# SUPREME COURT CP

# Negative

## Top

### Generic 1nc

#### The United States Supreme Court should <<insert plan action>>

#### Supreme Court rulings against domestic surveillance solve – past instances prove the Supreme Court *alone* can scale back the scope of domestic surveillance

Xiu 03 [Jie, counsel in the corporate practice of Locke Lord LLP. Her practice focuses on mergers and acquisitions, corporate and securities law. Jie represents complex, high-profile M&A and securities offerings projects across the globe, ROLES OF THE JUDICIARY IN EXAMINING AND SUPERVISING THE CHANGING LAWS OF ELECTRONIC SURVEILLANCE, <http://www.lexisnexis.com.proxy.lib.umich.edu/hottopics/lnacademic/>] Schloss

B. The Supreme Court's Recent Decisions on Electronic Privacy Issues It is difficult to predict the United States Supreme Court's response to the special appeals court's decision if the ACLU and NACDL succeed in having it appealed. The 2000-2001 term of the Supreme Court produced two excellent examples of the continuing disagreement among the judiciary that swirls around the clash between people's privacy and modern surveillance technologies. In the context of the newly-declared campaign against terrorism, as clashes between competing claims to solitude and security are increasing rapidly, the two Court decisions - Kyllo v. United States n115 - deserve special attention in revealing the analytic struggle the Court is undertaking when confronted with such issues. The collisions in the two cases took place in different contexts. Kyllo involved a privacy-based challenge to the search of a home by government agents using a heat detection device. n116 Bartnicki, on the other hand, involved a privacy-based challenge to the broadcast of an illegally intercepted cell phone call. n117 Two common threads bring them together: both challenges are based on claims to privacy, and the invasion of privacy is, in turn, based on new technologies. Nevertheless, the United States Supreme Court has reached different conclusions when comparing the privacy right with other recognized rights and policies. In Kyllo, the Court had to decide the issue of whether the use of a thermal imaging device to scan the suspect's house constituted a "search" within the scope of the Fourth Amendment, and hence, would have been presumptively unreasonable if performed without the requisite warrant. n119 to detect unusually high amounts of heat emanating from a [\*249] suspect's home. n120 Based upon that discovery, investigators obtained a search warrant n122 The Court ruled that surveillance of this type - where an instrument "not in general public use" was employed "to explore details of the home that would be previously unknowable without physical intrusion" - was different from purely "visual surveillance" (i.e., "naked eye" surveillance). n123 The Fourth Amendment draws a firm and bright line at the entrance to a person's home and all details occurring within that home are "intimate details" that should be "safe from prying government eyes." n124 In Bartnicki, the Court dealt with a fairly unusual situation where a telephone call, involving a union official who was engaged in aggressive contract negotiations with a school board, was intercepted by an unknown person, who then sent the recording to an official of another organization in opposition to the union. n125 That official in turn provided the recording to a local radio station who then broadcasted it. n126 The Court ruled that the broadcast of an illegally intercepted telephone call still constitutes free speech that is protected by the First Amendment. n127 In refuting the government's argument that the alleged violation of the federal wiretap law n128 breached people's privacy of communication, the Court emphasized that "privacy concerns give way when balanced against the interest in publishing matters of public importance... .One of the costs associated with participation in public affairs is an attendant loss of privacy." n129 Because the radio station was "not involved in the initial illegality," the Court also refuted the [\*250] government's argument that punishing the radio station would serve the interest in removing an incentive for parties to intercept private conversations. n130 It may be unwise to conclude, based only on a few cases, that the United States Supreme Court has demonstrated a clear and unwavering trend of favoring individual privacy over government surveillance. However, these cases do illustrate that the Supreme Court is adept at applying Constitutional jurisprudence to the new challenges brought by electronic surveillance, and that the Court will closely scrutinize the government's alleged justified surveillance in each case under the First and Fourth Amendments.

### Judicial Independence 1nc

#### National security cases are key to overall judicial independence- otherwise deference gets out of hand and tyranny becomes inevitable

McCormack 14 (Wayne, E.W. Thode Professor of Law, University of Utah, “U.S. Judicial Independence: Victim in the “War on Terror,” Washington and Lee Law Review, Volume 71, Issue 1, Winter 2014, <http://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=4374&context=wlulr>, silbs)

The “head in the sand” attitude of the U.S. Judiciary in the past decade is a rather dismal record that does not fit the high standard for judicial independence on which the American public has come to rely. Many authors have discussed these cases from the perspective of the civil rights and liberties of the individual.512 What I have attempted to do here is sketch out how the undue deference to the Executive in “time of crisis” has undermined the independent role of the Judiciary. Torture, executive detentions, illegal surveillance, and now killing of U.S. citizens, have escaped judicial review under a variety of excuses.513 To be clear, many of the people against whom these abuses have been levied are, or were, very dangerous if not evil individuals. Khalid Sheikh Muhamed and Anwar al-Aulaqi should not be allowed to roam free to kill innocent civilians. But hundreds of years of history show that there are ways of dealing with such people within the limits of restrained government without resort to the hubris and indignity of unreviewed Executive discretion. The turning of blind eyes by many, albeit not all, federal judges is a chapter of this history that will weigh heavily against us in the future. No judge wants to feel responsible for the deaths of innocents. But direct responsibility for death lies with those who contribute to the act. Meanwhile, the judge has an ethical responsibility for abuses by government of which the Judiciary is a part. To illustrate the threat, one federal judge resigned from the secret FISA Court in “protest because the Bush administration was bypassing the court on warrantless wiretaps.”514 To be fair, his public statement before Congress included the thought that the judges were independent but not making fully informed decisions.515 It makes sense that this courageous judge (who also ruled against the Government in a major Guantanamo case516) would extol the independence of the federal Judiciary, but perhaps those of us outside the club can be forgiven for seriously challenging his assessment. Meanwhile, critics are voicing the belief that recent appointments to the FISA Court will be even more deferential to the Executive.517 To repeat, there is nothing “new” in the killing of innocents for religious or political vengeance.518 This violence has always been with us and unfortunately will continue despite our best efforts to curb it. Pleas for Executive carte blanche power are exactly what judicial independence was developed to avoid, and what many statements in various declarations of human rights are all about. The way of unreviewed Executive discretion is the way of tyranny.

#### Democratic transitions are coming now but will fail absent Supreme Court leadership

Suto 11, Research Associate at Tahrir Institute and J.D.

[07/15/11, Ryan Suto is a Research Associate at Tahrir Institute for Middle East Policy, has degrees in degrees in law, post-conflict reconstruction, international relations and public relations from Syracuse Law, “Judicial Diplomacy: The International Impact of the Supreme Court”, http://jurist.org/dateline/2011/07/ryan-suto-judicial-diplomacy.php]

**The Court is certainly the best institution to explain to scholars, governments, lawyers and lay people alike the enduring legal values of the US, why they have been chosen and how they contribute to the development of a stable and democratic society**. **A return to the mentality that one of America's most important exports is its legal traditions would certainly benefit the US and stands to benefit nations building and developing their own legal traditions**, and our relations with them. Furthermore, **it stands to increase the influence and higher the profile of the bench**. The Court already engages in the exercise of dispensing justice and interpreting the Constitution, and to deliver its opinions with an eye toward their diplomatic value would take only minimal effort and has the potential for high returns. **While the Court is indeed the best body to conduct legal diplomacy, it has been falling short in doing so in recent sessions**. **We are at a critical moment in world history**. **People in the Middle East and North Africa are asserting discontent with their governments**. **Many nations in Africa, Asia, and Eurasia are grappling with new technologies, repressive regimes and economic despair.** With **the development of new countries, such as South Sudan, the formation of new governments, as is occurring in Egypt, and the development of new constitutions, as is occurring in Nepal, it is important that the US welcome and engage in legal diplomacy and informative two-way dialogue**. As a nation with lasting and sustainable legal values and traditions, **the Supreme Court should be at the forefront of public legal diplomacy. With each decision, the Supreme Court has the opportunity to better define, explain and defend key legal concepts. This is an opportunity that should not be wasted.**

#### Democracy prevents global wars

Kagan ‘15

[Bob. Senior Fellow for Foreign Policy at Brookings. “Is Democracy in Decline? The Weight of Geopolitics” 1/25/15 <http://www.brookings.edu/research/articles/2015/01/democracy-in-decline-weight-of-geopolitics-kagan> //GBS-JV]

Diamond and others have noted how important it was that these “global democratic norms” came to be “reflected in regional and international institutions and agreements as never before.”[10] Those norms had an impact on the internal political processes of countries, making it harder for authoritarians to weather political and economic storms and easier for democratic movements to gain legitimacy. But “norms” are transient as well. In the 1930s, the trendsetting nations were fascist dictatorships. In the 1950s and 1960s, variants of socialism were in vogue. But from the 1970s until recently, the United States and a handful of other democratic powers set the fashion trend. They pushed—some might even say imposed—democratic principles and embedded them in international institutions and agreements. Equally important was the role that the United States played in preventing backsliding away from democracy where it had barely taken root. Perhaps the most significant U.S. contribution was simply to prevent military coups against fledgling democratic governments. In a sense, the United States was interfering in what might have been a natural cycle, preventing nations that ordinarily would have been “due” for an authoritarian phase from following the usual pattern. It was not that the United States was exporting democracy everywhere. More often, it played the role of “catcher in the rye”—preventing young democracies from falling off the cliff—in places such as the Philippines, Colombia, and Panama. This helped to give the third wave unprecedented breadth and durability. Finally, there was the collapse of the Soviet Union and with it the fall of Central and Eastern Europe’s communist regimes and their replacement by democracies. What role the United States played in hastening the Soviet downfall may be in dispute, but surely it played some part, both by containing the Soviet empire militarily and by outperforming it economically and technologically. And at the heart of the struggle were the peoples of the former Warsaw Pact countries themselves. They had long yearned to achieve the liberation of their respective nations from the Soviet Union, which also meant liberation from communism. These peoples wanted to join the rest of Europe, which offered an economic and social model that was even more attractive than that of the United States. That Central and East Europeans uniformly chose democratic forms of government, however, was not simply the fruit of aspirations for freedom or comfort. It also reflected the desires of these peoples to place themselves under the U.S. security umbrella. The strategic, the economic, the political, and the ideological were thus inseparable. Those nations that wanted to be part of NATO, and later of the European Union, knew that they would stand no chance of admission without democratic credentials. These democratic transitions, which turned the third wave into a democratic tsunami, need not have occurred had the world been configured differently. That a democratic, united, and prosperous Western Europe was even there to exert a powerful magnetic pull on its eastern neighbors was due to U.S. actions after World War II.

## Solvency

### General surveillance

#### The Supreme Court solves--- curtailed two instances of domestic surveillance

Xiu 03 [Jie, counsel in the corporate practice of Locke Lord LLP. Her practice focuses on mergers and acquisitions, corporate and securities law. Jie represents complex, high-profile M&A and securities offerings projects across the globe, ROLES OF THE JUDICIARY IN EXAMINING AND SUPERVISING THE CHANGING LAWS OF ELECTRONIC SURVEILLANCE, <http://www.lexisnexis.com.proxy.lib.umich.edu/hottopics/lnacademic/>] Schloss

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#### The Judiciary is the only branch that can make substantial change to domestic surveillance

Bump 13 [Philip, Politics writer at The Washington Post, How the Government Can Fix the Spying Problem It Doesn't Want to Fix, <http://www.thewire.com/politics/2013/06/nsa-privacy-government-fixes/66014/>] Schloss

Each of the three branches of the government was involved in accessing call data from Verizon (and, apparently, AT&T and Sprint). All three are likely involved in the push for data collection from Internet companies. Congress passed the law legalizing the behavior. Judges signed off on doing so in this case — for the administration, who was asking. In a defensive press appearance Friday afternoon, President Obama suggested that Americans should feel confident in their collective decisions. If people can’t trust not only the executive branch but also don’t trust Congress and don’t trust **federal** judges to make sure that we’re abiding by the Constitution and due process and rule of law, then we’re going to have some problems here. If Americans want to halt the behavior, each of those branches also holds a possible solution. If it chooses to do so. What Congress can do To understand what Congress can do, it's important to understand what it has already done. Our colleagues at the National Journal have a good overview of the legalization of the government's ability to collect electronic information on American citizens. In an effort to modernize intelligence-gathering in the wake of the September 11th attacks, Congress passed the PATRIOT Act in October 2001. Included in that bill was Section 215, which expanded the government's ability to collect data as part of its investigations into criminal and terror plots. In 2008, Congress amended the Foreign Intelligence Services Act to include Section 702, which the government cites as its authorization for PRISM. In 2011 and 2012, Congress voted to renew those provisions. How the government interprets its authority under those acts is one of the core disputes in the aftermath of the recent revelations. As Slate notes, several members of Congress — including Oregon senator Ron Wyden — have consistently attempted to narrow the scope of the government's interpreted authority to reduce the likelihood that information is collected from American citizens. After all, the Fourth Amendment states that the government may not conduct "unreasonable searches and seizures," and that a warrant, including probable cause, is needed for the government to conduct such a search. When the FISA amendments came up for renewal in 2012, Wyden put a block on the legislation, demanding that it address two concerns: that Congress know how often citizens had been included in data collection under the Act, and stricter rules around collecting data on the issue. Wyden eventually lifted that hold. Today, Sen. Rand Paul of Kentucky plans to introduce a bill he calls the Fourth Amendment Restoration Act of 2013. It is modeled on previous attempts to restrict the scope of the bill, and is a specific response to the recent Verizon revelation. "The Fourth Amendment to the Constitution shall not be construed," it reads, "to allow any agency of the United States Government to search the phone records of Americans without a warrant based on probable cause." (Calls to Paul's and Wyden's offices for questions about other policy proposals were not returned.) In a phone conversation earlier today, ACLU national security staff attorney Alex Abdo indicated to The Atlantic Wire that such a restriction wouldn't do much to curtail privacy concerns. At its heart, Abdo suggested, FISA now allows far too much information-gathering of citizens. Asked what the ACLU saw as a suitable policy response to the problem, Abdo called it a "difficult question." The recent revelations didn't change the ACLU's concerns about the problem, he said, but merely confirmed them. Abdo pointed to a 2008 push by then-Senator Obama to limit the ability of the government to collect domestic data. "It would have put significantly greater restrictions on the government's ability to look at Americans' communications if they were swept up," Abdo said. "That is the type of solution that is needed — something that puts a barrier between intelligence agencies and unrestricted access." At the very least, he said, "the government shouldn't have license to listen to any American's communications just because they talk to a foreigner." Which is the current standard — the NSA can eavesdrop only on those in communication with someone it believes is a foreigner. There's a lot of flexibility there, obviously. While Abdo's was a stronger response than has been introduced in Congress so far, it's also somewhat more flexible than one might expect from the ACLU. Asked if the policy idea was an ideal or a practical consideration, Abdo noted that it was practical. Considering the ongoing, strong support for renewal of these policies in the Congress, practical revisions may be the most anyone can expect. Only 13 sitting senators voted against each of five key provisions expanding surveillance when given the opportunity, suggesting that a full repeal is highly unlikely. (Two of those senators, by the way: Paul and Wyden.) What the judiciary can do Part of the reason for that support, as various other senators made clear on Thursday, is a desire to grant the government the benefit of the doubt in drawing the line between civil liberties and the need to investigate and prevent terror attacks. Which is where the judiciary is meant to come in, to help draw that line between what the government wants to do and what the Constitution says it can do. For the FBI or NSA to instantiate the collection of data, it needs sign off from the FISC, the Foreign Intelligence Surveillance Court. The FISC rarely says no. But how it makes its decisions isn't clear. Last month, we detailed efforts by the Electronic Frontier Foundation to get more information about an incident in which the NSA admitted that it had violated the Fourth Amendment. In light of the new revelations, the organization suggested to The Verge that it now sees a judicial response as critical. It filed a lawsuit in 2006 in an attempt to discover how the government was working with AT&T to collect phone data. "We’re waiting for the judge’s decision," [Cindy] Cohn told The Verge, noting that EFF would bring the recent Verizon surveillance order to the judge’s attention. "Hopefully the court will issue an injunction to stop the program." Even if that happens, surveillance won’t stop right away, as the US government will have a chance to appeal the ruling. "It may go all the way to the Supreme Court," Cohen said. "The American people deserve their day in court." This is possible. It is possible that the EFF's petition for more data on the NSA's activity will be revealed; it is possible that a court fight over halting the government's efforts could result in the program being stopped and the judiciary finalizing where the line between security and privacy is drawn. It's possible. It's perhaps not likely. What the executive branch can do In that press conference, the president recognized that it's not clear where the line should be. But Obama, more than anyone else in government, has the ability to draw that line on one side or the other. It is his Department of Justice that wants to surveil electronic data. It's his NSA that's cobbling together millions of phone records. By this time tomorrow, the President could conceivably curtail that activity. As he also made clear in that press conference, he won't. He plans to continue to use surveillance tools instantiated under (and inviting unflattering comparison to) George W. Bush. For a second-term president, there's not much that public opprobrium can do. Those hoping Obama will act to reel in the government's behavior are left to rely on his changing his mind, which so far hasn't worked. Like the judiciary and Congress, Obama seems disinclined to do anything different. There's one last refuge. Someone has invariably started WhiteHouse.gov petitions aimed at provoking a response from the administration. As of writing, 73 people have signed.

