levels to ensure its strategic aims are not derailed by operational and tactical expediency.

#### Heg without legitimacy causes violent transitions and economic volatility—voluntary limits on power maintain relative international stability

Martin Griffiths January **2004**; Associate Professor and Head of School at School of Government and International Relations, Griffith University (coincidence, as it turns out) “BEYOND THE BUSH DOCTRINE: AMERICAN HEGEMONY AND WORLD ORDER” AUSTRALASIAN JOURNAL OF AMERICAN STUDIES www.anzasa.arts.usyd.edu.au/a.j.a.s/Articles/1\_04/Griffiths.pdf‎

In international relations, an established hegemony helps the cause of international peace in a number of ways. First, a hegemon deters renewed military competition and provides general security through its preponderant power. Second, a hegemon can, if it chooses, strengthen international norms of conduct. Third, a hegemon’s economic power serves as the basis of a global lending system and free trade regime, providing economic incentives for states to cooperate and forego wars for resources and markets. Such was the nature of British hegemony in the nineteenth century, hence the term Pax Britannica. After the Second World War, the United States has performed the roles that Britain once played, though with an even greater preponderance of power. Thus, much of the peace between democracies after World War Two can be explained by the fact that the political-military hegemony of the United States has helped to create a security structure in Europe and the Pacific conducive to peaceful interaction. Today, American hegemony is tolerated by many states in Europe and Asia, not because the United States is particularly liked, but because of the perception that its absence might result in aggression by aspiring regional hegemons. However, Chalmers Johnson has argued that this is a false perception promoted from Washington to silence demands for its military withdrawal from Japan and South Korea.8 It is true that hegemonic stability theory can be classified as belonging in the realist tradition because of its focus on the importance of power structures in international politics. The problem is that power alone cannot explain why some states choose to follow or acquiesce to one hegemon while vigorously opposing and forming counter-alliances against another hegemon. Thus when international relations theorists employ the concept of hegemonic stability, they supplement it with the concept of legitimacy.9 Legitimacy in international society refers simply to the perceived justice of the international system. As in domestic politics, legitimacy is a notoriously difficult factor to pin down and measure. Still, one cannot do away with the concept, since it is clear that all political orders rely to some extent on consent in addition to coercion. Hegemony without legitimacy is insufficient to deter violent challenges to the international order, and may provoke attempts to build counter-alliances against the hegemon. Hegemonic authority which accepts the principle of the independence of states and treats states with a relative degree of benevolence is more easily accepted. The legitimacy of American hegemony during the cold war was facilitated by two important characteristics of the era. First, the communist threat (whether real or imaginary) disguised the tension between the United States’ promotion of its own interests and its claim to make the world safe for capitalism.10 Second, American hegemony managed to combine economic liberalism between industrialised states with an institutional architecture (the Bretton Woods system) that moderated the volatility of transaction flows across borders. It enabled governments to provide social investments, safety nets and adjustment assistance at the domestic level.11 In the industrialised world, this grand bargain formed the basis of the longest and most equitable economic expansion in human history, from the 1950s to the 1980s. And it provided the institutional foundation for the newest wave of globalisation, which began not long thereafter and is far broader in scope and deeper in reach than its nineteenth century antecedent. The system that the United States led the way in creating after 1945 has fared well because the connecting and restraining aspects of democracy and institutions reduce the incentives for Western nations to engage in strategic rivalry or balance against American hegemony. The strength of this order is attested to by the longevity of its institutions, alliances and arrangements, based on their legitimacy in the eyes of the participants. Reacting against the closed autarchic regions that had contributed to the world depression and split the globe into competing blocs before the war, the United States led the way in constructing a post-war order that was based on economic openness, joint management of the Western political-economic order, and rules and institutions that were organised to support domestic economic stability and social security.12 This order in turn was built around a basic bargain: the hegemonic state obtains commitments from secondary states to participate in the international order, and the hegemon in return places limits on the exercise of its power. The advantage for the weak state is that it does not fear domination or abandonment, reducing the incentive to balance against the hegemon, and the leading state does not need to use its power to actively enforce order and compliance. It is these restraints on both sides and the willingness to participate in this mutual accord that explains the longevity of the system, even after the end of the cold war. But as the founder and defender of this international order, the United States, far from being a domineering hegemon, was a reluctant superpower.

#### US leadership prevents global nuclear conflict

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This does not necessarily mean that the US is in systemic decline, but it encompasses a trend that appears to be negative and perhaps alarming. Although the US still possesses incomparable military prowess and its economy remains the world’s largest, the once seemingly indomitable chasm that separated America from anyone else is narrowing. Thus, the global distribution of power is shifting, and the inevitable result will be a world that is less peaceful, liberal and prosperous, burdened by a dearth of effective conflict regulation. Over the past two decades, no other state has had the ability to seriously challenge the US military. Under these circumstances, motivated by both opportunity and fear, many actors have bandwagoned with US hegemony and accepted a subordinate role. Canada, most of Western Europe, India, Japan, South Korea, Australia, Singapore and the Philippines have all joined the US, creating a status quo that has tended to mute great power conflicts. However, as the hegemony that drew these powers together withers, so will the pulling power behind the US alliance. The result will be an international order where power is more diffuse, American interests and influence can be more readily challenged, and conflicts or wars may be harder to avoid. As history attests, power decline and redistribution result in military confrontation. For example, in the late 19th century America’s emergence as a regional power saw it launch its first overseas war of conquest towards Spain. By the turn of the 20th century, accompanying the increase in US power and waning of British power, the American Navy had begun to challenge the notion that Britain ‘rules the waves.’ Such a notion would eventually see the US attain the status of sole guardians of the Western Hemisphere’s security to become the order-creating Leviathan shaping the international system with democracy and rule of law. Defining this US-centred system are three key characteristics: enforcement of property rights, constraints on the actions of powerful individuals and groups and some degree of equal opportunities for broad segments of society. As a result of such political stability, free markets, liberal trade and flexible financial mechanisms have appeared. And, with this, many countries have sought opportunities to enter this system, proliferating stable and cooperative relations. However, what will happen to these advances as America’s influence declines? Given that America’s authority, although sullied at times, has benefited people across much of Latin America, Central and Eastern Europe, the Balkans, as well as parts of Africa and, quite extensively, Asia, the answer to this question could affect global society in a profoundly detrimental way. Public imagination and academia have anticipated that a post-hegemonic world would return to the problems of the 1930s: regional blocs, trade conflicts and strategic rivalry. Furthermore, multilateral institutions such as the IMF, the World Bank or the WTO might give way to regional organisations. For example, Europe and East Asia would each step forward to fill the vacuum left by Washington’s withering leadership to pursue their own visions of regional political and economic orders. Free markets would become more politicised — and, well, less free — and major powers would compete for supremacy. Additionally, such power plays have historically possessed a zero-sum element. In the late 1960s and 1970s, US economic power declined relative to the rise of the Japanese and Western European economies, with the US dollar also becoming less attractive. And, as American power eroded, so did international regimes (such as the Bretton Woods System in 1973). A world without American hegemony is one where great power wars re-emerge, the liberal international system is supplanted by an authoritarian one, and trade protectionism devolves into restrictive, anti-globalisation barriers. This, at least, is one possibility we can forecast in a future that will inevitably be devoid of unrivalled US primacy.

#### Intra-executive processes cause operational error

Chehab, 12 [Ahmad, Georgetown University Law Center, Retrieving the Role of Accountability in the Targeted Killings Context: A Proposal for Judicial Review]

The practical, pragmatic justification for the COAACC derives largely from considering social psychological findings regarding the skewed potential associated with limiting unchecked decision-making in a group of individuals. As an initial point, psychologists have long pointed out how individuals frequently fall prey to cognitive illusions that produce systematic errors in judgment.137 People simply do not make decisions by choosing the optimal outcome from available alternatives, but instead employ shortcuts (i.e., heuristics) for convenience.138 Cognitive biases like groupthink can hamper effective policy deliberations and formulations.139 Groupthink largely arises when a group of decision-makers seek conformity and agreement, thereby avoiding alternative points of view that are critical of the consensus position.140 This theory suggests that some groups—particularly those characterized by a strong leader, considerable internal cohesion, internal loyalty, overconfidence, and a shared world view or value system—suffer from a deterioration in their capacity to engage in critical analysis.141 Many factors can affect such judgment, including a lack of crucial information, insufficient timing for decision-making, poor judgment, pure luck, and/or unexpected actions by adversaries.142 Moreover, decision-makers inevitably tend to become influenced by irrelevant information,143 seek out data and assessments that confirm their beliefs and personal hypotheses notwithstanding contradictory evidence,144 and “[i]rrationally avoid choices that represent extremes when a decision involves a trade-off between two incommensurable values.”145 Self-serving biases can also hamper judgment given as it has been shown to induce well-intentioned people to rationalize virtually any behavior, judgment or action after the fact.146 The confirmation and overconfidence bias, both conceptually related to groupthink, also result in large part from neglecting to consider contradictory evidence coupled with an irrational persistence in pursuing ideological positions divorced from concern of alternative viewpoints.147 Professor Cass Sunstein has described situations in which groupthink produced poor results precisely because consensus resulted from the failure to consider alternative sources of information.148 The failures of past presidents to consider alternative sources of information, critically question risk assessments, ensure neutral-free ideological sentiment among those deliberating,149 and/or generally ensure properly deliberated national security policy has produced prominent and devastating blunders,150 including the Iraq War of 2003,151 the Bay of Pigs debacle in the 1960’s,152 and the controversial decision to wage war against Vietnam.153 Professor Sunstein also has described the related phenomenon of “group polarization,” which includes the tendency to push group members toward a “more extreme position.”154 Given that both groupthink and group polarization can lead to erroneous and ideologically tainted policy positions, the notion of giving the President unchecked authority in determining who is eligible for assassination can only serve to increase the likelihood for committing significant errors.155 The reality is that psychological mistakes, organizational ineptitude, lack of structural coherence and other associated deficiencies are inevitable features in Executive Branch decision-making. D. THE NEED FOR ACCOUNTABILITY CHECKS To check the vices of groupthink and shortcomings of human judgment, the psychology literature emphasizes a focus on accountability mechanisms in which a better reasoned decision-making process can flourish.156 By serving as a constraint on behavior, “accountability functions as a critical norm-enforcement mechanism—the social psychological link between individual decision makers on the one hand and social systems on the other.”157 Such institutional review can channel recognition for the need by government decision-makers to be more self-critical in policy targeted killing designations, more willing to consider alternative points of view, and more willing to anticipate possible objections.158 Findings have also shown that ex ante awareness can lead to more reasoned judgment while also preventing tendentious and ideological inclinations (and political motivations incentivized and exploited by popular hysteria and fear).159 Requiring accounting in a formalized way prior to engaging in a targeted killing—by providing, for example, in camera review, limited declassification of information, explaining threat assessments outside the immediate circle of policy advisors, and securing meaningful judicial review via a COAACC-like tribunal—can promote a more reliable and informed deliberation in the executive branch. With process-based judicial review, the COAACC could effectively reorient the decision to target individuals abroad by examining key procedural aspects—particularly assessing the reliability of the “terrorist” designation—and can further incentivize national security policy-makers to engage in more carefully reasoned choices and evaluate available alternatives than when subject to little to no review.

