## Gonzaga 1AC v policy

### Plan

#### Text: The United States federal judiciary should eliminate the president's war power authority to indefinitely detain individuals including extraordinary rendition.

### Contention 1 – Torture

#### Status quo policy means detainees are transferred to ‘black sites’ where they are tortured and denied due process

Parry 13 Law Professor (John T., Lewis & Clark University, JD cumm laude Harvard Law School, “Ahmad and Others v. The United Kingdom (Eur. Ct. H.R.) Introductory Note by John T. Parry”, *International Legal Materials*, vol. 52 no. 2 pp. 440-495, 2013, <http://www.jstor.org/stable/10.5305/intelegamate.52.2.0440?origin=JSTOR-pdf>, accessed September 2013)

Extraordinary rendition, as conducted by the Central Intelligence Agency (‘CIA’), appears to be the latest mutation of enforced disappearance. From the information available it appears that the CIA had set up an apparatus, by which it collected information about suspected terrorists, abducted them, transferred them to one or more countries where they were detained without any legal process. In these countries, unregistered places of detention (also known as ‘black sites’) were in full operation. At these sites, ‘enhanced interrogation techniques’ — a euphemism for torture — were applied to individuals. It is difficult to believe that the hosting countries had no knowledge, actual or constructive, of this. For instance, Poland and Romania have been named as two of the hosting countries.20 Despite the denial by the former country, it has been reported that indeed it was implicated in the CIA program.21

#### Extraordinary rendition places detainees in situations where they are tortured; setting them free eliminates the notion of ‘enforced disappearance’

Parry 13 Law Professor (John T., Lewis & Clark University, JD cumm laude Harvard Law School, “Ahmad and Others v. The United Kingdom (Eur. Ct. H.R.) Introductory Note by John T. Parry”, *International Legal Materials*, vol. 52 no. 2 pp. 440-495, 2013, <http://www.jstor.org/stable/10.5305/intelegamate.52.2.0440?origin=JSTOR-pdf>, accessed September 2013)

Broadly speaking, there are two main categories of persons subjected to extraordinary rendition. The first includes those Guantanamo detainees whose names have eventually been released. Although some of them may have been captured legally, for example in the battlefield, their subsequent unacknowledged detention and transfer places them in the realm of enforced disappearance and their possible subjection to torture in the realm of extraordinary rendition.137 However, the aforementioned acknowledgment of their detention, such as in the case of ‘high value detainees’,138 puts the violation of the prohibition of enforced disappearance to an end and brings to the fore other human rights violations, such as the violation of the right to liberty and security, the right not to be subjected to torture or cruel, inhuman or degrading treatment, the right to be treated with humanity and with respect for one’s inherent dignity, and the right of access to a court. Similar considerations apply for the limited cases that have reached US courts.139 The second category relates to those who have been victims of extraordinary rendition and still remain unaccounted for. These individuals continue to be victims of enforced disappearance. From the moment one of the constitutive elements ceases to exist, either as a result of being set free or through an acknowledgment of their detention being made, then enforced disappearance comes to an end. In summary, it is submitted that extraordinary rendition stricto sensu is equated to enforced disappearance and is, in its broader sense, the aggregate result of enforced disappearance and torture.

#### Torture destroys an individual’s agency and therefore value to life

Sussman 5 Ass. Philosophy Professor University of Illinois (David, “What’s Wrong with Torture”, Philosophy & Public Affairs, vol. 33, Issue 1, pp. 1-33, Jan 2005, <http://onlinelibrary.wiley.com/doi/10.1111/j.1088-4963.2005.00023.x/full>, accessed 2013)

The orthodox Kantian can go a little farther toward accommodating the special significance of pain. Unlike other kinds of unwanted imposition, pain characteristically compromises or undermines the very capacities constitutive of autonomous agency itself. It is almost impossible to reflect, deliberate, or even think straight when one is in agony. When sufficiently intense, pain becomes a person's entire universe and his entire self, crowding out every other aspect of his mental life. Unlike other harms, pain takes its victim's agency apart “from the inside,” such that the agent may never be able to reconstitute himself fully. The Kantian can thus recognize that torture is not only a violation of the value of rational agency, but a violation that is accomplished through the very annihilation of such agency itself, if only temporarily or incompletely.

#### Even if the aff isn’t the silver bullet, our policy is necessary as an individual act of resistance against detention and torture

Ahmad 9 Law Professor (Muneer I., American University, visiting professor @ Georgetown Law, “Resisting Guantanamo: Rights at the Brink of Dehumanization”, <http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=muneer_ahmad>, accessed 2013)

Much like the death penalty lawyer, our purpose was to intervene in the prevailing, post-September 11th social organization of violence. Understanding this intervention as a resistance practice rather than a transformative act yields three benefits. First, it enlarges the time frame for action and result, de-centering the transformative “rights moment”— the landmark case, the smoking gun document, the game-changing revelation—and instead commits the lawyer to a long-term oppositional stance, and a set of daily practices of objection and contravention.286 Second, the resistance frame contextualizes the individual client representation within the larger structures and operations of power, rejecting an atomistic view of lawyering or a diffuse engagement with the state and opting instead for direct confrontation with state violence. Lastly, the resistance frame can provide the lawyer a source of sustenance in her and her client’s protracted struggle. As in death penalty litigation, resistance is mounted not merely because of a felt need to “do something,” but because through tactical maneuver and strategic intervention, previously unavailable spaces can be opened, new realities can be created, and new opportunities for more meaningful intervention realized. Lawyers can help gain their clients release, even if not through court order; moments of transformative potential, though fleeting, can be created; still others can be exploited. Unlike the traditional litigation model, which presupposes a beginning, middle and perhaps most importantly, an end, resistance rejects linearity, and is not strictly teleological. It thus demands that the resister—whether lawyer or prisoner—search for what altered realities might be created through the act of resistance, without knowing what or where they will be.

#### Torture as a human rights issue is the litmus test of morality

Twiss 7 Distinguished Professor of Human Rights (Sumner B., prof. Emeritus @ Brown University, “Torture, Justification, and Human Rights: Toward an Absolute Proscription”, Human Rights Quarterly, 29.2 pp. 346-367)

[Torture expresses] contempt for the personality of the other individual which has to be destroyed and annihilated. It is for that reason that torture is one of the most heinous violations of human rights as it is the very denial of . . . the recognition that each living being has a personality of his own which has to be respected . . . [making] the duty to eradicate torture . . . a primordial obligation.27 These are strong words, and to explicate a bit, it is now known that the harm for the victim of torture, no matter the length of time it is administered, is both severe and permanent. The harms include not only permanent physical injury and disability (what we usually think of) but also chronic anxiety, inability to trust others, subsequent deliberate self-injury, violent behavior toward others, substance abuse, depression (often leading to suicide), paranoia, severe insomnia, uncontrollable nightmares and flashbacks, self-loathing, psychosomatic illness, shortened life-span, permanent alterations of brain patterns, and so the list continues.28 The empirical evidence is overwhelming that for most survivors of torture, the rest of their lives is a sort of living death. This knowledge sharpens, deepens, and extends the reach of the original primary intuition about the prima facie wrongness of torture, and accounts for the rapporteur's language of destruction and [End Page 358] annihilation, heinous violation, and primordial obligation of prevention. Informed reflection, to put it this way, so deepens and extends the primary moral intuition about torture that it converts it into an intuition that torture is always wrong.29 These considerations could also be put to use in an alternative or ancillary consequentialist argument to the effect that the harmful consequences for the victims of torture (and in the aggregate they number in the hundreds of thousands) by far outweigh whatever benefits government elites may derive from the use of such practices to hang onto their positions of political power.

#### We cannot separate politics from questions of ethics. All politics are based on the challenge to put human freedom as an ethical encounter with others

Dillon ’96 (Michael. Senior Lecturer International Relations @ University of Lancaster. The Politics of Security, 1996)

The recovery of the political is, therefore, inescapably bound-up with the recovery of the ethical as well. For, to concur, and at some length, with Caputo’s Levinasian forcing of this thought in directions which Heidegger would no doubt have resisted: On the view I am defending ethics is always already in place, is factically there as soon as there is Dasein, as soon as there is world. Ethics is not something fitted into a world that is somehow constituted prior to it. Ethics constitutes the world in the first place. .. . If you want to think what truly ‘is’ you have to start with ethics and obligation, not add it on later. To put it in terms that I would prefer, the space of obligation is opened up by factical life, by the plurality of living bodies, by the commerce and intercourse of bodies with bodies, and above all, in these times, in the times of holocausts and of killing fields, by bodies in pain — but no less by thriving and flourishing bodies, by bodies at play. Later, albeit only in a sketch, I will therefore argue that the political is precisely this: the continuous challenge to put human freedom as an ethical encounter with others, and within the Otherness that is integral to its own constitution as a way of being, into work in the world.

#### Current rulings lay the groundwork for SCOTUS to smash the executive later – now just lets us stop the torture of detainees sooner

Fallon 10 Harvard Constitutional Law Prof (Richard H. Jr., “The Supreme Court, Habeas Corpus, and the War on Terror: An Essay on Law and Political Science”, Columbia Law Review 110 Colum. L. Review, 2010, <http://heinonline.org/HOL/Page?men_tab=srchresults&handle=hein.journals/clr110&id=367&size=2&collection=journals&terms=Supreme%20Court|Court&termtype=phrase&set_as_cursor=#366>, accessed 2013)

Third, even though the Court’s jurisdictional rulings have not entailed the recognition of substantive rights, they have had the effect – which was almost surely intended – of unsettling the status quo ante by giving notice to the Executive Branch that its detention policies are not immune from judicial scrutiny. More specifically, the Court’s jurisdictional decisions have invited litigation in the lower courts in which petitioners have asserted an array of substantive and procedural rights. The result has been a kind of “percolating” process through which challenges to executive practices that are initially advanced in the lower federal courts draw public attention and, what is more, law the foundation for future appeals to the Supreme Court. Despite relative quiescence to date, the Court has thus guaranteed itself future opportunities to consider what rights executive detainees have in a climate different from that which existed in the months and years immediately after 9/11.

#### 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.

## Contention 2 – Judicial Globalism

#### In the Kiyemba decisions, the court has ruled that the right to habeas corpus doesn’t endow it with the power to release a detainee or stop a detainee from being transferred

Milko 12

[Winter, 2012, Jennifer L. Milko, “Separation of Powers and Guantanamo Detainees: Defining the Proper Roles of the Executive and Judiciary in Habeas Cases and the Need for Supreme Guidance”, 50 Duq. L. Rev. 173]