#### The Supreme Court is key to reform surveillance---perception of challenging the government is key

Williams, Tech Reporter, 14 [Lauren C., tech reporter for ThinkProgress with an affinity for consumer privacy, cybersecurity, tech culture and the intersection of civil liberties and tech policy., How The Supreme Court Could Decide The Fate Of NSA Surveillance, <http://thinkprogress.org/justice/2014/12/10/3601363/nsa-surveillance-ninth-circuit/>] Schloss

An Idaho nurse is leading the latest charge against the Obama administration for the U.S. National Security Agency’s dragnet phone data surveillance program. With legal help from the American Civil Liberties Union and the Electronic Frontier Foundation, neonatal intensive care nurse Anna Smith contested the government’s spy programs Monday in the U.S. Court of Appeals for the Ninth Circuit. In Monday’s oral argument for Smith v. Obama, Smith’s attorney and husband, Peter Smith, asserted the government violated Smith’s privacy by searching and collecting data that reveals intimate details about her and her family without her permission. Smith argued that each time the NSA’s database was queried or restocked with new information violated the Fourth Amendment. Smith built his case’s standing on the fact Verizon is America’s top telecommunications provider and the NSA’s program indiscriminately swept up swaths of customer data, which included and potentially revealed personal information about his wife’s business and life. “When you can do the hops, and see the connections—you can see that Anna called her doctor, Anna called her mother…It can reveal a lot about a person. It can reveal relationships,” Smith told the judges. The government’s attorney, Thomas Byron, maintained the NSA could collect phone record information — call length, numbers called and when the call was made — without a warrant thanks to almost 50 years of legal precedent. In the 1970s, the Supreme Court ruled in Smith v. Maryland that phone records could be collected without a warrant. Judges Richard Tallman, Michael Hawkins, and Margaret McKeown drilled Smith with some skepticism on how the government’s bulk collection of phone data was constitutionally different from the routine practice of monitoring an individual’s phone activity over a set period, and whether one’s privacy extends to data given to a third party such as a phone company. Tallman in particular seemed unconvinced that Smith was a victim of the dragnet surveillance, saying that Smith was merely speculating that Verizon Wireless’ call records were in fact included in the program and Smith’s records specifically were collected and stored. Smith’s case is the third to reach the federal appellate courts since Edward Snowden’s 2013 NSA revelations. The Second Circuit Court of Appeals in New York and the D.C. Circuit Court of Appeals are hearing similar cases that argue Fourth Amendment violations, as people don’t know how revealing telephone metadata is. According to a metadata study, researchers were able to identify who made calls to and from organization that rely on confidentiality and anonymity, such as Alcoholics Anonymous, health clinics, divorce lawyers, pharmacies and gun stores. These cases have yet to be finalized, but depending on their outcome, the Supreme Court could end up deciding the constitutionality of the NSA’s phone surveillance program. The Supreme Court tends to get involved in cases mainly where there’s a split decision among federal appeals courts — in this case with some courts ruling in the government’s favor and others against. But challenging the government has proven to be an uphill legal battle. Civil liberties activists’ biggest obstacle is decades-old legal precedent. Smith v. Maryland established that law enforcement could collect the call records of an individual or small group of individuals suspected of a crime. The question is whether the sheer scale and volume of the NSA’s metadata program, which was technologically impossible in 1979, is protected under that same ruling. Even if the legal standard wins out, the publicity of challenging the government’s actions could have a positive effect down the line; showing that taking the government to task can be done. There have been past cases where despite proof of being targeted for surveillance, courts have ruled in favor of the government. The Al-Haramain Islamic Foundation sued the Bush Administration for illegally wiretapping the charity’s leaders and lawyers based on a classified document accidentally disclosed in court documents. The court ruled in favor of the government because the information was classified. After news of the NSA’s program broke, the legal fight went public two federal judges issued conflicting rulings on the legality of the NSA’s program. Judge Richard Leon of the D.C. district court ruled that the systematic collection and storage of Americans’ phone records breached the privacy protections afforded in the Fourth Amendment. A week later, New York’s Southern District Court decided the program was legal. Those decisions are now being considered by appeals courts. Snowden’s revelations inspired public calls to action for comprehensive reform of U.S. intelligence programs. But in the year since, there’s been little movement toward policy changes. Obama rolled back some of the NSA’s spying power earlier this year saying intelligence agencies could still collect phone records but couldn’t store them, and accessing the database would be subject to a judge’s approval. The House later passed a diluted version of a revised USA Freedom Act in May, causing tech companies, lobbyists, and privacy advocates to pull their support. The bill failed to muster enough support in the Senate, and its fate when Republicans take control next year is unclear. Meanwhile, a federal judge for the FISA court reauthorized the NSA’s program Monday, keeping the NSA’s controversial metadata program intact until February 27, 2015. The extension is the fourth since Obama promised to reform the program in January.

#### Empirics prove that the Supreme Court causes a spillover through precedent in regards to surveillance

Freiwald and Metille, Professor of Law and Attorney, 13 [Susan and Sylvain, REFORMING SURVEILLANCE LAW:

THE SWISS MODEL, <http://btlj.org/data/articles2015/vol28/28_2/28-berkeley-tech-l-j-1261-1332.pdf>] Schloss

The older cases do make some things clear. In Berger v. New York, the Supreme Court found unconstitutional a New York statute that regulated electronic surveillance because the state law did not impose sufficient procedural hurdles on law enforcement agents.99 In Katz v. United States, concurring Justice Harlan formulated the reasonable expectation of privacy test100 and the majority opinion announced that surveillance practices that intrude upon such expectations must comply with the restrictions set out in Berger. 101 In a series of cases in the late 1980s and early 1990s, seven federal courts of appeal extended the core Fourth Amendment protections established in Berger to government use of video surveillance cameras that record activities subject to a reasonable expectation of privacy.102 The appellate courts found video surveillance to share the features of wiretapping that make it particularly prone to abuse in that such surveillance is hidden, indiscriminate, intrusive, and continuous and therefore it must be subject to the same restrictions as wiretapping.103 The crucial question in the United States is whether the law enforcement practice at issue constitutes a “search” under the Fourth Amendment like wiretapping, bugging, and some types of silent video surveillance. Unlike in Switzerland, constitutional privacy principles apply only to that subset of practices that are considered to be such searches. Practices that are not searches under the Fourth Amendment are subject to no constitutional regulation, and are regulated, if at all, by Congress, subject to no constitutional constraints. In two important cases, the Supreme Court significantly limited what surveillance-type practices count as constitutional searches. In United States v. Miller, the Court found no Fourth Amendment search when law enforcement agents compelled a bank to produce records of the defendant’s transactions with the bank such as his deposit slips and account statements.104 The Court stated: [T]he Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.105 Government litigators and academics have disagreed over the implications of Miller. Some have argued that it establishes that the Fourth Amendment does not protect information obtained from a third party, which would include records of electronic communications stored with service providers.106 Others have promoted a narrow construction of Miller, 107 under which, for example, customers would not forfeit their Fourth Amendment interests by sharing information with intermediaries such as electronic communication providers.108 Whatever the proper application of Miller to new technologies, it clearly inspired Congress to provide only limited restrictions on law enforcement access to stored electronic records in ECPA.109 The Supreme Court extended Miller to the communications context in 1979 when it found law enforcement acquisition of dialed telephone numbers not to be an unconstitutional search in Smith v. Maryland. 110 Law enforcement agents used a device known as a “pen register” to obtain the telephone numbers dialed on a telephone.111 The Supreme Court considered the limited intrusiveness of the pen register investigation as well as the target’s voluntary and knowing disclosure of his telephone numbers to telephone company employees when it found the technique to intrude on no reasonable expectation of privacy.112 As with the Miller case, the Smith decision does not have to be read to imply a lack of constitutional protection for modern electronic communications information.113 Justice Department litigators, however, have maintained that Smith establishes that all “noncontent” information lacks Fourth Amendment protection.114 Whatever the appropriate reading of the case, it inspired Congress to provide for relatively little restriction in ECPA on law enforcement access to communication attributes, which include all non-content features of communications.115 Miller and Smith established that the practices they considered— compelled disclosure of stored bank records and acquisition of telephone numbers dialed—fell entirely outside the protection of the Fourth Amendment because they were not “searches” that intruded upon the targets’ reasonable expectations of privacy. Some U.S. courts have read Miller and Smith more expansively and have found modern surveillance practices, such as IP address and cell site location acquisition, to be similarly outside the protection of the Fourth Amendment.116 Some courts have recently rejected such broad readings, and found new practices, such as stored email acquisition, to be constitutionally protected because they differ significantly from the practices considered in Miller and Smith and instead more analogous to wiretapping and acquisition of postal mail.117 Congress retains complete discretion over how to regulate those practices that do not implicate the Fourth Amendment. Unlike Swiss legislators, Congress has not produced a comprehensive surveillance law that covers all types of surveillance used during law enforcement investigations. Instead, restrictions derive from piecemeal legislation such as ECPA, which has fallen out-of-date in the more than twenty-five years since its passage. As the next section shows, in the United States, there is nothing comparable to the restrictions imposed by the ECtHR to inspire or require Congress to bring U.S. laws up to date.

### Racial profiling

#### Empirically the court has been important in solving racial discrimination

Badger 15 [Emily, Washington Post Reporter, Supreme Court upholds a key tool fighting discrimination in the housing market, <http://www.washingtonpost.com/blogs/wonkblog/wp/2015/06/25/supreme-court-upholds-a-key-tool-fighting-discrimination-in-the-housing-market/>] Schloss

Civil rights groups and the Obama administration won a major victory Thursday as the Supreme Court upheld a tool that advocates argue is essential to fighting housing discrimination and patterns of segregation that have persisted in America for decades. In the 5-4 decision written by Justice Anthony Kennedy, the court ruled that the 1968 Fair Housing Act prevents more than just intentional discrimination in the housing market. The court said the law can also prohibit seemingly race-neutral policies that have the effect of disproportionately harming minorities and other protected groups, even if there is no overt evidence of bias behind them. "The Court acknowledges," Kennedy wrote, "the Fair Housing Act’s continuing role in moving the Nation toward a more integrated society." He cautioned, though, that "disparate impact" claims don’t simply arise any time statistical disparities appear along racial lines in housing. It must be clear that housing policies caused that disparity, and that those policies don’t serve another valid goal. The decision upholds a legal strategy that civil rights groups and the federal government have used for four decades to fight lending practices, local housing policies and zoning laws that have had the effect of limiting housing options available to minorities. Lower courts have repeatedly agreed that the Fair Housing Act allows such "disparate impact" claims, but the Supreme Court had not weighed in on the question until now. As overt racial discrimination has receded from the housing market, civil rights lawyers and housing advocates have argued that "disparate impact" claims are vital to dismantling policies and practices that sound like they have little to do with race at all, such as zoning laws that bar multi-family apartment construction in wealthier white suburbs. If the Supreme Court had ruled that such claims couldn't be made under the Fair Housing Act, civil rights groups argued that the landmark civil rights law would have lost much of its power. "This really is the most we possibly could have hoped for," said Betsy Julian, the president of the Inclusive Communities Project, the Texas nonprofit that brought the case. "We’re thrilled that 'disparate impact' as a principle was upheld. We're also particularly gratified that the court appreciated that we are not a post-racial society when it comes to housing and that we have a ways to go." The ruling is a defeat for banks and developers who countered that the fear of disparate impact lawsuits might discourage them from trying to build affordable housing. Critics have also argued that "disparate impact" claims unfairly impugn the motives of banks, communities and developers who never intended to discriminate. In his dissent, Justice Samuel A. Alito Jr. warned that the court “makes a serious mistake” in giving meaning to the Fair Housing Act that Congress never intended when it passed the law. The case arose from a lawsuit filed by the Inclusive Communities Project against the Texas Department of Housing and Community Affairs over how it distributes tax credits for low-income housing. ICP argued that the state's formula effectively ensured that low-income housing was primarily built in poor, minority neighborhoods, and seldom placed in white suburban ones. As a result, poorer, minority families in need of affordable housing had little option but to live in impoverished communities without access to good schools, jobs or opportunity. "This is going to open up this issue all over the country," said Myron Orfield, a law professor at the University of Minnesota. "The things that are happening in Texas are happening in every city in the Untied States. They’re all evading civil rights law by concentrating affordable housing in segregated neighborhoods, thus perpetuating segregation — which Justice Kennedy said they cannot do today." While the Texas case was winding its way through the courts, the Department of Housing and Urban Development, which is charged with enforcing the Fair Housing Act, issued a rule in 2013 explicitly interpreting the law to cover disparate impact claims. HUD Secretary Julian Castro in a statement Thursday called the ruling "another important step in the long march toward fulfilling one of our nation’s founding ideals: equal opportunity for all Americans." The White House, in a separate statement, said the decision "reflects the reality that discrimination often operates not just out in the open, but in more hidden forms," such as predatory lending and exclusionary zoning. The decision was expected to be a close one. The Supreme Court had twice previously tried to take up "disparate impact" cases to resolve the question, despite the agreement among lower courts. But both earlier cases settled before they reached the high court, to the relief of civil rights groups and administration officials who feared conservative justices were searching for a case to weaken the law. The court's four liberals sided in the case with Kennedy, while Alito was joined in his dissent by Antonin Scalia and John G. Roberts Jr. Clarence Thomas wrote a separate dissent. In his rebuttal, Thomas wrote that racial imbalances don't always disfavor minorities, pointing to instances in which minorities have dominated certain industries. "And in our own country, for roughly a quarter-century now, over 70 percent of National Basketball Association players have been black," Thomas wrote. "To presume that these and all other measurable disparities are products of racial discrimination is to ignore the complexities of human existence."

#### Supreme Court Solves--- set a precedent of anti-discrimination to a similar case in the past

GIS Watch 14 [Global Information Society Watch, The Global Information Society Watch is a joint initiative of the Association for Progressive Communications (APC) and the Humanist Institute for Development Cooperation (Hivos), and follows up on our long-term interest in the impact of civil society on governance processes and our efforts to enhance public participation in national and international forums., <http://giswatch.org/sites/default/files/the_harms_of_surveillance.pdf>] Schloss

In a landmark 1958 case, NAACP v. Alabama, the Supreme Court of the US held that if the state forced the National Association for the Advancement of Colored People (NAACP) to hand over its membership lists, its members’ rights to assemble and organise would be violated.9 This case set the precedent for the Supreme Court’s foray into the constitutionally guaranteed right to association after decades of government attempts to shun “disloyal” individuals. Justice John Marshall Harlan wrote for a unanimous court: This Court has recognized the vital relationship between freedom to associate and privacy in one’s associations. Compelled disclosure of membership in an organization engaged in advocacy of particular beliefs is of the same order. Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.10 Today, the data collected by the NSA’s various surveillance programmes poses a similar threat to the collection of membership lists. The vast majority of what the NSA collects is metadata, an ambiguous term that in this case describes the data surrounding one’s communications. That is to say, if the content of one’s phone call is the data, the metadata could include the number called, the time of the call, and the location from which the call was made. The danger in metadata is that it allows the surveiller to map our networks and activities, making us think twice before communicating with a certain group or individual. In a surveillance state, this can have profound implications: Think of Uganda, for example, where a legal crackdown on lesbian, gay, bisexual and transgender (LGBT) activists is currently underway. Under surveillance, a gay youth seeking community or health care faces significant risks just for the simple act of making a phone call or sending an email. In many countries, there has long been a legal distinction between the content of a message (that is, the message itself), and the “communications data”, or metadata. This distinction is based on the traditional model of postal mail, where information written on the outside of an envelope is distinguished from the content of the envelope. This distinction is, however, rendered nearly meaningless by modern surveillance methods, which can capture far more than the destination of a communication, and en masse. 11 In order to argue effectively for and reclaim the right to associate freely without surveillance, it is imperative that such a distinction be made. Digital metadata is different from analogue metadata and its wide-scale capture creates a chilling effect on speech and association. It is time for fresh thinking on the impact of the culture of surveillance on our daily habits.

