# 1AC

## 1AC—Great Writ

### 1AC Plan

#### The United States federal judiciary should rule that individuals in military detention who have won their habeas corpus hearing cannot be detained.

### 1AC Legitimacy

#### Contention One is Legitimacy

#### The Kiyemba court ruled the right to habeas doesn’t give the power to release a detainee

Milko 12

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

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

#### These rulings make habeas useless—this abdicates their key role

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]

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 where 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.

#### The inability to order release undermines commitment to rule of law and breeds global resentment

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[December 2009, Hope Metcalf is Director of the Arthur Liman Public Interest Program and teaches a clinic on prisoners’ rights in the United States. She formerly directed the National Litigation Project of the Allard K. Lowenstein International Human Rights Clinic, which was founded in 2002 to respond to infringements on civil liberties and human rights arising out of U.S. counterterrorism policy, “BRIEF OF INTERNATIONAL LAW EXPERTS AS AMICI CURIAE IN SUPPORT OF PETITIONERS”, http://www.law.yale.edu/documents/pdf/cglc/Kiyamba\_v\_Obama\_brief.pdf]

Since the mid-1970s, the United States has compiled annual reports on the human rights practices of other countries. By law, the reports reflect the Secretary of State’s assessment of the “status of internationally recognized human rights” in the states under review.23 These reports have consistently criticized foreign countries for failing to provide effective judicial review of detention. They have further made clear that the United States considers courts’ capacity to order release essential to effective judicial review. They therefore provide powerful evidence of the importance of the shared international norm requiring release upon a finding that a detention is unlawful. If the United States now fails to live up to this shared norm, it will not only breed resentment but will also undermine its ability to encourage other countries to follow basic principles of international law in the future. In evaluating other countries’ human rights practices, the United States has considered whether habeas corpus review is not simply available but is effective. The United States has criticized the Philippines for providing formal habeas corpus review but not making that process “effectively available to persons detained by the regime. . . .” See 1 Dep’t of State, Country Reports on Human Rights Practices 261 (1978). It has similarly criticized Cuba for “theoretically provid[ing] a safeguard against unlawful detention” but failing to provide any effective remedy. See 13 Dep’t of State, Country Reports on Human Rights Practices for 1988, at 520 (1989). The United States has criticized many other countries for providing ineffective habeas review, including Paraguay, 9 Dep’t of State, Country Reports on Human Rights Practices for 1984, at 637 (1985) (“the right of habeas corpus . . . can be ignored by government officials.”), Ethiopia, id. at 110 (“A writ of habeas corpus on [Ethiopia]’s statutes has not been successfully invoked in any known case.”), Ghana 8 Dep’t of State, Country Reports on Human Rights Practices for 1984, at 150 (1984) (“There has been no instance of the successful exercise of the right of habeas corpus.”), Afghanistan, 10 Dep’t of State, Country Report on Human Rights Practices for 1985, at 1166 (1986) (“nor is the right of habeas corpus respected”), and Bolivia, 4 Dep’t of State, Country Reports on Human Rights Practices for 1980, at 351 (1981) (“The Garcia Meza regime routinely violates constitutional provisions for habeas corpus.”). And the United States regularly criticizes countries for failing to provide effective judicial review for all detainees. See, e.g., 27 Dep’t of State, Country Reports on Human Rights Practices for 2002, at 345-46 (2003) (noting Liberia had incarcerated “an unknown number of persons . . . during [a] state of emergency as ‘illegal combatants,’ . . . and denied habeas corpus”); 13-A Dep’t of State, Country Reports on Human Rights Practices for 1988, at 844 (1989) (“[H]abeas corpus . . . does not apply to those [in South Korea] charged with violating the National Security Law.”). The United States’ criticisms of other countries further makes clear that it regards the power of the courts to order release as essential to effective judicial review. The United States criticized Ghana for responding to writs of habeas corpus by imposing “ex post facto preventive custody orders barring their release.” 10 Dep’t of State, supra, at 129. The United States similarly criticized Nepal for failing to release a prisoner after the Supreme Court issued a writ of habeas corpus. 27-B Dep’t of State, Country Reports on Human Rights Practices for 2002, at 2284 (2003). In discussing Zambia’s detention policies, the United States noted that “[h]abeas corpus is, in principle, available to persons detained under presidential order, but the Government is not obliged to accept the recommendation of the review tribunal.” 10 Dep’t of State, supra, at 383 (1986). The United States criticized Gambia when its “[p]olice ignored a December 31 court-ordered writ of habeas corpus to release [Gambian National Assembly Majority Leader Baba] Jobe and his co-detainees.” 28 Dep’t of State, Country Reports on Human Rights Practices for 2003, at 241 (2004). The United States has held other countries to account for their failure to live up to “internationally recognized human rights” including effective judicial review of detention. In reviewing the practices of other states, the United States has not regarded as sufficient a formal process allowing detainees to challenge their detention in court. The courts reviewing detention must also have the capacity to order release. The United States should now live up to its own high standards – standards it successfully fought to codify in international law and that it has long sought to encourage the rest of the world to follow.