After the Boumediene and Munaf cases, it was clear that the United States district courts have habeas jurisdiction over detainee cases, and the District of Columbia Circuit has taken center stage in Guantanamo cases. n58 While many felt that Boumediene granted federal judges considerable control over the legal fate of detainees, the D.C. Circuit Court of Appeals used the Supreme Court's warning not to "second-guess" the Executive as its mantra in detainee cases. Though the district court ruled in several cases that a remedy, including actual release, was proper, the D.C. Circuit Court of Appeals has never approved such a release and has struck down district court orders seeking to control the fate of detainees. n59 1.Kiyemba I and Kiyemba III-Petitions for Release into the United States Following the Boumediene decision and after a determination by the Government that they were no longer "enemy combatants," seventeen Uighurs n60 detained at Guantanamo Bay for over seven years petitioned for the opportunity to challenge their detention as unlawful and requested to be released into the United States. n61 [\*182] Because they were no longer classified as "enemy combatants," the issue presented to the district court was "whether the Government had the authority to 'wind up' the petitioners' detention" or if the court could authorize the release of the Uighurs. n62 The district court decided that the Government's authority to "wind-up" the detentions ceased when "(1) detention becomes effectively indefinite; (2) there is a reasonable certainty that the petitioner will not return to the battlefield to fight against the United States; and (3) an alternative legal justification has not been provided for continued detention. Once these elements are met, further detention is unconstitutional." n63 Under this framework, the court decided that the time for wind-up authority had ended, and looked to the remedies the judiciary could utilize under its habeas jurisdiction. n64 The court concluded that based on separation of powers, the courts had authority to protect individual liberty, especially when the Executive Branch brought the person into the court's jurisdiction and then undermined the efforts of release. n65 Noting that the Executive could not have the power to limit the scope of habeas by merely assuring the court that it was using its best efforts to release the detainees, the court held that under the system of checks and balances and the importance of separation of powers to the protection of liberty, the motion for release was granted. n66 In the case renamed Kiyemba v. Obama on appeal, and commonly referred to as Kiyemba I, the D.C. Circuit Court of Appeals reversed, framing the issue as whether the courts had authority to issue release into the United States. n67 Because there was the potential that the Petitioners would be harmed if returned to their native China, the Government asserted that they had been undergoing extensive efforts to relocate the detainees in suitable third countries. n68 The court based its reversal on case law that held that the power to exclude aliens from the country was an inherent Executive power, and not one with which the courts should inter [\*183] fere. n69 Though Petitioners claimed that release was within the court's habeas power, the court of appeals noted that the Petitioners sought more than a "simple release"-they sought to be released into the United States, and habeas could not interfere with the Executive's power to control the borders. n70 The Supreme Court granted the Petitioner's writ of certiorari in which they argued that the courts had the authority to issue release of unlawfully detained prisoners under its habeas power and to hold otherwise constituted a conflict with Boumediene. n71 By the time the case reached the High Court for determination on the merits, all of the detainee-Petitioners received resettlement offers, and only five had rejected these offers. n72 Due to the possibility of a factual difference based on this new information, the Supreme Court remanded the case to the D.C. Circuit Court of Appeals. n73 The remanded case became known as Kiyemba III. n74 The court of appeals reinstated its former opinion from Kiyemba I. n75 The D.C. Circuit Court of Appeals noted that just prior to the Kiyemba I decision, the government filed information under seal which indicated that all seventeen Petitioners had received a resettlement offer, and this influenced the court's conclusion that the Government was engaging in diplomatic efforts to relocate the detainees when it decided Kiyemba I. n76 Even if the Petitioners had a valid reason to decline these offers, it did not change the underlying notion that habeas afforded no remedy to be released into the United States. n77 Additionally, the court determined that the Petitioners had no privilege to have the courts review the determinations made by the Executive regarding the locations of resettlement, as this was a foreign policy issue for the political branches to handle. n78 The five remaining petitioners filed a second petition for certiorari on December 8, 2010, asking the Supreme Court to decide [\*184] whether the courts had the power to release unlawfully detained aliens under its habeas jurisdiction. n79 2.Kiyemba II and Petitions Requesting Notice of Transfer Prior to Release While the Kiyemba I and Kiyemba III litigation was occurring, a separate Uighur petition was moving through the D.C. Circuit. Nine Uighurs petitioned the district court for a writ of habeas, and asked the court to require the government to provide 30 days' advance notice of any transfer from Guantanamo based on fear of torture, and the district court granted the petition. n80 The cases were consolidated on appeal and renamed Kiyemba v. Obama, which is referred to as Kiyemba II. The Kiyemba II case has been the source of much debate over both the proper allocation of power in the tripartite system and the D.C. Circuit Court of Appeals' use of Supreme Court precedent in detainee cases. The D.C. Court of Appeals analogized the Uighurs' claims in the Kiyemba II case to the 2008 Supreme Court decision Munaf v. Geren, which held that habeas corpus did not prevent the transfer of an American citizen in captivity in Iraq to face prosecution in a sovereign state. n81 The court of appeals analyzed the Uughurs' claims by comparing them to the Munaf petitioners. First, the court found that the Uighurs and the petitioners in Munaf sought an order of the district court to enjoin their transfer based on fear of torture in the recipient country. n82 As in Munaf, the court decided that if the United States Government had asserted that it was against its policy to transfer detainees to a location where they may face torture, the Judiciary could not question that determination. n83 In reaching that conclusion, the Kiyemba II court cited to the Munaf language that the Judiciary should not "second-guess" the Executive in matters of foreign policy. n84 [\*185] Just as the court rejected the fear of torture argument, the Petitioners' claims that transfer should be enjoined to prevent continued detention or prosecution in the recipient country was also denied based on Munaf. n85 As Munaf reasoned, detainees could not use habeas as a means to hide from prosecution in a sovereign country, and any judicial investigation into a recipient country's laws and procedures would violate international comity and the Executive Branch's role as the sole voice on foreign policy. n86 Additionally, because the 30 days' notice requirements were seen as an attempt by the courts to enjoin the transfer of a detainee, they, too, were impermissible remedies. n87 Judge Griffith, concurring and dissenting in part, opined that Munaf did not require total deference to the political branches in detainee matters, that privileges of detainees outlined in Boumediene required advance notice of any transfer from Guantanamo, and the opportunity to challenge the Government's determination that transfer to the recipient country would not result in torture or additional detainment. n88 The Judge distinguished Munaf from the present situation because in the former, the petitioners knew they were going to be transferred to Iraqi custody and had an opportunity to bring habeas petitions to challenge that transfer. n89 In closing, Judge Griffith believed that "the constitutional habeas protections extended to these petitioners by Boumediene would be greatly diminished, if not eliminated, without an opportunity to challenge the government's assurances that their transfers will not result in continued detention on behalf of the United States." n90 Following this reversal, the Petitioners filed a motion for rehearing and suggested a rehearing en banc, as well as a stay of the mandate of the D.C. Circuit Court of Appeals. n91 Both of these motions were denied, and the Petitioners filed a writ for a petition of certiorari on November 10, 2009. n92 The Supreme Court denied the writ on March 22, 2010. n93 [\*186]

#### The Kiyemba decisions have created a model of runaway executive power undermining the global rule of law

Vaughn and Wiliams, Professors of Law, 13 [2013, Katherine L. Vaughns B.A. (Political Science), J.D., University of California at Berkeley. Professor of Law, University of Maryland Francis King Carey School of Law, and Heather L. Williams, B.A. (French), B.A. (Political Science), University of Rochester, J.D., cum laude, University of Maryland Francis King Carey School of Law, “OF CIVIL WRONGS AND RIGHTS: 1 KIYEMBA V. OBAMA AND THE MEANING OF FREEDOM, SEPARATION OF POWERS, AND THE RULE OF LAW TEN YEARS AFTER 9/11”, Asian American Law Journal, Vol. 20, 2013, http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2148404]

When it denied certiorari in Kiyemba III, the Supreme Court missed the opportunity to reassert its primary role under the separation of powers doctrine. In so doing, it allowed the D.C. Circuit’s reinstated, and misguided, decision to stand—allowing the Executive’s sovereign prerogative to trump constitutional mandates. After being reversed three times in a row—in Rasul, Hamdan, and then Boumediene—the D.C. Circuit finally managed in Kiyemba to reassert its highly deferential stance towards the Executive in cases involving national security. Of critical significance is the fact that the D.C. Circuit’s ruling in Kiyemba relied on its own view of separation of powers principles—a view that is dramatically different than the view espoused in Boumediene.272 In particular, the D.C. Circuit concluded that an order mandating the Uighurs’ release into the continental United States would impermissibly interfer with the political branches’ exclusive authority over immigration matters. But, this reasoning is legal ground that the Supreme Court has already impliedly—and another three-judge panel of the D.C. Circuit more explicitly—covered earlier.273 Denying a practical remedy for unlawfully detained individuals at Guantanamo Bay, in the face of Supreme Court precedent providing such individuals an opportunity to challenge their detention, effectively eviscerates the landmark decision rendered in Boumediene. Thus, the Bush administration’s strategy in employing the “war” paradigm at all costs and without any judicial intervention, while unsuccessful in the Supreme Court, has paid off—in troubling, and binding, fashion—in the D.C. Court of Appeals, where, national security fundamentalism reigns supreme and the Executive’s powers as “Commander-in-Chief” are with little, if any, real check. The consequences of this decision continue today with passage of the NDAA of 2012,274 which President Obama signed into law with reservations on December 31, 2011.275 What is different about this particular defense authorization bill is that it contains detainee provisions that civil liberties groups and human rights advocates have strongly opposed.276 The bill’s supporters strenuously objected to the assertion that these provisions authorize the indefinite detention of U.S. citizens.277 In signing the bill President Obama later issued a statement to the effect that although he had reservations about some of the provisions, he “vowed to use discretion when applying” them.278 Of course, that doesn’t necessarily mean that another administration wouldn’t do otherwise. As a result of these events, what we now have is a fascinating dichotomy with regard to the privilege of habeas corpus: A detainee may challenge the legality of their detention through the mechanism of a petition for habeas corpus. But, a habeas court may not order that individual’s release, even in the face of indefinite detention, if the Executive argues otherwise. Thus, as we explain below, what is needed, in our view, is a dissenting voice, reminding us of what is at stake and what is in peril as the Executive’s counterterrorism efforts persist.279 But first, we confront the problem that placed us here: judicial abstention, caused largely by political and practical external influences on the court that have pushed us away from the all-essential separation of powers. 1. Separation of Powers: A Necessary Check on Executive Excess As noted above, the doctrine of separation of powers is a constitutional imperative. As Neal Katyal has noted, “[t]he standard conception of separation of powers presumes three branches with equivalent ambitions of maximizing their powers.”280 Today, however, “legislative abdication is the reigning modus operandi.”281 Indeed, during the Bush Administration’s reign against terror, Congress either failed to act and/or did the Administration’s bidding—providing almost a blank check for any actions the Executive wished to undertake. In such a situation, it is all the more important that the Court act to preserve our tripartite system of government, particularly because national security is an area vulnerable to abuse and excess. The Supreme Court was on board with refusing to endorse a blank check for four years running. But, the Court dropped the ball when it dismissed—at the Executive’s urging—the certiorari petitions in Kiyemba I and III. As stated in the Uighurs’ certiorari petition, as a constitutional matter, “the President’s discretionary release of a prisoner is no different from his discretionary imprisonment: each proceeds from unchecked power.”282 To view the question of release as based on sovereign prerogative in the administration of immigration law, while viewing the question of imprisonment as based on constitutional authority is, put simply, senseless and without precedent. It cannot be that the two inquiries are unrelated; they both undoubtedly implicate individual constitutional rights and the separation of powers. Having refused to resolve this matter, the Supreme Court has left the separation of powers out of balance—and tilting dangerously toward unilateralism.

#### US action determines the global separation of powers—status quo trends towards executive authority get modeled and expand global executive power—a strong judicial assertion is critical to check

Flaherty 11, Professor of International Law

[2011, Martin S. Flaherty is a Leitner Professor of International Law, Fordham Law School; Visiting Professor, Woodrow Wilson School of Public and International Affairs, Princeton University, “Judicial Foreign Relations Authority After 9/11”, 56 N.Y.L. Sch. L. Rev. 119]