### Drones

#### Only court action on aerial surveillance solves privacy backsliding, keeps up with technology, and provides law enforcement with legal bright lines

Celso 2014 (Joel [JD Candidate U of Baltimore Law]; DRONING ON ABOUT THE FOURTH AMENDMENT: ADOPTING A REASONABLE FOURTH AMENDMENT JURISPRUDENCE TO PREVENT UNREASONABLE SEARCHES BY UNMANNED AIRCRAFT SYSTEMS; 43 U. Balt. L. Rev. 461; kdf)

IV. ENSURING A REASONABLE FUTURE BY PREVENTING UNREASONABLE UAS SURVEILLANCE Speaking for the Supreme Court in Kyllo, Justice Scalia acknowledged that technological advances have reduced the privacy [\*489] protections granted by the Fourth Amendment. n252 In Justice Scalia's mind, the primary issue facing the Court was "what limits there are upon this power of technology to shrink the realm of guaranteed privacy." n253 Attempting to determine how courts might decide the constitutionality of warrantless UAS surveillance of the home and its curtilage is context-dependent, and ultimately speculative. n254 As one author has noted, if UAS surveillance is not a Fourth Amendment search, then the "realm of guaranteed privacy" referred to by Justice Scalia would not just be shrunk, but eliminated. n255 Even if UAS surveillance is currently a search subject to the Fourth Amendment that status may be lost as UAS flights become routine. n256 Furthermore, the Fourth Amendment does not currently protect anyone's privacy from UAS surveillance, even for extended periods, when they are in public or other open areas. n257 To ensure that privacy will be protected from the threat posed by UAS surveillance, a new rule should be added to current Fourth Amendment jurisprudence. Courts should hold that all UAS surveillance by law enforcement constitutes a search within the meaning of the Fourth Amendment, and is presumptively unreasonable without a warrant. n258 Under this rule, all warrantless UAS surveillance used for law enforcement purposes such as criminal investigation, targeted surveillance, and monitoring property or zones, would violate the Fourth Amendment regardless of where the surveillance took place. n259 [\*490] The justification for this rule should be grounded in the unprecedented technological capabilities of UAS and the unique threat they represent to privacy. n260 Although the Supreme Court has heard challenges to law enforcement's use of aerial surveillance, sense enhancing devices, and electronic tracking, it has never considered anything like UAS, which combine all three capabilities. n261 Historically, the cost of using personnel for traditional surveillance placed a practical limitation on police surveillance which acted to protect privacy. n262 The affordability of UAS could eliminate this constraint on excessive police presence and dramatically increase the potential for abuses. n263 In addition, UAS' small size and silent operation allow them to operate in relative stealth. n264 Citizens could be observed by law enforcement without ever knowing they were under surveillance. n265 Although UAS are not invasive by causing "undue noise ... wind, dust, or threat of injury," they may actually be more intrusive than conventional aircraft. n266 Because people will not have notice of UAS' approach or presence, they will be unable to keep private those activities which they do not wish to expose to public view. n267 UAS technology has been described as providing law enforcement with "permanent, multi-dimensional, multi-sensory surveillance of citizens twenty-four hours per day." n268 Some have gone as far as claiming that UAS give law enforcement capabilities reserved for deities. n269 As such, UAS present the potential for unprecedented law enforcement abuses which would be prevented by the warrant requirement proposed here. [\*491] Not only will this proposed rule ensure that the Fourth Amendment remains the guarantor of privacy, but it provides other advantages as well. n270 First, it draws a bright-line rule for police who will not have to determine in advance whether or not their actions are constitutional each time they want to use a UAS in a new context, or when they are armed with a new technology. n271 Similarly, the courts will not lag behind each new technological advance in UAS technology because a warrant will always be required. n272 Finally, and most importantly, the rule will accomplish what current jurisprudence cannot: it will prevent Fourth Amendment protections from being left "at the mercy of advancing technology." n273 The Supreme Court has established precedent for adopting the rule proposed here. n274 In Katz, the Court shifted the basis of finding that a Fourth Amendment search had occurred from a physical trespass to an intrusion on a reasonable expectation of privacy. n275 In doing so, the Court demonstrated its willingness to adopt new rules to ensure that privacy is protected from threats posed by new technologies. By adopting the rule proposed here, the courts would be acting in accordance with the precedent from Katz and would guarantee that UAS technology remains within the scope of Fourth Amendment protections.

#### The Supreme Court is the most viable actor to uphold a citizen’s right to privacy under drone surveillance

Olivito 13 [Jonathan, Attorney, Beyond the Fourth Amendment: Limiting Drone Surveillance Through the Constitutional Right to Informational Privacy, <http://moritzlaw.osu.edu/students/groups/oslj/files/2013/12/8-Olivito.pdf>] Schloss

To remedy these privacy concerns, courts should adjudicate cases involving drone surveillance under the constitutional right to informational privacy. As already recognized by most courts applying the right, the constitutional right to privacy creates a right of action against the government.177 This right of action stands independent of the Fourth Amendment, augmenting the Fourth Amendment’s protections rather than replacing them.178 When courts confront the claim that drone surveillance has invaded an individual’s constitutional right to privacy, courts should apply the following test. First, courts should require a claimant to establish a threshold requirement: that a government action has implicated a privacy interest. Once this threshold criterion is met, the court should engage in a balancing test that weighs the individual’s privacy interests against the government’s interests in conducting the challenged drone surveillance. Courts should consider five factors when applying the balancing test: (a) the duration of the surveillance; (b) the invasiveness of the technologies used; (c) the thoroughness of the surveillance; (d) the individualized nature of the surveillance; (e) and the presence of a warrant or probable cause. If the individual’s privacy interests outweigh the government’s interests, then the court would, as a remedy, prohibit the government from storing, aggregating, transferring, or distributing any information gathered in the challenged surveillance. The court’s remedy would apply both to any information that the government had already gathered and to information that the government might observe through the challenged drone surveillance in the future.179 The subsequent discussion elucidates the elements of this balancing test. Courts should apply a broad definition of what constitutes a privacy interest when determining whether a constitutional privacy claim has met the threshold requirement for the proposed balancing test. Specifically, a claimant should establish that the government has implicated a privacy interest simply by the claimant asserting that his or her body or activity has been photographed, recorded, or in some way scanned by a drone. Although this broad interpretation of a privacy interest—an interest in limiting one’s exposure to drone surveillance—diverges from the medical and financial disclosure claims typically brought under the constitutional right to privacy, an expanded interpretation of privacy finds support in the theoretical underpinnings that initially led the Court to assume the existence of the constitutional right to informational privacy.180 The Supreme Court countenanced a broad articulation of privacy in Whalen v. Roe. 181 Courts adjudicating constitutional right to privacy claims involving drone surveillance should look to the articulation of privacy found in Whalen. Under that articulation, privacy encompasses both an interest in “avoiding disclosure of personal matters” and an interest in “independence in making certain kinds of important decisions.”182 This broad conception of privacy aligns with the view held by commentators dating back to Samuel Warren and Louis Brandeis183 that privacy involves more than an actual concealment of information; privacy encompasses a “right to be let alone.”184 The compilation through drone surveillance of photographs and video recordings of individuals’ public activities violates both the right to be let alone and the accompanying understanding that people enjoy a degree of anonymity in public spaces.185 Once a court has determined that a claimant has stated the threshold requirement—that the government photographed, recorded, or scanned the claimant using a drone—the court should apply a balancing test to determine if the government violated the claimant’s privacy interest.

#### The Supreme Court is the test for whether done use violates the 4th amendment

O’Brien 13 [Jennifer, Senior Solicitor at Wellers Law Group, Warrantless Government Drone Surveillance: A Challenge to the Fourth Amendment, 30 J. Marshall J. Info. Tech. & Privacy L. 155 (2013), <http://repository.jmls.edu/cgi/viewcontent.cgi?article=1732&context=jitpl>] Schloss

The Federal Aviation Administration Modernization and Reform Act of 2012 aims to integrate drones into the United States national airspace by 2015. While the thought of prevalent private and public daily drone use might seem implausible now, the combination of this new legislation and the increasing availability of inexpensive, technologically advanced small drones will make it a reality. From detectaphones to pen registers and most recently, the GPS, the Supreme Court has faced a plethora of unreasonable search challenges to the warrantless use of such sense augmentation devices by law enforcement to collect information. Acting as the privacy safeguard of the Constitution, the Fourth Amendment has been invoked to challenge the warrantless governmental use of this ever-evolving timeline of devices. The gauge of Fourth Amendment protection has been society’s view of what is or is not a reasonable expectation of privacy. However, with the voluntary increase in the dissemination of personal, private information society’s objective view of reasonable expectations of privacy has become blurred. With the ability to capture high-resolution images and video, sustain mass surveillance, and long-term data retention, the drone presents one of the greatest challenges to society’s privacy expectations under the Fourth Amendment. As the drone is poised to become the newest in a long line of surveillance tools available to law enforcement, an important inquiry is whether such use will require a warrant. This Comment will analyze United States Supreme Court case law concerning various surveillance devices challenged under the Fourth Amendment and argue for several approaches to be taken to ensure the protection of privacy rights without needlessly hindering government use of a potentially important investigative device

### NSA

#### Courts are key to check back the same executive authority that instituted the NSA

Balkin and Levinson 07 [Jack and Sanford, American legal scholar. He is the Knight Professor of Constitutional Law and the First Amendment at Yale Law School, American legal scholar, best known for his writings on constitutional law and a professor at the University of Texas Law School., THE REHNQUIST COURT AND BEYOND: REVOLUTION, COUNTER-REVOLUTION, OR MERE CHASTENING OF CONSTITUTIONAL ASPIRATIONS? THE PROCESSES OF CONSTITUTIONAL CHANGE: FROM PARTISAN ENTRENCHMENT TO THE NATIONAL SURVEILLANCE STATE, [file:///C:/Users/Jonah/Downloads/75FordhamLRev489.pdf](file:///C%3A/Users/Jonah/Downloads/75FordhamLRev489.pdf)] Schloss

Courts often play a role in these constitutional constructions. Courts may legitimate new constitutional constructions or hold certain institutional innovations unconstitutional; examples of the latter might include the Court striking down the National Recovery Act in A.L.A. Schechter Poultry Corp. v. United States,28 congressional vetoes in INS v. Chadha,29 and the Presidential line item veto in Clinton v. City of New York. 30 Courts can uphold or strike down super-statutes or read them broadly or narrowly, and they can also intervene in the balance of power between the branches, as in the famous decision in Youngstown Sheet & Tube Co. v. Sawyer.31 Nevertheless, much constitutional development (and therefore much constitutional change) occurs outside of judicial case law. Steven Teles has described how the conservative jurisprudence of the present era was fostered by decades of institution building in conservative think tanks, policy institutes, conservative public interest law firms, professional organizations like the Federalist Society, and constitutional scholarship. 32 This institution building helped shape professional legal ideology, generated new ideas and litigation strategies, drove litigation favoring conservative causes through the court system, and created networks for job placement and influence both in government and the private sector. Conservative institution building helped create an agenda of cases that conservative courts would later decide. It nourished a generation of conservative lawyers and intellectuals, often placed in Supreme Court clerkships and influential executive branch positions, who would produce new conservative constitutional arguments and form a talent pool for judicial appointments. George W. Bush's two Supreme Court appointments, John G. Roberts and Samuel A. Alito, are among the results of this long process of conservative institution building.33 In many areas, the constitutional law enunciated in formal opinions and memoranda issued by the Office of Legal Counsel (OLC) within the Department of Justice (DOJ) is sometimes at least as important as any decision of Article III courts. The most obvious example over the past fiveyears is the OLC's enunciation of the broad scope of presidential power in foreign affairs, leading, in one notorious example, to a crabbed and narrow reading of what constitutes "torture" banned by domestic law and international treaties. The same "torture memo" also offered (to our minds, at least) highly disturbing views about the essentially unconstrained powers that the President enjoys under Article II.34 The OLC has also issued memos absolving the President of obligations to obey existing treaties and international law obligations, and, in a memo whose contents still remain secret, gave its blessing to the President's decision to employ the National Security Administration (NSA) to spy on American citizens beyond the confines of the Foreign Intelligence Surveillance Act of 1978 (FISA). Presidents often change the practical balance of power between themselves and the other branches through their assertions of constitutional authority. In these executive assertions, the constitutional and legal interpretations of the OLC and the DOJ may prove quite important in providing the necessary professional and ideological cover for what the President seeks to do. The OLC, and the DOJ more generally, have been crucial in creating and providing constitutional interpretations justifying the *President's* robust assertions of Article II power to disregard congressional statutes that he believes hamper his inherent authority as Commander-in-Chief,35 as well asthe President's capacious view of the authority vested in him by the September 18, 2001 Authorization for the Use of Military Force.

#### The Supreme Court agrees that NSA surveillance guts U.S. citizen’s privacy and Congress fails at reform

Donohue 13 [Laura, professor at Georgetown University Law Center and director of Georgetown’s Center on National Security and the Law., NSA surveillance may be legal — but it’s unconstitutional, <http://www.washingtonpost.com/opinions/nsa-surveillance-may-be-legal--but-its-unconstitutional/2013/06/21/b9ddec20-d44d-11e2-a73e-826d299ff459_story.html>] Schloss

The National Security Agency’s recently revealed surveillance programs undermine the purpose of the Foreign Intelligence Surveillance Act, which was established to prevent this kind of overreach. They violate the Fourth Amendment’s guarantee against unreasonable search and seizure. And they underscore the dangers of growing executive power. The intelligence community has a history of overreaching in the name of national security. In the mid-1970s, it came to light that, since the 1940s, the NSA had been collecting international telegraphic traffic from companies, in the process obtaining millions of Americans’ telegrams that were unrelated to foreign targets. From 1940 to 1973, the CIA and the FBI engaged in covert mail-opening programs that violated laws prohibiting the interception or opening of mail. The agencies also conducted warrantless “surreptitious entries,” breaking into targets’ offices and homes to photocopy or steal business records and personal documents. The Army Security Agency intercepted domestic radio communications. And the Army’s CONUS program placed more than 100,000 people under surveillance, including lawmakers and civil rights leaders. After an extensive investigation of the agencies’ actions, Congress passed the 1978 Foreign Intelligence Surveillance Act (FISA) to limit sweeping collection of intelligence and create rigorous oversight. But 35 years later, the NSA is using this law and its subsequent amendments as legal grounds to run even more invasive programs than those that gave rise to the statute. We’ve learned that in April, the Foreign Intelligence Surveillance Court (FISC) ordered Verizon to provide information on calls made by each subscriber over a three-month period. Over the past seven years, similar orders have been served continuously on AT&T, Sprint and other telecommunications providers. Another program, PRISM, disclosed by the Guardian and The Washington Post, allows the NSA and the FBI to obtain online data including e-mails, photographs, documents and connection logs. The information that can be assembled about any one person — much less organizations, social networks and entire communities — is staggering: What we do, think and believe. The government defends the programs’ legality, saying they comply with FISA and its amendments. It may be right, but only because FISA has ceased to provide a meaningful constraint. Under the traditional FISA, if the government wants to conduct electronic surveillance, it must make a classified application to a special court, identitying or describing the target. It must demonstrate probable cause that the target is a foreign power or an agent thereof, and that the facilities to be monitored will be used by the target. In 2008, Congress added section 702 to the statute, allowing the government to use electronic surveillance to collect foreign intelligence on non-U.S. persons it reasonably believes are abroad, without a court order for each target. A U.S. citizen may not intentionally be targeted. To the extent that the FISC sanctioned PRISM, it may be consistent with the law. But it is disingenuous to suggest that millions of Americans’ e-mails, photographs and documents are “incidental” to an investigation targeting foreigners overseas. The telephony metadata program raises similar concerns. FISA did not originally envision the government accessing records. Following the 1995 Oklahoma City bombing, Congress allowed applications for obtaining records from certain kinds of businesses. In 2001, lawmakers further expanded FISA to give the government access to any business or personal records. Under section 215 of the Patriot Act, the government no longer has to prove that the target is a foreign power. It need only state that the records are sought as part of an investigation to protect against terrorism or clandestine intelligence. This means that FISA can now be used to gather records concerning individuals who are neither the target of any investigation nor an agent of a foreign power. Entire databases — such as telephony metadata — can be obtained, as long as an authorized investigation exists. Congress didn’t pass Section 215 to allow for the wholesale collection of information. As Rep. F. James Sensenbrenner Jr. (R-Wis.), who helped draft the statute, wrote in the Guardian: “Congress intended to allow the intelligence communities to access targeted information for specific investigations. How can every call that every American makes or receives be relevant to a specific investigation?” As a constitutional matter, the Supreme Court has long held that, where an individual has a reasonable expectation of privacy, search and seizure may occur only once the government has obtained a warrant, supported by probable cause and issued by a judge. The warrant must specify the places to be searched and items to be seized. There are exceptions to the warrant requirement. In 1979 the court held that the use of a pen register to record numbers dialed from someone’s home was not a search. The court suggested that people who disclose their communications to others assume the risk that law enforcement may obtain the information. More than three decades later, digitization and the explosion of social-network technology have changed the calculus. In the ordinary course of life, third parties obtain massive amounts of information about us that, when analyzed, have much deeper implications for our privacy than before. As for Section 702 of FISA, the Supreme Court has held that the Fourth Amendment does not protect foreigners from searches conducted abroad. But it has never recognized a foreign intelligence exception to the warrant requirement when foreign-targeted searches result in the collection of vast stores of citizens’ communications. Americans reasonably expect that their movements, communications and decisions will not be recorded and analyzed by the government. A majority of the Supreme Court seems to agree. Last year, the court considered a case involving 28-day GPS surveillance. Justice Samuel Alito suggested that in most criminal investigations, long-term monitoring “impinges on expectations of privacy.” Justice Sonia Sotomayor recognized that following a person’s movements “reflects a wealth of detail about her familial, political, professional, religious, and sexual associations.” The FISC is supposed to operate as a check. But it is a secret court, notorious for its low rate of denial. From 1979 to 2002, it did not reject a single application. Over the past five years, out of nearly 8,600 applications, only two have been denied. Congress has an opportunity to create more effective checks on executive power. It could withdraw Sections 215 and 702 and introduce new measures to regulate intelligence collection and analysis. There are many options. James Madison put it best: “In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.”