#### Ex ante key – FISA critics miss the mark

Guiora, 12 [Targeted Killing: When Proportionality Gets All Out of Proportion, Amos N. Guiora. Professor of Law, S.J. Quinney College of Law, University of Utah, p. SSRN]

The unitary executive theory aggressively articulated, and implemented, by the Bush Administration has been adopted in toto by the Obama Administration. While the executive clearly prefers to operate in a vacuum, the question whether that most effectively ensures effective operational counterterrorism is an open question. The advantage of institutionalized, process-based input into executive action prior to decision implementation is worthy of discussion in operational counterterrorism. The solution to this search for an actionable guideline is the **strict scrutiny standard.** What is strict scrutiny, and how is it to be implemented in the context of operational counterterrorism? Why is there a need, if at all, for an additional standard articulating self-defense? The strict scrutiny standard would enable operational engagement of a non-state actor predicated on intelligence information that would meet admissibility standards akin to a court of law. The strict scrutiny test seeks to strike a balance **enabling the state to act sooner** but subject to significant restrictions. The ability to act sooner is limited, however, by the requirement that intelligence information must be reliable, viable, valid, and corroborated. The strict scrutiny standard proposes that for states to act as early as possible in order to prevent a possible terrorist attack the information must meet admissibility standards similar to the rules of evidence. The intelligence must be reliable, material, and probative. The proposal is predicated on the understanding that while states need to engage in operational counterterrorism, mistakes regarding the correct interpretation and analysis of intelligence information can lead to tragic mistakes. Adopting admissibility standards akin to the criminal law minimizes operational error. Rather than relying on the executive branch making decisions in a “closed world” devoid of oversight and review, the intelligence information justifying the proposed action must be submitted to a court that would ascertain the information’s admissibility. The discussion before the court would necessarily be conducted ex parte; however, the process of preparing and submitting available intelligence information to a court would significantly contribute to minimizing operational error that otherwise would occur. The logistics of this proposal are far less daunting than might seem—the court before which the executive would submit the evidence is the FISA Court. Presently, FISA Court judges weigh the reliability of intelligence information in determining whether to grant government ex parte requests for wire-tapping warrants. Under this proposal, judicial approval is necessary prior to undertaking a counterterrorism operation predicated solely on intelligence information. The standard the court would adopt in determining the information’s reliability is the same applied in the traditional criminal law paradigm. The intelligence must be reliable, material, and probative. While the model is different—a defense attorney cannot question state witnesses—the court will assume a dual role. In this dual role capacity the court will cross-examine the representative of the intelligence community and subsequently rule as to the information’s admissibility. While some may suggest that the FISA court is largely an exercise in “rubber-stamping,” the importance of the proposal is in requiring the government to present the available information to an independent judiciary as a precursor to engaging in operational counterterrorism. The call is complicated: the United States is a nation based on democratic values rooted in ethics and morals; yet, when push comes to shove the United States does not always act in accordance with these articulated principles. The vision of a “city upon a hill,” articulated by Puritan settler John Winthrop and subsequently referenced by President Ronald Reagan, 9 has been called into question by certain U.S. counterterrorism measures. This is not the first time that American responses in the face of crisis (whether real or perceived) have reflected “over-board” and “over-broad” approaches.10

#### OP failure generates recruitment to insurgent groups

Mayer 9 (Jane, critically acclaimed author and staff writer for the New Yorker, “The Predator War,” The New Yorker, 10-26, http://www.newyorker.com/reporting/2009/10/26/091026fa\_fact\_mayer)

Indeed, the history of targeted killing is marked by errors. In 1973, for example, Israeli intelligence agents murdered a Moroccan waiter by mistake. They thought that he was a terrorist who had been involved in slaughtering Israeli athletes at the Munich Olympics, a year earlier. And in 1986 the Reagan Administration attempted to retaliate against the Libyan leader Muammar Qaddafi for his suspected role in the deadly bombing of a disco frequented by American servicemen in Germany. The U.S. launched an air strike on Qaddafi’s household. The bombs missed him, but they did kill his fifteen-month-old daughter. The C.I.A.’s early attempts at targeting Osama bin Laden were also problematic. After Al Qaeda blew up the U.S. Embassies in Tanzania and Kenya, in August, 1998, President Bill Clinton retaliated, by launching seventy-five Tomahawk cruise missiles at a site in Afghanistan where bin Laden was expected to attend a summit meeting. According to reports, the bombardment killed some twenty Pakistani militants but missed bin Laden, who had left the scene hours earlier. The development of the Predator, in the early nineteen-nineties, was supposed to help eliminate such mistakes. The drones can hover above a target for up to forty hours before refuelling, and the precise video footage makes it much easier to identify targets. But the strikes are only as accurate as the intelligence that goes into them. Tips from informants on the ground are subject to error, as is the interpretation of video images. Not long before September 11, 2001, for instance, several U.S. counterterrorism officials became certain that a drone had captured footage of bin Laden in a locale he was known to frequent in Afghanistan. The video showed a tall man in robes, surrounded by armed bodyguards in a diamond formation. At that point, drones were unarmed, and were used only for surveillance. “The optics were not great, but it was him,” Henry Crumpton, then the C.I.A.’s top covert-operations officer for the region, told Time. But two other former C.I.A. officers, who also saw the footage, have doubts. “It’s like an urban legend,” one of them told me. “They just jumped to conclusions. You couldn’t see his face. It could have been Joe Schmo. Believe me, no tall man with a beard is safe anywhere in Southwest Asia.” In February, 2002, along the mountainous eastern border of Afghanistan, a Predator reportedly followed and killed three suspicious Afghans, including a tall man in robes who was thought to be bin Laden. The victims turned out to be innocent villagers, gathering scrap metal. In Afghanistan and Pakistan, the local informants, who also serve as confirming witnesses for the air strikes, are notoriously unreliable. A former C.I.A. officer who was based in Afghanistan after September 11th told me that an Afghan source had once sworn to him that one of Al Qaeda’s top leaders was being treated in a nearby clinic. The former officer said that he could barely hold off an air strike after he passed on the tip to his superiors. “They scrambled together an élite team,” he recalled. “We caught hell from headquarters. They said ‘Why aren’t you moving on it?’ when we insisted on checking it out first.” It turned out to be an intentionally false lead. “Sometimes you’re dealing with tribal chiefs,” the former officer said. “Often, they say an enemy of theirs is Al Qaeda because they just want to get rid of somebody. Or they made crap up because they wanted to prove they were valuable, so that they could make money. You couldn’t take their word.” The consequences of bad ground intelligence can be tragic. In September, a nato air strike in Afghanistan killed between seventy and a hundred and twenty-five people, many of them civilians, who were taking fuel from two stranded oil trucks; they had been mistaken for Taliban insurgents. (The incident is being investigated by nato.) According to a reporter for the Guardian, the bomb strike, by an F-15E fighter plane, left such a tangle of body parts that village elders resorted to handing out pieces of unidentifiable corpses to the grieving families, so that they could have something to bury. One Afghan villager told the newspaper, “I took a piece of flesh with me home and I called it my son.” Predator drones, with their superior surveillance abilities, have a better track record for accuracy than fighter jets, according to intelligence officials. Also, the drone’s smaller Hellfire missiles are said to cause far less collateral damage. Still, the recent campaign to kill Baitullah Mehsud offers a sobering case study of the hazards of robotic warfare. It appears to have taken sixteen missile strikes, and fourteen months, before the C.I.A. succeeded in killing him. During this hunt, between two hundred and seven and three hundred and twenty-one additional people were killed, depending on which news accounts you rely upon. It’s all but impossible to get a complete picture of whom the C.I.A. killed during this campaign, which took place largely in Waziristan. Not only has the Pakistani government closed off the region to the outside press; it has also shut out international humanitarian organizations like the International Committee for the Red Cross and Doctors Without Borders. “We can’t get within a hundred kilometres of Waziristan,” Brice de la Vingne, the operational coördinator for Doctors Without Borders in Pakistan, told me. “We tried to set up an emergency room, but the authorities wouldn’t give us authorization.” A few Pakistani and international news stories, most of which rely on secondhand sources rather than on eyewitness accounts, offer the basic details. On June 14, 2008, a C.I.A. drone strike on Mehsud’s home town, Makeen, killed an unidentified person. On January 2, 2009, four more unidentified people were killed. On February 14th, more than thirty people were killed, twenty-five of whom were apparently members of Al Qaeda and the Taliban, though none were identified as major leaders. On April 1st, a drone attack on Mehsud’s deputy, Hakimullah Mehsud, killed ten to twelve of his followers instead. On April 29th, missiles fired from drones killed between six and ten more people, one of whom was believed to be an Al Qaeda leader. On May 9th, five to ten more unidentified people were killed; on May 12th, as many as eight people died. On June 14th, three to eight more people were killed by drone attacks. On June 23rd, the C.I.A. reportedly killed between two and six unidentified militants outside Makeen, and then killed dozens more people—possibly as many as eighty-six—during funeral prayers for the earlier casualties. An account in the Pakistani publication The News described ten of the dead as children. Four were identified as elderly tribal leaders. One eyewitness, who lost his right leg during the bombing, told Agence France-Presse that the mourners suspected what was coming: “After the prayers ended, people were asking each other to leave the area, as drones were hovering.” The drones, which make a buzzing noise, are nicknamed machay (“wasps”) by the Pashtun natives, and can sometimes be seen and heard, depending on weather conditions. Before the mourners could clear out, the eyewitness said, two drones started firing into the crowd. “It created havoc,” he said. “There was smoke and dust everywhere. Injured people were crying and asking for help.” Then a third missile hit. “I fell to the ground,” he said. The local population was clearly angered by the Pakistani government for allowing the U.S. to target a funeral. (Intelligence had suggested that Mehsud would be among the mourners.) An editorial in The News denounced the strike as sinking to the level of the terrorists. The Urdu newspaper Jang declared that Obama was “shutting his ears to the screams of thousands of women whom your drones have turned into dust.” U.S. officials were undeterred, continuing drone strikes in the region until Mehsud was killed. After such attacks, the Taliban, attempting to stir up anti-American sentiment in the region, routinely claims, falsely, that the victims are all innocent civilians. In several Pakistani cities, large protests have been held to decry the drone program. And, in the past year, perpetrators of terrorist bombings in Pakistan have begun presenting their acts as “revenge for the drone attacks.” In recent weeks, a rash of bloody assaults on Pakistani government strongholds has raised the spectre that formerly unaligned militant groups have joined together against the Zardari Administration. David Kilcullen, a counter-insurgency warfare expert who has advised General David Petraeus in Iraq, has said that the propaganda costs of drone attacks have been disastrously high. Militants have used the drone strikes to denounce the Zardari government—a shaky and unpopular regime—as little more than an American puppet. A study that Kilcullen co-wrote for the Center for New American Security, a think tank, argues, “Every one of these dead non-combatants represents an alienated family, a new revenge feud, and more recruits for a militant movement that has grown exponentially even as drone strikes have increased.” His co-writer, Andrew Exum, a former Army Ranger who has advised General Stanley McChrystal in Afghanistan, told me, “Neither Kilcullen nor I is a fundamentalist—we’re not saying drones are not part of the strategy. But we are saying that right now they are part of the problem. If we use tactics that are killing people’s brothers and sons, not to mention their sisters and wives, we can work at cross-purposes with insuring that the tribal population doesn’t side with the militants. Using the Predator is a tactic, not a strategy.” Exum says that he’s worried by the remote-control nature of Predator warfare. “As a military person, I put myself in the shoes of someone in fata”—Pakistan’s Federally Administered Tribal Areas—“and there’s something about pilotless drones that doesn’t strike me as an honorable way of warfare,” he said. “As a classics major, I have a classical sense of what it means to be a warrior.” An Iraq combat veteran who helped design much of the military’s doctrine for using unmanned drones also has qualms. He said, “There’s something important about putting your own sons and daughters at risk when you choose to wage war as a nation. We risk losing that flesh-and-blood investment if we go too far down this road.”