That "old-time" separation of powers should be enough to turn back any trend toward deference. The balance of this essay, however, offers one more interpretation, which is at once more original and potentially the most powerful. Call this separation of powers in a global context--or "global separation of powers" for short. The premise is straightforward. It assumes, first, that globalization generally has resulted in a net gain in power not for judiciaries, but for the "political" branches--and above all, for executives--within domestic legal systems. In other words, the growth of globalized transnational government networks has yielded an imbalance among the three (to four) major branches of government in terms of separation of powers. Such an imbalance, among other things, poses a significant and growing threat for the protection of individual rights by domestic courts, whether on the basis of international or national norms. [\*139] Yet if separation of powers analysis helps identify the problem, it also suggests the solution. If globalization has comparatively empowered executives in particular, it follows that fostering, rather than prohibiting, judicial globalization provides a parallel approach to help restore the balance. In this way, judicial separation of powers justifies judicial borrowing on both non-democratic and democratic grounds. From a non democratic perspective, transnational judicial dialogue with reference to international law and parallel comparative questions gives national judiciaries a unique expertise on aspects of foreign affairs, and so is a further exception to the usual presumption that the judiciary is the least qualified branch of government for the purposes of foreign affairs. More importantly, from a democratic point of view, restoring the balance that separation of powers seeks has the effect of promoting self-government to the extent that separation of powers is itself seen as a predicate for any well-ordered form of democratic self-government. A. Globalization and Imbalance Globalization, and the corollary erosion of sovereignty, may not yet be cliches, but they are hardly news. As any human rights lawyer would be quick to point out, the post-World War II emergence of international human rights law represents one of the most profound assaults on the notion that state sovereigns are the irreducible, impermeable building blocks of foreign affairs. n123 But the nation-state model has been eroding no less profoundly in less formal ways. Central, here, is the insight that governments today no longer simply interact state to state, through heads of state, foreign ministers, ambassadors, and consuls. Increasingly, if not already predominantly, there is interaction through global networks in which subunits of governments deal directly with one another. In separation of powers terms, executive branches at all levels interact less as the sole representative of the nation, than as partners in education ministries, intelligence agencies, or health and education initiatives. Likewise, though lagging, legislators and committees from different jurisdictions meet to share approaches and discuss common ways forward. Last, and least powerful if not least dangerous, judges from different nations share approaches in conference, teaching abroad programs, and of course, formally citing to one another in their opinions. Only recently has pioneering work by Anne-Marie Slaughter, among others, given a comprehensive picture of this facet of globalization. n124 That work, in turn, suggests that among the results of this process has been a net shift of domestic power in any given state toward the executive and away from the judiciary and the protection of fundamental rights. [\*140] 1. Executive Globalization Where international human rights lawyers seek to directly pierce the veil of state sovereignty, international relations experts have chronicled the no less significant desegregation of state sovereignty through the emergence of sub-governmental networks. Nowhere has this process been more greatly marked than with regard to the interaction of various levels of regulators within the executive branches--in parliamentary systems, the "governments" n125--of individual nations. Starting with pioneering work by Robert Koehane and Joseph Nye, n126 and more recently enhanced and consolidated by Slaughter, current scholarship offers a multifaceted picture of what may be termed "executive globalization." That said, much work remains to be done on how the "Global War on Terror" post-9/11 has accelerated this process with regard to security agencies. Nor, on a more general level, has significant work been done as to what the net effects of executive networking have been in separation of powers terms. The following reviews what has been done and suggests the likely answers to the questions that arise. Slaughter, somewhat consciously overstating, terms government regulators who associate with their counterparts abroad "the new diplomats." n127 This characterization immediately raises the question of who they are and in what contexts they operate. Perhaps ironically, desegregation begins at the top when presidents, prime ministers, and heads of state gather in settings such as the G-8, not only as the representatives of their states but as chief executives with common problems, which may include dealing with other branches of their respective governments. Moving down the ladder come an array of different specialists who meet across borders with one another both formally and informally: central bankers, finance ministers, environmental regulators, health officials, government educators, prosecutors, and--today perhaps most importantly--military, security, and intelligence officials. The frameworks in which these horizontal groups associate are various. One type of setting might be transnational organizations under the aegis of the United Nations, the European Union, NATO, or the WTO. Another framework can be networks that meet within the structure of executive agreements, such as the Transatlantic Economic Partnership of 1998. Other groups meet outside governmental frameworks, at least to begin with, with examples ranging from the Basel Committee to the Financial Crime Enforcement Network. n128 As important as which executive officials currently cross borders is what they actually do. The activities that make up executive transgovernmentalism may be sliced in various ways. n129 One breakdown divides the phenomenon into: (a) [\*141] information networks; (b) harmonization networks; and (c) enforcement networks. n130 An obvious yet vital activity, many government regulatory networks interact simply to exchange relevant information and expertise. Such exchanges include brainstorming on common problems, sharing information on identified challenges, banding together to collect new information, and reviewing how one another's agencies perform. n131 Harmonization networks, which usually arise in settings such as the European Union or the North American Free Trade Agreement (NAFTA), entail relevant administrators working together to fulfill the mandate of common regulations pursuant to the relevant international instrument. n132 For present purposes, however, enforcement networks most greatly implicate separation of powers concerns precisely because they involve police and security agencies sharing intelligence in specific cases, and, more generally, in capacity building and training. In the context of Northern Ireland, the Royal Ulster Constabulary (RUC) maintained "numerous links with other police services, particularly with those in Britain, but also with North American agencies and others elsewhere in the world . . . [including] the Federal Bureau of Investigation . . . ." n133 In a relatively benign vein, the Independent Police Commission charged with reforming the RUC recommended further international contact, in part because "the globalisation of crime requires police services around the world to collaborate with each other more effectively and also because the exchange of best practice ideas between police services will help the effectiveness of domestic policing." n134 It is exactly at this point, moreover, that 9/11-era concerns render the enforcement aspect of executive globalization ever more salient, and often more ominous. To take one example, consider the shadowy practice of "extraordinary renditions," that is, when the security forces of one country capture a person and send him or her to another country where rough interrogation practices are likely to take place--all outside the usual mechanisms of extradition. n135 To this extent, transnational executive cooperation moves from general, mutual bolstering to the expansion of one another's jurisdiction in the most direct and concrete fashion possible. All this, in turn, suggests a profound shift in power to the executives in any given nation state. At least in the United States, the conventional wisdom holds that the executive branch has grown in power relative to Congress or the courts, not even [\*142] counting the rise of administrative and regulatory agencies, even in purely domestic terms. n136 Add to the specter of enlarged executives worldwide who are enhancing one another's power, through information and enforcement networks in particular, and the conclusion becomes presumptive. Add further the cooperation of executives in light of 9/11, and the pro-executive implications of government globalization become more troubling still. 2. Legislative Globalization This pro-executive conclusion becomes even harder to resist given the slowness with which national legislators have been interacting with their counterparts. Several factors account for the slower pace of legislative globalization. Membership in a legislature almost by definition entails not just representation but representation keyed to national and subnational units. The turnover among legislators typically outpaces either executive officials or, for that matter, judges. In further contrast to legislators, regulators need to be specialists, and specialization facilitates cross-border interaction if only because it is easier to identify counterparts and focus upon common challenges. n137 Transnational legislative networks exist nonetheless and are growing. To take one example, national legislators have begun to work with one another in the context of such international organizations as NATO, the Organization for Security and Co-operation in Europe (OSCE), and the Association of Southeast Asian Nations (ASEAN). To take another example, independent legislative networks have begun to emerge, such as the Inter-Parliamentary Union and Parliamentarians for Global Action. n138 Yet even were national legislators to "catch up" to their executive counterparts in any meaningful way, the result would not necessarily be more robust or adequate protection of fundamental rights in times of perceived danger or the protection of minority rights at any time. Human rights organizations around the world are all too familiar with the democratic pathology of draconian statutes hastily enacted in response to actual attacks or perceived threats, including the Prevention of Terrorism Act in the United Kingdom, the USA PATRIOT Act in the United States, and the Internal Security Act in Malaysia. n139 It is for this reason that the essential player in the matter of rights protection must remain the courts. [\*143]

#### New democratic states are forming now—judicial influence determines the state of their transitions

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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.

#### Promoting a strong judiciary is necessary to make those transitions stable and democratic—detention policies specifically allow for global authoritarianism

CJA 3, Center for Justice and Accountability

[OCTOBER 2003, The Center for Justice & Accountability (“CJA”) seeks, by use of the legal systems, to deter torture and other human rights abuses around the world., “BRIEF OF the CENTER FOR JUSTICE AND ACCOUNTABILITY, the INTERNATIONAL LEAGUE FOR HUMAN RIGHTS, and INDIVIDUAL ADVOCATES for the INDEPENDENCE of the JUDICIARY in EMERGING DEMOCRACIES as AMICI CURIAE IN SUPPORT OF PETITIONERS”, http://www.cja.org/downloads/Al-Odah\_Odah\_v\_US\_\_\_Rasul\_v\_Bush\_CJA\_Amicus\_SCOTUS.pdf]

A STRONG, INDEPENDENT JUDICIARY IS ESSENTIAL TO THE PROTECTION OF INDIVIDUAL FREEDOMS AND THE ESTABLISHMENT OF STABLE GOVERNANCE IN EMERGING DEMOCRACIES AROUND THE WORLD. A. Individual Nations Have Accepted and Are Seeking to Implement Judicial Review By A Strong, Independent Judiciary. Many of the newly independent governments that have proliferated over the past five decades have adopted these ideals. They have emerged from a variety of less-than-free contexts, including the end of European colonial rule in the 1950's and 1960's, the end of the Cold War and the breakup of the former Soviet Union in the late 1980's and 1990's, the disintegration of Yugoslavia, and the continuing turmoil in parts of Africa, Latin America and southern Asia. Some countries have successfully transitioned to stable and democratic forms of government that protect individual freedoms and human rights by means of judicial review by a strong and independent judiciary. Others have suffered the rise of tyrannical and oppressive rulers who consolidated their hold on power in part by diminishing or abolishing the role of the judiciary. And still others hang in the balance, struggling against the onslaught of tyrants to establish stable, democratic governments. In their attempts to shed their tyrannical pasts and to ensure the protection of individual rights, emerging democracies have consistently looked to the United States and its Constitution in fashioning frameworks that safeguard the independence of their judiciaries. See Ran Hirschl, The Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Four Constitutional Revolutions, 25 Law & Soc. Inquiry 91, 92 (2000) (stating that of the “[m]any countries . . . [that] have engaged in fundamental constitutional reform over the past three decades,” nearly all adopted “a bill of rights and establishe[d] some form of active judicial review”) Establishing judicial review by a strong and independent judiciary is a critical step in stabilizing and protecting these new democracies. See Christopher M. Larkins, Judicial Independence and Democratization: A Theoretical and Conceptual Analysis, 44 Am. J. Comp. L. 605, 605-06 (1996) (describing the judicial branch as having "a uniquely important role" in transitional countries, not only to "mediate conflicts between political actors but also [to] prevent the arbitrary exercise of government power; see also Daniel C. Prefontaine and Joanne Lee, The Rule of Law and the Independence of the Judiciary, International Centre for Criminal Law Reform and Criminal Justice Policy (1998) ("There is increasing acknowledgment that an independent judiciary is the key to upholding the rule of law in a free society . . . . Most countries in transition from dictatorships and/or statist economies recognize the need to create a more stable system of governance, based on the rule of law."), available at http://www.icclr.law.ubc.ca/Publications/Reports/RuleofLaw. pdf (last visited Jan. 8, 2004). Although the precise form of government differs among countries, “they ultimately constitute variations within, not from, the American model of constitutionalism . . . [a] specific set of fundamental rights and liberties has the status of supreme law, is entrenched against amendment or repeal . . . and is enforced by an independent court . . . .” Stephen Gardbaum, The New Commonwealth Model of Constitutionalism, 49 Am. J. Comp. L. 707, 718 (2001). This phenomenon became most notable worldwide after World War II when certain countries, such as Germany, Italy, and Japan, embraced independent judiciaries following their bitter experiences under totalitarian regimes. See id. at 714- 15; see also United States v. Then, 56 F.3d 464, 469 (2d Cir. 1995) (Calabresi, J., concurring) (“Since World War II, many countries have adopted forms of judicial review, which — though different from ours in many particulars — unmistakably draw their origin and inspiration from American constitutional theory and practice. See generally Mauro Cappelletti, The Judicial Process in Comparative Perspective (Oxford: Clarendon Press, 1989).”). It is a trend that continues to this day. It bears mention that the United States has consistently affirmed and encouraged the establishment of independent judiciaries in emerging democracies. In September 2000, President Clinton observed that "[w]ithout the rule of law, elections simply offer a choice of dictators. . . . America's experience should be put to use to advance the rule of law, where democracy's roots are looking for room and strength to grow." Remarks at Georgetown University Law School, 36 Weekly Comp. Pres. Doc. 2218 (September 26, 2000), available at http://clinton6.nara.gov/2000/09/2000-09-26- remarks-by-president-at-georgetown-international-lawcenter.html. The United States acts on these principles in part through the assistance it provides to developing nations. For example, the United States requires that any country seeking assistance through the Millenium Challenge Account, a development assistance program instituted in 2002, must demonstrate, among other criteria, an "adherence to the rule of law." The White House noted that the rule of law is one of the "essential conditions for successful development" of these countries. See http://www.whitehouse.gov/infocus/developingnations (last visited Jan. 8, 2004).12 A few examples illustrate the influence of the United States model. On November 28, 1998, Albania adopted a new constitution, representing the culmination of eight years of democratic reform after the communist rule collapsed. In addition to protecting fundamental individual rights, the Albanian Constitution provides for an independent judiciary consisting of a Constitutional Court with final authority to determine the constitutional rights of individuals. Albanian Constitution, Article 125, Item 1 and Article 128; see also Darian Pavli, "A Brief 'Constitutional History' of Albania" available at http://www.ipls.org/services/others/chist.html (last visited Janaury 8, 2004); Jean-Marie Henckaerts & Stefaan Van der Jeught, Human Rights Protection Under the New Constitutions of Central Europe, 20 Loy. L.A. Int’l & Comp. L.J. 475 (Mar. 1998). In South Africa, the new constitutional judiciary plays a similarly important role, following generations of an oppressive apartheid regime. South Africa adopted a new constitution in 1996. Constitution of the Republic of South Africa, Explanatory Memorandum. It establishes a Constitutional Court which “makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional.” Id. at Chapter 8, Section 167, Item (5), available at http://www.polity.org.za/html/govdocs/constitution/saconst.html?r ebookmark=1 (last visited January 8, 2004); see also Justice Tholakele H. Madala, Rule Under Apartheid and the Fledgling Democracy in Post-Apartheid South Africa: The Role of the Judiciary, 26 N.C. J. Int’l L. & Com. Reg. 743 (Summer 2001). Afghanistan is perhaps the most recent example of a country struggling to develop a more democratic form of government. Adoption by the Loya Jirga of Afghanistan's new constitution on January 4, 2004 has been hailed as a milestone. See http://www.cbsnews.com/stories/2004/01/02/world/main59111 6.shtml (Jan 7, 2004). The proposed constitution creates a judiciary that, at least on paper, is "an independent organ of the state," with a Supreme Court empowered to review the constitutionality of laws at the request of the Government and/or the Courts. Afghan Const. Art. 116, 121 (unofficial English translation), available at http://www.hazara.net/jirga/AfghanConstitution-Final.pdf (last visited January 8, 2004). See also Ron Synowitz, Afghanistan: Constitutional Commission Chairman Presents Karzai with Long-Delayed Draft Constitution (November 3, 2003), available at http://www.rferl.org/nca/features/2003/11/03112003164239.as p (last visited Jan. 8, 2004). B. Other Nations Have Curtailed Judicial Review During Times Of Crisis, Often Citing the United States' Example, And Individual Freedoms Have Diminished As A Result. While much of the world is moving to adopt the institutions necessary to secure individual rights, many still regularly abuse these rights. One of the hallmarks of tyranny is the lack of a strong and independent judiciary. Not surprisingly, where countries make the sad transition to tyranny, one of the first victims is the judiciary. Many of the rulers that go down that road justify their actions on the basis of national security and the fight against terrorism, and, disturbingly, many claim to be modeling their actions on the United States. Again, a few examples illustrate this trend. In Peru, one of former President Alberto Fujimori’s first acts in seizing control was to assume direct executive control of the judiciary, claiming that it was justified by the threat of domestic terrorism. He then imprisoned thousands, refusing the right of the judiciary to intervene. International Commission of Jurists, Attacks on Justice 2000-Peru, August 13, 2001, available at http://www.icj.org/news.php3?id\_article=2587&lang=en (last visited Jan. 8, 2004). In Zimbabwe, President Mugabe’s rise to dictatorship has been punctuated by threats of violence to and the co-opting of the judiciary. He now enjoys virtually total control over Zimbabweans' individual rights and the entire political system. R.W. Johnson, Mugabe’s Agents in Plot to Kill Opposition Chief, Sunday Times (London), June 10, 2001; International Commission of Jurists, Attacks on Justice 2002— Zimbabwe, August 27, 2002, available at http://www.icj.org/news.php3?id\_article=2695&lang=en (last visited Jan. 8, 2004). While Peru and Zimbabwe represent an extreme, the independence of the judiciary is under assault in less brazen ways in a variety of countries today. A highly troubling aspect of this trend is the fact that in many of these instances those perpetuating the assaults on the judiciary have pointed to the United States’ model to justify their actions. Indeed, many have specifically referenced the United States’ actions in detaining persons in Guantánamo Bay. For example, Rais Yatim, Malaysia's "de facto law minister" explicitly relied on the detentions at Guantánamo to justify Malaysia's detention of more than 70 suspected Islamic militants for over two years. Rais stated that Malyasia's detentions were "just like the process in Guantánamo," adding, "I put the equation with Guantánamo just to make it graphic to you that this is not simply a Malaysian style of doing things." Sean Yoong, "Malaysia Slams Criticism of Security Law Allowing Detention Without Trial," Associated Press, September 9, 2003 (available from Westlaw at 9/9/03 APWIRES 09:34:00). Similarly, when responding to a United States Government human rights report that listed rights violations in Namibia, Namibia's Information Permanent Secretary Mocks Shivute cited the Guantánamo Bay detentions, claiming that "the US government was the worst human rights violator in the world." BBC Monitoring, March 8, 2002, available at 2002 WL 15938703. Nor is this disturbing trend limited to these specific examples. At a recent conference held at the Carter Center in Atlanta, President Carter, specifically citing the Guantánamo Bay detentions, noted that the erosion of civil liberties in the United States has "given a blank check to nations who are inclined to violate human rights already." Doug Gross, "Carter: U.S. human rights missteps embolden foreign dictators," Associated Press Newswires, November 12, 2003 (available from Westlaw at 11/12/03 APWIRES 00:30:26). At the same conference, Professor Saad Ibrahim of the American University in Cairo (who was jailed for seven years after exposing fraud in the Egyptian election process) said, "Every dictator in the world is using what the United States has done under the Patriot Act . . . to justify their past violations of human rights and to declare a license to continue to violate human rights." Id. Likewise, Shehu Sani, president of the Kaduna, Nigeriabased Civil Rights Congress, wrote in the International Herald Tribune on September 15, 2003 that "[t]he insistence by the Bush administration on keeping Taliban and Al Quaeda captives in indefinite detention in Guantánamo Bay, Cuba, instead of in jails in the United States — and the White House's preference for military tribunals over regular courts — helps create a free license for tyranny in Africa. It helps justify Egypt's move to detain human rights campaigners as threats to national security, and does the same for similar measures by the governments of Ivory Coast, Cameroon and Burkina Faso." Available at http://www.iht.com/ihtsearch.php?id=109927&owner=(IHT)&dat e=20030121123259. In our uni-polar world, the United States obviously sets an important example on these issues. As reflected in the foundational documents of the United Nations and many other such agreements, the international community has consistently affirmed the value of an independent judiciary to the defense of universally recognized human rights. In the crucible of actual practice within nations, many have looked to the United States model when developing independent judiciaries with the ability to check executive power in the defense of individual rights. Yet others have justified abuses by reference to the conduct of the United States. Far more influential than the words of Montesquieu and Madison are the actions of the United States. This case starkly presents the question of which model this Court will set for the world. CONCLUSION Much of the world models itself after this country’s two hundred year old traditions — and still more on its day to day implementation and expression of those traditions. To say that a refusal to exercise jurisdiction in this case will have global implications is not mere rhetoric. Resting on this Court’s decision is not only the necessary role this Court has historically played in this country. Also at stake are the freedoms that many in emerging democracies around the globe seek to ensure for their peoples.

