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## Offcase

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#### Interpretation:

#### Restrictions are prohibitions --- the aff is distinct

Jean Schiedler-Brown 12, Attorney, Jean Schiedler-Brown & Associates, Appellant Brief of Randall Kinchloe v. States Dept of Health, Washington, The Court of Appeals of the State of Washington, Division 1, http://www.courts.wa.gov/content/Briefs/A01/686429%20Appellant%20Randall%20Kincheloe%27s.pdf

3. The ordinary definition of the term "restrictions" also does not include the reporting and monitoring or supervising terms and conditions that are included in the 2001 Stipulation.

Black's Law Dictionary, 'fifth edition,(1979) defines "restriction" as;

A limitation often imposed in a deed or lease respecting the use to which the property may be put. The term "restrict' is also cross referenced with the term "restrain." Restrain is defined as; To limit, confine, abridge, narrow down, restrict, obstruct, impede, hinder, stay, destroy. To prohibit from action; to put compulsion on; to restrict; to hold or press back. To keep in check; to hold back from acting, proceeding, or advancing, either by physical or moral force, or by interposing obstacle, to repress or suppress, to curb.

In contrast, the terms "supervise" and "supervisor" are defined as; To have general oversight over, to superintend or to inspect. See Supervisor. A surveyor or overseer. . . In a broad sense, one having authority over others, to superintend and direct. The term "supervisor" means an individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but required the use of independent judgment.

Comparing the above definitions, it is clear that the definition of "restriction" is very different from the definition of "supervision"-very few of the same words are used to explain or define the different terms. In his 2001 stipulation, Mr. Kincheloe essentially agreed to some supervision conditions, but he did not agree to restrict his license.

#### Restrictions on authority are distinct from conditions

William Conner 78, former federal judge for the United States District Court for the Southern District of New York United States District Court, S. D. New York, CORPORACION VENEZOLANA de FOMENTO v. VINTERO SALES, http://www.leagle.com/decision/19781560452FSupp1108\_11379

Plaintiff next contends that Merban was charged with notice of the restrictions on the authority of plaintiff's officers to execute the guarantees. Properly interpreted, the "conditions" that had been imposed by plaintiff's Board of Directors and by the Venezuelan Cabinet were not "restrictions" or "limitations" upon the authority of plaintiff's agents but rather conditions precedent to the granting of authority. Essentially, then, plaintiff's argument is that Merban should have known that plaintiff's officers were not authorized to act except upon the fulfillment of the specified conditions.

#### Authority is power delegated to an agent by a principle

Kelly 3 Judge for the State of Michigan, JOSEPH ELEZOVIC, Plaintiff, and LULA ELEZOVIC, Plaintiff-Appellant/Cross-Appellee, v. FORD MOTOR COMPANY and DANIEL P. BENNETT, Defendants-Appellees/Cross-Appellants., No. 236749, COURT OF APPEALS OF MICHIGAN, 259 Mich. App. 187; 673 N.W.2d 776; 2003 Mich. App. LEXIS 2649; 93 Fair Empl. Prac. Cas. (BNA) 244; 92 Fair Empl. Prac. Cas. (BNA) 1557, lexis

Applying agency principles, a principal is responsible for the acts of its agents done within the scope of the agent's authority, "even though acting contrary to instructions." [Dick Loehr's, Inc v Secretary of State, 180 Mich. App. 165, 168; 446 N.W.2d 624 (1989)](https://www.lexis.com/research/buttonTFLink?_m=6cbcd97524abff5644c0987b135f7517&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b259%20Mich.%20App.%20187%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_origin=TOASHLX&_butNum=115&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b180%20Mich.%20App.%20165%2cat%20168%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=136&_startdoc=101&wchp=dGLbVtb-zSkAk&_md5=708331d40466e4347936b73e103c82fb). This is because, in part, an agency relationship arises where the principal [\*\*\*36]  has the right to control the conduct of the agent. [St Clair Intermediate School Dist v Intermediate Ed Ass'n/Michigan Ed Ass'n, 458 Mich. 540, 558 n 18; 581 N.W.2d 707 (1998)](https://www.lexis.com/research/buttonTFLink?_m=6cbcd97524abff5644c0987b135f7517&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b259%20Mich.%20App.%20187%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_origin=TOASHLX&_butNum=116&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b458%20Mich.%20540%2cat%20558%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=136&_startdoc=101&wchp=dGLbVtb-zSkAk&_md5=c0a63a81a484a6ce53be229bc2290a07) (citations omitted). The employer is also liable for the torts of his employee if "'the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation,'" [McCann v Michigan, 398 Mich. 65, 71; 247 N.W.2d 521 (1976)](https://www.lexis.com/research/buttonTFLink?_m=6cbcd97524abff5644c0987b135f7517&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b259%20Mich.%20App.%20187%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_origin=TOASHLX&_butNum=117&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b398%20Mich.%2065%2cat%2071%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=136&_startdoc=101&wchp=dGLbVtb-zSkAk&_md5=5219d53b6a7119254f8041c911d87fd2), quoting [Restatement of Agency, 2d § 219(2)(d)](https://www.lexis.com/research/buttonTFLink?_m=6cbcd97524abff5644c0987b135f7517&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b259%20Mich.%20App.%20187%5d%5d%3e%3c%2fcite%3e&_butType=4&_butStat=0&_origin=TOASHLX&_butNum=118&_butInline=1&_butinfo=AGENCY%20SECOND%20219&_fmtstr=FULL&docnum=136&_startdoc=101&wchp=dGLbVtb-zSkAk&_md5=71c1bf8c001fe5ae1153be4268b8e9e9), p 481; see also [Champion v Nation Wide Security, Inc, 450 Mich. 702, 704, 712; 545 N.W.2d 596 (1996)](https://www.lexis.com/research/buttonTFLink?_m=6cbcd97524abff5644c0987b135f7517&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b259%20Mich.%20App.%20187%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_origin=TOASHLX&_butNum=119&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b450%20Mich.%20702%2cat%20704%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=136&_startdoc=101&wchp=dGLbVtb-zSkAk&_md5=3d1841dc7f4fb90804d8adb6349a6fae), citing [Restatement of Agency, 2d § 219(2)(d)](https://www.lexis.com/research/buttonTFLink?_m=6cbcd97524abff5644c0987b135f7517&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b259%20Mich.%20App.%20187%5d%5d%3e%3c%2fcite%3e&_butType=4&_butStat=0&_origin=TOASHLX&_butNum=120&_butInline=1&_butinfo=AGENCY%20SECOND%20219&_fmtstr=FULL&docnum=136&_startdoc=101&wchp=dGLbVtb-zSkAk&_md5=c1927abf5bf3954a85d211c044ada141), p 481 ("the master is liable for the tort of his servant if the servant 'was aided in accomplishing the tort by the existence of the agency relation'"). In [Backus v  [\*213]  Kauffman (On Rehearing), 238 Mich. App. 402, 409; 605 N.W.2d 690 (1999)](https://www.lexis.com/research/buttonTFLink?_m=6cbcd97524abff5644c0987b135f7517&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b259%20Mich.%20App.%20187%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_origin=TOASHLX&_butNum=121&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b238%20Mich.%20App.%20402%2cat%20409%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=136&_startdoc=101&wchp=dGLbVtb-zSkAk&_md5=d9947545fee151274d489cbc14123160), this Court stated: The term "authority" is defined by Black's Law Dictionary to include "the power delegated by a principal to an agent." Black's Law Dictionary (7th ed), p [\*\*\*37]  127. "Scope of authority" is defined in the following manner: "The reasonable power that an agent has been delegated or might foreseeably be delegated in carrying out the principal's business." Id. at 1348.

#### Violation:

#### Ex-post review only determines whether particular targeted killings exceeded authority the government already had---that doesn’t affect the legality of targeted killings at all

Steve Vladeck 13, professor of law and the associate dean for scholarship at American University Washington College of Law, 2/5/13, “What’s Really Wrong With the Targeted Killing White Paper,” <http://www.lawfareblog.com/2013/02/whats-really-wrong-with-the-targeted-killing-white-paper/>

Many of us wondered, at the time, just where this came from–since it’s hard to imagine what due process could be without at least some judicial oversight. On this point, the white paper again isn’t very helpful. The sum total of its analysis is Section II.C, on page 10, which provides that:

[U]nder the circumstances described in this paper, there exists no appropriate judicial forum to evaluate these constitutional considerations. It is well established that “[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention,” because such matters “frequently turn on standards that defy the judicial application,” or “involve the exercise of a discretion demonstrably committed to the executive or legislature.” Were a court to intervene here, it might be required inappropriately to issue an ex ante command to the President and officials responsible for operations with respect to their specific tactical judgment to mount a potential lethal operation against a senior operational leader of al-Qa’ida or its associated forces. And judicial enforcement of such orders would require the Court to supervise inherently predictive judgments by the President and his national security advisors as to when and how to use force against a member of an enemy force against which Congress has authorized the use of force.

There are two enormous problems with this reasoning:

First, many of us who argue for at least some judicial review in this context specifically don’t argue for ex ante review for the precise reasons the white paper suggests. Instead, we argue for ex post review–in the form of damages actions after the fact, in which liability would only attach if the government both (1) exceeded its authority; and (2) did so in a way that violated clearly established law. Whatever else might be said about such damages suits, they simply don’t raise the interference concerns articulated in the white paper, and so one would have expected some distinct explanation for why that kind of judicial review shouldn’t be available in this context. All the white paper offers, though, is its more general allusion to the political question doctrine. Which brings me to…

Second, and in any event, the suggestion that lawsuits arising out of targeted killing operations against U.S. citizens raise a nonjusticiable political question is almost laughable–and is the one part of this white paper that really does hearken back to the good ole’ days of the Bush Administration (I’m less sold on any analogy based upon the rest of the paper). Even before last Term’s Zivotofsky decision, in which the Supreme Court went out of its way to remind everyone (especially the D.C. Circuit) of just how limited the political question doctrine really should be, it should’ve followed that uses of military force against U.S. citizens neither “turn on standards that defy the judicial application,” nor “involve the exercise of a discretion demonstrably committed to the executive or legislature.” Indeed, in the context of the Guantánamo habeas litigation, courts routinely inquire into the very questions that might well arise in such a damages suit, e.g., whether there is sufficient evidence to support the government’s conclusion that the target is/was a senior operational leader of al Qaeda or one of its affiliates…

Don’t get me wrong: Any suit challenging a targeted killing operation, even a post hoc damages action, is likely to run into a number of distinct procedural concerns, including the difficulty of arguing for a Bivens remedy; the extent to which the state secrets privilege might preclude the litigation; etc. But those are the arguments that the white paper should’ve been making–and not a wholly unnuanced invocation of the political question doctrine in a context in which it clearly does not–and should not–apply.

V. A Modest Proposal

This all leads me to what I’ve increasingly come to believe is the only real solution here: If folks are really concerned about this issue, especially on the Hill, then Congress should create a cause of action–with nominal damages–for individuals who have been the targets of such operations (or, more honestly, their heirs). The cause of action could be for $1 in damages; it could expressly abrogate the state secrets privilege and replace it with a procedure for the government to offer at least some of its evidence ex parte and in camera; and it could abrogate qualified immunity so that, in every case, the court makes law concerning how the government applies its criteria in a manner consistent with the Due Process Clause of the Fifth Amendment. This wouldn’t in any way resolve the legality of targeted killings, but it would clear the way for courts to do what courts do–ensure that, when the government really is depriving an individual of their liberty (if not their life), it does so in a manner that comports with the Constitution–as the courts, and not just the Executive Branch, interpret it. It’s not a perfect solution, to be sure, but if ever there was a field in which the perfect is the enemy of the good, this is it.

#### Vote neg---

#### Neg ground---only prohibitions on particular authorities guarantee links to every core argument like flexibility and deference

#### Precision---only our interpretation defines “restrictions on authority”---that’s key to adequate preparation and policy analysis

#### Limits---there are an infinite number of small hoops they could require the president to jump through---overstretches our research burden

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#### Judicial ex-post review of targeted killing would collapse military effectiveness and command structure---causes second-guessing of every crucial battlefield decision

Stuart F. Delery 12, Principal Deputy Assistant Attorney General, Civil Division, 12/14/12, Defendants’ Motion to Dismiss, NASSER AL-AULAQI, as personal representative of the estate of ANWAR AL-AULAQI, et al., Plaintiffs, v. LEON E. PANETTA, et al., in their individual capacities, Defendants, No. 1:12-cv-01192 (RMC), <http://www.lawfareblog.com/wp-content/uploads/2012/12/MTD-AAA.pdf>

First, the D.C. Circuit has repeatedly held that where claims directly implicate matters involving national security and particularly war powers, special factors counsel hesitation. See Doe, 683 F.3d at 394-95 (discussing the “strength of the special factors of military and national security” in refusing to infer remedy for citizen detained by military in Iraq); Ali, 649 F.3d at 773 (explaining that “the danger of obstructing U.S. national security policy” is a special factor in refusing to infer remedy for aliens detained in Iraq and Afghanistan (internal quotation and citation omitted)); Rasul v. Myers, 563 F.3d 527, 532 n.5 (D.C. Cir. 2009) (same for aliens detained at Guantánamo Bay). These cases alone should control Plaintiffs’ claims here. Plaintiffs challenge the alleged targeting of and missile strikes against members of AQAP in Yemen. Few cases more clearly present “the danger of obstructing U.S. national security policy” than this one. Ali, 649 F.3d at 773. Accordingly, national security considerations bar inferring a remedy for Plaintiffs’ claims.19¶ Second, Plaintiffs’ claims implicate the effectiveness of the military. As with national security, the D.C. Circuit has consistently held that claims threatening to undermine the military’s command structure and effectiveness present special factors. See Doe, 683 F.3d at 396; Ali, 649 F.3d at 773. Allowing a damages suit brought by the estate of a leader of AQAP against officials who allegedly targeted and directed the strike against him would fly in the face of explicit circuit precedent. As the court in Ali explained: “It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home.” 649 F.3d at 773 (quoting Eisentrager, 339 U.S. at 779). Moreover, allowing such suits to proceed “would diminish the prestige of our commanders, not only with enemies but with wavering neutrals.” Id.; see also Vance, 2012 WL5416500 at \*5 (“The Supreme Court’s principal point was that civilian courts should not interfere with the military chain of command . . . .”); Lebron, 670 F.3d at 553 (barring on special factors grounds Bivens claims by detained terrorist because suit would “require members of the Armed Services and their civilian superiors to testify in court as to each other’s decisions and actions” (citation and internal quotation omitted)). ¶ Creating a new damages remedy in the context of alleged missile strikes against enemy forces in Yemen would have the same, if not greater, negative outcome on the military as in the military detention context that is now well-trodden territory in this and other circuits. These suits “would disrupt and hinder the ability of our armed forces to act decisively and without hesitation in defense of our liberty and national interests.” Ali, 649 F.3d at 773 (citation and internal quotation omitted). To infuse such hesitation into the real-time, active-war decision-making of military officers absent authorization to do so from Congress would have profound implications on military effectiveness. This too warrants barring this new species of litigation.

#### Targeted killing’s vital to counterterrorism---disrupts leadership and makes carrying out attacks impossible

Kenneth Anderson 13, Professor of International Law at American University, June 2013, “The Case for Drones,” Commentary, Vol. 135, No. 6

Targeted killing of high-value terrorist targets, by contrast, is the end result of a long, independent intelligence process. What the drone adds to that intelligence might be considerable, through its surveillance capabilities -- but much of the drone's contribution will be tactical, providing intelligence that assists in the planning and execution of the strike itself, in order to pick the moment when there might be the fewest civilian casualties.

Nonetheless, in conjunction with high-quality intelligence, drone warfare offers an unparalleled means to strike directly at terrorist organizations without needing a conventional or counterinsurgency approach to reach terrorist groups in their safe havens. It offers an offensive capability, rather than simply defensive measures, such as homeland security alone. Drone warfare offers a raiding strategy directly against the terrorists and their leadership.

If one believes, as many of the critics of drone warfare do, that the proper strategies of counterterrorism are essentially defensive -- including those that eschew the paradigm of armed conflict in favor of law enforcement and criminal law -- then the strategic virtue of an offensive capability against the terrorists themselves will seem small. But that has not been American policy since 9/11, not under the Bush administration, not under the Obama administration -- and not by the Congress of the United States, which has authorized hundreds of billions of dollars to fight the war on terror aggressively. The United States has used many offensive methods in the past dozen years: Regime change of states offering safe havens, counter-insurgency war, special operations, military and intelligence assistance to regimes battling our common enemies are examples of the methods that are just of military nature.

Drone warfare today is integrated with a much larger strategic counterterrorism target -- one in which, as in Afghanistan in the late 1990s, radical Islamist groups seize governance of whole populations and territories and provide not only safe haven, but also an honored central role to transnational terrorist groups. This is what current conflicts in Yemen and Mali threaten, in counterterrorism terms, and why the United States, along with France and even the UN, has moved to intervene militarily. Drone warfare is just one element of overall strategy, but it has a clear utility in disrupting terrorist leadership. It makes the planning and execution of complex plots difficult if only because it is hard to plan for years down the road if you have some reason to think you will be struck down by a drone but have no idea when. The unpredictability and terrifying anticipation of sudden attack, which terrorists have acknowledged in communications, have a significant impact on planning and organizational effectiveness.

#### Extinction

**Creamer 11** (Robert, Strategic Consulting Group, “Post-Bin Laden, It's Time to End the Threat of Nuclear Terrorism for Good”)

Worse, al Qaeda and other terrorist organizations have vowed to **obtain** and actually **use** nuclear weapons. The status quo -- the balance of terror -- that for six decades prevented a nuclear war between the U.S. and Russia is every day being made more unstable by the increasing numbers of nuclear players -- and by the potential entry of non-state actors. Far from being deterred by the chaos and human suffering that would ensue from nuclear war -- actors like al Qaeda actively seek precisely that kind of **cataclysm**. The more nuclear weapons that exist in the world -- and more importantly the more weapons-grade fissile material that can be obtained to build a nuclear weapon -- the more likely it is that one, or many more, will actually be used. In the 1980's the specter of a "Nuclear Winter" helped spur the movement for nuclear arms reduction between the U.S. and Soviet Union. Studies showed that smoke caused by fires set off by nuclear explosions in cities and industrial sites would rise to the stratosphere and **envelope the world**. The ash would absorb energy from the sun so that the earth's surface would get **cold**, dry and dark. Plants would die. Much of our food supply would disappear. Much of the world's surface would reach winter temperatures in the summer.

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#### The Executive branch should publicly articulate the legal rationale for its targeted killing policy, including the process and safeguards in place for target selection.

#### The United States Congress should enact a resolution and issue a white paper stating that, in the conduct of its oversight it has reviewed ongoing targeted killing operations and determined that the United States government is conducting such operations in full compliance with relevant laws, including but not limited to the Authorization to Use Military Force of 2001, covert action findings, and the President’s inherent powers under the Constitution.

#### The CP’s the best middle ground---preserves the vital counter-terror role of targeted killings while resolving all their downsides

Daniel Byman 13, Professor in the Security Studies Program at the Edmund A. Walsh School of Foreign Service at Georgetown University and a Senior Fellow at the Saban Center for Middle East Policy at the Brookings Institution, July/August 2013, “Why Drones Work,” Foreign Affairs, Vol. 92, No. 4

Despite President Barack Obama's recent call to reduce the United States' reliance on drones, they will likely remain his administration's weapon of choice. Whereas President George W. Bush oversaw fewer than 50 drone strikes during his tenure, Obama has signed off on over 400 of them in the last four years, making the program the centerpiece of U.S. counterterrorism strategy. The drones have done their job remarkably well: by killing key leaders and denying terrorists sanctuaries in Pakistan, Yemen, and, to a lesser degree, Somalia, drones have devastated al Qaeda and associated anti-American militant groups. And they have done so at little financial cost, at no risk to U.S. forces, and with fewer civilian casualties than many alternative methods would have caused.

Critics, however, remain skeptical. They claim that drones kill thousands of innocent civilians, alienate allied governments, anger foreign publics, illegally target Americans, and set a dangerous precedent that irresponsible governments will abuse. Some of these criticisms are valid; others, less so. In the end, drone strikes remain a necessary instrument of counterterrorism. The United States simply cannot tolerate terrorist safe havens in remote parts of Pakistan and elsewhere, and drones offer a comparatively low-risk way of targeting these areas while minimizing collateral damage.

So drone warfare is here to stay, and it is likely to expand in the years to come as other countries' capabilities catch up with those of the United States. But Washington must continue to improve its drone policy, spelling out clearer rules for extrajudicial and extraterritorial killings so that tyrannical regimes will have a harder time pointing to the U.S. drone program to justify attacks against political opponents. At the same time, even as it solidifies the drone program, Washington must remain mindful of the built-in limits of low-cost, unmanned interventions, since the very convenience of drone warfare risks dragging the United States into conflicts it could otherwise avoid.

#### The CP’s combination of executive disclosure and Congressional support boosts accountability and legitimacy

Gregory McNeal 13, Associate Professor of Law, Pepperdine University, 3/5/13, “Targeted Killing and Accountability,” <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1819583>

Perhaps the most obvious way to add accountability to the targeted killing process is for someone in government to describe the process the way this article has, and from there, defend the process. The task of describing the government’s policies in detail should not fall to anonymous sources, confidential interviews, and selective leaks. Government’s failure to defend policies is not a phenomenon that is unique to post 9/11 targeted killings. In fact, James Baker once noted

"In my experience, the United States does a better job at incorporating intelligence into its targeting decisions than it does in using intelligence to explain those decisions after the fact. This in part reflects the inherent difficulty in articulating a basis for targets derived from ongoing intelligence sources and methods. Moreover, it is hard to pause during ongoing operations to work through issues of disclosure…But articulation is an important part of the targeting process that must be incorporated into the decision cycle for that subset of targets raising the hardest issues…"519

Publicly defending the process is a natural fit for public accountability mechanisms. It provides information to voters and other external actors who can choose to exercise a degree of control over the process. However, a detailed public defense of the process also bolsters bureaucratic and professional accountability by demonstrating to those within government that they are involved in activities that their government is willing to publicly describe and defend (subject to the limits of necessary national security secrecy). However, the Executive branch, while wanting to reveal information to defend the process, similarly recognizes that by revealing too much information they may face legal accountability mechanisms that they may be unable to control, thus their caution is understandable (albeit self-serving).520

It’s not just the Executive branch that can benefit from a healthier defense of the process. Congress too can bolster the legitimacy of the program by specifying how they have conducted their oversight activities. The best mechanism by which they can do this is through a white paper. That paper could include:

A statement about why the committees believe the U.S. government's use of force is lawful. If the U.S. government is employing armed force it's likely that it is only doing so pursuant to the AUMF, a covert action finding, or relying on the President's inherent powers under the Constitution. Congress could clear up a substantial amount of ambiguity by specifying that in the conduct of its oversight it has reviewed past and ongoing targeted killing operations and is satisfied that in the conduct of its operations the U.S. government is acting consistent with those sources of law. Moreover, Congress could also specify certain legal red lines that if crossed would cause members to cease believing the program was lawful. For example, if members do not believe the President may engage in targeted killings acting only pursuant to his Article II powers, they could say so in this white paper, and also articulate what the consequences of crossing that red line might be. To bolster their credibility, Congress could specifically articulate their powers and how they would exercise them if they believed the program was being conducted in an unlawful manner. Perhaps stating: "The undersigned members affirm that if the President were to conduct operations not authorized by the AUMF or a covert action finding, we would consider that action to be unlawful and would publicly withdraw our support for the program, and terminate funding for it."

A statement detailing the breadth and depth of Congressional oversight activities. When Senator Feinstein released her statement regarding the nature and degree of Senate Intelligence Committee oversight of targeted killing operations it went a long way toward bolstering the argument that the program was being conducted in a responsible and lawful manner. An oversight white paper could add more details about the oversight being conducted by the intelligence and armed services committees, explaining in as much detail as possible the formal and informal activities that have been conducted by the relevant committees. How many briefings have members attended? Have members reviewed targeting criteria? Have members had an opportunity to question the robustness of the internal kill-list creation process and target vetting and validation processes? Have members been briefed on and had an opportunity to question how civilian casualties are counted and how battle damage assessments are conducted? Have members been informed of the internal disciplinary procedures for the DoD and CIA in the event a strike goes awry, and have they been informed of whether any individuals have been disciplined for improper targeting? Are the members satisfied that internal disciplinary procedures are adequate?

3) Congressional assessment of the foreign relations implications of the program. The Constitution divides some foreign policy powers between the President and Congress, and the oversight white paper should articulate whether members have assessed the diplomatic and foreign relations implications of the targeted killing program. While the white paper would likely not be able to address sensitive diplomatic matters such as whether Pakistan has privately consented to the use of force in their territory, the white paper could set forth the red lines that would cause Congress to withdraw support for the program. The white paper could specifically address whether the members have considered potential blow-back, whether the program has jeopardized alliances, whether it is creating more terrorists than it kills, etc. In specifying each of these and other factors, Congress could note the types of developments, that if witnessed would cause them to withdraw support for the program. For example, Congress could state "In the countries where strikes are conducted, we have not seen the types of formal objections to the activities that would normally be associated with a violation of state's sovereignty. Specifically, no nation has formally asked that the issue of strikes in their territory be added to the Security Council's agenda for resolution. No nation has shot down or threatened to shoot down our aircraft, severed diplomatic relations, expelled our personnel from their country, or refused foreign aid. If we were to witness such actions it would cause us to question the wisdom and perhaps even the legality of the program."

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#### The United States Congress should establish a statutory cause of action against the government, available solely to individuals lacking a cause of action recognized by the United States Federal Judiciary, for damages arising directly out of the constitutional provision allegedly violated by the United States’ targeted killing operations, to be adjudicated by a legislatively-created Article I administrative National Security Tribunal with jurisdiction limited to review of United States’ targeted killing operations.

#### The United States federal government should remove its private military contractor presence from Afghanistan.

#### Judicially-created remedies undermine deference and the political question doctrine despite being ineffective---an Article I administrative tribunal solves better while avoiding both disads

Alexander Zbrozek 13, J.D. Candidate, Columbia University School of Law, 11/20/13, “Square Pegs and Round Holes: Moving Beyond Bivens in National Security Cases,” http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2357260

Since its inception, the Supreme Court has largely orphaned Bivens, a child of its own jurisprudence.15 In the past few decades, the Court refused to recognize, inter alia. First Amendment suits brought by federal employees,16 Due Process claims for Social Security benefits,17 and lawsuits naming federal agencies, rather than individual officials.18 In doing so, the Court has repeatedly invoked dicta contained in Bivens warning that unspecified "special factors counseling hesitation" could preclude judicial recognition of future constitutional remedies.19

Picking up on this thread, lower courts have notably limited the justiciability of Bivens claims in national security cases (i.e. "suits in which the challenged governmental conduct arose in the context of a response to a national security crisis, rather than in the more traditional context of everyday law enforcement").20 As Vladeck notes, since the September 11, 2001 terrorist attacks, not one court has granted damages to plaintiffs alleging violations of their individual rights as a result of U.S. counterterrorism policies.21 In dismissing these suits, courts have consistently relied on this "special factors" analysis, finding that traditional judicial deference to the Government in national security matters forecloses court-created constitutional remedies.22 This stands in stark contrast to Supreme Court habeas corpus jurisprudence, where the Court, most recently in Boumediene v. Bush,23 has vigorously defended judicial review of enemy combatant challenges to unlawful Government detention.24 It is a cruel irony that had the Government captured and incarcerated the victims, they could have contested their confinement; yet, because of current legal lacunae, their estates have no recourse to challenge the victims' targeted killing.25

The status quo is unacceptable. As encapsulated by the above quote from Chief Justice Marshall, a core aspiration of our constitutional democracy is to afford individuals remedies for legally cognizable injuries. Unfortunately, Bivens is not up to the task. Aside from the limitations imposed by the special factors carve-out, other justiciability constraints and affirmative defenses, such as the qualified immunity, state secrets, and political question doctrines, not to mention deeply engrained judicial deference to the Government in the national security arena,26 have undermined Bivens' efficacy. Not only has this array of doctrinal and institutional hurdles created an insurmountable barrier for individual plaintiffs, but it has also fostered a serious transparency problem.27 As George Brown has observed, "the default accountability mechanism for questioning government [national security] conduct is the array of civil suits against federal officials by self-proclaimed victims of the war, cases which might be referred to as reverse war on terror suits."23 Without a viable cause of action, the political process and internal executive branch review provide the sole checks on the Government's targeted killing program. Unfortunately, the simple truth is that Bivens and national security cases cannot be reconciled; it would be akin to forcing a square peg into a round hole.

In response, some have proposed the creation of a specialized Article III "national security court" to handle Aulaqi-like claims,29 and others have advocated for pre-deprivation administrative procedures to provide due process safeguards prior to drone strikes.30 However, both of these proposals are inadequate. Aside from the constraints identified above, Article III courts are ill-equipped to handle classified national security information.31 Further, an ex ante process, while necessary, is insufficient: Only a post-deprivation remedy would fulfill the goals of individual justice and public scrutiny by providing a public forum for litigants to seek redress for constitutional violations.