#### Only the courts can set a new precedent that will challenge the ruling that has allowed the NSA to conduct mass surveillance

Schwartz, New Yorker Staff writer, 15 [Mattathias, January 23, 2015, Who Can Control N.S.A. Surveillance?, <http://www.newyorker.com/news/news-desk/can-control-n-s-surveillance>] Schloss

President Obama spent only a few moments of his State of the Union this week talking about the National Security Agency and civil liberties. A year before, he’d promised to “end” Section 215, the N.S.A.’s most controversial surveillance program, “as it currently exists.” In his speech last Tuesday, he said almost nothing concrete, aside from mentioning a forthcoming report “on how we’re keeping our promise to keep our country safe while strengthening privacy.” Since Edward Snowden revealed the extent of the N.S.A.’s activities in the summer of 2013, there have been a number of official reports on the troubled relationship between surveillance and privacy—one from the President’s Review Group, two from the Privacy and Civil Liberties Oversight Board, and another, last week, from the National Academy of Sciences. In August, 2013, the Office of the Director of National Intelligence started a Tumblr, on which they’ve posted many interesting and useful documents, including redacted orders from the secret Foreign Intelligence Surveillance Court (FISA). But, while the government has made some moves toward transparency about its surveillance programs, it has enacted few substantial reforms of them. The N.S.A. continues to use Section 215, named after a part of the Patriot Act, to collect metadata on hundreds of billions of U.S. phone calls. Obama has talked about moving the data to some third party. Congress has talked about more serious reforms, including an independent advocate who would represent privacy concerns before the FISA court. But the most significant reform that has been undertaken as the result of an order from Obama is a reduction in the scope of metadata searches, from three “hops,” or degrees of association, to two. There isn’t much evidence to suggest that Section 215 helps catch the most dangerous terrorists, like those who committed the attacks in Paris two weeks ago. It may even slow investigators down, by eating up resources and generating extraneous leads. (I wrote about Section 215’s track record in this week’s magazine.) Nevertheless, opponents of N.S.A. reform continue to claim that Section 215 can stop violent terrorists. Last week, House Speaker John Boehner, of Ohio, said that information collected from phone records helped halt a plot to bomb the U.S. Capitol, despite the fact that, as the Guardian reported, the F.B.I. has indicated that the critical information came from a government informant. “The first thing that strikes me is that we would’ve never known about this had it not been for the FISA program and our ability to collect information for people who pose an imminent threat,” Boehner told Politico. When Obama and Congress talk about N.S.A. reform, they’re mostly talking about Section 215. But what other classified surveillance programs are out there? The difficulty of answering this question was made clear last week, when the Drug Enforcement Administration revealed in a court filing that it had maintained a database of calls made from U.S. phone numbers to and from overseas callers. The D.E.A. held the database under a law ostensibly related to administrative subpoenas, not metadata, and used it in criminal drug-trafficking investigations, not counterterrorism activities. Despite the apparent lack of a connection to terrorism, all the D.E.A. needed to search the database was a “reasonable articulable suspicion,” a lower standard of evidence than probable cause that is most often associated with counterterrorism and counterintelligence programs. According to the D.E.A. filings, the program was suspended in September, 2013. All of the information that was contained in the database has since been deleted, a D.E.A. spokesperson told the Times. If Obama and Congress were to undertake serious surveillance reforms, they would have a hard time doing it one authority at a time. The limits on U.S. surveillance were written in an analog age, when “pen registers” and “trap and trace devices” intercepted communications moving on copper wire. The legality of collecting phone metadata rests on a 1979 Supreme Court case, Smith v. Maryland, which held that the police did not need a warrant to obtain the phone numbers dialed from a single suspect’s land line. It didn’t say anything about location tracking, pattern-based analysis, or collecting phone records by the million. The discrepancy between the old guidelines and the new technology they describe has facilitated surprisingly broad interpretations of the ruling, most notably Section 215. Last October, Senator Patrick Leahy, of Vermont, proposed the U.S.A. Freedom Act, which would curtail some of the N.S.A.’s domestic powers with an independent FISA advocate, more legal authority for a key oversight board, and more stringent legal standards for obtaining phone metadata and other records. It’s unclear whether the bill will make it through the Republican-controlled Congress, or what will happen if Congress fails to reform Section 215 before June, when it will expire if it’s not renewed. In the end, the branch of government most capable of settling the thorny N.S.A. debate may turn out to be the courts.

## Net Benefit

### link- generic

#### The “war on terror” security policies are crushing judicial independence

McCormack 14 (Wayne, E.W. Thode Professor of Law, University of Utah, “U.S. Judicial Independence: Victim in the “War on Terror,” Washington and Lee Law Review, Volume 71, Issue 1, Winter 2014, <http://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=4374&context=wlulr>, silbs)

 One of the principal victims in the United States’ so-called “war on terror” has been the independence of the U.S. Judiciary. Time and again, challenges to assertedly illegal conduct on the part of government officials have been turned aside, either because of overt deference to the government or because of special doctrines such as the state secrets privilege and standing requirements. I have even described the behavior of the United States since 9/11 as a “war on the rule of law.”1 This Article catalogs the principal cases first by the nature of the government action challenged and then by the special doctrines invoked. What I attempt to show is that the Judiciary has virtually relinquished its valuable role in the U.S. system of governance, which depends on judicial review. In the face of governmental claims of crisis and national security needs, the courts have refused to examine, or have examined with undue deference, the actions of government officials. Oddly enough, the mostly Republican Supreme Court has shown more stiff resistance than most of the lower courts,2 but still has ducked some significant issues.3 In the cases considered here, the U.S. government has taken the position that inquiry by the Judiciary into a variety of actions against alleged malfeasors would threaten the safety of the nation.4 This is pressure that amounts to intimidation. When this level of pressure is mounted to create exceptions to established rules of law, it undermines due process of law. Perhaps one or two examples of government warnings about the consequences of a judicial decision would be within the domain of legal argument. But a long pattern of threats and intimidation to depart from established law undermines judicial independence. That has been the course of the U.S. “war on terror” for over a decade now.

#### The executive branch has been given carte blanche for electronic snooping- the court needs to check back against that

McCormack 14 (Wayne, E.W. Thode Professor of Law, University of Utah, “U.S. Judicial Independence: Victim in the “War on Terror,” Washington and Lee Law Review, Volume 71, Issue 1, Winter 2014, <http://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=4374&context=wlulr>, silbs)

The battle over NSA surveillance probably has less to do with actual invasions of privacy and more to do with the sense that government decided it can do whatever it wants to do with total impunity. The existence of secret NSA programs is not at all surprising to those who have paid close attention to this issue for the last decade. The fact is that our government was never open or transparent about what it was doing, and we knew it was not. For example, Attorney General Alberto Gonzales in a number of public statements during 2005 and 2006 was always careful to say “the program the President has disclosed” is legal, leaving open the inference that there was much more that had not been disclosed: A word of caution here. This remains a highly classified program. . . . So my remarks today speak only to those activities confirmed publicly by the President, and not to other purported activities described in press reports. These press accounts are in almost every case, in one way or another, misinformed, confusing, or wrong. And unfortunately, they have caused concern over the potential breadth of what the President has actually authorized.429 Nowhere in the many public statements of the era—all of which are contained on the DOJ website—is there any mention of the undisclosed activities of the NSA. Naturally we would get “press accounts . . . [that were] misinformed, confusing, or wrong.”430 But we probably got some information that was accurate. What do we know now in 2014? We know that NSA and its affiliated agencies are capable of reading all our e-mail and listening to our phone conversations.431 Do they do so? They would have us believe they are too busy to bother with us little people. But it is also clear that if the “metadata mining” reveals a pattern of curiosity, then it is a simple matter to reach into the grab bag and pull out everything any particular individual has said for a long period of time.432 Indeed, some instances of unauthorized snooping into content have been acknowledged and one FISA judge has described the NSA as having repeatedly misrepresented its activities to the court.433 The FISA Court has approved “programmatic” surveillance by interpreting the word “relevant”434 to mean basically all electronic communications, which can be monitored for suspicious patterns.435 “And under the ‘reasonable suspicion’ standard, there is no judicial review when someone decides to look into the content of those communications.”436 Frankly, I’m not so sure that privacy of information is really that important, except to the extent that I need to be able to protect my bank accounts from being raided. What makes the NSA dustup more disturbing is the feeling within government that government can act with impunity in the name of “national security.”437 If they can read my e-mails today, can they haul me off to a military brig without judicial approval tomorrow? Oh, wait, they did that already—kept several people locked up for years with total impunity—even tortured with impunity.438 Recently, two judges have taken a hard look at the NSA activity and disagreed on the merits.439 At least, these two judges did not yield to the temptation to abdicate judicial independence in the face of the dreaded word “terrorism.”440 G. Standing The U.S. federal courts have a rather mystical, ethereal approach to their “special place” in separation of powers. Part of the mystique is a doctrine called “standing,” which I have described elsewhere as part of the “Mythology of Justiciability.”441 The heart of the doctrine is that a person who is not able to show an injury by another person has no claim of right against that other person. The mystery is why we need to waste barrels of ink and jurisprudential energy on a point basic to all of law—if you haven’t harmed me, I don’t have a claim against you.442 Be that as it may, there are two instances in which federal courts have turned blind eyes to what would seem to be palpable injuries, either likely or threatened. These are the cases dealing with the illegal surveillance by the NSA under the heading of the Terrorist Surveillance Program (TSP),443 and the targeted killing of a U.S. citizen, Anwar al-Aulaqi.444

### impact- terror

#### Credibility established by independent judiciaries reduces violence and terrorism.

**Findley and Young 11** (Michael, assistant prof of polisci at Brigham Young University with a research emphasis in terrorism and development. Joseph, Associate Professor at American University with a joint appointment in the School of Public Affairs and the School of International Service. “Terrorism, Democracy, and Credible Commitments,” International Studies Quarterly. Vol. 55 No. 2, spring 2011. Wiley Online Lirbrary.)//CB

Like dissident groups, states are not always homogeneous actors. Different actors could vie for policy control within the state, the main divisions being the branches of government. In many circumstances, the executive branch is dominant. In other cases, a legislative branch could be the primary state actor. In cases where the judicial branch exercises a credible check on executive power, we contend that the outcome of the interactions between the state and the dissident group will be less violent.7 The separation of powers could thus alter the incentive structure that shapes the actions of both states and extremist groups.¶ North, Summerhill, and Weingast (2000:27) indicate that ‘‘establishing credible commitments requires the creation of political institutions that alter the incentives of political officials so that it becomes in their interest to protect relevant citizen rights.’’ A credible commitment to limited government makes terrorism and other violent dissent less beneficial in comparison with formal, nonviolent political participation. Nonviolent interaction with the state is also less costly, as the regime not only tolerates, but honors, political participation through formal mechanisms. In particular, it offers a wider range of choices—not simply violence—for political contention (Tilly 2003). Importantly, for a commitment to be credible, a limit on government power needs to be self-enforcing (Weingast 1995). Institutions that credibly restrain the executive branch of government are most important, because the executive branch typically has the ability to control the means of coercion. Terrorism, therefore, is less likely in states that credibly commit to honoring the formal political process and respecting citizen rights than in states that cannot make such commitments.¶ Although most of the conflict bargaining literature highlights the need for credible commitments to avoid or end wars (Fearon 1995; Walter 2002; Powell 2006), precisely which institutions make commitments more credible is not well understood.8 A number of political institutions could facilitate credible commitments, and we now turn to a discussion of one important institution— independent judiciaries.

#### Independent judiciaries establish governmental credibility that breeds state engagement instead of terrorism.

**Findley and Young 11** (Michael, assistant prof of polisci at Brigham Young University with a research emphasis in terrorism and development. Joseph, Associate Professor at American University with a joint appointment in the School of Public Affairs and the School of International Service. “Terrorism, Democracy, and Credible Commitments,” International Studies Quarterly. Vol. 55 No. 2, spring 2011. Wiley Online Lirbrary.)//C

States that create independent judiciaries provide a limit on the power of the executive, the most likely agent of government violence (North and Weingast 1996; Smith 2008). As Staton and Reenock (2010:117) assert, rights enforced by ‘‘effective, independent judiciaries are designed to ensure that state promises to forgo financial predation and to respect the physical integrity of its subjects are perceived credible.’’ In their study of seventeenth-century England, North and Weingast (1989:819) find that ‘‘the creation of a politically independent judiciary greatly expanded the government’s ability credibly to promise to honor its agreements, that is, to bond itself. By limiting the ability of the government to renege on its agreements, the courts played a central role in assuring a commitment to secure rights.’’11¶ Independent judiciaries can constrain the actions of the executive and provide confidence to citizens to invest, contract with other citizens, and negotiate with the state. As Feld and Voigt (2003:498) argue, there are three general cases in which an independent judicial branch has importance for societal interactions: ‘‘in cases of conflict between citizens... in cases of conflict between government and the citizens... in cases of conflict between various government branches.’’ The second case, conflict between the state and citizens, is important for under- standing a citizen’s resort to terrorist violence. Davenport (1996), for example, finds that states with independent judiciaries repress their citizens less than states without this institution. Because states are constraining their use of violence and credibly limiting their power, citizens may be as well.¶ If individuals with extreme preferences feel that they cannot pursue their policy goals and⁄or grievances in a formal institutional setting because the government might later crack down on them, they will turn to noninstitutional participation. Because of the extreme nature of their preferences, violence is more likely than it may be for moderates. Moderates have less reason to be concerned about a future government response, because the nature of their claims is less consequential to the government. Because independent judiciaries can limit the power of the executive and credibly restrain state violence, thereby reducing the need for dissident violence, we offer the following hypothesis:

### impact- disease

#### Independent judiciaries are key to fighting global disease spread

**Greco 5** (Michael S., President – American Bar Association, Miami Daily Business Review, 52.42, 12-5, Factiva)

**What makes the rule of law so important that it attracted such a distinguished community**† **First, because the rule of law is so central to everything the legal community stands for, both in the United States and around the world. And** second, **because we increasingly find that** our nation's **top international priorities-defeating terrorism**, corruption **and even the spread of deadly diseases-are being undone at the ground level by poor governance and lawlessness**. As Rice eloquently told the gathering, "In a world where threats pass even through the most fortified boundaries, **weak** and poorly governed **states enable disease to spread undetected, and** corruption to multiply unchecked, and **hateful ideologies to grow** more **violent and** more **vengeful." The only real antidote to** these **global threats is** governments, in all corners of the world, that operate with just, transparent and **consistent legal systems that** are **enforced by fair and independent judiciaries**. These issues are not just the province of distant foreign governments. Building the rule of law must begin at home. Recent revelations in our own country-that the CIA has maintained secret prisons for foreign detainees-underscore the urgent need for an independent, nonpartisan commission to investigate our treatment of such prisoners.

