### Case

#### The executive can’t circumvent the courts once they’ve spoken – courts legitimate government policy externally and internally by disciplining the executive

Cleveland et. al. 12 Professor Constitutional Rights Columbia Law (Sarah H., I can’t list all her quals so here’s her wiki page: <http://en.wikipedia.org/wiki/Sarah_Cleveland>, WAR, TERROR, AND THE FEDERAL COURTS, TEN YEARS AFTER 9/11: CONFERENCE\*: ASSOCIATION OF AMERICAN LAW SCHOOLS' SECTION ON FEDERAL COURTS PROGRAM AT THE 2012 AALS ANNUAL MEETING IN WASHINGTON, D.C., American University Law Review, 61 Am. U.L. Rev. 1253, June 2012, <http://www.lexisnexis.com/lnacui2api/api/version1/getDocCui?lni=563M-8640-00CW-G07K&csi=7373&hl=t&hv=t&hnsd=f&hns=t&hgn=t&oc=00240&perma=true>, lexisnexis, accessed 2013)

And so I think the courts, at least some have not adequately appreciated the really positive role that judicial review can play in this context. It can play a very important role in disciplining internal government conversations about policies and legal principles. It helps legitimate governmental action externally and it allows, in some [\*1257] cases, the political practice to accomplish what may be politically difficult for them to accomplish on their own. So if you think back to the civil rights movement - I grew up in Alabama - this is not a digression. Southern judges who actually wanted to comply with desegregation orders were much better positioned politically when they had a court order requiring them to do it, than if they had it to do on their own. So courts can play all of these positive things and they have, to some extent, post-9/11, that I do think that we are seeing in some cases, not all, a combination of the view that courts are sort of across the board, institutionally ill-equipped to deal with these questions and therefore, necessarily need to defer to political branches' decisions in nearly all circumstances. And on the other hand, reaching out to the kind of threshold doctrines that Marty was just talking about; political question, standing, mootness, Bivens, qualified immunity, Westfall Act n9 substitution, battlefield preemption, all kinds of doctrines. And the question as to how much of an impact 9/11 has had on these doctrines, I think can be hard to answer because it depends what your baseline view is of where the doctrine was before. I mean if you think Bivens was already dead, then the fact that courts haven't been very willing to adjudicate Bivens claims in these contexts is not surprising. If you think as the Seventh Circuit did in the Vance n10 case, which involves two U.S. citizens who were detained in Iraq during the conflict there, that the kind of conduct that they allege they were subjected to would have obviously given rise to a Bivens action had they been subjected to it in the United States. Then at least some of the Bivens decisions that have come out of the national security cases are carving out new spaces for non-application of Bivens to similar conduct abroad. I'm of the view that the courts in general have been quite reluctant to apply domestic law rules, to recognize Bivens damages, actions, in their application to substantive conduct that would be considered a constitutional violation that occurred in the United States. And they're reluctant for a number of reasons. They generally articulate this in terms of Bivens special factors. But I think in reality, in most of the cases, at least in the cases involving Bivens claims by aliens who are detained abroad, including in Iraq and Afghanistan, that what the court is really doing is sort of using the finding that there's no Bivens claim as pretext for a decision that either qualified immunity applies, [\*1258] because the rights were not clearly established at the time, or a decision on the merits, that the individuals actually had no substantive constitutional rights. Frankly, I think it would be preferable if the courts would actually engage with the appropriate applicable doctrine, rather than sort of mushing it all into the Bivens context, because you can end up feeling that Bivens is just sort of expanding so it will never apply in a national security context. I just spoke to Bivens but that's enough.

#### Law and Versteeg ignore key measures like case law—variance in constitutional texts are explained by latter judicial developments—US influence is strong

Jackson 12

[November 2012, Vicki C. Jackson is a Thurgood Marshall Professor of Constitutional Law, Harvard Law School., “COMMENT ON LAW AND VERSTEEG”, NEW YORK UNIVERSITY LAW REVIEW ONLINE, Vol. 87:25, November 2012, <http://www.nyulawreview.org/sites/default/files/NYULawReviewOnline-87-5-Jackson.pdf>]

Thus, the headline-grabber of “decline” may depend on whether the focus is on larger ideas or more detailed provisions. But even as to the content of a constitution’s specific provisions, the study’s methodology may understate the degree of similarity that continues to exist between the U.S. constitutional system and those of other countries. Indeed, one might wonder whether there has been any substantial decline in influence, rather than a set of departures in discrete, albeit significant, areas. For one thing, the authors’ research design rests, generally, on comparisons only of formal constitutional texts.10 The exclusion of constitutional case law and conventions may have contributed to the quantifiability and reliability of the empirical analysis. But the study of what can readily be quantified and coded, while interesting, should not obscure that other equally or more important phenomena may be harder to quantify reliably. And the impact of U.S. case law on constitutional design and interpretation in the rest of the world has been considerable. The impact of the authors’ methodology is suggested by the fact that a number of specific rights that the authors describe as existing in “generic”—that is, widely held—constitutions, but not in the United States, are in fact well-fixed in U.S. constitutional case law.11 These include rights of freedom of movement12 and women’s rights.13 Indeed, U.S. case law may well have influenced the adoption of formal rights in later adopted written constitutions.14 Moreover, among the provisions listed as being found only in the U.S. Constitution, and not in the “generic” constitution, are speedy and public trial rights.15 But cognate rights are set out in the European Convention on Human Rights (ECHR)16 and are enforced by the European Court of Human Rights (ECtHR);17 both the Convention and the ECtHR’s case law function as a form of quasiconstitutional supranational public law for forty-seven member states. Law and Versteeg’s methodological choice to focus only on formal constitutional texts (and not to include externally binding human rights commitments) may thus also have resulted in some overstatement of the degree of separation between the U.S. constitutional system and those of other countries.