#### That makes war impossible—liberal democratic norms through judicial globalization cause global peace

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[2006, Ken I. Kersch, Assistant Professor of Politics, Princeton University. B.A., Williams; J.D., Northwestern; Ph.D., Cornell. Thanks to the Social Philosophy and Policy Center at Bowling Green State University, where I was a visiting research scholar in the fall of 2005, and to the organizers of, and my fellow participants in, the Albany Law School Symposium, Albany Law School, “The Supreme Court and international relations theory.”, http://www.thefreelibrary.com/The+Supreme+Court+and+international+relations+theory.-a0151714294]

Liberal theories of international relations hold that international peace and prosperity are advanced to the degree that the world’s sovereign states converge on the model of government anchored in the twin commitment to democracy and the rule of law.52 Liberal “democratic peace” theorists hold that liberal democratic states anchored in rule of law commitments are less aggressive and more transparent than other types of states.53 When compared with non-liberal states, they are thus much better at cooperating with one another in the international arena.54 Because they share a market-oriented economic model, moreover, international relations liberals believe that liberal states hewing to the rule of law will become increasingly interdependent economically.55 As they do so, they will come to share a common set of interests and ideas, which also enhances the likelihood of cooperation.56 Many foreign policy liberals—sometimes referred to as “liberal internationalists”—emphasize the role that effective multilateral institutions, designed by a club or community of liberal-democratic states, play in facilitating that cooperation and in anchoring a peaceful and prosperous liberal world order.57 The liberal foreign policy outlook is moralized, evolutionary, and progressive. Unlike realists, who make no real distinctions between democratic and non-democratic states in their analysis of international affairs, liberals take a clear normative position in favor of democracy and the rule of law.58 Liberals envisage the spread of liberal democracy around the world, and they seek to advance the world down that path.59 Part of advancing the cause of liberal peace and prosperity involves encouraging the spread of liberal democratic institutions within nations where they are currently absent or weak.60 Furthermore, although not all liberals are institutionalists, most liberals believe that effective multilateral institutions play an important role in encouraging those developments.61 To be sure, problems of inequities in power between stronger and weaker states will exist, inevitably, within a liberal framework.62 “But international institutions can nonetheless help coordinate outcomes that are in the long-term mutual interest of both the hegemon and the weaker states.”63 Many foreign policy liberals have emphasized the importance of the judiciary in helping to bring about an increasingly liberal world order. To be sure, the importance of an independent judiciary to the establishment of the rule of law within sovereign states has long been at the core of liberal theory.64 Foreign policy liberalism, however, commonly emphasizes the role that judicial globalization can play in promoting democratic rule of law values throughout the world.65 Post-communist and post-colonial developing states commonly have weak commitments to and little experience with liberal democracy, and with living according to the rule of law, as enforced by a (relatively) apolitical, independent judiciary.66 In these emerging liberal democracies, judges are often subjected to intense political pressures.67 International and transnational support can be a life-line for these judges. It can encourage their professionalization, enhance their prestige and reputations, and draw unfavorable attention to efforts to challenge their independence.68 In some cases, support from foreign and international sources may represent the most important hope that these judges can maintain any sort of institutional power—a power essential to the establishment within the developing sovereign state of a liberal democratic regime, the establishment of which liberal theorists assume to be in the best interests of both that state and the wider world community.69 Looked at from this liberal international relations perspective, judicial globalization seems an unalloyed good. To many, it will appear to be an imperative.70 When judges from well-established, advanced western democracies enter into conversations with their counterparts in emerging liberal democracies, they help enhance the status and prestige of judges from these countries. This is not, from the perspective of either side, an affront to the sovereignty of the developing nation, or to the independence of its judiciary. It is a win-win situation which actually strengthens the authority of the judiciary in the developing state.71 In doing so, it works to strengthen the authority of the liberal constitutional state itself. Viewed in this way, judicial globalization is a way of strengthening national sovereignty, not limiting it: it is part of a state-building initiative in a broader, liberal international order.72 A liberal foreign policy outlook will look favorably on travel by domestic judges to conferences abroad (and here in the United States) where judges from around the world can meet and talk.73 It will not view these conferences as “junkets” or pointless “hobnobbing.” These meetings may very well encourage judges from around the world to increasingly cite foreign precedent in arriving at their decisions. Judges in emerging democracies will use these foreign precedents to help shore up their domestic status and independence. They will also avail themselves of these precedents to lend authority to basic, liberal rule-of-law values for which, given their relative youth, there is little useful history to appeal to within their domestic constitutional systems. Judges in established democracies, on the other hand, can do their part to enhance the status and authority of independent judiciaries in these emerging liberal democratic states by showing, in their own rulings, that they read and respect the rulings of these fledgling foreign judges and their courts (even if they do not follow those rulings as binding precedent).74 They can do so by according these judges and courts some form of co-equal status in transnational “court to court” conversations.75 It is worth noting that mainstream liberal international relations scholars are increasingly referring to the liberal democratic international order (both as it is moving today, and indeed, as read backward to the post-War order embodied in the international institutions and arrangements of NATO, Bretton Woods, the International Monetary Fund, the World Bank, and others) as a “constitutional order,” and, in some cases, as a “world constitution.”76 No less a figure than Justice Breyer—in a classic articulation of a liberal foreign policy vision—has suggested that one of the primary questions for American judges in the future will involve precisely the question of how to integrate the domestic constitutional order with the emerging international one.77 If they look at judicial globalization from within a liberal foreign policy framework (whether or not they have read any actual academic articles on liberal theories of foreign policy), criticisms of “foreign influences” on these judges, and of their “globe-trotting” will fall on deaf ears. They will be heard as empty ranting by those who don’t really understand the role of the judge in the post-1989 world. These judges will not understand themselves to be undermining American sovereignty domestically by alluding to foreign practices and precedents. And they will not understand themselves as (in other than a relatively small-time and benign way) as undermining the sovereignty of other nations. They will see the pay-off-to-benefit ratio of simply talking to other judges across borders, and to citing and alluding to foreign preferences (when appropriate, and in non-binding ways) as high. They will, moreover, see themselves as making a small and modest contribution to progress around the world, with progress defined in a way that is thoroughly consistent with the core commitments of American values and American constitutionalism. And they will be spurred on by a sense that the progress they are witnessing (and, they hope, participating in) will prove of epochal historical significance. Even if they are criticized for it in the short-term, these liberal internationalist judges will have a vision of the future which suggests that, ultimately, their actions will be vindicated by history. The liberal foreign policy outlook will thus fortify them against contemporary criticism.

#### The alternative is nuclear war

Muravchik 1

Joshua Muravchik, resident scholar The American Enterprise Institute, July 11-14, 2001   
 http://www.npec-web.org/syllabi/muravchik.htm

The greatest impetus for world peace -- and perforce of nuclear peace -- is the spread of democracy. In a famous article, and subsequent book, Francis Fukuyama argued that democracy's extension was leading to "the end of history." By this he meant the conclusion of man's quest for the right social order, but he also meant the "diminution of the likelihood of large-scale conflict between states." (1) Fukuyama's phrase was intentionally provocative, even tongue-in-cheek, but he was pointing to two down-to-earth historical observations: that democracies are more peaceful than other kinds of government and that the world is growing more democratic. Neither point has gone unchallenged. Only a few decades ago, as distinguished an observer of international relations as George Kennan made a claim quite contrary to the first of these assertions. Democracies, he said, were slow to anger, but once aroused "a democracy . . . . fights in anger . . . . to the bitter end." (2) Kennan's view was strongly influenced by the policy of "unconditional surrender" pursued in World War II. But subsequent experience, such as the negotiated settlements America sought in Korea and Vietnam proved him wrong. Democracies are not only slow to anger but also quick to compromise. And to forgive. Notwithstanding the insistence on unconditional surrender, America treated Japan and that part of Germany that it occupied with extraordinary generosity. In recent years a burgeoning literature has discussed the peacefulness of democracies. Indeed the proposition that democracies do not go to war with one another has been described by one political scientist as being "as close as anything we have to an empirical law in international relations." (3) Some of those who find enthusiasm for democracy off-putting have challenged this proposition, but their challenges have only served as empirical tests that have confirmed its robustness. For example, the academic Paul Gottfried and the columnist-turned-politician Patrick J. Buchanan have both instanced democratic England's declaration of war against democratic Finland during World War II. (4) In fact, after much procrastination, England did accede to the pressure of its Soviet ally to declare war against Finland which was allied with Germany. But the declaration was purely formal: no fighting ensued between England and Finland. Surely this is an exception that proves the rule. That Freedom House could count 120 freely elected governments by early 2001 (out of a total of 192 independent states) bespeaks a vast transformation in human governance within the span of 225 years. In 1775, the number of democracies was zero. In 1776, the birth of the United States of America brought the total up to one. Since then, democracy has spread at an accelerating pace, most of the growth having occurred within the twentieth century, with greatest momentum since 1974. That this momentum has slackened somewhat since its pinnacle in 1989, destined to be remembered as one of the most revolutionary years in all history, was inevitable. So many peoples were swept up in the democratic tide that there was certain to be some backsliding. Most countries' democratic evolution has included some fits and starts rather than a smooth progression. So it must be for the world as a whole. Nonetheless, the overall trend remains powerful and clear. Despite the backsliding, the number and proportion of democracies stands higher today than ever before. This progress offers a source of hope for enduring nuclear peace. The danger of nuclear war was radically reduced almost overnight when Russia abandoned Communism and turned to democracy. For other ominous corners of the world, we may be in a kind of race between the emergence or growth of nuclear arsenals and the advent of democratization. If this is so, the greatest cause for worry may rest with the Moslem Middle East where nuclear arsenals do not yet exist but where the prospects for democracy may be still more remote.