#### Extinction

**Torrey and Yolken 5** E. Fuller and Robert H, Directors Stanley Medical Research Institute, 2005, Beasts of the Earth: Animals, Humans and Disease, pp. 5-6

The outcome of this marriage, however, is not as clearly defined as it was once thought to be. **For many years, it was believed that microbes and human slowly learn to live with each other as microbes evolve toward a benign coexistence** wit their hosts. Thus, the bacterium that causes syphilis was thought to be extremely virulent when it initially spread among humans in the sixteenth century, then to have slowly become less virulent over the following three centuries. This reassuring view of microbial history has recently been challenged by Paul Ewald and others, who have questioned whether microbes do necessarily evolve toward long-term accommodation with their hosts. Under certain circumstances, Ewald argues, “**Natural selection may…favor the evolution of extreme harmfulness** if the exploitation that damages the host [i.e. disease] enhances the ability of the harmful variant to compete with a more benign pathogen.” **The outcome of such a “marriage” may thus be the murder of one spouse by the other**. In eschatological terms, this view argues that **a microbe such as HIV or SARS virus may be truly capable of eradicating the human race.**

## AT: Aff Arguments

### at: international perception key

#### The US judiciary is modeled

Kock and Foertsch '14 (Judge William H, Stephen M; January 1, 2014; Local Courts, Global Impact; Judge Koch joined the Hennepin County bench in May 2007. He was elected to a six-year term in 2008. He has served rotations in Family Court and on the Serious Felony Team. + Mr. Foertsch is a graduate of St. John's University in 2009 and William Mitchell College of Law in June 2013, Stephen has been a full-time clerk for Judge Koch for the last two years. He was admitted to the Bar in October 2013. hennepin.membershipsoftware.org/article\_content.asp?article=1775; 7-8-15; mbc)

“When we think America, we think jury trial.” A Supreme Court justice from Kyrgyzstan recently issued this opinion while visiting Hennepin County. The opinion was a bit of a surprise to the several members of the Hennepin County bench who were meeting with the justice and his colleagues from Kyrgyzstan—particularly because at the time, the federal government was approaching the inevitable shutdown, and the news was monopolized by NSA revelations on an almost daily basis—but the justice’s sentiment was quickly endorsed by his colleagues. As odd as such an exchange might appear at first glance, it is the type of dialogue the Hennepin County bench has been having with colleagues from around the world for many years. The world will descend upon Sochi, Russia, for the Olympics next month. Delegations from around the globe will compete in timeless classics, and a few new events. In many ways, the same can be said about what recently took place on the 12th floor of the Hennepin County Government Center. Sans any torch, of course.1 Hosting international representatives is nothing new at 300 South Sixth Street in Minneapolis. The Kyrgyz delegation was the thirteenth such delegation to visit Hennepin County since 2005. The judges and staff of the Hennepin County courts have welcomed visiting delegations from Africa, Western Europe, Eastern Europe, the former Soviet Union, Asia, and the South Pacific. Places as disparate as London, Pretoria, Seoul, Kuwait City, Bishkek, Belgrade, Pristina, Sarajevo, Port Louis, Mexico, and Tbilisi now have a connection with Minneapolis. The exchanges are meant to build bridges, share successes, and contribute also to the international development of the rule of law as well as public confidence in the court system. Sponsored by entities like the United Nations, the U.S. Department of State, and the U.S. Congress, various representatives of these national legal systems2 have traveled to Minnesota to meet with our local judges and staff. Many times these visits coincide with forays to our appellate courts and federal court. Foreign dignitaries, like the Kyrgyz delegation, come to Minnesota to learn first-hand what works, and why. They learn about the value we place on a fair and independent judiciary, and the important role of our citizens in the administration of justice. The Kyrgyz delegation arrived in Minnesota for a week in late September. Five Supreme Court justices from Bishkek made the trip. They were hosted by U.S. District Court Chief Judge Michael Davis, U.S. District Court Judge John Tunheim, Magistrate Judge Steven Rau, and Minnesota Supreme Court Justice Paul Anderson (retired). The visit was facilitated by a representative from the Bishkek office of the United States Agency for International Development in conjunction with The Open World Program, a non-partisan initiative of Congress. The Kyrgyz justice and his colleagues on that nation’s highest court expressed interest and caution about our jury trial system. The Kyrgyz delegation—like those from Bosnia, Serbia, Georgia, and Kosovo—is embarking on a new way of approaching trials, moving toward civil jury trials by lay people, selected at random. International delegations visit Hennepin County to observe juror orientation, jury selection, jury trials, and to discuss the process with members of the Hennepin County bench. Importantly, they also meet with court staff working in these areas to see what works, and what does not. Justice Anderson has been a tireless advocate for “rule of law” judicial exchange programs throughout his career and now into his retirement. According to Anderson, many judges from former-Soviet nations, “see [the jury system] as a buttress against bias amongst the judiciary.” Many Kyrgyz judges evidenced this concern by inquiring how the Hennepin County courts handle pressure from police, prosecutors, businesses, and other governmental branches, pressure that can be almost overwhelming in their home country. The Kyrgyz judges, and others like them, are tasked with fighting this pressure with only a newly emerging concept of judicial independence. The concept of judicial independence is foundational to the rule of law. While this concept, and the rule of law itself, is often taken for granted here at home, the concepts are still developing in many new democracies. Professor Anthony Winer teaches international law at William Mitchell College of Law, and has experience with the developing rule-of-law nations of the former Soviet Union. According to Winer, “In the post-Soviet space, it is not unusual to encounter difficulty in getting all actors to believe in the independence of the judiciary.” After generations of authoritative rule, “judges still serving today often retain the effects of that system (whether consciously or not) in their current work.” Winer continues, “Perhaps, in many cases, justice systems are still so hierarchical that indeed judicial independence is quite limited.” Accordingly, “even when hierarchical control is not being imposed from above, the judges themselves (let alone lawyers and parties) might well have trouble understanding the modalities and ramifications of judicial independence.” For many of these judges, including the Kyrgyz delegation and other foreign visitors to Hennepin County courts, the implementation of the jury system is seen as a first step toward judicial independence and a societal belief in that independence.

### at: aff is unconstitutional

#### Unchecked executive surveillance in unconstitutional- violates the 1st and 4th amendments

Kreimer 4 (Seth, Kenneth W. Gemmill Professor of Law, University of Pennsylvania, “WATCHING THE WATCHERS: SURVEILLANCE, TRANSPARENCY, AND POLITICAL FREEDOM IN THE WAR ON TERROR,” "Homeland Security and Civil Liberties" conference jointly hosted by the University of Pennsylvania Law School and the Army War College, June 18, 2004, <http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1297&context=jcl>, silbs)

The government argued that in the midst of a rising wave of antigovernment bombings, "the President must protect the government-and thereby the society for whose benefit it exists." 69 Where the President seeks to obtain information that will be used to prevent rather than prosecute attacks, the argument continued, the question of the reasonableness of searches diverges from the criminal justice model.7° Given the "complicated facts and subtle inferences" involved in domestic intelligence investigations, the Justice Department concluded that "[a] llowing the Attorney General to authorize such surveillances without prior approval by a magistrate would centralize responsibility.., facilitating close control of the use of this investigative technique. 7 ' "[T] he interest of privacy of the American citizen," claimed the government, "is better protected in limiting this authority in the area of electronic surveillance in counterintelligence cases, to one man-the Attorney General, acting for the President of the United States-rather than to proliferate amongst all of the Federal sitting judges in the United States." 72 Unlike Laird, the Court in Keith rejected the government's position without dissent.73 Justice Powell's opinion acknowledged the president's "fundamental duty" to "protect, preserve and defend the Constitution of the United States," the record of "threats and acts of sabotage," and the "covertness and complexity of potential unlawful conduct" in domestic security cases.74 But it noted as well that "national security cases often reflect a convergence of First and Fourth Amendment values": History abundantly documents the tendency of Government-however benevolent and benign its motives-to view with suspicion those who most fervently dispute its policies. Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs. The danger to political dissent is acute where the Government attempts S to ,75 act under so vague a concept as the power to protect "domestic security. In light of the "potential danger[s] posed by unreasonable surveillance to individual privacy and free expression," 6 the opinion held, neither the demands of internal security nor the claims of executive authority justified the claim that wiretapping, even for "intelligence" purposes, could be constitutional in the absence of a warrant issued by a "neutral and detached magistrate., 77 "[U]nreviewed executive discretion," the court held, "may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech.7 8

### at: judicial deference good

#### The idea of deference is wrong, none of the arguments for why it’s a good idea are coherent

Cover 14 (Avidan, Assistant Professor of Law, Case Western Reserve University School of Law; Director, Institute for Global Security Law and Policy, “PRESUMED IMMINENCE: JUDICIAL RISK ASSESSMENT IN THE POST-9/11 WORLD,” Cardozo Law Review, Volume 35, <http://www.cardozolawreview.com/content/35-4/COVER.35.4.pdf>, silbs)

IV. THE INADEQUACY OF DEFERENCE IN THE POST-9/11 WORLD Errors in cognition and other biases owing to cultural cognition might be thought to buttress arguments in favor of judicial deference in the terrorism context. However, because deference does not mean total judicial abdication,268 deferring to government characterization of risk assessments can reinforce and even compound cognitive errors and biases endemic to the government’s initial risk assessment. The factual findings relating to terrorism threats also have significant constitutional implications for civil liberties in the post-9/11 world.269 As we have seen, courts often undertake their own fact-finding and risk assessment to support their decision to defer. Moreover, government terrorism experts are also susceptible to cognitive errors and the biases of cultural cognition.270 They are also very much subject to concerns over political or public outcry and blameworthiness, which may lead them to overestimate the probability of attacks and ignore civil liberties concerns.271 This Part examines the differing rationales for judicial deference and ultimately rejects each of them as untenable. First, deference proponents contend that because emergencies and national security crises are of some fixed and limited duration, the harms affecting civil liberties will be confined in similar scope; therefore, courts need not intervene. Chief Justice William Rehnquist sketched out this historical argument in All the Laws but One, describing how the Court has generally issued decisions favoring civil liberty only after hostilities ceased.272 Similarly, Eric Posner and Adrian Vermeule contend that eventually following a crisis, “the government will downgrade its threat assessment, and judges will worry less and less about the harms of blocking emergency measures.”273 Arguments favoring judicial abdication because of temporary and possibly exigent circumstances are less persuasive in light of the seeming permanence of the terrorism threat.274 It is hardly clear when the threat of terrorism will abate. While the government may no doubt be viewed as a provider of security, it is also a protector of civil liberty.275 Where the nation is now so fully consumed by prevention of catastrophic terror attacks and susceptible to cognitive errors, it is incumbent on judges in a perpetual crisis not to presume imminence but to test the government’s risk assessments. Second, proponents argue that deference is justified in the national security arena because of foreign and international relations, which are highly sensitive and demand discretion from the executive branch. Roberts invoked this rationale in Humanitarian Law Project, deferring to the government’s contention that teaching peaceful advocacy to the PKK could upset relations with Turkey.276 If Humanitarian Law Project has a limiting principle, it would appear to be its national security and foreign affairs context. Critical to the decision was that it concerned material support of a foreign terrorist organization.277 Although not situated in the “wartime” context of several of the Court’s post-9/11 decisions,278 the rationale for deference hinges on similar reasoning. Thus, one might expect that decisions addressing similar communication or teaching of human rights law to a domestic terrorist organization would come out differently.279 But there is good reason to question the extent of this limitation. The increasingly globalized and interconnected world raises questions about the elasticity and malleability of this theory of deference in the terrorism context. The most domestic of threats may well have an international dimension or a foreign connection.280 Thus, the logical stopping place of this rationale is unclear. Third, deference advocates argue that national security issues are of a highly complex and classified nature, which courts are not competent to handle or assess. Without full information about potential harms and the expertise to make risk assessments, courts are not equipped to determine whether the government’s infringement of a particular liberty is appropriate.281 Kennedy articulated the expertise rationale in Boumediene: in contrast to members of the other branches, most judges do not “begin the day with briefings that may describe new and serious threats to our Nation and its people.”282 Though the dissenters in Boumediene criticized its employment as a rhetorical pose,283 Roberts reified the rationale in Humanitarian Law Project at the heart of his opinion.284 Relatedly, deference may be rationalized because the objective in the terrorism context is prevention, not prosecution.285 As a result, the government may rely on intelligence standards as opposed to those utilized in the criminal context.286 Courts are not familiar with the intelligence area and are therefore not qualified to evaluate the evidence that the government may rely on.287 Finally, deference may be urged due to the lack of precision or quantification of likelihood of an attack.288 The expertise rationale ignores the fact that courts review the decisions of experts in a myriad of highly complex subject**s**.289 Judges also may be at a greater advantage in terms of determining the accuracy of information because of the adversarial process, which allows them to weigh contrary information that executive officials might not have incentive to consider.290 Article III courts have, of course, overseen scores of terrorism cases, both of domestic and international dimensions.291 As for the secretive nature of certain subjects, there are procedures in place that have permitted courts to have access to classified information.292 Finally, specialized courts have also been created that allow for judicial review of information with standards distinct from those in traditional Article III courts.293 Concerning the lack of quantification, some scholars argue that terrorism risk analysis can be undertaken as it is in other areas, where threats are analyzed “as a matter of course,” such as nuclear power plant accidents and environmental protection.294 Moreover, private entities, such as insurance companies, and various private and governmental risk analysts commonly engage in the admittedly difficult enterprise of predicting terrorist attacks.295 Deference can finally be rejected because experts are not always right.296 Indeed, experts are often political actors whose predictions and assessments may be both a product of fear of blame and accountability and objective analysis.297 Moreover, judicial review that entails an honest discussion of risk assessments can play an important role in a democratic society; how we deal with the risks we face should not be left only to the experts.298

#### Judicial deference gives too much power to the executive

Scheppele 2012 (Kim Lane, Laurance S. Rockefeller Professor of Sociology and Public Affairs in the Woodrow Wilson School and University Center for Human Values; Director of the Program in Law and Public Affairs, Princeton University, “THE NEW JUDICIAL DEFERENCE,” HeinOnline, Boston University Law Review, Volume 92, silbs)

This new judicial deference has its negative, or at least cynical, side as well. Courts have tended to act most aggressively in defense of constitutional values when their own fates have been at stake. This is what Brian Simpson observed in the WWII cases in the United Kingdom, when courts bestirred themselves to act primarily in cases where their own jurisdiction was in danger of being whittled away.406 And it seems equally true in the new judicial deference cases after 9/11 in the United States as well. In these post-9/11 terrorism cases, courts have been most assertive when their own jurisdiction has been challenged – for example, when the government has tried to take cases out of the ordinary courts into other venues by creating military commissions407 or to deny access to counsel and routine habeas hearings before Article III courts.408 These matters are particularly salient as they infringe directly on what courts take to be their most distinctive responsibilities. Not surprisingly, then, courts have been most vigorous in protecting the very rights that are most important in their own immediate environs – the power of courts to review executive detention and to oversee special tribunals. Courts have been most aggressive in standing up to governments in the “war on terror” on precisely those subjects most crucial for maintaining the position of the courts themselves. Another way to interpret these bold constitutional rulings, then, is that courts have been highly alert to keep themselves from being a casualty of the crisis. Are suspected terrorists – who are, after all, the direct targets of overbearing government tactics – the ones whose rights are really vindicated? Or are the courts more self-regarding as they protect themselves from the collateral damage of anti-terrorism policies? One suspects in observing this large gap between victories in law and the fates of the concrete petitioners that the plights of the petitioners were not in fact what these courts cared most about. Had the courts decided that assisting these petitioners was their central aim, the courts could have done so much more to help them. Judges have been bold in their opinions, but not in their regard for those who sought their assistance. The constitutional claims most likely to be vindicated in these cases, as a result, have been those of the courts themselves. The case for self-regarding courts can be made even more strongly, on the evidence we’ve seen in this Article. As long as courts still exercise a certain degree of deference to the way that governments are dealing with specific cases, courts can avoid incurring the wraths of those governments. Governments care primarily in times of crisis about having a green light to go on detaining those whom they want to detain and about stringing out the day of reckoning when proof has to be provided. If governments receive that deference, then governments have no reasons to attack the courts when the courts assert themselves on matters of relatively abstract principle. If courts stay within these limits, doing whatever they feel they need to do to the law while letting the governments prevail on the facts, then governments are likely to appear to follow the court decisions, insist on their respect for the courts, and in general let courts get away with issuing governments these “defeats.” Of course, governments would probably prefer to do whatever they want without being hauled before courts to justify their actions, but as long as being hauled before courts comes with the territory of being a constitutional state, new judicial deference may be the best they can expect.