#### Perception of US provision of habeas rights is critical to US soft power — court action is key

Sidhu 11

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The “Great Wall” The writ of habeas corpus enables an individual to challenge the factual basis and legality of his detention,91 activating the judiciary’s review function in the separation of powers scheme.92 Because the writ acts to secure individual liberty by way of the judicial checking of unlawful executive detentions, the writ has been regarded as a bulwark of liberty. The Supreme Court has observed, for example, that “There is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus . . . .”93 The writ is seen as a vital aspect of American jurisprudence, and an essential element of the law since the time of the Framers.94 The United States is a conspicuous actor in the world theater, subject to the interests and inclinations of other players, and possessing a similar, natural desire to shape the global community in a manner most favorable to its own objects. The tendency to attempt to inﬂuence others is an inevitable symptom of international heterogeneity and, at present, the United States is mired in an epic battle with fundamentalists bent on using terrorism as a means to repel,95 if not destroy, America.96 American success in foreign policy depends on the internal assets available to and usable by the United States, including its soft power. The law in America is an aspect of its national soft power. In particular, the moderates in the Muslim world—the intended audience of America’s soft power— may ﬁnd attractive the American constitutional system of governance in which 1) the people are the sovereign and the government consists of merely temporary and recallable agents of the people, 2) federal power is diffused so as to diminish the possibility that any branch of the government, or any of them acting in tandem, can infringe upon the liberty of the people, 3) structural protections notwithstanding, the people are entitled to certain substantive rights including the right to be free of governmental interference with respect to religious exercise, 4) the diversity of interests inherent in its populace is considered a critical safeguard against the ability of a majority group to oppress the minority constituents, 5) the courts are to ensure that the people’s rights to life, liberty, and property are not abridged, according to law, by the government or others, and 6) individuals deprived of liberty have available to them the writ of habeas corpus to invoke the judiciary’s checking function as to executive detention decisions. The Constitution, in the eyes of Judge Learned Hand, is “the best political document ever made.”97 If the aforementioned constitutional principles are part of the closest approximation to a just and reasoned society produced by man, surely they may have some persuasive appeal to the rest of the world, including moderate Muslims who generally live in areas less respectful of minority rights and religious pluralism. Such reverence is to be expected and warranted only if the United States has remained true to these constitutional principles in practice, and in particular, in its behavior in the aftermath of the 9/11 attacks, when national stress is heightened and the option of deviating from such values in favor of an expedient “law of necessity” similarly tempting.98 The extent to which the United States has remained true to itself as a nation of laws—and thus may credibly claim such legal soft power—is the subject of the next section. II. THE COURTS AND SOFT POWER The Judiciary In Wartime The United States has been charged with being unfaithful to its own laws and values in its prosecution of the post-9/11 campaign against transnational terrorism. With respect to its conduct outside of the United States, following 9/11, America has been alleged to have tortured captured individuals in violation of its domestic and international legal obligations,99 and detained individuals indeﬁnitely without basic legal protections.100 Closer to home, the United States is thought to have proﬁ led Muslims, Arabs, and South Asians in airports and other settings,101 conducted immigration sweeps targeting Muslims,102 and engaged in mass preventative detention of Muslims in the United States,103 among other things. These are serious claims. The mere perception that they bear any resemblance to the truth undoubtedly impairs the way in which the United States is viewed by Muslims around the world, including Muslim-Americans, and thus diminishes the United States’ soft power resources.104 The degree to which they are valid degrades the ability of the United States to argue persuasively that it not only touts the rule of law, but exhibits actual ﬁdelity to the law in times of crisis. These claims relate to conduct of the executive and/or the legislature in the aftermath of the 9/11 attacks. This Article is concerned, however, with the judiciary, that is whether the courts have upheld the rule of law in the post-9/11 context—and thus whether the courts may be a source of soft power today (even if the other branches have engaged, or are alleged to have engaged, in conduct that is illegal or unwise). As to the courts, it is my contention that the judiciary has been faithful to the rule of law after 9/11 and as such should be considered a positive instrument of American soft power. Prior to discussing post-9/11 cases supporting this contention, it is important to provide a historical backdrop to relationship between the courts and wartime situations because judicial decision-making in cases implicating the wars in Afghanistan and Iraq does not take occur on a blank slate, despite the unique and modern circumstances of the post-9/11 conﬂ ict.

#### Judicial action clarifying a meaningful right to habeas is key

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]

The Bush Administration's detainee policy made clear that - due to America's power - the content of enforceable international law applicable to the detainees would largely depend on interpretation by the U.S. government. Under the classic realist paradigm, international law is less susceptible to judicial comprehension because it cannot be taken at face value; its actual, enforceable meaning depends on ever-shifting political dynamics and complex relationships among great powers. But in a hegemonic system, while enforceable international legal norms may still be political, their content is heavily influenced by the politics of one nation - the United States. n412 As an institution of that same government, the courts are well-positioned to understand and interpret international law that has been incorporated into U.S. law. Because the courts have the capacity to track international legal norms, there was no longer a justification for exceptional deference to the Administration's interpretation of the Geneva Conventions as applied to the detainees. Professors Posner and Sunstein have argued for exceptional deference on the ground that, unless the executive is the voice of the nation in foreign affairs, other nations will not know whom to hold accountable for foreign policy decisions. n413 But the Guantanamo litigation demonstrated that American hegemony has altered this classic assumption as well. The [\*154] transparent and accessible nature of the U.S. government made it possible for other nations to be informed about the detainee policy and, conceivably, to have a role in changing it. The Kuwaiti government hired American attorneys to represent their citizens held at Guantanamo. n414 In the enemy combatant litigation, the government was forced to better articulate its detainee policies, justify the detention of each detainee, and permit attorney visits with the detainees. n415 Other nations learned about the treatment of their citizens through the information obtained by attorneys. n416 Although the political climate in the U.S. did not enable other nations to have an effect on detainee policy directly - and Congress, in fact, acted twice to limit detainees' access to the courts n417 - this was an exceptional situation. Foreign governments routinely lobby Congress for favorable foreign affairs legislation, and are more successful with less politically-charged issues. n418 Even "rogue states" such as Myanmar have their lobbyists in Washington. n419 In addition, foreign governments facing unfavorable court decisions can and do appeal or seek reversal through political channels. n420 The accessibility and openness of the U.S. government is not a scandal or weakness; instead, it strengthens American hegemony by giving other nations a voice in policy, drawing them into deeper relationships that serve America's strategic interests. n421 In the Guantanamo litigation, the courts served as an important accountability mechanism when the political branches were relatively unaccountable to the interests of other nations. The hegemonic model also reduces the need for executive branch flexibility, and the institutional competence terrain shifts toward the courts. The stability of the current U.S.