#### The plan solves—making habeas meaningful is a critical avenue for the judiciary to reassert its role

Vaughn and Williams, Professors of Law, 13

[2013, Katherine L. Vaughns B.A. (Political Science), J.D., University of California at Berkeley. Professor of Law, University of Maryland Francis King Carey School of Law, and Heather L. Williams, B.A. (French), B.A. (Political Science), University of Rochester, J.D., cum laude, University of Maryland Francis King Carey School of Law, “OF CIVIL WRONGS AND RIGHTS: 1 KIYEMBA V. OBAMA AND THE MEANING OF FREEDOM, SEPARATION OF POWERS, AND THE RULE OF LAW TEN YEARS AFTER 9/11”, Asian American Law Journal, Vol. 20, 2013, http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2148404]

Just as significant as what Boumediene does do, is what it does not. The case does not address the Executive’s authority to detain the Guantanamo Bay detainees, nor does it hold that the writ must issue as to these particular detainees.86 Instead, the case holds only that the detainees are entitled to access to the writ; the contours of when, if at all, the writ must issue, or the appropriate remedy for the writ upon issuance are not addressed. In the Court’s words, “[t]hese and other questions regarding the legality of the detention,” and presumably, the appropriate remedy if the detention is found unlawful, “are to be resolved in the first instance” by the trial court. Thus, in the years immediately following 9/11, the Supreme Court took deliberate, if not measured, steps in the direction of affirmatively asserting its role as a guarantor of individual rights in the context of the War on Terror. However, Boumediene—which was decided more than three years ago—remains the Court’s last word. In 2010, eight petitions for certiorari related to the continued detention of various prisoners at Guantanamo Bay were presented to the Supreme Court.87 Certiorari was denied as to seven of the eight petitions; the eighth petition was rendered moot.88 The Supreme Court’s recent silence in this arena is deafening. As we discuss throughout this article, Kiyemba presented the Court with an opportunity to break its silence—to make clear rulings on specific remedial issues related to the habeas rights of the Guantanamo detainees and to reassert the judiciary’s ongoing role in securing individual rights in the War on Terror. The Supreme Court missed this opportunity, leaving many significant rulings—including the D.C. Circuit’s reinstated ruling in Kiyemba—to stand as governing, if not fully challenged, law. Justice O’Connor’s 2004 plurality opinion in Hamdi offers perhaps one of the strongest assertions of the continued, and undiminished, role of the judiciary in the War on Terror: She rejects “the Government’s assertion that separation of powers principles mandate a heavily circumscribed role for the courts” in this context, stating that such an assertion “serves only to condense power into a single branch of government.”89 Such condensation of power is contrary to established principles, Justice O’Connor states, as the Court has long “made clear that a state of war is not a blank check for the President when it comes to [individual] rights.”90 Indeed, “[w]hatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.”91 We couldn’t agree more. And this is precisely why Kiyemba represents a missed opportunity. The case also presents a missed opportunity because, in the wake of Boumediene, the lower federal courts, and particularly the courts located in the District of Columbia, have tended (with some significant exceptions), not to delicately balance the competing interests of national security and civil liberties, but to tip the scales in near-absolute deference to the government’s security agenda. In an important 2005 article, Cass Sunstein termed this phenomenon “National Security Fundamentalism.”

#### Judicial action is critical to resolve the Kiyemba decisions and establish legitimate habeas laws

Milko 12

[Winter, 2012, Jennifer L. Milko, “Separation of Powers and Guantanamo Detainees: Defining the Proper Roles of the Executive and Judiciary in Habeas Cases and the Need for Supreme Guidance”, 50 Duq. L. Rev. 173]

In light of the compelling arguments on both sides, several important issues have ambiguous answer, and the Supreme Court has, thus far, not chosen to shine light on the situation. Following the 2010 October Term and the Supreme Court's denial of all Guantanamo detainee petitions, the High Court has sent a message that it does not want to review the D.C. Circuit's interpretation of the procedural and substantive issues which that Circuit has implemented. The Supreme Court has not ruled on any cases relating to Guantanamo detainees since its 2008 decision in Boumediene v. Bush. While the Court settled the issue of whether detainees had the privilege of habeas corpus in that case, the Court left the intricacies of the writ and its scope for the lower courts to define. Though leaving this authority in the hands of the lower courts may have been a been appropriate at the time Boumediene was decided, the number of habeas petitions and the subsequent petitions for certiorari to the Supreme Court indicate that there are important issues that must be clarified, and the Supreme Court [\*194] should grant certiorari to be the final voice on these issues for several reasons. First, the stakes in these habeas petitions are high. The detainees at Guantanamo have already been assured the right to petition the courts for habeas corpus to challenge their detention as unlawful. The scope of the courts' authority to provide a remedy is a critical for those individuals on a personal level as well as for the nation as whole. This country was created with a tripartite system and checks and balances for a reason: the Founding Fathers implemented a governmental structure that would serve to limit the three individual branches in order to protect individual liberty. n142 The writ of habeas corpus has an extensive history and is considered to play an integral role in the protection of individual liberty. n143 Habeas corpus is the Judiciary's tool to check the power of the Executive, and has traditionally allowed courts to provide a remedy to reign in the unbridled power of the Executive. The Court in Boumediene asserted that habeas gave the prisoner a meaningful opportunity to challenge his confinement as unlawful, and "the habeas court must have the power to order conditional release of an individual unlawfully detained - though release need not be the exclusive remedy and is not the appropriate one in every case in which the writ is granted." n144 While the importance of the writ for the preservation of the individual liberty and as a check on Executive power is one aspect of the tripartite system, the Executive's interest in maintaining a unified voice in the realm of foreign policy is another key concern. By allowing the courts to order release of a detainee or to order advance notice of transfer so that the petitioner may present evidence that he would be harmed in a recipient country, the Judiciary would be forced to make determinations about foreign affairs that its judges may not be competent to make. In a time of chaos and intricate foreign relations, the sensitivity and difficulty of forging meaningful diplomatic relations with other nations at this time in history is a key concern of the Executive, and properly within that Branch's authority under the Constitution. Permitting the Judiciary to make determinations from the bench about the appropriateness of human rights or other similar determinations in a judicial proceeding could very well damage the diplo [\*195] matic relations that the Executive is attempting to form with recipient nations. This separation of powers dilemma facing the High Court has no easy solution, but the critical role that the proper allocation of authority plays in the separation of powers system and the lack of substantive guidance on Guantanamo issues since Boumediene in 2008 demands attention from the Supreme Court. Additionally, because the Guantanamo cases have been litigated in the D.C. Circuit, no other appellate courts have had the opportunity to review these issues. n145 Without the opportunity for an opposing view in another judicial circuit and with no final determination by the Supreme Court, the D.C. Circuit Court of Appeals has been free to shape the law of Guantanamo habeas cases as it wishes. Adding to the concern of the lack of a "check" on the D.C. Circuit Court of Appeals is the fact that the trend within the Circuit itself has been inconsistent as the district courts have assumed a greater role for the judiciary, only to be chastised on appeal for failure to defer to the political branches in these cases. With the D.C. Circuit serving as the sole authority on the scope of the courts' habeas power in Guantanamo cases, petitioners' claims that this court has been improperly applying Supreme Court precedent is another concern that the High Court should address. In both release and transfer cases, the petitioners have argued that while Boumediene assures the privilege of habeas corpus, the Kiyemba cases have foreclosed the courts from fashioning a remedy in contradiction to Boumediene. n146 Instead, the D. C. Circuit Court of Appeals has refused to interfere, based on the Munaf proposition that the determinations of the Executive should not be second-guessed, and has accepted the assurances of the Executive Branch that they are working secure release or that they will not send detainees to countries where it is more likely than not that they will face torture. Raising suspicions that the use of Munaf in the Guantanamo habeas cases was perhaps improper, three Supreme Court Justices questioned the role of that decision and the questions it raised. Petitioners have alleged that the circumstances of that case are markedly different than the facts in the Guantanamo cases, and that Munaf should not be read to bar detainees in habeas petitions [\*196] the opportunity to challenge their transfer or the court to enjoin such a transfer. The nature of these Guantanamo issues presents a complex situation that makes the separation of powers issue more difficult. If the courts do traditionally have the power to require notice or order release under its habeas authority, the manner in which that remedy would require inquiry into the Executive Branch's policy decisions may cross the line into a political question. Because of the nature of diplomacy and foreign affairs in contemporary society, the thought may be that it is easier to reduce the rights of the individual in order to provide for the national security of the country as a whole. IV. Conclusion There are valid arguments on both sides in this issue and the nature of the cases and the times in which we live complicate the situation. The Supreme Court is in a difficult situation-if the Court grants certiorari to review the D.C. Circuit Court of Appeals' jurisprudence of the Guantanamo cases, it must settle an issue of vast importance. Separation of powers and the roles of the Executive and Judiciary in the context of Guantanamo litigation impact the individual liberty of the petitioners and the sensitive nature of foreign affairs and the war on terrorism. Because of significance of these issues, the D.C. Circuit should not be the sole voice addressing them. It should be the responsibility of the nation's Highest Court to settle the debate and determine the appropriate balance of power. Without this supreme guidance, the petitioners will continue to present the same issues and questions to the courts, and these cases will continue to be litigated according to the trend that has dominated the D.C. Circuit over the past several years. With a new Supreme Court Term beginning and new Guantanamo cases bearing old issues appearing before the Court again, the Supreme Court should grant certiorari to review the delicate balance between the power of the courts and the authority of the political branches. The Court left the scope of habeas power undefined after Boumediene and has refused to substantively address the issues created in its aftermath. Since that decision, the D.C. Circuit has given great deference to the Executive Branch. Without any supreme guidance, the D.C. Circuit has been free to fashion the law as it sees fit with no further checks and balances on that interpretation as this Circuit is the sole decision-maker re [\*197] garding these habeas petitions. If the current system stays in place, appeals and petitions regarding the same issues for Guantanamo detainees will continue to cycle through the D.C. Circuit. With so many petitions to the High Court on the same subject, it seems only logical that the Supreme Court should finish what it started nearly six years ago and decide whether the courts have a role to play in the release and transfer of detainees. More Guantanamo petitions for certiorari have been filed in the 2011 Term, and one has raised a familiar issue yet again: whether the Guantanamo detainees have the right to challenge transfer to a recipient nation on fear of torture. n147 The Founding Fathers envisioned a system of checks and balances in order to protect the People from oppression and to prevent any one person or entity from hoarding too much power. The struggle for power between the branches of our government is something that will never fade away entirely, and there are times when it is proper for one branch to defer to the judgment of another, but when an issue arises that has raised so many questions and has been the foundation for numerous appeals and petitions to the Supreme Court for clarification, the People deserve at least some guidance on such an unsettled area of the law. As of now, the D.C. Circuit has been trustworthy of the Executive Branch, and, while in the end, such deference in this area may be appropriate, the very nature of habeas corpus is a strong tool in the hands of the judiciary which should be considered by the Supreme Court. The Court should analyze whether allowing deference strips the Judiciary of the important check of habeas corpus because granting the right of habeas corpus to prisoners without giving the courts the subsequent power to remedy the problem has the potential of making this important right just a phrase with no underlying force.

