## UMKC 1AC

### Plan

Plan: The United States federal judiciary should require that detained individuals who are unlawfully detained or who have been denied any due process be released and prevented from transference by the executive.

### Torture

#### 1) Status quo Supreme Court fails to rule on torture cases

Entin 12 Law Professor (Jonathan L., “Presidential Powers and Foreign Affairs: Presidential Power to Implement International Law after Medellin: War Powers, Foreign Affairs, and the Courts: Some Institutional Considerations”, Case Western Reserve Journal of International Law, 45 Case W. Res. J. Int'l L. 443, Fall 2012, <http://www.lexisnexis.com/lnacui2api/api/version1/getDocCui?lni=58NV-MTK0-00CV-B0B1&csi=148375&hl=t&hv=t&hnsd=f&hns=t&hgn=t&oc=00240&perma=true>, accessed 2013)

Meanwhile, other challenges to post-2001 terrorism policies also have failed, and the Supreme Court has declined to review those rulings as well. For example, the lower courts have rebuffed claims asserted by foreign nationals who were subject to extraordinary rendition. In Arar v. Ashcroft, n102 the U.S. Court of Appeals for the Second Circuit affirmed the dismissal of constitutional and statutory challenges brought by a plaintiff holding dual citizenship in Canada and the United States. n103 And in Mohamed v. Jeppesen Dataplan, Inc., n104 the U.S. Court of Appeals for the Ninth Circuit held that the state-secrets privilege barred a separate challenge to extraordinary rendition brought by citizens of Egypt, Morocco, Ethiopia, Iraq, and Yemen. n105 Unlike Arar, in which the defendants were federal officials, n106 this case was filed against a private corporation that allegedly assisted in transporting the plaintiffs to overseas locations where they were subjected to torture. n107 Although at least four judges on the en banc courts dissented from both rulings, n108 the Supreme Court declined to review either case.

#### 2) Humans are guaranteed protection from torture under international law – practices of our detention centers violate human rights

Bernaz 13 Ph. D University Paul Cezanne (Nadia, “Life Imprisonment and the Prohibition of Inhuman Punishments in International Human Rights Law: Moving the Agenda Forward”, Human Rights Quarterly, vol. 35, no. 2, May 2013, pp. 487-488)

The right not to be subjected to torture and inhuman or degrading treatments is entrenched in international law. All general human rights treaties provide a protection to individuals against such treatments and states have also adopted treaties specifically prohibiting the practice of torture, which are widely ratified.104 On many occasions, the human rights bodies in charge of interpreting human rights treaties have formulated authoritative statements on the issue. For the UN Human Rights Committee, "the prohibition on torture . . . is an absolute one that is not subject to countervailing considerations."105 For the ECtHR, Article 3 of the European Convention, prohibiting torture, "enshrines [End Page 488] one of the fundamental values of the democratic societies making up the Council of Europe."106 Moreover, the International Criminal Tribunal for the Former Yugoslavia suggested that the prohibition of torture was a norm of customary international law of a jus cogens nature.107 What this right actually entails is a matter of interpretation, as shown, for example, by the debates following the confessions of former President Bush in relation to the use of waterboarding as an "enhanced interrogation technique."108 As it stands, not only is this right violated daily, but some have even justified the use of torture in order to obtain information on the location of "terrorists" which, in turn, has led to extrajudicial killings in blatant violation of international law.109 Moreover, on several occasions, the United Kingdom and other European countries have (unsuccessfully) intervened in cases before the ECtHR, arguing that the absolute prohibition of torture should be revisited.110 For the Court, however, "even in the most difficult of circumstances, such as the fight against terrorism, and irrespective of the conduct of the person concerned, the Convention prohibits in absolute terms torture and inhuman or degrading treatment and punishment."111 In other words, despite serious attacks against it, the law has not changed and the right not to be tortured and not to be subjected to inhuman or degrading treatments or punishments is still firmly established under international law. This right gives a protection against a variety of treatments including police brutality,112 poor conditions of detention,113 and the so-called death row phenomenon.114

#### 3) 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.

#### 4) Torture renders societies dysfunctional

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)

A statement such as this is just the tip of an iceberg involving well-documented case studies and empirical data that the torture of primary victims inflicts extreme hardship and trauma on the victims' relatives and does serious long-term damage to family relationships, in addition to imposing devastating effects on the wider community, not only fomenting hatred and spirals of violence, but also resulting in the breakdown of civilian institutions amounting to a kind of collective trauma for the entire community. Thus, in situations of systematic torture imposed by government agents, one invariably finds a set of deleterious effects on families and communities ranging from widespread substance abuse and domestic violence to violent crime, collective rage, and a stagnation of social and economic life.31 Indeed, even [End Page 359] beyond these specific effects, there is the additional phenomenon that the systematic use of torture in any society makes that society morally and historically dysfunctional.32 The use of such torture is invariably accompanied by vigorous public government denial of its use, and the disconnection that evolves between what is officially stated and what is actually practiced leads to a false history that can only be repaired when public knowledge of the torture is later ratified through public acknowledgment, for example, in the form of prosecutions and truth commissions. Absent such efforts, the society loses its own sense of true history or identity, as if it too, like the primary victims, had been hooded and violated. Reflective awareness of all of these negative effects—in addition to the harms done to the primary victims—further strengthens the moral intuition that torture is always wrong, as well as constituting an even stronger ancillary consequentialist argument for why torture should be regarded as always wrong. One might even argue that these effects of torture on victims' families and communities themselves constitute violations of yet other human rights, for example, to the integrity of the family, to health and well-being, to the continuous improvement of living conditions, and to a social order in which all rights can be fully realized.

#### 5) Indefinite detention is torture that violates human rights and undermines U.S. credibility

Goering, 7/27 --- executive director of the Center for Victims of Torture, an international nongovernmental organization (7/27/2013, Curt, “End indefinite detention now,” <http://thehill.com/blogs/congress-blog/homeland-security/313761-end-indefinite-detention-now>))

The recent Senate hearing on closing Guantanamo, under the leadership of Sen. Dick Durbin (D-Ill.), shed much needed light on the symbol of injustice and cruelty this prison has become.

