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#### Interpretation – A restriction limits allowable action

Oxford Advanced Learner’s Dictionary – 2013, <http://oald8.oxfordlearnersdictionaries.com/dictionary/restriction>

restriction NOUN

1 [countable]

a rule or law that limits what you can do or what can happen

import/speed/travel, etc. restrictions

restriction on something to impose/place a restriction on something

The government has agreed to lift restrictions on press freedom.

There are no restrictions on the amount of money you can withdraw.

2 [uncountable]

the act of limiting or controlling somebody/something

sports clothes that prevent any restriction of movement

A diet to lose weight relies on calorie restriction in order to obtain results.

3 [countable]

a thing that limits the amount of freedom you have

the restrictions of a prison

#### War power is the power to conduct war successfully

HIRABAYASHI v. UNITED STATES - SUPREME COURT - June 21, 1943, Decided, 320 U.S. 81; 63 S. Ct. 1375; 87 L. Ed. 1774; 1943 U.S. LEXIS 1109

The war power of the national government is "the power to wage war successfully." See Charles Evans Hughes, War Powers Under the Constitution, 42 A. B. A. Rep. 232, 238.It extends to every matter and activity so related to war as substantially to affect its conduct and progress. The power is not restricted to the winning of victories in the field and the repulse of enemy forces. It embraces every phase of the national defense, including the protection of war materials and the members of the armed forces from injury and from the dangers which attend the rise, prosecution and progress of war. Prize Cases, supra; Miller v. United States, 11 Wall. 268, 303-14; Stewart v. Kahn, 11 Wall. 493, 506-07; Selective Draft Law Cases, 245 U.S. 366; McKinley v. United States, 249 U.S. 397; United States v. Macintosh, 283 U.S. 605, 622-23. HN4Go to this Headnote in the case.Since the Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the selection of the means for resisting it. Ex parte Quirin, supra, 28-29; cf. Prize Cases, supra, 670; Martin v. Mott, 12 Wheat. 19, 29. Where, as they did here, the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.

### DA

#### The aff is an internal link turn to the DA – a strong causes developing democracies to develop more like autocracies, which risks war to a larger degree. Seperation of powers solves peace better.

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

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

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

#### Executive 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.

#### Their DA relies on an outmoded theory of IR—prefer the turn

Knowles 9 [Spring, 2009, Robert Knowles is a Acting Assistant Professor, New York University School of Law, “American Hegemony and the Foreign Affairs Constitution”, ARIZONA STATE LAW JOURNAL, 41 Ariz. St. L.J. 87]