#### The impact is Middle East War and Pakistani collapse

Hussain 13 (Nazia, research scholar at the Terrorism, Transnational Crime and Corruption Center and a doctoral student at George Mason University, “Pakistan's Jihadi Problem and the Middle East,” Middle East Institute, 4-11, <http://www.mei.edu/content/pakistans-jihadi-problem-and-middle-east>)

Jihadi groups in Pakistan pose grave threats to the stability of the country and the surrounding region. Their operations and influence have extended from beyond the tribal areas to Pakistan’s cities. Along with countries such as Syria and Iraq, Pakistan has become a theater of doctrinal differences between Shia and Sunni Muslims, signifying that rifts between local groups have become linked to the wider violent sectarianism in the Middle East. This evolving composition of the “Jihadi problem” in Pakistan demonstrates that while jihadi groups may be based locally, their outlook is becoming increasingly transnational, and directly linked with the Middle East and the various conflicts raging within the region. The jihadi groups, mainly Tehreek-e-Taliban Pakistan (TTP) have become powerful enough to extend influence from beyond the tribal areas to major urban centers. Not only have they been operating in Quetta and Peshawar for some time, they are disbursing justice and instilling a reign of fear in Karachi, a city which contributes a quarter of Pakistan’s GDP. At the political level, this ease of functioning in Karachi is important as it means that they are in the process of displacing political parties such as Muttahida Qaumi Movement (MQM), Pakistan Peoples Party (PPP), and Awami National Party (ANP), thereby constricting political space for Pakistanis. In an open letter to Pakistanis, the TTP called upon them to boycott the elections as it would only mean a continuation of Western-style corrupt governance, but if they had to attend any political gatherings, to avoid those held by MQM, ANP, and PPP. The threats have worked to the effect that the secular ANP, which to date has represented Pashtuns in Pakistan, has been forced to go door-to-door for political canvassing, instead of holding political rallies. In Punjab, the sectarian Lashkar-e-Jhangvi (LeJ) has secured a political alliance with the ruling party of Pakistan Muslim League-Nawaz faction (PML-N), highlighting that it not only has a constituency that will vote for it, but also has political sway to forge a partnership with the ruling party. These developments point out that jihadi and sectarian groups have begun to command popular respect, and cannot be considered merely as foot soldiers of jihad that can be controlled by the state machinery. Slowly but surely, they are carving constituencies of support, instilling fear, or both, among the people of Pakistan. Adding to the conundrum, the ongoing Shia-Sunni conflict in the Middle East has spilled over into Pakistan. The trend of wreaking revenge on Pakistan’s Shia minority for ideological reasons as well as for the tactical purpose of avenging the suffering of Sunnis at the hands of the Alawite regime in Syria and the slights suffered under the Shia government in Iraq is disturbing. It manifests the fact that religious motivations of local sectarian groups are aligning with the interests of transnational entities such as Al Qaeda that believe in creating unrest in the already turbulent Syria and Iraq. Since the1980s, doctrinal differences between Sunnis and Shias have become a full-blown conflict in Pakistan. The country also has become a theater of competing ideologies of Sunni and Shia Islam, especially after the revolution in neighboring Iran. As a US diplomatic cable published by Wikileaks noted, an estimated $100 million a year from donors from the Gulf was supporting some of the hardline religious seminaries that have been responsible in creation of an extremist recruitment network in Punjab province. Vali Nasr traces the genesis of this problem in his book, The Shia Revival (p.160–162), pointing out that, ‘In the 1980s and the1990s, South Asia in general and Pakistan in particular served as the main battleground of the Saudi-Iranian and Sunni-Shia conflict. India and Pakistan were far more vulnerable to Shia assertiveness than the Arab countries...Pakistan was where Iran focused its attention first. There, as contrasted with the situation along the Iran-Iraq border, it would not be conventional war but rather ideological campaigns and sectarian inspired civil violence that would decide the outcome…The more aggressively Iran tried to influence the Shias of India and Pakistan, the more the Sunni ulama in those countries became determined to respond. After Iran organized Shia youth into student associations and supported the formation of a Pakistani Shia party modeled after Lebanon’s Amal, the Sunnis **began to form sectarian militias recruited from madrassas across the country**, including those that had been set up in the Pashtun region along the Afghan border to train fighters for the war against the Soviet Union. These militias enjoyed the backing not only of Islamabad but also of Riyadh and even for a time of Baghdad, as all three regimes saw Iranian influence in Pakistan as a strategic threat.” From the days of foreign governments supporting various factions to the use of the jihadi groups in India and Afghanistan, the situation has become even more complex. Different jihadi groups have not only become interlinked with each other for operational ease, they also share the goal of establishing an Islamic caliphate in Pakistan and beyond. In that respect, the dream of making Pakistan a truly Islamic state has become even more elusive. It can be argued that what these groups aspire for, in its distorted version, is striking at the heart of the ideological confusion that surrounded Pakistan and the possible role of Islam in its polity and society. Over the years, successive governments dabbled with the idea of finding a place for Islam in the new republic, but none did this more systematically than General Zia-ul-Haq. Not only was the use of Islam a useful tool to dilute the impact of populist appeal of Zulfiqar Ali Bhutto, it also provided a newborn constituency of Islamists and ulama to the Zia government. The new constituency of Islamists in Pakistan was further strengthened by support during the Afghan jihad days. The historical genesis of the jihadi groups is useful to understand, as it paints them as more than miscreants contributing to chaos in Pakistan, but more so, as people whose thinking and operations have been in the making for years. These groups, by their very actions, question the role of Islam ― and what version of Islam at that ― in the state of Pakistan. Furthermore, in their conception of Pakistan as an Islamic caliphate, and their worldview of not tolerating Shia interpretations of Islam, their actions are synchronizing with the current plight of Sunni brethren in the Middle East. In conclusion, the jihadi problem poses an existential problem not only in terms of the future of, and the role of Islam (and dominant interpretation of religion) in Pakistan, but is also connected to the Sunni-Shia conflict in the Middle East, as demonstrated in Iraq and Syria, and which threatens to affect other countries in the region as well. For policy makers in Pakistan and elsewhere, it is important to understand the nature of the “jihadi problem” as beyond the debate of terrorism and counterterrorism, and law and the absence of the rule of law. Hypothetically, neither can all Shias leave Pakistan, nor all extremist groups tried in courts of law. Instead, it is necessary to understand the multidimensional “jihadi problem” confronting Pakistan and the region. The links between national and transnational issues need to be recognized, in order to collaborate with Middle Eastern countries in preventing a Shia-Sunni conflagration that spans the length and breadth of the Muslim world. Lastly, policy makers should take into account the Pakistani people, who, if their loyalties are transferred to actors other than the state, can be the country’ undoing, or if their energies are harnessed, can provide the opportunity to turn things around. Pakistan needs to spend more on social sectors,[1] as well as improve governance throughout the country. **If the government will not cater to the needs of the people, they will have no option but to seek sustenance from actors who will. That could prove** tragic **for Pakistan and dangerous for its immediate neighbors and the international community**.

#### Goes nuclear

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PhD in public and international affairs from Princeton, Apr 27 2005, “Dealing with the Collapse of a Nuclear-Armed State: The Cases of North Korea and Pakistan,” http://www.princeton.edu/~ppns/papers/ohanlon.pdf

Were Pakistan to collapse, it is unclear what the United States and like-minded states would or should do. As with North Korea, it is highly unlikely that “surgical strikes” to destroy the nuclear weapons could be conducted before extremists could make a grab at them. The United States probably would not know their location – at a minimum, scores of sites controlled by Special Forces or elite Army units would be presumed candidates – and no Pakistani government would likely help external forces with targeting information. The chances of learning the locations would probably be greater than in the North Korean case, given the greater openness of Pakistani society and its ties with the outside world; but U.S.-Pakistani military cooperation, cut off for a decade in the 1990s, is still quite modest, and the likelihood that Washington would be provided such information or otherwise obtain it should be considered small. If a surgical strike, series of surgical strikes, or commando-style raids were not possible, the only option would be to try to restore order before the weapons could be taken by extremists and transferred to terrorists. The United States and other outside powers might, for example, respond to a request by the Pakistani government to help restore order. Given the embarrassment associated with requesting such outside help, the Pakistani government might delay asking until quite late, thus complicating an already challenging operation. If the international community could act fast enough, it might help defeat an insurrection. Another option would be to protect Pakistan’s borders, therefore making it harder to sneak nuclear weapons out of the country, while only providing technical support to the Pakistani armed forces as they tried to quell the insurrection. Given the enormous stakes, the United States would literally have to do anything it could to prevent nuclear weapons from getting into the wrong hands. India would, of course, have a strong incentive to ensure the security of Pakistan’s nuclear weapons. It also would have the advantage of proximity; it could undoubtedly mount a large response within a week, but its role would be complicated to say the least. In the case of a dissolved Pakistani state, India likely would not hesitate to intervene; however, in the more probable scenario in which Pakistan were fraying but not yet collapsed, India’s intervention could unify Pakistan’s factions against the invader, even leading to the deliberate use of Pakistani weapons against India. In such a scenario, with Pakistan’s territorial integrity and sovereignty on the line and its weapons put into a “use or lose” state by the approach of the Indian Army, nuclear dangers have long been considered to run very high.

### Plan

#### The United States Federal Government should establish a limited ex ante judicial review process for targeted killing by drones.