Members heard compelling testimony from experts on how Guantanamo undermines the U.S. commitment to the rule of law, weakens national security and runs contrary to our country’s global leadership in upholding international human rights standards.

In written testimony, the Center for Victims of Torture (CVT) addressed the human rights implications of indefinite detention of prisoners held at Guantanamo. The continued indefinite detention of individuals at Guantanamo – some of whom have been held over 11 years without being charged or tried – is inconsistent with U.S. treaty obligations and constitutional principles.

Indefinite detention is an unlawful practice that rises to the level of cruel, inhuman and degrading treatment in direct violation of U.S. laws and our obligations under international laws, including the UN Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, signed by the United States 25 years ago during President Reagan’s final year in office.

Placing prisoners in custody indefinitely without charge or trial has absolutely no place in our laws. As Sen. Patrick Leahy (D-Vt.) said during the hearing, “Countries that champion the rule of law and human rights do not lock away prisoners indefinitely without charge or trial.”

We oppose indefinite detention on behalf of torture survivors, because among those we care for are survivors who have suffered while being imprisoned without charge or trial and without being told when, if ever, they might be released.

From our experience healing survivors of torture and war related atrocities, we know indefinite detention causes severe, prolonged and harmful health and mental health problems for those imprisoned. Our intensive work with individual torture survivors, combined with medical literature that documents the damaging physical and psychological effects of indefinite detention, causes us to oppose this practice. For example, research by Physicians for Human Rights has found that the effects of indefinite detention include depression and suicide; Post Traumatic Stress Disorder; and damage to the body’s immune, cardiovascular and central nervous systems.

Many of the survivors we serve who were imprisoned without trial or charge speak of the absolute despair they felt, never knowing if their detention would come to an end. CVT clinicians who work with survivors of torture that have been indefinitely detained tell us that with no defined end, survivors feel there is no guarantee there will ever be an end. This creates severe, chronic emotional distress: hopelessness, debilitation, uncertainty, and powerlessness.

The hunger strike among the detainees at Guantanamo underscores the despair among prisoners facing indefinite detention. Hunger strikes are a form of expression by individuals who have no other way of making their demands known.

#### 6) U.S. moral and political leadership are key to the global spread of democracy and human rights

Goldstone, 7 --- retired as a Justice of the Constitutional Court of South Africa, his experience ranges from war crimes prosecution to fact-finding missions, from international investigations to human rights advocacy (Fall 2007, Justice Richard J. Goldstone, Arizona Journal of International and Comparative Law, “THE J. BYRON MCCORMICK LECTURE\*: THE CONSEQUENCES OF THE UNITED STATES ABDICATING ITS MORAL AND POLITICAL LEADERSHIP OF THE FREE WORLD, 24 Ariz. J. Int'l & Comp. Law 587))