How should the balance of power in the world affect the separation of powers under the U.S. Constitution? The conventional approaches to this question rely on an outmoded view of geopolitics. This Article offers a new model for assessing the courts' appropriate role in foreign affairs. American courts treat foreign affairs issues as unique and requiring very strong, sometimes absolute, deference to the Executive. n1 These "special deference" doctrines are a swamp of under-justification and inconsistent application. n2 But when courts and scholars do seek to justify special deference in foreign affairs, they usually resort to received wisdom about superior executive branch competence - attributes such as speed, flexibility, secrecy, and uniformity - contrasted with judicial incompetence. n3 In the [\*90] years since 9/11, in particular, these pragmatic arguments have been the weapon of choice for defenders of special deference. n4 The courts are, apparently, bringing a knife to a gunfight. n5 Why do foreign affairs demand that the executive branch enjoy vast discretion? The courts' view of their own competence has been shaped by America's role in the world. There is a deep, if usually unarticulated, connection between the assumed need for special deference and a popular theory of international relations known as realism. Realism depicts an anarchic international realm, populated only by nation-states, and dominated by roughly co-equal great powers carefully balancing one another. n6 Executive competences are required to handle this dangerous and unstable external environment. n7 This classic realist model of comparative institutional competence seemed appropriate when America was one of several, or even two, great powers. But even then, importing international relations ("IR") realism into constitutional foreign affairs doctrine was a recipe for chaos. Realpolitik teaches that the state must do whatever is necessary to protect itself. n8 But how can courts successfully balance this overriding principle against other constitutional values such as the protection of liberty? Moreover, the post-Cold War world has provoked a crisis in realism. n9 The United States is a global hegemon. It is unrivaled in its ability to deploy force throughout the globe, and it provides "public goods" for the world - such as the protection of sea lanes - in exchange for broad acceptance of [\*91] U.S. leadership. n10 Although realism predicts counter-balancing, no great power or coalition has yet emerged to challenge America's predominance. And despite a new round of predictions about American decline, the U.S. is still projected to have by far the largest economy and the largest military for decades. n11 Political scientists have struggled to define this American-led system, but courts and scholars of constitutional law have largely ignored it. n12 Instead, most debates about special deference have simply accepted outmoded classic realist assumptions that became conventional wisdom in the 1930s and 40s. This Article offers a new model for assessing appropriate judicial deference in foreign affairs that takes account of American-led order. By maintaining consistent interpretation of U.S. and international law over time and providing virtual representation for other nations and non-citizens, U.S. courts bestow legitimacy on the acts of the political branches, provide public goods for the world, and increase America's soft power - all of which assist in maintaining the stability and legitimacy of the American-led hegemonic order. This "hegemonic" model substantially eliminates the problematic deference gap between foreign and domestic cases and enables courts to appropriately balance foreign affairs needs against other separation-of-powers goals by "domesticating" foreign affairs deference. The hegemonic model also has explanatory and predictive value. In four recent cases addressing habeas claims by alleged enemy combatants, the Supreme Court rejected special deference. n13 It refused to defer to the executive branch [\*92] interpretations of foreign affairs statutes and international law, and even asserted military exigencies. The hegemonic model justifies this recent rejection of special deference and explains why it could augur increased judicial involvement in foreign affairs. The interpretive scope here is limited. The hegemonic model is functional but concerns overall governmental effectiveness in foreign affairs, not the appropriate allocation of power with respect to any particular policy. Nor do I analyze the appropriate allocation of foreign affairs powers between the President and Congress, although the hegemonic model has many implications for this relationship as well. Finally, I do not address formalist - e.g., originalist - arguments for or against special deference. The hegemonic model provides insights that should be considered in conjunction with the teachings of text, structure, and history. n14 This Article proceeds in four parts. In Part I, a background section, I explain functionalism's centrality to debates about the separation of powers in foreign affairs. I then describe the major special deference doctrines. I conclude by briefly recounting the Supreme Court's refusal to apply special deference in the enemy combatant cases. Part II explains the origins of the functional justifications for special deference. It limns the major tenets of international relations realism as it had been traditionally understood prior to the post-Cold War era. Realists describe the international realm as inherently de-centralized and unstable. n15 Nation-states, rather than individuals or institutions, are the only viable units. States are identical in terms of their function - like "billiard balls colliding" n16 - and the only salient difference among them is their relative power. n17 Great powers determine the structure of the system, and enforceable international law merely reflects their interests. n18 A lay version [\*93] of realism became incorporated into constitutional foreign relations law largely through the landmark 1936 decision, Curtiss-Wright. n19 This completed the transformation to an executive-centered understanding of the foreign affairs Constitution driven by America's acquisition of an empire and rise to great power status. Part III comprehensively maps the functional justifications to corresponding realist tenets, and explains how these realist assumptions create more problems than they solve. First, this classic realist model does not accurately depict the actual functioning of the branches in foreign affairs. For example, although foreign relations is said to require that the United States "speak with one voice," Congress and the President often conflict on foreign policy. Second, as a descriptive matter, the realist model encounters boundary problems because globalization will continue to blur the distinction between domestic and foreign affairs issues. Third, as a normative matter, the realist model, if accepted in full, would require total deference: it tells us very little about how best to balance foreign policy needs against other constitutional values. Part IV describes the current international order and introduces the hegemonic model, which I construct using insights from three mainstream preeminent-power theories: unipolarity, hegemony, and empire. n20 The hegemonic model assumes that (1) the hegemon plays a major role in determining enforceable international norms; (2) the system is durable and stable; and that (3) the stability of the system depends not only on the hegemon's military predominance, but also on its provision of "public goods" for the system as a whole and the perceived legitimacy of the order. The hegemonic model aligns the assessment of institutional competences more closely with the positive reality of the international system. It brings more coherence to the courts' treatment of foreign affairs by largely "domesticating" it. And the hegemonic model reveals additional functional justifications for greater judicial involvement in foreign affairs controversies. Part IV concludes by using the hegemonic model to explain and justify the results in the enemy combatant cases. In the Post-9/11 Era, the United States faces serious threats from transnational terrorist groups such as al-Qaeda, rogue states, and the proliferation of WMDs, but these phenomena will not themselves alter the hegemonic structure of the international system. When they are properly viewed as problems of hegemonic [\*94] management rather than as some new form of realist balancing, they cannot, in most situations, justify special deference.