#### Judicial globalism is inevitable—the only question is how the US shapes it—resting authority in the executive models judicial inaction

Krotoszynski 9, John C. Stone Chair, Director of Faculty Research, and Professor of Law, University of Alabama School of Law

[2009, Ronald J. Krotoszynski is a John C. Stone Chair, Director of Faculty Research, and Professor of Law, University of Alabama School of Law, “The Perils and the Promise of Comparative Constitutional Law: The New Globalism and the Role of the United States in Shaping Human Rights”, 61 Ark. L. Rev. 603]

In thinking about the reality and effects of the new globalism, we should be proactive and thoughtful. This means defending our values, even if they appear exceptionalist from a global or comparative perspective, as much, if not more, than modifying our legal rules to square them with foreign views. Just because Germany has a different rule does not imply that the German rule is better, or a better rule for the United States. That said, we do need to at least think about the possibility that things could be different than they are presently. The fact that other democratic societies value rights more, or less, highly than we do should at least make us pause. It seems rude either to pretend these differences do not exist or, worse yet, that these differences simply do not matter. As I have observed in another context, "[A] circular jurisprudence that posits its own conclusions as justifications is intellectually indefensible." n52 The alternative to active global engagement, attempting to maintain a kind of intellectual isolationism, is neither attractive nor feasible because ideas travel faster and more easily than superbugs. We should be just as actively concerned and engaged about the transnational marketplace of ideas as we are about the transnational sale of pet food, lead-painted toys, or the safety of air travel. As scholars like Anne-Marie Slaughter and Harold Koh have suggested, it is not a question of whether transnational legal rules will develop - it is a question of how they will develop and the role that the United States will play in their [\*617] development. n53 In the case of freedom of expression, foreign law is very different, in myriad ways, and the United States contributes to the global discussion of this human right as much by refusing to get with the program as it would by redefining domestic First Amendment law to bring it into conformity with prevailing foreign attitudes. The development of new global legal understandings of fundamental human rights is not limited to courts. Courts are not the only source of transnational understanding of human rights, as the behavior of Congress and the executive branch also signals the content and scope of our commitment to human rights. To say that we oppose torture generally but not in the specific context of the war on terrorism has the effect of undermining the norm against torture as inconsistent with fundamental human rights. Similarly, holding persons in indefinite detention, without access to lawyers or judicial process sends a very mixed message. When the Soviet government engaged in this sort of behavior, the United States denounced it. n54 Our credibility in arguing for a right to a fair trial by an impartial tribunal, to the assistance of counsel, and to the right to be free of unreviewed (and unreviewable) executive detention has taken a hit lately. Our behavior and our practices have the effect of modeling acceptable government practices, whether we wish them to have that effect or not. We should be cautious in accepting an argument that observance of the rule of law lies within the discretion of the executive branch of government. It is said that "as one sows, so shall one reap." n55 The new legal globalism will reflect this truism. Simply put, if we ever had the luxury of saying one thing while doing another, that time has come and gone. The best way of convincing others that they must observe a particular human right would be that we observe it ourselves as a matter of course. Thus, the process of exporting legal rules is not solely a job for the judiciary, nor should it be. [\*618] V. AMERICAN CONTRIBUTIONS Over the last 200 years, the United States has been remarkably successful at exporting its legal ideas. Since World War II, the notion of limited government, checked by a written constitution with judicially enforceable rights, has become the most commonly accepted model of legitimate government. n56 The old British model of parliamentary supremacy, as a means of securing democratic control, has fallen into something of a rut. n57 The modern trend has been entirely in favor of judicial review (judicial supremacy, some might say) with democratically elected legislatures being limited by enumerated constitutional rights. n58 The separation of powers is another structural innovation of the United States that has proven quite popular. The British model of legislative, executive, and judicial power all being vested in a single body (like the Parliament) no longer seems a successful way to run a railroad. Although parliamentary systems remain popular, and involve the merger of executive and legislative power, the structural separation of courts has become a standard feature of modern democracies. In this sense, the separation of powers has become the global norm rather than the exception. Federalism provides a third major contribution to constitutionalism that the United States pioneered and which has achieved substantial adoption abroad. In a nation featuring ethnic, religious, or cultural differences, federalism provides a means of securing some measure of local autonomy that can accommodate these differences. Additionally, even in the contemporary United Kingdom, federalism has found a foothold, with local parliaments now sitting for Scotland, Wales, and Northern Ireland, and plans for an English Parliament. n59 The European Union itself represents a federalism solution to [\*619] the problem of a divided, and less efficient, Europe. By dividing power among various levels of government, centralization can coexist with local autonomy and choice. Judicial review, the separation of powers, and federalism are all contributions that the United States has made to constitutional democracy. Indeed, it would not be an overstatement to suggest that the American model of constitutionalism is to modern government as the Microsoft Corporation's "Windows" operating system is to computing. Having had so much success in defining the institutions and structures of a just government with reference to the structures and doctrines reflected in our own Constitution, why should we fear the outcome of constructive engagement with the world? n60 In this regard, it bears noting that our own framers, meeting in Philadelphia during the summer of 1787, were themselves very familiar with government structures dating back to ancient Rome and Athens. The Framers consciously considered various constitutional arrangements, including those of Great Britain, but also of Athens, Sparta, and Rome. n61 To be sure, the Framers did not overtly borrow any particular constitutional system, but developed one of their own self-styled a new order for the ages ("novus ordo seclorum"). Given this history of familiarity with comparative constitutional law, the success of American constitutional innovations, and the stakes, why should we shrink from engaging the world in defense of our domestic conception of fundamental human rights? VI. CONCLUSION We must recognize that we will participate in the new legal globalism whether we choose to be active participants in the process or passive recipients of the results. If the United States wants to impact the content of emerging human-rights norms, we need to join the conversation, even if we do so as defenders [\*620] (or exporters) of our legal norms. n62 The alternative, a kind of default, will simply mean that the United States has less impact on the development and content of both emerging legal systems and the scope and content of transnational human rights. n63 To engage the world does not require the United States to abandon its own idiosyncratic legal values, any more than consideration of American legal norms requires the Supreme Court of Canada or the German Federal Constitutional Court to abdicate responsibility for articulating and enforcing local legal imperatives.

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#### ID = no defined duration

Ulysses S. Smith - Winter, 2007, Candidate for J.D., Cornell Law School, 2007, "More Ours than Theirs" n1: The Uighurs, Indefinite Detention, and the Constitution, 40 Cornell Int'l L.J. 265, LexisNexis

The Court has found indefinite detention, a deprivation of liberty with no defined scope or duration, justified in very limited circumstances, and then only when governed by robust procedural safeguards. n45 The following discussion considers two broad contexts - civil and military - in which the Court has found indefinite detention justified, and the particular circumstances relevant to each context that warranted such an extreme measure. The discussion focuses on the Court's rationale in each instance, concluding that in both contexts, detention must be closely tied to its purpose, and that once the purpose of the detention - securing the alien's [\*273] removal, preventing his escape or commission of harm, or preventing his return to the battlefield - can no longer be met, detention must cease.

### CP

#### Judicial action is key to judicial globalization

Flaherty—executive

Key to Modeling—Suto, CJA, and Kersch

Cleveland – courts legitimate govt policy

#### Perm do both—solves the NB because Obama will be seen as taking the lead

#### 2009 proves the CP links to politics

Fisher, 13 --- served four decades in the Library of Congress as senior specialist in separation of powers at the Congressional Research Service and specialist in constitutional law at the Law Library (7/1/2013, Louis, The National Law Journal, “Closing Guantanamo http://www.constitutionproject.org/wp-content/uploads/2013/07/Guantanamo-NLJ-2013.pdf))

On January 22, 2009, on his second day in office, Obama issued Executive Order 13492 to close the detention facility “as soon as practicable, and no later than 1 year from the date of this order.” Remarkably, no one in the administration seemed to warn him of the political risks. Transferring terrorist suspects to the United States was immensely controversial. The administration needed to first meet with lawmakers, learn about their concerns, fashion a reasonable compromise and locate a secure facility on the mainland to house the detainees. It failed to take any of those steps. If Obama had asked Congress to help create a legislative framework for the closure, progress was possible. The executive order was the type of unilateral action that backfired on George W. Bush.

#### 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'

### Deference

#### Defer to rejecting deference—if the court overreaching, Congress can fill in and ensure executive authority, but there’s no comparable check on executive overreaching—star this argument

Jinks and Katyal 7 [April, 2007, Derek Jinks is Assistant Professor of Law, University of Texas School of Law. Neal Kumar Katyal is Professor of Law, Georgetown University Law Center, “Disregarding Foreign Relations Law”, 116 Yale L.J. 1230]

Courts say that the nation must speak in "one voice" in its foreign policy; the executive can do this, while Congress and the courts cannot. They say that the executive has expertise and flexibility, can keep secrets, can efficiently monitor developments, and can act quickly and decisively; the other branches cannot. As emphasized in Chevron, the executive, unlike the judiciary, is politically accountable as well as uniquely knowledgeable ... . n78¶ This line of reasoning misses the mark in several important respects and, in our view, offers no good reason to augment the deference already accorded executive interpretations of international law. First, there is no reason to conclude that the current scope of judicial deference unacceptably impedes the ability of the President to respond to a crisis. Second, wholly adequate checking mechanisms limit the power of the courts to foist unwelcome interpretations of international law on the political branches. Consider a few examples. The political branches, in the course of negotiating, ratifying, performing, and otherwise implementing U.S. treaty obligations, undertake a series of actions that signal, and at times establish, the U.S. interpretation of specific treaty terms. When the United States has authoritatively and discernibly embraced an interpretation of its treaty obligations, courts give effect to this interpretation. n79 The President might also issue formal interpretations of U.S. treaty obligations through the proper exercise of his substantial lawmaking (or delegated rulemaking) n80 authority. n81 In addition, the President has the constitutional [\*1251] authority to execute the laws - this power almost certainly includes the authority to terminate, suspend, or withdraw from treaties in accordance with international law. Congress has the constitutional authority to abrogate, in whole or in part, U.S. treaty obligations via an ordinary statute - a lawmaking process that, of course, includes the President. Augmenting the law-interpreting (and lawbreaking) power of the President drastically diminishes the role of courts - thereby effectively depriving international law in the executive-constraining zone of its capacity to constrain meaningfully and, [\*1252] consequently, its status as enforceable "law." Such an expansion of the President's authority also subverts the institutional capacity (and hence, the political will) of Congress to regulate the executive in these domains. These themes merit some elaboration.¶ Exigency does not compel a rejection of the status quo. Indeed, Posner and Sunstein's article is not concerned with whether the President can put boots on the ground without a statute; rather, it is addressed to litigation and what courts should do, typically years after the fact. Speed is often irrelevant. n82 So, too, is accountability. The legislature is just as accountable as the executive. And textually, of course, Congress has a strong role to play in the incorporation of international law into the domestic sphere, from its Article I, Section 8 powers to "declare War," to "make Rules concerning Captures on Land and Water," and to "punish ... Offences against the Law of Nations," to the Senate's Article II, Section 2 power to ratify treaties. n83¶ In one sense, then, our disagreement centers around default rules. Posner and Sunstein acknowledge that Congress can specify an antidelegation/ antideference principle. n84 Yet oddly, their whole article frames the relevant issue as the competence of the executive branch versus that of the judiciary. But given the fact that this tussle between the executive and the judiciary will always play out within a matrix set by the legislature, it is not quite appropriate to compare the foreign policy expertise of the executive branch with that of the courts. n85 After all, Congress could specify a prodelegation/prodeference policy [\*1253] most of the time as well. (In fact, it has repeatedly done so. n86) The more precise question is which entity is better suited to interpret a legislative act of some ambiguity, when international law principles would yield an answer that restrains the executive branch.¶ Once the question is properly framed, much of Posner and Sunstein's challenge to the status quo falls out. Most crucially, they fail to account for a dynamic statutory process - through which mistakes (if any) made by courts in the area can be corrected by the legislature. Such legislative corrections can take place in both the statutory and the treaty realm. If a court reads a statute in light of international law principles and Congress disagrees with those principles, it can rewrite the statute. And if a court reads a treaty to constrain the executive in a way Congress does not like, it can trump the treaty, in whole or in part, with a statute under the "last-in-time" rule. n87 More fundamentally, the Senate can define the role of courts up front - during the ratification process - by attaching to the instrument of ratification specific reservations, declarations, or understandings concerning the judicial enforceability of the treaty. n88¶ With a stylized account that criticizes the relative competence of the judiciary, Posner and Sunstein make it appear that a judicial decision in foreign affairs is the last word. But that set of events would rarely, if ever, unfold in this three-player game. If the courts err in a way that fails to give the executive enough power, Congress will correct them. Surely national security is not an area rife with process failures. In that sense, current law works better than the Posner and Sunstein proposal because it forces democratic deliberation before international law is violated.¶ For this reason, it obscures more than it illuminates to say that "the courts, and not the executive, might turn out to be the fox." n89 Such language assumes [\*1254] a stagnant legislative process, so that the choice is "court" versus "executive," when the real choice is really "court + Congress." That is to say, if the courts grab power in a way that undermines the executive, Congress can correct them. The relevant calculus turns on which type of judicial error is more likely to be resolved, one in which the court wrongly sides with the President (in which case Congress would have to surmount the veto) or one in which the court wrongly sides against the President (in which case the veto would be unlikely to be a barrier to corrective legislation).¶ Recall that Posner and Sunstein are not addressing their argument to constitutional holdings by courts, but statutory ones that are the subject of Chevron deference. There is much to criticize when courts declare government practices unconstitutional in the realm of foreign affairs, as those practices cannot then be resuscitated by the legislature absent a constitutional amendment. But when a court's holding centers on a statutory interpretation, the dynamic legislative process ensures that the judiciary will not have the last word.¶ Indeed, in this statutory area, the risks of judicial error are asymmetric - that is, judicial decisions that side with the President are far less likely to be the subject of legislative correction than those that side against him. While contemporary case law and theory have not taken the point into account, we believe that they provide a powerful reason to reject Posner and Sunstein's proposal. Our claim centers on the President's veto power and how the structure of the Constitution imposes serious hurdles when Congress tries to modify existing statutes to restrict presidential power.¶ Suppose that, for example, the President asserts that the Detainee Treatment Act, n90 sponsored by Senator John McCain and others to prohibit the torture of detainees, does not forbid a particular practice, such as waterboarding. A group of plaintiffs, in contrast, argue that standard principles of international law and treaties ratified by the Senate forbid waterboarding, and that these principles require reading the statute to forbid the practice. Now imagine that the matter goes to the Supreme Court. The risks from judicial error are not equivalent. If the Court sides with the plaintiffs, the legislature can - presumably with presidential encouragement - modify the statute to permit waterboarding, provided that a bare majority of Congress agrees. The [\*1255] prospect of legislative revision explains why many of the criticisms of the Supreme Court's involvement in the war on terror thus far are entirely overblown. n91¶ Now take the other possibility - that the Court sides with the President. In such a case, it is virtually impossible to alter the decision. That would be so even if everyone knew that the legislative intent at the time of the Act was to forbid waterboarding. Even if, after that Court decision, Senator McCain persuaded every one of his colleagues in the Senate to reverse the Court's interpretation of the Detainee Treatment Act and to modify the Act to prohibit waterboarding, the Senator would also have to persuade a supermajority in the House of Representatives. After all, the President would be able to veto the legislation, thus upping the requisite number of votes necessary from a bare majority to two-thirds. And his veto power functions ex ante as a disincentive even to begin the legislative reform process, as Senators are likely to spend their resources and time on projects that are likely to pass. n92¶ So what Posner and Sunstein seek is not a simple default rule, but one with a built-in ratchet in favor of presidential power. The President can take, under the guise of an ambiguous legislative act, an interpretation that gives him striking new powers, have that interpretation receive deference from the courts, and then lock the interpretation into place for the long term by brandishing his veto power. For authors who assert structural principles as [\*1256] their touchstone, Posner and Sunstein's omission of the veto is striking and provides a lopsided view of what would happen under their proposal.