### Solvency

#### The plans procedural safeguard is key to minimize operational error and establish a credible signal – all other alternatives fail

Somin, 13 [Ilya Somin Professor of Law HEARING ON “DRONE WARS: THE CONSTITUTIONAL AND COUNTERTERRORISM IMPLICATIONS OF TARGETED KILLING” TESTIMONY BEFORE THE UNITED STATES SENATE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND HUMAN RIGHTS April 23, 2013]

In my view, the use of targeted killings by drones is not inherently illegal or immoral. It is a legitimate weapon of war in the struggle against al Qaeda and associated terrorist groups. However, serious constitutional and other problems arise if the US government fails to take proper care to ensure that the use of drones is strictly limited to legitimate terrorist targets. These dangers are likely to be at their most severe in the admittedly rare cases involving American citizens. I would urge the Subcommittee and Congress generally to consider adopting procedural safeguards that would minimize the likelihood of erroneous or illegal drone strikes. One proposal that deserves serious consideration is the establishment of an independent court that would oversee drone strikes in advance. 2 I. WHY TARGETED KILLING IS NOT INHERENTLY ILLEGAL OR IMMORAL. The Authorization for the Use of Military Force enacted by Congress on September 14, 2001 authorizes the president to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”1 This is generally understood as creating a legal state of war between the United States and Al Qaeda and its allies. The Supreme Court has recognized this, describing the conflict we are engaged in as “the war with al Qaeda.”2 Similarly, President Obama, like President George W. Bush before him, has emphasized that “we are indeed at war with Al Qaeda and its affiliates.”3 Thus, all three branches of government have recognized that a state of war exists, and that therefore the United States is entitled to use all measures normally permitted in warfare against its enemies. In wartime, the individualized targeting of an enemy commander is surely both legal and moral. During World War II, for example, the United States targeted Japanese Admiral Isoruku Yamamoto, and the British and Czechs successfully targeted German SS General Reinhard Heydrich.4 Few if any serious commentators claim that these operations and others like them were either illegal or morally dubious. If it is permissible to individually target a uniformed enemy officer, such as Admiral Yamamoto in World War II, it is surely legitimate to do the same to the leader of a terrorist organization. Indeed, it would be perverse if terrorist leaders enjoyed greater protection against targeting than uniformed military officers. Unlike the latter, terrorists do not even pretend to obey the laws of war. And they deliberately endanger civilians by choosing not to wear distinctive uniforms. To give terrorists greater protection against targeted killing than that enjoyed by uniformed military personnel would in effect reward and incentivize illegal behavior that endangers innocent civilians by making it harder to distinguish them from combatants. In some ways, individual targeting of terrorist leaders is actually more defensible than mass targeting of their underlings. Leaders usually bear greater moral and legal responsibility for the activities of their groups than do low-level members. And, at least in some cases, individual targeting of leaders is less likely to inflict collateral damage on civilians than conventional attacks on groups. This analysis does not change if the enemy leader happens to be an American citizen. Surely the targeting of Admiral Yamamoto would not have become illegal or immoral if he had acquired dual US citizenship while living in the United States during the 1920s. As Justice Sandra Day O’Connor noted in her majority opinion for the Supreme Court in Hamdi v. Rumsfeld, “[a] citizen, no less than an alien, can be part of or supporting forces hostile to the United States or coalition partners and engaged in an armed conflict against the United States.”5 Benjamin Wittes of the Brookings Institution correctly points out that “Americans have fought in foreign armies against their country in numerous armed conflicts in the past, and their citizenship has never relieved them of the risks of that belligerency.”6 Most obviously, nearly all the combatants arrayed against US forces in the Civil War were American citizens. Yet that did not prevent the Union Army from targeting them with lethal force or make it illegal to do so. Giving American citizens who join terrorist organizations blanket immunity from individual targeting is also problematic because it would increase terrorists’ incentives to recruit Americans. Obviously, a terrorist leader who is immune from individually targeted attack can be more effective than one who is not. There is also no reason to believe that the use of drones for such targeting raises any greater moral or legal problems than the use of conventional weapons such as air strikes, attacks by ground forces, or artillery. Drones can, of course, be used in ways that are illegal, unethical, or unwise. For example, they could be used to deliberately target civilians. But the same is true of virtually every other weapon of war. Given the existence of a state of war, I believe that the Obama administration was correct to conclude in its recently released White Paper that it is legal for the government to target US citizens who are “senior operational leader[s] of al-Qa’ida or an associated force.”7 Some critics of the Administration White Paper focus on the possible weaknesses of the memo’s three additional requirements for the targeted killing of a US citizen: that “(1) an informed, high-level official of the US government has determined that the targeted individual poses an imminent threat of violent attack against the United States, (2) capture is infeasible and the United States continues to monitor whether capture becomes feasible, and (3) the operation would be conducted in a manner consistent with applicable law of war principles.”8 Law Professor Gerard Magliocca, for example, argues that “[t]he White Paper says that a citizen is eligible for death-by-drone when ‘an informed, high-level, official of the U.S. government has determined that the targeted individual poses an imminent threat of violent attack against the United States.’ In my opinion, this threshold is too low.”9 But the “imminent threat” test applies only to people located outside the United States who are “senior operational leaders of al-Qa’ida or an associated force,” not to just anyone who “an informed...official” believes to be a threat.10 In other words, the requirements that the target pose an “imminent threat” and cannot be captured are in addition to the requirement that he be a senior leader of Al Qaeda or one of its “associated forces.” Once this key point is recognized, many of the objections to the memo are weakened. Indeed, a senior al Qaeda leader likely qualifies as a legitimate target even if he does not pose an “imminent threat.” It was surely permissible to target Admiral Yamamoto even if the US did not have any proof that he was planning “imminent” military operations against US forces. The fact that he was a top enemy commander in an ongoing war was enough. Here as elsewhere, there is no good reason to give terrorist leaders greater immunity from attack than that enjoyed by uniformed military officers. Even when the use of targeted killing is both legal and moral, it is not always prudent and wise. In, many cases, it might be desirable to refrain from otherwise unproblematic strikes in order to avoid antagonizing civilian populations in the relevant region, or for other strategic reasons. Such considerations are extremely important, but probably best left to those with greater expertise on the relevant issues than I possess. I note them here only to emphasize that I do not claim that the US government should indiscriminately resort to the use of targeted killing in every instance where it might be legally permissible to do so. To the contrary, a prudent government should exercise great caution in ordering such operations. II. THE TARGETING DILEMMA. Although the targeting of genuine al Qaeda leaders is legally and morally unproblematic, the administration’s policy of targeted killing still raises serious questions. The key issue is whether we are following rigorous enough procedures to ensure that the people targeted by drone strikes really are members of terrorist organizations at war with the United States. A. Choosing Targets. Unfortunately, identifying al Qaeda leaders is a far more difficult task than identifying enemy officers in a conventional war. Precisely because terrorists do not wear uniforms and often do not have a clear command structure, it is easy to make mistakes. And where US citizens are involved, there is the danger that the government will target someone merely because that person is a political enemy of the current administration. Even if officials are acting entirely in good faith, there is still a serious risk that innocent people will be targeted in error. The DOJ White Paper does not even consider the question of how we decide whether a potential target really is a terrorist leader or not. But that is the most difficult and dangerous issue that must be considered. The problem is not an easy one. On the one hand, war cannot wait on elaborate judicial processes. And we usually cannot give a potential target an opportunity to contest his designation in court without tipping him off. On the other hand, it is both dangerous and legally problematic to give the president and his subordinates unconstrained power to designate American citizens as “terrorist leaders” and then target them at will. A drone strike aimed at American citizen without adequate evidence showing that he or she is a terrorist combatant raises serious constitutional problems. In particular, it is likely to violate the Due Process Clause of the Fifth Amendment, which forbids government deprivation of “life, liberty, or property without due process of law.”11 Legal scholars and jurists have spilled many barrels of ink debating the exact meaning of these words. But at the very least, they surely prevent the executive from unilaterally ordering the death of American citizen without at least some substantial proof that he is an enemy combatant, and perhaps an independent judicial determination thereof.12 As the Supreme Court has recognized, the Bill of Rights protects American citizens overseas, as well as domestically.13 Whether non-citizens are also entitled to the protection of the Due Process Clause when targeted beyond the boundaries of the United States is more disputable. Even though the text of the Amendment extends to all “persons,” some historical evidence suggests that the Due Process Clause was originally understood as not applying to foreigners outside US jurisdiction.14 The risk of either inadvertent or deliberate targeting of innocent people is heightened by the growing scale of targeted killing over the last several years. According to leading counterterrorism expert Peter Bergen, the Obama Administration conducted 283 drone strikes in Pakistan alone between 2009 and late 2012, more than six times as many as in the years of the George W. Bush administration.15 These strikes go well beyond targeting “senior” terrorists. Indeed, only 13% of them succeeded in killing a terrorist or “militant” leader.16 A recent analysis of government documents obtained by McClatchy Newspapers suggests that the vast majority of drone strikes under the Obama administration have been aimed at low-level al Qaeda and Taliban members.17 During a 12 month period ending in September 2011, McClatchy estimates that drone strikes in Pakistan killed some 482 people, of which only 8 were “senior al Qaida leaders” and 265 were low-level “militants.”18 Low- level terrorists and their allies are still legitimate targets. But the extension of the targeted killing program to cover such minor figures necessarily heightens the risk of error and abuse. A related challenge is the extension of targeted killings to cover radical Islamist groups that have few or no ties to al Qaeda or the Taliban. The AUMF only authorizes military action against “those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.”19As Harvard Law School Professor and former head of the Office of Legal Counsel Jack Goldsmith points out, the AUMF “is a tenuous foundation for military action against newly threatening Islamist terrorist groups … that have ever-dimmer links to the rump al-Qaeda organization.”20 The difficulty of determining which groups are closely enough affiliated with al Qaeda to be covered by the AUMF also heightens the danger of error and abuse in target selection. In this testimony, I do not address the special issues raised by the potential use of targeted killings on American soil. But I agree with Attorney General Eric Holder’s recent statement indicating that the president does not “have the authority to use a weaponized drone to kill an American not engaged in combat on American soil.”21 B. Possible Institutional Safeguards. One partial solution to the problem of target selection would be to require officials to get advance authorization for targeting a United States citizen from a specialized court, similar to the FISA Court, which authorizes intelligence surveillance warrants for spying on suspected foreign agents in the United States. The specialized court could act faster than ordinary courts do and without warning the potential target, yet still serve as a check on unilateral executive power. In the present conflict, there are relatively few terrorist leaders who are American citizens. Given that reality, we might even be able to have more extensive judicial process than exists under FISA. Professor Amos Guiora of the University of Utah, a leading expert on legal regulation of counterterrorism operations with extensive experience in the Israeli military, has developed a proposal for a FISA-like oversight court that deserves serious consideration by this subcommittee, and Congress more generally.22 The idea of a drone strike oversight court has also been endorsed by former Secretary of Defense Robert Gates, who served in that position in both the Obama and George W. Bush administrations. Gates emphasizes that “some check 7 on the president’s ability to do this has merit as we look to the long-term future,” so that the president would not have the unilateral power of “being able to execute” an American citizen.23 We might even consider developing a system of judicial approval for targeted strikes aimed at non-citizens. The latter process might have to be more streamlined than that for citizens, given the larger number of targets it would have to consider. But it is possible that it could act quickly enough to avoid compromising operations, while simultaneously acting as a check on abusive or reckless targeting. However, the issue of judicial review for strikes against non-citizens is necessarily more difficult than a court that only covers relatively rare cases directed at Americans. Alternatively, one can envision some kind of more extensive due process within the executive branch itself, as advocated by Neal Katyal of the Georgetown University Law Center.24 But any internal executive process has the flaw that it could always be overriden by the president, and possibly other high-ranking executive branch officials. Moreover, lower-level executive officials might be reluctant to veto drone strikes supported by their superiors, either out of careerist concerns, or because administration officials are naturally likely to share the ideological and policy priorities of the president. An external check on targeting reduces such risks. External review might also enhance the credibility of the target-selection process with informed opinion both in the United States and abroad. Whether targeting decisions are made with or without judicial oversight, there is also an important question of burdens of proof. How much evidence is enough to justify classifying you or me as a senior Al Qaeda leader? The administration memo does not address that crucial question either. Obviously, it is unrealistic to hold military operations to the standards of proof normally required in civilian criminal prosecutions. But at the same time, we should be wary of giving the president unfettered power to order the killing of citizens simply based on his assertion that they pose a threat. Amos Guiora suggests that an oversight court should evaluate proposed strikes under a “strict scrutiny standard” that ensures that strikes are only ordered based on intelligence that is “reliable, material and probative.”25 It is difficult for me to say whether this standard of proof is the best available option. But the issue is a crucial one that deserves further consideration. Ideally, we need a standard of proof rigorous enough to minimize reckless or abusive use of targeted killing, but not so high as to preclude its legitimate use. Neither judicial review nor any other oversight system can completely eliminate all errors from the system. Given the limitations of intelligence and the fallibility of human decision-makers, some mistakes are probably inevitable. The only way avoid all error is to ban targeted killing entirely. But that approach might actually lead to greater loss of innocent life overall, by making it more difficult to combat terrorism and by incentivizing policymakers to use military tactics that often cause greater loss of life than targeted drone strikes. What we can hope to achieve is an oversight system that greatly diminishes the risk of serious abuse: targeted killings that are undertaken recklessly or - worse still – for the deliberate purpose of eliminating people who do not pose any genuine threat, but are merely attacked because they are critics of the government, or otherwise attracted the wrath of policymakers. Overall, we should seek to establish procedural safeguards that provide a check on executive discretion without miring the process in prolonged litigation that makes it impossible to conduct operations in “real time.” We cannot achieve anything approaching perfection. But it is reasonable to hope that we can improve on the status quo. Judicial oversight can help ensure that we are targeting the right individuals. But courts are less likely to be effective in addressing the problem of defining the range of groups that we are at war with. Our enemies probably are not limited to individuals formally affiliated with al Qaeda, since that organization has a variety of allies that support it. But the AUMF is not broad enough to cover all radical Islamist groups everywhere, nor is it desirable that we wage war against all of them. Ultimately, only Congress can properly clarify the scope of the conflict we are engaged in. Like many commentators and legal scholars across the political spectrum, I hope that Congress enacts a framework statute defining the scope of the War on Terror, and regulating the use of targeted killing, including appropriate procedural safeguards. So far, however, it has not chosen to do. It may take a highly visible disaster such as the deliberate or clearly reckless targeting of an obviously innocent person, to stimulate appropriate legislative action. At that point, it may be too late to reverse either the resulting harm to innocent people or the damage to the public image and foreign policy interests of the United States. But I very much hope that such a conjecture is unduly pessimistic.