### 2AC Congress CP

#### Judicial action is key to judicial globalization

Flaherty—executive

Key to Modeling—Suto, CJA, and Kersch

Cleveland – courts legitimate govt policy

#### Habeas is uniquely key—respect for legal norms is a key avenue for legitimacy and the perception of the great writ is intimately tied to that—that’s Sidhu

#### Boumediene’s credibility is key—the perception of Boumediene restored faith in the effectiveness of US constitutional checks—that’s Knowles

#### Court inactivism causes congress to fear the executive will manipulate their authorizations and means they go from restricted authorizations to no authorizations at all—that slays executive authority

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

If adopted, one of the most dangerous byproducts of Posner and Sunstein's theory may be to weaken, as a practical matter, the ability of Congress to legislate meaningful constraints on executive power. Members of Congress, when enacting legislation, would now have to contemplate whether any statutory ambiguities would be used to permit the President to violate longstanding treaty commitments. n170 The result of their proposal, ex ante, may be to instill trepidation in Congress about enacting legislation in the first place.¶ For example, imagine how Congress, under the Posner and Sunstein model, would react to an administration's request to pass a Use of Force Resolution. Members would have to fear that such legislation could be used by the President in the future as a blank check to permit him to disregard international law. The upshot of such fear is that they might not pass such a statute at all. Instead, some would predictably embrace theories about the [\*1276] "inherent" right of the President to use military force in times of crisis; others would simply stay quiet and let the President use force. The alternative to legislative silence - that Congress would have to enact such laws with such a degree of specificity (for example, no domestic spying, no torture, no indefinite detentions) - would demand such high foresight and political maneuvering that it would often be safer for Congress to decide to do nothing.¶ The risk of furthering congressional inactivity exists even with contemporary presidential interpretations of the AUMF. Congress already has to fear, with or without Chevron deference, that the executive will distort its statutes to permit activities that it did not intend. n171 But what stops that risk from flowering today is the courts - which have reassured Congress that it can pass something like the AUMF and not have it interpreted in ludicrous ways by the executive. n172 In this respect, cases such as Rasul v. Bush n173 and Hamdan are not only democracy-forcing ex post in that they compel Congress to act to give the executive additional powers in those specific areas; they are also democracy-forcing ex ante. They reassure the legislature that it can pass laws without having them subject to wild-eyed, self-interested interpretations by the executive.¶ By contrast, Posner and Sunstein's proposal would encourage executive branch gamesmanship and might lead, ex ante, to fewer congressional enactments in the area. Congress would have to fear the risk of unwittingly authorizing a variety of activities that it could not adequately foresee, and it would therefore stay silent. The result would be to further the democratic deficit that already plagues the nation in the legal war on terror - in which the [\*1277] President has been acting without the explicit support of the legislature. This presidential netherworld is bad for the reputation of the United States, as well as for our deliberative democracy.¶ There is no way to "prove" that such a result would follow from Posner and Sunstein's proposal short of adopting it and watching what would unfold. But the abdication of Congress for the five years after the September 11, 2001, attacks in many of the key decisions in this realm suggests that strong deference claims might make it harder to enact legislation. That view gains some support from structural principles as well. After all, our Founders set up the tripartite government to make it difficult for government to take action that deprives people of their rights. Short of an emergency that precluded Congress from acting, the concurrence of any one branch alone in such a scheme was not considered enough to change the status quo baseline. n174 Instead, Congress had to pass a law, the President had to enforce the law, and the courts had to uphold the law. All three branches thus had to agree under this constitutional framework - a key feature of the document that led to greater deliberation and dialogue among the branches.¶ Posner and Sunstein would flip that standard assumption. Under their view, Congress would necessarily have to fear that its authorizing legislation, in a world of Chevron deference, could be used for radically unintended purposes. It would be entirely natural for the legislative body, faced with such a dilemma, to be led down the path of doing nothing at all. This problem does not manifest itself as much in the domestic context, as there Congress has to act before the President can change the status quo. In the foreign policy arena, however, Congress knows that the President can always use his "inherent authority" to use military force regardless of what it does, and it may therefore find it safer to stay silent than to legislate.¶ Posner and Sunstein respond to these arguments by suggesting that their proposal would force more, not less, legislative restriction over the President. n175 They surmise that a future Congress "might issue a more detailed AUMF, one that more carefully described the entities against which force could be used and the limits under which the President might operate, rather than leaving those issues to a President it did not trust or to courts that had no expertise in the area." n176 Their last words are just one tip-off among many that this claim is a weak one. After all, if Congress didn't trust the courts, the status quo provides [\*1278] it plenty of opportunities to craft a more calibrated AUMF. But of course Congress hasn't done that, and the reasons have little to do with distrust of the courts. The reason why a more detailed AUMF is only conceivable in the University of Chicago Roundtable, as opposed to the halls of Congress, is that Congress will never be able, as a practical matter, to legislate with the necessary prospectivity. It did not foresee the National Security Agency (NSA) program or military commissions in the 2001 AUMF, and it is unlikely to be able to foresee the next round of programs either. (Recall that the executive branch has repeatedly justified its failure to inform Congress of the NSA program on the ground that even debate about the program would reveal details of our intelligence activities that Congress and our enemies do not currently know.) n177