-led international system depends on the ability of the U.S. to govern effectively. Effective governance depends on, among other things, predictability. n422 G. John Ikenberry analogizes America's hegemonic position to that of a "giant corporation" seeking foreign investors: "The rule of law and the institutions of policy making in a democracy are the political equivalent of corporate transparency and [\*155] accountability." n423 Stable interpretation of the law bolsters the stability of the system because other nations will know that they can rely on those interpretations and that there will be at least some degree of enforcement by the United States. At the same time, the separation of powers serves the global-governance function by reducing the ability of the executive branch to make "abrupt or aggressive moves toward other states." n424 The Bush Administration's detainee policy, for all of its virtues and faults, was an exceedingly aggressive departure from existing norms, and was therefore bound to generate intense controversy. It was formulated quickly, by a small group of policy-makers and legal advisors without consulting Congress and over the objections of even some within the executive branch. n425 Although the Administration invoked the law of armed conflict to justify its detention of enemy combatants, it did not seem to recognize limits imposed by that law. n426 Most significantly, it designed the detention scheme around interrogation rather than incapacitation and excluded the detainees from all legal protections of the Geneva Conventions. n427 It declared all detainees at Guantanamo to be "enemy combatants" without establishing a regularized process for making an individual determination for each detainee. n428 And when it established the military commissions, also without consulting Congress, the Administration denied defendants important procedural protections. n429 In an anarchic world characterized by great power conflict, one could make the argument that the executive branch requires maximum flexibility to defeat the enemy, who may not adhere to international law. Indeed, the precedents relied on most heavily by the Administration in the enemy combatant cases date from the 1930s and 1940s - a period when the international system was radically unstable, and the United States was one of several great powers vying for advantage. n430 But during that time, the executive branch faced much more exogenous pressure from other great powers to comply with international law in the treatment of captured enemies. If the United States strayed too far from established norms, it would risk retaliation upon its own soldiers or other consequences from [\*156] powerful rivals. Today, there are no such constraints: enemies such as al Qaeda are not great powers and are not likely to obey international law anyway. Instead, the danger is that American rule-breaking will set a pattern of rule-breaking for the world, leading to instability. n431 America's military predominance enables it to set the rules of the game. When the U.S. breaks its own rules, it loses legitimacy. The Supreme Court's response to the detainee policy enabled the U.S. government as a whole to hew more closely to established procedures and norms, and to regularize the process for departing from them. After Hamdi, n432 the Department of Defense established a process, the CSRTs, for making an individual determination about the enemy combatant status of all detainees at Guantanamo. After the Court recognized habeas jurisdiction at Guantanamo, Congress passed the DTA, n433 establishing direct judicial review of CSRT determinations in lieu of habeas. Similarly, after the Court declared the military commissions unlawful in Hamdan, n434 this forced the Administration to seek congressional approval for commissions that restored some of the rights afforded at courts martial. n435 In Boumediene, the Court rejected the executive branch's foreign policy arguments, and bucked Congress as well, to restore the norm of habeas review. n436 Throughout this enemy combatant litigation, it has been the courts' relative insulation from politics that has enabled them to take the long view. In contrast, the President's (and Congress's) responsiveness to political concerns in the wake of 9/11 has encouraged them to depart from established norms for the nation's perceived short-term advantage, even at the expense of the nation's long-term interests. n437 As Derek Jinks and Neal Katyal have observed, "treaties are part of [a] system of time-tested standards, and this feature makes the wisdom of their judicial interpretation manifest." n438 At the same time, the enemy combatant cases make allowances for the executive branch's superior speed. The care that the Court took to limit the issues it decided in each case gave the executive branch plenty of time to [\*157] arrive at an effective detainee policy. n439 Hamdi, Rasul, and Boumediene recognized that the availability of habeas would depend on the distance from the battlefield and the length of detention. n440 The enemy combatant litigation also underscores the extent to which the classic realist assumptions about courts' legitimacy in foreign affairs have been turned on their head. In an anarchic world, legitimacy derives largely from brute force. The courts have no armies at their disposal and look weak when they issue decisions that cannot be enforced. n441 But in a hegemonic system, where governance depends on voluntary acquiescence, the courts have a greater role to play. Rather than hobbling the exercise of foreign policy, the courts are a key form of "soft power." n442 As Justice Kennedy's majority opinion observed in Boumediene, courts can bestow external legitimacy on the acts of the political branches. n443 Acts having a basis in law are almost universally regarded as more legitimate than merely political acts. Most foreign policy experts believe that the Bush Administration's detention scheme "hurt America's image and standing in the world." n444 The restoration of habeas corpus in Boumediene may help begin to counteract this loss of prestige. Finally, the enemy combatant cases are striking in that they embrace a role for representation-reinforcement in the international realm. n445 Although defenders of special deference acknowledge that courts' strengths lie in protecting the rights of minorities, it has been very difficult for courts to protect these rights in the face of exigencies asserted by the executive branch in foreign affairs matters. This is especially difficult when the minorities are alleged enemy aliens being held outside the sovereign territory of the United States in wartime. In the infamous Korematsu decision, another World War II-era case, the Court bowed to the President's factual assessment of the emergency justifying detention of U.S. citizens of Japanese ancestry living in the United States. n446 In Boumediene, the Court [\*158] pointedly declined to defer to the executive branch's factual assessments of military necessity. n447 The court may have recognized that a more aggressive role in protecting the rights of non-citizens was required by American hegemony. In fact, the arguments for deference with respect to the rights of non-citizens are even weaker because aliens lack a political constituency in the United States. n448 This outward-looking form of representation-reinforcement serves important functions. It strengthens the legitimacy of U.S. hegemony by establishing equality as a benchmark and reinforces the sense that our constitutional values reflect universal human rights. n449