#### Limited drone court creates institutional clarity, but avoids interference with operations

Weinberger, 13 [Dr. Weinberger is Associate Professor in the Department of Politics & Government at the University of Puget Sound, <https://blogs.commons.georgetown.edu/globalsecuritystudiesreview/2013/05/07/enemies-among-us-the-targeted-killing-of-american-members-of-al-qaeda-and-the-need-for-congressional-leadership/>]

Several people have voiced objections to the creation of a FISA-style “drone court.” One worries that a court of “generalist federal judges” will lack “national security expertise,” “are not accustomed to ruling on lightning-fast timetables,” and should not be able to involve themselves in “questions about whether to target an individual for assassination by a drone strike.”[22] Another writes that, “the determination of whether a person is a combatant to judicial review would seem to rather clearly violate the separation of powers requirements in the Constitution,” as in Ex Parte Milligan, the Supreme Court ruled that the congressional war power “extends to all legislation essential to the prosecution of the war…except such as interferes with the command of the forces and the conduct of campaigns,” which includes, the author argues, the “sole authority to determine who the specific combatants are when conducting a campaign.”[23] While in a traditional war such objections are almost certainly correct, in the context of the Hamdi decision and with the unconventional nature of the armed conflict against al Qaeda, they become less compelling. First, if properly defined, the new court could be limited solely to questions of eligibility, not the decision of whether and when to conduct a drone strike. The court would carry out a function quite similar to the FISA courts, judging whether the Executive Branch has sufficient evidence to support its claim that a citizen has become a senior operational member of a group covered under the AUMF and 2012 NDAA. This would differ little from the FISA courts’ assessments of Executive Branch requests to wiretap individuals believed to be agents of a foreign power without a warrant. Second, given the definition of imminent threat in the Department of Justice’s white paper – a definition that incorporates “considerations of the relevant window of opportunity, the possibility of reducing collateral damage to civilians, and the likelihood of heading off future disastrous attacks on Americans”[24] – such eligibility decisions are not likely to be made in the moments immediately prior to a drone strike. Rather, eligibility decisions are likely made in the process of long investigations and in light of much intelligence. Finally, while Anthony Arend is almost certainly correct that in nearly every other incidence of armed conflict, Congress would not be permitted to involve itself in determinations of who is and who is not an eligible target for the American military, as Hamdi makes clear, the armed conflict against al Qaeda is not like every other armed conflict. The Supreme Court has already inserted a judicial proceeding into the determination of whether an American citizen seized on the battlefield is actually an enemy combatant and therefore eligible for indefinite detention, a determination that traditionally has been solely within the purview of executive power. It would be counterintuitive – to say the least – if an American citizen could be killed, but not detained, without judicial involvement. Terrorism is, without question, a serious threat to the security of the United States. President Obama is currently employing military force under a legal authority granted by Congress in the 2001 AUMF and in Section 1021 of the 2012 NDAA. That legal authority gives the president the power to determine which groups are affiliated with al Qaeda, to identify American citizens who have assumed senior operational roles within those groups, and to kill those citizens through drone strikes or other means. However, while Congress may have given the president the power to order targeted killings, that does not mean that Congress cannot or should not alter the scope of that authority. Congress’s fundamental tasks are to define the contours of the American legal sphere, to determine the legal status of American citizens before the Executive Branch, and to protect the rights of U.S. citizens. America’s war against terrorism has produced myriad challenges to the civil liberties of American citizens: from the warrantless wiretapping program under President Bush to the military detention without trial of Yasir Hamdi to the targeted killing of Anwar al-Awlaki, the rights of American citizens have been tested as never before. If an opportunity exists to clarify and define that balance without unduly interfering with the president’s war powers, it should be taken. But that requires Congress to put aside its traditional reluctance to interfere with the conduct of military campaigns and exercise its own war powers. Unfortunately, Congress does not possess a stellar track record on this issue. Perhaps by using the Hamdi decision to point the way, Congress can be encouraged to step up to define and protect the most elemental right of all – the right not to be killed by one’s government without judicial involvement.

#### Ex ante review key to solve while protecting national security – its effective

#### Congressional action key to create a court with jurisdiction and to establish independent oversight – it’s effective

McKelvey, 11 [Benjamin, JD Candidate, Senior Editorial Board, Vanderbilt Journal of Transnational Law, “Due Process Rights and the Targeted Killing of Suspected Terrorists: The Unconstitutional Scope of Executive Killing Power,” Vanderbilt Journal of Transnational Law, November, 44 VAND. J. TRANSNAT'L L. 1353, <http://www.vanderbilt.edu/jotl/2012/06/due-process-rights-and-the-targeted-killing-of-suspected-terrorists-the-unconstitutional-scope-of-executive-killing-power/>]

Option One: Congress Could Pass Legislation to Establish Screening and Oversight of Targeted Killing As the Aulaqi case demonstrates, any resolution to the problem of targeted killing would require a delicate balance between due process protections and executive power.204 In order to accomplish this delicate balance, Congress can pass legislation modeled on the Foreign Intelligence Surveillance Act (FISA) that establishes a federal court with jurisdiction over targeted killing orders, similar to the wiretapping court established by FISA.205 There are several advantages to a legislative solution. First, FISA provides a working model for the judicial oversight of real-time intelligence and national security decisions that have the potential to violate civil liberties.206 FISA also effectively balances the legitimate but competing claims at issue in Aulaqi: the sensitive nature of classified intelligence and national security decisions versus the civil liberties protections of the Constitution.207 A legislative solution can provide judicial enforcement of due process while also respecting the seriousness and sensitivity of executive counterterrorism duties.208 In this way, congress can alleviate fears over the abuse of targeted killing without interfering with executive duties and authority. Perhaps most importantly, a legislative solution would provide the branches of government and the American public with a clear articulation of the law of targeted killing.209 The court in Aulaqi began its opinion by explaining that the existence of a targeted killing program is no more than media speculation, as the government has neither confirmed nor denied the existence of the program.210 Congress can acknowledge targeted killing in the light of day while ensuring that it is only used against Americans out of absolute necessity.211 Independent oversight would promote the use of all peaceful measures before lethal force is pursued.212 i. FISA as an Applicable Model FISA is an existing legislative model that is applicable both in substance and structure.213 FISA was passed to resolve concerns over civil liberties in the context of executive counterintelligence.214 It is therefore a legislative response to a set of issues analogous to the constitutional problems of targeted killing.215 FISA also provides a structural model that could help solve the targeted killing dilemma.216 The FISA court is an example of a congressionally created federal court with special jurisdiction over a sensitive national security issue.217 Most importantly, **FISA works**. Over the years, the FISA court has proven itself capable of handling a large volume of warrant requests in a way that provides judicial screening without diminishing executive authority.218 Contrary to the DOJ’s claims in Aulaqi, the FISA court proves that independent judicial oversight is institutionally capable of managing real-time executive decisions that affect national security.219 The motivation for passing FISA makes this an obvious choice for a legislative model to address targeted killing. With FISA, Congress established independent safeguards and a form of oversight in response to President Nixon’s abusive wiretapping practices.220 The constitutional concern in FISA involved the violation of Fourth Amendment privacy protections by excessive, unregulated executivepower.221 Similarly, the current state of targeted killing law allows for executive infringement on Fifth Amendment due process rights. Although there is no evidence of abusive or negligent practices of targeted killing, the main purpose of congressional intervention is to ensure that targeted killing is conducted only in lawful circumstances after a demonstration of sufficient evidence. Finally, a FISA-style court is a potentially effective possibility because it would provide ex ante review of targeted killing orders, and the pre-killing stage is the only stage during which judicial review would be meaningful.222 In the context of targeted killing, due process is not effective after the decision to deprive an American of life has already been carried out. Pre-screening targeted killing orders is a critical component of judicial oversight. Currently, this screening is conducted by a team of attorneys at the CIA.223 Despite assurances that review of the evidence against potential targets is rigorous and careful, due process is best accomplished through independent judicial review.224 The FISA court provides a working model for judicial review of real-time requests related to national security.225 FISA also established the requisite level of probable cause for clandestine wiretapping and guidelines for the execution and lifetime of the warrant, whereas the legal standards used by the CIA’s attorneys are unknown.226 The only meaningful way to ensure that Americans are not wrongfully targeted with lethal force is to screen the evidence for the decision and to give ultimate authority to an impartial judge with no institutional connection to the CIA.