#### Doesn’t solve Judicial Globalism

#### Separation of Powers—judicial action is key restore the balance with the executive by asserting judicial strength and countering perceptoins judicial irrelevance—that’s Milko and Vaughn and Williams—the impact is our Flaherty evidence and CJA evidence—prevents stable democratic transitions globally

#### Globalization—only the plan is modeled—Judiciary’s participate in transnational conferences and interactions and are looked to by foreign governments—that’s Flaherty, Suto, and Kersch—those are key to encourage judicial independence and strength in new states

#### Legislative action fails—isn’t globalized and doesn’t check the executive

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]

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] 3.

#### Perm do both

#### Perm do the CP

### 2AC Security

#### The aff resolves the worst example of the link – ending indefinite detention is *preventative security* because it structurally reduces the magnitude and risk of war through global liberal norms – the alternative is *reactive security* which responds to flash-point crises through Iraq-style intervention or sanctions on proliferating countries – causes greater levels of conflict and structural violence

#### **That’s most ethical – failure of preventative action and predictions drives structural violence and inequality, only actions that act to preserve future generations can resolve power relations**

Kurasawa‘4,

(Fuyuki, Assistant Prof. of Sociology @ York University, Cautionary Tales, Constellations Vol. 11, No. 4, Blackwell Synergy)