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

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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'

#### Executive flexibility leads to detention policy failure—organizational insulation ensures it

Pearlstein 9, Visiting Scholar and Lecturer at Princeton

[July, 2009, Deborah N. Pearlstein is a Visiting Scholar and Lecturer in Public and International Affairs, Woodrow Wilson School of Public & International Affairs, Princeton University, “Form and Function in the National Security Constitution”, 41 Conn. L. Rev. 1549]

Examples of excessive flexibility producing adverse consequences are ample. Following Hurricane Katrina, one of the most important lessons independent analysis drew from the government response was the extent to which the disaster was made worse as a result of the lack of experience and knowledge of crisis procedures among key officials, the absence of expert advisors available to key officials (including the President), and the failure to follow existing response plans or to draw from lessons learned from simulations conducted before the fact. n199 Among the many consequences, [\*1605] basic items like food, water, and medicines were in such short supply that local law enforcement (instead of focusing on security issues) were occupied, in part, with breaking into businesses and taking what residents needed. n200 Or consider the widespread abuse of prisoners at U.S. detention facilities such as Abu Ghraib. Whatever the theoretical merits of applying coercive interrogation in a carefully selected way against key intelligence targets, n201 the systemic torture and abuse of scores of detainees was an outcome no one purported to seek. There is substantial agreement among security analysts of both parties that the prisoner abuse scandals have produced predominantly negative consequences for U.S. national security. n202 While there remain important questions about the extent to which some of the abuses at Abu Ghraib were the result of civilian or senior military command actions or omissions, one of the too often overlooked findings of the government investigations of the incidents is the unanimous agreement that the abuse was (at least in part) the result of structural organization failures n203 -failures that one might expect to [\*1606] produce errors either to the benefit or detriment of security. In particular, military investigators looking at the causes of Abu Ghraib cited vague guidance, as well as inadequate training and planning for detention and interrogation operations, as key factors leading to the abuse. Remarkably, "pre-war planning [did] not include[] planning for detainee operations" in Iraq. n204 Moreover, investigators cited failures at the policy level- decisions to lift existing detention and interrogation strictures without replacing those rules with more than the most general guidance about custodial intelligence collection. n205 As one Army General later investigating the abuses noted: "By October 2003, interrogation policy in Iraq had changed three times in less than thirty days and it became very confusing as to what techniques could be employed and at what level non-doctrinal approaches had to be approved." n206 It was thus unsurprising that detention and interrogation operations were assigned to troops with grossly inadequate training in any rules that were still recognized. n207 The uncertain effect of broad, general guidance, coupled [\*1607] with the competing imperatives of guidelines that differed among theaters of operation, agencies, and military units, caused serious confusion among troops and led to decisionmaking that it is overly kind to call arbitrary. n208 Would the new functionalists disagree with the importance of government planning for detention operations in an emergency surrounding a terrorist nuclear attack? Not necessarily. Can an organization anticipate and plan for everything? Certainly not. But such findings should at least call into question the inclination to simply maximize flexibility and discretion in an emergency, without, for example, structural incentives that might ensure the engagement of professional expertise. n209 Particularly if one embraces the view that the most potentially damaging terrorist threats are nuclear and biological terrorism, involving highly technical information about weapons acquisition and deployment, a security policy structure based on nothing more than general popular mandate and political instincts is unlikely to suffice; a structure that systematically excludes knowledge of and training in emergency response will almost certainly result in mismanagement. n210 In this light, a general take on role effectiveness might suggest favoring a structure in which the engagement of relevant expertise in crisis management is required, leaders have incentives to anticipate and plan in advance for trade-offs, and [\*1608] organizations are able to train subordinates to ensure that plans are adhered to in emergencies. Such structural constraints could help increase the likelihood that something more than arbitrary attention has been paid before transcendent priorities are overridden.

### Politics

#### GOP will inevitably fold

Bolton, 9/14 (Alexander, 9/14/2013, “Confident Dems want separate showdowns on fiscal battles,” http://thehill.com/homenews/senate/322247-confident-democrats-want-separate-showdowns-on-shutdown-and-debt-limit))

“If push comes to shove on debt ceiling, I’m virtually certain they’ll blink,” said Sen. Charles Schumer (N.Y.), the third-ranking member of the Senate Democratic leadership. “They know they shouldn’t be playing havoc with the markets.”

Schumer said Republicans are on stronger political ground if there’s a government shutdown, but warned “even on that one, they’re on weak ground because the public sort of is finally smelling that these guys are for obstructing.”

#### No internal link to shutdown

#### Shutdown is good --- reduces chance of default that will wreck the economy

Green, 9/27 --- national correspondent at Bloomberg Businessweek (9/27/2013, Joshua, The Boston Globe, “Root for a shutdown ; It's the best way to jolt Washington back to its senses,” Factiva))

If Congress could maintain even a semblance of functionality, then no one should want the government to shut down. According to the Congressional Research Service, the back-to-back shutdowns brought on by Newt Gingrich in 1995 and 1996 cost the country $1.4 billion. But it's now clear that Congress can't operate smoothly and even a conclusive national election won't break the cycle of dysfunction.

That's why I'm rooting for a shutdown and you should be too -- at this point, it's the safest way to jolt Washington back to its senses.

Here are three reasons why:

1.

A shutdown would be far less costly than default. Unless Congress acts, most government agencies will shut down on Tuesday. This would inconvenience millions and waste plenty of money, but it wouldn't affect "mandatory" programs, such as Medicare, Medicaid, Social Security, or nutrition assistance. Americans would be angry. The stock market might drop. But we've lived through this before. By contrast, a default would be catastrophic. Markets would plummet. Interest rates would rise, probably permanently, because lenders would price in the now-very-real risk of default, making everything from mortgages to cars to college educations more expensive. The government itself would also face higher borrowing costs -- a Treasury Department study found that a single percentage-point increase in interest rates would cost taxpayers an additional $150 billion a year. Worst of all, a default would almost certainly snuff out the recovery and bring on another recession.

2.

We'd quickly find out which party Americans support. One powerful driver of Washington dysfunction is the certainty among partisans of both camps that Americans secretly agree with them and would rally to their side during a shutdown. In April 2011, when Republicans first demanded concessions to pass a continuing resolution, many hoped for a shutdown because they thought the Tea Party movement that had rebuked Democrats in the midterm elections would rise up once again. Today, many Democrats want a shutdown because polls show Republicans would be blamed. Some Republicans disagree. "I think Americans would side with the people who are fighting against a law they know is unfair," says Heritage Foundation president Jim DeMint, the godfather of the "defund Obamacare" movement. A shutdown would make clear who is right and who is wrong, removing the temptation for another showdown.

3.

Congress might start working again. The severity (and danger) of budget crises has steadily intensified as Congress has stopped working the way it is supposed to. It no longer operates as civic textbooks describe, where committees in both chambers study issues, pass bills, and then reconcile them in a formal negotiating conference. Instead, party leaders began resorting to last-minute, back-room deals. But Republicans, bitter about the deals they were getting, forced their leaders to stop. That led to the current system of negotiation-by-public-threat. A shutdown would be a bracing reminder to one party or the other (my money's on the Republicans) of why the Gingrich approach failed so badly. When that lesson sinks in, the old, saner way of doing things will probably look much better.

#### Their DA never says extinction – their ev is so bad prefer ours it’s much better about how autocracies will go to war.

### K

#### Liberal democracy is best – rejection of sovereignty guarantees people can be seen as without value

Dean ‘1 (Mitchell-, Finn-, States of Imagination: Ethnographic Explorations of the Postcolonial State, ed. by Thomas Blom Hansen & Finn Stepputat , P. 61-63)

There is no necessity that means that our most general rationalities of rule such as sovereignty and biopolitics will ineluctably lead to the truly demonic eventualities we have continued to witness right to the beginning of the twenty-first century. Nor, however, is there any guarantee that the appeal to rights within liberal democracies and the international community of states will guard against such eventualities, as the contemporary confinement of illegal immigrants in camps in liberal democracies attests. Elements within sovereignty and biopolitics will continue to provide resources for political rationality and action in Weber's sense of the attempt to influence the government of organizations. But there can be no system of safeguards that offer us a zone of comfort when we engage in political action. When we do so, Foucault's position here seems to suggest, we enter a zone of uncertainty and danger because of the governmental resources we have at our disposal. We might add that the price of not engaging in political action is equally great, if not greater. A condition of informed political action remains an analysis of the actors involved, the contexts of their action, the resources at hand, the tactics used, and the ends sought. Though handling this relation between biopolitics and sovereignty remains tricky, we must establish an analysis of the way an implementation of programs of the administration of life opens fresh arenas of contestation. negotiation, and redefinition around citizenship, democracy, and rights. We must also be prepared to admit, nevertheless. that the appeal to rights might link this form of contestation to the powers it contests, particularly when such an appeal concerns the rights of those without any status bur their mere existence. The more general argument advanced here is that modern politics must combine the resources of a biopolitics based on population, life, procreation, and sexuality with the deductive logic of sovereignty based on right, territory, death, and blood. Moreover, this biopolitics captures life stripped naked (or the zoe that was the exception of sovereign power) and makes it a matter of political life (bios). It follows that, given that we continue to live in a system of modern states, we must face up to forms of biopolitical racism, that is, a racism that follows not simply from discrimination, scapegoating, or institutions, but from the elements by which we are compelled to think about and imagine states and their populations and seek to govern them. This is as true for liberal arts of government as for non-liberal rule. The liberal arts of governing through freedom means that liberalism always contains a division between those capable or deserving of the responsibilities and freedoms of mature citizenship and those who are not. For those who are not, this will often mean despotic provision for their special needs with the aim of rendering them autonomous by fostering capacities of responsibility and self-governance. Under certain conditions, however, frustrations with such programs of improvement may lead to forms of knowledge and political rationality that identify certain groups as without value and beyond improvement, as those who are merely living, whose existence is but zoe. Liberal regimes of government can thus slide from the "good despot" for the improvable to sovereign interventions to confine, to contain, to coerce, and to eliminate, if only by prevention, those deemed without value. It is true, perhaps, that many of our worst nightmares tend to be realized when these elements of sovereignty and biopolitical rule are articulated somewhat differently from the way they are in liberal democracies today. This should offer no reason for complacency even for those who find themselves marked as the mature subjects within the boundaries contained by liberal-democratic constitutionalism, let alone those who currently remain in need of a good despot within and outside these boundaries. It offers even less room for complacency for those who find themselves occupying the position of the good despot.