The sad reality is that the United States is no longer providing moral and political leadership to the free world. Its moral influence has been diminished and its leadership is now more a consequence of economic and military power than morality and political leadership. This is a huge and immeasurable loss to the democratic world and especially so because there is no other country in the world that can fill that position. The result is, the consequence is of the free world at the moment is pretty much leaderless. What I propose to do this morning is to talk about my own -- the benefits that I have received from the United States in my career, in my legal career, in my professional and my international career and to talk about the ways -- the many ways in which South Africa benefited from the United States' leadership, and indeed [\*590] apartheid wouldn't have come to an end relatively peacefully without that American intervention, not only American but primarily from the United States. And I want to then end with making some suggestions as to how the United States should consider taking back that leadership position. The benefits I have received from the United States' intervention, in my own career and in my country's life, have put me perhaps in a better position than Americans themselves to appreciate the ripple effect of the United States' involvement in the affairs of foreign countries, particularly democracies. Let me be subjective for a few minutes. In the early 1960s, I became involved in the antiapartheid campaign in South Africa as a student leader. In those dark days of apartheid, the government was set on excluding black students from my University in Johannesburg, the Witwatersrand University, and the University of Cape Town, which were known as the two open universities because, throughout their lives, they have admitted students and employed faculty regardless of color or gender. And that was bad news to the apartheid regime as they wanted to put a stop to that. The National Union of South African Students was the national student body of the university that opposed apartheid. Its leaders were considered, by the government, and especially by the security police, to be unpatriotic and worse, and that only on the grounds that they were publicly opposed to the immoral and oppressive policies of the apartheid government. Crucial support for our opposition to apartheid came from around the free world, but principally from the United States. It was primarily the United States government that took the lead. The opposition to racial repression in South Africa, from successive United States governments since the Second World War, has been a little bit uneven and sporadic. It's been dictated not only by moral opposition to racial oppression, but it has at times and understandably, if not regrettably, been influenced by economic reasons. For economic reasons and particularly during the Cold War, the United States was concerned about Russian and later Chinese influence in African countries, and, for that reason, didn't want to abandon even the apartheid government in South Africa because it was seen as a bastion against the threat of communism in our part of the world. So the leadership came, and more importantly from the universities, from the churches, from the Bar and Bench, and from individual politicians, both at the state and federal levels. I could speak for hours about the efforts of so many Americans who helped bring down racial oppression in South Africa; the likes of Erwin Griswold, when he was dean of Harvard Law School and later as the solicitor general of the United States without his very significant funds for the defense of those charged with apartheid crimes; federal judges such as Leon Higginbotham, a federal judge; and Thelton Henderson inspired black South African lawyers to use their skills in fighting the evil system, leading foundations help create public interest law firms, the legal resources center, Lawyers for Human Rights, that did so much work to [\*591] assist those charged in our courts with apartheid crimes; the Reverend Leon Sullivan, who influenced leading U.S. firms to use their economic muscle and influence to fight discrimination on their factory floors in South Africa and in their employment practices; more importantly, the annual state department reports on human rights, reports that still come out each year, criticizing human rights violations in just about every country in the world. There is only one country that the United States State Department reports don't deal with, and that's, of course, the United States. There were many important American student boycotts and efforts to isolate South Africa and help turn it into a pariah state. It was a pariah state. I can assure you that, for most of my life, it was a great embarrassment and worse to have to travel abroad with a South African passport. Nothing was worse than having to hand a South African passport at JFK or Heathrow or any country, and I would always anticipate some negative response from the passport official about South Africa, and that often happened. I was tempted to say I share your views about South Africa, but that obviously wasn't the sort of thing that would have gone down well with them in those days. There was divestment and disinvestment at the insistence mainly of students and faculty in many universities around this country. All those efforts--and there were many more that I haven't referred to--strengthened resistance and reinforced the conviction of those of us who opposed the system, that we were correct in doing so and that the route taken by the United States to outlaw racism in this country was the appropriate way for South Africa to go. Now to become even a little more personal, as a student leader, my inspiration--first inspiration-- came from Americans I had the privilege of coming into contact with as a student. I think of Father Theodore Hesburgh, who visited South Africa when he was the comparatively young president of the University of Notre Dame, and Clark Kerr, who was already then the embattled president of the University of California. As a young boy, I had the privilege of meeting and listening to Robert Kennedy when he visited South Africa not too long before his death. And I witnessed at firsthand the tumultuous reception that he received from many thousands of black South Africans who correctly saw him as their champion. I'll never forget the day outside of our bar building in Johannesburg when he arrived to meet with us. He arrived outside the building, and there was a huge gathering, a spontaneous gathering of thousands of black South Africans screaming his name in adulation. And he climbed spontaneously onto the top of a motor vehicle that was parked in front of the building and gave a wonderful extemporaneous to the gathering throng. I've mentioned the foundations, the Ford and Carnegie in particular, that helped set up the legal resources center, which is a public interest firm based really [\*592] on the legal defense fund of the NAACP, the so-called Ink Fund, which did so much good work during the civil rights years in this country. The Legal Resources League, the second organization set up with Ford and Carnegie funds -- and later South African funds were added to them --, was for human rights, an organization that provided many, many thousands of pro bono defenses for black South Africans suffering under apartheid laws. The successful efforts of those two organizations, in particular, made it just possible for some of us, who opposed apartheid and were successful lawyers, to accept appointments to the bench in the 1980s, a difficult decision. Fortunately, I have no reason to regret my decision to accept such appointment, as difficult as that decision was. In 1984, it was my good fortune to be invited by the Aspen Institute to attend a seminar on the international violation of human rights that it had arranged for federal judges in Mobile, Alabama. The seminar was funded by the Ford Foundation, and they suggested to the Aspen people that they should invite one South African judge to the four seminars on that topic that year, in 1984. I had the privilege of being one of them, and I made lifelong friends at that seminar. Two of the judges who attended the seminar - there were about thirty federal judges; I was the only non-American judge - two of them came from federal courts of appeals, circuit courts of appeal, one from the Ninth Circuit in California, and one from the D.C. circuit in Washington, D.C. They were Anthony Kennedy and Ruth Bader Ginsburg, and we have maintained that friendship for the last twenty-three years. In that same year, 1984, I spent three months in the United States on an American government international visit program meeting many academics and leading American lawyers. It was those American contacts and experiences that helped to shape my views and many other South Africans' who opposed racial discrimination and oppression. Certainly I and we learned from American lawyers and American judges how the law should be used to establish rights, even in a country like South Africa, where there was no written constitution and parliament was supreme. I hope I've said enough to help you realize that, when apartheid came to an end, South Africans had a great deal to be thankful for to the United States. Americans were recognized, by the vast majority of our people in the South Africa, as having been instrumental in bringing apartheid to an end. It was a small wonder that Nelson Mandela, when he was released from twenty-seven years in prison, paid a visit to this country to thank its people for their role in bringing freedom to his people. It was mainly because of the United States' influence that I came to be appointed, by the security council of the United Nations, as the first chief prosecutor in the UN ad hoc tribunal for the former Yugoslavia, and later Rwanda. From personal experience, I can assure you that neither of those important war crime tribunals, for Yugoslavia or Rwanda, would have been established without the efforts of the United States and its leadership. [\*593] In particular, I mention in that regard, the tremendous amount of work and time and effort: that was put into it by the lady United States ambassador to the United Nations, Madeline Albright, and that continued when she became the secretary of state. I can assure you, too, from my experience in those positions, that, without United States' political resolve and financial assistance, those two tribunals would never have very gotten off their feet. They wouldn't have functioned. And there would have been consequences. The international criminal court is one of them. Without the United States' push, without successes of the ad hoc tribunals, the international criminal court would not be up and running as it is today in the Hague. More recently, since my retirement from the constitutional court, I have been teaching almost full time at United States law schools. This is the fourth year in which I'm doing that. It is really a new career and one I'm enjoying more than any other in my life. I've given you this largess objective account in order to qualify myself as someone who is not only indebted to the United States, but someone who has both respect and admiration and definitely has affection for its people. The influence of the United States and the careers of leaders from so many countries can be multiplied many times. I'm one of thousands of people from countries right around the world, in five continents, who have benefited, to a greater or lesser extent, from that sort of United States' influence, and the ripple effect of this involvement cannot be overstated. The United States, in these respects, leads by example. The crumbling of racial discrimination in South Africa and the encouragement of democracy in many parts of world was a consequence of your civil rights movement and the values enshrined in your constitution. They proved to be important catalysts for change. I would emphasize that the example the United States set came from those values. Your power and your influence were incidental. It was the values that led the way. The United States was truly the moral leader