### at: permutation do both

#### The counterplan alone is key – the ruling must be *in spite* of other branches

Henriksen – Prof law Washington – ‘96

[Kelly. Prof @ Washington College of Law. 9 Admin LJ Am U 1273, 1996. ln//GBS-JV]

If the Court employs the Weiss standard of deference, [185](http://www.lexis.com/research/retrieve?_m=940ab819fd46b332551fc5a68f887359&docnum=1&_fmtstr=FULL&_startdoc=1&wchp=dGLzVzz-zSkAz&_md5=5f6cee8ef0c6ece689be0dc053944574&focBudTerms=henriksen%20and%20military%20and%20deference%20and%20congress&focBudSel=all" \l "n185" \t "_self) its analysis might proceed as follows: because Congress is bound by the Equal Protection Clause of the Fourteenth Amendment, the level of review the courts should apply under equal protection analysis is determined by congressional authority to regulate the military. Both the Thomasson court and the Able court followed the directive of the Supreme Court in Weiss when they examined the legislative history of the policy. They reviewed the record to determine if Congress did its own balancing. The difference in deference and outcome resulted from the courts' different views of their authority. The Thomasson court substituted Congress's judgment of what is constitutionally permissible for its own; [186](http://www.lexis.com/research/retrieve?_m=940ab819fd46b332551fc5a68f887359&docnum=1&_fmtstr=FULL&_startdoc=1&wchp=dGLzVzz-zSkAz&_md5=5f6cee8ef0c6ece689be0dc053944574&focBudTerms=henriksen%20and%20military%20and%20deference%20and%20congress&focBudSel=all" \l "n186" \t "_self) the court in Able allowed Congress and the military their judgment as to what is desirable, but refused to allow Congress to judge the constitutional merit of the policy. [187](http://www.lexis.com/research/retrieve?_m=940ab819fd46b332551fc5a68f887359&docnum=1&_fmtstr=FULL&_startdoc=1&wchp=dGLzVzz-zSkAz&_md5=5f6cee8ef0c6ece689be0dc053944574&focBudTerms=henriksen%20and%20military%20and%20deference%20and%20congress&focBudSel=all" \l "n187" \t "_self) In reviewing challenges under both the old and the new policies, courts have professed their hesitancy to substitute their judgment for that of the military or of Congress. All courts correctly note the impropriety of judicial policymaking and determination. However, only three courts - one of which is the Able court - have recognized the two types of judgment at work in these cases: policy judgment and constitutional judgment. A policy judgment is about what is desirable. When reviewing challenges to the military's policy banning gays, courts must not make a determination as to the desirability of that policy. This means no review of the fact that the military articulated the desirability of a policy banning homosexuals, no matter what the basis of that policy desire. The courts must, however, make a determination as to the constitutionality of the policy and of how it applies to individuals, just as the Pruitt court, Able court, and the dissent in the Steffan case did. This is a judgment the courts are both uniquely qualified and constitutionally charged with making.  [\*1305]  The Ninth, Seventh, and D.C. Circuits, as well as several district courts, have held that deferential review under equal protection is tantamount to rational-basis review. [188](http://www.lexis.com/research/retrieve?_m=940ab819fd46b332551fc5a68f887359&docnum=1&_fmtstr=FULL&_startdoc=1&wchp=dGLzVzz-zSkAz&_md5=5f6cee8ef0c6ece689be0dc053944574&focBudTerms=henriksen%20and%20military%20and%20deference%20and%20congress&focBudSel=all" \l "n188" \t "_self) Thus, because even rational-basis review requires some level of review, it can be said that courts are conducting review. The problem is that it is bad review. The error lies in mistaking personal prejudice for reason and rationality; the error occurs when a court abdicates its responsibility to review by substituting the constitutional judgment of Congress and the military for its own. Traditional equal protection jurisprudence maintains that neither prejudice nor presumption of conduct based on status can survive even rational-basis review. [189](http://www.lexis.com/research/retrieve?_m=940ab819fd46b332551fc5a68f887359&docnum=1&_fmtstr=FULL&_startdoc=1&wchp=dGLzVzz-zSkAz&_md5=5f6cee8ef0c6ece689be0dc053944574&focBudTerms=henriksen%20and%20military%20and%20deference%20and%20congress&focBudSel=all" \l "n189" \t "_self) When a challenge to the military's policy on homosexuals finally reaches the Supreme Court, the Court will face the Weiss question of whether the servicemember's equal protection rights have sufficient weight to overcome the balance Congress established between individual rights and military necessity. If it is possible for servicemembers' rights to trump the balance struck by Congress, then who is to make this determination? This has been not only the traditional role of the courts, [190](http://www.lexis.com/research/retrieve?_m=940ab819fd46b332551fc5a68f887359&docnum=1&_fmtstr=FULL&_startdoc=1&wchp=dGLzVzz-zSkAz&_md5=5f6cee8ef0c6ece689be0dc053944574&focBudTerms=henriksen%20and%20military%20and%20deference%20and%20congress&focBudSel=all" \l "n190" \t "_self) but, more importantly, the constitutional duty of the courts. [191](http://www.lexis.com/research/retrieve?_m=940ab819fd46b332551fc5a68f887359&docnum=1&_fmtstr=FULL&_startdoc=1&wchp=dGLzVzz-zSkAz&_md5=5f6cee8ef0c6ece689be0dc053944574&focBudTerms=henriksen%20and%20military%20and%20deference%20and%20congress&focBudSel=all" \l "n191" \t "_self) Separation of powers often is cited as a justification for judicial deference to the military; but what does the principle of separation of powers say about abdication of constitutional authority? Separation should never reach the point of abdication. Abdication of constitutional authority is as egregious under the principle of separation of powers as are overreaching and aggrandizement. When the judiciary abdicates its power of constitutional review, the legislature's power is aggrandized. Review is rendered meaningless when the rulemaker reviews the rules; and when the one [\*1306]  charged with making the laws is also charged with ensuring their fairness, there is neither check nor balance.

#### The permutation fails – the court must be the only branch to act – otherwise, double-entry bookkeeping guts judicial independence

Bederman ‘99

[David Bederman, Professor of Law, Emory University, University of Colorado Law Review, Fall, 1999 70 U. Colo. L. Rev. 1439. Lexis]

My second contention is that, as Professor Franck has observed in the cases, the courts engage in "double-entry bookkeeping." n33 With this "forked approach," judges disavow the political question doctrine, but then proceed to rule in favor of the executive branch's case on the merits. n34 This phenomenon is especially marked in treaty cases. n35 I think it is important, however, to distinguish two sorts of cases implicating treaty rights. The first involves treaty application, the threshold question of whether a treaty right can even be claimed by a party. In part - but only in part - this question of applicability turns on the well-known distinction between self-executing and non-self-executing treaties in American jurisprudence. But it can also implicate other questions, such as whether the treaty is even in force.¶ <Continues…> I believe that the treaty interpretation cases have become the model of what Professor Franck calls "double-entry bookkeeping," in which courts profess independence and maintain [\*1470] judicial review of treaty claims, but actually extend unnecessary and untoward deference to executive branch positions that tend to frustrate the litigation of those claims. In fact, the government's apparent distrust of, and hostility towards, the independent litigation of treaty rights claims in U.S. courts has apparently grown exponentially in the past few years. This antipathy has resulted in renewed assertions of a pure political question doctrine as a bar to litigation of treaty rights.

### at: permutation do the counterplan

#### The counterplan competes:

#### The United States federal government is all three branches – it proves the counterplan is functionally and textually competitive because it is less action than the plan

Ardaiz ‘8

[Aran. Attorney. *Hawaii: The Fake State*, 2008. Available as an Ebook from the University of Wisconsin Libraries. Pg 168]

In the United States, government consists of the executive, legislative, and judicial branches in addition to administrative agencies. In a broader sense, includes the federal government and all its agencies and bureaus, state and county governments, and city and township governments.

#### Especially true because the counterplan doesn’t make a policy, it just bans the existing law

Treanor and Sperling – Profs Law and Econ @ Fordham – ‘93

[William and Gene. Prof of Law @ Fordham and Asst to the President of Economic Policy @ Fordham. The Columbia Law Review, Dec 1993. Lexis]

Commentators have generally agreed with the overwhelming majority of courts that an overruling decision has the effect of automatically reviving statutes. For example, Erica Frohman Plave observed that revival was a necessary function of the limited scope of a judicial determination of unconstitutionality: "Such laws found unconstitutional are merely unenforceable until such time as they are found valid." 54 Professor Gerald Gunther has pronounced Attorney General Cummings's conclusion that Adkins "simply "suspended' enforcement" 55 of the District of Columbia minimum wage statute "persuasive," 56 and Professor Melville Nimmer similarly declared that "it seems clear that Attorney General Homer Cummings' opinion was correct." 57 Finally, Professor Oliver Field noted that a statute that has been found unconstitutional becomes enforceable when the case in which it was held unconstitutional is reversed because "a declaration of unconstitutionality does not operate as a repeal of a statute." 58 [\*1916]

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# Aff

### Permutation Do Both

#### Perm do both- involving both the courts and congress is key to reining in executive power

The Federalist Society for Law and Public Policy Studies 6 (think tank, “The ABA, the Separation of Powers, and Executive Power,” August 2006, [www.fed-soc.org/aboutus/DownloadLibrary?id=1258](http://www.fed-soc.org/aboutus/DownloadLibrary?id=1258), silbs)

Greco has emphasized that both Congress and the courts possess critically broad roles in exerting oversight over the executive branch with respect to this surveillance program. In particular, he has urged a “meaningful” role for the judiciary in checking the jurisdiction of the executive branch. Some of his statements demonstrating his perspective follow: · In discussing whether Congress should conduct an inquiry into the NSA surveillance program, Greco wrote to the Senate Judiciary Committee on May 9: “Like all our fellow citizens, the members of the American Bar Association want the government to have the powers it needs to effectively combat terrorists. However, we are deeply concerned about the electronic surveillance of Americans without the express authorization of the Congress and the independent oversight of the courts.” · In that same May 9 letter, Greco questioned S. 2453 and S. 2455, proposed surveillance policy legislation. He wrote that S. 2455’s current wording “raises serious concerns about its constitutionality.” The bill is viewed by the Association as potentially authorizing “indefinite surveillance under a lower probable cause standard that fails to contemplate any meaningful role for the judicial branch if the FISA evidentiary threshold is not met.” · In a June 7 speech to the Commonwealth Club of California, Greco asserted, “The real issue is whether the Executive Branch, on its own, can authorize and conduct long-term, secret, electronic surveillance without the checks and balances from the Judiciary or Congress that is required by our Constitution. It cannot.” · In that same June 7 speech, Greco addressed the treatment of enemy combatants detained at Guantanamo. He maintained, “The Administration at times has argued that our cherished federal court system—the envy of every nation in the free world, which has seen us through every crisis since the founding of our country—lacks jurisdiction over these 14 cases….We have argued that our courts cannot simply be brushed aside by the Administration or Congress, especially on matters that deprive detainees of their rights, because in time such deprivation may be visited on others in America…The issues presented in the Hamdi and Padilla cases speak directly to the crucial role that our courts have—and that they must continue to have— in protecting the fundamental rights guaranteed by our Constitution.” In his June 7 speech, Greco alleged that the Administration was repeatedly violating the law by its actions and violating the principles of the separation of powers and checks and balances. He warned, “When any one branch of government attempts to place itself above or usurp the constitutionally-mandated roles of the other branches, our democracy is threatened. We have now reached a point where all Americans must ask themselves whether these practices of our government are isolated and unconnected, or whether they form a pattern that threatens the very foundations of the rule of law in the United States.” He continued: Defenders of the Administration maintain that these practices are legal. In several instances, however, these defenses have been offered only after the press has revealed the existence of programs and practices that were kept secret from Congress and the American people for years. Under our system of government, the Executive Branch must not be allowed to determine the legality of its actions—that is the role of Congress and the Courts. That is the very essence of separation of powers and checks and balances…The Administration seems not to understand or endorse the basic principle of checks and balances.

### No modeling

#### US Constitution not modeled anymore – its outdated

LAW & VERSTEEG, 12 - DAVID S., Professor of Law and Professor of Political Science, Washington University in St. Louis Ph.D., Stanford University, MILA, Associate Professor, University of Virginia School of Law, “THE DECLINING INFLUENCE OF THE UNITED STATES CONSTITUTION,” New York University Law Review, Vol. 87, No. 3, pp. 762-858, June 2012, SSRN//BR/)

The existence of this generic core of constitutional content raises the question of whether there are particular countries that play an especially significant role in driving its popularity or shaping its content. Are there specific constitutions that define this core and serve as models for rights constitutionalism in other countries? And if so, is the U.S. Constitution such a model? The question of whether and to what extent any given constitution shapes, or conversely, is shaped by, global constitutional practice is deeply vexing for both conceptual and methodological reasons. It is relatively straightforward to measure, as we have done here, the extent to which two constitutions are similar to one another. The fact that two constitutions exhibit extensive similarities does not necessarily imply, however, that one has influenced the other. Likewise, the fact that a constitution happens to be highly generic, or typical, does not necessarily mean that it serves as a model for other constitutions. A constitution may be generic, for example, not because it serves as a model for other constitutions, but rather because it follows the practice in other countries. Realistically speaking, some countries are more likely to be followers than leaders. It would be surprising if the average constitutional drafter were to exhibit a keen awareness of the (highly generic) constitutions of Botswana or St. Lucia, much less to look deliberately to them for inspiration.33 Constitutions may also be similar for functional reasons. To the extent that countries face similar challenges that lend themselves to a limited range of constitutional solutions, the result is likely to be a degree of constitutional similarity, regardless of whether countries look to one another for examples.34 It is a chronic challenge in social science that the available data may be susceptible to multiple interpretations and explanations,35 and our data on constitutions is no exception. Nevertheless, much can be learned simply by analyzing the extent to which constitutions resemble one another or typify global practice. If two constitutions are becoming increasingly dissimilar, it stands to reason that neither is following the example of the other. Likewise, an increasingly atypical constitution is almost certainly not serving as a model for global constitutionalism. To the extent that a particular constitution is increasingly out of sync with global trends, we can rule out the possibility that it is leading those trends. And it is in precisely this manner that we establish the declining influence of the U.S. Constitution. Whatever the ongoing appeal of American constitutional jurisprudence happens to be,36 the U.S. Constitution itself appears to have lost at least some of its attraction as a model for constitution writers in other countries. If the components of the rights index are used as the yardstick, the world’s constitutions have on average become less similar to the U.S. Constitution over the last sixty years. As Figure 2 reveals, average similarity to the U.S. Constitution was higher in 1946 than in 2006.37 It is an unfortunate irony, moreover, that the onset of this decline roughly coincided with celebration of the Constitution’s bicentennial in 1987.38 Although the 1990s were a period of intense constitution-making activity39 during which American victory in the Cold War might have been expected to translate into American constitutional influence, this decade actually saw a noticeable decline in average similarity to the U.S. Constitution. During this time, dozens of Central and Eastern European countries overhauled their Sovietera constitutions,40 while countries in Africa and Asia underwent a contemporaneous wave of constitutional reforms.41 Whatever constitutional script prevailed amidst the ostensible triumph of liberal democracy,42 however, it was not that of the venerable U.S. Constitution. Which constitutions have shown the most extreme similarity—or dissimilarity—to the U.S. Constitution over the last six decades? Table 4 sets forth the answer. Most similar to the U.S. Constitution, for many years, was the constitution of Liberia, which is unsurprising given the degree to which the histories of the two countries are intertwined. Not only was Liberia founded by freed slaves from the United States, but the first Liberian constitutions were drafted with the help of the American Colonialization Society, the organization that arranged the settlement of the former slaves.43 Likewise, the fact that the Philippines was a colony of the United States readily explains the proximity of its post-war constitution to the American model.44 By contrast, the reasons for the close and continuing resemblance between the American and Tongan constitutions are less obvious.45 Tonga is a British colony that is governed through a mixture of western institutions and chieftainship, with a polity divided into three classes—the king, the nobility, and the commoners.46 Perhaps the crucial link between the two constitutions is that they are both very old: At 134 years of age and counting, the constitution of Tonga is by now older than all but a handful of the constitutions in our data.47 Thus, at the time that the Tongan constitution was drafted, the U.S. Constitution was not only one of the most prominent models available, but also one of the only models available. Figures 3 through 6 are color-coded maps that convey geographic patterns of similarity to the U.S. Constitution at four points in time: 1946, 1966, 1986, and 2006. (The maps appear beginning on page 789.) Each map is a global snapshot of the extent to which other constitutions resembled or diverged from the U.S. Constitution at a particular point in time. Darker shades of blue represent closer similarity to the U.S. Constitution, while darker shades of red indicate greater dissimilarity.48 These maps illustrate not only an overall global trend of divergence from the U.S. Constitution, but also a conspicuous regional pattern—namely, a notable evolution away from the American model among Latin American countries. Historically, Latin American constitutions reflected American hegemony in the region in the form of a high degree of resemblance to the U.S. Constitution.49 Today, by contrast, the rights-related content of the constitutions of Peru, Argentina, and Venezuela is negatively correlated with that of the U.S. Constitution, meaning that these constitutions tend to contain provisions that the U.S. Constitution lacks, while at the same time omitting provisions that can be found in the U.S. Constitution.

#### No modelling --- Supreme Court losing international influence

**Liptak 08** (Adam, Supreme Court correspondent for NYT. “U.S. Supreme Court's global influence is waning,” NYT. 9/17/2008. http://www.nytimes.com/2008/09/17/world/americas/17iht18legal.16249317.html?pagewanted=all&\_r=0)//CB

But now American legal influence is waning. Even as a debate continues in the court over whether its decisions should ever cite foreign law, a diminishing number of foreign courts seem to pay attention to the writings of American justices."One of our great exports used to be constitutional law," said Anne-Marie Slaughter, the dean of the Woodrow Wilson School of Public and International Affairs at Princeton. "We are losing one of the greatest bully pulpits we have ever had." From 1990 through 2002, for instance, the Canadian Supreme Court cited decisions of the United States Supreme Court about a dozen times a year, an analysis by The New York Times found. In the six years since, the annual citation rate has fallen by more than half, to about five. Australian state supreme courts cited American decisions 208 times in 1995, according to a recent study by Russell Smyth, an Australian economist. By 2005, the number had fallen to 72. The story is similar around the globe, legal experts say, particularly in cases involving human rights. These days, foreign courts in developed democracies often cite the rulings of the European Court of Human Rights in cases concerning equality, liberty and prohibitions against cruel treatment, said Harold Hongju Koh, the dean of the Yale Law School. In those areas, Dean Koh said, "they tend not to look to the rulings of the U.S. Supreme Court." The rise of new and sophisticated constitutional courts elsewhere is one reason for the Supreme Court's fading influence, legal experts said. The new courts are, moreover, generally more liberal that the Rehnquist and Roberts courts and for that reason more inclined to cite one another. Another reason is the diminished reputation of the United States in some parts of the world, which experts here and abroad said is in part a consequence of the Bush administration's unpopularity abroad. Foreign courts are less apt to justify their decisions with citations to cases from a nation unpopular with their domestic audience. "It's not surprising, given our foreign policy in the last decade or so, that American influence should be declining," said Thomas Ginsburg, who teaches comparative and international law at the University of Chicago.The adamant opposition of some Supreme Court justices to the citation of foreign law in their own opinions also plays a role, some foreign judges say "Most justices of the United States Supreme Court do not cite foreign case law in their judgments," Aharon Barak, then the chief justice of the Supreme Court of Israel, wrote in the Harvard Law Review in 2002. "They fail to make use of an important source of inspiration, one that enriches legal thinking, makes law more creative, and strengthens the democratic ties and foundations of different legal systems." Partly as a consequence, Chief Justice Barak wrote, the United States Supreme Court "is losing the central role it once had among courts in modern democracies." Justice Michael Kirby of the High Court of Australia said that his court no longer confines itself to considering English, Canadian and American law. "Now we will take information from the Supreme Court of India, or the Court of Appeal of New Zealand, or the Constitutional Court of South Africa," he said in an interview published in 2001 in The Green Bag, a legal journal. "America" he added, "is in danger of becoming something of a legal backwater."