In the previous section, I described how the capacity to produce, disseminate, and receive warning signals regarding disasters on the world stage has developed in global civil society. Yet the fact remains that audiences may let a recklessness or insouciance toward the future prevail, instead of listening to and acting upon such warnings. There is no doubt that the short-sightedness and presentism are strong dynamics in contemporary society, which is enveloped by a “temporal myopia” that encourages most individuals to live in a state of chronological self-referentiality whereby they screen out anything that is not of the moment.22 The commercial media, advertising, and entertainment industries are major contributors to this “tyranny of real time”23 that feeds a societal addiction to the ‘live’ and the immediate while eroding the principle of farsightedness. The infamous quip attributed to Madame de Pompadour, ‘après nous, le déluge,’ perfectly captures a sense of utter callousness about the future that represents one of presentism’s most acute manifestations. Two closely related notions underlie it: the belief that we should only concern ourselves with whether our actions, or lack thereof, have deleterious consequences visible to us in the short-to medium-term (temporally limited responsibility); and sheer indifference toward the plight of those who will come after us (generational self-centeredness). Substantively, the two are not much different because they shift the costs and risks of present-day decisions onto our descendants. “The crisis of the future is a measure of the deficiency of our societies, incapable as they are of assessing what is involved in relationships with others,” Bindé writes. “This temporal myopia brings into play the same processes of denial of others as social shortsightedness. The absence of solidarity in time between generations merely reproduces selfishness in space within the same generation.”24 Thus, to the NIMBY (‘not-in-my-back-yard’) politics of the last few decades can be added the ‘not-in-my-lifetime’ or ‘not-to-my-children’ lines of reasoning. For members of dominant groups in the North Atlantic region, disasters are something for others to worry about – that is, those who are socio-economically marginal, or geographically and temporally distant. The variations on these themes are numerous. One is the oft-stated belief that prevention is a luxury that we can scarcely afford, or even an unwarranted conceit. Accordingly, by minimizing the urgency or gravity of potential threats, procrastination appears legitimate. Why squander time, energy, and resources to anticipate and thwart what are, after all, only hypothetical dangers? Why act today when, in any case, others will do so in the future? Why not limit ourselves to reacting to cataclysms if and when they occur? A ‘bad faith’ version of this argument goes even further by seeking to discredit, reject, or deny evidence pointing to upcoming catastrophes. Here, we enter into the domain of deliberate negligence and “culpable ignorance,”25 as manifest in the apathy of US Republican administrations toward climate change or the Clinton White House’s disengenuous and belated responses to the genocides in ex-Yugoslavia and Rwanda. At another level, instrumental-strategic forms of thought and action, so pervasive in modern societies because institutionally entrenched in the state and the market, are rarely compatible with the demands of farsightedness. The calculation of the most technically efficient means to attain a particular bureaucratic or corporate objective, and the subsequent relentless pursuit of it, intrinsically exclude broader questions of long-term prospects or negative side-effects. What matters is the maximization of profits or national self-interest with the least effort, and as rapidly as possible. Growing risks and perils are transferred to future generations through a series of trade-offs: economic growth versus environmental protection, innovation versus safety, instant gratification versus future well-being. What can be done in the face of short-sightedness? Cosmopolitanism provides some of the clues to an answer, thanks to its formulation of a universal duty of care for humankind that transcends all geographical and socio-cultural borders. I want to expand the notion of cosmopolitan universalism in a temporal direction, so that it can become applicable to future generations and thereby nourish a vibrant culture of prevention. Consequently, we need to begin thinking about a farsighted cosmopolitanism, a chrono-cosmopolitics that takes seriously a sense ¶ of “intergenerational solidarity” toward human beings who will live in our wake as much as those living amidst us today.26 But for a farsighted cosmopolitanism to take root in global civil society, the latter must adopt a thicker regulative principle of care for the future than the one currently in vogue (which amounts to little more than an afterthought of the non-descript ‘don’t forget later generations’ ilk). Hans Jonas’s “imperative of responsibility” is valuable precisely because it prescribes an ethico-political relationship to the future consonant with the work of farsightedness.27 Fully appreciating Jonas’s position requires that we grasp the rupture it establishes with the presentist assumptions imbedded in the intentionalist tradition of Western ethics. In brief, intentionalism can be explained by reference to its best-known formulation, the Kantian categorical imperative, according to which the moral worth of a deed depends upon whether the a priori “principle of the will” or “volition” of the person performing it – that is, his or her intention – should become a universal law.28 Ex post facto evaluation of an act’s outcomes, and of whether they correspond to the initial intention, is peripheral to moral judgment. A variant of this logic is found in Weber’s discussion of the “ethic of absolute ends,” the “passionate devotion to a cause” elevating the realization of a vision of the world above all other considerations; conviction without the restraint of caution and prudence is intensely presentist.29 By contrast, Jonas’s strong consequentialism takes a cue from Weber’s “ethic of responsibility,” which stipulates that we must carefully ponder the potential impacts of our actions and assume responsibility for them – even for the incidence of unexpected and unintended results. Neither the contingency of outcomes nor the retrospective nature of certain moral judgments exempts an act from normative evaluation. On the contrary, consequentialism reconnects what intentionalism prefers to keep distinct: the moral worth of ends partly depends upon the means selected to attain them (and vice versa), while the correspondence between intentions and results is crucial. At the same time, Jonas goes further than Weber in breaking with presentism by advocating an “ethic of long-range responsibility” that refuses to accept the future’s indeterminacy, gesturing instead toward a practice of farsighted preparation for crises that could occur.30 From a consequentialist perspective, then, intergenerational solidarity would consist of striving to prevent our endeavors from causing large-scale human suffering and damage to the natural world over time. Jonas reformulates the categorical imperative along these lines: “Act so that the effects of your action are compatible with the permanence of genuine human life,” or “Act so that the effects of your action are not destructive of the future possibility of such life.”31 What we find here, I would hold, is a substantive and future-oriented ethos on the basis of which civic associations can enact the work of preventive foresight.

#### pdb

#### Even if security and risk calculation are flawed, engaging in them creates discourse of social welfare and promotes a democratic civic culture that checks political exclusion and loss of value to life

Loader – Criminology Prof at Oxford – 7

(Civilizing Security, Pg. 5)