This Note therefore proposes the creation of an Article I administrative court with jurisdiction over post-deprivation constitutional claims in national security cases.32 Part II traces the evolution of the Bivens doctrine and the national security exception; Part III discusses how the lack of a viable judicial remedy has created an accountability gap; and Part IV describes the proposed structure and responsibilities of this new tribunal.

## Cooperation Adv

### No Shutdown---General

#### Absolutely zero chance that criticism of the drone program causes it to collapse

Benjamin Wittes 13, Senior Fellow in Governance Studies at the Brookings Institution, 2/27/13, “In Defense of the Administration on Targeted Killing of Americans,” http://www.lawfareblog.com/2013/02/in-defense-of-the-administration-on-targeted-killing-of-americans/

This view has currency among European allies, among advocacy groups, and in the legal academy. Unfortunately for its proponents, it has no currency among the three branches of government of the United States. The courts and the executive branch have both taken the opposite view, and the Congress passed a broad authorization for the use of force and despite many opportunities, has never revisited that document to impose limitations by geography or to preclude force on the basis of co-belligerency—much less to clarify that the AUMF does not, any longer, authorize the use of military force at all. Congress has been repeatedly briefed on U.S. targeting decisions, including those involving U.S. persons.[5] It was therefore surely empowered to either use the power of the purse to prohibit such action or to modify the AUMF in a way that undermined the President’s legal reasoning. Not only has it taken neither of these steps, but Congress has also funded the relevant programs. Moreover, as I noted above, Congress’s recent reaffirmation of the AUMF in the 2012 NDAA with respect to detention, once again contains no geographical limitation.

There is, in other words, a consensus among the branches of government on the point that the United States is engaged in an armed conflict that involves co-belligerent forces and follows the enemy to the new territorial ground it stakes out. It is a consensus that rejects the particular view of the law advanced by numerous critics. And it is a consensus on which the executive branch is entitled to rely in formulating its legal views.

### SQ Solves – Yes Allied Coop

#### Allied terror coop is high now, despite frictions

Kristin Archick, European affairs specialist @ CRS, 9-4-2013, “U.S.-EU Cooperation Against Terrorism,” Congressional Research Service, <http://www.fas.org/sgp/crs/row/RS22030.pdf>

As part of the EU’s efforts to combat terrorism since September 11, 2001, the EU made improving law enforcement and intelligence cooperation with the United States a top priority. The previous George W. Bush Administration and many Members of Congress largely welcomed this EU initiative in the hopes that it would help root out terrorist cells in Europe and beyond that could be planning other attacks against the United States or its interests. Such growing U.S.-EU cooperation was in line with the 9/11 Commission’s recommendations that the United States should develop a “comprehensive coalition strategy” against Islamist terrorism, “exchange terrorist information with trusted allies,” and improve border security through better international cooperation. Some measures in the resulting Intelligence Reform and Terrorism Prevention Act of 2004 (P.L. 108-458) and in the Implementing Recommendations of the 9/11 Commission Act of 2007 (P.L. 110-53) mirrored these sentiments and were consistent with U.S.-EU counterterrorism efforts, especially those aimed at improving border controls and transport security. U.S.-EU cooperation against terrorism has led to a new dynamic in U.S.-EU relations by fostering dialogue on law enforcement and homeland security issues previously reserved for bilateral discussions. Despite some frictions, most U.S. policymakers and analysts view the developing partnership in these areas as positive. Like its predecessor, the Obama Administration has supported U.S. cooperation with the EU in the areas of counterterrorism, border controls, and transport security. At the November 2009 U.S.-EU Summit in Washington, DC, the two sides reaffirmed their commitment to work together to combat terrorism and enhance cooperation in the broader JHA field. In June 2010, the United States and the EU adopted a new “Declaration on Counterterrorism” aimed at deepening the already close U.S.-EU counterterrorism relationship and highlighting the commitment of both sides to combat terrorism within the rule of law. In June 2011, President Obama’s National Strategy for Counterterrorism asserted that in addition to working with European allies bilaterally, “the United States will continue to partner with the European Parliament and European Union to maintain and advance CT efforts that provide mutual security and protection to citizens of all nations while also upholding individual rights.”

### Coop Inevitable---General

#### U.S.-EU anti-terror coop’s locked in, inevitable, and resilient

Sally McNamara 11, Senior Policy Analyst in European Affairs in the Margaret Thatcher Center for Freedom, a division of the Kathryn and Shelby Cullom Davis Institute for International Studies, at The Heritage Foundation, 3/8/11, “The EU–U.S. Counterterrorism Relationship: An Agenda for Cooperation,” http://www.heritage.org/research/reports/2011/03/the-eu-us-counterterrorism-relationship-an-agenda-for-cooperation

America needs allies to win the war on terrorism. The EU equally accepts that third-party cooperation is necessary to successfully counter Islamist terrorism. A number of EU–U.S. counterterrorism agreements have been reached since 9/11, especially in the areas of information-sharing and terrorist-financing.[28] Two EU–U.S. Declarations on Combating Terrorism have been concluded,[29] and in February 2010, two new treaties entered into force on the central issues of extradition and mutual legal assistance.[30]

But despite an unprecedented display of transatlantic solidarity following the 9/11 terrorist attacks, the EU–U.S. counterterrorism relationship has been marked as much by confrontation as cooperation. The Lisbon Treaty, introduced on December 1, 2009, formally abolished the EU’s pillar structure, which had previously reserved “justice and home affairs” as a purely intergovernmental competence. Post Lisbon, the EU now formally enjoys shared competency with the member states in JHA, and the EU’s role in counterterror policymaking has become truly supra-nationalized. In particular, the European Parliament has enjoyed a huge boost in powers—and it has not been afraid to flex its legislative muscle.

### Alt Cause – NSA (NEW)

#### NSA scandal wrecks terror coop

Matthew Feeney 10/25, Reason, "EU Leaders: Latest NSA Revelations Could Threaten Fight Against Terrorism", 2013, reason.com/blog/2013/10/25/eu-leaders-latest-nsa-revelations-could

The latest reporting on the documents leaked by Edward Snowden reveals that the NSA has spied on 35 world leaders, who have not been named.¶ From The Guardian:¶ The National Security Agency monitored the phone conversations of 35 world leaders after being given the numbers by an official in another US government department, according to a classified document provided by whistleblower Edward Snowden.¶ The confidential memo reveals that the NSA encourages senior officials in its "customer" departments, such as the White House, State and the Pentagon, to share their "Rolodexes" so the agency can add the phone numbers of leading foreign politicians to their surveillance systems.¶ The document notes that one unnamed US official handed over 200 numbers, including those of the 35 world leaders, none of whom is named. These were immediately "tasked" for monitoring by the NSA.¶ The news comes days after the French newspaper Le Monde reported that the NSA spied on millions of French phone records, the German newspaper Der Spiegel reported that the NSA hacked into the Mexican president’s public email account, and German Chancellor Angela Merkel called President Obama over concerns that her cellphone was targeted by American intelligence.¶ The timing of these revelations is not good for the Obama administration. European Union leaders recently began their latest summit in Brussels, and unsurprisingly both the French and the Germans are pushing for a “no-spying” agreement with the U.S.¶ While the NSA revelations from this week make up only some of the latest embarrassing news facing the Obama administration, it is the only news that could have long-lasting diplomatic and national security implications.¶ Ironically, the behavior of the NSA (which is supposedly tasked with helping keep the U.S. safe) could threaten the fight against terrorism. A statement from the heads of state and government of European Union nations reads in part:¶ "Alongside our foreseen work, we had a discussion tonight about recent developments concerning possible intelligence issues and the deep concerns that these events have raised among European citizens.¶ The Heads of State or government underlined the close relationship between Europe and the USA and the value of that partnership. They expressed their conviction that the partnership must be based on respect and trust, including as concerns the work and cooperation of secret services.¶ They stressed that intelligence gathering is a vital element in the fight against terrorism. This applies to relations between European countries as well as to relations with the USA. A lack of trust could prejudice the necessary cooperation in the field of intelligence gathering.

### NATO Defense

#### NATO collapse inevitable

Bandow 5/20/12 Doug, former columnist with Copley News Service and a senior fellow at the Cato Institute, Forbes.com, “NATO as NERO: Alliance postures while Europe burns” http://www.forbes.com/sites/dougbandow/2012/05/20/nato-as-nero-alliance-postures-while-europe-burns/

Last June Secretary Gates predicted “a dim if not dismal future” for the alliance.  He warned “that there will be dwindling appetite and patience in the U.S. Congress — and in the American body politic writ large — to expend increasingly precious funds on behalf of nations that are apparently unwilling to devote the necessary resources or make the necessary changes to be serious and capable partners in their own defense.”   Last October Gates’ successor, Leon Panetta, was only slightly less blunt:  “legitimate questions about whether, if present trends continue, NATO will again be able to sustain the kind of operations that we have seen in Libya and Afghanistan without the United States taking on even more of the burden.” Of course, the answer obviously was no, and nothing decided in Chicago will change it. To coin a phrase, it is time for a change.  Washington once opposed an independent European defense.  Now the U.S. should insist on it.  Or rather—since it is not America’s place to decide Europe’s future for Europe—should adopt policies likely to lead to that result.  Washington should bring home the 80,000 troops which remain in Europe and announce that it will be formally leaving NATO after a “decent interval.”  The Europeans could use the existing alliance structure to organize continental military affairs, perhaps in cooperation with the European Union.  (Albania, Croatia, Iceland, and Turkey are not currently EU members, but Croatia is slated to join next year and the others are candidates for membership; Canada is the only true outlier.)

#### No NATO impact

Kaplan & Kaplan 11 – Robert D., senior fellow at the Center for a New American Security in Washington and a member of the Pentagon’s Defense Policy Board, and Stephen S., former vice chairman of the National Intelligence Council as well as a longtime daily White House briefer and director of the president’s daily briefing, March/April 2011, “America Primed,” <http://nationalinterest.org/print/article/america-primed-4892>

OF COURSE even this set of assets is not enough to ensure American primacy—nor its sway over the West. And not all alliances are created equal. For example, Washington can less and less rely on NATO to serve as its linchpin in Europe. NATO is of limited help in Afghanistan, was irrelevant in Iraq and simply does not matter in the larger Middle East. The defense budgets of member states in Western Europe are generally below the NATO standard of 2 percent of GDP, even as these same countries now brace for the steepest cuts in military spending since the end of the Cold War. U.S. Defense Secretary Robert Gates, as prudent and low-key a public speaker as one can imagine, has publicly chided Europeans for being too reluctant to use military force. Nor does NATO, whatever the fine print of its documents, really guarantee the territorial integrity of its new member states in Eastern Europe against potential Russian aggression. The United States does that, and the Balts, Poles, Romanians and others know it. Plainly, the Poles and Romanians sent troops to Iraq and Afghanistan (and any number of various African countries where the United States has had military missions) not because they necessarily approved of these deployments or were enthusiastic about them, but as a quid pro quo for this implicit security guarantee.

## Imminence Adv

### No Drone Overuse

#### No drone overuse---the military shapes operations specifically to balance CT objectives with local blowback

Richard Murphy 11, the AT&T Professor of Law, Texas Tech University School of Law, and Afsheen John Radsan, Professor, William Mitchell College of Law, was assistant general counsel at the Central Intelligence Agency from 2002-2004, 2011, “ARTICLE: MEASURE TWICE, SHOOT ONCE: HIGHER CARE FOR CIA-TARGETED KILLING,” University of Illinois Law Review, 11 U. Ill. L. Rev. 1201

Critics of the CIA's targeted killing, contrary to Panetta, say the program does more harm than good to U.S. interests. Kilcullen and Exum, for instance, concede that killing terrorists, viewed in a vacuum, creates positive military effects. n126 But they also contend that the overall costs outweigh their benefits because: (1) drone strikes create a counterproductive "siege mentality" among the local populace of Northwest Pakistan, solidifying extremists in that area; (2) they cause public outrage across Pakistan; and (3) the drones, deployed without a sound understanding of their effects, substitute a "piece of technology" for strategy. n127

Assessing the Kilcullen and Exum critique is not a mathematical exercise - rather, it requires nuanced political and military judgments based on incomplete, uncertain facts. Still, the U.S. military's own policies demonstrate that it agrees with critics that controlling collateral damage and maintaining local support are crucial. In this regard, the objectives of law and policy overlap. The U.S. Army's Counterinsurgency Manual advises that "political power is the central issue in insurgencies and counterinsurgencies; each side aims to get the people to accept its governance or authority as legitimate." n128 It adds, "an operation that kills five insurgents is counterproductive if collateral damage leads to recruitment of fifty more insurgents." n129 For this reason, the U.S. military [\*1224] has applied extremely restrictive rules of engagement in Afghanistan to bring down civilian casualties. n130

### Casualties

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

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

Drone critics have a much different take. They are passionate in their conviction that US drones are indiscriminately killing and terrorizing civilians. The Guardian's own Glenn Greenwald argued recently that no "minimally rational person" can defend "Obama's drone kills on the ground that they are killing The Terrorists or that civilian deaths are rare". Conor Friedersdorf, an editor at the Atlantic and a vocal drone critic, wrote last year that liberals should not vote for President Obama's re-election because of the drone campaign, which he claimed "kills hundreds of innocents, including children," "terrorizes innocent Pakistanis on an almost daily basis" and "makes their lives into a nightmare worthy of dystopian novels". ¶ I disagree. Increasingly it appears that arguments like Friedersdorf makes are no longer sustainable (and there's real question if they ever were). Not only have drone strikes decreased, but so too have the number of civilians killed – and dramatically so. ¶ This conclusion comes not from Obama administration apologists but rather, Chris Woods, whose research has served as the empirical basis for the harshest attacks on the Obama Administration's drone policy. ¶ Woods heads the covert war program for the Bureau of Investigative Journalism (TBIJ), which maintains one of three major databases tabulating civilian casualties from US drone strikes. The others are the Long War Journal and the New America Foundation (full disclosure: I used to be a fellow there). While LWJ and NAJ estimate that drone strikes in Pakistan have killed somewhere between 140 and 300 civilians, TBIJ utilizes a far broader classification for civilians killed, resulting in estimates of somewhere between 411-884 civilians killed by drones in Pakistan. The wide range of numbers here speaks to the extraordinary challenge in tabulating civilian death rates. ¶ There is little local reporting done on the ground in northwest Pakistan, which is the epicenter of the US drone program. As a result data collection is reliant on Pakistani news reporting, which is also dependent on Pakistani intelligence, which has a vested interest in playing up the negative consequences of US drones. ¶ When I spoke with Woods last month, he said that a fairly clear pattern has emerged over the past year – far fewer civilians are dying from drones. "For those who are opposed to drone strikes," says Woods there is historical merit to the charge of significant civilian deaths, "but from a contemporary standpoint the numbers just aren't there." ¶ While Woods makes clear that one has to be "cautious" on any estimates of casualties, it's not just a numeric decline that is being seen, but rather it's a "proportionate decline". In other words, the percentage of civilians dying in drone strikes is also falling, which suggests to Woods that US drone operators are showing far greater care in trying to limit collateral damage. ¶ Woods estimates are supported by the aforementioned databases. In Pakistan, New America Foundation claims there have been no civilian deaths this year and only five last year; Long War Journal reported four deaths in 2012 and 11 so far in 2013; and TBIJ reports a range of 7-42 in 2012 and 0-4 in 2013. In addition, the drop in casualty figures is occurring not just in Pakistan but also in Yemen. ¶ These numbers are broadly consistent with what has been an under-reported decline in drone use overall. According to TBIJ, the number of drone strikes went from 128 in 2010 to 48 in 2012 and only 12 have occurred this year. These statistics are broadly consistent with LWJ and NAF's reporting. In Yemen, while drone attacks picked up in 2012, they have slowed dramatically this year. And in Somalia there has been no strike reported for more than a year. ¶ Ironically, these numbers are in line with the public statements of CIA director Brennan, and even more so with Senator Dianne Feinstein of California, chairman of the Select Intelligence Committee, who claimed in February that the numbers she has received from the Obama administration suggest that the typical number of victims per year from drone attacks is in "the single digits".¶ Part of the reason for these low counts is that the Obama administration has sought to minimize the number of civilian casualties through what can best be described as "creative bookkeeping". The administration counts all military-age males as possible combatants unless they have information (posthumously provided) that proves them innocent. Few have taken the White House's side on this issue (and for good reason) though some outside researchers concur with the administration's estimates.¶ Christine Fair, a professor at Georgetown University has long maintained that civilian deaths from drones in Pakistan are dramatically overstated. She argues that considering the alternatives of sending in the Pakistani military or using manned aircraft to flush out jihadists, drone strikes are a far more humane method of war-fighting.

### Pakistan Advs---Squo Solves---1NC

#### Pakistan’s stabilizing---drone strikes are declining as precision increases---the status quo resolves their whole advantage

Cameron Munter 9-30, professor of practice in international relations at Pomona College, served as a U.S. Foreign Service Officer for nearly three decades, was Ambassador to Pakistan 2010-2012, 9/30/13, “Guest Post: A New Face in the U.S.-Pakistani Relationship,” http://justsecurity.org/2013/09/30/cameron-munter-pakistan-relations/

In doing so, however, we have made the image of a soldier or a drone the image of America’s strategic vision for Pakistan and the region. As 2014 approaches, and American troops end their combat mission in Afghanistan; as drone strikes in the Pakistani tribal areas appear to be fewer in number and more precise in targeting; as the general trends of the U.S. “pivot toward Asia” become clear, the soldier and the drone will be less common. Even though the President’s commitment to U.S. security does not waver, the reminders of his commitment will be fewer and far between – at least it would seem, seen from the street in Pakistan.

Will that face of America – the M-16 and flak jacket, the film of a predator strike – remain, or can we replace it with something else? A different face of commitment, one that Americans have supported throughout the last decade but which has, in the Pakistani media (fairly or not) been shoved aside by the violence in the tribal areas and unrest throughout the country? That other commitment has been enormous expenditure by the U.S. government in support of economic growth, building schools, replacing crops destroyed by floods, refurbishing power plants, and improving health delivery services, to name just a few achievements. But few Pakistanis believe this aid has made a difference. Instead, they associate us only with the manifestations of the war on terror.

In the coming month this can change. No, it should not just be a PR campaign to convince Pakistanis of our commitment to what they care about (not just what we care about). Certainly, PR is necessary, but lacking a new face, it won’t be sufficient. It will require two things.

First, on the policy level, we must use the changes in 2014 to wrest U.S. policy toward Pakistan from its current status as derivative of the war in Afghanistan. Of course, Pakistan has an enormous role to play in security arrangements of the region in years to come. Its relationship to India, to China, to Iran, and of course to Afghanistan are very important as the international community seeks to find a just and equitable peace in the region. But we should make every effort to consider Pakistan’s needs. Not just the needs of the Pakistani military and intelligence leadership, important as they are. Rather, the needs of a country of nearly 200 million people whose stability and prosperity will be essential to the long-term stability and prosperity of the entire region. Pakistan’s success is not a guarantee of regional peace; but Pakistani failure is certainly a guarantee of regional strife.

Second, on a practical level, we should provide a face of American commitment that we know, through decades of effort, is welcome. Polling shows consistently that while most Pakistanis are angry at America (citing security policies as the reason), most Pakistanis – across the political spectrum, rural and urban, young and old – want a better relationship with us. Why? Because despite all the searing problems of the last decade, they admire us: they admire our educational institutions, our business acumen, our commitment to philanthropy. And here, I believe, they can find the practical partners to renew Pakistani understanding of American commitment to the relationship. Universities, businesses, foundations. Students and teachers, businesspeople and investors, donors and grassroots workers. These are the faces of the relationship in which America can play to its strengths, and in doing so, help build a successful Pakistan that is so necessary for us to achieve our own strategic interests in South Asia and beyond.

Recent press articles highlight just how worried we’ve been about Pakistan’s nuclear arsenal. And we should be worried. We need to know if that arsenal can be misused or fall into the wrong hands. But even a massive surveillance effort, while necessary, will be insufficient. We need to take modest but purposeful measures to help Pakistan remain stable. That’s not the same as focusing so overwhelmingly on immediate security concerns. We also need to engage in Pakistani politics, economics, society, where we have a much stronger hand to play than we perhaps realize.

Certainly, such changes cannot take place overnight. After all, the main reason that we see so few American university professors or businesspeople in Pakistan is that it’s still considered too dangerous. Yes, Pakistan’s government must take on the terrorist challenge, and it is enormous. And when Pakistan’s new Interior Minister propose plans to make the best use of Pakistan’s internal security forces, we should engage with him and take seriously any requests for help. But I believe we have a chance to do so, a chance afforded by the potential change in the face of America in Pakistan: difficult as it is, painful as our experiences in Pakistan have been, let’s listen to them and see if their plans to tackle terrorism have a place for our help. It’s certainly in our interest and theirs. Who knows? If Pakistan’s new leadership is able to make real progress against terrorism, there may be another new face – a face of a Pakistan that is not the negative image so common in recent years, but a Pakistan where people of good will are determined to succeed, and ask the help of an old friend in doing so.

### Pakistani Public Backlash---No Impact

#### No impact to Pakistani public opposition---it’s not widespread

Daniel Byman 13, Professor in the Security Studies Program at the Edmund A. Walsh School of Foreign Service at Georgetown University and a Senior Fellow at the Saban Center for Middle East Policy at the Brookings Institution, July/August 2013, “Why Drones Work,” Foreign Affairs, Vol. 92, No. 4

A 2012 poll found that 74 percent of Pakistanis viewed the United States as their enemy, likely in part because of the ongoing drone campaign. Similarly, in Yemen, as the scholar Gregory Johnsen has pointed out, drone strikes can win the enmity of entire tribes. This has led critics to argue that the drone program is shortsighted: that it kills today's enemies but creates tomorrow's in the process.

Such concerns are valid, but the level of local anger over drones is often lower than commonly portrayed. Many surveys of public opinion related to drones are conducted by anti-drone organizations, which results in biased samples. Other surveys exclude those who are unaware of the drone program and thus overstate the importance of those who are angered by it. In addition, many Pakistanis do not realize that the drones often target the very militants who are wreaking havoc on their country. And for most Pakistanis and Yemenis, the most important problems they struggle with are corruption, weak representative institutions, and poor economic growth; the drone program is only a small part of their overall anger, most of which is directed toward their own governments. A poll conducted in 2007, well before the drone campaign had expanded to its current scope, found that only 15 percent of Pakistanis had a favorable opinion of the United States. It is hard to imagine that alternatives to drone strikes, such as SEAL team raids or cruise missile strikes, would make the United States more popular.

### Offense

#### Turn --- The U.S. currently conducts TKs on behalf of Pakistan against militants that threaten the Pakistani state as an explicit quid-pro-quo for the overall TK program---narrowing requirements for imminence makes these ‘good will kills’ illegal---results in kickout

C. Christine Fair 13, Peace and Security Studies Program, Edmund A. Walsh School of Foreign Service, Georgetown University, 11/12/13, “Drones, Spies, Terrorists and Second Class Citizenship in Pakistan - A Review Essay,” http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2353447

Closely related to the issue of Pakistan’s sovereignty is the question about Pakistan’s ability and willingness to exercise the rule of law and take action against those militants operating in and from Pakistan. On this matter the Stanford-NYU Law Schools’ report concedes that “in the absence of Pakistani consent, US use of force in Pakistan may not constitute an unlawful violation of Pakistan’s sovereignty if the force is necessary in self- defense in response to an armed attacked—either as a response to the attacks of September 11, 2001 or as anticipatory self-defense to mitigate threats posed by non-state groups” in the FATA (Stanford-NYU Law Schools, pp. 106-107). The report further points out that for this use of force to be lawful in Pakistan, Pakistan must also be shown to be “unwilling or unable to take [the appropriate steps, itself, against the non-state group]” (p. 107). The Stanford-NYU Law Schools’ report thus casts doubt upon whether contemporary drone attacks can be justified by reference to the events of 9/11. The authors are also doubtful about the resort to “anticipatory” self defense because it is unlikely that the majority of the drone strikes have averted attacks that are “instant, overwhelming, and leaving no choice of means, and no moment of deliberation” (pp. 107-108).

Indeed recent reporting casts doubt upon the U.S. claims that drone strikes target al Qaeda and Taliban operatives or their associates to prevent imminent attack to the United States and its interests. Recent reporting by Jonathan Landay, based upon a privileged review of primary source materials, indicated that as many as “265 of up to 482 people who the U.S. intelligence reports estimated the CIA killed during a 12-month period ending in September 2011 were not senior al Qaida leaders but instead were ‘assessed’ as Afghan, Pakistani and unknown extremists. Drones killed only six top al Qaida leaders in those months, according to news media accounts.”24 This is consistent with author interviews with American and Pakistani officials who concede that the U.S. drones are killing “Pakistani terrorists,” such as Pakistani Taliban leaders (e.g. Nek Mohammad in 2004, Baitullah Mehsood in 2009, Waliur Rehman in 2013 among numerous others). What motivation does the United States have to eliminate Pakistan’s enemies that pose no significant imminent threat to the United States?

I have long speculated that the U.S. and Pakistan’s intelligence agencies engage in a deadly exchange rate: the United States targets and eliminates Pakistan’s foes so that it can have the opportunity to eliminate its own. The ISI fulminates domestic outrage to increase the price of American access to Pakistani air space. This is important because, as Mazzetti’s account explains, in recent years U.S. and Pakistani interests have increasingly diverged. At the beginning of the war both countries boasted fondly of their joint successes in targeting al-Qaeda even while Pakistan preserved its ties to the Afghan Taliban and allied fighters such as the network of Jalaluddin Haqqani and India-oriented militants such as Lashkar-e-Taiba. However, as the war progressed and as American goals evolved to the point where they increasingly viewed the Afghan Taliban as the enemy rather than Al Qaeda, the United States and Pakistan have essentially become locked in a proxy war. As both parties pursued different outcomes at the strategic level, both sought to achieve minimal non-negotiables from the other while increasingly viewing the other as the enemy.

### Pakistan Defense

#### No Pakistani collapse

AP 10 (Pakistan's stability, leadership under spotlight after floods and double dealing accusations, 6 August 2010, http://www.foxnews.com/world/2010/08/06/pakistans-stability-leadership-spotlight-floods-double-dealing-accusations/, AMiles)

Not for the first time, Pakistan appears to be teetering on the edge with a government unable to cope. Floods are ravaging a country at war with al-Qaida and the Taliban. Riots, slayings and arson are gripping the largest city. Suggestions are flying that the intelligence agency is aiding Afghan insurgents. The crises raise questions about a nation crucial to U.S. hopes of success in Afghanistan and to the global campaign against Islamist militancy. Despite the recent headlines, few here see Pakistan in danger of collapse or being overrun by militants — a fear that had been expressed before the army fought back against insurgents advancing from their base in the Swat Valley early last year. From its birth in 1947, Pakistan has been dogged by military coups, corrupt and inefficient leaders, natural disasters, assassinations and civil unrest. Through it all, Pakistan has not prospered — but it survives. “There is plenty to be worried about, but also indications that when push comes to shove the state is able to respond," said Mosharraf Zaidi, an analyst and writer who has advised foreign governments on aid missions to Pakistan. "The military has many weaknesses, but it has done a reasonable job in relief efforts. There have been gaps in the response. But this is a developing a country, right?" The recent flooding came at a sensitive time for Pakistan, with Western doubts over its loyalty heightened by the leaking of U.S. military documents that strengthened suspicions the security establishment was supporting Afghan insurgents while receiving billions in Western aid. With few easy choices, the United States has made it clear it intends to stick with Pakistan. Indeed, it has used the floods to demonstrate its commitment to the country, rushing emergency assistance and dispatching helicopters to ferry the goods. The Pakistani government's response to the floods has been sharply criticized at home, especially since President Asif Ali Zardari departed for a European tour. With so many Pakistanis suffering, the trip has left the already weak and unpopular leader even more vulnerable politically. The flooding was triggered by what meteorologists said were "once-in-a-century" rains. The worst affected area is the northwest, a stronghold for Islamist militants. Parts of the northwest have seen army offensives over the last two years. Unless the people are helped quickly and the region is rebuilt, anger at the government could translate into support for the militants. At least one charity with suspected links to a militant outfit has established relief camps there. The extremism threat was highlighted by a suicide bombing in the main northwestern town of Peshawar on Wednesday. The bomber killed the head of the Frontier Constabulary, a paramilitary force in the northwest at the forefront of the terror fight. With authorities concentrating on flood relief, some officials have expressed concern that militants could regroup. The city of Karachi has seen militant violence and is rumored to be a hiding place for top Taliban and al-Qaida fighters. It has also been plagued by regular bouts of political and ethnic bloodletting since the 1980s, though it has been calmer in recent years. The latest violence erupted after the assassination of a leading member of the city's ruling party. More than 70 people have been killed in revenge attacks since then, paralyzing parts of the city of 16 million people. While serious, the unrest does not yet pose an immediate threat to the stability of the country. Although the U.S. is unpopular, there is little public support for the hardline Islamist rule espoused by the Taliban and their allies. Their small movement has been unable to control any Pakistani territory beyond the northwest, home to only about 20 million of the country's 175 million people.