### No judicial independence

#### Judicial independence is already destroyed- Guantanamo, detention and torture, unlawful surveillance, targeted killing, asset forfeiture

McCormack 14 (Wayne, E.W. Thode Professor of Law, University of Utah, “U.S. Judicial Independence: Victim in the “War on Terror,” Washington and Lee Law Review, Volume 71, Issue 1, Winter 2014, <http://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=4374&context=wlulr>, silbs)

 II. The Actions Challenged What follows is simply a list of the governmental actions that have been challenged and a brief statement of how the courts responded to government demands for deference. A. Guantanamo In Boumediene v. Bush,5 the Supreme Court allowed the United States to detain alleged “terrorists” under unstated standards to be developed by the lower courts with “deference” to Executive determinations.6 The intimidation exerted on the Court was reflected in Justice Scalia’s injudicious comment that the Court’s decision would “certainly cause more Americans to be killed.”7 B. Detention and Torture Khalid El-Masri8 claimed that he was detained in Central Intelligence Agency (CIA) “black sites” and tortured.9 His case was dismissed under the doctrine of “state secrets privilege” (SSP).10 Maher Arar11 is a Canadian citizen who was detained at John F. Kennedy (JFK) Airport by U.S. authorities, shipped off to Syria for imprisonment and mistreatment, and finally released to Canadian authorities.12 His case was dismissed under the “special factors” exception to tort actions for violations of law by federal officials.13 Arar was awarded $10.5 million by Canadian authorities.14 Jose Padilla15 was arrested deplaning at O’Hare Airport, imprisoned in the United States for three and a half years without a hearing and allegedly mistreated in prison.16 His case was dismissed on grounds of “good faith” immunity.17 Binyam Mohamed18 was subjected to so-called enhanced interrogation techniques at several CIA “black site[s]” before being repatriated to England,19 which awarded him £ 1 million in damages.20 The U.S. suit was dismissed under SSP.21 C. Unlawful Detentions Abdullah al-Kidd22 was arrested as a material witness, held in various jails for two weeks, and then confined to house arrest for fifteen months. His suit was dismissed on grounds of “qualified immunity” and apparent validity of material witness warrant.23 Ali al-Marri was originally charged with perjury, then detained as an enemy combatant, for a total detention of four years before the Fourth Circuit finally held that he must be released or tried.24 Javad Iqbal25 was detained on visa violations in New York following 9/11 and claimed he was subjected to mistreatment on the basis of ethnic profiling.26 His suit was dismissed on grounds that he could not prove Attorney General authorization of illegal practices and because the Court was unwilling to divert the attention of officials away from national security.27 Osama Awadallah28 was taken into custody in Los Angeles after his name and phone number were found on a gum wrapper in the car of one of the 9/11 hijackers.29 He was charged with perjury before a grand jury and held as a material witness.30 The Second Circuit reversed the district court’s ruling that the government had abused the material witness statute.31 D. Unlawful Surveillance Amnesty International32 is one of numerous organizations that brought suit believing that its communications, especially with foreign clients or correspondents, had been monitored by the National Security Agency (NSA).33 Its suit was dismissed because the secrecy of the NSA spying program made it impossible to prove that any particular person or group had been monitored.34 The validity of the entire Foreign Intelligence Surveillance Act (FISA)35 rests on the “special needs” exception to the Fourth Amendment,36 a conclusion that was rejected by one district court37 although accepted by others.38 E. Targeted Killing Anwar Al-Aulaqi (or Al-Aulaqi)39 was reported by press accounts as having been placed on a “kill list” by President Obama.40 A suit by his father was dismissed on grounds that Anwar himself could come forward and seek access to U.S. courts.41 Not only Anwar but also his son was then killed in separate drone strikes.42 F. Asset Forfeiture The Justice Department has found both Al Haramain Islamic Foundation and KindHearts for Charitable Humanitarian Development to be fronts for raising money for Hamas, and their assets have been blocked.43 Despite findings of due process violations by the lower courts, the blocking of assets has been upheld on the basis that their support for terrorist activities is public knowledge.44 G. Summary of Actions Challenged The Guantanamo cases are a good starting point because they show the Supreme Court answering government demands for extreme deference with a modicum of deference but also a claim of judicial review authority.45 The version of judicial review adopted by the Court for the Guantanamo detentions ultimately resulted in a watered-down form of review that does not eliminate judicial independence entirely, but does allow a high degree of deference to Executive determinations. After looking at the Guantanamo decisions, I want to illustrate the more extreme versions of deference for domestic detentions by reference to several cases in which individuals have been detained for years without any degree of judicial oversight.46 And then there are the basic underpinnings of the Foreign Intelligence Surveillance Act, which depends first on the “special needs” exception to the Fourth Amendment,47 but then in individual cases relies on virtually unreviewable statements by government agents.48

#### Partisan judicial appointments make judicial independence impossible

King 7 — Carolyn Dineen King, Circuit Judge, United States Court of Appeals for the Fifth Circuit, 2007 (CHALLENGES TO JUDICIAL INDEPENDENCE AND THE RULE OF LAW: A PERSPECTIVE FROM THE CIRCUIT COURTS, Marquette Law Review, Summer, Vol. 90, No. 4, http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1072&context=mulr)

Instead, the Supreme Court generally takes cases where the law is unclear or in need of further development or where the circuits are in conflict. What this means is that the intermediate federal appellate courts are the courts of the last resort for all but the handful of cases that the Supreme Court will agree to hear. It is precisely that fact that has resulted in the politicization of the intermediate federal appellate court appointment process. Political and issue activists understand only too well that ideologically committed judges on these benches can make an enormous difference in the outcomes of hundreds of cases each year. Too, it would be a mistake to think that ideologically committed judges affect the outcomes only in cases that involve the so-called hot button issues: the civil rights of racial and ethnic minorities and women; abortion; the rights of criminal defendants; the death penalty; and states' rights (or the proper balance of power between federal and state governments). My own observations suggest that these judges cast a much wider net. They have strong views on plaintiffs' jury verdicts, especially (but not only) large ones; on class actions; on a wide range of federal statutes imposing burdens on corporate defendants; on religion in schools and in public areas; and on and on. If candidates for the presidency of both parties continue, as they have now for decades, to energize issue activists within or allied with their parties by promising the appointment of judges who will pursue the respective political and ideological agendas of those parties in their decisions, then judicial independence will continue to be severely threatened, and with it the rule of law in the United States. The Washington Post, in a 2005 editorial, captured the imminence of the threat: The war [over Justice O'Connor's successor] is about money and fundraising as much as it is about jurisprudence and the judicial function. It elevates partisanship and political rhetoric over any serious discussion of law. In the long run, the war over the courts—which teaches both judges and the public at large to view the courts simply as political institutions—threatens judicial independence and the integrity of American justice."8

#### Independent judiciaries continue to apply state corruption in rulings—judge selection.

**Gibler and Randazzo 11.** (Douglas, professor of political science at University of Alabama. Kirk, assistant professor of political science at University of South Carolina. “Testing the Effects of Independent Judiciaries on the Likelihood of Democratic Backsliding,” American Journal of Political Science. Vol. 55, No. 3. July 2011. JSTOR.)//CB

The difficulties of establishing judicial independence have led some to argue that courts only reflect elite interests. Tsebelis (2002), for example, argues that courts almost never constitute a separate veto player within a polity. Judicial-selection procedures in most countries practically guarantee that courts will fail to provide new constraints on the policymaking process. Only when other political actors take extreme positions or when a new issue, not related to judicial selection, comes before the court can the judiciary pose an effective veto. This is why judicial independence does not necessarily lead to higher rates of judicial annulment (Burbank, Friedman, and Goldberg 2002). This is also why institutionalization of the courts matters as newly independent courts will tend to reflect executive and/or legislative policy preferences on most issues (Epstein, Knight, and Shvetsova 2001). Nevertheless, the attention other political actors devote to the courts suggests that judicial institutions can matter. Yeltsin was concerned enough with the Russian constitutional court to dismiss it entirely, as was Argentina’s military regime in 1976 and its democratic regime in 1983. These rulers understand that even courts lacking judicial independence can provide increased legitimacy for the dominant position of other political actors (Larkins 1998.)

### Courts fail

#### The court fails at national security policy- judges have too many external biases and influences

Cover 14 (Avidan, Assistant Professor of Law, Case Western Reserve University School of Law; Director, Institute for Global Security Law and Policy, “PRESUMED IMMINENCE: JUDICIAL RISK ASSESSMENT IN THE POST-9/11 WORLD,” Cardozo Law Review, Volume 35, <http://www.cardozolawreview.com/content/35-4/COVER.35.4.pdf>, silbs)

E. Judicial Susceptibility to Errors Research and anecdotal accounts suggest that judges may also be susceptible to emotions and concomitant cognitive errors in their decision making.85 For example, one study found that on various cognitive tests, trial judges tend to employ intuitive, rather than deliberative, reasoning at levels very similar to the general public, resulting in poorer scores.86 Other studies evidence judges’ tendencies to respond intuitively to numeric anchors. In one study, German judges were given a description of a shoplifter and then rolled loaded dice that would land on either a three or a nine.87 Judges who rolled a nine said they would sentence the shoplifter to an average of eight months, whereas those who rolled a three recommended a five-month sentence.88 Additional studies found judges likely to react emotionally to evaluations of statistical evidence and assess conduct after learning of outcomes associated with that conduct, which leads to erroneous or unjust results.89 Other studies have found that in areas where predictions are often inaccurate, judges may “over-rely on their intuitions.”90 Still another study found that extraneous influences, such as a late morning snack or lunch, could lead to more favorable rulings by judges.91 Although these studies have generally focused on trial judges and have greater ramifications for those making relatively quick decisions, the demonstrable impact of intuition on judgments suggests that initial responses to emotional stimuli will impact appellate decisions as well. For example, appellate judges may rely on System 1 thinking and intuition in choosing how to vote immediately after argument. Thereafter, writing the opinion is a System 2 exercise in justifying a particular outcome, notwithstanding the possibility of the judge’s change of heart or mind.92 Paul Brest argues that appellate courts’ legislative fact-finding— determining facts that support particular regulations or acts—is equally susceptible to availability and affect biases.93 He suggests that judges’ lack of training in statistics renders them more prone to errors in probability determinations.94 Brest also contends that “[i]n legislative fact-finding, overconfidence combines with motivated skepticism, confirmation bias, and the gravitational force of prior commitments to make it particularly difficult for policy makers to be open to considering alternative positions relevant to major policy issues.”95 Many judges may cling to the principle or belief that their decisions withstand the influence of System 1 thinking or other external considerations, but individual accounts by appellate judges indicate that emotions inevitably affect and influence their reasoning.96 Judge Richard Posner contends that it is impossible “to judge without biases.”97 Posner argues these biases or “priors” influence all judges, including at the appellate level, in their weightings of evidence and assessments of probability.98 Judge Alex Kozinski also acknowledges the presence and potential influence of emotions and biases, but suggests that a judge can overcome them through thoughtful deliberation.99 Posner proposes that “[t]hrough self-awareness and discipline a judge can learn not to allow his sympathies or antipathies to influence his judicial votes—unduly.”100 Other judges, as discussed below, acknowledge the emotional impact of the 9/11 attacks on their decisions; whether they are able to overcome the related cognitive biases is less clear.

#### Empirically the Supreme Court fails at curtailing surveillance--- leaks and not enough knowledge

Baldwin and Shaw 06 [Fletcher and Robert, Emeritus Professor Past recipient of the Chesterfield Smith Professorship Director of The Centre For International Financial Crimes Studies, BA from Harvard University, where he studied with Robert Lowell, and a PhD from Yale, DOWN TO THE WIRE: ASSESSING THE CONSTITUTIONALITY OF THE NATIONAL SECURITY AGENCY'S WARRANTLESS WIRETAPPING PROGRAM: EXIT THE RULE OF LAW, [file:///C:/Users/Jonah/Downloads/17UFlaJLPubPoly429.pdf](file:///C%3A/Users/Jonah/Downloads/17UFlaJLPubPoly429.pdf)] Schloss

In an effort to clarify the legality of warrantless surveillance, the U.S. Supreme Court considered whether the Fourth Amendment contained a national security exception. 6 In United States v. U.S. District Court for the Eastern District of Michigan (Keith), the government, without prior judicial review, intercepted communications of an individual who conspired to bomb a federal building. 7 The government argued that warrantless surveillance was necessary to protect the country from "attempts of domestic organizations to attack and subvert the existing [government] structure. '8 8 In addition, the government urged that (1) the judicial branch did not have the practical knowledge to determine whether probable cause existed to believe that surveillance was necessary to protect national security and (2) that the inclusion of the judicial branch would result in leaks of sensitive information to the public. 9 The Keith Court agreed that the "covertness and complexity"9 of political subversives and their "dependency . . . upon the telephone"'" makes wiretapping an effective weapon.92 However, the Keith court was profoundly apprehensive of the invasive nature of electronic surveillance.93 Recognizing that the "broader spirit" of the Fourth Amendment was to shield private communications from unreasonable surveillance,94 the Keith Court analyzed two central inquiries relating to domestic national security: (1) "whether the needs of citizens for privacy and free expression may not be better protected by requiring a warrant" 95 and (2) "whether a warrant requirement would unduly frustrate the efforts of the government to protect itself."9' 6

#### Judicial oversight fails --- non enforceable, extremely high standards, and executive privilege

Dalal 14 --- JD Yale Law School, BS University of Pennsylvania (Anjali S, Michigan State Law Review, “SHADOW ADMINISTRATIVE CONSTITUTIONALISM AND THE CREATION OF SURVEILLANCE CULTURE”, 2014 Mich. St. L. Rev. 59, Lexis)//Jmoney