#### Pragmatic approaches to limit violence are good

**Narveson 12**, Professor Emeritus at University of Waterloo, Canada, Pacifism—Fifty Years Later, <http://link.springer.com/content/pdf/10.1007%2Fs11406-013-9461-2.pdf>

Is this reasonable? I think not. We should, of course, be reasonable, and that includes refraining from violence—except when the violence is necessary to counter the aggressive violence of others. For we reason, on practical matters, in terms of benefits and costs. Agents, especially political agents, can, alas, benefit from violence where that violence is unilateral. Thus it is rational to see to it that it won’t be unilateral. And when it is not unilateral, then the balance is in favor—strongly in favor—of peace. It remains that we must, alas, be able to make war in the possible case that we can’t have peace. When everybody shares the preference for peace, then we can scale down and hopefully even eliminate war-making capability. (Contemporary nations have already scaled down considerably—there have been few wars in the classic sense of military exchanges between states as such in recent times.) But until the scaling down is universal and includes a genuine renunciation of the use of warlike methods to achieve ends other than genuine self-defense, what most of us think of as “pacifism” is a non-option in the near run.

#### The perm is the best middle ground—the alternative goes too far—democratic liberalism and associated interventionism are necessary prevent atrocities

Krauthammer 4 – Charles is a Pulitzer Prize–winning syndicated columnist, political commentator, and research fellow at a variety of think tanks. “In Defense of Democratic Realism,” The National Interest, Fall 2004; 77, http://people.cas.sc.edu/rosati/krauthammer.demrealism.ni.f04.htm

On February 10, 2004, I delivered the Irving Kristol Lecture to the American Enterprise Institute outlining a theory of foreign policy that I called democratic realism. It was premised on the notion that the 1990s were a holiday from history, an illusory period during which we imagined that the existential struggles of the past six decades against the various totalitarianisms had ended for good. September 11 reminded us rudely that history had not ended, and we found ourselves in a new existential struggle, this time with an enemy even more fanatical, fatalistic and indeed undeterable than in the past. Nonetheless, we had one factor in our favor. With the passing of the Soviet Union, we had entered a unique period in human history, a unipolar era in which America enjoys a predominance of power greater than any that has existed in the half-millennium of the modern state system. The challenge of the new age is whether we can harness that unipolar power to confront the new challenge, or whether we rely, as we did for the first decade of the post-Cold War era, on the vague internationalism that characterizes the foreign policy thinking of European elites and American liberalism. The speech and the subsequent AEI monograph1 have occasioned some comment. None, however, as loquacious as Frank Fukuyama's twelve-page rebuttal in the previous issue of The National Interest. His essay is doubly useful. It is a probing critique of democratic realism, yet demonstrates inadvertently how little the critics have to offer as an alternative. Democratic Realism In my speech I describe the four major schools of American foreign policy. Isolationism defines the American national interest extremely narrowly and essentially wishes to pull up the drawbridge to Fortress America. Unfortunately, in the age of the supersonic jet, the submarine and the ballistic missile, to say nothing of the suitcase bomb, the fortress has no moat, and the drawbridge, as was demonstrated on 9/11, cannot be drawn up. Isolationism has a long pedigree, but today it is a theory of nostalgia and reaction. It is as defunct post-9/11 as it was on December 11, 1941, the day the America First Committee disbanded. More important is liberal internationalism, the dominant school of American liberalism and of the foreign policy establishment. Its pillars are (a) legalism, the construction of a web of treaties and agreements that will bind the international community in a normative web; (b) multilateralism, acting in concert with other countries in pursuit of "international legitimacy"; and (c) humanitarianism, a deep suspicion of national interest as a justification for projecting power--hence the congressional Democrats' overwhelming 1991 vote against the Gulf War, followed by a Democratic administration that launched humanitarian military interventions in Haiti, Bosnia and Kosovo. Liberal internationalists see national interest as a form of communal selfishness and thus as inimical to their true objective: the construction of a new international system that mimics domestic society, being based on law, treaties, covenants, understandings and norms that will ultimately abolish power politics. To do so, liberal internationalism is prepared to yield America's unique unipolar power piece by piece by subsuming it into the new global architecture in which America becomes not the arbiter of international events but a good and tame international citizen. The third school, realism, emphasizes the primacy of power in international relations. It recognizes that the international system is a Hobbesian state of nature, not to be confused with the settled order of domestic society that enjoys a community of values, a monopoly of power, and most important, an enforcer of norms--all of which are lacking in the international system. Realism has no use for a liberal internationalism that serves only to divert the United States from its real tasks. The United States spent the 1990s, for example, endlessly negotiating treaties on the spread of WMD, which would have had absolutely no effect on the very terrorists and rogue states that are trying to get their hands on these weapons. Realism has the virtue of most clearly understanding the new unipolarity and its uses, including the unilateral and pre-emptive use of power if necessary. But in the end, pure realism in any American context fails because it offers no vision beyond power. It is all means and no ends. It will not play in a country that was built on a proposition and that sees itself as the carrier of the democratic idea. Hence, the fourth school, democratic globalism, often incorrectly called neoconservatism. It sees the spread of democracy, "the success of liberty", as John F. Kennedy put it in his inaugural address, as both the ends and the means of foreign policy. Its most public spokesmen, George W. Bush and Tony Blair, have sought to rally America and the world to a struggle over values. Its response to 9/11 is to engage in a War on Terror whose essential element is the global spread of democracy. Democratic globalism is an improvement on realism because it understands the utility of democracy as a means for achieving global safety and security. Realists undervalue internal democratic structures. They see the state system as an arena of colliding billiard balls. Realists have little interest in what is inside. Democratic globalists understand that as a rule, fellow democracies provide the most secure alliances and most stable relationships. Therefore the spread of democracy--understood not just as elections, but as limited government, protection of minorities, individual rights, the rule of law and open economies--has ultimately not just moral but geopolitical value. The problem with democratic globalism, as I argued in my address, is that it is too ambitious and too idealistic. The notion, expressed by Tony Blair, that "the spread of freedom is . . . our last line of defense and our first line of attack" is a bridge too far. "The danger of democratic globalism", I wrote, "is its universalism, its open-ended commitment to human freedom, its temptation to plant the flag of democracy everywhere." Such a worldwide crusade would overstretch our resources, exhaust our morale and distract us from our central challenge. I therefore suggested an alternative, democratic realism, that is "targeted, focused and limited", that intervenes not everywhere that freedom is threatened but only where it counts--in those regions where the defense or advancement of freedom is critical to success in the larger war against the existential enemy. That is how we fought the Cold War. The existential enemy then was Soviet communism. Today, it is Arab/Islamic radicalism. Therefore "where it really counts today is in that Islamic crescent stretching from North Africa to Afghanistan." An Existential Threat At its most fundamental, Fukuyama's critique is that I am misreading the new world because there is no existential struggle. By calling our war with Arab/Islamic radicalism existential, I exaggerate the threat and thus distort the whole fabric of American foreign policy. "Krauthammer", he writes, "speaks of the United States as being in the midst of a bitter and remorseless war with an implacable enemy that is out to destroy Western civilization." "Speaks of"--as one might speak of flying saucers. In reality, asserts Fukuyama, "Al-Qaeda and other radical Islamist groups aspire to be existential threats to American civilization but do not currently have anything like the capacity to actualize their vision." Fukuyama apparently believes that the phrase "not currently" saves him from existential peril. But the problem is that precisely as we speak, Al-Qaeda is energetically trying to make up for the deficiencies from which Fukuyama so complacently derives comfort. When Hitler marched into the Rhineland in 1936, he did not "currently" have the means to overrun Europe. Many Europeans believed, delusionally, that he did not present an existential threat. By Fukuyama's logic, they were right. What defines an existential threat is intent, objective and potential capability. Existential struggle is a struggle over existence and identity. Until it lost heart late in life, Soviet communism was utterly committed to the eradication of what it called capitalism, in other words, the entire way of life of the West. Its mission was to do to the world what it had done to, say, Lithuania and Czechoslovakia--remake it in its image. Existential struggle is a fight to the end--extermination or, even better, conversion. That is what distinguishes it from non-existential struggles, in which the contending parties in principle can find compromise (over territory or resources or power). Fukuyama is unimpressed with radical Islam because, in his view, it lacks the global appeal of such true existential threats as communism and Nazism. But Nazism had little global appeal. A master-race theory hardly plays well among the other races. Did it really have more sympathizers and fifth columnists in the West than does Islamism today? Islamist cells are being discovered regularly in just about every European capital, and some even in the United States. And these, of course, are just the fifth columnists we know about. The thought is sobering, given how oblivious we were to the presence among us of the 9/11 plotters. Just because Islamism in the West may not, like its Nazi or communist counterparts, take the form of a political party or capture Western celebrity intellectuals, does not minimize the threat or the power of its appeal. Radical Islam does not have its Sartre or its Pound. It is the conceit of intellectuals to think that this counts for more than a Richard Reid, armed this time not with a shoe-bomb but a nuclear suitcase or consignment of anthrax. Disdaining the appeal of radical Islam is the conceit also of secularists. Radical Islam is not just as fanatical and unappeasable in its anti-Americanism, anti-Westernism and anti-modernism as anything we have ever known. It has the distinct advantage of being grounded in a venerable religion of over one billion adherents that not only provides a ready supply of recruits--trained and readied in mosques and madrassas far more effective, autonomous and ubiquitous than any Hitler Youth or Komsomol camp--but is able to draw on a long and deep tradition of zeal, messianic expectation and a cult of martyrdom. Hitler and Stalin had to invent these out of whole cloth. Mussolini's version was a parody. Islamic radicalism flies under a flag with far more historical depth and enduring appeal than the ersatz religions of the swastika and hammer-and-sickle that proved so historically thin and insubstantial. Fukuyama does not just underestimate the power of religion. He underestimates the power of technology. He is trapped in the notion that only Great Powers can threaten other Great Powers. Because the enemy today does not resemble a Germany or a Japan, the threat is "of a lesser order of magnitude." For a realist, he is remarkably blind to the revolution that technology has brought. The discovery of nuclear power is the greatest "order of magnitude" leap in potential destructiveness since the discovery of fire. True, the atomic bomb was detonated half a century ago; but the democratization of the knowledge of how to make it is new. Chemical and biological weapons are perhaps a century old; but the diffusion of the capacity to develop them is new. Radical Islam's obvious intent is to decapitate the American polity, cripple its economy and create general devastation. We have seen what a mere 19 Islamists can do in the absence of WMD We have seen what but two envelopes of mail-delivered anthrax can do to the world's most powerful capital. Imagine what a dozen innocuous vans in a dozen American cities dispersing aerosolized anthrax could do. Imagine what just a handful of the world's loose nukes, detonated simultaneously in New York, Washington, Chicago and just a few other cities, would do to the United States. America would still exist on the map. But what kind of country--and what kind of polity--would be left? If that is not an existential threat, nothing is.

#### The impact is genocide

Rieff, World Policy Institute, ’99 (David- New York Institute for the Humanities and Council on Foreign Relations, Summer, “A New Age of Liberal Imperialism?” World Policy Journal, Vol XVI No 2, http://www.worldpolicy.org/journal/rieff2.html)

Finessing the Disaster And yet in Kosovo (this had almost happened in Bosnia), the West was finally hoist on the petard of its own lip service to the categorical imperative of human rights. It was ashamed not to intervene, but it lacked the will to do so with either vision or coherence. Kosovo is probably a lost cause; it is certainly ruined for a generation, whatever eventual deal is worked out, as Bosnia, whose future is to be a ward of NATO, America, and the European Union, probably for decades, has also been ruined for a generation, Dayton or no Dayton. What remains are the modalities through which this disaster can be finessed, and its consequences mitigated. It is to be hoped that in the wake of Kosovo, the realization that this kind of geo-strategic frivolity and ad hoc-ism, this resolve to act out of moral paradigms that now command the sympathy but do not yet command the deep allegiance of Western public opinion-at least not to the extent that people are willing to sacrifice in order to see that they are upheld-will no longer do. To say this is not to suggest that there are any obvious alternatives. Even if one accepts more of its premises than I do, the human rights perspective clearly is insufficient. As for the United Nations, it has been shown to be incapable of playing the dual role of both succoring populations at risk while simultaneously acting like a colonial power and imposing some kind of order and rebuilding civic institutions. The important Third World countries seem to have neither the resources nor the ideological inclination to intervene even in their own regions, as Africa's failure to act in Rwanda in 1994 demonstrated so painfully. The conclusion is inescapable. At the present time, only the West has both the power and, however intermittently, the readiness to act. And by the West, one really means the United States. Obviously, to say that America could act effectively if it chose to do so as, yes, the world's policeman of last resort, is not the same thing as saying that it should. Those who argue, as George Kennan has done, that we overestimate ourselves when we believe we can right the wrongs of the world, must be listened to seriously. So should the views of principled isolationists. And those on what remains of the left who insist that the result of such a broad licensing of American power will be a further entrenchment of America's hegemony over the rest of the world are also unquestionably correct. What Is to Be Done But the implications of not doing anything are equally clear. Those who fear American power are-this is absolutely certain-condemning other people to death. Had the U.S. armed forces not set up the air bridge to eastern Zaire in the wake of the Rwandan genocide, hundreds of thousands of people would have perished, rather than the tens of thousands who did die. This does not excuse the Clinton administration for failing to act to stop the genocide militarily; but it is a fact. And analogous situations were