#### No Indian intervention

Sunil Dasgupta '13 Ph.D. in political science and the director of UMBC's Political Science Program and a senior fellow at Brookings, 2/25/13, "How will India respond to civil war in Pakistan," East Asia Forum, http://www.eastasiaforum.org/2013/02/25/how-will-india-respond-to-civil-war-in-pakistan/

In 2013, prospects of another [civil war in Pakistan](http://tribune.com.pk/story/487017/the-2013-jitters/) — this time one that pits radical Islamists against the secular but authoritarian military — have led once again to questions about what India would do. What would trigger Indian intervention, and who would India support?¶ **In the context of a civil war between Islamists and the army in Pakistan**, **it is hard to imagine Pakistani refugees streaming into India and triggering intervention as the Bengalis did in 1971**. **Muslim Pakistanis do not see India as a refuge**, and Taliban fighters are likely to seek refuge in Afghanistan, especially if the United States leaves the region.¶ A more selective spillover, such as the increased threat of terrorism, is possible. **But a civil war inside Pakistan is more likely to** [**train radical attention on Pakistan itself**](http://www.eastasiaforum.org/2012/12/12/extremism-in-pakistan-the-more-things-change/) **than on India.**¶In fact, the real problem for India would be in Afghanistan. India has already staked a claim in the Afghan endgame, so if Islamists seek an alliance with an Afghan government favoured by India, New Delhi’s best option might be to side covertly with the Islamists against the Pakistani army. But this is unlikely, because for India to actually side with Islamists, US policy in Pakistan and Afghanistan would have to change dramatically.¶ Conversely, for India to back the Pakistani army over the Islamists, Indian leaders would need to see a full and verifiable settlement of all bilateral disputes with India, including Kashmir, and/or the imminent fall of Pakistani nuclear weapons into the hands of Islamists.¶ In the first case, [a Kashmir resolution is not only unrealistic](http://www.eastasiaforum.org/2012/09/14/india-and-pakistan-a-decade-since-operation-parakram/), but also likely to weaken the legitimacy of the Pakistani army itself, jeopardising the army’s prospects in the civil war. In the second case, Indian leaders would need to have independent (non-US/UK) intelligence, or alternatively see US action (such as a military raid on Pakistani nuclear facilities) that convinces them that nuclear weapons are about to pass into terrorist hands. Neither of those triggers is likely to exist in the near future.¶ As it is, India and Pakistan have gone down to the nuclear edge four times — in 1986, 1990, 1999 and 2001–02. In each case, India responded in a manner that did not escalate the conflict. Any incursion into Pakistan was extremely limited. An Indian intervention in a civil war in Pakistan would be subject to the same limitations — at least so long as the Pakistani army maintains its integrity.¶ Given the new US–India ties, the most important factor in determining the possibility and nature of Indian intervention in a possible Pakistani civil war is Washington. If the United States is able to get Kabul and Islamabad to work together against the Taliban, as it is trying to do now, then India is likely to continue its current policy or try to preserve some influence in Afghanistan, especially working with elements of the Northern Alliance.¶ India and Afghanistan already have a strategic partnership agreement in place that creates the framework for their bilateral relationship to grow, but the degree of actual cooperation will depend on how Pakistan and the Taliban react. If Indian interests in Afghanistan come under attack, New Delhi might have to pull back. The Indian government has been quite clear about not sending troops to Afghanistan.¶ If the United States shifts its policy to where it has to choose Kabul over Islamabad, in effect reviving the demand for an independent Pashtunistan, India is likely to be much more supportive of US and Afghan goals. The policy shift, however, carries the risk of a full-fledged proxy war with Pakistan in Afghanistan, but should not involve the prospect of a direct Indian intervention in Pakistan itself.¶ India is not likely to initiate an intervention that causes the Pakistani state to fail.

## PQD Adv

### Offense

#### The plan shatters court deference on national security affairs --- decks effective executive responses to prolif, terror, and the rise of hostile powers---link threshold is low

Robert Blomquist 10, Professor of Law, Valparaiso University School of Law, THE JURISPRUDENCE OF AMERICAN NATIONAL SECURITY PRESIPRUDENCE, 44 Val. U.L. Rev. 881

Supreme Court Justices--along with legal advocates--need to conceptualize and prioritize big theoretical matters of institutional design and form and function in the American national security tripartite constitutional system. By way of an excellent introduction to these vital issues of legal theory, the Justices should pull down from the library shelf of the sumptuous Supreme Court Library in Washington, D.C. (or more likely have a clerk do this chore) the old chestnut, The Legal Process: Basic Problems in the Making and Application of Law by the late Harvard University law professors Henry M. Hart and Albert M. Sacks. n7 Among the rich insights on institutional design coupled with form and function in the American legal system that are germane to the Court's interpretation of national security law-making and decision-making by the President are several pertinent points. First, "Hart and Sacks' intellectual starting point was the interconnectedness of human beings, and the usefulness of law in helping us coexist peacefully together." n8 By implication, therefore, the Court should be mindful of the unique [\*883] constitutional role played by the POTUS in preserving peace and should prevent imprudent judicial actions that would undermine American national security. Second, Hart and Sacks, continuing their broad insights of social theory, noted that legal communities establish "institutionalized[] procedures for the settlement of questions of group concern" n9 and regularize "different procedures and personnel of different qualifications . . . appropriate for deciding different kinds of questions" n10 because "every modern society differentiates among social questions, accepting one mode of decision for one kind and other modes for others-e.g., courts for 'judicial' decisions and legislatures for 'legislative' decisions" n11 and, extending their conceptualization, an executive for "executive" decisions. n12 Third, Professors Hart and Sacks made seminal theoretical distinctions between rules, standards, principles, and policies. n13 While all four are part of "legal arrangements [\*884] in an organized society," n14 and all four of these arrangements are potentially relevant in judicial review of presidential national security decisions, principles and policies n15 are of special concern because of the sprawling, inchoate, and rapidly changing nature of national security threats and the imperative of hyper-energy in the Executive branch in responding to these threats. n16

The Justices should also consult Professor Robert S. Summers's masterful elaboration and amplification of the Hart and Sacks project on enhancing a flourishing legal system: the 2006 opus, Form and Function in a Legal System: A General Study. n17 The most important points that [\*885] Summers makes that are relevant to judicial review of American national security presiprudence are three key considerations. First, a "conception of the overall form of the whole of a functional [legal] unit is needed to serve the founding purpose of defining, specifying, and organizing the makeup of such a unit so that it can be brought into being and can fulfill its own distinctive role" n18 in synergy with other legal units to serve overarching sovereign purposes for a polity. The American constitutional system of national security law and policy should be appreciated for its genius in making the POTUS the national security sentinel with vast, but not unlimited, powers to protect the Nation from hostile, potentially catastrophic, threats. Second, "a conception of the overall form of the whole is needed for the purpose of organizing the internal unity of relations between various formal features of a functional [legal] unit and between each formal feature and the complementary components of the whole unit." n19 Thus, Supreme Court Justices should have a thick understanding of the form of national security decision-making conceived by the Founders to center in the POTUS; the ways the POTUS and Congress historically organized the processing of national security through institutions like the National Security Council and the House and Senate intelligence committees; and the ways the POTUS has structured national security process through such specific legal forms as Presidential Directives, National Security Decision Directives, National Security Presidential Decision Directives, Presidential Decision Directives, and National Security Policy Directives in classified, secret documents along with typically public Executive Orders. n20 Third, according to Summers, "a conception of the overall form of the whole functional [legal] unit is needed to organize further the mode of operation and the instrumental capacity of the [legal] unit." n21 So, the Supreme Court should be aware that tinkering with national security decisions of the POTUS--unless clearly necessary to counterbalance an indubitable violation of the text of the Constitution--may lead to unforeseen negative second-order consequences in the ability of the POTUS (with or without the help of Congress) to preserve, protect, and defend the Nation. n22

 [\*886] B. Geopolitical Strategic Considerations Bearing on Judicial Interpretation

Before the United States Supreme Court Justices form an opinion on the legality of national security decisions by the POTUS, they should immerse themselves in judicially-noticeable facts concerning what national security expert, Bruce Berkowitz, in the subtitle of his recent book, calls the "challengers, competitors, and threats to America's future." n23 Not that the Justices need to become experts in national security affairs, n24 but every Supreme Court Justice should be aware of the following five basic national security facts and conceptions before sitting in judgment on presiprudential national security determinations.

(1) "National security policy . . . is harder today because the issues that are involved are more numerous and varied. The problem of the day can change at a moment's notice." n25 While "[y]esterday, it might have been proliferation; today, terrorism; tomorrow, hostile regional powers" n26, the twenty-first century reality is that "[t]hreats are also more likely to be intertwined--proliferators use the same networks as narco-traffickers, narco-traffickers support terrorists, and terrorists align themselves with regional powers." n27

(2) "Yet, as worrisome as these immediate concerns may be, the long-term challenges are even harder to deal with, and the stakes are higher. Whereas the main Cold War threat--the Soviet Union--was brittle, most of the potential adversaries and challengers America now faces are resilient." n28

(3) "The most important task for U.S. national security today is simply to retain the strategic advantage. This term, from the world of military doctrine, refers to the overall ability of a nation to control, or at least influence, the course of events." n29 Importantly, "[w]hen you hold [\*887] the strategic advantage, situations unfold in your favor, and each round ends so that you are in an advantageous position for the next. When you do not hold the strategic advantage, they do not." n30

(4) While "keeping the strategic advantage may not have the idealistic ring of making the world safe for democracy and does not sound as decisively macho as maintaining American hegemony," n31 maintaining the American "strategic advantage is critical, because it is essential for just about everything else America hopes to achieve--promoting freedom, protecting the homeland, defending its values, preserving peace, and so on." n32

(5) The United States requires national security "agility." n33 It not only needs "to refocus its resources repeatedly; it needs to do this faster than an adversary can focus its own resources." n34

 [\*888] As further serious preparation for engaging in the jurisprudence of American national security presiprudence in hotly contested cases and controversies that may end up on their docket, our Supreme Court Justices should understand that, as Walter Russell Mead pointed out in an important essay a few years ago, n35 the average American can be understood as a Jacksonian pragmatist on national security issues. n36 "Americans are determined to keep the world at a distance, while not isolating ourselves from it completely. If we need to take action abroad, we want to do it on our terms." n37 Thus, recent social science survey data paints "a picture of a country whose practical people take a practical approach to knowledge about national security. Americans do not bother with the details most of the time because, for most Americans, the details do not matter most the time." n38 Indeed, since the American people "do know the outlines of the big picture and what we need to worry about [in national security affairs] so we know when we need to pay greater attention and what is at stake. This is the kind of knowledge suited to a Jacksonian." n39

Turning to how the Supreme Court should view and interpret American presidential measures to oversee national security law and policy, our Justices should consider a number of important points. First, given the robust text, tradition, intellectual history, and evolution of the institution of the POTUS as the American national security sentinel, n40 and the unprecedented dangers to the United States national security after 9/11, n41 national security presiprudence should be accorded wide latitude by the Court in the adjustment (and tradeoffs) of trading liberty and security. n42 Second, Justices should be aware that different presidents [\*889] institute changes in national security presiprudence given their unique perspective and knowledge of threats to the Nation. n43 Third, Justices should be restrained in second-guessing the POTUS and his subordinate national security experts concerning both the existence and duration of national security emergencies and necessary measures to rectify them. "During emergencies, the institutional advantages of the executive are enhanced", n44 moreover, "[b]ecause of the importance of secrecy, speed, and flexibility, courts, which are slow, open, and rigid, have less to contribute to the formulation of national policy than they do during normal times." n45 Fourth, Supreme Court Justices, of course, should not give the POTUS a blank check--even during times of claimed national emergency; but, how much deference to be accorded by the Court is "always a hard question" and should be a function of "the scale and type of the emergency." n46 Fifth, the Court should be extraordinarily deferential to the POTUS and his executive subordinates regarding questions of executive determinations of the international laws of war and military tactics. As cogently explained by Professors Eric Posner and Adrian Vermeule, n47 "the United States should comply with the laws of war in its battle against Al Qaeda"--and I would argue, other lawless terrorist groups like the Taliban--"only to the extent these laws are beneficial to the United States, taking into account the likely response of [\*890] other states and of al Qaeda and other terrorist organizations," n48 as determined by the POTUS and his national security executive subordinates.

**Emboldened rogue states threaten nuclear war --- crisis management is key to solve**

**Dibb 6** Emeritus Prof of IR @ Australian National University, Sydney Morning Herald (Australia), August 15, 2006 Tuesday, As one nuclear flashpoint reaches a lull, another simmers away, Pg. 11, Lexis

NOW that the building blocks for achieving a cessation in hostilities in the crisis involving Israel and Hezbollah in Lebanon are in place, the focus can shift back to the main game - Iran and North Korea. Both flashpoints have the **potential to escalate out of control** if they are not **managed carefully**. Yet neither region is noted for the success of its diplomacy. Both the Middle East and North-East Asia are **heavily armed parts of the world** characterised by **deep-seated hatreds** and **long-standing territorial disputes**. Historically, such situations have been a **recipe for disaster.** Not so long ago we were being told that we were living in a **peaceful, interdependent world**. Yet the fact is that the constraints and understandings of the bipolar Cold War world have been replaced by a more uncertain world, where there is much more jockeying for **position and influence.** In the Middle East, the destruction of Saddam Hussein's regime and its replacement, at least for now, by a weakened Iraq has allowed Iran to become the dominant regional power. The regime in Tehran is hell-bent on exporting terrorism and acquiring nuclear weapons. For Israel, the ceasefire may stall the military action, but the longer-term real strategic threat it faces - the spectre of a nuclear-armed Iran equipped with ballistic missiles of sufficient range and accuracy to target Israel without taking out Palestinian or neighbouring Arab territories - will not go away. Israel will not tolerate this and the US needs to make it clear to Tehran that any such attack on Israel will bring about Iran's destruction. That was a good enough understanding with the USSR at the height of the Cold War. But this discipline no longer applies because now there is only one superpower, which cannot control both Israel and Arab-Iranian protagonists. In North Korea a similar situation applies. Having seen the destruction of Saddam's regime, North Korea's Kim Jong-il is intent on acquiring nuclear weapons to preserve his regime. But the end of the Cold War has eroded the influence of North Korea's allies over its military ambitions and sense of security. China has been embarrassed by its inability to restrain North Korea from testing nuclear-capable ballistic missiles and Russia no longer wields any influence over the rogue state. In many ways, the situation in North-East Asia is potentially even more dire than in the Middle East. North Korea's recalcitrance in dismantling its nuclear weapons program comes at a time of unprecedented tensions between China and Japan and South Korea and Japan where **one false move could spell disaster**. North Korea is playing a dangerous game of **bellicose brinkmanship**; it continues to keep more than a million troops on **high-alert status**, including heavy artillery concentrations only 50 kilometres from Seoul, a city of more than 10 million people. North Korea's acquisition of nuclear weapons threatens to seriously destabilise North-East Asia and result in a nuclear arms race developing there. As it is, the North's belligerence is encouraging Japan to build up its military capabilities. This at a time when China's poor relations with Japan are worrying. The Chinese communist leadership drums up anti-Japanese nationalism whenever it suits, while China's military build-up greatly concerns Japan. The pace of Beijing's defence spending is puzzling, particularly as China faces no military threat for the first time in many decades. Similarly, Japan's relations with South Korea are at a low point, partly over Japan's view of the history of World War II but also because of territorial disputes, which Seoul has elevated to the level of national pride, threatening the use of military force. This is occurring when, from Tokyo's perspective, South Korea is drifting from the orbit of the US alliance and getting uncomfortably close to China, as well as appeasing North Korea. All this is an **unhealthy mix of great power tensions** and **deep-seated historical distrust** and **growing military capabilities**. The bigger worry is that **Pyongyang's adventurism** will **incinerate any efforts to stabilise a region full of dangerous rivalries**, as **will the inevitable collision between Iran and Israel** in the Middle East.

#### Specifically, Courts have refused to rule on targeted killing cases because of the political question doctrine---the plan strikes at the core of the PQD

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Even if a plaintiff establishes standing to sue, the political question doctrine will almost certainly block judicial review of the nation’s targeted-killing policy. The Supreme Court, in Baker v. Carr,27 delineated the attributes of political questions, finding that they involve at least one of the following six factors:

[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable or manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of the government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.28

The quintessential political question case is one challenging a military or foreign policy decision,29 which necessarily implicates virtually every Baker factor, particularly the constitutional commitment of the issues to Congress and the President and the lack of judicially discoverable or manageable standards for deciding the issues.30 Thus, federal courts have refused to review damages claims arising out of cruise missile strikes against a suspected al Qaeda chemical-weapons plant in the Sudan,31 losses suffered because the United States mined a Nicaraguan harbor,32 injuries incurred from U.S. actions in connection with the Soviet Union’s shoot down of a Korean airliner,33 damages sustained because of U.S. involvement in the Chilean coup,34 injuries caused by the U.S.-supported Guatemalan army,35 property lost from the creation of a U.S. naval base on Diego Garcia,36 and deaths caused by equipment sold to Israel under the military-sales program.37 Similarly, courts have refused to review the legitimacy of the Government’s combat operations in Cambodia,38 mining of Vietnam’s Haiphong Harbor,39 decision to go to war in Iraq,40 placement of cruise missiles in Great Britain,41 and testing of nuclear weapons.42

While not all cases implicating foreign or military policies are nonjusticiable,43 a complaint that seeks to preclude the United States from engaging a particular military target or to enjoin the President from employing a particular weapons system is at the core of the political-question doctrine,44 especially because drones are the only effective means of reaching al Qaeda and the Taliban in their Pakistani sanctuaries.45

#### Setting a precedent against the PQD spills over to climate change cases---litigants are turning to the Courts now and asking them to abrogate the PQD

Laurence H. Tribe 10, the Carl M. Loeb University Professor, Harvard Law School; Joshua D. Branson, J.D., Harvard Law School and NDT Champion, Northwestern University; and Tristan L. Duncan, Partner, Shook, Hardy & Bacon L.L.P., January 2010, “TOOHOTFORCOURTSTO HANDLE: FUEL TEMPERATURES, GLOBAL WARMING, AND THE POLITICAL QUESTION DOCTRINE,” <http://www.wlf.org/Upload/legalstudies/workingpaper/012910Tribe_WP.pdf>

Two sets of problems, one manifested at a microcosmic level and the other about as macrocosmic as imaginable, powerfully illustrate these propositions. Not coincidentally, both stem from concerns about temperature and its chemical and climactic effects, concerns playing an increasingly central role in the American policy process. As those concerns have come to the fore, courts have correspondingly warmed to the idea of judicial intervention, drawn by the siren song of making the world a better place and fueled by the incentives for lawyers to convert public concern into private profit. In both the fuel temperature and global warming cases, litigants, at times justifying their circumvention of representative democracy by pointing to the slow pace of policy reform, have turned to the courts. By donning the cloak of adjudication, they have found judges for whom the common law doctrines of unjust enrichment, consumer fraud, and nuisance appear to furnish constitutionally acceptable and pragmatically useful tools with which to manage temperature’s effects. Like the proverbial carpenter armed with a hammer to whom everything looks like a nail, those judges are wrong. For both retail gasoline and global climate, the judicial application of common law principles provides a constitutionally deficient—and structurally unsound—mechanism for remedying temperature’s unwanted effects.

It has been axiomatic throughout our constitutional history that there exist some questions beyond the proper reach of the judiciary. In fact, the political question doctrine originates in no less august a case than Marbury v. Madison, where Chief Justice Marshall stated that “[q]uestions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.”1 Well over a century after that landmark ruling, the Supreme Court, in Baker v. Carr, famously announced six identifying characteristics of such nonjusticiable political questions, which, primarily as a “function of the separation of powers,” courts may not adjudicate.2 Of these six characteristics, the Court recently made clear that two are particularly important: (1) the presence of “a textually demonstrable constitutional commitment of the issue to a coordinate political department;” and (2) “a lack of judicially discoverable and manageable standards for resolving it.”3

The spectrum of nonjusticiable political questions in a sense spans the poles formed by these two principles. At one pole, the Constitution’s specific textual commitments shield issues expressly reserved to the political branches from judicial interference. At the other pole lie matters not necessarily reserved in so many words to one of the political branches but nonetheless institutionally incapable of coherent and principled resolution by courts acting in a truly judicial capacity; such matters are protected from judicial meddling by the requirement that “judicial action must be governed by standard, by rule” and by the correlative axiom that “law pronounced by the courts must be principled, rational, and based upon reasoned distinctions.”4

At a deeper level, however, the two poles collapse into one. The reason emerges if one considers issues that courts are asked to address involving novel problems the Constitution’s framers, farsighted though they were, could not have anticipated with sufficient specificity to entrust their resolution to Congress or to the Executive in haec verba. A perfect exemplar of such problems is the nest of puzzles posed by humaninduced climate change. When matters of that character are taken to court for resolution by judges, what marks them as “political” for purposes of the “political question doctrine” is not some problem-specific language but, rather, the demonstrable intractability of those matters to principled resolution through lawsuits. And one way to understand that intractability is to view it as itself marking the Constitution’s textual, albeit broadly couched, commitment of the questions presented to the processes we denominate “legislative” or “executive”—that is, to the pluralistic processes of legislation and treaty-making rather than to the principle-bound process of judicially resolving what Article III denominates “cases” and “controversies.” In other words, the judicial unmanageability of an issue serves as powerful evidence that the Constitution’s text reserves that issue, even if broadly and implicitly, to the political branches.5

It has become commonplace that confusion and controversy have long distinguished the doctrine that determines, as a basic matter of the Constitution’s separation of powers, which questions are “political” in the specific sense of falling outside the constitutional competence of courts and which are properly justiciable despite the “political” issues they may touch. But that the principles in play have yet to be reduced to any generally accepted and readily applied formula cannot mean that courts are simply free to toss the separation of powers to the winds and plunge ahead in blissful disregard of the profoundly important principles that the political question doctrine embodies. Unfortunately, that appears to be just what some courts have done in the two temperature-related cases—one involving hot fuels, the other a hot earth— that inspired this publication. In the first, a court allowed a claim about measuring fuels to proceed despite a constitutional provision specifically reserving the issue to Congress. In the second—a case in which the specific issue could not have been anticipated, much less expressly reserved, but in which the only imaginable solutions clearly lie beyond judicial competence—a court, rather than dismissing the case as it ought to have done, instead summarily dismissed the intractable obstacles to judicial management presented by climate change merely because it was familiar with the underlying cause of action. As this pair of bookend cases demonstrates, the political question doctrine is feeling heat from both directions.

#### That crushes global coordination necessary to solve climate change

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But that being said, if the Second Circuit was implying that such claims are justiciable in part because they are relatively costless, it was wrong again. In the wake of the recent Copenhagen climate negotiations, America is at a crossroads regarding its energy policy. At Copenhagen, the world—for the first time including both the United States and China—took a tremulous first step towards a comprehensive and truly global solution to climate change.44 By securing a modicum of international consensus—albeit not yet with binding commitments—President Obama laid the foundation for what could eventually be a groundbreaking congressional overhaul of American energy policy, an effort that will undoubtedly be shaped by considerations as obviously political as our energy independence from hostile and unreliable foreign regimes and that will both influence and be influenced by the delicate state of international climate negotiations.45

Against this backdrop, courts would be wise to heed the conclusion of one report that what “makes climate change such a difficult policy problem is that decisions made today can have significant, uncertain, and difficult to reverse consequences extending many years into the future."46 This observation is even more salient given that America—and the world—stand at the precipice of major systemic climate reform, if not in the coming year then in the coming decade. It would be disastrous for climate policy if, as at least one commentator has predicted,47 courts were to “beat Congress to the punch” and begin to concoct common law “solutions” to climate change problems before the emergence of a legislative resolution. Not only does judicial action in this field require costly and irreversible technological change on the part of defendants, but the prior existence of an ad hoc mishmash of common law regimes will frustrate legislators’ attempts to design coherent and systematic marketbased solutions.48 Indeed, both emissions trading regimes and carbon taxes seek to harness the fungibility of GHG emissions by creating incentives for reductions to take place where they are most efficient. But if courts were to require reductions of randomly chosen defendants—with no regard for whether they are efficient reducers— they would inhibit the effective operation of legislatively-created, market-based regimes by prematurely and artificially constricting the size of the market. And as one analyst succinctly put it before Congress, “[a]n insufficient number of participants will doom an emissions trading market.”49

There is no doubt that the “Copenhagen Accord only begins the battle” against climate change, as diplomats, bureaucrats, and legislators all now begin the lengthy struggle to turn that Accord’s audacious vision into concrete reality.50 But whatever one’s position in the debate between emissions trading and carbon taxes, or even in the debate over the extent or indeed the reality of anthropogenic climate change, one thing is clear: legislators, armed with the best economic and scientific analysis, and with the capability of binding, or at least strongly incentivizing, all involved parties, are the only ones constitutionally entitled to fight that battle.

CONCLUSION

Some prognosticators opine that the political question doctrine has fallen into disrepute and that it no longer constitutes a viable basis upon which to combat unconstitutional judicial overreaching.51 No doubt the standing doctrine could theoretically suffice to prevent some of the most audacious judicial sallies into the political thicket, as it might in the climate change case, where plaintiffs assert only undifferentiated and generalized causal chains from their chosen defendants to their alleged injuries. But when courts lose sight of the important limitations that the political question doctrine independently imposes upon judicial power–even where standing problems are at low ebb, as with the Motor Fuel case–then constitutional governance, and in turn the protection of individual rights and preservation of legal boundaries, suffer. The specter of two leading circuit courts manifestly losing their way in the equally real thicket of political question doctrine underscores the urgency, perhaps through the intervention of the Supreme Court, of restoring the checks and balances of our constitutional system by reinforcing rather than eroding the doctrine’s bulwark against judicial meddling in disputes either expressly entrusted by the Constitution to the political branches or so plainly immune to coherent judicial management as to be implicitly entrusted to political processes. It is not only the climate of the globe that carries profound implications for our future; it is also the climate of the times and its implications for how we govern ourselves.