#### Executive lead role spurs mistrust and global opposition

Goldsmith, 13 [May 1st, Jack Goldsmith teaches at Harvard Law School and is a member of the Hoover Institution Task Force on National Security and Law. He is the author, most recently, of Power and Constraint, How Obama Undermined the War on Terror http://www.newrepublic.com/article/112964/obamas-secrecy-destroying-american-support-counterterrorism]

And so Barack Obama greatly expanded the secret war that George W. Bush began. In the fall of 2009, Obama approved a "long list" of new CIA paramilitary operation proposals, as well as CIA requests for more armed drones, more spies, and larger targeting areas in Pakistan. "The CIA gets what it wants," said the president, approving the CIA requests, and conveying what Mazzetti thinks was his first-term attitude toward the Agency. The Department of Defense also got most of what it wanted. Obama approved an initiative by General David Petraeus to expand "military spying activities throughout the Muslim world," and gave special operations forces "even broader authorities to run spying missions across the globe" than they possessed under the Bush administration. Mazzetti describes Obama's souped-up secret war as "the way of the knife," a reference to Obama counterterrorism czar (and now CIA director) John Brennan's claim that the administration had replaced the "hammer" of large deployments with the "scalpel" of secret pinpoint missions. Its most famous use was the Abbottabad raid to kill bin Laden. But its most enduring legacy is Obama's significant expansion of the CIA and JSOC drone-strike campaign against Al Qaeda and affiliates, especially in Pakistan and Yemen. In 2009, the Obama administration conducted more drone strikes in those countries than the Bush administration had done in the seven years after 9/11; and to date, it has conducted almost nine times more drone strikes there than its predecessor. The administration's most controversial drone strike came against an American citizen, Anwar al-Awlaki, a leader of Al Qaeda in the Arabian Peninsula, the Yemeni organization responsible for the failed Detroit "underwear bomb" attack on Christmas in 2009 and other attempted attacks against the United States. Government lawyers gave the green light to kill al-Awlaki in 2010, but the administration had no idea where in Yemen he was. By 2011, the CIA and JSOC both had spies on the ground in Yemen and were "running two distinct drone wars," with different targeting lists, from bases in Saudi Arabia (for the CIA) and Ethiopia and Djibouti (for JSOC). In the fall of 2011, in part because of prior JSOC targeting mistakes and in part because of the CIA's extraordinary successes in Pakistan, Obama tasked the CIA alone with finding and killing al-Awlaki. On September 30, a CIA Reaper drone fired on a convoy near the Saudi Arabian desert and completed the mission. At the end of president Obama's first term, Mazzetti remarks, Americans seemed "little concerned about their government's escalation of clandestine warfare." By that point Obama's way of the knife had both decimated the senior leadership of Al Qaeda and reversed the Republicans' traditional advantage on national security. "Ask Osama bin Laden and the 22 out of 30 top Al Qaeda leaders who have been taken off the field whether I engage in appeasement," said the boastful president in December 2011, flicking away Republican charges that he was soft on terrorism. "Or whoever is left out there, ask them about that," he added. But in the last few months the Obama administration's secret war—and especially its drone program—have come under attack on multiple fronts. In 2011, The Washington Post reported the CIA's counterterrorism chief bragging of his Al Qaeda strikes that "we are killing these sons of bitches faster than they can grow them now." It is unclear whether this statement is true today. The core Al Qaeda organization appears debilitated. But its affiliate organizations are operating in Somalia, Yemen, and Iraq. And powerful new affiliates appear to be springing up elsewhere, including Al Qaeda in the Islamic Maghreb in post-Qaddafi North Africa, and the Al Nusra Front in revolutionary Syria. Secrecy is the essence of the type of war that Obama has chosen to fight. In this light, questions about the strategic success of Obama's drone campaign, and his secret war more generally, are growing. "We cannot kill our way to victory," former Congresswoman Jane Harman, who was a member of the House Intelligence Committee, testified in a counterterrorism hearing last month. General Stanley McChrystal, who presided over JSOC from 2003 to 2008, made a similar point in a recent interview in Foreign Affairs. The "danger of special operating forces," he noted, is that "you get this sense that it is satisfying, it's clean, it's low risk, it's the cure for most ills." But history provides no example of "a covert fix that solved a complex problem," he continued, adding that a too-heavy reliance on drone strikes is also "problematic" because "it's not a strategy in itself; it's a short-term tactic." One reason McChrystal questions the strategic efficacy of heavy reliance on drones is that "inhabitants of that area and the world have significant problems watching Western forces, particularly Americans, conduct drone strikes inside the terrain of another country." Last summer, Pew Research reported "considerable opposition" in "nearly all countries," and especially in predominantly Muslim countries, to Obama's drone program. It also found that Lebanon, Egypt, Jordan, and Pakistan now had a less favorable attitude toward the United States than at the end of the Bush administration. And a Gallup poll in February found that 92 percent of the people in Pakistan disapprove of the American leadership and 4 percent approve—historically bad numbers for the United States that are largely attributable to the way of the knife. These are discouraging numbers for a president who hoped to diminish the terrorism threat by establishing "a new beginning between the United States and Muslims ... based upon mutual interest and mutual respect," as Obama said in Cairo in 2009. The president added in that speech that the United States during the Bush era had acted "contrary to our ideals," and he pledged to "change course." But as the polls abroad show, Obama's change of course has not made the world think better of American ideals. Ben Emmerson, a United Nations special rapporteur on counter-terrorism and human rights, recently suggested that some American drone attacks might be war crimes. Since he launched an investigation in January, he has noted that most nations "heavily disput[e]" the legal theory underlying Obama's stealth wars, and concluded that American drone strikes violate Pakistan's sovereignty, contrary to international law. Most Americans are little interested in the popularity abroad of the way of the knife. To date, they very strongly support what they know about the president's drone campaign against foreign terrorist suspects. Support for targeting American citizens such as Anwar al-Awlaki, however, has dropped, and the focus on American citizens is affecting other elements of the way of the knife. In large part this has resulted from the administration's stilted explanations about the legal limits on killing Americans and the secret processes for placing American suspects on target lists. When a less-than-convincing Justice Department white paper on the topic leaked to the press in February, it stoked suspicions that the administration had big plans and something to hide. Questions grew when the administration continued to withhold legal memos from Congress, and when John Brennan danced around the issue during his confirmation hearings to be director of the CIA. Senator Rand Paul then cleverly asked Brennan whether the president could order a drone to kill a terrorist suspect inside the United States. When Brennan and Attorney General Eric Holder seemed to prevaricate, Paul conducted his now-famous filibuster. "I cannot sit at my desk quietly and let the president say that he will kill Americans on American soil who are not actively attacking the country," Paul proclaimed. The president never said, or suggested, any such thing. But with trust in Obama falling fast, Paul was remarkably successful in painting the secret wars abroad as a Constitution-defying threat to American citizens at home. Paul's filibuster attracted attention to the issue of drone attacks on Americans in the homeland. A more serious challenge to the president comes from growing concerns, including within his own party, about the legal integrity of his secret wars abroad. Anne-Marie Slaughter, a former senior official in Obama's State Department, recently gainsaid "the idea that this president would leave office having dramatically expanded the use of drones—including [against] American citizens—without any public standards and no checks and balances." Many in Congress want to increase the transparency of the processes and legal standards for placing a suspect (especially an American) on a targeting list, to tighten those legal standards (perhaps by recourse to a "drone court"), and to establish a more open accounting of the consequences (including civilian casualties) from the strikes. "This is now out in the public arena, and now it has to be addressed," Senator Dianne Feinstein, a Democrat, recently said. Others in Congress worry about the obsolescence of the legal foundation for the way of the knife: the congressional authorization, in 2001, of force against Al Qaeda. "I don't believe many, if any, of us believed when we voted for [the authorization] that we were voting for the longest war in the history of the United States and putting a stamp of approval on a war policy against terrorism that, 10 years plus later, we're still using," said Senator Richard Durbin, also a Democrat, in a Wall Street Journal interview. "What are the checks and balances of the system?" he asked. Senator John McCain, who led bipartisan efforts against what he saw as Bush-era legal excesses, is now focusing similar attention on Obama. "I believe that we need to revisit this whole issue of the use of drones, who uses them, whether the CIA should become their own air force, what the oversight is, [and] what the legal and political foundations [are] for this kind of conflict," he said last month. These are unhappy developments for the president who in his first inaugural address pledged with supercilious confidence that, unlike his predecessor, he would not expend the "rule of law" for "expedience's sake." Obama reportedly bristles at the legal and political questions about his secret war, and the lack of presidential trust that they imply. "This is not Dick Cheney we're talking about here," he recently pleaded to Democratic senators who complained about his administration's excessive secrecy on drones, according to Politico. And yet the president has ended up in this position because he committed the same sins that led Cheney and the administration in which he served to a similar place. The first sin is an extraordinary institutional secrecy that Obama has long promised to reduce but has failed to. In part this results from any White House's inevitable tendency to seek maximum protection for its institutional privileges and prerogatives. The administration's disappointing resistance to sharing secret legal opinions about the secret war with even a small subset of Congress falls into this category. Much of what the administrat-ion says about its secret war seems incomplete, self-serving, and ultimately non-credible. But the point goes deeper, for secrecy is the essence of the type of war that Obama has chosen to fight. The intelligence-gathering in foreign countries needed for successful drone strikes there cannot be conducted openly. Nor can lethal operations in foreign countries easily be acknowledged. Foreign leaders usually insist on non-acknowledgment as a condition of allowing American operations in their territories. And in any event, an official American confirmation of the operations might spark controversies in those countries that would render the operations infeasible. The impossible-to-deny bin Laden raid was a necessary exception to these principles, and the United States is still living with the fallout in Pakistan. 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 oftheseparation 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. Administration officials resist this route because they worry about the outcome of the public debate, and because the president is, as The Washington Post recently reported, "seen as reluctant to have the legislative expansion of another [war] added to his legacy." But the administration can influence the outcome of the debate only by engaging it. And as Mazzetti makes plain, the president's legacy already includes the dramatic and unprecedented unilateral expansion of secret war. What the president should be worried about for legacy purposes is that this form of warfare, for which he alone is today responsible, is increasingly viewed as illegitimate.