and the political leader of the free and democratic world. The United States' influence in international law and international institutions is nothing new. It's something, I think, that's shared by all powerful states. Small states can afford to subject themselves to international law, to international rule of law. Powerful states prefer to be free to do as they wish. So there's always been an ambivalence amongst many and most United States leaders that they recognize the necessity and benefits that flow from a well-ordered international community, on the one hand, and yet they have resistance to being bound themselves as a member of that order. The United States was primarily responsible for the founding of the United Nations and the International Criminal Court. It was the strong support from this [\*594] country that lead to the United Nations calling the diplomatic conference in 1998, in Rome, that gave birth to the International Criminal Court. n6 Take the Law of the Sea Treaty of 1982: the United States is one of the few important nations not to ratify that treaty. n7 It doesn't want to bind itself to the rigors and rules set out by the international treaty, which controls the use of the sea, both the surface of the sea and what lies beneath it. Of course, all of a sudden now, because of global warming and the discovery of huge deposits of oil and minerals in the Arctic and probably too in the Antarctic, all of a sudden, the big powers are rushing to make claims to rights to minerals and other rights in the Arctic. The Russians sent down an American flag to the bottom of the Arctic Ocean. The Canadians are making claims and the United States too obviously had an interest. Under the Law of the Sea Treaty, those interests have to be decided upon by an international commission that's set out by the treaty. n8 And, out of the blue, President Bush is now suggesting to the Senate that it ratify, that the United States should ratify the Law of the Sea Treaty. n9 All of a sudden it's fallen within the interests of the United States to do so. So there is this ambivalence. Let me hasten to add that, of course, no country should be expected or should be called upon to ratify international treaties that are not in its own interests. Countries don't and shouldn't have to join with other countries unless it's in their own interests. What is the problem is determining the interest of a country in this regard. The International Criminal Court is an example of this. I believe it's in the interest of all countries to have a strong international criminal court that can withdraw impunity for war criminals. The people of this country don't approve of war crimes. The people of this country want war criminals to be punished, but the United States doesn't want to subject itself to the rigors and to the discipline of such an international court. [\*595] There is all this ambivalence to which I have referred. The international criminal court has now garnered the support of 105 nations, about half of the members of the United Nations. n10 They include most of the democracies. There are only two democracies that haven't joined in the Rome treaty for the international court today: India and the United States of America. Japan is the most recent to ratify it. Only in July of this year--July 17th,--Japan joined in. n11 The countries that have joined in include every member of the European Union, twenty-seven African nations, many Latin American nations, and it's a great regret that the United States is not there leading the International Criminal Court as it should be. n12 It's a great tragedy that there is no American judge on the International Criminal Court. n13 It's a great tragedy that the International Criminal Court prosecutor's office isn't better staffed with the United States experts, lawyers, computer technicians. It was certainly my privilege, with the Yugoslavia tribunal and the Rwanda Tribunal, to have the full support from the United States, and what a huge difference it made. Slobodan Milosevic would not have been in the Hague except for the United States' pressure. Croatian generals wouldn't have been brought to trial, in the Yugoslavia tribunal, except for the United States' pressure. Of course, that is not completely absent in the case of the International Criminal Court. In fact, to the contrary, during the present administration, Congress has passed almost bizarre statutes making it a criminal offense for anybody in the United States to assist the International Criminal Court without a special exemption from the president; The so-called Hague Invasion Act, the American Service Members Protection Act n14 that gives power to the United States military to go and rescue any American who might be brought before the International Criminal Court in the Hague, almost one hundreed so-called Article 98 agreements n15 , between the [\*596] United States and some of the least powerful, least impressive nations who are members of the United Nations, agreements that solemnly oblige these countries not to hand over American citizens to the International Criminal Court, as if that's likely to happen. But it's these acts, I think, which have brought a great deal of embarrassment and has had the effect of lowering the esteem of the United States in, I think, many democracies around the world. The history of the annual State Department reports, to which I referred, and the public effect that it had in many countries -- I've referred to their effect on South Africa. The South African apartheid government was embarrassed year after year when it was criticized in forthright terms in the annual human rights report put out by the State Department, and many other oppressive leaders were similarly embarrassed. Not so today. Their response now is to throw, in the face of the United States, its own disregard for fundamental human rights, and especially the respect for dignity of all people. Abu Ghraib, Guantanamo Bay, indefinite detention, withdrawal of habeas corpus rights to non-Americans detained by the United States, the sanctioning of inhumane treatment to those in its path, and the extraordinary rendition of some of those people to countries where they would inevitably be victims of torture. The extraordinary rendition program was, again, reconfirmed only this week by a leading member of the administration. It is sobering, I suggest, that the American Psychological Society, at its very recent annual meeting, in San Francisco, unequivocally condemned the use of twenty distinct interrogation methods that are reportedly being used by the CIA, including mock execution, forced nakedness, stretch positions, water boarding, and stress to the families of detainees. n16 The American Psychological Society is not some crazy left-wing organization. It's a very serious organization representing psychologists throughout the country. It has called upon the defense department, the CIA, and other agencies to prohibit these twenty tactics and admonish psychologists to not participate in planning, designing, or carrying them out. n17 The attitude of the administration to global warming and its distain for the evidence that it is causing anguish in so many countries; of course the invasion of Iraq and the disastrous effect it is having on the status of the United States especially, but not only, in the Islamic world; and then there is the vitreous and racial [\*597] profiling that is leading to visa refusals of persons who in no way would harm the interest of the United States. I can give you a South African example. In recent weeks, South African Muslim Professor Adam Habib has frequently visited this country. He has a Ph.D. from the City University of New York. He is the executive director of South African Human Sciences Research Council's program on Democracy and Governance, and a professor at the school of Development Studies at the University of Kawzulu in Natal Province. He was turned back at Kennedy Airport in New York. n18 No reasons were given. Since then he applied for a new visa. No decision was been given to him: silence, neither a grant nor a refusal. Professor Habib came to New York on that occasion to speak at the annual meeting of the American Sociological Association, and it issued the following statement: [T]he ASA expresses its deepest disappointment and profound concern about the Department of State's de facto denial of a visa, which has barred Professor Adam Habib from participating in the Association's Annual Meeting. Such actions undermine the willingness of numerous scientists and academics from many nations to visit the United States and collaborate with their American colleagues. The APA believes this limitation on scholarly exchange erodes our nation's reputation as the defender of the free and open search for knowledge. n19 The consequences of these policies are pretty obvious. Within the past, the United States was a powerful force for the spread of democracy and the respect for human dignity. It is now perceived as having double standards. Oppressive leaders around the world scoff at U.S.'s criticism of their violations of human rights.When, in the past, the U.S. was seen as a powerful and influential supporter of international justice and it abhorred impunity for war criminals, it is now perceived to tolerate such impunity rather than submit itself to the rigors of international law. When, in the past, Americans took leading positions in most international institutions, they're finding it increasingly difficult to work for those bodies. [\*598] So the picture today is not a happy one. Of course, the fight against international terrorism is a difficult one. I'd be the last person to understate. Unfortunately, however, it necessitates serious inconvenience to all of us. It has also become necessary to confer power to law enforcement authorities that are invasive of fundamental privacy rights. I think it's something we have to accept and most of us do accept it. We put up patiently with the inconveniences that are imposed to protect all of us, and we understand that. The point I would like, however, is that other democracies are too are under threat. The United Kingdom, other Europe powers too are under threat from international terrorism, but they've succeeded in introducing some of the unpopular measures without authorizing or condoning the use of inhumane treatment, violation of the rule of law, racial profiling, or other methods that have reflected so badly on the United States. Allow me to bring this address to an end on an optimistic note. The leadership that the United States has traditionally given to the free world can and I'm confident will speedily be restored. Referring to my life, it changed over night. Nelson Mandela was released from prison after twenty-seven years, and all of a sudden, I was very proud to hold a South African passport. And when I handed it in to that same passport official, I was welcomed, and people would ask me how Nelson Mandela was getting along. So things can change very quickly. It is dangerous to assume, I would say, that criticism of the present policies of the United States is the result of anti-Americanism. Far from it. The United States and United States citizens are popular in most countries of the world. Those of you -- and I'm sure many in this audience -- who travel outside your own country will be aware that you are welcome certainly in my country and many others around the African and other continents. I would suggest that the steps that the United States should take -- and this is some of them -- in the coming years would include, firstly, I would suggest convening a meeting of leading democratic nations in an attempt to reach agreement on appropriate measures to combat international terrorism. I think it's a problem common to all democracies, and it could be a good step forward if the United States led the democratic world in finding acceptable means, even if inconsistent with privacy rights, to efficiently fight terrorism. Speedily close Guantanamo Bay because it's become a varying point for those attacking the United States. Speedily restore respect for the rule of law and fundamental human rights of all people subject to the authority or power of the United States.