#### Warming is real, anthropogenic and causes extinction

Flournoy 12 -- Citing Feng Hsu, PhD NASA Scientist @ the Goddard Space Flight Center. Don Flournoy is a PhD and MA from the University of Texas, Former Dean of the University College @ Ohio University, Former Associate Dean @ State University of New York and Case Institute of Technology, Project Manager for University/Industry Experiments for the NASA ACTS Satellite, Currently Professor of Telecommunications @ Scripps College of Communications @ Ohio University (Don, "Solar Power Satellites," January, Springer Briefs in Space Development, Book, p. 10-11

In the Online Journal of Space Communication , Dr. Feng Hsu, a  NASA scientist at Goddard Space Flight Center, a research center in the forefront of science of space and Earth, writes, “The evidence of global warming is alarming,” noting the potential for a catastrophic planetary climate change is real and troubling (Hsu 2010 ) . Hsu and his NASA colleagues were engaged in monitoring and analyzing climate changes on a global scale, through which they received first-hand scientific information and data relating to global warming issues, including the dynamics of polar ice cap melting. After discussing this research with colleagues who were world experts on the subject, he wrote: I now have no doubt global temperatures are rising, and that global warming is a serious problem confronting all of humanity. No matter whether these trends are due to human interference or to the cosmic cycling of our solar system, there are two basic facts that are crystal clear: (a) there is overwhelming scientific evidence showing positive correlations between the level of CO2 concentrations in Earth’s atmosphere with respect to the historical fluctuations of global temperature changes; and (b) the overwhelming majority of the world’s scientific community is in agreement about the risks of a potential catastrophic global climate change. That is, if we humans continue to ignore this problem and do nothing, if we continue dumping huge quantities of greenhouse gases into Earth’s biosphere, humanity will be at dire risk (Hsu 2010 ) . As a technology risk assessment expert, Hsu says he can show with some confidence that the planet will face more risk doing nothing to curb its fossil-based energy addictions than it will in making a fundamental shift in its energy supply. “This,” he writes, “is because the risks of a catastrophic anthropogenic climate change can be potentially the extinction of human species, a risk that is simply too high for us to take any chances” (Hsu 2010 )

### Defense

#### CMR is high and resilient – no empirical evidence for a decline

Thomas C. Bruneau, Nat. Sec. Affairs Prof @ Naval Postgrad, 11-12-2013, “America's Enduring Military,” National Interest, http://nationalinterest.org/commentary/americas-enduring-military-9383

The first sentence in the latest report on the U.S. military by the Pew Research Religion & Public Life Project reads as follows: “Americans continue to hold the military in high regard with more than three-quarters of U.S. adults (78 percent) saying that the members of the armed services contribute ‘a lot’ to society’s well-being.” Another 15 percent say that the military contribute “some,” and only 5 percent “not too much/not at all.” These ratings are higher than any other of the ten occupational groups included in the early 2013 Spring survey. An earlier report by the Pew Research Center summarizing the results of a survey of 1853 military veterans and 2003 civilians found the same high percentage of approval with the military being the highest regarded profession. The American population holds these very positive attitudes towards the military despite two long wars in Afghanistan and Iraq where the United States has left (or is in the process of leaving) without having achieved much of the initial promise. The military is not blamed for these foreign-policy fiascos, as the American public believes that the elected and appointed civilian leadership make policy decisions related to entering or leaving a conflict, and the military does what the authorities direct them to do. Unlike many countries today, including Egypt and Pakistan, the question of who controls the military is not at issue in the United States. In these two countries, as was the case not so long ago in countries such as Brazil, Indonesia, South Korea and Spain, the question of democratic civilian control has yet to be decided and institutionalized. Although it is not a significant issue in the United States, the mainstream scholars, who continue to be influenced by Samuel P. Huntington and his 1957 classic, The Soldier and the State: The Theory and Politics of Civil-Military Relations, would have us believe that the issue of democratic civilian control is at the center of the political agenda. What Peter D. Feaver calls “the civil-military problematique” is simply not relevant in the United States. As it is not an issue, consequently a series of other related issues such as “the civil-military gap,” “civil-military tensions,” the all-volunteer force (AVF), and the fact that there are today few members of Congress who have served in the military, are also not significant issues. These mainstream authors use terms such as: “erosion,” “decline,” “fractious” and “bad” vs. “robust,” “harmonious,” “healthy” and “good,” without ever defining the meaning of the terms, let alone providing empirical evidence. To follow my argument requires that we look beyond the possibly distant personal relationships between the president, or even the Secretary of Defense, and a few top generals or admirals, and include the political institutions created over time to exercise control as well as the supportive culture and mechanisms demonstrating respect for the U.S. military. With the founding of the American Republic at the end of the eighteenth century, there was indeed concern regarding establishing and guaranteeing democratic civilian control of the armed forces, largely based on the colonial experience. Consequently, there is extensive guidance regarding civil-military relations in the U.S. Constitution in which eleven of the eighteen articles specifying the powers of the Congress deal with security. Between the late eighteenth century and today, the United States has created a large and all-encompassing array of institutions to ensure the control of the military as individuals and as an entity, which in all cases are directed by civilians that both exercise control and conduct oversight to ensure compliance. Among the most important institutionalized civilian control mechanisms are those that concern budgets, promotions and education—that is, money, careers and culture. The key control components of the budget process include, at the executive level, both the Office of Management and Budget and agencies within the Department of Defense. At the legislative level it includes the authorizing and appropriating committees of both houses of Congress. Extensive oversight is conducted at the executive level by inspectors general and by Congress with oversight committees, the Government Accountability Office, the Congressional Budget Office and specialized inspectors general like the Special Inspector General for Iraq Reconstruction (SIGIR) and Special Inspector General for Afghanistan Reconstruction (SIGAR). The three services have responsibility for recruiting, organizing, training and equipping the military. Military promotions begin with boards of military personnel, but the recommended promotions must then be vetted by the military and civilian leadership within Department of Defense, passed on to the President, and finally approved, or not, by the Senate. In sum, the responsibility for promotions is shared among the military services themselves, the executive, and the Congress. The “precepts,” which define the numbers and priorities for the military promotion boards, are provided by the civilian service secretaries. These secretaries, down to the level of Assistant Secretaries, are nominated by the President and approved, or not, by the Senate. Military education is also a shared responsibility. Each of the services has service academies, at Annapolis, Colorado Springs, and West Point, as well as intermediate and senior staff or war colleges. Funding is provided in the same manner as budgeting discussed above, and the Congress, using its budgetary powers, can impose new priorities in military education, as it did in the Goldwater-Nichols Defense Reorganization Act of 1986. The members of Congress have further roles in nominating the individuals who will attend the three service academies, which ensures both regional and political diversity. The service academy degrees are accredited by regional accreditation bodies, which are composed overwhelmingly of civilian academics. Of course only a minority of the officers attend the service academies. Some 70-80 percent attend civilian institutions in reserve officer training corps programs. Although the executive branch manages education at the academies and the ROTC program, no individual becomes an officer or increases in rank without the advice and consent of the Senate. In short, following from the original base established in the U.S. Constitution, the United States has developed a comprehensive set of institutions that are ingrained in the thinking of the U.S. military and all of civilian society, including the political decision makers. And the U.S. media, its think tanks and its nongovernmental organizations are extremely active in highlighting any real or imagined independence of the military. It is clear in the October 2011 Pew study that whereas the military is the most highly regarded institution in the United States—and the only institution in the survey showing an increase in confidence since the surveys began in the 1970s—the population makes a distinction between the military and the wars it fights. “The public makes a sharp distinction in its view of military service members and the wars they have been fighting. More than nine-in-ten express pride in the troops and three-quarters say they thanked someone in the military. But a 45 percent plurality says neither of the post–9/11 wars has been worth the cost and only a quarter say they are following news of the wars closely. And half of the public say the wars have made little difference in their lives.” In short, the public distinguishes between the U.S. military and the wars that their civilian leaders have sent them to fight. It is significant that in the October 2011 Pew study the veteran sample are overwhelmingly happy with their lives and would encourage others to join the military. The esteem and appreciation of American society is demonstrated in a concrete manner. The esteem is manifested in very competitive (with civilian equivalents) salaries, housing allowances, health insurance and educational opportunities while the military are on active duty. The most complete analysis of annual military compensation compared to civilian equivalents, by James E. Grefer of the Center for Naval Analyses, found that “the total compensation packages, including both cash and benefits, are on the average about $13,365 more for enlisted personnel than their civilian equivalents, and an average of $24,875 more for officers than their civilian counterparts.” Probably more important than annual compensation while on active duty are programs available when members of the military retire. Unlike other countries, where options after retirement are minimal, causing great anxiety and unhappiness, the United States takes good care of its veterans. No other agency in the U.S. government has what is termed a “float.” That is, there are sufficient officers to allow many of them to pursue a graduate degree program during their careers, often fully funded by the U.S. government. Advanced degrees, of course, make a great deal of sense in a modern military that must deal on equal terms with an increasingly educated group of civilians, and where the demands for policy and technical proficiency are high priorities. Advanced degrees are also an incentive for promotion and retention; few are promoted beyond the junior-officer ranks if they do not have a graduate degree. And the military is indeed a meritocracy where individuals can be promoted regardless of socioeconomic background and race. Retirement is possible after twenty years, at which time the retiree receives 50 percent of his or her base salary; for civilian employees of the Department of Defense after twenty years it is less than 25 percent. Upon serving thirty years, a military member can retire with 75 percent of base pay. After retirement, which according to the Pew study is probably by the age of forty-one, the retiree can very easily—and with the U.S. military and government support—begin a whole new career. There is also the possibility of the GI bill for further education. None of this is to denigrate the vocation or contribution of the U.S. military and its members; or to ignore that their profession may require them to go into harm’s way. Rather, in view of the institutional mechanisms created from the U.S. Constitution until the present, the culture established within society and the military itself and the respectful manner in which members of the military are treated during active duty and after, there is virtually no issue of control. In this regard, President Obama and his predecessors have had one less worry that many of his counterparts throughout the world lose sleep over.

#### Civil-military tensions inevitable but there’s no impact

Davidson 13 Janine Davidson is assistant professor at George Mason University’s Graduate School of Public Policy. From 2009-2012 she served as the Deputy Assistant Secretary of Defense, Plans in the Pentagon, Presidential Studies Quarterly, March 2013, " Civil-Military Friction and Presidential Decision Making: Explaining the Broken Dialogue", Vol. 43, No. 1, Ebsco

In the 2010 bestselling book, Obama’s Wars, Bob Woodward recounts President Barack Obama’s friction with his military chain of command as he sought options for ending the war in Afghanistan.1 Woodward paints a compelling picture of a frustrated president who felt “boxed in” by his military commanders who were presenting him with only one real option—deploy 40,000 more troops for a comprehensive counterinsurgency strategy and an uncertain timeline. The president and his civilian advisors could not understand why the military seemed incapable of providing scalable options for various goals and outcomes to inform his decision-making. Meanwhile the military was frustrated that their expert advice regarding levels of force required for victory were not being respected (Woodward 2010).¶ Such mutual frustration between civilian leadership and the military is not unique to the Obama administration. In the run-up to the Iraq War in 2002, Secretary of Defense Donald Rumsfeld famously chastised the military for its resistance to altering the invasion plan for Iraq. The military criticized him for tampering with the logistical details and concepts of operations, which they claimed led to the myriad operational failures on the ground (Gordon and Trainor 2006; Ricks 2007; Woodward 2004). Later, faced with spiraling ethnic violence and rising U.S. casualties across Iraq, George W. Bush took the advice of retired four-star General Jack Keane and his think tank colleagues over the formal advice of the Pentagon in his decision to launch the so-called surge in 2007 (Davidson 2010; Feaver 2011; Woodward 2010).¶ A similar dynamic is reflected in previous eras, from John F. Kennedy’s famous debates during the Cuban Missile Crisis (Allison and Zelikow 1999) to Lyndon Johnson’s quest for options to turn the tide in Vietnam (Berman 1983; Burke and Greenstein 1991), and Bill Clinton’s lesser-known frustration with the military over its unwillingness to develop options to counter the growing global inﬂuence of al-Qaeda.2 In each case, exasperated presidents either sought alternatives to their formal military advisors or simply gave up and chose other political battles. Even Abraham Lincoln resorted to simply ﬁring generals until he got one who would fight his way (Cohen 2002).¶ What accounts for this perennial friction between presidents and the military in planning and executing military operations? Theories about civilian control of the military along with theories about presidential decision making provide a useful starting point for this question. While civilian control literature sheds light on the propensity for friction between presidents and the military and how presidents should cope, it does not adequately address the institutional drivers of this friction. Decision-making theories, such as those focused on bureaucratic politics and institutional design (Allison 1969; Halperin 1974; Zegart 2000) motivate us to look inside the relevant black boxes more closely. What unfolds are two very different sets of drivers informing the expectations and perspectives that civilian and military actors each bring to the advising and decisionmaking table.¶ This article suggests that the mutual frustration between civilian leaders and the military begins with cultural factors, which are actually embedded into the uniformed military’s planning system. The military’s doctrine and education reinforce a culture of “military professionalism,” that outlines a set of expectations about the civil-military decision-making process and that defines “best military advice” in very speciﬁc ways. Moreover, the institutionalized military planning system is designed to produce detailed and realistic military plans for execution—and that will ensure “victory”—and is thus ill suited to the rapid production of multiple options desired by presidents. The output of this system, framed on specific concepts and definitions about “ends,” “ways,” “means,” and expectations about who provides what type of planning “guidance,” is out of synch with the expectations of presidents and their civilian advisors, which in turn have been formed from another set of cultural and institutional drivers.¶ Most civilian leaders recognize that there is a principal-agent issue at work, requiring them to rely on military expertise to provide them realistic options during the decision-making process. But, their definition of “options” is framed by a broader set of political objectives and a desire to winnow decisions based, in part, on advice about what various objectives are militarily feasible and at what cost. In short, civilians’ diverse political responsibilities combined with various assumptions about military capabilities and processes, create a set of expectations about how advice should be presented (and how quickly), how options might be defined, and how military force might or might not be employed. These expectations are often considered inappropriate, unrealistic, or irrelevant by the military. Moreover, as discussed below, when civilians do not subscribe to the same “hands off” philosophy regarding civilian control of the military favored by the vast majority of military professionals, the table is set for what the military considers “meddling” and even more friction in the broken dialogue that is the president’s decision-making process.¶ This article identifies three drivers of friction in the civil-military decision-making dialogue and unpacks them from top to bottom as follows: The first, civil-military, is not so much informed by theories of civilian control of the military as it is driven by disagreement among policy makers and military professionals over which model works best. The second set of drivers is institutional, and reflects Graham Allison’s organizational process lens (“model II”). In this case, the “outputs” of the military’s detailed and slow planning process fail to produce the type of options and advice civilians are hoping for. Finally, the third source of friction is cultural, and is in various ways embedded into the first two. Powerful cultural factors lead to certain predispositions by military planners regarding the appropriate use of military force, the best way to employ force to ensure “victory,” and even what constitutes “victory” in the American way of war. These cultural factors have been designed into the planning process in ways that drive certain types of outcomes. That civilians have another set of cultural predispositions about what is appropriate and what “success” means, only adds more fuel to the flame.

### No Impact

#### Hegemony isn’t key to peace

Fettweis 11 Christopher J. Fettweis, Department of Political Science, Tulane University, 9/26/11, Free Riding or Restraint? Examining European Grand Strategy, Comparative Strategy, 30:316–332, EBSCO

It is perhaps worth noting that there is no evidence to support a direct relationship between the relative level of U.S. activism and international stability. In fact, the limited data we do have suggest the opposite may be true. During the 1990s, the United States cut back on its defense spending fairly substantially. By 1998, the United States was spending $100 billion less on defense in real terms than it had in 1990.51 To internationalists, defense hawks and believers in hegemonic stability, this irresponsible “peace dividend” endangered both national and global security. “No serious analyst of American military capabilities,” argued Kristol and Kagan, “doubts that the defense budget has been cut much too far to meet America’s responsibilities to itself and to world peace.”52 On the other hand, if the pacific trends were not based upon U.S. hegemony but a strengthening norm against interstate war, one would not have expected an increase in global instability and violence. The verdict from the past two decades is fairly plain: The world grew more peaceful while the U**nited** S**tates** cut its forces. No state seemed to believe that its security was endangered by a less-capable United States military, or at least none took any action that would suggest such a belief. No militaries were enhanced to address power vacuums, no security dilemmas drove insecurity or arms races, and no regional balancing occurred once the stabilizing presence of the U.S. military was diminished. The rest of the world acted as if the threat of international war was not a pressing concern, despite the reduction in U.S. capabilities. Most of all, the United States and its allies were no less safe. The incidence and magnitude of global conflict declined while the United States cut its military spending under President Clinton, and kept declining as the Bush Administration ramped the spending back up. No complex statistical analysis should be necessary to reach the conclusion that the two are unrelated. Military spending figures by themselves are insufficient to disprove a connection between overall U.S. actions and international stability. Once again, one could presumably argue that spending is not the only or even the best indication of hegemony, and that it is instead U.S. foreign political and security commitments that maintain stability. Since neither was significantly altered during this period, instability should not have been expected. Alternately, advocates of hegemonic stability could believe that relative rather than absolute spending is decisive in bringing peace. Although the United States cut back on its spending during the 1990s, its relative advantage never wavered. However, even if it is true that either U.S. commitments or relative spending account for global pacific trends, then at the very least stability can evidently be maintained at drastically lower levels of both. In other words, even if one can be allowed to argue in the alternative for a moment and suppose that there is in fact a level of engagement below which the United States cannot drop without increasing international disorder, a rational grand strategist would still recommend cutting back on engagement and spending until that level is determined. Grand strategic decisions are never final; continual adjustments can and must be made as time goes on. Basic logic suggests that the United States ought to spend the minimum amount of its blood and treasure while seeking the maximum return on its investment. And if the current era of stability is as stable as many believe it to be, no increase in conflict would ever occur irrespective of U.S. spending, which would save untold trillions for an increasingly debt-ridden nation. It is also perhaps worth noting that if opposite trends had unfolded, if other states had reacted to news of cuts in U.S. defense spending with more aggressive or insecure behavior, then internationalists would surely argue that their expectations had been fulfilled. If increases in conflict would have been interpreted as proof of the wisdom of internationalist strategies, then logical consistency demands that the lack thereof should at least pose a problem. As it stands, the only evidence we have regarding the likely systemic reaction to a more restrained United States suggests that the current peaceful trends are unrelated to U.S. military spending. Evidently the rest of the world can operate quite effectively without the presence of a global policeman. Those who think otherwise base their view on faith alone.

#### Hegemony’s inevitable and resilient

Eric S. Edelman 10, former Under Secretary of Defense for Policy, was Principal Deputy Assistant to the Vice President for National Security Affairs, 2010, “Understanding America’s Contested Primacy,” Center for Strategic and Budgetary Assessments

A rigorous assessment should consider the strengths and weaknesses of the United States’ putative competitors on the global scene as well as the enduring strengths and sources of resilience that have enabled America to extend its primacy and maintain a stabilizing, global hegemonic role against all expectations. There is a need for a framework to inform how US policymakers might think about the problem of developing strategies and policies to extend that role yet again, since it is at least an arguable proposition that rather than a multipolar world, the global system, after the current Great Recession passes, will continue to be unipolar but with some additional challenges for US leadership.

Arguments for US national decline are not new. They have been made repeatedly in the past, and before they are accepted as the prevailing conventional wisdom it would be worthwhile to review the history of “declinism” and to submit some of the arguments that undergird the declinist persuasion to a searching re-examination. This paper, in the remaining pages, will consider the declinist arguments and will raise several questions. Will the undeniable relative decline of the United States, in fact, lead to the end of unipolarity? Do the BRIC countries really represent a bloc? What would multipolarity look like? How does one measure national power anyhow, and how can one measure the change in the power distribution globally? Is the rise of global competitors inevitable? What are some of the weaknesses that might hamper the would-be competitors from staying on their current favorable economic and political trajectory? Does the United States possess some underappreciated strengths that might serve as the basis for continued primacy in the international system and, if so, what steps would a prudent government take to extend that primacy into the future?

The history of straight-line projections of economic growth and the rise of challengers to the dominance of the United States has not been kind to those who have previously predicted US decline. It is not necessarily the case that the United States will be caught between the end of the “unipolar moment” of post- Cold War predominance and a global multipolar world. The emerging international environment is likely to be different than either of the futures forecast by the NIC in Mapping the Global Future in 2004 or Global Trends 2025 in 2008. It would seem more likely that the relative decline of American power will still leave the United States as the most powerful actor in the international system. But the economic rise of other nations and the spread of nuclear weapons in some key regions are likely to confront the United States with difficult new challenges.

### Afghanistan Impact D

#### Stability increasing

DoD July 2013, Department of Defense, July 2013, "Report on¶ Progress Toward Security and¶ Stability in Afghanistan," http://www.defense.gov/pubs/Section\_1230\_Report\_July\_2013.pdf¶

The conflict in Afghanistan has shifted into a fundamentally new phase. For the past 11 years, ¶ the United States and our coalition partners have led the fight against the Taliban, but now ¶ Afghan forces are conducting almost all combat operations. The progress made by the ¶ International Security Assistance Force (ISAF)-led surge over the past three years has put the ¶ Government of the Islamic Republic of Afghanistan (GIRoA) firmly in control of all of ¶ Afghanistan’s major cities and 34 provincial capitals and driven the insurgency into the ¶ countryside. ISAF’s primary focus has largely transitioned from directly fighting the insurgency ¶ to training, advising and assisting the Afghan National Security Forces (ANSF) in their efforts to ¶ hold and build upon these gains, enabling a U.S. force reduction of roughly 34,000 personnel—¶ half the current force in Afghanistan—by February 2014. ¶ As agreed by President Obama and President Karzai at their January 2013 meeting in ¶ Washington, D.C., and in line with commitments made at the Lisbon and Chicago NATO ¶ summits, "Milestone 2013" was announced on June 18, 2013, marking ISAF’s official transition ¶ to its new role. The ANSF has grown to approximately 96 percent of its authorized end-strength ¶ of 352,000 personnel and is conducting almost all operations independently. As a result, ISAF ¶ casualties are lower than they have been since 2008. The majority of ISAF bases has been ¶ transferred to the ANSF or closed (although most large ISAF bases remain), and construction of¶ most ANSF bases is complete. Afghanistan’s populated areas are increasingly secure; the ANSF ¶ has successfully maintained security gains in areas that have transitioned to Afghan lead ¶ responsibility. To contend with the continuing Taliban threat, particularly in rural areas, the ¶ ANSF will require training and key combat support from ISAF, including in extremis close air ¶ support, through the end of 2014.

#### Insurgency is defeated

DoD July 2013, Department of Defense, July 2013, "Report on¶ Progress Toward Security and¶ Stability in Afghanistan," http://www.defense.gov/pubs/Section\_1230\_Report\_July\_2013.pdf¶

The insurgency failed to achieve its campaign objectives during this reporting period. Insurgent held territory continued to shrink, and the insurgents’ ability to strike at major population centers ¶ continued to decline. The insurgency is now less capable, less popular and less of an existential ¶ threat to GIRoA than in 2011.¶ Insurgents relied on high profile attacks (HPAs) to reassert operational influence in key Pashtun ¶ areas and influence key audiences at the strategic level, compensating for insurgents’ inability to ¶ coordinate operations beyond the district level.

#### Great power cooperation is far more likely --- they will also prevent a civil war

Hadar 11—former prof of IR at American U and Mount Vernon-College. PhD in IR from American U (1 July 2011, Leon, Saving U.S. Mideast Policy, http://nationalinterest.org/commentary/saving-us-policy-the-mideast-5556)

Indeed, contrary to the warning proponents of U.S. military intervention typically express, the withdrawal of American troops from Iraq and Afghanistan would not necessarily lead to more chaos and bloodshed in those countries. Russia, India and Iran—which supported the Northern Alliance that helped Washington topple the Taliban—and Pakistan (which once backed the Taliban) all have close ties to various ethnic and tribal groups in that country and now have a common interest in stabilizing Afghanistan and containing the rivalries.

### Central Asia Impact D

#### Powers will work together to stabilize the region—security and economic incentives

Gresh 12 (Dr. Geoffrey F., Assistant Professor of International Security Studies at National Defense University, “Russia, China, and stabilizing South Asia”, 3/12, http://afpak.foreignpolicy.com/posts/2012/03/12/russia\_china\_and\_stabilizing\_south\_asia)

As the U.S. begins to withdraw troops from Afghanistan, Russia and China have both declared a desire to increase their military presence throughout Central and South Asia. This new regional alignment, however, should not be viewed as a threat to U.S. strategic national interests but seen rather as concurrent with strategic and regional interests of the United States: regional peace, stability and the prevention of future terrorist safe havens in ungoverned territories. As China and Russia begin to flex their military muscles, the U.S. military should harness their expanded regional influence to promote proactively a new period of responsible multilateral support for Afghanistan and Pakistan. This past December it became clearer that Russia had begun to re-assert its regional presence when the Collective Security Treaty Organization (CSTO) granted Russia the veto power over any member state's future decision to host a foreign military. CSTO members, including Kazakhstan, Kyrgyzstan, Tajikistan, and Uzbekistan, have become increasingly valuable U.S. partners in the Northern Distribution Network after Pakistan shut down U.S. military supply routes running from the south into Afghanistan when NATO troops killed 24 Pakistani soldiers last November in the border area of Salala. Though it appears the route may soon open again, the United States must still adopt a new strategy that works more closely with Russia and the CSTO to maintain the Northern Distribution Network long into the future, which currently accounts for about 60 percent of all cargo transiting Central Asia en route to Afghanistan. Certainly, the U.S. risks being unable to control many aspects of the Northern Distribution Network as it withdraws from the region, and this may in turn adversely affect Afghanistan's future success. However, if the United States remains concerned about leaving the region to a historically obdurate regional rival like Russia, it should also bear in mind that Russia has a vital strategic interest in the future stability of the region. Russia has approximately 15 million Muslims living within its borders, with an estimated 2 million Muslims in Moscow. Russia is fearful of what occurs on its periphery and wants to minimize the spread of Muslim extremism that may originate from an unstable Afghanistan or Pakistan. In addition, Russia does not want regional instability that threatens its oil and gas investments. In particular, Russia wants to ensure that it continues to influence the planning and implementation of the potentially lucrative natural gas pipeline that may one day traverse Turkmenistan, Afghanistan, Pakistan, and India. In a recent meeting with Pakistani Foreign Minister Hina Rabbani Khar, Russian Foreign Minister Sergey Lavrov discussed Russia's commitment to preserving peace and stability throughout the AfPak region, and rejected the use of violence by al-Qaeda and its affiliates that aim to undermine the current Afghan government. Furthermore, he pledged to bolster bilateral ties and work cooperatively with Pakistan to achieve stability in Afghanistan. A newly-elected President Vladimir Putin also recently wrote in a campaign brief that "Russia will help Afghanistan develop its economy and strengthen its military to fight terrorism and drug production." It is not lost on the U.S. government that Russia is proposing to succeed where the U.S. has struggled. However, if Russia does succeed in helping establish a secure Afghanistan and Pakistan that can prevent the spread of bases for terrorism then it is a victory for everyone. Aside from Pakistan, and in line with promoting security throughout the region, Russia announced recently that it will provide $16 million to Kyrgyzstan to assist with border security in the south. Russia also agreed recently to pay $15 million in back rent for its four military facilities across the country, including an air base, a torpedo test center on Lake Issyk-Kul, and a communications center in the south. Further, Russia signed a security pact with Tajikistan last fall to extend its basing lease for 49 years, in addition to a bilateral agreement that will enable Russia to become more integrated into Tajikistan's border security forces that oversee an 830-mile border with Afghanistan. Providing similar types of U.S. aid and security support will also help ensure that the valuable Northern Distribution Network remains open and secure for supply lines into Afghanistan. If the northern trade routes are shut down it would adversely affect aid arriving to Afghanistan and therefore jeopardize the stability of Afghanistan and the region. It would also be in opposition to Russia's regional interests. Rather than citing these examples in Kyrgyzstan and Tajikistan as a demonstration of how the U.S. will soon lose out in the region to a resurgent Russia, policymakers can view them as an indication of how Russian interests align with the U.S. to help maintain regional security. More importantly, if Russia wants to take a more active future role in Central Asia, the U.S. should address this shift and work directly with Russia and other CSTO members to ensure that the Northern Distribution Network remains operational in the distant future. Certainly, the U.S. should not be naïve to think that Russia will not at times oppose U.S. regional interests and that there will not be significant areas of conflict. In 2009, Russia tried to convince then President of Kyrgyzstan Kurmanbek Bakiyev to terminate the U.S. contract for its base in Manas. In this case, the U.S. fended off the threat of expulsion successfully through promises of increased U.S. military and economic aid. Continuing to maintain significant amounts of aid to the Central Asia Republics will therefore provide additional incentives to ensure the U.S. is less vulnerable to Russian whims, while at the same time remaining present and active for the benefit of regional security and the maintenance of the Northern Distribution Network. Another powerful regional player, China, also has a vested interest in the stability of the AfPak region, and has already begun to play a more active security role. It was reported this past January, for example, that China intends to establish one or more bases in Pakistan's Federally Administered Tribal Areas. Subsequently, at the end of February, Beijing played host to the first China-Afghanistan-Pakistan trilateral dialogue to discuss regional cooperation and stability. Due to China's shared borders and vibrant trade with both Afghanistan and Pakistan -- not to mention China's estimated 8 million Turkic-speaking Muslim Uyghurs living in western Xinjiang Province -- it has a direct interest in ensuring that both Afghanistan and Pakistan remain stable long into the future. Bilateral trade between China and Pakistan, for example, increased 28 percent in the past year to approximately $8.7 billion. China also signed an oil agreement with Afghanistan in December that could be worth $7 billion over the next two decades. Additionally, China is concerned about the rise of its Uyghur separatist movement that maintains safe havens in both countries, in addition to the spread of radical Islam. The United States should push China to become more actively engaged in Pakistan's security affairs as China has a direct interest in moderating radicalism in Pakistan and keeping it stable. Indicative of Pakistan's strategic value to China, since 2002 China has financed the construction and development of Pakistan's Gwadar deep water port project. China has contributed more than $1.6 billion toward the port's development as a major shipping and soon-to-be naval hub, which is located just 250 miles from the opening of the Persian Gulf. A Pakistan Supreme Court decision in 2011 enabled China to take full control of Gwadar from a Singapore management company further establishing China's firm position in the Pakistani port city. The creation of a new Chinese military network in Pakistan between Gwadar and the FATA would enable China to oversee the transit and protection of Chinese goods and investments that travel from both the coast and interior through the Karakorum corridor to China's Xinjiang Province. China already has an estimated 4,000 troops in Gilgit Baltistan, part of the larger and disputed Kashmir, and just recently it was reported after a January 2012 trip by Pakistani Army Chief General Ashfaq Kayani to China that Pakistan is considering leasing Gilgit Baltistan to China for the next 50 years. Such a move would indeed escalate tensions with India to the south, but from a Pakistani perspective, China would be positioned better than it already is to assist with any future Pakistani national security concerns. And from a Chinese perspective, it would improve their ability to monitor any illicit Uyghur activities aimed at inciting further rebellion in western China. With interest comes responsibility, and in the wake of the recent reports predicting the establishment of a more robust Chinese military network across Pakistan, it is time that China begins to supplement its increased involvement in Pakistan by helping to maintain peace and stability throughout the entire AfPak region. Certainly after fighting two long wars, the United States can no longer be the sole world power responsible for the region, and both China and Russia have been U.S. security free-riders for too long. They have benefited financially while NATO continues to lose soldiers and accrue a massive war debt. After 11 years of war, it is time the United States work more proactively with Russia, China, Pakistan and the Central Asian Republics to create solutions for the future stability and collective security of the region. Indeed, we may not have a choice, and the United States should embrace the transformation of a new era in Eurasia's heartland.