#### \*\*Legal constraints key --- institutionalizing clarity key to guide norms

HRI, 11 [Human Rights Institute, Targeting Operations with Drone Technology: Humanitarian Law Implications Background Note for the American Society of International Law Annual Meeting Human Rights Institute, Columbia Law School March 25, 2011, p. online]

While they disagree on important legal issues, critics and proponents alike share at least one significant concern: drones may be the future of warfare, and the U.S. may soon find itself “on the other end of the drone,” as other governments and armed non-state groups develop drone technology. Yet **discussions of** the legal constraints lag behind the rapid advances in technological capability and deployment. Even those who believe that the U.S. government’s use of drone technology is carefully calibrated to adhere to applicable law worry that other governments or non-state groups will cite the U.S. government’s silence on legal questions as justification to shirk from transparency about their practice or even openly flout the law. In this paper, we describe three questions arising from the U.S. government’s use of drone technology, focusing on ambiguities in the government’s position which scholars have debated: the scope of the armed conflict; who may be targeted; and the legal and policy implications of who conducts the targeting. These questions stem not so much from drone technology itself, but from the kind of warfare for which the U.S. is currently using drones. Scholars and experts have sharply disagreed about the answers to these questions, but it is telling that a core set of issues has emerged as the shared focus for individuals from across the ideological spectrum. Ambiguity on these core issues exists despite **the Administration’s efforts** to establish the legality of targeting practices—most notably, State Department Legal Adviser Harold Koh’s address at the 2010 annual meeting of the American Society of International Law. Some scholars laud Koh’s speech as divorcing the Administration from an approach that invokes the privileges of the law of war while dismissing the relevance of it duties and restraints. Observers have recognized that Koh’s address reflects the Administration’s desire to legitimize its policy through forthrightness about the constraints imposed by law. However, scholars disagree about the functional difference between the paradigm of the “global war against terrorism” and the Administration’s articulation, in a variety of fora, of an armed conflict against al Qaeda, the Taliban and associated forces. Some observers have argued that without further explanation, the Administration’s position confirms the relevancy of humanitarian law but leaves unanswered questions fundamental to assessing the legality of U.S. practice. We agree that where significant ambiguity exists, it leaves the U.S. government vulnerable to challenges about the sincerity of its commitment to the rule of law. In the near future, ambiguity may also weaken the government’s ability to argue for constraints on the practice of less law-abiding states. Clarity about U.S. legal standards and policy, as we describe in this paper, would not require disclosure of classified information about who is targeted, or intelligence sources and methods. We recognize that rules of engagement are classified and vary based on the theater of combat. Instead, we encourage clarification of the existence or character of legal justifications TARGETING WITH DRONE TECHNOLOGY: HUMANITARIAN LAW IMPLICATIONS HUMAN RIGHTS INSTITUTE, COLUMBIA LAW SCHOOL 3 and standards, and generic procedural safeguards, about which scholars and experts have debated. To be sure, not all the scholars and observers whose views we present believe that the government needs to disclose more information about its legal standards and procedures. Some have objected to court scrutiny of the government’s standards or justifications. Many observers are concerned that further government clarification would require divulging sensitive information, or at least information that the government has not historically made public. They point to the extent to which the questions we raise involve not just legal standards, but policy determinations. These observers’ concerns, and countervailing concerns about the expansive or unbounded scope of the armed conflict referenced by the Administration, require further discussion—one we attempt to set the foundation for, by identifying particular areas of ambiguity and debate. For some issues, scholars disagree with each others’ characterization of the government’s position. For other issues, they agree that the government’s position is unknown. On still other issues, the question of the government’s position is relegated to the background in favor of a highly contested debate among scholars and practitioners about the relevance of the law or the practicability of a legal standard. Yet in each case, disagreement among scholars underscores the need for clarity about the U.S. government’s position. U.S. legal standards and policies are a necessary starting point for discussions among scholars, yet they are such a “moving target”—or simply a target in the fog—that discussions can be expected to devolve to speculation. Disagreement among scholars, to some degree, reflects a necessarily myopic understanding of government policy. At least to that extent, the government non-disclosure may undermine the robustness of debate among scholars and practitioners about humanitarian law standards, and effectively halt sound legal analysis of U.S. practice. Limiting scholarly debate would be detrimental to the development of clear legal standards that aid, rather than undermine, U.S. armed forces charged with conducting targeting operations. Insofar as government non-disclosure prevents public or legal accountability, it also undermines the U.S. government’s message to the international community, so evident in Koh’s ASIL speech, of commitment to the rule of law.

#### \*\*It’s reverse causal: formal agreements are only effective if driven by US precedent

Robert Farley 11, assistant professor at the Patterson School of Diplomacy and International Commerce at the University of Kentucky, Over the Horizon: U.S. Drone Use Sets Global Precedent, October 12, http://www.worldpoliticsreview.com/articles/10311/over-the-horizon-u-s-drone-use-sets-global-precedent

Is the world about to see a "drone race" among the United States, China and several other major powers? Writing in the New York Times, Scott Shane argued that just such an arms race is already happening and that it is largely a result of the widespread use of drones in a counterterror role by the United States. Shane suggests that an international norm of drone usage is developing around how the United States has decided to employ drones. In the future, we may expect that China, Russia and India will employ advanced drone technologies against similar enemies, perhaps in Xinjiang or Chechnya. Kenneth Anderson agrees that the drone race is on, but disagrees about its cause, arguing that improvements in the various drone component technologies made such an arms race inevitable. Had the United States not pursued advanced drone technology or launched an aggressive drone campaign, some other country would have taken the lead in drone capabilities. So which is it? Has the United States sparked a drone race, or was a race with the Chinese and Russians inevitable? While there's truth on both sides, on balance Shane is correct. **Arms races don't just "happen"** because of outside technological developments. Rather, they are embedded in political dynamics associated with public perception, international prestige and bureaucratic conflict. China and Russia pursued the development of drones before the United States showed the world what the Predator could do, but they are pursuing capabilities more vigorously because of the U.S. example. Understanding this is necessary to developing expectations of what lies ahead as well as a strategy for regulating drone warfare. States run arms races for a variety of reasons. The best-known reason is a sense of fear: The developing capabilities of an opponent leave a state feeling vulnerable. The Germany's build-up of battleships in the years prior to World War I made Britain feel vulnerable, necessitating the expansion of the Royal Navy, and vice versa. Similarly, the threat posed by Soviet missiles during the Cold War required an increase in U.S. nuclear capabilities, and so forth. However, states also "race" in response to public pressure, bureaucratic politics and the desire for prestige. Sometimes, for instance, states feel the need to procure the same type of weapon another state has developed in order to maintain their relative position, even if they do not feel directly threatened by the weapon. Alternatively, bureaucrats and generals might use the existence of foreign weapons to argue for their own pet systems. **All of these reasons** share common characteristics, however: They are both social and strategic, and they depend on the behavior of other countries. Improvements in technology do not make the procurement of any given weapon necessary; rather, geostrategic interest creates the need for a system. So while there's a degree of truth to Anderson's argument about the availability of drone technology, he ignores the degree to which dramatic **precedent can affect state policy**. The technologies that made HMS Dreadnought such a revolutionary warship in 1906 were available before it was built; its dramatic appearance nevertheless transformed the major naval powers' procurement plans. Similarly, the Soviet Union and the United States accelerated nuclear arms procurement following the Cuban Missile Crisis, with the USSR in particular increasing its missile forces by nearly 20 times, partially in response to perceptions of vulnerability. So while a drone "race" may have taken place even without the large-scale Predator and Reaper campaign in Pakistan, Yemen and Somalia, the extent and character of the race now on display has been driven by U.S. behavior. Other states, observing the effectiveness -- or at least the capabilities -- of U.S. drones will work to create their own counterparts with an enthusiasm that **they would not have had in absence of the U.S. example**. What is undeniable, however, is that we face a drone race, which inevitably evokes the question of arms control. Because they vary widely in technical characteristics, appearance and even definition, drones are poor candidates for "traditional" arms control of the variety that places strict limits on number of vehicles constructed, fielded and so forth. Rather, to the extent that any regulation of drone warfare is likely, it will come through treaties limiting how drones are used. Such a treaty would require either deep concern on the part of the major powers that advances in drone capabilities threatened their interests and survival, or widespread revulsion among the global public against the practice of drone warfare. The latter is somewhat more likely than the former, as drone construction at this point seems unlikely to dominate state defense budgets to the same degree as battleships in the 1920s or nuclear weapons in the 1970s. However, for now, drones are used mainly to kill unpleasant people in places distant from media attention. So creating the public outrage necessary to force global elites to limit drone usage may also prove difficult, although the specter of "out of control robots" killing humans with impunity might change that. P.W. Singer, author of "Wired for War," argues that new robot technologies will require a new approach to the legal regulation of war. Robots, both in the sky and on the ground, not to mention in the sea, already have killing capabilities that rival those of humans. Any approach to legally managing drone warfare will likely come as part of a more general effort to regulate the operation of robots in war. However, even in the unlikely event of global public outrage, any serious effort at regulating the use of drones will require U.S. acquiescence. Landmines are a remarkably unpopular form of weapon, but the United States continues to resist the Anti-Personnel Mine Ban Convention. If the United States sees unrestricted drone warfare as being to its advantage -- and it is likely to do so even if China, Russia and India develop similar drone capabilities -- then even global outrage may not be sufficient to make the U.S. budge on its position. This simply reaffirms the original point: Arms races don't just "happen," but rather are a direct, if unexpected outcome of state policy. Like it or not, the behavior of the United States right now is structuring how the world will think about, build and use drones for the foreseeable future. Given this, U.S. policymakers should perhaps devote a touch more attention to the precedent they're setting.