1. Judicial Intervention The Church Committee, reflecting on the Keith decision, emphasized the importance of judicial intervention in the national security arena when it reminded the public that warrantless wiretapping "had been permitted by successive presidents for more than a quarter of a century without 'guidance from the Congress or a definitive decision of the Courts.'" [n308](http://www.lexisnexis.com.proxy.lib.umich.edu/lnacui2api/frame.do?tokenKey=rsh-20.196893.6075947738&target=results_DocumentContent&returnToKey=20_T22257107026&parent=docview&rand=1435599783312&reloadEntirePage=true#n308) Unfortunately, there are three barriers to judicial intervention that facilitate shadow administrative constitutionalism in the national security arena: the lack of judicially enforceable rights, the standing hurdle, and the growth of executive privilege. a. Judicially Enforceable Rights By the time the Civiletti Guidelines were issued in 1980, the DOJ made eminently clear that the Attorney General Guidelines were "solely for the purpose of internal Department of Justice guidance" [n309](http://www.lexisnexis.com.proxy.lib.umich.edu/lnacui2api/frame.do?tokenKey=rsh-20.196893.6075947738&target=results_DocumentContent&returnToKey=20_T22257107026&parent=docview&rand=1435599783312&reloadEntirePage=true#n309) and would otherwise be legally binding. Specifically, the Guidelines made clear that "[t]hey are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any manner, civil or criminal." [n310](http://www.lexisnexis.com.proxy.lib.umich.edu/lnacui2api/frame.do?tokenKey=rsh-20.196893.6075947738&target=results_DocumentContent&returnToKey=20_T22257107026&parent=docview&rand=1435599783312&reloadEntirePage=true#n310) Such rights-limiting language prevents any injured party from using the governing document of the FBI to enforce the self-imposed limitations on the Bureau's power. [\*129] b. The Standing Hurdle The lack of judicially enforceable rights is not, however, the only problem. Those who might bring a First Amendment claim based on the surveillance authorized by the Attorney General Guidelines face immense difficulty simply getting into court. [n311](http://www.lexisnexis.com.proxy.lib.umich.edu/lnacui2api/frame.do?tokenKey=rsh-20.196893.6075947738&target=results_DocumentContent&returnToKey=20_T22257107026&parent=docview&rand=1435599783312&reloadEntirePage=true#n311)One of the primary problems with surveillance is that it has the power to coerce people into self-censorship--or chilled speech. This makes surveillance, fundamentally, a First Amendment issue and a prime subject for constitutional litigation. As our communications are increasingly subject to the prying eyes of the government, our ability to speak freely is directly curtailed. However, after the Supreme Court's decision in Laird v. Tatum, litigants suing under the First Amendment theory of chilled speech are subject to a high standing bar that, more often than not, prevents them from having their case heard at all. The first mention of the term "chill" in Supreme Court jurisprudence occurred in 1952 in Wieman v. Updegraff, a case overturning an Oklahoma law that required all state employees to take a loyalty oath denying all affiliation, direct and indirect, with "any foreign political agency, party, organization or Government, or with any agency, party, organization, association, or group whatever which has been officially determined by the United States Attorney General or other authorized agency of the United States to be a communist front or subversive organization." [n312](http://www.lexisnexis.com.proxy.lib.umich.edu/lnacui2api/frame.do?tokenKey=rsh-20.196893.6075947738&target=results_DocumentContent&returnToKey=20_T22257107026&parent=docview&rand=1435599783312&reloadEntirePage=true#n312) In an important concurrence, Justice Frankfurter argued that the loyalty oath had "an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice." [n313](http://www.lexisnexis.com.proxy.lib.umich.edu/lnacui2api/frame.do?tokenKey=rsh-20.196893.6075947738&target=results_DocumentContent&returnToKey=20_T22257107026&parent=docview&rand=1435599783312&reloadEntirePage=true#n313) From that time to when the term "chilling effect" was first used in Dombrowski v. Pfister [n314](http://www.lexisnexis.com.proxy.lib.umich.edu/lnacui2api/frame.do?tokenKey=rsh-20.196893.6075947738&target=results_DocumentContent&returnToKey=20_T22257107026&parent=docview&rand=1435599783312&reloadEntirePage=true#n314) thirteen years later, Professor Frederick Schauer argues that [\*130] the term evolved from an "emotive argument into a major substantive component of first amendment [sic] adjudication." [n315](http://www.lexisnexis.com.proxy.lib.umich.edu/lnacui2api/frame.do?tokenKey=rsh-20.196893.6075947738&target=results_DocumentContent&returnToKey=20_T22257107026&parent=docview&rand=1435599783312&reloadEntirePage=true#n315) However, after Laird v. Tatum, litigating on the basis of chilling effects has become difficult. Tatum requires litigants to first prove that the surveillance in question led to a cognizable harm before they will be granted standing and further held that "the mere existence . . . of a governmental investigative and data-gathering activity that is alleged to be broader in scope than is reasonably necessary for the accomplishment of a valid governmental purpose" was simply not a cognizable harm. [n316](http://www.lexisnexis.com.proxy.lib.umich.edu/lnacui2api/frame.do?tokenKey=rsh-20.196893.6075947738&target=results_DocumentContent&returnToKey=20_T22257107026&parent=docview&rand=1435599783312&reloadEntirePage=true#n316) As a result of Tatum, before an individual can bring a First Amendment claim against FBI based on the authorizations of the Attorney General Guidelines, she must first prove that she has been harmed by the often-secret surveillance. [n317](http://www.lexisnexis.com.proxy.lib.umich.edu/lnacui2api/frame.do?tokenKey=rsh-20.196893.6075947738&target=results_DocumentContent&returnToKey=20_T22257107026&parent=docview&rand=1435599783312&reloadEntirePage=true#n317) Because of the difficulty of first affirmatively identifying that one is the subject of government surveillance in order to allege a cognizable harm under the law, such litigation has been made increasingly unlikely under Tatum. For example, in 2005, The New York Times exposed the President's Surveillance Program (PSP), a program developed after 9/11 that secretly authorized the NSA to intercept "the international telephone calls and international e-mail messages of hundreds, perhaps thousands, of people inside the United States without warrants over the past three years in an effort to track possible 'dirty numbers' linked to Al Qaeda." [n318](http://www.lexisnexis.com.proxy.lib.umich.edu/lnacui2api/frame.do?tokenKey=rsh-20.196893.6075947738&target=results_DocumentContent&returnToKey=20_T22257107026&parent=docview&rand=1435599783312&reloadEntirePage=true#n318) "Additionally, the NSA told Congress that privileged communications, such as those between an attorney and her client, would not be 'categorically excluded' from interception." [n319](http://www.lexisnexis.com.proxy.lib.umich.edu/lnacui2api/frame.do?tokenKey=rsh-20.196893.6075947738&target=results_DocumentContent&returnToKey=20_T22257107026&parent=docview&rand=1435599783312&reloadEntirePage=true#n319) This discovery led prominent civil rights organizations, including the American Civil Liberties Union (ACLU), to file [\*131] lawsuits against the government arguing that their speech was chilled because their communications were likely targets of the surveillance program. [n320](http://www.lexisnexis.com.proxy.lib.umich.edu/lnacui2api/frame.do?tokenKey=rsh-20.196893.6075947738&target=results_DocumentContent&returnToKey=20_T22257107026&parent=docview&rand=1435599783312&reloadEntirePage=true#n320) The ACLU filed on behalf of itself and a group of journalists, scholars, and other organizations that regularly communicate with likely targets of the PSP. [n321](http://www.lexisnexis.com.proxy.lib.umich.edu/lnacui2api/frame.do?tokenKey=rsh-20.196893.6075947738&target=results_DocumentContent&returnToKey=20_T22257107026&parent=docview&rand=1435599783312&reloadEntirePage=true#n321) Importantly, none of the plaintiffs had evidence that they were in fact the subject of NSA surveillance. [n322](http://www.lexisnexis.com.proxy.lib.umich.edu/lnacui2api/frame.do?tokenKey=rsh-20.196893.6075947738&target=results_DocumentContent&returnToKey=20_T22257107026&parent=docview&rand=1435599783312&reloadEntirePage=true#n322) This was a fact that only the government knew and would not disclose. The Supreme Court held that, without this information, the plaintiffs lacked standing to pursue their case. [n323](http://www.lexisnexis.com.proxy.lib.umich.edu/lnacui2api/frame.do?tokenKey=rsh-20.196893.6075947738&target=results_DocumentContent&returnToKey=20_T22257107026&parent=docview&rand=1435599783312&reloadEntirePage=true#n323) The standing barrier created by Tatum is especially problematic given the nature of surveillance today. Surveillance today no longer presents viable Fourth Amendment claims because so much of our most personal information is mediated through third parties, and the third-party doctrine limits the extent of Fourth Amendment protections. [n324](http://www.lexisnexis.com.proxy.lib.umich.edu/lnacui2api/frame.do?tokenKey=rsh-20.196893.6075947738&target=results_DocumentContent&returnToKey=20_T22257107026&parent=docview&rand=1435599783312&reloadEntirePage=true#n324) While Justice Sotomayor's concurrence in United States v. Jones provides some indication that this doctrine may be up [\*132] for reconsideration by the Supreme Court, [n325](http://www.lexisnexis.com.proxy.lib.umich.edu/lnacui2api/frame.do?tokenKey=rsh-20.196893.6075947738&target=results_DocumentContent&returnToKey=20_T22257107026&parent=docview&rand=1435599783312&reloadEntirePage=true#n325) until that time, the Fourth Amendment no longer provides a powerful source of legal recourse against the growth of surveillance authority. As a result, now, more than ever, the chilling effects doctrine must be revived in order to provide a First Amendment backstop to the growing problem of government surveillance. c. Executive Privilege As Professor Heidi Kitrosser describes, "A claim of executive privilege is generally a claim by the President of a constitutional right to withhold information." [n326](http://www.lexisnexis.com.proxy.lib.umich.edu/lnacui2api/frame.do?tokenKey=rsh-20.196893.6075947738&target=results_DocumentContent&returnToKey=20_T22257107026&parent=docview&rand=1435599783312&reloadEntirePage=true#n326) It is a claim whose authority lies not in the text of the Constitution or of any specific law, but rather in the "notion that some information requests effectively infringe on the President's Article II powers, threatening his ability to receive candid advice or to protect national security." [n327](http://www.lexisnexis.com.proxy.lib.umich.edu/lnacui2api/frame.do?tokenKey=rsh-20.196893.6075947738&target=results_DocumentContent&returnToKey=20_T22257107026&parent=docview&rand=1435599783312&reloadEntirePage=true#n327) Executive privilege as a means of obfuscation facilitates shadow administrative constitutionalism by preventing judicial oversight. Professor Jack Balkin first made this claim nearly ten years ago when he argued that, increasingly we exclude more and more executive action from judicial review on the twin grounds of secrecy and efficiency. . . . [A]n independent judiciary plays an important role in making sure that zealous officials do not overreach. If the executive seeks greater efficiency, this requires a corresponding duty of greater disclosure before the fact and reporting after the fact to determine whether its surveillance programs are targeting the right people or are being abused. [n328](http://www.lexisnexis.com.proxy.lib.umich.edu/lnacui2api/frame.do?tokenKey=rsh-20.196893.6075947738&target=results_DocumentContent&returnToKey=20_T22257107026&parent=docview&rand=1435599783312&reloadEntirePage=true#n328) The courts have not taken heed to his warning. In the wake of the disclosure of the PSP, there was one case that survived the extremely high standing bar set in Tatum. In Al-Haramain Islamic Foundation v. Bush, an Islamic charity based in Oregon discovered that the government inadvertently sent them classified documents demonstrating that their communications were [\*133] subject to warrantless surveillance. [n329](http://www.lexisnexis.com.proxy.lib.umich.edu/lnacui2api/frame.do?tokenKey=rsh-20.196893.6075947738&target=results_DocumentContent&returnToKey=20_T22257107026&parent=docview&rand=1435599783312&reloadEntirePage=true#n329) With proof that they were in fact subject to surveillance, Al-Haramain proceeded to court. However, the government argued that the state-secrets privilege prevented the introduction of the classified documents and permitted the government to avoid acknowledging the existence of the surveillance program. [n330](http://www.lexisnexis.com.proxy.lib.umich.edu/lnacui2api/frame.do?tokenKey=rsh-20.196893.6075947738&target=results_DocumentContent&returnToKey=20_T22257107026&parent=docview&rand=1435599783312&reloadEntirePage=true#n330) Despite the fact that the classified information had already been disclosed (and in seemingly direct conflict with the government's otherwise settled third-party doctrine), the Ninth Circuit agreed with the government's position. [n331](http://www.lexisnexis.com.proxy.lib.umich.edu/lnacui2api/frame.do?tokenKey=rsh-20.196893.6075947738&target=results_DocumentContent&returnToKey=20_T22257107026&parent=docview&rand=1435599783312&reloadEntirePage=true#n331) The doctrinal barriers that prevent judicial intervention are significantly harder to overcome than the failures that stymie intrabranch checks and balances. This is in no small part due to the doctrine of stare decisis and the value of having binding precedent. Even judges who recognize the problems with the current system and wish to reassert their role in determining both small-"c" and ultimately large-"C" constitutional meaning cannot. Judge Colleen McMahon expressed her frustration with the state-secrets privilege in a court opinion, saying, "I can find no way around the thicket of laws and precedents that effectively allow the Executive Branch of our Government to proclaim as perfectly lawful certain actions that seem on their face incompatible with our Constitution and laws, while keeping the reasons for its conclusion a secret." [n332](http://www.lexisnexis.com.proxy.lib.umich.edu/lnacui2api/frame.do?tokenKey=rsh-20.196893.6075947738&target=results_DocumentContent&returnToKey=20_T22257107026&parent=docview&rand=1435599783312&reloadEntirePage=true#n332) As a result, without a major shift in the doctrine, the judiciary will be limited in its ability to provide useful oversight.

### Judicial deference good

#### In issues of national security, judicial review will simply be circumvented

Posner and Vermeule 7 (Eric, law professor, and Adrian, legal scholar, “Terror in the Balance: Security, Liberty, and the Courts,” Oxford University Press, Chapter 6, page 208)

In any event, if a government is intent on engaging with interrogation to protect national security; there is little the judges can do about it anyway. This is just an extreme version of the point we make in chapter 3: judicial deference in matters of national security is inevitable, whether or not it is desirable. There is little reason to believe that a ringing judicial proclamation against a coercive interrogation would have a real-world effect, precisely because the national security settings in which coercive interrogation will be of greatest value and where it is most likely to be used are the very settings which are least amenable to judicial oversight. Coercive interrogation by officials in remote or secret facilities abroad- not in the fishbowl of Guantanamo Bay, but in Bagram in Afghanistan in the Central Intelligence Agency’s “black sites”63- will not be checked in the threat of lawsuits, since the subjects of such interrogation will rarely have access to lawyers and will be nonpersons until released; and governments facing problems of judicial review may simply engage in “rendition,” or the handing over of subjects to allied governments which enjoy a freer hand to conduct coercive interrogations, in return for a share of any information obtained. Overall, it is very dubious that constitutional doctrine relating to coercive interrogation can be made relevant where national security concerns are at issue.

#### Judicial deference is good when national security is at stake- any risk of an impact means this is a time of emergency that the court isn’t equipped to handle in a timely, flexible, and covert manner

Posner and Vermeule 7 (Eric, law professor, and Adrian, legal scholar, “Terror in the Balance: Security, Liberty, and the Courts,” Oxford University Press, Introduction, page 5)

Our argument has two components. First, the tradeoff thesis, holds that the governments should, and do, balance civil liberties and security at all times. During emergencies, when new threats appear, the balance shifts; government should and will reduce civil liberties in order to enhance security in those domains where the two must be traded off. Governments will err, but those errors will not be systematically skewed in any direction and will not be more likely during emergencies than during normal times, in which governments also make mistakes about quotidian matters of policy. Second, the deference thesis also holds that the executive branch, not Congress, or the judicial branch, should make the tradeoff between security and liberty. During emergencies, the institutional advantages of the executive are enhanced. Because 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. The deference thesis does not hold that courts and legislators have no role at all. The view is that courts and legislators should be more deferential than they are during normal times; how much more deferential is always a hard question and depends on the scale and type of the emergency. To that extent, we agree with the subset of civil libertarians who concede that courts and legislators should defer somewhat more during emergencies than during normal times. Nonetheless, even these civil libertarians criticize the court and congress for their excessive deference during these emergencies. We agree with the descriptive premise, but not the normative one. Courts and legislators are far more deferential during emergencies than any civil libertarian would have the, be, but we think this is good and for the most part, inevitable. Accordingly, we will argue for a much higher degree of deference than any version of the civil libertarian view permits. In our view, the historical baseline of great deference during emergencies is also the right level of deference. To be clear, we do not argue that government always acts rationally, or with public-regarding motivations, nor that it always strikes the correct balance between security and liberty. Our two theses are just two halves of our central claim, which is about the comparison of institutional performance during normal times, on the one hand, and during times of emergencies, on the other. Our central claim is that government is better than the courts or legislation at striking the correct balance between security and liberty during emergencies. Against the baseline of normal times, government does no worse during emergencies, or at least its performance suffers less than that of courts and legislators. By contrast, the institutional structures that work to the advantage of court and Congress during normal times greatly hamper their effectiveness during emergencies; and the decline in governmental performance. Therefore, deference to government should increase during emergencies.

#### Administrative power shouldn’t be checked by judicial review – speed, secrecy, and popular accountability

Michaels 11 (Jon D., J.D., professor at UCLA’s School of Law, “The (Willingly) Fettered Executive: Presidential Spinoffs in National Security Domains and Beyond”, 97 Va. L. Rev. 801, pg. 829-831, 2011)

When it comes to the CIA, most everything that the spy agency does is largely free from legal control. Professional spies, intelligence analysts, and R&D gurus need flexibility. The imposition of legal constraints such as judicial review, civil service protections, and the APA could jeopardize the twin imperatives of speed and secrecy. n120 For these reasons, Congress has insulated the Agency [\*830] from the range of legal checks that attach to most other agencies. Moreover, even where the legislature has failed to ensure sufficiently robust insulation, the courts have typically pro-vided minimal scrutiny and generally looked unfavorably on lawsuits seeking to hold the CIA legally accountable. n121 Political accountability, where it exists, n122 can supplement legal constraints or compensate for the absence of such legal checks. n123 The electorate's mindfulness - and capacity to discipline the President - encourages reasoned, prudent agency action. n124 Accordingly, even if Congress has not imposed strong procedural or substantive constraints on Ex-ecutive agencies, an administration still cannot abuse its discretion lest it jeopardize the President's popular support. Political accountability no doubt helps legitimate Executive primacy in military and foreign affairs n125 and justifies in large part the judiciary's deference to agency action. n126 Yet political accountability might have perverse effects when it comes to intelligence incubation. Political pressure from the electorate might result in the shortchanging of long-term investments in order to devote maximum resources to current and near-future needs. This is a pervasive problem for political officials responsible [\*831] for long-term planning yet dependent on short-term popular approval. And, it is especially acute in this context because the fruits of long-term intelligence planning cannot, for secrecy reasons, be announced ex ante to the public - and thus the incum-bent administration will not receive immediate credit for its foresight. n127 By contrast, the costs of failing today to de-vote (or be seen as devoting) maximal resources to the present task could be politically disastrous in the event an intel-ligence failure paves the way to another attack. n128 Hence, there appears to be a tension between the responsibility to pursue long-term technology incubation and political accountability. With respect to scrutinizing foreign investments, a similar accountability deficit to the one just described would arise were the responsibility conventionally assigned to a single line agency or kept within the White House. Here, too, legal accountability is ratcheted down on the assumption that national security and diplomacy would be endangered by such safeguards as procedural transparency and judicial review. n129