#### Structural barriers prevent instability

Weitz 12 (Richard, writes a weekly column on Asia-Pacific strategic and security issues. He is director of the Center for Political-Military Analysis and a Senior Fellow at the Hudson Institute. His commentaries have appeared in the International Herald Tribune, The Guardian and Wall Street Journal (Europe), among other publications. “Stabilizing the Stans”, 6/1, http://www.project-syndicate.org/commentary/stabilizing-the-stans)

Social disorder in Tunisia, Egypt, Libya, and other Arab countries has invariably led observers to regard Central Asia’s autocracies as potentially vulnerable to similar upheaval. Some Central Asian leaders have been in power for many years, and only Kyrgyzstan, the most impoverished of the five, has developed a competitive multi-party political system. Elsewhere, political parties are weak or are tools of the regime. But other factors make the Arab scenario less plausible in Central Asia. ­­Security forces are more closely aligned with ruling elites; independent political groups and social-media networks are less well developed; economic performance remains high in some countries; and a previous wave of revolutions produced disappointing results in Ukraine and Kyrgyzstan.

# 2NC

## Counterplan

### Solves the Case---2NC

#### The CP eliminates the accountability gap created by current judicial precedent, send a global signal of U.S. adherence to the rule of law, and avoid all our disads to a lead role by Article III courts

Alexander Zbrozek 13, J.D. Candidate, Columbia University School of Law, 11/20/13, “Square Pegs and Round Holes: Moving Beyond Bivens in National Security Cases,” http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2357260

Both Clark179 and Brown180 acknowledge that civil lawsuits can be a critical accountability mechanism, especially in the opaque national security arena. Through the discovery process, suits can reveal the Government's policy rationale, legal justifications, and internal deliberations regarding its challenged conduct, force the Government to defend its decisions in a public forum, and, if merited, provide a plaintiff with some form of relief.181 Lesley Wexler argues that Aulaqi I is a particularly illuminating case model in that it shows both the benefits and the limits of national security Bivens claims.182 She asserts that

[w]hile the [plaintiffs] lost big on paper, they may have achieved some gains in instigating other checks on executive authority … By bringing this case, [they] spurred a heated public and academic debate on the limits of the executive's authority to target individuals … [and] raised another issue not previously a significant part of the public debate on targeting: whether the President should have unreviewable authority to carry out the targeted killing of an American anywhere that the President deems to be a threat to the nation."183

However, Wexler concedes that "few politicians on either side of the aisle have seriously questioned the legality of the decision, with even [President] Obama's political rivals lauding the outcome. If restraint and overt transparency were the measures by which one ought to judge the success of [Aulaqi I], it [] appears to be a failure."184 Further, the lawsuit did not force the Government to reveal its legal justification for targeting Aulaqi.185

On February 4, 2013, news media186 obtained a copy of a Government white paper providing legal guidance on whether the Government could "use lethal force in a foreign country outside the area of active hostilities against a U.S. citizen who is a senior operational leader of al-Qa'ida or an associated force of al-Qa'ida—that is, an al-Qa'ida leader actively engaged in planning operations to kill Americans."187 Although this document did not specifically authorize lethal force against the victims,188 it did note that there is no "appropriate forum to evaluate these constitutional considerations [i.e., the constitutionality of using lethal force against U.S. enemy combatants]. It is well-established that '[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention,' Haig v. Agee, 453 U.S. 280, 292 (1981), because such matters" are often considered to be non-justiciable political questions.189 Although the white paper specifically addressed ex ante judicial review of lethal operations against U.S. enemy combatants, its conclusion that court intervention would be inappropriate in this context conceivably applies to post-deprivation litigation, as well.

Thus, although even unsuccessful national security lawsuits can foment public scrutiny and Congressional oversight,190 the Government will not be required to account for its actions if such claims are repeatedly dismissed before discovery begins. In particular, Chesney argues that "concerns for democratic accountability are especially acute when the [state secrets] privilege is asserted in the face of allegations of unconstitutional government conduct."191 In sum, without a forum in which a plaintiff can effectively prosecute his claims, "information," "justification," and "rectification" are all illusory goals.

IV. An Article I National Security Court

A. Introduction

To create such a forum, Congress should establish an administrative National Security Tribunal (NST) to hear constitutional claims brought by American citizens.192 The NST would close the rights/remedies gap generated by the national security exception to the Bivens doctrine and bolster the Government's reputation as a stalwart defender of the rule of law.193 Further, an appropriately balanced legislative scheme can furnish safeguards for both individual rights and classified information by using specialized evidentiary procedures, ensuring that the Government can effectively carry out its national security obligations.194 Hearings before the NST would be adversarial, providing a forum in which individual plaintiffs can seek relief for violations of their constitutional rights before neutral arbiters and compel the Government to account for its conduct. Through the NST, the Government can also alleviate concerns regarding its counterterrorism policies without compromising its ability to combat exigent security threats. Finally, as Benjamin McKelvey notes, "a legislative solution [to the justiciability gap] would provide the branches of government and the American public with a clear articulation of the law of targeted killing."195

#### No solvency deficits---the CP is an end-run around the problems with current Bivens jurisprudence---it’s specifically designed to make all their “plan key” args irrelevant by establishing an alternate process

Alexander Zbrozek 13, J.D. Candidate, Columbia University School of Law, 11/20/13, “Square Pegs and Round Holes: Moving Beyond Bivens in National Security Cases,” http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2357260

In sum, the national security exception to the Bivens doctrine has rendered cases like Aulaqi II non-starters. Statutory alternatives to Bivens are unavailing because of their own exemptions and the qualified immunity, political question, and state secrets doctrines. This has created a troubling accountability gap and an impediment to individual justice, both of which belie our nation's commitment to the rule of law. Congress should therefore create an administrative Article I court to hear claims brought by American citizens alleging that the Government violated their constitutional protections due to national security-related conduct. This National Security Tribunal would close a significant legal lacuna that has undermined America's commitment to transparent governance and fundamental rights.

### Plank

#### The United States federal government should not deploy Active Sonar Technology.

#### 2NC CP’s good --- key to check back against non-intrinsic 2AC add-ons, it’s a constructive, CX checks

### PMCs Plank

Ending dependence on PMC’s enables a troop increase if necessary

AP 10 (Associated Press, “McChrystal: Too many contractors in Afghanistan”, <http://www.usatoday.com/news/world/afghanistan/2010-04-16-mcchrystal-afghanistan_N.htm>, April 16, 2010)

PARIS (AP) — The top U.S. and NATO commander in Afghanistan said Friday that the coalition depends too much on private-sector contractors, and insisted his forces are keeping close watch on the flow of Taliban fighters who are training in Iran. Gen. Stanley McChrystal, during a four-day visit to France, said the coalition in Afghanistan has become too dependent on private contractors in the effort to stabilize the country. "I think we've gone too far," McChrystal said at France's IHEDN military institute. "I actually think we would be better to reduce the number of contractors involved." Alternatives could include increasing the number of troops "if necessary," or "using a greater number of Afghan contractors, or Afghans to help with the mission," he said. McChrystal said the use of contractors was founded upon "good intentions," such as to limit military commitments or to save money for governments. "I think it doesn't save money," he said. "We have created in ourselves a dependency on contractors that I think is greater than it ought to be." He didn't specify where any cuts might come. A Congressional Research Service report in January about the Pentagon's use of contractors in Iraq and Afghanistan said that as of September, more than 11,400 private security contractors were in Afghanistan. It cited Pentagon figures. The report, which has been posted on the website of the Federation of American Scientists, said 94% of contractors in Afghanistan were armed — and 90% were local nationals. The issue of contractors — who carry out tasks as diverse as security for diplomats, advisory roles or mercenary work — has been a thorny one for U.S. and some allied commanders and policymakers. The company once known as Blackwater was re-dubbed Xe after a deadly shooting incident by its guards that left 17 people dead in Baghdad. Xe is now trying to win Defense Department approval for a bid to train police in Afghanistan.

Afghan police check your impact

BBC Monitoring South Asia ‘9 (6/15/09, "Afghan TV show discusses private security companies' operations, legality", lexis, LEQ)

[Announcer] There is a notion that PSCs are needed because the Afghan National Police [ANP] is neither reliable enough, nor it does it have the required capacity to ensure full security. Let us see what commentators say about this view. [Sayedzadah] In my view, the ANP can ensure security in much better way than the PSCs. Afghanistan used to have a specialized police force that was responsible for performing guard duties for public buildings, foreign embassies, and NGOs. The Interior Ministry is seeking to revive that force in the form of Public Order forces. There is a view that the government does not have enough funds available to recruit ANP personnel to replace PSCs. My view is that the Public Order forces should replace PSCs and secure their funds from the stakeholders that fund PSCs currently.

## Drones DA

### Impact Calc. --- Creamer

### AT: Leakes

#### Security reforms solve the impact

Phil Stewart 7/18/13, Reuters, “U.S. overhauling intelligence access to try to prevent another Snowden,” http://articles.chicagotribune.com/2013-07-18/news/sns-rt-us-usa-security-snowden-intelligence-20130718\_1\_edward-snowden-guardian-two-man-rule

 The United States is overhauling procedures to tighten access to top-secret intelligence in a bid to prevent another mega-leak like the one carried out by former spy agency contractor Edward Snowden, senior U.S. officials said on Thursday.¶ The National Security Agency, which Snowden worked for as a Hawaii-based contractor, said it would lead the effort to isolate intelligence and implement a "two-man rule" for downloading - similar to procedures used to safeguard nuclear weapons.¶ "When are we taking countermeasures? ... The answer is now," Deputy Defense Secretary Ashton Carter told the Aspen Security Forum in Colorado.¶ NSA Director General Keith Alexander told the forum the two-man rule would apply to system administrators like Snowden and anyone with access to sensitive computer server rooms.¶ "You limit the numbers of people who can write to removable media," Alexander said. "Instead of allowing all systems administrators (to do it), you drop it down to a few and use a two-person rule."¶ "We'll close and lock server rooms so that it takes two people to get in there."¶ Carter partly blamed the security breach on the emphasis placed on intelligence-sharing after the wake of the September 11, 2001, attacks, which eventually allowed someone like Snowden to access so many documents at once.¶ "We normally compartmentalize information for a very good reason, so one person can't compromise a lot," Carter said. "Loading everything onto one server ... it's something we can't do. Because it creates too much information in one place."

#### It’s impossible to litigate a case over drone policy without disclosing highly sensitive military and intelligence data---implicates allies as well

Richard D. Rosen 11, Professor of Law and Director, Center for Military Law and Policy, Texas Tech University School of Law. Colonel, U.S. Army (retired), 2011, “PART III: ARTICLE: DRONES AND THE U.S. COURTS,” William Mitchell Law Review, 37 Wm. Mitchell L. Rev. 5280

Not only will the state secrets doctrine thwart plaintiffs from acquiring or introducing evidence vital to their case,96 it could result in dismissal of the cases themselves. Under the doctrine, the courts will dismiss a case either because the very subject of the case involves state secrets,97 or a case cannot proceed without the privileged evidence or presents an unnecessary risk of revealing protected secrets.98 Employing drones as a weapons platform against terrorists and insurgents in an ongoing armed conflict implicates both the nation’s military tactics and strategy as well as its delicate relations with friendly nations.99 As such, lawsuits challenging the policy cannot be tried without access to and the possible disclosure of highly classified information relating to the means, methods, and circumstances under which drones are employed.

### XT Delery

#### Delery WAY better than any card they’ve read ---

#### Plan fetters field commanders b/c it deters them from using force --- they have to always think twice before a strike --- quick action is crucial in the context of CT so weighing the risks of judicial review means we don’t act until it’s too late.

#### The prospect of judicial involvement causes battlefield risk aversion---TK decisions are made in split-seconds---any delay has massive negative effects on missions

Larry Maher 10, Quartermaster General, Veterans of Foreign Wars, et al, 9/30/10, BRIEF OF THE VETERANS OF FOREIGN WARS OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS AND DISMISSAL, Nasser al-Aulaqi, Plaintiff, vs. Barack H. Obama, et al., Defendants, <http://www.lawfareblog.com/wp-content/uploads/2010/10/VFW_Brief_PACER.pdf>

War is the province of chance. “If we now consider briefly the subjective nature of war—the means by which war has to be fought—it will look more than ever like a gamble . . . [i]n the whole range of human activities, war most closely resembles a game of cards.” Clausewitz, 86-87. Within this field of human endeavor, the most successful armies are those led by decisive commanders who visualize the operational environment and make rapid, sound decisions. Combat leadership involves the motivation of others to risk their lives, and only the most decisive and confident leaders can inspire this kind of self-sacrifice.¶ Leadership is the multiplying and unifying element of combat power. Confident, competent, and informed leadership intensifies the effectiveness of all other elements of combat power by formulating sound operational ideas and assuring discipline and motivation in the force . . . Leadership in today’s operational environment is often the difference between success and failure.¶ Dept. of the Army, Field Manual 3-0, Operations, at ¶¶ 4-6 - 4-8 (2008), available at http://www.army.mil/fm3-0/fm3-0.pdf.¶ Battle command is a subset of combat leadership—it is how wartime leaders operationalize their intent and transmit their guidance to subordinate units. Battle command is the art and science of understanding, visualizing, describing, directing, leading, and assessing forces to impose the commander’s will on a hostile, thinking, and adaptive enemy. Battle command applies leadership to translate decisions into actions—by synchronizing forces and warfighting functions in time, space, and purpose—to accomplish missions. Battle command is guided by professional judgment gained from experience, knowledge, education, intelligence, and intuition. It is driven by commanders.¶ Id. at ¶ 5-9. Battlefield decisionmaking involves the visualization of the battlefield and all its components, the deliberate assessment of operational risk, and the selection of a course of action which accepts certain risks in order to achieve tactical, operational or strategic success. Id. at ¶5-10; see also Gen. Frederick M. Franks, Jr., Battle Command: A Commander’s Perspective, Military Review, May-June 1996, at 120-121. “Given the inherently uncertain nature of war, the object of planning is not to eliminate or minimize uncertainty but to foster decisive and effective action in the midst of such uncertainty.” Army Field Manual 3-07, Stability Operations, at ¶ 4-4 (2008), available at http://usacac.army.mil/cac2/repository/FM307/FM3- 07.pdf.¶ In bringing this case, Plaintiff asks this Court to substitute itself as the battlefield commander, and to second-guess the strategic, operational and tactical decisions made by this nation’s military chain of command in the campaign against Al Qaeda. Judicial decisionmaking is incompatible with military decisionmaking. Rather than produce rapid, confident, decisive actions, judicial resolution of this matter would produce deliberate and measured decisions which are the product of adversarial process, and which would reflect judicial considerations, not strategic or tactical ones.¶ Also, judicial involvement may induce risk aversion among commanders, who would worry about how their actions might be judged in courtrooms far removed from the battlefield, and thus hedge their battlefield decisions in order to protect themselves and their units from future judicial scrutiny. This is particularly true of Plaintiff’s prayer for relief, which calls upon the Court to enjoin the Government from using lethal force “except in circumstances in which they present concrete, specific, and imminent threats to life or physical safety, and there are no means other than lethal force that could reasonably be employed to neutralize the threats.” Such decisions about the use of force can often be made by soldiers in a split-second, on the basis of intuition and training. The specter of judicial involvement will affect the way soldiers and leaders approach these decisions, potentially complicating and slowing their decisions by injecting judicial considerations which have no place on the battlefield.

### Imminence Link

#### Judicial review would result in all targeted killings being ruled unconstitutional---courts would conclude they don’t satisfy the requirement of imminence for use of force in self-defense

Benjamin McKelvey 11, J.D., Vanderbilt University Law School, November 2011, “NOTE: Due Process Rights and the Targeted Killing of Suspected Terrorists: The Unconstitutional Scope of Executive Killing Power,” Vanderbilt Journal of Transnational Law, 44 Vand. J. Transnat'l L. 1353

In the alternative, and far more broadly, the DOJ argued that executive authority to conduct targeted killings is constitutionally committed power. n101 Under this interpretation, the President has the authority to defend the nation against imminent threats of attack. n102 This argument is not limited by statutory parameters or congressional authorization, such as that under the AUMF. n103 Rather, the duty to defend the nation is inherent in the President's constitutional powers and is not subject to judicial interference or review. n104

The DOJ is correct in arguing that the President is constitutionally empowered to use military force to protect the nation from imminent attack. n105 As the DOJ noted in its brief in response, the Supreme Court has held that the president has the authority to protect the nation from "imminent attack" and to decide the level of necessary force. n106 The same is true in the international context. Even though Yemen is not a warzone and al-Qaeda is not a state actor, international law accepts the position that countries may respond to specific, imminent threats of harm with lethal force. n107 [\*1367] Under these doctrines of domestic and international law, the use of lethal force against Aulaqi was valid if he presented a concrete, specific, and imminent threat of harm to the United States. n108

Therefore, the President was justified in using lethal force to protect the nation against Aulaqi, or any other American, if that individual presented a concrete threat that satisfied the "imminence" standard. n109 However, the judiciary may, as a matter of law, review the use of military force to ensure that it conforms with the limitations and conditions of statutory and constitional grants of authority. n110 In the context of targeted killing, a federal court could evaluate the targeted killing program to determine whether it satisfies the constitutional standard for the use of defensive force by the Executive Branch. Targeted killing, by its very name, suggests an entirely premeditated and offensive form of military force. n111 Moreover, the overview of the CIA's targeted killing program revealed a rigorous process involving an enormous amount of advance research, planning, and approval. n112 While the President has exclusive authority over determining whether a specific situation or individual presents an imminent threat to the nation, the judiciary has the authority to define "imminence" as a legal standard. n113 These [\*1368] are general concepts of law, not political questions, and they are subject to judicial review. n114

Under judicial review, a court would likely determine that targeted killing does not satisfy the imminence standard for the president's authority to use force in defense of the nation. Targeted killing is a premeditated assassination and the culmination of months of intelligence gathering, planning, and coordination. n115 "Imminence" would have no meaning as a standard if it were stretched to encompass such an elaborate and exhaustive process. n116 Similarly, the concept of "defensive" force is eviscerated and useless if it includes entirely premeditated and offensive forms of military action against a perceived threat. n117 Under judicial review, a court could easily and properly determine that targeted killing does not satisfy the imminence standard for the constitutional use of defensive force. n118

### Narrowing AUMF

#### Judicial review would result in limiting AUMF drone strikes to declared zones of armed conflict---that functionally bans drones

Milena Sterio 12, Associate Professor of Law, Cleveland-Marshall College of Law, Fall 2012, “Presidential Powers and Foreign Affairs: Rendition and Targeted Killings of Americans: The United States' Use of Drones in the War on Terror: The (Il)legality of Targeted Killings Under International Law,” Case Western Reserve Journal of International Law, 45 Case W. Res. J. Int'l L. 197

After the terrorist attacks of 9/11, President George W. Bush, in his capacity as Commander-in-Chief, authorized the use of drones against leaders of al-Qaeda forces, pursuant to Congress' Authorization for Use of Military Force (AUMF). n1 Pursuant to AUMF, drones could be utilized against al-Qaeda forces to target or to kill enemies. It has been reported that the United States possesses two types of drones: smaller ones, which predominantly carry out surveillance missions, and larger ones, which can carry hellfire missiles and have been used to conduct strikes and targeted killings. n2 Drone strikes have been carried out by both the military as well as the CIA. As Jane Mayer famously noted in her article:

The U.S. government runs two drone programs. The military's version, which is publicly acknowledged, operates in the recognized war zones of Afghanistan and Iraq, and targets enemies of U.S. troops stationed there. As such, it is an extension of conventional warfare. The C.I.A.'s program is aimed at terror suspects around the world, including in countries where U.S. troops are not based. n3

 [\*199]

Moreover, although the President had designated Afghanistan and its airspace as a combat zone, the United States has used drones in other areas of the world, such as Yemen, where al-Qaeda forces have been targeted and killed. n4 In fact, the U.S. approach for the use of drones is that members of al-Qaeda forces may be targeted anywhere in the world: that the battlefield follows those individuals who have been designated as enemies due to their affiliation with al-Qaeda. n5 While many in the international community have criticized the United States' expansive geographical use of drones against al-Qaeda forces, n6 officials in the Bush Administration have defended the drone program as consistent and conforming to international law. n7 President Obama has continued this approach and has expanded the use of drones in the war on terror. n8 Moreover, high-level officials in the Obama Administration have offered detailed legal justifications for the legality of the American drone program.

Harold Koh, State Department Legal Advisor, justified the use of drones at the American Society of International Law Annual Meeting on March 25, 2010, arguing "it is the considered view of this Administration . . . that U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war." n9 In his speech, Koh cited both domestic law (AUMF) and international law as proof that the United States is engaged in armed conflict with al-Qaeda, the Taliban, and "associated forces." n10 Targeted killings, according to Koh, are justified because they are performed in [\*200] accordance with the laws of war. n11 In other words, the United States conducts targeted strikes consistent with the well-known principles of distinction and proportionality to ensure that the targets are legitimate and collateral damage minimized. n12

Koh offered four reasons supporting the legality of targeted drone killings. First, enemy leaders are legitimate targets because they are belligerent members of an enemy group in a war with the United States. n13 Second, drones can constitute appropriate instruments for such missions, so long as their use conforms to the laws of war. n14 Third, enemy targets are selected through "robust" procedures; as such, they require no legal process and are not "unlawful extrajudicial" killings. n15 Finally, Koh argued that using drones to target "high level belligerent leaders" does not violate domestic law banning assassinations. n16

The Obama Administration has continued to use drones in Pakistan, as well as in Yemen. Increasingly, however, the American drone program has been run by the CIA. n17 Leon Panetta, the CIA Director, has praised the drone program stating that drones were "the only game in town." n18 On September 30, 2011, a CIA-operated drone targeted and killed an American citizen in Yemen, Anwar al-Awlaki. n19 Al-Awlaki had been accused of holding prominent roles within the ranks of al-Qaeda and had been placed on a hit list, authorized by President Obama. n20 His assassination marked the first time in history an American citizen had been targeted abroad without any judicial involvement or proceedings to determine guilt of any crime.

In a subsequent speech, Attorney General Eric Holder confirmed the Obama Administration's view on the legality of targeted killings, including killings of American citizens. On March 5, 2012, in a speech at Northwestern University, Holder claimed targeted killings of American citizens are legal if the targeted citizen is located abroad, a [\*201] senior operational leader of al-Qaeda or associated forces, actively engaged in planning to kill Americans, poses an imminent threat of violent attack against the United States (as determined by the U.S. government), and cannot be captured; such operations must be conducted in a manner consistent with applicable law of war principles. n21

Despite Koh's and Holder's justifications, many have questioned the legality of the American use of drones to perform targeted killings of al-Qaeda members and of U.S. citizens. Philip Alston, UN Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, has famously stated his concerns that drones "are being operated in a framework which may well violate international humanitarian law and international human rights law." n22 This article highlights some of the most relevant issues surrounding the (il)legality of targeted killings under the current approach of the Obama Administration. This article concludes that most targeted killings are illegal under international law; only a very small number of such killings, performed under carefully crafted circumstances, could potentially comply with the relevant rules of jus ad bellum and jus in bello, and only if one accepts the premise that the United States is engaged in an armed conflict against al-Qaeda. This article discusses the following issues related to the use of drones to perform targeted killings: the definition of the battlefield and the applicability of the law of armed conflict (Part II); the identity of targetable individuals and their status as combatants or civilians under international law (Part III); the legality of targeted killings under international humanitarian law (Part IV); and the location and status of drone operators (Part V).

II. What and Where is the Battlefield? Which Laws Apply?

Under the Bush Administration approach, the United States post 9/11 was engaged in a global war against terrorists. Under this expansive approach, the war had no geographic constraints, and the battlefield was of a global nature. n23 In other words, the war followed [\*202] the terrorist enemies, and wherever they were located was where the battlefield could be temporarily situated. According to the Bush Administration, as well as the U.S. Supreme Court case Hamdan v. Rumsfeld, the United States was at war against al-Qaeda and Taliban forces, and the applicable laws were the laws of war. n24 Thus, military force, including the use of drones, could be used if consistent with the laws of war.

Under the Obama Administration, the rhetoric has slightly changed: the United States is no longer engaged in a global war on terror but rather, in a war against al-Qaeda, the Taliban, and associated forces. n25 However, the Obama Administration, by conducting drone strikes in a variety of locations, including Pakistan and Yemen, has followed the Bush Administration view of the global battlefield. The Obama Administration believes, like the Bush Administration, that the laws of war apply to the use of drone strikes because the United States is engaged in an armed conflict. n26 Moreover, the Obama Administration has claimed drones can be used in countries that harbor terrorist enemies and are unwilling or unable to control territory where such enemies are located. n27 This rationale would likely exclude places like England and France from the possible definition and localization of the battlefield, but would purport to justify the use of drones in places like Pakistan and Yemen, where remote territories are hard to control and where central governments cannot claim to possess effective control. n28 [\*203]

The above described terminology ("global war on terror" and "war against al-Qaeda, the Taliban, and associated forces") is vastly important, as it designates the applicable legal framework surrounding targeted killings and drone strikes. If one accepts the premise that the United States is engaged in armed conflict against al-Qaeda terrorists, then one has to conclude that laws of war apply. n29 If laws of war apply, then the rules of jus ad bellum determine whether military force is utilized in a lawful way. In fact, laws of war permit targeted killings if two particular requirements of jus ad bellum are satisfied: the use of force is necessary and the use of force is proportionate.

First, a state resorting to force must prove its decision to resort to force was a result of an armed attack and necessary to respond to such attack. n30 It is possible to argue that al-Qaeda's campaign of terrorist attacks against the United States, including 9/11, corresponded to an armed attack. However, it is also possible to argue that "al Qaeda's campaign against the United States does not trigger the right of self-defensive force . . . because al Qaeda has not launched a full scale military offensive." n31 Another difficulty in this context is that al-Qaeda is not a state, and under traditional international law, only states could initiate armed attack against states, thus triggering the right to self-defense. n32 While some commentators have argued that the use of force in self-defense against a non-state actor should be [\*204] permissible, "in an era where non-state groups project military-scale power," n33 this view remains controversial. n34

Second, a state resorting to the use of force must prove its use of force was proportionate to the military campaign's objective. n35 The proportionality test of jus ad bellum should "be applied contextually, to determine whether the overall goal of a use of force . . . is a proportionate objective." n36 Because the CIA operates the drone program in Pakistan in secrecy, it is impossible to determine conclusively whether the program meets the proportionality requirement of jus ad bellum. It is possible to argue the resort to targeted killings through the use of drones is at least sometimes necessary and proportionate (for example, when a U.S. military commander possesses information that a high-value al-Qaeda operative, engaged in planning armed attacks against Americans, is located in a specific location which is relatively easily reachable via drones, and the commander decides that neutralization of the al-Qaeda target is necessary to prevent attacks against Americans). It is probable that many drone strikes do not meet the requirements of jus ad bellum, but it is nonetheless difficult to conclude, under this approach, that the entire drone program is per se illegal. Should the U.S. government--specifically the CIA--release more facts regarding the drone program, it may become plausible to assess the lawfulness of this type of force through the jus ad bellum prism.

If, however, one rejects the conclusion that the United States is engaged in armed conflict, then the legality of the entire drone program becomes questionable. One could logically conclude the United States is not fighting a true war, but chasing terrorists. Under this view, the law of armed conflict would no longer apply, and the United States could use force against such terrorists only under a law enforcement paradigm--only when the use of force is absolutely necessary. Moreover, if the laws of war do not apply, then international human rights law dictates that targeted killings are legal only if a threat imminent and the reaction necessary, because under human rights law, "it is never permissible for killing to be the sole [\*205] objective of an operation." n37 "A killing is only legal to prevent a concrete and imminent threat to life, and, additionally, if there is no other non-lethal means of preventing that threat to life." n38 The International Covenant on Civil and Political Rights (ICCPR) prohibits "arbitrary" killing, as well as punitive or deterrent killings of terrorists. n39 The very nature of the American drone program, where targeted killings are utilized to neutralize al-Qaeda operatives, even though such killings are not absolutely necessary, is contrary to international human rights law. Under this paradigm, one must conclude that the drone program is illegal.