#### Legitimacy is critical to make US leadership durable and effective—judicial action on indefinite detention is crucial

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]

American unipolarity has created a challenge for realists. Unipolarity was thought to be inherently unstable because other nations, seeking to protect their own security, form alliances to counter-balance the leading state. n322 But no nation or group of nations has yet attempted to challenge America's military predominance. n323 Although some realists predict that [\*140] counter-balancing will occur or is already in some ways occurring, n324 William Wohlforth has offered a compelling explanation for why true counter-balancing, in the traditional realist sense, will probably not happen for decades. n325 American unipolarity is unprecedented. n326 First, the United States is geographically isolated from other potential rivals, who are located near one another in Eurasia. n327 This mutes the security threat that the U.S. seems to pose while increasing the threats that potential rivals seem to pose to one another. n328 Second, the U.S. far exceeds the capabilities of all other states in every aspect of power - military, economic, technological, and in terms of what is known as "soft power." This advantage "is larger now than any analogous gap in the history of the modern state system." n329 Third, unipolarity is entrenched as the status quo for the first time since the seventeenth century, multiplying free rider problems for potential rivals and rendering less relevant all modern previous experience with balancing. n330 Finally, the potential rivals' possession of nuclear weapons makes the concentration of power in the United States appear less threatening. A war between great powers in today's world is very unlikely. n331 These factors make the current system much more stable, peaceful and durable than the past multi-polar and bipolar systems in which the United States operated for all of its history until 1991. The lack of balancing means that the United States, and by extension the executive branch, faces much weaker external constraints on its exercise of power than in the past. n332 Therefore, the internal processes of the U.S. matter now more than any other nations' have in history. n333 And it is these internal processes, as much as external developments, that will determine the durability of American unipolarity. As one realist scholar has argued, the U.S. can best ensure the [\*141] stability of this unipolar order by ensuring that its predominance appears legitimate. n334 Hegemonic orders take on hierarchical characteristics, with the preeminent power having denser political ties with other nations than in a unipolar order. n335 Stability in hegemonic orders is maintained in part through security guarantees and trade relationships that result in economic specialization among nations. n336 For example, if Nation X's security is supplied by Hegemon Y, Nation X can de-emphasize military power and focus on economic power. In a hegemonic system, the preeminent state has "the power to shape the rules of international politics according to its own interests." n337 The hegemon, in return, provides public goods for the system as a whole. n338 The hegemon possesses not only superior command of military and economic resources but "soft" power, the ability to guide other states' preferences and interests. n339 The durability and stability of hegemonic orders depends on other states' acceptance of the hegemon's role. The hegemon's leadership must be seen as legitimate. n340 [\*142] The United States qualifies as a global hegemon. In many ways, the U.S. acts as a world government. n341 It provides public goods for the world, such as security guarantees, the protection of sea lanes, and support for open markets. n342 After World War II, the U.S. forged a system of military alliances and transnational economic and political institutions - such as the United Nations, NATO, the International Monetary Fund, and the World Bank - that remain in place today. The U.S. provides security for allies such as Japan and Germany by maintaining a strong military presence in Asia and Europe. n343 Because of its overwhelming military might, the U.S. possesses what amounts to a "quasi-monopoly" on the use of force. n344 This prevents other nations from launching wars that would tend to be truly destabilizing. Similarly, the United States provides a public good through its efforts to combat terrorism and confront - even through regime change - rogue states. n345 The United States also provides a public good through its promulgation and enforcement of international norms. It exercises a dominant influence on the definition of international law because it is the largest "consumer" of such law and the only nation capable of enforcing it on a global scale. n346 The U.S. was the primary driver behind the establishment of the United Nations system and the development of contemporary treaties and institutional regimes to effectuate those treaties in both public and private international law. n347 Moreover, controlling international norms are [\*143] sometimes embodied in the U.S. Constitution and domestic law rather than in treaties or customary international law. For example, whether terrorist threats will be countered effectively depends "in large part on U.S. law regarding armed conflict, from rules that define the circumstances under which the President can use force to those that define the proper treatment of enemy combatants." n348 These public goods provided by the United States stabilize the system by legitimizing it and decreasing resistance to it. The transnational political and economic institutions created by the United States provide other countries with informal access to policymaking and tend to reduce resistance to American hegemony, encouraging others to "bandwagon" with the U.S. rather than seek to create alternative centers of power. n349 American hegemony also coincided with the rise of globalization - the increasing integration and standardization of markets and cultures - which tends to stabilize the global system and reduce conflict. n350 The legitimacy of American hegemony is strengthened and sustained by the democratic and accessible nature of the U.S. government. The American constitutional separation of powers is an international public good. The risk that it will hinder the ability of the U.S. to act swiftly, coherently or decisively in foreign affairs is counter-balanced by the benefits it provides in permitting foreigners multiple points of access to the government. n351 Foreign nations and citizens lobby Congress and executive branch agencies in the State, Treasury, Defense, and Commerce Departments, where foreign policy is made. n352 They use the media to broadcast their point of view in an effort to influence the opinion of decision-makers. n353 Because the United States is a nation of immigrants, many American citizens have a specific interest in the fates of particular countries and form "ethnic lobbies" for the purpose of affecting foreign policy. n354 The courts, too, are accessible to foreign nations and non-citizens. The Alien Tort Statute is emerging as an [\*144] important vehicle for adjudicating tort claims among non-citizens in U.S. courts. n355 Empires are more complex than unipolar or hegemonic systems. Empires consist of a "rimless-hub-and-spoke structure," with an imperial core - the preeminent state - ruling the periphery through intermediaries. n356 The core institutionalizes its control through distinct, asymmetrical bargains (heterogeneous contracting) with each part of the periphery. n357 Ties among peripheries (the spokes) are thin, creating firewalls against the spread of resistance to imperial rule from one part of the empire to the other. n358 The success of imperial governance depends on the lack of a "rim." n359 Stability in imperial orders is maintained through "divide and rule," preventing the formation of countervailing alliances in the periphery by exploiting differences among potential challengers. n360 Divide-and-rule strategies include using resources from one part of the empire against challengers in another part and multi-vocal communication - legitimating imperial rule by signaling "different identities ... to different audiences." n361 Although the U.S. has often been labeled an empire, the term applies only in limited respects and in certain situations. Many foreign relations scholars question the comparison. n362 However, the U.S. does exercise informal imperial rule when it has routine