Make this the card after the spreading democracy card – 00:30

#### 7) Because democracies possess checks to keep international peace with other democracies, the spread of democratic rule is key to global peace

Delahunty & Yoo 9 Law Professors (Robert, ass. professor of law University of St. Thomas, John, former deputy ass. US Attorney General and law professor UC Berkeley, “Kant, Habermas, and Democratic Peace”, 10 Chi. J. Int’l. L. 437, 2009, <http://scholarship.law.berkeley.edu/facpubs/42/>, accessed 2013) Our theory of the democratic peace carries a second implication, one involving the types of regimes that the US and its allies should prefer. While predicting the consequences of constitutional design is not easy,139 a democratic nation may favor in the constitutions of other nations certain provisions that would improve their ability to send costly signals and to make reliable commitments. In the area of signals, a constitution could create multiple channels to make foreign policy and national security decisions. Nations could choose the more costly method when it wishes to send meaningful signals as part of bargaining in an international dispute. To take an example from the US, the President has waged war without congressional authorization sometimes (for example, Korea), and with authorization at other times (for example, Iraq). It is politically costly for the President to seek legislative authorization for war, though the amount of those costs is a matter of degree depending, in part, on whether Congress is controlled by the opposition party. If the President wishes to send a meaningful signal about the willingness and capability of the US to go to war, he can choose to go through Congress. If there is nothing to be gained from such a signal, the President can still act on his own.' 4 0 With commitments, a constitution could disperse decision-making authority over certain forms of international agreements between different branches. A treaty requiring independently elected executive and legislative branches to concur would represent greater commitment than, for example, a treaty signed by a parliamentary government in which the majority party in the legislature also controls the executive branch. A constitution that places implementation of an international agreement in different branches may well make it more difficult for a nation to withdraw from its international commitments. The non-self-execution doctrine in American law, for example, allows the President and Senate to make the treaty, but requires Congress to implement provisions that require appropriations or changes in domestic law. Once these spending decisions or regulations are enacted, the executive branch cannot terminate them along with a treaty since they rest on Congress's independent legislative authorities.14 ' Congressional-executive agreements bear this same characteristic. Since Congress enacts them as legislation, the President cannot terminate them unilaterally. ' 42 These examples are only meant to be suggestive, rather than definitive. We only wish to highlight that the mechanisms of the democratic peace bear important implications for constitutional design. The important point is that if democracies do not wage war with each other because of their ability to send signals or make commitments, then certain features of their constitutions and political systems will perform those functions better than others. Nations that spread democracy in order to enhance their security will have an interest in promoting those constitutional features as well. IV. CONCLUSION There are two basic ways in which the Kantian project may be carried forward. One way is Habermas': that of starting from existing international or regional organizations such as the UN or the EU, and working for their evolution into some form of globalized government. The other way is to work forward from Kant's powerful insights into the possibility of a democratic peace. Habermas' version of the project may well be truer to Kant's original thought, but it seems likely to result in a world that risks being neither peaceful nor free. The root problem in Habermas' highly institutionalized approach is that the global governmental structures he envisages will lack real democratic legitimization. The approach we advocate instead has the advantage, among others, of "cutting with the grain." In promoting democratic government in particular states, the world's leading democratic powers will be serving their own security needs and, as a welcome by-product, producing the circumstances in which respect for human rights and friendly relations between states are likely to spread.

#### 8) 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.

#### 9) The courts legitimate government policy when they apply domestic law to detention

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.