### XO

#### Executive control reduces courts to political tools and prevents litigation of human rights issues

Free 3 (Brian C., Washington State Supreme Court, edit-in-chief Pacific Rim Law and Policy Journal, "Awaiting Doe v. Exxon Mobil Corp.: Advocating the Cautious Use of Executive Opinions in

Alien Tort Claims Act Litigation," Pacific Rim Law & Policy Journal, 2003, <http://digital.law.washington.edu/dspace-law/bitstream/handle/1773.1/731/12PacRimLPolyJ467.pdf?sequence=1>, accessed 2013)

Although executive opinions are necessary for judicial consideration in certain cases, the separation of powers doctrine mandates that courts make judicial determinations free from political control, even during times of national crisis. The Supreme Court in Youngstown Sheet & Tube Co. v. Sawyer 114 refused to accept President Truman's claims that the Korean War necessitated the seizure of American steel mills. 115 Instead, the Court insisted that the propriety of the President's actions be determined by established constitutional principles." 6 In Washington Post Co. v. United States Department of State,"17 the District of Columbia Court of Appeals assessed the State Department's claim that an individual would be significantly harmed if certain Department records were publicly released," 1 8 ultimately determining that the Department's contention was unfounded."19 The court concluded that "whatever weight the opinion of the Department, as a presumed expert in the foreign relations field, is able to garner, deference cannot extend to blatant disregard of countervailing evidence."' 120 If courts were to practice unquestioning adherence to executive communication, they would enable politicization of the judiciary. As the divergent views of the Carter and Reagan Administration demonstrate, 121 political support for § 1350 has differed dramatically among various presidential administrations. If courts do not make justiciability determinations independent from executive control, § 1350 may become little more than a political tool. Instead of objective determinations made according to established principles of law, courts would determine litigants'

### DA

#### The status quo triggers their DAs but not the advantages—the executive has functionally released all of the Uighurs, but it still happened on the executive’s terms and the court hasn’t ordered the release

Goldman 12/31

[12/31/13, Adam Goldman, “Final three Uighur prisoners moved from U.S. military prison at Guantanamo Bay”, <http://www.washingtonpost.com/world/national-security/final-three-uighur-prisoners-moved-from-us-military-prison-at-guantanamo-bay/2013/12/31/834c1eea-7220-11e3-8def-a33011492df2_story.html>]

The United States has transferred three Uighur Muslim detainees to Slovakia from the military prison at Guantanamo Bay, Cuba, U.S. officials said Tuesday. They were the last members of the ethnic minority from China to be held at the military prison. The trio had languished at Guantanamo for more than a decade since their capture in Pakistan after the Sept. 11, 2001, attacks — despite prior military assessments that they had no ties to al-Qaeda or the Taliban.

#### Terrorists wouldn’t be able to acquire, develop, and deliver the nuclear weapon

Steve Chapman, member of the Chicago Tribune editorial board since 1981, 2/8/08 “The Implausibility of Nuclear Terrorism,” <http://www.realclearpolitics.com/articles/2008/02/the_implausibility_of_nuclear.html>, accessed 7/2/10

The events required to make that happen comprise a multitude of Herculean tasks. First, a terrorist group has to get a bomb or fissile material, perhaps from Russia's inventory of decommissioned warheads. If that were easy, one would have already gone missing. Besides, those devices are probably no longer a danger, since weapons that are not scrupulously maintained (as those have not been) quickly become what one expert calls "radioactive scrap metal." If terrorists were able to steal a Pakistani bomb, they would still have to defeat the arming codes and other safeguards designed to prevent unauthorized use. As for Iran, no nuclear state has ever given a bomb to an ally -- for reasons even the Iranians can grasp. Stealing some 100 pounds of bomb fuel would require help from rogue individuals inside some government who are prepared to jeopardize their own lives. The terrorists, notes Mueller, would then have to spirit it "hundreds of miles out of the country over unfamiliar terrain, and probably while being pursued by security forces." Then comes the task of building a bomb. It's not something you can gin up with spare parts and power tools in your garage. It requires millions of dollars, a safe haven and advanced equipment -- plus people with specialized skills, lots of time and a willingness to die for the cause. And if al-Qaida could make a prototype, another obstacle would emerge: There is no guarantee it would work, and there is no way to test it. Assuming the jihadists vault over those Himalayas, they would have to deliver the weapon onto American soil. Sure, drug smugglers bring in contraband all the time -- but seeking their help would confront the plotters with possible exposure or extortion. This, like every other step in the entire process, means expanding the circle of people who know what's going on, multiplying the chance someone will blab, back out or screw up. Mueller recalls that after the Irish Republican Army failed in an attempt to blow up British Prime Minister Margaret Thatcher, it said, "We only have to be lucky once. You will have to be lucky always." Al-Qaida, he says, faces a very different challenge: For it to carry out a nuclear attack, everything has to go right. For us to escape, only one thing has to go wrong. That has heartening implications. If Osama bin Laden embarks on the project, he has only a minuscule chance of seeing it bear fruit. Given the formidable odds, he probably won't bother. None of this means we should stop trying to minimize the risk by securing nuclear stockpiles, monitoring terrorist communications and improving port screening. But it offers good reason to think that in this war, it appears, the worst eventuality is one that will never happen.