#### \*\*Formal judicial oversight key – maintains resolve while signaling restraint

NYT, 10 [“Lethal Force under Law”, New York Times, <http://www.nytimes.com/2010/10/10/opinion/10sun1.html>]

The drone program has been effective, killing more than 400 Al Qaeda militants this year alone, according to American officials, but fewer than 10 noncombatants. But assassinations are a grave act and subject to abuse — and imitation by other countries. The government needs to do a better job of showing the world that it is acting in strict compliance with international law. The United States has the right under international law to try to prevent attacks being planned by terrorists connected to Al Qaeda, up to and including killing the plotters. But it is not within the power of a commander in chief to simply declare anyone anywhere a combatant and kill them, without the slightest advance independent oversight. The authorization for military force approved by Congress a week after 9/11 empowers the president to go after only those groups or countries that committed or aided the 9/11 attacks. The Bush administration’s distortion of that mandate led to abuses that harmed the United States around the world. The issue of who can be targeted applies directly to the case of Anwar al-Awlaki, an American citizen hiding in Yemen, who officials have admitted is on an assassination list. Did he inspire through words the Army psychiatrist who shot up Fort Hood, Tex., last November, and the Nigerian man who tried to blow up an airliner on Christmas? Or did he actively participate in those plots, and others? The difference is crucial. If the United States starts killing every Islamic radical who has called for jihad, there will be no end to the violence. American officials insist that Mr. Awlaki is involved with actual terror plots. But human rights lawyers working on his behalf say that is not the case, and have filed suit to get him off the target list. The administration wants the case thrown out on state-secrets grounds. The Obama administration needs to go out of its way to demonstrate that it is keeping its promise to do things differently than the Bush administration did. It must explain how targets are chosen, demonstrate that attacks are limited and are a last resort, and allow independent authorities to oversee the process. PUBLIC GUIDELINES The administration keeps secret its standards for putting people on terrorist or assassination lists. In March, Harold Koh, legal adviser to the State Department, said the government adheres to international law, attacking only military targets and keeping civilian casualties to an absolute minimum. “Our procedures and practices for identifying lawful targets are extremely robust,” he said in a speech, without describing them. Privately, government officials say no C.I.A. drone strike takes place without the approval of the United States ambassador to the target country, the chief of the C.I.A. station, a deputy at the agency, and the agency’s director. So far, President Obama’s system of command seems to have prevented any serious abuses, but the approval process is entirely within the administration. After the abuses under President Bush, the world is not going to accept a simple “trust us” from the White House. There have been too many innocent people rounded up for detention and subjected to torture, too many cases of mistaken identity or trumped-up connections to terror. Unmanned drones eliminate the element of risk to American forces and make it seductively easy to attack. The government needs to make public its guidelines for determining who is a terrorist and who can be targeted for death. It should clearly describe how it follows international law in these cases and list the internal procedures and checks it uses before a killing is approved. That can be done without formally acknowledging the strikes are taking place in specific countries. LIMIT TARGETS The administration should state that it is following international law by acting strictly in self-defense, targeting only people who are actively planning or participating in terror, or who are leaders of Al Qaeda or the Taliban — not those who raise funds for terror groups, or who exhort others to acts of terror. Special measures are taken before an American citizen is added to the terrorist list, officials say, requiring the approval of lawyers from the National Security Council and the Justice Department. But again, those measures have not been made public. Doing so would help ensure that people like Mr. Awlaki are being targeted for terrorist actions, not their beliefs or associations. A LAST RESORT Assassination should in every case be a last resort. Before a decision is made to kill, particularly in areas away from recognized battlefields, the government needs to consider every other possibility for capturing the target short of lethal force. Terrorists operating on American soil should be captured using police methods, and not subject to assassination. If practical, the United States should get permission from a foreign government before carrying out an attack on its soil. The government is reluctant to discuss any of these issues publicly, in part to preserve the official fiction that the United States is not waging a formal war in Pakistan and elsewhere, but it would not harm that effort to show the world how seriously it takes international law by making clear its limits. INDEPENDENT OVERSIGHT Dealing out death requires additional oversight outside the administration. Particularly in the case of American citizens, like Mr. Awlaki, the government **needs to employ some** due process before depriving someone of life. It would be logistically impossible to conduct a full-blown trial in absentia of every assassination target, as the lawyers for Mr. Awlaki prefer. But judicial review could still be employed. The government could establish a court like the Foreign Intelligence Surveillance Court, which authorizes wiretaps on foreign agents inside the United States. Before it adds people to its target list and begins tracking them, the government could take its evidence to this court behind closed doors — along with proof of its compliance with international law — and get the equivalent of a judicial warrant in a timely and efficient way. Congressional leaders are secretly briefed on each C.I.A. attack, and say they are satisfied with the information they get and with the process. Nonetheless, that process is informal and could be changed at any time by this president or his successors. Formal oversight is a better way of demonstrating confidence in American methods. Self-defense under international law not only shows the nation’s resolve and power, but sends a powerful message to other countries that the United States couples drastic action with careful judgment.

#### \*\*External court oversight maintains legitimacy – key to global stability

Knowles, 09 [Robert, Assistant Professor, NYU Law, “Article: American Hegemony and the Foreign Affairs Constitution”, 41 Ariz. St. L.J. 87, p. lexis]

The hegemonic model also reduces the need for executive branch flexibility, and the institutional competence terrain shifts toward the courts. The stability of the current U.S.-led international system depends on the ability of the U.S. to govern effectively. Effective governance depends on, among other things, predictability. n422 G. John Ikenberry analogizes America's hegemonic position to that of a "giant corporation" seeking foreign investors: "The rule of law and the institutions of policy making in a democracy are the political equivalent of corporate transparency and [\*155] accountability." n423 Stable interpretation of the law bolsters the stability of the system because other nations will know that they **can rely on** those **interpretations** and that there will be at least some degree of enforcement by the United States. At the same time, the separation of powers serves the global-governance function by reducing the ability of the executive branch to make "abrupt or aggressive moves toward other states." n424 The Bush Administration's detainee policy, for all of its virtues and faults, was an exceedingly aggressive departure from existing norms, and was therefore bound to generate intense controversy. It was formulated quickly, by a small group of policy-makers and legal advisors without consulting Congress and over the objections of even some within the executive branch. n425 Although the Administration invoked the law of armed conflict to justify its detention of enemy combatants, it did not seem to recognize limits imposed by that law. n426 Most significantly, it designed the detention scheme around interrogation rather than incapacitation and excluded the detainees from all legal protections of the Geneva Conventions. n427 It declared all detainees at Guantanamo to be "enemy combatants" without establishing a regularized process for making an individual determination for each detainee. n428 And when it established the military commissions, also without consulting Congress, the Administration denied defendants important procedural protections. n429 In an anarchic world characterized by great power conflict, one could make the argument that the executive branch requires maximum flexibility to defeat the enemy, who may not adhere to international law. Indeed, the precedents relied on most heavily by the Administration in the enemy combatant cases date from the 1930s and 1940s - a period when the international system was radically unstable, and the United States was one of several great powers vying for advantage. n430 But during that time, the executive branch faced much more exogenous pressure from other great powers to comply with international law in the treatment of captured enemies. If the United States strayed too far from established norms, it would risk retaliation upon its own soldiers or other consequences from [\*156] powerful rivals. Today, there are no such constraints: enemies such as al Qaeda are not great powers and are not likely to obey international law anyway. Instead, the danger is that American rule-breaking will set a pattern of rule-breaking for the world, leading to instability. n431 America's military predominance enables it to set the rules of the game. When the U.S. breaks its own rules, it loses legitimacy. The Supreme Court's response to the detainee policy enabled the U.S. government as a whole to hew more closely to established procedures and norms, and to regularize the process for departing from them. After Hamdi, n432 the Department of Defense established a process, the CSRTs, for making an individual determination about the enemy combatant status of all detainees at Guantanamo. After the Court recognized habeas jurisdiction at Guantanamo, Congress passed the DTA, n433 establishing direct judicial review of CSRT determinations in lieu of habeas. Similarly, after the Court declared the military commissions unlawful in Hamdan, n434 this forced the Administration to seek congressional approval for commissions that restored some of the rights afforded at courts martial. n435 In Boumediene, the Court rejected the executive branch's foreign policy arguments, and bucked Congress as well, to restore the norm of habeas review. n436 Throughout this enemy combatant litigation, it has been the courts' relative insulation from politics that has enabled them to take the long view. In contrast, the President's (and Congress's) responsiveness to political concerns in the wake of 9/11 has encouraged them to depart from established norms for the nation's perceived short-term advantage, even at the expense of the nation's long-term interests. n437 As Derek Jinks and Neal Katyal have observed, "treaties are part of [a] system of time-tested standards, and this feature makes the wisdom of their judicial interpretation manifest." n438 At the same time, the enemy combatant cases make allowances for the executive branch's superior speed. The care that the Court took to limit the issues it decided in each case gave the executive branch plenty of time to [\*157] arrive at an effective detainee policy. n439 Hamdi, Rasul, and Boumediene recognized that the availability of habeas would depend on the distance from the battlefield and the length of detention. n440 The enemy combatant litigation also underscores the extent to which the classic realist assumptions about courts' legitimacy in foreign affairs have been turned on their head. In an anarchic world, legitimacy derives largely from brute force. The courts have no armies at their disposal and look weak when they issue decisions that cannot be enforced. n441 But in a hegemonic system, where governance depends on voluntary acquiesnce, the courts have a greater role to play. Rather than hobbling the exercise of foreign policy, the courts are a key form of "soft power." n442 As Justice Kennedy's majority opinion observed in Boumediene, courts can bestow external legitimacy on the acts of the political branches. n443 Acts having a basis in law are almost universally regarded as more legitimate than merely political acts. Most foreign policy experts believe that the Bush Administration's detention scheme "hurt America's image and standing in the world." n444 The restoration of habeas corpus in Boumediene may help begin to counteract this loss of prestige. Finally, the enemy combatant cases are striking in that they embrace a role for representation-reinforcement in the international realm. n445 Although defenders of special deference acknowledge that courts' strengths lie in protecting the rights of minorities, it has been very difficult for courts to protect these rights in the face of exigencies asserted by the executive branch in foreign affairs matters. This is especially difficult when the minorities are alleged enemy aliens being held outside the sovereign territory of the United States in wartime. In the infamous Korematsu decision, another World War II-era case, the Court bowed to the President's factual assessment of the emergency justifying detention of U.S. citizens of Japanese ancestry living in the United States. n446 In Boumediene, the Court [\*158] pointedly declined to defer to the executive branch's factual assessments of military necessity. n447 The court may have recognized that a more aggressive role in protecting the rights of non-citizens was required by American hegemony. In fact, the arguments for deference with respect to the rights of non-citizens are even weaker because aliens lack a political constituency in the United States. n448 This outward-looking form of representation-reinforcement serves important functions. It strengthens the legitimacy of U.S. hegemony by establishing equality as a benchmark and reinforces the sense that our constitutional values reflect universal human rights. n449 Conclusion When it comes to the constitutional regime of foreign affairs, geopolitics has always mattered. Understandings about America's role in the world have shaped foreign affairs doctrines. But the classic realist assumptions that support special deference do not reflect the world as it is today. A better, more realist, approach looks to the ways that the courts can reinforce and legitimize America's leadership role. The Supreme Court's rejection of the government's claimed exigencies in the enemy combatant cases strongly indicates that the Judiciary is becoming reconciled to the current world order and is asserting its prerogatives in response to the fewer constraints imposed on the executive branch. In other words, the courts are moving toward the hegemonic model. In the great dismal swamp that is the judicial treatment of foreign affairs, this transformation offers hope for clarity: the positive reality of the international system, despite terrorism and other serious challenges, permits the courts to reduce the "deference gap" between foreign and domestic cases.