and consistent influence over the foreign policies of other nations, who risk losing "crucial military, economic, or political support" if they refuse to comply. n363 The "Status of Force Agreements" ("SOFAs") that govern legal rights and responsibilities of U.S. military personnel and others on U.S. bases throughout the world are typically one-sided. n364 And the U.S. occupations in Iraq and Afghanistan had a strong imperial dynamic because those regimes depended on American support. n365 [\*145] But the management of empire is increasingly difficult in the era of globalization. Heterogeneous contracting and divide-and-rule strategies tend to fail when peripheries can communicate with one another. The U.S. is less able control "the flow of information ... about its bargains and activities around the world." n366 In late 2008, negotiations on the Status of Force Agreement between the U.S. and Iraq were the subject of intense media scrutiny and became an issue in the presidential campaign. n367 Another classic imperial tactic - the use of brutal, overwhelming force to eliminate resistance to imperial rule - is also unlikely to be effective today. The success of counterinsurgency operations depends on winning a battle of ideas, and collateral damage is used by violent extremists, through the Internet and satellite media, to "create widespread sympathy for their cause." n368 The abuses at Abu Ghraib, once public, harmed America's "brand" and diminished support for U.S. policy abroad. n369 Imperial rule, like hegemony, depends on maintaining legitimacy. B. Constructing a Hegemonic Model International relations scholars are still struggling to define the current era. The U.S.-led international order is unipolar, hegemonic, and, in some instances, imperial. In any event, this order diverges from traditional realist assumptions in important respects. It is unipolar, but stable. It is more hierarchical. The U.S. is not the same as other states; it performs unique functions in the world and has a government open and accessible to foreigners. And the stability and legitimacy of the system depends more on successful functioning of the U.S. government as a whole than it does on balancing alliances crafted by elite statesmen practicing realpolitik. "World power politics are shaped primarily not by the structure created by interstate anarchy but by the foreign policy developed in Washington." n370 These differences require a new model for assessing the institutional competences of the executive and judicial branches in foreign affairs. [\*146] One approach would be to adapt an institutional competence model using insights from a major alternative theory of international relations - liberalism. Liberal IR theory generally holds that internal characteristics of states - in particular, the form of government - dictate states' behavior, and that democracies do not go to war against one another. n371 Liberalists also regard economic interdependence and international institutions as important for maintaining peace and stability in the world. n372 Dean Anne-Marie Slaughter has proposed a binary model that distinguishes between liberal, democratic states and non-democratic states. n373 Because domestic and foreign issues are "most convergent" among liberal democracies, Slaughter reasons, the courts should decide issues concerning the scope of the political branches' powers. n374 With respect to non-liberal states, the position of the U.S. is more "realist," and courts should deploy a high level of deference. n375 One strength of this binary approach is that it would tend to reduce the uncertainty in foreign affairs adjudication. Professor Nzelibe has observed that it would put courts in the difficult position of determining which countries are liberal democracies. n376 But even if courts are capable of making these determinations, they would still face the same dilemmas adjudicating controversies regarding non-liberal states. Where is the appropriate boundary between foreign affairs and domestic matters? How much discretion should be afforded the executive when individual rights and accountability values are at stake? To resolve these dilemmas, an institutional competence model should be applicable to foreign affairs adjudication across the board. In constructing a new realist model, it is worth recalling that the functional justifications for special deference are aimed at addressing problems of a particular sort of role effectiveness - which allocation of power among the branches will best achieve general governmental effectiveness in foreign affairs. In the twenty-first century, America's global role has changed, and the best means of achieving effectiveness in foreign affairs have changed as well. The international realm remains highly political - if not as much as in the past - but it is American politics that matters most. If the U.S. is truly an empire - [\*147] and in some respects it is - the problems of imperial management will be far different from the problems of managing relations with one other great power or many great powers. Similarly, the management of hegemony or unipolarity requires a different set of competences. Although American predominance is recognized as a salient fact, there is no consensus among realists about the precise nature of the current international order. n377 The hegemonic model I offer here adopts common insights from the three IR frameworks - unipolar, hegemonic, and imperial - described above. First, the "hybrid" hegemonic model assumes that the goal of U.S. foreign affairs should be the preservation of American hegemony, which is more stable, more peaceful, and better for America's security and prosperity, than the alternatives. If the United States were to withdraw from its global leadership role, no other nation would be capable of taking its place. n378 The result would be radical instability and a greater risk of major war. n379 In addition, the United States would no longer benefit from the public goods it had formerly produced; as the largest consumer, it would suffer the most. Second, the hegemonic model assumes that American hegemony is unusually stable and durable. n380 As noted above, other nations have many incentives to continue to tolerate the current order. n381 And although other nations or groups of nations - China, the European Union, and India are often mentioned - may eventually overtake the United States in certain areas, such as manufacturing, the U.S. will remain dominant in most measures of capability for decades. According to 2007 estimates, the U.S. economy was projected to be twice the size of China's in 2025. n382 The U.S. accounted for half of the world's military spending in 2007 and holds enormous advantages in defense technology that far outstrip would-be competitors. n383 Predictions of American decline are not new, and they have thus far proved premature. n384 [\*148] Third, the hegemonic model assumes that preservation of American hegemony depends not just on power, but legitimacy. n385 All three IR frameworks for describing predominant states - although unipolarity less than hegemony or empire - suggest that legitimacy is crucial to the stability and durability of the system. Although empires and predominant states in unipolar systems can conceivably maintain their position through the use of force, this is much more likely to exhaust the resources of the predominant state and to lead to counter-balancing or the loss of control. n386 Legitimacy as a method of maintaining predominance is far more efficient. The hegemonic model generally values courts' institutional competences more than the anarchic realist model. The courts' strengths in offering a stable interpretation of the law, relative insulation from political pressure, and power to bestow legitimacy are important for realizing the functional constitutional goal of effective U.S. foreign policy. This means that courts' treatment of deference in foreign affairs will, in most respects, resemble its treatment of domestic affairs. Given the amorphous quality of foreign affairs deference, this "domestication" reduces uncertainty. The increasing boundary problems caused by the proliferation of treaties and the infiltration of domestic law by foreign affairs issues are lessened by reducing the deference gap. And the dilemma caused by the need to weigh different functional considerations - liberty, accountability, and effectiveness - against one another is made less intractable because it becomes part of the same project that the courts constantly grapple with in adjudicating domestic disputes.