### Deference UQ

#### We overwhelmingly control uniqueness---all federal courts are either siding with the executive’s terror policies through narrow rulings or declining to even hear the cases---past rulings are being distinguished

Jonathan L. Entin 12, Associate Dean for Academic Affairs (School of Law), David L. Brennan Professor of Law, and Professor of Political Science, Case Western Reserve University. War Powers, Foreign Affairs, and the Courts: Some Institutional Considerations, 45 Case W. Res. J. Int'l L. 443

Although these procedural and jurisdictional barriers to judicial review can be overcome, those who seek to limit what they regard as executive excess in military and foreign affairs should not count on the judiciary to serve as a consistent ally. The Supreme Court has shown substantial deference to the president in national security cases. Even when the Court has rejected the executive's position, it generally has done so on relatively narrow grounds.¶ Consider the Espionage Act cases that arose during World War I. Schenck v. United States, n63 which is best known for Justice Holmes's [\*452] announcement of the clear and present danger test, upheld a conviction for obstructing military recruitment based on the defendant's having mailed a leaflet criticizing the military draft although there was no evidence that anyone had refused to submit to induction as a result. Justice Holmes almost offhandedly observed that "the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out." n64 The circumstances in which the speech took place affected the scope of First Amendment protection: "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right." n65 A week later, without mentioning the clear and present danger test, the Court upheld the conviction of the publisher of a German-language newspaper for undermining the war effort n66 and of Eugene Debs for a speech denouncing the war. n67 Early in the following term, Justice Holmes refined his thinking about clear and present danger while introducing the marketplace theory of the First Amendment in Abrams v. United States, n68 but only Justice Brandeis agreed with his position. n69 The majority, however, summarily rejected the First Amendment defense on the basis of Holmes's opinions for the Court in the earlier cases. n70¶ Similarly, the Supreme Court rejected challenges to the government's war programs during World War II. For example, the Court rebuffed a challenge to the use of military commissions to try German saboteurs. n71 Congress had authorized the use of military tribunals in such cases, and the president had relied on that authorization in directing that the defendants be kept out of civilian courts. n72 In addition, the Court upheld the validity of the Japanese internment program. n73 Of course, the Court did limit the scope of the [\*453] program by holding that it did not apply to "concededly loyal" citizens. n74 But it took four decades for the judiciary to conclude that some of the convictions that the Supreme Court had upheld during wartime should be vacated. n75 Congress eventually passed legislation apologizing for the treatment of Japanese Americans and authorizing belated compensation to internees. n76¶ The Court never directly addressed the legality of the Vietnam War. The Pentagon Papers case, for example, did not address how the nation became militarily involved in Southeast Asia, only whether the government could prevent the publication of a Defense Department study of U.S. engagement in that region. n77 The lawfulness of orders to train military personnel bound for Vietnam gave rise to Parker v. Levy, n78 but the central issue in that case was the constitutionality of the provisions of the Uniform Code of Military Justice that were the basis of the court-martial of the Army physician who refused to train medics who would be sent to the war zone. n79 The few lower courts that addressed the merits of challenges to the legality of the Vietnam War consistently rejected those challenges. n80¶ The picture in the post-2001 era is less clear. In three different cases the Supreme Court has rejected the executive branch's position, but all of those rulings were narrow in scope. For example, Hamdi v. Rumsfeld n81 held that a U.S. citizen held as an enemy combatant must be given a meaningful opportunity to have a neutral decision-maker determine the factual basis for his detention. There was no majority opinion, however, so the implications of the ruling were ambiguous to say the least. Justice O'Connor's plurality opinion for four members of the Court concluded that Congress had authorized the president to detain enemy combatants by passing the Authorization for Use of Military Force n82 and that the AUMF satisfied the statutory requirement of congressional authorization for the detention of U.S. [\*454] citizens. n83 Justice Souter, joined by Justice Ginsburg, thought that the AUMF had not in fact authorized the detention of American citizens as required by the statute, n84 which suggested that Hamdi should be released. But the Court would have been deadlocked as to the remedy had he adhered to his view of how to proceed. This was because Justices Scalia and Stevens also believed that Hamdi's detention was unlawful and that he should be released on habeas corpus, n85 whereas Justice Thomas thought that the executive branch had acted within its authority and therefore would have denied relief. n86 This alignment left four justices in favor of a remand for more formal proceedings, four other justices in favor of releasing Hamdi, and one justice supporting the government's detention of Hamdi with no need for a more elaborate hearing. To avoid a deadlock, therefore, Justice Souter reluctantly joined the plurality's remand order. n87¶ Hamdi was atypical because that case involved a U.S. citizen who was detained. The vast majority of detainees have been foreign nationals. In Hamdan v. Rumsfeld, n88 the Supreme Court ruled that the military commissions that the executive branch had established in the wake of the September 11 attacks had not been authorized by Congress and therefore could not be used to try detainees. n89 A concurring opinion made clear that the president could seek authorization from Congress to use the type of military commissions that had been established unilaterally in this case. n90¶ Congress responded to that suggestion by enacting the Military Commissions Act of 2006, n91 which sought to endorse the executive's detainee policies and to restrict judicial review of detainee cases. In Boumediene v. Bush, n92 the Supreme Court again rejected the government's position. First, the statute did not suspend the writ of [\*455] habeas corpus. n93 Second, the statutory procedures for hearing cases involving detainees were constitutionally inadequate. n94 At the same time, the Court emphasized that the judiciary should afford some deference to the executive

 branch in dealing with the dangers of terrorism n95 and should respect the congressional decision to consolidate judicial review of detainee cases in the District of Columbia Circuit. n96¶ Detainees who have litigated in the lower federal courts in the District of Columbia have not found a sympathetic forum. The U.S. Court of Appeals for the D.C. Circuit has not upheld a single district court ruling that granted any sort of relief to detainees, and the Supreme Court has denied certiorari in every post-Boumediene detainee case in which review was sought. n97 In only one case involving a detainee has the D.C. Circuit granted relief, and that case came up from a military commission following procedural changes adopted in the wake of Boumediene. n98 About a month after this symposium took place, in Hamdan v. United States n99 the court overturned a conviction for providing material support for terrorism. The defendant was the same person who successfully challenged the original military commissions in Hamdan v. Rumsfeld. n100 This very recent ruling emphasized that the statute under which he was prosecuted did not apply to offenses committed before its enactment. n101 It remains to be seen how broadly the decision will apply. [\*456] ¶ Meanwhile, other challenges to post-2001 terrorism policies also have failed, and the Supreme Court has declined to review those rulings as well. For example, the lower courts have rebuffed claims asserted by foreign nationals who were subject to extraordinary rendition. In Arar v. Ashcroft, n102 the U.S. Court of Appeals for the Second Circuit affirmed the dismissal of constitutional and statutory challenges brought by a plaintiff holding dual citizenship in Canada and the United States. n103 And in Mohamed v. Jeppesen Dataplan, Inc., n104 the U.S. Court of Appeals for the Ninth Circuit held that the state-secrets privilege barred a separate challenge to extraordinary rendition brought by citizens of Egypt, Morocco, Ethiopia, Iraq, and Yemen. n105 Unlike Arar, in which the defendants were federal officials, n106 this case was filed against a private corporation that allegedly assisted in transporting the plaintiffs to overseas locations where they were subjected to torture. n107 Although at least four judges on the en banc courts dissented from both rulings, n108 the Supreme Court declined to review either case. n109

## Allies Adv

### XT Intel Sharing I/E

#### EU cooperation on terrorism intel high and inevitable – in their self interest

Kristin Archick, European affairs specialist @ CRS, 9-4-2013, “U.S.-EU Cooperation Against Terrorism,” Congressional Research Service, <http://www.fas.org/sgp/crs/row/RS22030.pdf>

As part of its drive to bolster its counterterrorism capabilities, the EU has also made promoting law enforcement and intelligence cooperation with the United States a top priority. Washington has largely welcomed these efforts, recognizing that they may help root out terrorist cells both in Europe and elsewhere, and prevent future attacks against the United States or its interests abroad. U.S.-EU cooperation against terrorism has led to a new dynamic in U.S.-EU relations by fostering dialogue on law enforcement and homeland security issues previously reserved for bilateral discussions. Contacts between U.S. and EU officials on police, judicial, and border control policy matters have increased substantially since 2001. A number of new U.S.-EU agreements have also been reached; these include information-sharing arrangements between the United States and EU police and judicial bodies, two new U.S.-EU treaties on extradition and mutual legal assistance, and accords on container security and airline passenger data. In addition, the United States and the EU have been working together to curb terrorist financing and to strengthen transport security.

### No Drone Opposition---Europe/NATO

#### No European or NATO drone opposition---recent shifts

Elsa Rassbach 11-8, Drones Campaign, 11/8/13, “How Europeans Are Opposing Drone and Robot Warfare: An Overview of the Anti-Drone Movement in Europe,” http://truth-out.org/news/item/19904-how-europeans-are-opposing-drone-and-robot-warfare-an-overview-of-the-anti-drone-movement-in-europe

So far only three countries are known to have used armed combat drones to carry out attacks: Israel, the US, and the UK. But this could soon change.

Analysts see demand for military UAVs (unmanned aerial vehicles, also known as drones) quadrupling over the next decade. Global spending on drone technology is expected to jump from an estimated $6.6 billion this year to $11.4 billion in 2022. Israeli weapons manufacturers have long been actively marketing military drones to other countries, and in the fall of 2012, the US announced that as many as 66 countries would be eligible to buy US drones under new Defense Department guidelines. However, the US Congress and State Department have final approval of drone exports on a case-by- case basis and have denied the request of NATO-partner Turkey to purchase Predator drones because of ongoing tensions between Turkey and Israel. Soon, however, countries that cannot obtain US or Israeli drones may be able to purchase them from weapons manufacturers in other countries such as China and South Africa.

European weapons manufacturers also seek a share of the drone market, not only for European military use, but also for export to other countries. Though it will likely be many years before a European-made combat drone will be operable, defense departments of several European countries are seeking to acquire for their arsenals US or Israeli combat drones capable of carrying weapons for targeted killing.

Italy requested US permission to weaponize the Italian fleet of six US Reaper two years ago. In May 2012, the Obama administration announced that it would soon notify the US Congress of plans to sell Italy "weaponization" kits, a move that, according to the Wall Street Journal, "could open the door for sales of advanced hunter-killer drone technology to other allies." But so far there have been no reports that approval to Italy has yet been granted.

In May 2013, France announced the purchase two unarmed US Reaper drones for the intervention in Mali, and the drones could later be armed. Holland is already using drones extensively for domestic police surveillance and is reportedly considering purchase of US Reaper drones for military purposes. And the German Bundeswehr, which some years ago leased three Israeli Heron drones for surveillance in Afghanistan, is now negotiating with the US and Israel to acquire armed combat drones.

Europe, Targeted Killing, and the International Rule of Law

By offering combat drones to European allies, the US seeks not only military "burden-sharing" in Afghanistan and elsewhere, but also undoubtedly hopes to gain more international acceptance and legitimacy for drone warfare. European drone opponents hope to instead bring European governments solidly behind international efforts to ban weaponized combat drones and to stop the threat of drone warfare to the international rule of law.

### Coop Inevitable/No Impact to Backlash---Drones

#### Allies will inevitably come around on US drone doctrine questions---they know they’re the future of war and won’t want to be left out

Ulrike Esther Franke 13, Ph.D. Candidate, International Relations, University of Oxford, April 2013, “Just the new hot thing? The diffusion of UAV technology worldwide and its popularity among democratic states,” <http://files.isanet.org/ConferenceArchive/4269932e782d47248d5269ad381ca6c7.pdf>

As shown in the first part of this paper, democracies seem to be particularly interested in drone technology. Niklas Schoerning argues that especially western democracies are fuelling a global UAV arms race.56 I argue that in addition to the aforementioned arguments, there are three main reasons why democracies and especially western democracies are particularly interested in the unmanned technology.

Prestige (among partners): Not only autocracies have an interest in depicting their armed forces as modern and powerful. Democracies use UAVs to show off as well – however, their aim is rather to portray themselves as capable and reliable coalition partners for other western democracies and especially with an eye on the United States. French General Patrick Charaix points out: “If [France] wants to remain powerful within a coalition, we need to bring an unmanned capability to the table. Indeed, those countries that count have this military means which contributes on the one hand to the success of a mission and on the other hand increases the power and influence of the country.57 German defence minister Thomas de Maizière voiced a similar opinion in a recent speech on UAVs in the Bundestag: “We cannot say ‘we’ll keep the stagecoach’ while all others are developing the railway”.58 UAVs, according to this interpretation, are the irresistible future – those who are not part of it will lose out. An important aspect of this desire not to lose out is interoperability.59 Western states rarely go to war alone anymore. Today’s western wars are fought by coalitions, namely within NATO. This has important consequences for the equipment that is needed: the members of the coalition need to use the same kind of material in order to be effective and powerful.60 As NATO is dominated by the US and since the US is the most capable user of UAVs, this has important repercussions on the other NATO members. For Frans Osinga, NATO is “an obvious and important avenue of infusion of US military […] technology”.61

### NATO Useless

#### Can’t project power effectively

Kupchan5/10/12Charles,Whitney Shepardson Senior Fellow Council on Foreign Relations & Professor of International Relations Georgetown University, “NATO: Chicago and Beyond” http://www.foreign.senate.gov/imo/media/doc/Charles\_Kupchan\_Testimony1.pdf

Although it is impossible to predict where the next NATO mission might take place, the alliance will surely continue to play a direct role in addressing security challenges well beyond its borders. At the same time, the idea of a “global NATO” is a bridge too far. Trying to turn the alliance into an all-purpose vehicle of choice for military operations around the world would likely lead to its demise, not revitalization. In many parts of the world, a NATO-led mission might lack legitimacy among local parties, compromising its chances of success. Efforts to turn NATO into a global alliance would also saddle it with unsustainable burdens and insurmountable political divides.

#### Military isn’t sufficient to de-escalate conflict

Bandow 5/20/12 Doug, former columnist with Copley News Service and a senior fellow at the Cato Institute, Forbes.com, “NATO as NERO: Alliance postures while Europe burns” http://www.forbes.com/sites/dougbandow/2012/05/20/nato-as-nero-alliance-postures-while-europe-burns/

Even during the Cold War the Europeans would promise to increase military spending, only to welsh when budgets got tight. Once the threat from the Soviet Union dissipated so did the continent’s heretofore modest interest in self-defense. Before he retired as Defense Secretary, Robert Gates complained that European military budgets “have been chronically starved for adequate funding for a long time, with the shortfalls compounding themselves each year.” The consequences have been grave. According to the group Notre Europe, the continent suffers “some alarming shortfalls in the areas of strategic transportation, communication, intelligence, logistics and satellites, requiring the implementation of costly reforms in terms of resources.” Despite having 1.8 million men under arms, at most 100,000 of them “are equipped and sufficiently trained to be able to be deployed in crisis theaters.” Successive crises have driven down European military outlays. The [International Institute for Strategic Studies](http://www.iiss.org) (IISS) has detailed cuts in Austria, France, Germany, Italy, Poland, Spain, and others. Even Great Britain, which traditionally maintained the most serious European military with the greatest expeditionary capabilities, is dramatically cutting outlays and capabilities. James Russell of the Naval Postgraduate School complained: “The European countries have made a strategic-level to disarm essentially.”

## Imminence Adv

### No Blowback

#### No public backlash in Pakistan or Yemen---just as many people love them as hate them

Max Boot 13, the Jeane J. Kirkpatrick Senior Fellow in National Security Studies at the Council on Foreign Relations, 2/6/13, “Obama Drone Memo is a Careful, Responsible Document,” http://www.commentarymagazine.com/2013/02/06/obama-drone-memo-is-a-careful-responsible-document/

Drone strikes are by no means risk free, the biggest risk being that by killing innocent civilians they will cause a backlash and thereby create more enemies for the U.S. than they eliminate. There is no doubt that some of these strikes have killed the wrong people–as the New York Times account highlights in one incident in Yemen. There is also little doubt, moreover, that drone strikes are no substitute for a comprehensive counterinsurgency and state-building policy designed to permanently safeguard vulnerable countries such as Pakistan, Yemen, Somalia, Libya, and Mali from the incursions of radical jihadists. But drone strikes have been effective in disrupting al-Qaeda operations and they have been conducted with less collateral damage and more precision than in the past.

It is hard to assess what impact they have had on public opinion in countries such as Yemen and Pakistan, but there is at least as much evidence that these strikes are applauded by locals who are terrorized by al-Qaeda thugs as there is evidence that the strikes are reviled for killing fellow clansmen. As the Times notes: “Although most Yemenis are reluctant to admit it publicly, there does appear to be widespread support for the American drone strikes that hit substantial Qaeda figures like Mr. Shihri, a Saudi and the affiliate’s deputy leader, who died in January of wounds received in a drone strike late last year.”

#### Zero data supports a causal link between drones and anti-Americanism---empirically reducing drone strikes doesn’t reduce resentment

Amitai Etzioni 13, professor of international relations at George Washington University, March/April 2013, “The Great Drone Debate,” Military Review, <http://usacac.army.mil/CAC2/MilitaryReview/Archives/English/MilitaryReview_20130430_art004.pdf>

Critics argue that drone strikes alienate the population and thus help Al-Qaeda’s recruitment, generating more terrorists than are killed. These statements, which may at ﬁrst seem “obviously true,” are not supported by data. In fact, the resentment of the United States has many sources, and this resentment was high before drones were used and is high in several nations in the Middle East where drones were never used.

For example, a comparison of drone strike frequency in Pakistan and anti-American sentiment in the country reveals little correlation.

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From 2004 to 2007, there were few drone strikes in that country (only 10 over the four year span).53 However, starting in 2008 the United States carried out a total of 36 drone strikes, with this number increasing in subsequent years to 54 strikes and 122 strikes, respectively.54 From this peak in 2010, the number of drone strikes per year began to decline with 73 strikes in 2011 and 48 in 2012. 55 In the same years, data from the Pew Global Attitudes Project reveals that the percentage of Pakistanis who held an “unfavorable” view of the United States remained relatively steady from 2008 to 2010, beginning to increase only after the United States scaled back the number of drone strikes starting in 2011.56 Moreover anti American sentiments were as high or higher in the same years in Jordan, Egypt, Turkey, and the Palestinian territories.57

Thus, in 2007, 2009, and 2010, the United States’ unfavorability in Pakistan held steady at 68 percent (dropping brieﬂy to 63 percent in 2008), but then began to increase, rising to 73 percent in 2011 and 80 percent in 2012—even as the number of drone strikes was dropping signiﬁcantly.58 At the same time, anti-American sentiment was on the rise in countries where no drone strikes were taking place. In Jordan, for example, U.S. unfavorability rose from 78 percent in 2007 to 86 percent in 2012 while Egypt saw a slight rise from 78 percent to 79 percent over the same period.59 Notably, the percentage of respondents reporting an “unfavorable” view of the United States in these countries is as high, or higher, than in drone-targeted Pakistan.

### Defense

#### No Indian intervention

Sunil Dasgupta '13 Ph.D. in political science and the director of UMBC's Political Science Program and a senior fellow at Brookings, 2/25/13, "How will India respond to civil war in Pakistan," East Asia Forum, http://www.eastasiaforum.org/2013/02/25/how-will-india-respond-to-civil-war-in-pakistan/

In 2013, prospects of another [civil war in Pakistan](http://tribune.com.pk/story/487017/the-2013-jitters/) — this time one that pits radical Islamists against the secular but authoritarian military — have led once again to questions about what India would do. What would trigger Indian intervention, and who would India support?¶ **In the context of a civil war between Islamists and the army in Pakistan**, **it is hard to imagine Pakistani refugees streaming into India and triggering intervention as the Bengalis did in 1971**. **Muslim Pakistanis do not see India as a refuge**,

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and Taliban fighters are likely to seek refuge in Afghanistan, especially if the United States leaves the region.¶ A more selective spillover, such as the increased threat of terrorism, is possible. **But a civil war inside Pakistan is more likely to** [**train radical attention on Pakistan itself**](http://www.eastasiaforum.org/2012/12/12/extremism-in-pakistan-the-more-things-change/) **than on India.**¶In fact, the real problem for India would be in Afghanistan. India has already staked a claim in the Afghan endgame, so if Islamists seek an alliance with an Afghan government favoured by India, New Delhi’s best option might be to side covertly with the Islamists against the Pakistani army. But this is unlikely, because for India to actually side with Islamists, US policy in Pakistan and Afghanistan would have to change dramatically.¶ Conversely, for India to back the Pakistani army over the Islamists, Indian leaders would need to see a full and verifiable settlement of all bilateral disputes with India, including Kashmir, and/or the imminent fall of Pakistani nuclear weapons into the hands of Islamists.¶ In the first case, [a Kashmir resolution is not only unrealistic](http://www.eastasiaforum.org/2012/09/14/india-and-pakistan-a-decade-since-operation-parakram/), but also likely to weaken the legitimacy of the Pakistani army itself, jeopardising the army’s prospects in the civil war. In the second case, Indian leaders would need to have independent (non-US/UK) intelligence, or alternatively see US action (such as a military raid on Pakistani nuclear facilities) that convinces them that nuclear weapons are about to pass into terrorist hands. Neither of those triggers is likely to exist in the near future.¶ As it is, India and Pakistan have gone down to the nuclear edge four times — in 1986, 1990, 1999 and 2001–02. In each case, India responded in a manner that did not escalate the conflict. Any incursion into Pakistan was extremely limited. An Indian intervention in a civil war in Pakistan would be subject to the same limitations — at least so long as the Pakistani army maintains its integrity.¶ Given the new US–India ties, the most important factor in determining the possibility and nature of Indian intervention in a possible Pakistani civil war is Washington. If the United States is able to get Kabul and Islamabad to work together against the Taliban, as it is trying to do now, then India is likely to continue its current policy or try to preserve some influence in Afghanistan, especially working with elements of the Northern Alliance.¶ India and Afghanistan already have a strategic partnership agreement in place that creates the framework for their bilateral relationship to grow, but the degree of actual cooperation will depend on how Pakistan and the Taliban react. If Indian interests in Afghanistan come under attack, New Delhi might have to pull back. The Indian government has been quite clear about not sending troops to Afghanistan.¶ If the United States shifts its policy to where it has to choose Kabul over Islamabad, in effect reviving the demand for an independent Pashtunistan, India is likely to be much more supportive of US and Afghan goals. The policy shift, however, carries the risk of a full-fledged proxy war with Pakistan in Afghanistan, but should not involve the prospect of a direct Indian intervention in Pakistan itself.¶ India is not likely to initiate an intervention that causes the Pakistani state to fail.

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## Transparency CP

### Defense

#### No accidental war - hundreds of empirics prove

**Quinlan 05**- former senior fellow at the International Institute of Strategic Studies

(Sir Michael, “Thinking About Nuclear Weapons,” <http://www.rusi.org/downloads/assets/WHP41_QUINLAN.pdf>, first published in 1997, reedited in 2005,)

Similar considerations apply to the hypothesis of war being mistakenly triggered by false alarm or misunderstanding. Critics again point to the fact, as it is understood, of numerous occasions when initial steps in alert sequences for US nuclear forces were embarked upon, or at least called for, by indicators mistaken or misinterpreted. In none of these instances, it is accepted, did matters get at all near to nuclear launch—more good fortune, the critics have suggested. But the rival and more logical inference from perhaps hundreds of events stretching over fifty years of experience presents itself once more: that the probability of initial misinterpretation leading far towards mistaken launch is hugely remote. Precisely because any nuclear-weapon possessor recognises the vast gravity of any launch, decision sequences have many steps, and human decision is repeatedly interposed as well as capping the sequences. (And even at the height of the Cold War no Western nuclear power had a launch-on-warning policy—that is, an intention to initiate nuclear retaliation on perceived evidence of impending rather than provenly-actual attack.) To convey that because an early step was prompted we somehow came close to accidental nuclear war is wild hyperbole. History anyway scarcely offers ready examples of major war started by accident (miscalculation is another matter, not at issue here) even before the nuclear revolution imposed an order-of-magnitude increase in caution.

### Offense

#### Times Tribune and cross-x proves they open the floodgates for enviro litigation on the navy

#### That wrecks readiness---turns 1AC heg impact

Major Charles Gartland 12, J.D., United States Air Force judge advocate currently serving as the Environmental Liaison Officer for the Air Force Materiel Command, “AT WAR AND PEACE WITH THE NATIONAL ENVIRONMENTAL POLICY ACT: WHEN POLITICAL QUESTIONS AND THE ENVIRONMENT COLLIDE,” 68 A.F. L. Rev. 27

The preceding cases illustrate, at best, inconsistent application of injunction analyses and the political question doctrine. n375 At worst they illustrate no injunction analysis and total disregard of the political question doctrine. n376 A lasting solution to this problem calls for more than merely advocating that the policy preference [\*67] that happened to be imposed by five Justices in Winter be universally applied. Over forty years of NEPA case law shows that when it collides with national defense, not all judges will agree with how the scales tipped in Winter; indeed, many judges will not agree that the factual scenario in Winter presents a Constitutional issue at all. n377 Consequently, the most manageable solution is one that removes the grounds for a disagreement over all the foregoing issues: amending NEPA to create a national defense exception. The remainder of this article will further expound on the necessity of this solution, the form this solution might take, and finally show that it is consistent with both the Constitutionally prescribed role for national defense and the statutorily prescribed role for NEPA.¶ A. The Basis for a National Defense Exemption¶ Entertaining political questions in the courtroom has consequences, both legal and practical. The argument for a national defense exemption to NEPA can be reduced to three bases: (1) the impracticality of hearing national defense political questions in the courtroom; (2) the real-world impact that results; and (3) that the very nature of injunction law causes the first two bases to blend in a manner that is particularly virulent to national defense.¶ 1. Policy and Politics in the Courtroom¶ Trident, Weinberger v. Wisconsin, and Callaway amply illustrate the issues that trial courts are unequipped to resolve, as tactical, strategic, and foreign policy elements figure into national defense undertakings. n378 One District Court judge hearing a NEPA case with foreign policy implications remarked on the oddity of the testimony given in his courtroom, more akin to a "legislative hearing" than a trial. n379 As noted in McQueary v. Laird, national security does not blend well with evidentiary hearings. n380¶ 2. Real-World Adverse Impact to the National Defense¶ The consequences of judicial intervention in national defense can be more than academic: Army units n381 and naval fleets not training adequately or at all, n382 [\*68] nuclear tests jeopardized, n383 and diplomatic missions put at risk. n384 Winter is but the most recent and highest profile example of unwieldy judicial process outcomes: uniformed personnel devoted to being lookouts with binoculars and adjusting sonar decibel levels as whales approach and disperse--in the middle of a warfighting exercise. n385¶ 3. The Nature of Injunction Law Forces Judicial Policy-Making¶ The law surrounding injunctions guarantees unsatisfactory results because the third and fourth prongs of the injunction test in essence require the courts to make a policy choice that, in the national defense context at least, involves the constitutional separation of powers. Some courts have simply avoided the dilemma by ignoring the portion of the injunction test corresponding to the agency's equity and the public interest in national defense, n386 while others have plainly considered the former to be more important. n387 Either way, the NEPA injunction often decides a question that the Constitution and statute intended to be handled differently.

#### Civil suits result in the death by a thousand cuts of the military

Aaron Riggio 09, J.D. Candidate, Seattle University School of Law, Fall 2009, “Whale Watching from 200 Feet Below: A New Approach to Resolving Operational Encroachment Issues,” 33 Seattle Univ. L. R. 229

From the military's perspective, there are many problems associated with the way exemptions are currently implemented under the previously discussed Acts. n38 The most obvious problem with the current [\*235] exemption framework is that it generally requires intervention from the highest level of the Executive Branch. n39 This problem is closely related to the next. The current system is suited to one-time, isolated events that are irreconcilable with environmental laws. When such isolated events arise, it may be appropriate to require the President to intervene and balance the importance of the military mission with the potential environmental impact. However, operational encroachment rarely involves a one-time, isolated event; it is far more likely to occur with regular and recurring training events. In recognition of the unsuitability of current exemptions to one-time scenarios, the DOD has commented that, while being "a valuable hedge against unexpected future emergencies, [the current statutory scheme of exemptions] cannot provide the legal basis for the Nation's everyday military readiness activities . . . ." n40 The result is "death by a thousand cuts" from "having to employ these exemptions on a case-by-case basis." n41¶ Other military concerns are notable, including the potential for release of classified information due to exemption reporting requirements; n42 so-called "negative training"; n43 increased wear and tear when equipment is shipped to locations suitable for an exercise; n44 and the significant financial costs involved in attempting to comply with exemption requirements. n45

### Offense 2

#### Trainings also key to broader naval power

US Navy 8, “U.S. Navy Mine Familiarizer,” <http://www.public.navy.mil/surfor/comomag/Pages/conceptofoperations.aspx#.UQ_YCh19Iw8>

The Navy is seriously committed to maintaining a potent sea mining capability. Mining can beused as a strategic deterrent and/or as a force multiplierin this era during which the Navy faces a continued reduction in platform numbers. The unique attributes of naval mines make them one of the most effective forms of naval warfare across the spectrum of conflict. Even the suggestion of the presence of mines in the water has deterred or delayed waterborne movement until the threat could be effectively assessed and neutralized. In the early stages of future crises, mines positioned either overtly or clandestinely, not necessarily in large numbers, could be a strategic tool in convincing an adversary to reassess its intentions, contributing to the establishment of battlespace dominance. Therefore, mining can be effective across many different levels of conflict, either as a stand‑alone option or as one element in a broader response. Our allies and adversaries recognize that mines are relatively low-cost weapons that can level the playing field between otherwise unequal opponents. To guarantee the effectiveness of our future forces, we must develop and maintain an inventory of modern weapons, integrate mining into the overall planning to shape the battlespace, and ensure the availability of a variety of delivery platforms in sufficient numbers to execute approved plans. Maintenance of a robust mining capability also provides a basic understanding of state-of-the-art sea mine technology that allows us to optimize development of an effective countermeasures force. Our Mining Concept of Operations (CONOPS) describes the top-level operational roles of mining as a key component of our overall naval operational structure. There are three stages of mining operations within which all aspects of mining are grouped. They are the planning, delivery, and campaign stages. Planning The planning stage of the mining CONOPS includes the following basic activities: · Determining mission requirements and maintaining mine assets · Identifying and planning priority minefields · Developing, acquiring, and prepositioning mining assets · Exercising and training in the mining area · Implementation of global mining alliances Requisite to the determination of mission requirements is threat assessment, collection of environmental and target data, and the development of algorithms for mine sensors. Effective minefield modeling is particularly important in this regard. The development and acquisition of mines is an extremely important component of the planning phase, as is maintenance of a modern mine stockpile. Rigorous training and mining exercises are essential to ensure our readiness to conduct mining operations.