Faced with such inhospitable conditions, one can easily lapse into fatalistic despair, letting events simply come as they will, or else seek refuge in the consolations offered by the total critique of securitization practices – a path that some critical scholars in criminology and security studies have found all too seductive (e.g. Bigo 2002, 2006; Walters 2003). Or one can, as we have done, supplement social criticism with the hard, uphill, necessarily painstaking work of seeking to specify what it may mean for citizens to live together securely with risk; to think about the social and political arrangements capable of making this possibility more rather than less likely, and to do what one can to nurture practices of collective security shaped not by fugitive market power or by the unfettered actors of (un)civil society, but by an inclusive, democratic politics. Social analysts of crime and security have become highly attuned to, and warned repeatedly of, the illiberal, exclusionary effects of the association between security and political community (Dillon 1996; Hughes 2007). They have not, it should be said, done so without cause, for reasons we set out at some length as the book unfolds. But this sharp sensitivity to the risks of thinking about security through a communitarian lens has itself come at a price, namely, that of failing to address and theorize fully the virtues and social benefits that can flow from members of a political community being able to put and pursue security in common. This, it seems to us, is a failure to heed the implications of the stake that all citizens have in security; to appreciate the closer alignment of self-interest and altruism that can attend the acknowledgement that we are forced to live, as Kant put it, inescapably side-by-side and that individuals simultaneously constitute and threaten one another’s security; and to register the security-enhancing significance and value of the affective bonds of trust and abstract solidarity that political communities depend upon, express and sustain. All this, we think, offers reasons to believe that security offers a conduit, perhaps the best conduit there is, for giving practical meaning to the idea of the public good, for reinventing social democratic politics, even for renewing the activity of politics at all.

#### Rejection of current IR paradigm magnifies hierarchy – emancipation rhetoric gives powerful states a basis for intervention and robs the Third World of agency – traditional security models solve their impacts better

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The following section will briefly raise some questions about the rejection of the old security framework as it has been taken up by the most powerful institutions and states. Here we can begin to see the political limits to critical and emancipatory frameworks. In an international system which is marked by great power inequalities between states, the rejection of the old narrow national interest-based security framework by major international institutions, and the adoption of ostensibly emancipatory policies and policy rhetoric, has the consequence of problematising weak or unstable states and allowing international institutions or major states a more interventionary role, yet without establishing mechanisms by which the citizens of states being intervened in might have any control over the agents or agencies of their emancipation. Whatever the problems associated with the pluralist security framework there were at least formal and clear demarcations. This has the consequence of entrenching international power inequalities and allowing for a shift towards a hierarchical international order in which the citizens in weak or unstable states may arguably have even less freedom or power than before. Radical critics of contemporary security policies, such as human security and humanitarian intervention, argue that we see an assertion of Western power and the creation of liberal subjectivities in the developing world. For example, see Mark Duffield’s important and insightful contribution to the ongoing debates about contemporary international security and development. Duffield attempts to provide a coherent empirical engagement with, and theoretical explanation of, these shifts. Whilst these shifts, away from a focus on state security, and the so-called merging of security and development are often portrayed as positive and progressive shifts that have come about because of the end of the Cold War, Duffield argues convincingly that these shifts are highly problematic and unprogressive. For example, the rejection of sovereignty as formal international equality and a presumption of nonintervention has eroded the division between the international and domestic spheres and led to an international environment in which Western NGOs and powerful states have a major role in the governance of third world states. Whilst for supporters of humanitarian intervention this is a good development, Duffield points out the depoliticising implications, drawing on examples in Mozambique and Afghanistan. Duffield also draws out the problems of the retreat from modernisation that is represented by sustainable development. The Western world has moved away from the development policies of the Cold War, which aimed to develop third world states industrially. Duffield describes this in terms of a new division of human life into uninsured and insured life. Whilst we in the West are ‘insured’ – that is we no longer have to be entirely self-reliant, we have welfare systems, a modern division of labour and so on – sustainable development aims to teach populations in poor states how to survive in the absence of any of this. Third world populations must be taught to be self-reliant, they will remain uninsured. Self-reliance of course means the condemnation of millions to a barbarous life of inhuman bare survival. Ironically, although sustainable development is celebrated by many on the left today, by leaving people to fend for themselves rather than developing a society wide system which can support people, sustainable development actually leads to a less human and humane system than that developed in modern capitalist states. Duffield also describes how many of these problematic shifts are embodied in the contemporary concept of human security. For Duffield, we can understand these shifts in terms of Foucauldian biopolitical framework, which can be understood as a regulatory power that seeks to support life through intervening in the biological, social and economic processes that constitute a human population (2007: 16). Sustainable development and human security are for Duffield technologies of security which aim to create self-managing and self-reliant subjectivities in the third world, which can then survive in a situation of serious underdevelopment (or being uninsured as Duffield terms it) without causing security problems for the developed world. For Duffield this is all driven by a neoliberal project which seeks to control and manage uninsured populations globally. Radical critic Costas Douzinas (2007) also criticises new forms of cosmopolitanism such as human rights and interventions for human rights as a triumph of American hegemony. Whilst we are in agreement with critics such as Douzinas and Duffield that these new security frameworks cannot be empowering, and ultimately lead to more power for powerful states, we need to understand why these frameworks have the effect that they do. We can understand that these frameworks have political limitations without having to look for a specific plan on the part of current powerful states. In new security frameworks such as human security we can see the political limits of the framework proposed by critical and emancipatory theoretical approaches.