#### US benevolent hegemony is critical to global peace—the alternative causes massive wars

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A final major gain to the United States from the benevolent hegemony has perhaps been less widely appreciated. It nevertheless proved of great significance in the short as well as in the long term: the pervasive cultural influence of the United States.39 This dimension of power base is often neglected. After World War II the authoritarian political cultures of Europe and Japan were utterly discredited, and the liberal democratic elements of those cultures revivified. The revival was most extensive and deliberate in the occupied powers of the Axis, where it was nurtured by drafting democratic constitutions, building democratic institutions, curbing the power of industrial trusts by decartelization and the rebuilding of trade unions, and imprisoning or discrediting much of the wartime leadership. American liberal ideas largely filled the cultural void. The effect was not so dramatic in the "victor" states whose regimes were reaffirmed (Britain, the Low and Scandinavian countries), but even there the United States and its culture was widely admired. The upper classes may often have thought it too "commercial," but in many respects American mass consumption culture was the most pervasive part of America's impact. American styles, tastes, and middle-class consumption patterns were widely imitated, in a process that' has come to bear the label "coca-colonization."40 After WWII policy makers in the USA set about remaking a world to facilitate peace. The hegemonic project involves using political and economic advantages gained in world war to restructure the operation of the world market and interstate system in the hegemon's own image. The interests of the leader are projected on a universal plane: What is good for the hegemon is good for the world. The hegemonic state is successful to the degree that other states emulate it. Emulation is the basis of the consent that lies at the heart of the hegemonic project.41 Since wealth depended on peace the U.S set about creating institutions and regimes that promoted free trade, and peaceful conflict resolution. U.S. benevolent hegemony is what has kept the peace since the end of WWII. The upshot is that U.S. hegemony and liberalism have produced the most stable and durable political order that the world has seen since the fall of the Roman Empire. It is not as formally or highly integrated as the European Union, but it is just as profound and robust as a political order, Kant’s Perpetual Peace requires that the system be diverse and not monolithic because then tyranny will be the outcome. As long as the system allows for democratic states to press claims and resolve conflicts, the system will perpetuate itself peacefully. A state such as the United States that has achieved international primacy has every reason to attempt to maintain that primacy through peaceful means so as to preclude the need of having to fight a war to maintain it.42 This view of the post-hegemonic Western world does not put a great deal of emphasis on U.S. leadership in the traditional sense. U.S. leadership takes the form of providing the venues and mechanisms for articulating demands and resolving disputes not unlike the character of politics within domestic pluralistic systems.43 America as a big and powerful state has an incentive to organize and manage a political order that is considered legitimate by the other states. It is not in a hegemonic leader's interest to preside over a global order that requires constant use of material capabilities to get other states to go along. Legitimacy exists when political order is based on reciprocal consent. It emerges when secondary states buy into rules and norms of the political order as a matter of principle, and not simply because they are forced into it. But if a hegemonic power wants to encourage the emergence of a legitimate political order, it must articulate principles and norms, and engage in negotiations and compromises that have very little to do with the exercise of power.44 So should this hegemonic power be called leadership, or domination? Well, it would tend toward the latter. Hierarchy has not gone away from this system. Core states have peripheral areas: colonial empires and neo-colonial backyards. Hegemony, in other words, involves a structure in which there is a hegemonic core power. The problem with calling this hegemonic power "leadership" is that leadership is a wonderful thing-everyone needs leadership. But sometimes I have notice that leadership is also an ideology that legitimates domination and exploitation. In fact, this is often the case. But this is a different kind of domination than in earlier systems. Its difference can be seen in a related question: is it progressive? Is it evolutionary in the sense of being better for most people in the system? I think it actually is a little bit better. The trickle down effect is bigger-it is not very big, but it is bigger.45 It is to this theory, Hegemonic Stability that the glass slipper properly belongs, because both U.S. security and economic strategies fit the expectations of hegemonic stability theory more comfortably than they do other realist theories. We must first discuss the three pillars that U.S. hegemony rests on structural, institutional, and situational. (1) Structural leadership refers to the underlying distribution of material capabilities that gives some states the ability to direct the overall shape of world political order. Natural resources, capital, technology, military force, and economic size are the characteristics that shape state power, which in turn determine the capacities for leadership and hegemony. If leadership is rooted in the distribution of power, there is reason to worry about the present and future. The relative decline of the United States has not been matched by the rise of another hegemonic leader. At its hegemonic zenith after World War II, the United States commanded roughly forty five percent of world production. It had a remarkable array of natural resource, financial, agricultural, industrial, and technological assets. America in 1945 or 1950 was not just hegemonic because it had a big economy or a huge military; it had an unusually wide range of resources and capabilities. This situation may never occur again. As far as one looks into the next century, it is impossible to see the emergence of a country with a similarly commanding power position. (2) Institutional leadership refers to the rules and practices that states agree to that set in place principles and procedures that guide their relations. It is not power capabilities as such or the interventions of specific states that facilitate concerted action, but the rules and mutual expectations that are established as institutions. Institutions are, in a sense, self-imposed constraints that states create to assure continuity in their relations and to facilitate the realization of mutual interests. A common theme of recent discussions of the management of the world economy is that institutions will need to play a greater role in the future in providing leadership in the absence of American hegemony. Bergsten argues, for example, that "institutions themselves will need to play a much more important role.46 Institutional management is important and can generate results that are internationally greater than the sum of their national parts. The argument is not that international institutions impose outcomes on states, but that institutions shape and constrain how states conceive and pursue their interests and policy goals. They provide channels and mechanisms to reach agreements. They set standards and mutual expectations concerning how states should act. They "bias" politics in internationalist directions just as, presumably, American hegemonic leadership does. (3) Situational leadership refers to the actions and initiatives of states that induce cooperation quite apart from the distribution of power or the array of institutions. It is more cleverness or the ability to see specific opportunities to build or reorient international political order, rather than the power capacities of the state, that makes a difference. In this sense, leadership really is expressed in a specific individual-in a president or foreign minister-as he or she sees a new opening, a previously unidentified passage forward, a new way to define state interests, and thereby transforms existing relations. Hegemonic stability theorists argue that international politics is characterized by a succession of hegemonies in which a single powerful state dominates the system as a result of its victory in the last hegemonic war.47 Especially after the cold war America can be described as trying to keep its position at the top but also integrating others more thoroughly in the international system that it dominates. It is assumed that the differential growth of power in a state system would undermine the status quo and lead to hegemonic war between declining and rising powers48, but I see a different pattern: the U.S. hegemonic stability promoting liberal institutionalism, the events following 9/11 are a brief abnormality from this path, but the general trend will be toward institutional liberalism. Hegemonic states are the crucial components in military alliances that turn back the major threats to mutual sovereignties and hence political domination of the system. Instead of being territorially aggressive and eliminating other states, hegemons respect other's territory. They aspire to be leaders and hence are upholders of inter-stateness and inter-territoriality.49 The nature of the institutions themselves must, however, be examined. They were shaped in the years immediately after World War II by the United States. The American willingness to establish institutions, the World Bank to deal with finance and trade, United Nations to resolve global conflict, NATO to provide security for Western Europe, is explained in terms of the theory of collective goods. It is commonplace in the regimes literature that the United States, in so doing, was providing not only private goods for its own benefit but also (and perhaps especially) collective goods desired by, and for the benefit of, other capitalist states and members of the international system in general. (Particular care is needed here about equating state interest with "national" interest.) Not only was the United States protecting its own territory and commercial enterprises, it was providing military protection for some fifty allies and almost as many neutrals. Not only was it ensuring a liberal, open, near-global economy for its own prosperity, it was providing the basis for the prosperity of all capitalist states and even for some states organized on noncapitalist principles (those willing to abide by the basic rules established to govern international trade and finance). While such behaviour was not exactly selfless or altruistic, certainly the benefits-however distributed by class, state, or region-did accrue to many others, not just to Americans.50 For the truth about U.S. dominant role in the world is known to most clear-eyed international observers. And the truth is that the benevolent hegemony exercised by the United States is good for a vast portion of the world's population. It is certainly a better international arrangement than all realistic alternatives. To undermine it would cost many others around the world far more than it would cost Americans-and far sooner. As Samuel Huntington wrote five years ago, before he joined the plethora of scholars disturbed by the "arrogance" of American hegemony; "A world without U.S. primacy will be a world with more violence and disorder and less democracy and economic growth than a world where the United States continues to have more influence than any other country shaping global affairs”. 