### Judicial Globalism

#### 1) 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

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[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]

#### 2) These rulings make habeas useless—the judiciary has allowed for excess deference and abdicated its key role in checking executive war powers

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[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]

A. Arguments for a Remedy By urging deference to the Executive Branch, the D.C. Circuit Court of Appeals has scolded the district courts that have second-guessed the political branches' determinations about release and suitable transfers. Those in favor of judicial power have argued that the denial of the right to review the Executive's decisions is allowing too much deference to that branch and severely limiting the remedies that courts have had the power to issue in the past. Though the petitioners have made several arguments for relief, the main arguments for judicial power stem from the idea that the court of appeals has been improperly applying Supreme Court precedent. Petitioners have argued that the D.C. Court of Appeals expanded the scope of Munaf too broadly as the Supreme Court noted that the decision was limited to the facts of that case. n118 In Munaf, the Court was primarily concerned about allowing the Iraqi government to have the power to punish people who had committed crimes in that territory when fashioning its holding, and the petitioners in that case had the opportunity of notice because they were told about their transfer and were able to petition the court to try and prevent it. n119 Petitioners have argued that those facts are entirely different than cases such as Mohammed and Khadr were there was concern of torture in foreign nations but no need to allow those nations to have the ability to prosecute the detainees for crimes, there was potential for torture at the hands of non-government entities, and no notice of transfer was permitted. n120 [\*190] Additionally, Petitioners have argued that the use of Munaf has impermissibly limited Boumediene by preventing courts from fashioning equitable relief for habeas petitions. n121 There has been concern that the ability to use the writ of habeas will be essentially eliminated if there is no chance for a petitioner to challenge the Executive Branch's determinations regarding safe transfers. The Boumediene Court spent considerable time discussing the history of the writ n122 and noted that the tribunals implemented in that case to determine enemy combatant status were not a sufficient replacement for the writ of habeas because they lacked, in part, the authority to issue an order of release. n123 Here, the D.C. Circuit Court of Appeals has effectively prevented the other courts from determining if there is a right not to be transferred, which has been argued to be an inadequate statement of the right of habeas. n124 Similarly, it has been argued that by accepting the Executive Branch's assurances of its efforts to release the detainees, the courts are not properly using the power of habeas corpus that has been granted to them by the Constitution. n125 By refusing to question these assertions, the courts would be unable to offer a remedy to the petitioners who have the privilege of habeas corpus. n126 The Petitioners also argued a due process right to challenge transfers as the detainees have a right to a meaningful hearing to at least have the opportunity to challenge the Government's conclusions regarding safety. n127 By refusing to second-guess the Executive, the judiciary may be losing an important check on the former's power because there is no guarantee that the Executive is ensuring safety or making the best effort to protect the unlawfully kept detainees. Without allowing courts to have the power to enjoin a transfer in order to examine these concerns, there is the potential that the detainee could be harmed at the hands of foreign terrorists. Without the ability to challenge the Executive Branch through the judicial tool of habeas corpus, there has been genuine concern that the courts are losing too much power and that their authority [\*191] is being improperly limited, as they are not utilizing their constitutional power properly.

#### 3) 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.

#### 4) 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]

#### 5) 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.

#### 6) 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.

#### 7) 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.

#### 8) 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.

#### 9) 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.”

#### 10) 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.

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

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[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.

## 2AC UMKC Round 2

### CP

#### Perm: I don’t see why we can’t do both.

#### Judicial action is key to judicial globalization

Flaherty—executive

Key to Modeling—Suto, CJA, and Kersch

### Deference

#### There’s no correlation between hegemony and stability

Fettweis, ’10

[Christopher J. Fettweis, Assistant Professor of Political Science at Tulane University, “Threat and Anxiety in US Foreign Policy,” Survival, 52:2, 59-82, March 25th 2010, <http://dx.doi.org/10.1080/00396331003764603>]

One potential explanation for the growth of global peace can be dismissed fairly quickly: US actions do not seem to have contributed much. The limited evidence suggests that there is little reason to believe in the stabilising power of the US hegemon, and that there is no relation between the relative level of American activism and international stability. During the 1990s, the United States cut back on its defence spending fairly substantially. By 1998, the United States was spending $100 billion less on defence in real terms than it had in 1990, a 25% reduction.29 To internationalists, defence hawks and other believers in hegemonic stability, this irresponsible ‘peace dividend’ endangered both national and global security. ‘No serious analyst of American military capabilities’, argued neo-conservatives William Kristol and Robert Kagan in 1996, ‘doubts that the defense budget has been cut much too far to meet America’s responsibilities to itself and to world peace’.30 And yet the verdict from the 1990s is fairly plain: the world grew more peaceful while the United States cut its forces. No state seemed to believe that its security was endangered by a less-capable US military, or at least none took any action that would suggest such a belief. No militaries were enhanced to address power vacuums; no security dilemmas drove insecurity or arms races; no regional balancing occurred once the stabilising presence of the US military was diminished. The rest of the world acted as if the threat of international war was not a pressing concern, despite the reduction in US military capabilities. Most of all, the United States was no less safe. The incidence and magnitude of global conflict declined while the United States cut its military spending under President Bill Clinton, and kept declining as the George W. Bush administration ramped the spending back up. Complex statistical analysis is unnecessary to reach the conclusion that world peace and US military expenditure are unrelated.