#### Transition to the alternative guarantees war – radical changes in existing security architecture collapse threat perception

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In history, the effort to balance power quite often tended to start too late to protect the security of some of the individual states. If the balancing process begins too late, the resulting amount of force necessary to stop an aggressor is often much larger than if the process had been started much earlier. For example, the fate of Czechoslovakia and Poland showed how non-intervention or waiting for the “automatic” working through of the process turned out to be problematic. Power cycle theory could also supplement the structure-oriented nature of the traditional balance of power theory by incorporating an agent-oriented explanation. This was possible through its focus on the relationship between power and the role of a state in the international system. It especially highlighted the fact that a discrepancy between the relative power of a state and its role in the system would result in a greater possibility for systemic instability. In order to prevent this instability from developing into a war, practitioners of international relations were to become aware of the dynamics of changing power and role, adjusting role to power. A statesperson here was not simply regarded as a prisoner of structure and therefore as an outsider to the process but as an agent capable of influencing the operation of equilibrium. Thus power cycle theory could overcome the weakness of theoretical determinism associated with the traditional balance of power. The question is often raised whether government decision-makers could possibly know or respond to such relative power shifts in the real world. According to Doran, when the “tides of history” shift against the state, the push and shove of world politics reveals these matters to the policy-maker, in that state and among its competitors, with abundant urgency. (2) The Issue of Systemic Stability Power cycle theory is built on the conception of changing relative capabilities of a state, and as such it shares the realist assumption emphasizing the importance of power in explaining international relations. But its main focus is on the longitudinal dimension of power relations, the rise and decline of relative state power and role, and not on the static power distribution at a particular time. As a result, power cycle theory provides a significantly different explanation for stability and order within the international system. First of all, power cycle theory argues that what matters most in explaining the stability of the international system or war and peace is not the type of particular international system (Rosecrance, 1963) but the transformation from one system to another. For example, in the 1960s there was a debate on the stability of the international system between the defenders of bipolarity such as Waltz (1964) and the defenders of multi-polarity such as Rosecrance (1966), and Deutsch and Singer (1964). After analyzing five historical occasions since the origin of the modern state system, Doran concluded that what has been responsible for major war was not whether one type of system is more or less conducive to war but that instead systems transformation itself led to war (Doran, 1971). A non-linear type of structural change that is massive, unpredicted, devastating to foreign policy expectation, and destructive of security is the trigger for major war, not the nature of a particular type of international system.

#### A focus on policy is necessary to learn the pragmatic details of powerful institutions – acting without this knowledge is doomed to fail in the face of policy professionalists who make the decisions that actually affect outcomes