51 I argue that the overall American-shaped system is still in place. It is this macro political system-a legacy of American power and its liberal polity that remains and serves to foster agreement and consensus. This is precisely what people want when they look for U.S. leadership and hegemony.52 If the U.S. retreats from its hegemonic role, who would supplant it, not Europe, not China, not the Muslim world –and certainly not the United Nations. Unfortunately, the alternative to a single superpower is not a multilateral utopia, but the anarchic nightmare of a New Dark Age. Moreover, the alternative to unipolarity would not be multipolarity at all. It would be ‘apolarity’ –a global vacuum of power.53 Since the end of WWII the United States has been the clear and dominant leader politically, economically and military. But its leadership as been unique; it has not been tyrannical, its leadership and hegemony has focused on relative gains and has forgone absolute gains. The difference lies in the exercise of power. The strength acquired by the United States in the aftermath of World War II was far greater than any single nation had ever possessed, at least since the Roman Empire. America's share of the world economy, the overwhelming superiority of its military capacity-augmented for a time by a monopoly of nuclear weapons and the capacity to deliver them--gave it the choice of pursuing any number of global ambitions. That the American people "might have set the crown of world empire on their brows," as one British statesman put it in 1951, but chose not to, was a decision of singular importance in world history and recognized as such.54 Leadership is really an elegant word for power. To exercise leadership is to get others to do things that they would not otherwise do. It involves the ability to shape, directly or indirectly, the interests or actions of others. Leadership may involve the ability to not just "twist arms" but also to get other states to conceive of their interests and policy goals in new ways. This suggests a second element of leadership, which involves not just the marshalling of power capabilities and material resources. It also involves the ability to project a set of political ideas or principles about the proper or effective ordering of po1itics. It suggests the ability to produce concerted or collaborative actions by several states or other actors. Leadership is the use of power to orchestrate the actions of a group toward a collective end.55 By validating regimes and norms of international behaviour the U.S. has given incentives for actors, small and large, in the international arena to behave peacefully. The uni-polar U.S. dominated order has led to a stable international system. Woodrow Wilson’s zoo of managed relations among states as supposed to his jungle method of constant conflict. The U.S. through various international treaties and organizations as become a quasi world government; It resolves the problem of provision by imposing itself as a centralized authority able to extract the equivalent of taxes. The focus of the theory thus shifts from the ability to provide a public good to the ability to coerce other states. A benign hegemon in this sense coercion should be understood as benign and not tyrannical. If significant continuity in the ability of the United States to get what it wants is accepted, then it must be explained. The explanation starts with our noting that the institutions for political and economic cooperation have themselves been maintained. Keohane rightly stresses the role of institutions as "arrangements permitting communication and therefore facilitating the exchange of information. By providing reliable information and reducing the costs of transactions, institutions can permit cooperation to continue even after a hegemon's influence has eroded. Institutions provide opportunities for commitment and for observing whether others keep their commitments. Such opportunities are virtually essential to cooperation in non-zero-sum situations, as gaming experiments demonstrate. Declining hegemony and stagnant (but not decaying) institutions may therefore be consistent with a stable provision of desired outcomes, although the ability to promote new levels of cooperation to deal with new problems (e.g., energy supplies, environmental protection) is more problematic. Institutions nevertheless provide a part of the necessary explanation.56 In restructuring the world after WWII it was America that was the prime motivator in creating and supporting the various international organizations in the economic and conflict resolution field. An example of this is NATO’s making Western Europe secure for the unification of Europe. It was through NATO institutionalism that the countries in Europe where able to start the unification process. The U.S. working through NATO provided the security and impetus for a conflict prone region to unite and benefit from greater cooperation. Since the United States emerged as a great power, the identification of the interests of others with its own has been the most striking quality of American foreign and defence policy. Americans seem to have internalized and made second nature a conviction held only since World War II: Namely, that their own wellbeing depends fundamentally on the well-being of others; that American prosperity cannot occur in the absence of global prosperity; that American freedom depends on the survival and spread of freedom elsewhere; that aggression anywhere threatens the danger of aggression everywhere; and that American national security is impossible without a broad measure of international security. 57 I see a multi-polar world as one being filled with instability and higher chances of great power conflict. The Great Power jostling and British hegemonic decline that led to WWI is an example of how multi polar systems are prone to great power wars. I further posit that U.S. hegemony is significantly different from the past British hegemony because of its reliance on consent and its mutilaterist nature. The most significant would be the UN and its various branches financial, developmental, and conflict resolution. It is common for the international system to go through cataclysmic changes with the fall of a great power. I feel that American hegemony is so different especially with its reliance on liberal institutionalism and complex interdependence that U.S. hegemonic order and governance will be maintained by others, if states vary in size, then cooperation between the largest of the former free riders (and including the declining hegemonic power) may suffice to preserve the cooperative outcome. Thus we need to amend the assumption that collective action is impossible and incorporate it into a fuller specification of the circumstances under which international cooperation can be preserved even as a hegemonic power declines.58 If hegemony means the ability to foster cooperation and commonalty of social purpose among states, U.S. leadership and its institutional creations will long outlast the decline of its post war position of military and economic dominance; and it will outlast the foreign policy stumbling of particular administrations.59 U.S. hegemony will continue providing the public good that the world is associated with despite the rise of other powers in the system “cooperation may persist after hegemonic decline because of the inertia of existing regimes. Institutional factors and different logics of regime creation and maintenance have been invoked to explain the failure of the current economic regime to disintegrate rapidly in response to the decline of American predominance in world affairs.”60 Since the end of WWII the majority of the states that are represented in the core have come to depend on the security that U.S. hegemony has provided, so although they have their own national interest, they forgo short term gains to maintain U.S. hegemony. Why would other states forgo a leadership role to a foreign hegemon because it is in their interests; one particularly ambitious application is Gilpin's analysis of war and hegemonic stability. He argues that the presence of a hegemonic power is central to the preservation of stability and peace in the international system. Much of Gilpin's argument resembles his own and Krasner's earlier thesis that hegemonic states provide an international order that furthers their own self-interest. Gilpin now elaborates the thesis with the claim that international order is a public good, benefiting subordinate states. This is, of course, the essence of the theory of hegemonic stability. But Gilpin adds a novel twist: the dominant power not only provides the good, it is capable of extracting contributions toward the good from subordinate states. In effect, the hegemonic power constitutes a quasigovernment by providing public goods and taxing other states to pay for them. Subordinate states will be reluctant to be taxed but, because of the hegemonic state's preponderant power, will succumb. Indeed, if they receive net benefits (i.e., a surplus of public good benefits over the contribution extracted from them), they may recognize hegemonic leadership as legitimate and so reinforce its performance and position. During the 19th century several countries benefited from British hegemony particularly its rule of the seas, since WWII the U.S. has also provided a similar stability and security that as made smaller powers thrive in the international system. The model presumes that the (military) dominance of the hegemonic state, which gives it the capacity to enforce an international order, also gives it an interest in providing a generally beneficial order so as to lower the costs of maintaining that order and perhaps to facilitate its ability to extract contributions from other members of the system.