#### No impact to hegemony

Friedman 10—research fellow in defense and homeland security, Cato. PhD candidate in pol sci, MIT (Ben, Military Restraint and Defense Savings, 20 July 2010, http://www.cato.org/testimony/ct-bf-07202010.html, AMiles)

Another argument for high military spending is that U.S. military hegemony underlies global stability. Our forces and alliance commitments dampen conflict between potential rivals like China and Japan, we are told, preventing them from fighting wars that would disrupt trade and cost us more than the military spending that would have prevented war. The theoretical and empirical foundation for this claim is weak. It overestimates both the American military's contribution to international stability and the danger that instability abroad poses to Americans. In Western Europe, U.S. forces now contribute little to peace, at best making the tiny odds of war among states there slightly more so.7 Even in Asia, where there is more tension, the history of international relations suggests that without U.S. military deployments potential rivals, especially those separated by sea like Japan and China, will generally achieve a stable balance of power rather than fight. In other cases, as with our bases in Saudi Arabia between the Iraq wars, U.S. forces probably create more unrest than they prevent. Our force deployments can also generate instability by prompting states to develop nuclear weapons. Even when wars occur, their economic impact is likely to be limited here.8 By linking markets, globalization provides supply alternatives for the goods we consume, including oil. If political upheaval disrupts supply in one location, suppliers elsewhere will take our orders. Prices may increase, but markets adjust. That makes American consumers less dependent on any particular supply source, undermining the claim that we need to use force to prevent unrest in supplier nations or secure trade routes.9 Part of the confusion about the value of hegemony comes from misunderstanding the Cold War. People tend to assume, falsely, that our activist foreign policy, with troops forward supporting allies, not only caused the Soviet Union's collapse but is obviously a good thing even without such a rival. Forgotten is the sensible notion that alliances are a necessary evil occasionally tolerated to balance a particularly threatening enemy. The main justification for creating our Cold War alliances was the fear that Communist nations could conquer or capture by insurrection the industrial centers in Western Europe and Japan and then harness enough of that wealth to threaten us — either directly or by forcing us to become a garrison state at ruinous cost. We kept troops in South Korea after 1953 for fear that the North would otherwise overrun it. But these alliances outlasted the conditions that caused them. During the Cold War, Japan, Western Europe and South Korea grew wealthy enough to defend themselves. We should let them. These alliances heighten our force requirements and threaten to drag us into wars, while providing no obvious benefit.

### 2AC Pacifism K—Practice Debate

#### Framework—the alt should be gauged as its effectiveness as a political strategy vs. the plan

#### Absent these questions shifts in knowledge production are useless – governments’ obey institutional logics that exist independently of individuals and constrain decisionmaking

Wight – Professor of IR @ University of Sydney – 6

(Colin, Agents, Structures and International Relations: Politics as Ontology, pgs. 48-50

One important aspect of this relational ontology is that these relations constitute our identity as social actors. According to this relational model of societies, one is what one is, by virtue of the relations within which one is embedded. A worker is only a worker by virtue of his/her relationship to his/her employer and vice versa. ‘Our social being is constituted by relations and our social acts presuppose them.’ At any particular moment in time an individual may be implicated in all manner of relations, each exerting its own peculiar causal effects. This ‘lattice-work’ of relations constitutes the structure of particular societies and endures despite changes in the individuals occupying them. Thus, the relations, the structures, are ontologically distinct from the individuals who enter into them. At a minimum, the social sciences are concerned with two distinct, although mutually interdependent, strata. There is an ontological difference between people and structures: ‘people are not relations, societies are not conscious agents’. Any attempt to explain one in terms of the other should be rejected. If there is an ontological difference between society and people, however, we need to elaborate on the relationship between them. Bhaskar argues that we need a system of mediating concepts, encompassing both aspects of the duality of praxis into which active subjects must fit in order to reproduce it: that is, a system of concepts designating the ‘point of contact’ between human agency and social structures. This is known as a ‘positioned practice’ system. In many respects, the idea of ‘positioned practice’ is very similar to Pierre Bourdieu’s notion of *habitus*. Bourdieu is primarily concerned with what individuals do in their daily lives. He is keen to refute the idea that social activity can be understood solely in terms of individual decision-making, or as determined by surpa-individual objective structures. Bourdieu’s notion of the *habitus* can be viewed as a bridge-building exercise across the explanatory gap between two extremes. Importantly, the notion of a habitus can only be understood in relation to the concept of a ‘social field’. According to Bourdieu, a social field is ‘a network, or a configuration, of objective relations between positions objectively defined’. A social field, then, refers to a structured system of social positions occupied by individuals and/or institutions – the nature of which defines the situation for their occupants. This is a social field whose form is constituted in terms of the relations which define it as a field of a certain type. A *habitus* (positioned practices) is a mediating link between individuals’ subjective worlds and the socio-cultural world into which they are born and which they share with others. The power of the habitus derives from the thoughtlessness of habit and habituation, rather than consciously learned rules. The habitus is imprinted and encoded in a socializing process that commences during early childhood. It is inculcated more by experience than by explicit teaching. Socially competent performances are produced as a matter of routine, without explicit reference to a body of codified knowledge, and without the actors necessarily knowing what they are doing (in the sense of being able adequately to explain what they are doing). As such, the *habitus* can be seen as the site of ‘internalization of reality and the externalization of internality.’ Thus social practices are produced in, and by, the encounter between: (1) the *habitus* and its dispositions; (2) the constraints and demands of the socio-cultural field to which the habitus is appropriate or within; and (3) the dispositions of the individual agents located within both the socio-cultural field and the *habitus*. When placed within Bhaskar’s stratified complex social ontology the model we have is as depicted in Figure 1. The explanation of practices will require all three levels. Society, as field of relations, exists prior to, and is independent of, individual and collective understandings at any particular moment in time; that is, social action requires the conditions for action. Likewise, given that behavior is seemingly recurrent, patterned, ordered, institutionalised, and displays a degree of stability over time, there must be sets of relations and rules that govern it. Contrary to individualist theory, these relations, rules and roles are not dependent upon either knowledge of them by particular individuals, or the existence of actions by particular individuals; that is, their explanation cannot be reduced to consciousness or to the attributes of individuals. These emergent social forms must possess emergent powers. This leads on to arguments for the reality of society based on a causal criterion. Society, as opposed to the individuals that constitute it, is, as Foucault has put it, ‘a complex and independent reality that has its own laws and mechanisms of reaction, its regulations as well as its possibility of disturbance. This new reality is society…It becomes necessary to reflect upon it, upon its specific characteristics, its constants and its variables’.

#### Pragmatic approaches to limit violence are good — the alt causes war even if it isn’t a total renunciation of violence

**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](http://link.springer.com/content/pdf/10.1007/s11406-013-9461-2.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.

#### No link – we make it more difficult to fight war. The information derived from interrogation of detainees fuels targeted killing operations, but removing this source of information would decrease the amount of violence that occurs.