#### Global great power war

Conway et al 7 James T., General, U.S. Marine Corps, Gary Roughead, Admiral, U.S. Navy, Thad W. Allen, Admiral, U.S. Coast Guard, “A Cooperative Strategy for 21st Century Seapower,” October, http://www.navy.mil/maritime/MaritimeStrategy.pdf

This strategy reaffirms the use of seapower to influence actions and activities at sea and ashore. The expeditionary character and versatility of maritime forces provide the U.S. the **asymmetric advantage** of enlarging or contracting its military footprint in areas where access is denied or limited. Permanent or prolonged basing of our military forces overseas often has unintended economic, social or political repercussions. The sea is a vast maneuver space, where the presence of maritime forces can be adjusted as conditions dictate to enable **flexible approaches** to escalation, **de-escalation** **and deterrence of conflicts**. The speed, flexibility, agility and scalability of maritime forces provide joint or combined force commanders a range of options for responding to crises. Additionally, integrated maritime operations, either within formal alliance structures (such as the North Atlantic Treaty Organization) or more informal arrangements (such as the Global Maritime Partnership initiative), send powerful messages to would-be aggressors that we will act with others to ensure collective security and prosperity. United States seapower will be globally postured to secure our homeland and citizens from direct attack and to advance our interests around the world. As our security and prosperity are inextricably linked with those of others, U.S. maritime forces will be deployed to protect and sustain the peaceful global system comprised of interdependent networks of trade, finance, information, law, people and governance. We will employ the global reach, persistent presence, and operational flexibility inherent in U.S. seapower to accomplish six key tasks, or strategic imperatives. Where tensions are high or where we wish to demonstrate to our friends and allies our commitment to security and stability, U.S. maritime forces will be characterized by regionally concentrated, forward-deployed task forces with the combat power to limit regional conflict, deter major power war, and should deterrence fail, win our Nation’s wars as part of a joint or combined campaign. In addition, persistent, mission-tailored maritime forces will be globally distributed in order to contribute to homeland defense-in-depth, foster and sustain cooperative relationships with an expanding set of international partners, and prevent or mitigate disruptions and crises. Credible combat power will be continuously postured in the Western Pacific and the Arabian Gulf/Indian Ocean to protect our vital interests, assure our friends and allies of our continuing commitment to regional security, and deter and dissuade potential adversaries and peer competitors. This combat power can be selectively and **rapidly repositioned to meet contingencies** that may arise elsewhere. These forces will be sized and postured to fulfill the following strategic imperatives: Limit regional conflict with forward deployed, decisive maritime power. Today regional conflict has ramifications far beyond the area of conflict. Humanitarian crises, violence spreading across borders, pandemics, and the interruption of vital resources are all possible when regional crises erupt. While this strategy advocates a wide dispersal of networked maritime forces, we cannot be everywhere, and we cannot act to mitigate all regional conflict. Where conflict threatens the global system and our national interests, maritime forces will be ready to respond alongside other elements of national and multi-national power, to give political leaders a range of options for deterrence, escalation and de-escalation. Maritime forces that are persistently present and combat-ready provide the Nation’s primary forcible entry option in an era of declining access, even as they provide the means for this Nation to respond quickly to other crises. Whether over the horizon or powerfully arrayed in plain sight, maritime forces can deter the ambitions of regional aggressors, assure friends and allies, gain and maintain access, and protect our citizens while working to sustain the global order. **Critical to this** notion **is the maintenance of a powerful fleet**—ships, aircraft, Marine forces, and shore-based fleet activities—capable of selectively controlling the seas, projecting power ashore, and protecting friendly forces and civilian populations from attack. Deter major power war. No other disruption is as potentially disastrous to **global stability** as **war among major powers**. Maintenance and extension of this Nation’s comparative seapower advantage is a **key component** of deterring major power war. While war with another great power strikes many as improbable, the near-certainty of its ruinous effects demands that it be actively deterred using all elements of national power. The expeditionary character of maritime forces—our lethality, global reach, speed, endurance, ability to overcome barriers to access, and operational agility—provide the joint commander with a range of deterrent options. We will pursue an approach to deterrence that includes a credible and scalable ability to retaliate against aggressors conventionally, unconventionally, and with nuclear forces. Win our Nation’s wars. In times of war, our ability to impose local sea control, overcome challenges to access, force entry, and project and sustain power ashore, makes our maritime forces an indispensable element of the joint or combined force. This expeditionary advantage must be maintained because it provides joint and combined force commanders with freedom of maneuver. Reinforced by a robust sealift capability that can concentrate and sustain forces, sea control and power projection enable extended campaigns ashore.

#### Trainings key to prevent bioterrorism

Peterson, 9 – Lieutenant Commander, United States Navy

[Erick, "The Strategic Utility of U.S. Navy Seals," Naval Postgraduate School, June 2009, www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA501950, accessed 2-6-13, mss]

Terror is likely to remain a threat in the foreseeable future. It may become, like Dick Couch proclaims in Sherriff of Ramadi, that terror will be similar to illegal drugs, something we never eradicate, but requires constant attention. For this reason, SEALs will always have a mission of removing terrorist leaders and tenaciously chasing terrorists across the globe. This constant vigilance will **systematically erode** the **terrorists’ ability to operate** (Couch 2008). This task is often seen as the domain of special mission units (SMUs), but SMUs are extremely limited. The “vanilla” or “white” SOF assets, specifically SEALs, can provide a responsive means of dealing with this threat. Terrorism is akin to cancer. Like cancer there are multiple measures that must be taken to eliminate the disease. Some of the measures are non-invasive. For cancer these measures are nutrition, rest and pharmacological. For terrorism these are the activities surrounding civil affairs, psychological operations, and “nation building.” But invasive measures must also be taken and the deadly tumor removed. For cancer this is the work of the skilled surgeon, armed with the scalpel he uses with precision. For the military, the highly trained SEALs are the surgeon and the scalpel. In order to ensure this capability remains a precision tool, SEAL mission focus should remain direct action in nature with a very good understanding of how the "kinetic scalpel of a surgical operation" should be used (Smith, 2009). And just as important, they must understand when a not-so-sharp scalpel can adversely affect the indirect effort. Therefore, **this skill must remain as sharp as possible to ensure success** (Smith, 2009).

#### Bioweapons cause extinction---no burnout

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The risks from anthropogenic hazards appear at present larger than those from natural ones. Although great progress has been made in reducing the number of nuclear weapons in the world, humanity is still threatened by the possibility of a global thermonuclear war and a resulting nuclear winter. We may face even greater risks from emerging technologies. Advances in synthetic biology might make it possible to engineer pathogens capable of extinction-level pandemics. The knowledge, equipment, and materials needed to engineer pathogens are more accessible than those needed to build nuclear weapons. And unlike other weapons, pathogens are self-replicating, allowing a small arsenal to become exponentially destructive. Pathogens have been implicated in the extinctions of many wild species. Although most pandemics "fade out" by reducing the density of susceptible populations, pathogens with wide host ranges in multiple species can reach even isolated individuals. The intentional or unintentional release of engineered pathogens with high transmissibility, latency, and lethality might be capable of causing human extinction. While such an event seems unlikely today, the likelihood may increase as biotechnologies continue to improve at a rate rivaling Moore's Law.

## Deference

#### No UQ for link turns---Li ev says good now---nuclear, bio warfare

#### Flexibility is key to solve conflict

Jung Hyok Kim 8, KDI School of Public Policy and Management, “A STUDY ON THE IMPACT OF U.S. “STRATEGIC FLEXIBILITY” ON THE KOREA-U.S. ALLIANCE

Military **flexibility is more important than ever** because nobody can expect complicated security environment and battlefield condition of today easily. The 21st century security environment faces various military and non-military threats; it becomes difficult to find the countermeasure against threatening. In this situation, military‘s mission and its scope of activity having been broadened from the conventional operation to the counter-terror and supporting national catastrophe as well as Military Operations Other Than War (MOOTW) such as peace keeping operations (PKO). Consequently, under the uncertain and complicated security environment, flexible thinking and countermeasures are necessarily needed for the military and leaders in order to successfully complete various duties. In the aspect of strategic theory and military doctrine, **flexibility functions as one of the War Principles.** For example, British military adopts flexibility as one of the ten Principles of War. 33 They emphasize that flexibility is an essential principle to cope with unpredictable and changeable conditions as well as in order not to indulge in dogma. On the other hand, the U.S. doctrine does not adopt ―Flexibility‖ as one of the nine Principles of War34 ; however, it functions same as the Principle of War. In order to achieve the military victory and strategic success simultaneously, the nine Principles of War should be adopted harmoniously; in addition, flexibility plays a role as binding material for these nine Principles of War, as if it functions like the tenth Principle of War.35 As discussed earlier, future forms of warfare can take many paths, and much uncertainty lies ahead. Flexible responses are often born of **flexible planning**. Further, in tomorrow‘s unfolding environment where asymmetric and other nontraditional threats will be more prevalent, open-minded, nonjudgmental and critical thinking skills—at all ranks and levels of war—will become the tools to eliminate dangerous blind spots and develop effective solutions. That is flexibility. As we go through the 21st century, the need for flexibility is an indispensable condition for conducting a victory for military operations in uncertain security conditions and ambiguous battlefield environments. 36

#### Judicial intervention collapses crisis response --- they’re too inflexible, inexperienced, and open --- the link threshold is low

-AT: Holmes medical analogy

Eric A. Posner 12, Kirkland & Ellis Professor, University of Chicago Law School, Winter, “REFLECTIONS ON THE LAW OF SEPTEMBER 11: A TEN-YEAR RETROSPECTIVE: DEFERENCE TO THE EXECUTIVE IN THE UNITED STATES AFTER SEPTEMBER 11: CONGRESS, THE COURTS, AND THE OFFICE OF LEGAL COUNSEL,” 35 Harv. J.L. & Pub. Pol'y 213, Lexis

THE DEFERENCE THESIS¶ The deference thesis states that during emergencies the legislature and judiciary should defer to the executive. n8 It assumes that the executive is controlled by the President, but to the extent that the President could be bound by agents within the executive, the deference thesis also holds that those agents should follow the President's orders, not the other way around. In normal times, the three branches of government share power. For example, if the executive believes that a new, dangerous drug has become available, but possession of the drug is not yet illegal, the executive may not act on its own to detain and prosecute those who deal and use the drug. The legislature must first enact a statute that outlaws the drug. The executive also depends on the legislature for financial appropriations and other forms of support. The executive also faces constraints from the courts. If the executive arrests drug dealers and seeks to imprison them, it must first obtain the approval of courts. The courts ensure that the executive does not go beyond the bounds of the new law, does not violate earlier-enacted laws [\*215] that have not been superseded by the new law, and does not violate the Constitution.¶ In emergencies, the executive often will contemplate actions that do not have clear legislative authority and might be constitutionally dubious. For example, after September 11, the U.S. government engaged in immigration sweeps, detained people without charges, used coercive interrogation, and engaged in warrantless wiretapping of American citizens. n9 Many, if not all, of these actions would have been considered violations of the law and the U.S. Constitution if they had been undertaken against normal criminal suspects the day before the attacks. After September 11, both the legislature and the courts gave the executive some deference. The legislature gave explicit authorities to the executive that it had initially lacked; n10 the courts did not block actions that they would have blocked during normal times. n11 But neither body was entirely passive. Congress objected to coercive interrogation and did not give the executive all the authorities that it requested. n12 After a slow start, the courts also resisted some of the assertions the executive made. There is some dispute about whether this resistance was meaningful and caused the executive to change policy or merely reacted to the same stimuli that caused the executive to moderate certain policies independently. n13 In any event, no one disputes that the courts gave the executive a nearly free pass over at least the first five to seven years of the conflict with al Qaeda.¶ The deference thesis, then, can be strong-form or weak-form. This ambiguity has had unfortunate consequences for debates about post-September 11 legal policies. Few people believe that the courts should impose exactly the same restrictions on the [\*216] executive during an emergency as during normal times. Indeed, doctrine itself instructs courts to balance the security value of a course of action and its cost to civil liberties, implying that certain actions might be legally justified to counter high-stakes threats but not to counter low-stakes threats. n14 Nor does anyone believe that the executive should be completely unconstrained.¶ The debate is best understood in the context of the U.S. government's post-September 11 policies. Defenders of these policies frequently invoked the deference thesis--not so much as a way of justifying any particular policy, but as a way of insisting that the executive should be given the benefit of the doubt, at least in the short term. n15 The deference thesis rests on basic intuitions about institutional competence: that the executive can act more decisively and with greater secrecy than Congress or the courts because it is a hierarchical body and commands forces that are trained and experienced in countering security threats. The other branches lack expertise. Although they may have good ideas from time to time, and are free to volunteer them, the ability of the executive to respond to security threats would be unacceptably hampered if Congress and the courts had the power to block it to any significant degree.¶ Secrecy is an important part of the argument. Policymaking depends on information, and information during emergencies often must be kept secret. Congress and the courts are by nature and tradition open bodies; if they were to act in secret, their value would be diminished. Meanwhile, the argument continues, the fear of an out-of-control executive who would engage in abuses unless it was constrained by the other branches is exaggerated. The President has strong electoral and other political incentives to act in the public interest (at least, in the United States). Even if the executive can conceal various "inputs" into counterterrorism policy, it cannot conceal the "output"--the existence, or not, of terrorist attacks that kill civilians.¶ Thus, it was possible for defenders of the Bush Administration's counterterrorism policies to express discomfort with certain policy choices, while arguing nonetheless that Congress and the courts should not try to block executive policymaking [\*217] for the duration of the emergency--at least not as a matter of presumption. Critics of the Bush Administration argued that deference was not warranted--or at least not more than a limited amount of deference was warranted, although again these subtleties often were lost in the debate--for a variety of reasons. I now turn to these arguments.¶ II. EXTERNAL CONSTRAINTS: THE PROTOCOL ANALOGY¶ A. Medical Protocols¶ In an article published a few years ago, Professor Holmes uses the arresting image of the medical protocol as a device for criticizing the deference thesis--or, more broadly, the thesis that the executive should be "unconstrained" during emergencies. Holmes describes his own experience in an emergency room, where his daughter had been brought with a serious injury:¶ At a crucial moment, two nurses rushed into her hospital room to prepare for a transfusion. One clutched a plastic pouch of blood and the other held aloft my daughter's medical chart. The first recited the words on the bag, "Type A blood," and the other read aloud from the file, "Alexa Holmes, Type A blood." They then proceeded, following a prepared and carefully rehearsed script to switch props and roles, the first nurse reading from the dossier, "Alexa Holmes, Type A blood," and the second reading from the bag, "Type A blood." n16¶ To the layman, the repetitive actions of the nurses seem senseless. Why are they repeating themselves when the patient might die unless she receives the blood transfusion immediately? Surely, the nurses should depart from the script rather than follow it in a time of extreme medical urgency. Yet the protocol makes good sense. Experience has taught medical personnel that basic errors--the transfusion of the wrong blood--occur frequently, and that they can be avoided through the use of simple protocols. Although following the protocol uses valuable time, in practice the increased risk to the patient as a result [\*218] of the loss of time is less than the risk caused by the errors that protocols are designed to prevent. n17¶ The larger and more striking point of the example is that, even during emergencies, when the stakes are high and time is of the essence, agents should follow rules rather than improvise. In this way, agents should be constrained. n18 This argument has potentially radical implications. Recall that the conventional objection to deference is that the risk of executive abuse exceeds the benefits of giving the executive a free hand to counter al Qaeda. Professor Holmes argues--although at times he hedges--that in fact the benefits of giving the President a free hand are zero: A constrained executive, like a constrained medical technician, is more effective than an unconstrained executive. If the benefits of lack of constraint are zero, then the deference thesis is clearly wrong. Constraints both prevent executive abuses such as violations of civil liberties and ensure that counterterrorism policy is most effective.¶ B. Rules and Standards¶ The arresting medical protocol example helps clarify the tradeoffs involved, but it remains merely an illustration of the familiar rules versus standards tradeoff that has been a staple of the legal literature since time immemorial. n19 A rule is a norm that directs the decisionmaker to ignore some relevant policy considerations when deciding on a course of action; a standard is a norm that directs the decisionmaker to take into account all relevant policy considerations when deciding on a course of action. The familiar example is the speed limit. A sixty-mile-per-hour speed limit tells the driver that she does not face a legal sanction if she drives below sixty miles per hour, and that she does face a legal sanction if she exceeds that speed. A standard--for example, "drive carefully"--tells the driver that she does not face a legal sanction if she drives carefully, but that she does if she drives carelessly. The standard, unlike the rule, directs the driver to take into account all relevant considerations--the weather, traffic congestion, her own skill and [\*219] experience, the responsiveness of her car, and so on--when deciding how to drive.¶ A skilled and experienced driver who drives at sixty-five miles per hour on a clear day on an empty, straight road poses little threat to anyone, and most people would regard her driving as careful. Thus, under the standard she could not be held liable, although under a rule she would be. Meanwhile, an inexperienced driver who drives sixty miles per hour on a congested, dangerous road, at night, in bad weather, would probably be regarded as careless. He would be held liable under a standard but not under the rule. It is in the nature of standards that we cannot be sure that he would be held liable; it depends on the biases, intuitions, and experiences of the legal decisionmaker. n20 Thus, we say that applying standards involves high decision costs. It is in the nature of rules that we can easily tell whether the driver would be held liable or not, but only because the legal decisionmaker is forced to ignore relevant moral and policy considerations that otherwise complicate evaluation. Rules are under-and over-inclusive; by design, they cause error.¶ These considerations lead to a basic prescription. n21 Rules should be used to govern recurrent behavior, and standards to govern unusual behavior. Experience teaches us that if drivers obey certain rules (such as speed limits), the risk of accidents is greatly reduced, although judicious choice of (sometimes complex) rules ensures that error costs are low. When legislatures enact new rules, they can invest a great deal of time and effort determining the optimal rules, because the cost of the rules are then spread out over many instances of the behavior that the legislatures seek to regulate. Yet rules frustrate us because there always seems to be some new, unanticipated case where the application of rules leads to an injustice. The speed limit rule should not apply to the parent who rushes a badly injured child to the hospital. And there are many cases where rules can too easily be gamed. Tax rules, no matter how intricate, can be exploited: Lawyers set up tax shelters that evade the purpose of the rules. Congress reacted to this problem initially by creating ever more complex rules, but eventually trumped them [\*220] with a standard that prohibited bad faith evasion of the tax laws. n22¶ The legal landscape is a complex mix of rules and standards, which often overlap. Drivers must obey both traffic rules like the speed limit and traffic standards like laws against reckless driving and tort norms against negligent driving. Indeed, one can think of traffic norms as complex rules with standards--where there are apparently bright-line rules (drive under sixty miles per hour) that are subject to muddy standards (unless there is an emergency).¶ Medical protocols are just one more example of a choice along the rules-standards continuum. The nurses Professor Holmes describes follow a protocol that ensures that they do not use the wrong blood in a transfusion. Likewise, doctors are instructed to clear the windpipe before staunching the wound. n23 These protocols, like the speed limit, reflect generalizations from past medical experience. Delaying the blood transfusion is less risky than permitting only one nurse to check the blood type. Letting the blood flow from the wound is less risky than leaving the windpipe blocked. In the absence of protocols, medical practitioners may misjudge the situation, or panic, or allow themselves to be distracted by irrelevant factors (the goriness of the wound calls out for attention while the blocked windpipe is hidden). It is important to see that these rules, like the speed limit, are mere generalizations, and in individual cases the generalizations might be wrong. The patient dies because of the delay before the transfusion, yet we instruct medical practitioners to follow the rules because otherwise they are likely to make worse or more frequent errors.¶ That uncompromising rules produce high error costs supports adopting sensible exceptions to rules. Indeed, medical practitioners may violate protocols. The reasons are obvious. Consider Professor Holmes's insistence that the rule "always wash your hands" is unalterable and written in stone. n24 This clearly cannot be the case. Suppose that, in the midst of an emergency involving a patient with a serious trauma, the staff [\*221] is informed that the tap water is tainted, it is discovered that a patient has a rare allergy to the only soap available in the emergency room; or, for that matter, the emergency room runs out of soap. Common sense (which is just the application of the standard, "help the patient at minimal risk to him and oneself") will tell the doctors and nurses to deviate from the protocols when they clearly interfere with medical necessity. If they did not, they would be sued, and rightly so. The protocols, like many rules, turn out to be presumptions, which may be overcome by the press of events. That is why medical professionals are so highly trained; if one could really treat patients by following algorithms, one would not need doctors who have vast training and experience that supplies them with judgment and the ability to improvise. n25¶ In sum, medical protocols, like rules, provide a valuable service by simplifying the decision-making process at times of high stress, but, like rules, they unavoidably produce wrong results if they are not applied sensitively. Usually, when the stakes are high, rules and protocols create presumptions, but the decisionmaker is free to violate the presumption if circumstances suggest that that the presumption is based on factual assumptions that turn out not to be true in the particular setting in which the decisionmaker finds himself.¶ C. Rules and Standards During Emergencies¶ I now turn to the bulk of Professor Holmes's argument. Professor Holmes is right to identify confusion about the nature of emergency, and it is useful to distinguish a rule-development stage--which often but not always takes place before the emergency--and a rule-application stage--which takes place during the emergency. Holmes argues that during the emergency, rule application should be controlled by protocol, so the executive does not need (much) discretion; while pre-emergency, rule development does not need to be rushed and secret, so the executive can collaborate with Congress. The first problem with [\*222] this argument is that during the emergency one can follow protocols rather than exercise discretion only if the emergency is the same as earlier emergencies. This was not the case for September 11, though it may be the case for other security threats. The second problem is that the rule-development stage cannot always take place during normal times. For example, September 11 required not only an immediate response to the newly discovered threat but also the development of new rules under the shadow of that threat. Those rules needed to be developed quickly and (for the most part) secretly, and these exigencies limited the ability of Congress to contribute. A final point is that Holmes ignores an important dimension of the problem: the difference between agents, who in theory can merely follow rules and protocols, and principals, who cannot. The Bush Administration did in fact recognize the value of protocols and used them frequently; it just did not apply them to itself.¶ 1. Two Concepts of Emergency¶ Professor Holmes makes a valuable point, often neglected in the literature, that there are two distinct phases for addressing emergencies n26 --what I will call the stage of rule development and the stage of rule application. As we will see, the two stages can run together, but conceptually they are distinct. The rule-application stage comes when the patient is on the gurney. The doctors follow the protocols in the course of helping the patient. The rule development stage occurs earlier. Someone must decide what the protocols should be. Someone had to invent the rule that two nurses must check the blood type and that doctors should unblock the windpipe before staunching wounds--just as the legislature must determine the speed limit before drivers comply with it and police enforce it.¶ We might use the word "emergency" to refer to the time of rule application. As Professor Holmes points out, however, for the medical professionals, what seems like an emergency to a layperson is not an emergency at all. n27 They just apply the protocols that have been drilled into them, no different from assembly-line workers. Under this definition of "emergency," it is hard to support the deference thesis and those who argue that the executive [\*223] must be unconstrained during emergencies. If doctors are constrained during emergencies, why not executives?¶ If we refer instead to the time of rule-development, reliance on the idea of emergency seems even less appropriate. The doctors who develop emergency room protocols do not do so under time pressure but at their leisure. They also can do so in a large body, so as to take advantage of the perspectives of many different people, and in public, so that all stakeholders have a say. The executive can as well, the argument goes. When the executive determines the rules that will govern the response during a terrorist attack, it does so in advance, and it can, indeed should, do so in consultation with Congress and subject to judicial constraint.¶ Thus, executive deference is unnecessary. During rule development, there is no emergency, and so the executive, Congress, and the courts can collaborate in developing appropriate rules that will govern during emergencies. They can do so openly, deliberately, and slowly, with full respect for constitutional norms. During rule application, there is an emergency, but the executive can merely follow the rules or protocols that were developed during the rule-development stage. Thus, in the rule-application phase, executive discretion is unnecessary. It follows that deference to the executive is also unnecessary. During rule development, Congress has no reason to defer to the executive. During rule application, courts also have no reason to defer to the executive, but should instead insist that the executive comply with the rules.¶ 2. Rule Application¶ Let us consider the stages in reverse order. We already have addressed some of the problems with Professor Holmes's argument from protocols. Rules are seldom as bright-line as they first appear. They often turn out to be presumptions which are themselves subject to standards (drive under the speed limit unless there is an emergency). It is true that security threats, like medical emergencies, often fall into patterns and can be addressed in partially rule-governed fashion. Thus, when a gunman takes a hostage, the police follow certain rules: first clearing the area, then making contact with the gunman, and so on. Some officers will be given very simple rule-governed tasks ("don't let anyone cross this line"). But the rules quickly give out. Every hostage-taker is different, and the most highly [\*224] trained police officers will be given a great deal of discretion to deal with him and to make the crucial decision to use force. But even these types of threats are simple compared with the scenario that opened up on September 11. The government knew virtually nothing about the nature of the threat. It did not know how many more members of al Qaeda were in the United States, what their plans were, what resources were at their disposal, what their motives were, or how much support they had among American Muslims. n28 Protocols were worthless because nothing like the attack had ever happened before. (The closest analogy seemed to be the absurdly irrelevant example of Pearl Harbor.) The government could not follow rules; it had to improvise subject to a vague standard--protect the public while maintaining civil liberties to the extent possible. Improvise it did--instituting detentions, sweeps, profiling, surveillance, and many other policies on an unprecedented (in peacetime, if that was what it was) scale. n29¶ For the rule-application stage, the deference thesis counsels Congress and the judiciary to (presumptively) defer. Congress simply cannot set about holding hearings, debat[e]ing policy, and vot[e]ing on laws in the midst of emergency. Either the problem will not be addressed, or Congress will end up voting on a bill that it has not written, debated, or even read. n30 For courts, too, the alternatives are unrealistic. If courts enforce rules developed for normal times, then they will interfere with the proper response to the terrorist threat, just as they would if they required the U.S. military to comply with the Fourth Amendment on the battlefield. Alternatively, the courts could insist on applying a standard and halt executive actions that, in the courts' view, violated the standard described above--protect the nation while maintaining civil liberties to the extent possible. But here the courts are at a significant disadvantage. They do not have information [\*225] about the nature of the threat. n31 Courts can demand this information from the government, but the government will not give it to them because the government fears leaks (to say nothing of recalcitrance caused by rivalries among intelligence agencies). Moreover, judges are inexperienced in national security unlike the specialists in the executive branch.

#### Compliance with judicial restrictions distracts the Executive --- prevents effective crisis response

Andrew C. McCarthy 9, Director of the Center for Law & Counterterrorism at the Foundation for the Defense of Democracies and Alykhan Velshi, staff attorney at the Center for Law & Counterterrorism, “Outsourcing American Law: We Need A National Security Court”, AEI Working Paper #156, http://www.aei.org/files/2009/08/20/20090820-Chapter6.pdf

It is not enough to say, hopefully but naively, that the reviewing court will doubtless understand the reasons why a military record of the basis for detaining and trying an enemy combatant may not resemble the record developed at a domestic criminal trial following an extensive FBI criminal investigation. As we have seen, courts, which have no innate expertise in this area, have not demonstrated great sensitivity to national security concerns when deprivations of liberty are at issue—even the liberty of alien enemy combatants captured in battle against our country.¶ Empirically, judicial demands on executive branch procedural compliance, if unchecked, become steadily more demanding over time. The executive naturally responds by being more internally exacting to avoid problems. Progressively, executive compliance, initially framed and understood as a reasonably modest set of burdens to promote the integrity of judicial proceedings, becomes instead a consuming priority and expenditure, which, if permitted in the context of warfare, would inevitably detract from the military mission that is the bedrock of our national security.