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Or we might take Foucault who, at best, has provided us with what may reasonably be described as a very long and eccentric footnote to Nietzsche (I have once been accused, by a Foucaltian true believer, of "gelding" Foucault with other similar remarks). Foucault, who has provided the Left of the late 1960s through the present with such notions as "governmentality," "Limit," "archeology," "discourse" "power" and "ethics," creating or redefining their meanings, has made it overabundantly clear that all of our moralities and practices are the successors of previous ones which derive from certain configurations of savoir and connaisance arising from or created by, respectively, the discourses of the various scientific schools. But I have not yet found in anything Foucault wrote or said how such observations may be translated into a political movement or hammered into a political document or theory (let alone public policies) that can be justified or founded on more than an arbitrary aesthetic experimentalism. In fact, Foucault would have shuddered if any one ever did, since he thought that anything as grand as a movement went far beyond what he thought appropriate. This leads me to mildly rehabilitate Habermas, for at least he has been useful in exposing Foucault's shortcomings in this regard, just as he has been useful in exposing the shortcomings of others enamored with the abstractions of various Marxian-Freudian social critiques. Yet for some reason, at least partially explicated in Richard Rorty's Achieving Our Country, a book that I think is long overdue, leftist critics continue to cite and refer to the eccentric and often a priori ruminations of people like those just mentioned, and a litany of others including Derrida, Deleuze, Lyotard, Jameson, and Lacan, who are to me hugely more irrelevant than Habermas in their narrative attempts to suggest policy prescriptions (when they actually do suggest them) aimed at curing the ills of homelessness, poverty, market greed, national belligerence and racism. I would like to suggest that it is time for American social critics who are enamored with this group, those who actually want to be relevant, to recognize that they have a disease, and a disease regarding which I myself must remember to stay faithful to my own twelve step program of recovery. The disease is the need for elaborate theoretical "remedies" wrapped in neological and multi-syllabic jargon. These elaborate theoretical remedies are more "interesting," to be sure, than the pragmatically settled questions about what shape democracy should take in various contexts, or whether private property should be protected by the state, or regarding our basic human nature (described, if not defined (heaven forbid!), in such statements as "We don't like to starve" and "We like to speak our minds without fear of death" and "We like to keep our children safe from poverty"). As Rorty puts it, "When one of today's academic leftists says that some topic has been 'inadequately theorized,' you can be pretty certain that he or she is going to drag in either philosophy of language, or Lacanian psychoanalysis, or some neo-Marxist version of economic determinism. . . . These futile attempts to philosophize one's way into political relevance are a symptom of what happens when a Left retreats from activism and adopts a spectatorial approach to the problems of its country. Disengagement from practice produces theoretical hallucinations"(italics mine).(1) Or as John Dewey put it in his The Need for a Recovery of Philosophy, "I believe that philosophy in America will be lost between chewing a historical cud long since reduced to woody fiber, or an apologetics for lost causes, . . . . or a scholastic, schematic formalism, unless it can somehow bring to consciousness America's own needs and its own implicit principle of successful action." Those who suffer or have suffered from this disease Rorty refers to as the Cultural Left, which left is juxtaposed to the Political Left that Rorty prefers and prefers for good reason. Another attribute of the Cultural Left is that its members fancy themselves pure culture critics who view the successes of America and the West, rather than some of the barbarous methods for achieving those successes, as mostly evil, and who view anything like national pride as equally evil even when that pride is tempered with the knowledge and admission of the nation's shortcomings. In other words, the Cultural Left, in this country, too often dismiss American society as beyond reform and redemption. And Rorty correctly argues that this is a disastrous conclusion, i.e. disastrous for the Cultural Left. I think it may also be disastrous for our social hopes, as I will explain. Leftist American culture critics might put their considerable talents to better use if they bury some of their cynicism about America's social and political prospects and help forge public and political possibilities in a spirit of determination to, indeed, achieve our country - the country of Jefferson and King; the country of John Dewey and Malcom X; the country of Franklin Roosevelt and Bayard Rustin, and of the later George Wallace and the later Barry Goldwater. To invoke the words of King, and with reference to the American society, the time is always ripe to seize the opportunity to help create the "beloved community," one woven with the thread of agape into a conceptually single yet diverse tapestry that shoots for nothing less than a true intra-American cosmopolitan ethos, one wherein both same sex unions and faith-based initiatives will be able to be part of the same social reality, one wherein business interests and the university are not seen as belonging to two separate galaxies but as part of the same answer to the threat of social and ethical nihilism. We who fancy ourselves philosophers would do well to create from within ourselves and from within our ranks a new kind of public intellectual who has both a hungry theoretical mind and who is yet capable of seeing the need to move past high theory to other important questions that are less bedazzling and "interesting" but more important to the prospect of our flourishing - questions such as "How is it possible to develop a citizenry that cherishes a certain hexis, one which prizes the character of the Samaritan on the road to Jericho almost more than any other?" or "How can we square the political dogma that undergirds the fantasy of a missile defense system with the need to treat America as but one member in a community of nations under a "law of peoples?" The new public philosopher might seek to understand labor law and military and trade theory and doctrine as much as theories of surplus value; the logic of international markets and trade agreements as much as critiques of commodification, and the politics of complexity as much as the politics of power (all of which can still be done from our arm chairs.) This means going down deep into the guts of our quotidian social institutions, into the grimy pragmatic details where intellectuals are loathe to dwell but where the officers and bureaucrats of those institutions take difficult and often unpleasant, imperfect decisions that affect other peoples' lives, and it means making honest attempts to truly understand how those institutions actually function in the actual world before howling for their overthrow commences. This might help keep us from being slapped down in debates by true policy pros who actually know what they are talking about but who lack awareness of the dogmatic assumptions from which they proceed, and who have not yet found a good reason to listen to jargon-riddled lectures from philosophers and culture critics with their snobish disrespect for the so-called "managerial class."