#### Perm — do the aff and endorse pacifism — all their links boil down to omission — the perm resolves those.

#### 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 found in Bosnia and even, for all its failings, in the operation in Somalia.

#### They have no alternative standing against war. Our aff attempts to solve global peace, even if we don’t solve, that’s surely a stand against war.

#### 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.

### Anthro

1) No link

2) Perm: do both

3) War hurts all species – it’s pretty inevitable that war would hurt more than just humans.

4) They have no alternative standing against war

#### Perm do the plan and the alternative – it’s more productive to use human-centered logic to convince institutions to stop destroying the environment, the k cedes the political

Sapontzis, ’95 (S. F., California State University, Hayward, “The Nature of the Value of Nature”, spring 1995, <http://ejap.louisiana.edu/EJAP/1995.spring/sapontzis.1995.spring.html>)

[5] Finally, if the motivating concern about the value of nature really is practical, it must be political. **In order to overcome the environmental crisis,** we must convince peoples and governments **to change their behaviors and institutions in the ways necessary to achieve that end**. **If** the peoples and **governments which are devastating nature are anthropocentric**, **then environmentally enlightened anthropocentric arguments have** an immediate **relevance to political debates concerning environmentally significant practice**s. In contrast**,** arguments employing ideas **of the overriding, objective** value of nature are politically irrelevant **until these anthropocentric**, **nature-devastating** peoples and **governments come to believe that nature has such value**. While neither task is easy, convincing peoples and governments to change their fundamental value systems seems a far more problematic and time-consuming task than convincing them that continuing their nature-devastating practices is contrary to their anthropocentric values. Especially in a time of crisis, pursuing the less problematic and time-consuming course of argument is the course to take to make a real, political difference. Consequently, the practical motivation of overcoming the environmental crisis does not direct us to establish the overriding, objective value of nature; rather, it directs us to develop politically compelling, anthropocentric arguments for environmentalism.

#### Perm do the plan and reject anthropocentrism in all other instances – our ecology ethic is good, it shouldn’t be rejected

**Hwang**, **03**. Kyung-sig, Professor in the Department of Philosophy at Seoul National University. “Apology for Environmental Anthropocentrism,” Asian Bioethics in the 21st Century, <http://eubios.info/ABC4/abc4304.htm>.

The third view, which will be defended here, is that there is no need for a specifically ecological ethic to explain our obligations toward nature, that our moral rights and duties can satisfactorily be explained in terms of traditional, human-centered ethical theory.[[4]](http://eubios.info/ABC4/abc4304.htm#4) In terms of this view, ecology bears on ethics and morality in that it brings out the far-reaching, extremely important effects of man's actions, that much that seemed simply to happen-extinction of species, depletion of resources, pollution, over rapid growth of population, undesirable, harmful, dangerous, and damaging uses of technology and science - is due to human actions that are controllable, preventable, by men and hence such that men can be held accountable for what occurs. Ecology brings out that, often acting from the best motives, however, simply from short-sighted self-interest without regard for others living today and for those yet to be born, brings about very damaging and often irreversible changes in the environment, changes such as the extinction of plant and animal species, destruction of wilderness and valuable natural phenomena such as forests, lakes, rivers, seas. Many reproduce at a rate with which their environment cannot cope, so that damage is done, to and at the same time, those who are born are ill-fed, ill-clad, ill-sheltered, ill-educated. Moralists concerned with the environment have pressed the need for a basic rethinking of the nature of our moral obligations in the light of the knowledge provided by ecology on the basis of personal, social, and species prudence, as well as on general moral grounds in terms of hitherto unrecognized and neglected duties in respect of other people, people now living and persons yet to be born, those of the third world, and those of future generation, and also in respect of preservation of natural species, wilderness, and valuable natural phenomena. Hence we find ecological moralists who adopt this third approach, writing to the effect that concern for our duties entail concern for our environment and the ecosystems it contains. Environmental ethics is concerned with the moral relation that holds between humans and the natural world, the ethical principles governing those relations determine our duties, obligations, and responsibilities with regard to the earth's natural environment and all the animals and plants inhabit it. A human-centered theory of environmental ethics holds that our moral duties with respect to the natural world are all ultimately derived from the duties we owe to one another as human beings. It is because we should respect the human rights, or should protect and promote the well being of humans, that we must place certain constraints on our treatment of the earth's environment and its non-human habitants.

Perm sever the reps – the disad justifies war to protect human rights through hegemony – means that the DA should hold them accountable to the discourse used in the 1nc

#### Either the alternative is strong enough to overcome all instances of capitalism or it can’t solve all residual links.

**Anthropocentrism is inevitable – history proves**

**Sowers ’02** [George F. Sowers Jr., Lockheed Martin Astronautics, April 2002, The Transhumanist Case for Space, pgs. 6-7, JFang**]//Sorry for the gendered language**

**Man is a prodigious consumer of resources. From energy to minerals, from food to living space, the great bounty of our home planet is being depleted at ever increasing rates. Yet, this trend represents more than mere wastefulness. The history of humanity is one of ever increasing physical power. That we seek ever increasing power is one of the fundamental features of our species, and one of the keys to our success.** Unfortunately, **increasing power as it is utilized, generally leads to increasing demands for resources**. After all, in a Newtonian sense, power is simply the rate of energy expenditure. **The trends toward ever increasing resource utilization are easy to recognize, especially in the modern world where such statistics are actually recorded.** For example, per capita energy consumption in America has increased many-fold in the last 100 years even though enhancements in energy efficiency have slowed that increase in over the last 20 years or so. The standard of living enjoyed by a country can generally be related to per capita energy consumption and by this measure America has the highest standard of living in the world. Now I take it as given that higher standards of living are more desirable, and indeed, higher standards of living are consistent with transhumanist objectives. As I have argued above, we desire not just longer life, but better life.

#### No uniqueness to co-option - in the squo equality is already co-opted by elites to create a violent police order - there’s only a risk that our aff reverses hierarchy