## PQD

### Warming Impact---2NC

#### Litigation will target random emitters

Laurence H. Tribe 10, the Carl M. Loeb University Professor, Harvard Law School; Joshua D. Branson, J.D., Harvard Law School and NDT Champion, Northwestern University; and Tristan L. Duncan, Partner, Shook, Hardy & Bacon L.L.P., January 2010, “TOOHOTFORCOURTSTO HANDLE: FUEL TEMPERATURES, GLOBAL WARMING, AND THE POLITICAL QUESTION DOCTRINE,” <http://www.wlf.org/Upload/legalstudies/workingpaper/012910Tribe_WP.pdf>

The incompatibility of climate change and nuisance doctrine is further demonstrated by the lack of connection between the plaintiffs allegedly injured by climate change and the conduct of the defendants they target. The principle that plaintiffs lack standing to sue in Article III courts unless they present “something more than generalized grievances”34 is as axiomatic as Marbury’s declaration that courts should not adjudicate political questions. To move beyond such “generalized grievances,” plaintiffs must articulate a chain of causation from challenged conduct to injury that possesses a constitutionally “essential dimension of specificity.”35 Such specificity is sorely lacking in the climate change context. In terms of coastal erosion or species destruction allegedly caused by climate change, each carbon emission is like every other; the plaintiffs sue specific emitters not for their particular responsibility for the injuries alleged, but instead for their generic contribution to a collective global problem.

Indeed, the undifferentiated nature of any one defendant’s contribution to plaintiffs’ injuries enables plaintiffs—if courts let them—to wield the hammer of federal common law against any emitter of their choosing. The Supreme Court has recognized that the Constitution forbids such a contortion of standing principles for the same reason that it forbids courts from entertaining nonjusticiable political questions; the adjudication of such abstract and undifferentiated claims “open[s] the Judiciary to [the] charge of providing ‘government by injunction.’”36 And government by injunction is neither accountable to majority will nor a product of the “consent of the governed.” These bedrock democratic principles are what the separation of powers generally, and the political question doctrine specifically, protect.

#### Those court-created regs undermine solutions to warming

Laurence H. Tribe 10, the Carl M. Loeb University Professor, Harvard Law School; Joshua D. Branson, J.D., Harvard Law School and NDT Champion, Northwestern University; and Tristan L. Duncan, Partner, Shook, Hardy & Bacon L.L.P., January 2010, “TOOHOTFORCOURTSTO HANDLE: FUEL TEMPERATURES, GLOBAL WARMING, AND THE POLITICAL QUESTION DOCTRINE,” <http://www.wlf.org/Upload/legalstudies/workingpaper/012910Tribe_WP.pdf>

The Second Circuit, in allowing the plaintiffs’ claim for an injunction to proceed, presumed that any reduction in carbon emissions, no matter how bluntly calibrated or poorly targeted, contributes in some measure, however small, to the overall project of reducing the long-term injurious consequences of climate change. That simply is not so. Wielding the sledgehammer of injunctive relief against arbitrarily selected groups of carbon emitters and producers is as likely to exacerbate as to ameliorate those injurious effects. For one thing, many climate change scholars have identified the phenomenon of “carbon leakage,” whereby poorly thought out carbon reductions in one section of the global economy result in increased emissions elsewhere, as fossil fuel price reductions, coupled with the tendency for global corporations to shift their bases of operations to avoid stringent regulation, spark rising energy consumption in other jurisdictions.38 Such leakage would exacerbate the injuries about which the plaintiffs complain since carbon emissions from non-defendants—even those halfway around the world—“cause” coastal erosion in exactly the same undifferentiated and attenuated manner as do carbon emissions from the defendants they have randomly targeted.

Moreover, there are serious complexities involved in any process of carbon reduction, particularly with respect to the questions of how fast and how much. Slash emissions too fast or too far, and courts risk forcing industry to prematurely retire capital stock, “locking in” inferior technology as companies rush to innovate quickly enough to comply with short-term reduction requirements.39 Such a result would not only entail severe and irretrievable economic costs, but it would exacerbate the longrun harms of climate change by distorting the renewable energy market. On the other hand, slash emissions too little or too slowly, and courts do nothing to ameliorate climate change, while still shaping entitlements in a way that can only inhibit the emergence of any ultimate legislative solution.40 To ask a court to strike the right balance, given that even a stringent injunction will have no statistically significant impact on global temperatures, is to ask it to do the impossible.

### Yes Warming Action

#### Obama will doing everything he can to combat warming—more regulations coming.

Coral Davenport 13, The National Journal, August 29, 2013, Obama's Stealth War on Global Warming, http://www.nationaljournal.com/magazine/obama-s-stealth-war-on-global-warming-20130829

As President Obama tries to fight global warming without any backing from a gridlocked Congress, he's using every weapon in his executive arsenal. His Environmental Protection Agency will soon roll out controversial regulations on carbon pollution from coal-fired power plants. He's told every Cabinet agency to look into ways it can use its authority to act on climate change. And now the administration is stocking the executive branch with an army of new appointees who have a history of working aggressively on climate issues and clean energy, often from leadership jobs at environmental advocacy groups.¶ It's not surprising to see a president name a top nominee—for Cabinet secretary, say—who has led the way on an issue the White House cares about. In his first term, for example, Obama named as his Energy secretary Steven Chu, a Nobel physicist who had devoted his career to fighting climate change. With the executive branch the only avenue for the president to make an impact on climate policy, the Obama administration is filling out the second and third tiers of agencies—influential workhorse positions such as chiefs of staff, assistant secretaries, and heads of regulatory commissions—with appointees just as devoted to the cause, with the expectation that they'll muscle through a climate and clean-energy agenda wherever they can.

#### Obama will push progress on warming—spills over to global talks.

Brad Plumer 13, The Washington Post, 6/25/13, Obama tries the kitchen-sink approach to global warming, http://www.washingtonpost.com/blogs/wonkblog/wp/2013/06/25/obama-tries-the-kitchen-sink-approach-to-global-warming/

For instance: The White House is hammering out an agreement with China and other countries to phase out hydrofluorocarbons (HFCs), a potent greenhouse gas used in everything from soda machines to many car air conditioners. The administration will also develop a plan for curbing methane emissions from natural-gas production. The Energy Department will set new efficiency standards for appliances and buildings. The Interior Department will try to speed up wind and solar development on public lands. Foreign-aid agencies will cease financing coal plants overseas (except when there are no possible alternatives).¶ Pile that on top of all the climate steps the administration has already taken — like the fact that fuel-economy standards have been ratcheted up to 54.5 miles per gallon by 2025 — and the short-term climate target starts to look more attainable.¶ Emissions aren't the sole focus, either: The White House also plans to help state and local agencies prepare for the impacts of climate change that are lurking in the near future, such as sea-level rise or flooding or extreme weather. An example: All federally-funded rebuilding after superstorm Sandy now has to take the risks of future flooding into account.¶ All of these steps can, in theory, be pursued without Congress. Yet Obama could still encounter plenty of resistance from lawmakers, who can threaten to pull funding from the EPA and other agencies if they go too far. Last week, House Speaker John Boehner called Obama's rumored plans "absolutely crazy."¶ "Why," asked Boehner, "would you want to increase the cost of energy and kill more American jobs at a time when the American people are still asking the question, where are the jobs?”¶ What happens after 2020?¶ Meanwhile, the cuts that the Obama administration can make in the next seven years are just a small part of the climate story. Many developed nations have aimed to cut their emissions a whopping 80 percent by 2050, in the hopes of limiting global temperature rise to no more than 2°C.¶ A recent open letter from the Clean Air Task Force warned that cuts of that magnitude will require more than just reining in coal plants. Clean-energy technology will have to get a lot better, too. “Ultimately,” the letter notes, “we will need to capture the carbon from gas-fired power plants as well. Renewable energy faces challenges of scale, cost and intermittency; carbon capture and storage faces cost challenges at full scale; and current forms of nuclear power are challenged by safety, waste management, weapons proliferation and cost risks.”¶ Only Congress will be able to craft legislation that can reorient the nation's energy system that drastically. And the White House has said it would be open to more sweeping action to tackle global warming if lawmakers wanted to join in. Obama has, for instance, proposed a clean energy standard that would require utilities to get a greater portion of their electricity from renewables. Joseph Aldy, a former White House adviser, has hinted that Obama would be open to a carbon tax if Republicans were willing to negotiate.¶ At the same time, the White House will need to revive international climate talks with countries like China and India, which have been flagging of late. After all, it's impossible to solve climate change unless two of the world's fastest-growing emitters sign on. The White House thinks that hitting that 17 percent target by 2020 will help push global talks forward — and they're optimistic about further progress, citing the big recent breakthrough with China to curtail hydrofluorocarbons (HFCs), a potent greenhouse-gas.¶ "Nobody has a crystal ball," says the senior administration official. "But for a long time you had China with a very different position on HFCs, and as a result of focused work [by the administration's negotiators], we got them to a different place."

## Afghanistan

## CMR Adv

### No CMR Crisis

#### Civil-military tensions inevitable but there’s no impact

Davidson 13 Janine Davidson is assistant professor at George Mason University’s Graduate School of Public Policy. From 2009-2012 she served as the Deputy Assistant Secretary of Defense, Plans in the Pentagon, Presidential Studies Quarterly, March 2013, " Civil-Military Friction and Presidential Decision Making: Explaining the Broken Dialogue", Vol. 43, No. 1, Ebsco

In the 2010 bestselling book, Obama’s Wars, Bob Woodward recounts President Barack Obama’s friction with his military chain of command as he sought options for ending the war in Afghanistan.1 Woodward paints a compelling picture of a frustrated president who felt “boxed in” by his military commanders who were presenting him with only one real option—deploy 40,000 more troops for a comprehensive counterinsurgency strategy and an uncertain timeline. The president and his civilian advisors could not understand why the military seemed incapable of providing scalable options for various goals and outcomes to inform his decision-making. Meanwhile the military was frustrated that their expert advice regarding levels of force required for victory were not being respected (Woodward 2010).¶ Such mutual frustration between civilian leadership and the military is not unique to the Obama administration. In the run-up to the Iraq War in 2002, Secretary of Defense Donald Rumsfeld famously chastised the military for its resistance to altering the invasion plan for Iraq. The military criticized him for tampering with the logistical details and concepts of operations, which they claimed led to the myriad operational failures on the ground (Gordon and Trainor 2006; Ricks 2007; Woodward 2004). Later, faced with spiraling ethnic violence and rising U.S. casualties across Iraq, George W. Bush took the advice of retired four-star General Jack Keane and his think tank colleagues over the formal advice of the Pentagon in his decision to launch the so-called surge in 2007 (Davidson 2010; Feaver 2011; Woodward 2010).¶ A similar dynamic is reflected in previous eras, from John F. Kennedy’s famous debates during the Cuban Missile Crisis (Allison and Zelikow 1999) to Lyndon Johnson’s quest for options to turn the tide in Vietnam (Berman 1983; Burke and Greenstein 1991), and Bill Clinton’s lesser-known frustration with the military over its unwillingness to develop options to counter the growing global inﬂuence of al-Qaeda.2 In each case, exasperated presidents either sought alternatives to their formal military advisors or simply gave up and chose other political battles. Even Abraham Lincoln resorted to simply ﬁring generals until he got one who would fight his way (Cohen 2002).¶ What accounts for this perennial friction between presidents and the military in planning and executing military operations? Theories about civilian control of the military along with theories about presidential decision making provide a useful starting point for this question. While civilian control literature sheds light on the propensity for friction between presidents and the military and how presidents should cope, it does not adequately address the institutional drivers of this friction. Decision-making theories, such as those focused on bureaucratic politics and institutional design (Allison 1969; Halperin 1974; Zegart 2000) motivate us to look inside the relevant black boxes more closely. What unfolds are two very different sets of drivers informing the expectations and perspectives that civilian and military actors each bring to the advising and decisionmaking table.¶ This article suggests that the mutual frustration between civilian leaders and the military begins with cultural factors, which are actually embedded into the uniformed military’s planning system. The military’s doctrine and education reinforce a culture of “military professionalism,” that outlines a set of expectations about the civil-military decision-making process and that defines “best military advice” in very speciﬁc ways. Moreover, the institutionalized military planning system is designed to produce detailed and realistic military plans for execution—and that will ensure “victory”—and is thus ill suited to the rapid production of multiple options desired by presidents. The output of this system, framed on specific concepts and definitions about “ends,” “ways,” “means,” and expectations about who provides what type of planning “guidance,” is out of synch with the expectations of presidents and their civilian advisors, which in turn have been formed from another set of cultural and institutional drivers.¶ Most civilian leaders recognize that there is a principal-agent issue at work, requiring them to rely on military expertise to provide them realistic options during the decision-making process. But, their definition of “options” is framed by a broader set of political objectives and a desire to winnow decisions based, in part, on advice about what various objectives are militarily feasible and at what cost. In short, civilians’ diverse political responsibilities combined with various assumptions about military capabilities and processes, create a set of expectations about how advice should be presented (and how quickly), how options might be defined, and how military force might or might not be employed. These expectations are often considered inappropriate, unrealistic, or irrelevant by the military. Moreover, as discussed below, when civilians do not subscribe to the same “hands off” philosophy regarding civilian control of the military favored by the vast majority of military professionals, the table is set for what the military considers “meddling” and even more friction in the broken dialogue that is the president’s decision-making process.¶ This article identifies three drivers of friction in the civil-military decision-making dialogue and unpacks them from top to bottom as follows: The first, civil-military, is not so much informed by theories of civilian control of the military as it is driven by disagreement among policy makers and military professionals over which model works best. The second set of drivers is institutional, and reflects Graham Allison’s organizational process lens (“model II”). In this case, the “outputs” of the military’s detailed and slow planning process fail to produce the type of options and advice civilians are hoping for. Finally, the third source of friction is cultural, and is in various ways embedded into the first two. Powerful cultural factors lead to certain predispositions by military planners regarding the appropriate use of military force, the best way to employ force to ensure “victory,” and even what constitutes “victory” in the American way of war. These cultural factors have been designed into the planning process in ways that drive certain types of outcomes. That civilians have another set of cultural predispositions about what is appropriate and what “success” means, only adds more fuel to the flame.

# 2NR

#### Strict adherence to the political question doctrine

Bradley 9-2 (Curtis A., William Van Alstyne Professor of Law – Duke Law School, “War Powers, Syria, and Non-Judicial Precedent,” Lawfare Blog, 2013, http://www.lawfareblog.com/2013/09/war-powers-syria-and-non-judicial-precedent/)

As an initial matter, we need to bracket the issue of whether Obama’s action will weaken his own power as a political matter. This is a complicated issue: on the one hand, it may signal weakness both to Congress and to other nations; on the other hand, if he obtains congressional authorization, he may be in an ultimately stronger political position, as Jack Goldsmith has pointed out. As I understand it, the claim being made by Spiro, Rothkopf, and others is that the power of the presidency more generally is being weakened. How might this happen? Not through an influence on judicial doctrine: Although courts sometimes take account of historic governmental practices when assessing the scope of presidential authority, they have consistently invoked limitations on standing and ripeness, as well as the political question doctrine, to avoid addressing constitutional issues relating to war powers. In the absence of judicial review, what is the causal mechanism by which the “precedent” of Obama seeking congressional authorization for the action in Syria could constrain future presidential action? When judicial review is unavailable, the most obvious way in which the President is constrained is through the political process—pressure from Congress, the public, his party, etc. In an extreme case, this pressure could take the form of impeachment proceedings, but it does not take such an extreme case for the pressure to have a significant effect on presidential decisionmaking. Indeed, it is easy to think of political considerations that might have motivated Obama to go to Congress with respect to Syria.

#### Habeas rulings don’t spill over, and don’t inject the Court into areas outside its competence---damage suits do

George D. Brown 11, Interim Dean and Robert F. Drinan, S.l., Professor of Law, Boston College Law School, 1/7/11, “Accountability, Liability, and the War on Terror -- Constitutional Tort Suits as Truth and Reconciliation Vehicles,” Florida Law Review, <http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1337&context=lsfp>

This Article considers the question of why such suits are so difficult to bring. One possibility is that the legal system reflects, implicitly, the view that tort suits are an imperfect vehicle for evaluating and formulating public policy, particularly binding constitutional limits. For example, an individual suit may consider only a tiny slice of a broader systemic problem. I do not believe, however, that such objections are a sufficient explanation for the difficulties that reverse war on terror suits encounter. Constitutional adjudication is an integral part of our system, and at the state and local level, policies are affected, even made, through constitutional tort suits brought under § 1983.24 Theories of adjudication emphasize its legitimacy as a means of formulating public values.25 The common law has played an indispensable role in formulating and enacting policy in general. At the constitutional level, individual criminal actions, to take one example, have been the dominant mode of formulating limits on criminal procedure. 26

The major part of the answer lies elsewhere: problems raised by suits that are, in effect, challenges to the government's anti-terrorism policies. What is the proper role of the courts in such challenges? They inevitably produce calls for judicial deference in matters of national security, calls which are often heeded?7 Boumediene v. Bush led to a sharp exchange within the Court over whether the decision represented judicial usurpation of power over national security policy.28 The Supreme Court's apparent assertiveness in habeas corpus cases such as Boumediene may not carry over to other forms of suits attacking anti-terrorism policies. Certainly, the result in Iqbal suggests this conclusion,29 as does the more recent decision in Holder v. Humanitarian Law Project.30 Habeas actions may occupy a central place in the constitutional order that damages suits do not.31 Thus, there are practical and theoretical problems with the notion of the constitutional tort action as the legal and political systems' preferred means of achieving truth and reconciliation goals. Yet, it may be the most important one we have.

#### Bioterrorism causes extinction --- no barriers to use and terrorists pursuing now

Nathan **Myhrvold 13**, PhD in theoretical and mathematical physics from Princeton, and founded Intellectual Ventures after retiring as chief strategist and chief technology officer of Microsoft Corporation , July 2013, "Strategic Terrorism: A Call to Action," The Lawfare Research Paper Series No.2, <http://www.lawfareblog.com/wp-content/uploads/2013/07/Strategic-Terrorism-Myhrvold-7-3-2013.pdf>

A virus genetically engineered to infect its host quickly, to generate symptoms slowly—say, only after weeks or months—and to spread easily through the air or by casual contact would be vastly more devastating than HIV. It could silently penetrate the population to unleash its deadly effects suddenly. This type of epidemic would be almost impossible to combat because most of the infections would occur before the epidemic became obvious. A technologically sophisticated terrorist group could develop such a virus and kill a large part of humanity with it. Indeed, terrorists may not have to develop it themselves: some scientist may do so first and publish the details.¶ Given the rate at which biologists are making discoveries about viruses and the immune system, at some point in the near future, someone may create artificial pathogens that could drive the human race to extinction. Indeed, a ¶ detailed species-elimination plan of this nature was openly ¶ proposed in a scientific journal. ¶ The ostensible purpose of that particular research was ¶ to suggest a way to extirpate the malaria mosquito, but ¶ similar techniques could be directed toward humans.16 ¶ When I’ve talked to molecular biologists about this method, they are quick to point out that it is slow and easily ¶ detectable and could be fought with biotech remedies. If ¶ you challenge them to come up with improvements to the ¶ suggested attack plan, however, they have plenty of ideas.¶ Modern biotechnology will soon be capable, if it is not already, of bringing about the demise of the human race—¶ or at least of killing a sufficient number of people to end ¶ high-tech civilization and set humanity back 1,000 years or ¶ more. That terrorist groups could achieve this level of technological sophistication may seem far-fetched, but keep in mind that it takes only a handful of individuals to accomplish these tasks. Never has lethal power of this potency been accessible to so few, so easily. Even more dramatically ¶ than nuclear proliferation, modern biological science has ¶ frighteningly undermined the correlation between the lethality of a weapon and its cost, a fundamentally stabilizing ¶ mechanism throughout history. Access to extremely lethal agents—lethal enough to exterminate Homo sapiens—will be available to anybody with a solid background in biology, terrorists included.¶ The 9/11 attacks involved at least four pilots, each of ¶ whom had sufficient education to enroll in flight schools ¶ and complete several years of training. Bin laden had a degree in civil engineering. Mohammed Atta attended a German university, where he earned a master’s degree in urban ¶ planning—not a field he likely chose for its relevance to ¶ terrorism. A future set of terrorists could just as easily be students of molecular biology who enter their studies innocently enough but later put their skills to homicidal use. ¶ Hundreds of universities in Europe and Asia have curricula ¶ sufficient to train people in the skills necessary to make a ¶ sophisticated biological weapon, and hundreds more in the ¶ United States accept students from all over the world. ¶ Thus it seems likely that sometime in the near future a small band of terrorists, or even a single misanthropic individual, will overcome our best defenses and do something truly terrible, such as fashion a bioweapon that could kill ¶ millions or even billions of people. Indeed, the creation of such weapons within the next 20 years seems to be a virtual certainty.

#### Independently, casualties from a CBW attack ensure nuclear retaliation

Conley 3 – Lieutenant Colonel Harry W., Chief of the System Analysis Branch – Headquarters Air Combat Command, “Not with Impunity: Assessing US Policy for Retaliating to a Chemical or Biological Attack”, Air & Space Power Journal, Spring, http://www.airpower.maxwell.af.mil/airchronicles/apj/apj03/spr03/conley.html

The number of American casualties suffered due to a WMD attack may well be the most important variable in determining the nature of the US reprisal. A key question here is how many Americans would have to be killed to prompt a massive response by the United States. The bombing of marines in Lebanon**,** the Oklahoma City bombing, and the downing of Pan Am Flight 103 each resulted in a casualty count of roughly the same magnitude (150–300 deaths). Although these events caused anger and a desire for retaliation among the American public, they prompted no serious call for massive or nuclear retaliation. The body count from a single biological attack could easily be one or two orders of magnitude higher than the casualties caused by these events. Using the rule of proportionality as a guide, one could justifiably debate whether the United States should use massive force in responding to an event that resulted in only a few thousand deaths. However, what if the casualty count was around 300,000?Such an unthinkable result from a single CBW incident is not beyond the realm of possibility: “According to the U.S. Congress Office of Technology Assessment, 100 kg of anthrax spores delivered by an efficient aerosol generator on a large urban target would be between two and six times as lethal as a one megaton thermo-nuclear bomb.”46 Would the deaths of 300,000 Americans be enough to trigger a nuclear response? In this case, proportionality does not rule out the use of nuclear weapons. Besides simply the total number of casualties, the types of casualties- predominantly military versus civilian- will also affect the nature and scope of the US reprisal action. Military combat entails known risks, and the emotions resulting from a significant number of military casualties are not likely to be as forceful as they would be if the attack were against civilians. World War II provides perhaps the best examples for the kind of event or circumstance that would have to take place to trigger a nuclear response. A CBW event that produced a shock and death toll roughly equivalent to those arising from the attack on Pearl Harbor might be sufficient to prompt a nuclear retaliation.

**MARKED**

 President Harry Truman’s decision to drop atomic bombs on Hiroshima and Nagasaki- based upon a calculation that up to one million casualties might be incurred in an invasion of the Japanese homeland47- is an example of the kind of thought process that would have to occur prior to a nuclear response to a CBW event. Victor Utgoff suggests that “if nuclear retaliation is seen at the time to offer the best prospects for suppressing further CB attacks and speeding the defeat of the aggressor, and **if the original attacks** had **caused severe damage that had outraged American** or allied **publics,** nuclear retaliation would be more than just a possibility, whatever promises had been made.”48

#### High risk of bioterror --- there are no technological barriers --- experts confirm

James K. Glassman 12 is a former undersecretary of state for public affairs and public diplomacy. He is executive director of the George W. Bush Institute, part of the George W. Bush Presidential Center, located in Dallas, Texas, “We're Letting Our Bioterrorism Defenses Down,” 4/4, Forbes, http://www.forbes.com/sites/jamesglassman/2012/04/04/were-letting-our-bioterrorism-defenses-down/3/

But we haven’t heard much about bioterrorism since the anthrax incidents that closely followed 9/11, a little over a decade ago. The truth is that America remains vulnerable to an attack that could kill hundreds of thousands. Terrorists could spray Bacillus anthracis from crop-dusters over football stadiums. Or they could send intentionally infected fanatics out to spread the smallpox virus through a crowded city, doing far more damage than a brigade of suicide bombers.¶ While biological warfare dates back centuries (cadavers were used to contaminate the water supplies of enemies), the United States was paying scant attention to bio-defense until a few years before the airplane attacks on the World Trade Center and the Pentagon. Despite a relatively swift mobilization after 9/11, severe problems remain.¶ A “Bio-Response Report Card” study, issued last October by the Bipartisan WMD Terrorism Research Center, concluded, “The nation does not yet have adequate bio-response capability to meet fundamental expectations during a large-scale biological event.” The study gives grades of “D” to “detection and diagnosis” and “medical counter-measure availability” for a major bioterror attack.¶ Biological weapons have been called the “poor man’s atom bomb.” They are nowhere near as difficult to manufacture as nuclear weapons, and their return address is hard to assess, making them ideal for non-state actors like Al Qaeda, which, in fact, has been seeking to acquire biological WMD since at least 1999.¶ A report 12 years ago concluded, “Individuals, with no background in the development and production of bioweapons and no access to the classified information from the former U.S. bio-weapons program, were able to produce a significant quantity of high-quality weaponized Bacillus globigii – a close cousin to the well-known threat, Anthrax.”¶ In the spring of 2001, a Defense Science Board report, co-authored by Nobel Prize winner Joshua Lederberg and George Whiteside, former chair of the Harvard chemistry department, concluded that “major impediments to the development of biological weapons…have largely been eliminated in the last decade by the rapid spread of biotechnology.¶

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Later that year, five Americans were killed by anthrax powder, carried in letters. The FBI is convinced that the letters came from a civilian employee of the U.S. Army. If so, then “a single employee with no work experience in the weaponization of pathogens,… using equipment that could be readily purchased over the Internet, was able to produce very high-quality, dry-powdered anthrax,” said the Bio-Response Report Card.¶ As for smallpox: In 2001, the U.S. had only 14 million doses of vaccine available. The next year, the Bush Administration made a decision to acquire enough for every person in America. That has been achieved, and it is a great success story. Today, the Strategic National Stockpile has 300 million-plus doses.¶ Today, largely because of these small firms, we currently have enough drugs to limit the impact of a small-to-medium attack using anthrax or similar pathogens, but we would probably be helpless against an attack using mutant strains.¶ The first line of defense against bioterror is intelligence: spying on the likely bioterrorists, infiltrating their organizations, and stopping them before they spread disease. But a group or individual bent on killing biologically will be hard to stop.

#### No impact to defense cuts—their evidence is political hype

**Bennett 12**

 John T. Bennett 9/19/12, Senior Congressional Reporter for Defense News, and is a Master's candidate in Global Security Studies at Johns Hopkins University, "Experts: Automatic defense cuts might be manageable," The Great Falls Tribune, www.greatfallstribune.com/article/20120919/NEWS01/309190030/Experts-Automatic-defense-cuts-might-manageable?odyssey=tab|topnews|text|Frontpage

WASHINGTON — Pentagon officials, lawmakers and defense industry executives have described $500 billion in automatic military budget cuts set to kick in Jan. 2 as devastation, catastrophe and disaster. ¶ Yet several nonpartisan Washington think tanks have produced analyses that suggest the process, known as sequestration, might be manageable. ¶ The Bipartisan Policy Center estimates that even if the sequestration cuts stick, the annual Pentagon budget would dip below $500 billion for just one year, return to current levels by 2017 and approach $600 billion by 2020. ¶ And the Center for Strategic and Budgetary Assessments projects the Pentagon likely could avoid canceling any weapon programs and would not be forced to lay off troops or slash benefits. ¶ Spread over 10 years ¶ The $500 billion in cuts will be parceled out at $50 billion annually over 10 years. Yet even if they take place, Washington likely will continue to spend more on its military than the rest of the world combined, experts said. ¶ The reason: The Pentagon’s budget has experienced such dramatic growth in the past decade that taking the fiscal 2013 budget down 10 percent would return it to 2006 levels — when no one claimed an insufficient level of defense spending. ¶ The Bipartisan Policy Center study includes a chart that shows the Defense Department’s base budget would fall from $550 billion to a little less than $500 billion in 2013. From that point, it would begin rising steadily. ¶ By 2015, it would be well above $500 billion again, growing to almost $600 billion by the end of this decade. ¶ 'Slow down' but not stop ¶ The Strategic and Budgetary Assessments study, conducted by Todd Harrison, acknowledges that a sequester “would slow down nearly everything DoD does” and predicts fewer new contract awards and extensions. ¶ But Harrison’s findings suggest the cuts would not trigger “immediate program terminations” because money already committed on contracts would not be affected. Defense insiders have said most major defense contractors likely could ride out a dip in annual Pentagon spending because they are still sitting on money from the final years of the post-9/11 defense buildup. ¶ Buying less of the best ¶ Many defense sources doubt the full $500 billion cut would stick for a decade. Under such a scenario, at worst, the annual defense budget would climb at the rate of inflation. And if Republicans take control of Congress and the White House, it could grow even more. ¶ Gordon Adams, who oversaw defense budgeting for the Clinton administration, said that even if the entire $500 billion planned spending cut sticks, “the American military would still be the biggest, toughest kid on the block. The Pentagon would still be buying the most advanced equipment, just at slightly smaller numbers each year.” ¶ One example: Officials have stated a sequester would force them to do things like buy 25 F-35 fighter jets annually, rather than 29.