#### Best statistics prove primacy causes peace – reentrenches democratic peace, globalization, and resolves all proximate causes of war.

**Owen ‘11** (John M. Owen Professor of Politics at University of Virginia PhD from Harvard "DON’T DISCOUNT HEGEMONY" Feb 11 www.cato-unbound.org/2011/02/11/john-owen/dont-discount-hegemony/

Andrew Mack and his colleagues at the Human Security Report Project are to be congratulated. Not only do they present a study with a striking conclusion, driven by data, free of theoretical or ideological bias, but they also do something quite unfashionable: they bear good news. Social scientists really are not supposed to do that. Our job is, if not to be Malthusians, then at least to point out disturbing trends, looming catastrophes, and the imbecility and mendacity of policy makers. And then it is to say why, if people listen to us, things will get better. We do this as if our careers depended upon it, and perhaps they do; for if all is going to be well, what need then for us? Our colleagues at Simon Fraser University are brave indeed. That may sound like a setup, but it is not. I shall challenge neither the data nor the general conclusion that violent conflict around the world has been decreasing in fits and starts since the Second World War. When it comes to violent conflict among and within countries, things have been getting better. (The trends have not been linear—Figure 1.1 actually shows that the frequency of interstate wars peaked in the 1980s—but the 65-year movement is clear.) Instead I shall accept that Mack et al. are correct on the macro-trends, and focus on their explanations they advance for these remarkable trends. With apologies to any readers of this forum who recoil from academic debates, this might get mildly theoretical and even more mildly methodological. Concerning international wars, one version of the “nuclear-peace” theory is not in fact laid to rest by the data. It is certainly true that nuclear-armed states have been involved in many wars. They have even been attacked (think of Israel), which falsifies the simple claim of “assured destruction”—that any nuclear country A will deter any kind of attack by any country B because B fears a retaliatory nuclear strike from A. But the most important “nuclear-peace” claim has been about mutually assured destruction, which obtains between two robustly nuclear-armed states. The claim is that (1) rational states having second-strike capabilities—enough deliverable nuclear weaponry to survive a nuclear first strike by an enemy—will have an overwhelming incentive not to attack one another; and (2) we can safely assume that nuclear-armed states are rational. It follows that states with a second-strike capability will not fight one another. Their colossal atomic arsenals neither kept the United States at peace with North Vietnam during the Cold War nor the Soviet Union at peace with Afghanistan. But the argument remains strong that those arsenals did help keep the United States and Soviet Union at peace with each other. Why non-nuclear states are not deterred from fighting nuclear states is an important and open question. But in a time when calls to ban the Bomb are being heard from more and more quarters, we must be clear about precisely what the broad trends toward peace can and cannot tell us. They may tell us nothing about why we have had no World War III, and little about the wisdom of banning the Bomb now. Regarding the downward trend in international war, Professor Mack is friendlier to more palatable theories such as the “democratic peace” (democracies do not fight one another, and the proportion of democracies has increased, hence less war); the interdependence or “commercial peace” (states with extensive economic ties find it irrational to fight one another, and interdependence has increased, hence less war); and the notion that people around the world are more anti-war than their forebears were. Concerning the downward trend in civil wars, he favors theories of economic growth (where commerce is enriching enough people, violence is less appealing—a logic similar to that of the “commercial peace” thesis that applies among nations) and the end of the Cold War (which end reduced superpower support for rival rebel factions in so many Third-World countries). These are all plausible mechanisms for peace. What is more, none of them excludes any other; all could be working toward the same end. That would be somewhat puzzling, however. Is the world just lucky these days? How is it that an array of peace-inducing factors happens to be working coincidentally in our time, when such a magical array was absent in the past? The answer may be that one or more of these mechanisms reinforces some of the others, or perhaps some of them are mutually reinforcing. Some scholars, for example, have been focusing on whether economic growth might support democracy and vice versa, and whether both might support international cooperation, including to end civil wars. We would still need to explain how this charmed circle of causes got started, however. And here let me raise another factor, perhaps even less appealing than the “nuclear peace” thesis, at least outside of the United States. That factor is what international relations scholars call hegemony—specifically American hegemony**.** A theory that many regard as discredited, but that refuses to go away, is called hegemonic stability theory. The theory emerged in the 1970s in the realm of international political economy. It asserts that for the global economy to remain open—for countries to keep barriers to trade and investment low—one powerful country must take the lead. Depending on the theorist we consult, “taking the lead” entails paying for global public goods (keeping the sea lanes open, providing liquidity to the international economy), coercion (threatening to raise trade barriers or withdraw military protection from countries that cheat on the rules), or both. The theory is skeptical that international cooperation in economic matters can emerge or endure absent a hegemon. The distastefulness of such claims is self-evident: they imply that it is good for everyone the world over if one country has more wealth and power than others. More precisely, they imply that it has been good for the world that the United States has been so predominant. There is no obvious reason why hegemonic stability theory could not apply to other areas of international cooperation, including in security affairs, human rights, international law, peacekeeping (UN or otherwise), and so on. What I want to suggest here—suggest, not test—is that American hegemony might just be a deep cause of the steady decline of political deaths in the world. How could that be? After all, the report states that United States is the third most war-prone country since 1945. Many of the deaths depicted in Figure 10.4 were in wars that involved the United States (the Vietnam War being the leading one). Notwithstanding politicians’ claims to the contrary, a candid look at U.S. foreign policy reveals that the country is as ruthlessly self-interested as any other great power in history. The answer is that U.S. hegemony might just be a deeper cause of the proximate causes outlined by Professor Mack. Consider economic growth and openness to foreign trade and investment, which (so say some theories) render violence irrational. American power and policies may be responsible for these in two related ways. First, at least since the 1940s Washington has prodded other countries to embrace the market capitalism that entails economic openness and produces sustainable economic growth. The United States promotes capitalism for selfish reasons, of course: its own domestic system depends upon growth, which in turn depends upon the efficiency gains from economic interaction with foreign countries, and the more the better. During the Cold War most of its allies accepted some degree of market-driven growth. Second, the U.S.-led western victory in the Cold War damaged the credibility of alternative paths to development—communism and import-substituting industrialization being the two leading ones—and left market capitalism the best model. The end of the Cold War also involved an end to the billions of rubles in Soviet material support for regimes that tried to make these alternative models work. (It also, as Professor Mack notes, eliminated the superpowers’ incentives to feed civil violence in the Third World.) What we call globalization is caused in part by the emergence of the United States as the global hegemon. The same case can be made, with somewhat more difficulty, concerning the spread of democracy. Washington has supported democracy only under certain conditions—the chief one being the absence of a popular anti-American movement in the target state—but those conditions have become much more widespread following the collapse of communism. Thus in the 1980s the Reagan administration—the most anti-communist government America ever had—began to dump America’s old dictator friends, starting in the Philippines. Today Islamists tend to be anti-American, and so the Obama administration is skittish about democracy in Egypt and other authoritarian Muslim countries. But general U.S. material and moral support for liberal democracy remains strong.

### 1AC Democracy

#### Contention two is Democracy:

#### Kiyemba 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.

#### Judicial remedy authority is the test case for judicial leadership on the rule of law globally—undermining habeas causes global backsliding

Scharf et al 9, PILPG Managing Director

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**The precedent of this Court has** a significant impact on rule of law **in foreign states. Foreign governments, in particular foreign judiciaries,** notice and follow the example set by the U.S**.** in **upholding** the **rule of law**. As foreign governments and judiciaries grapple with new and challenging issues associated with upholding the rule of law during times of conflict, U.S. leadership on the primacy of law during the war on terror is particularly important**.** Recent decisions of this Court have reaffirmed the primacy of rule of law in the U.S. during the war on terror. As relates to the present case, a number of this Court’s decisions, **most notably Boumediene v. Bush**, 128 S.Ct. 2229 (2008), have **established clear precedent that Guantanamo detainees have a right to petition for habeas corpus relief. Despite a clear holding from this Court in Boumediene, the Court of Appeals sought in Kiyemba v. Obama to narrow Boumediene to such a degree as to render this Court’s ruling hollow**. 555 F.3d 1022 (D.C. Cir. 2009). **The** present **case is** thus a test of both the substance of the right granted in Boumediene and the role of this Court in ensuring faithful implementation of its prior decisions. Although this Court’s rulings only have the force of law in the U.S., foreign **governments will** take note of the decision in the present case and use the precedent set by this Court to guide their actions in times of conflict**. PILPG** has advised over two dozen foreign states on peace negotiations and post-conflict constitution drafting, as well as all of the international war crimes tribunals. Through providing pro bono legal assistance to foreign governments and judiciaries, PILPG has **observed the** important **role** this **Court and U.S. precedent serve in promoting rule of law in foreign states. In Uganda, for example, the precedent established by this Court in Hamdan v. Rumsfeld**, 548 U.S. 557 (2006), and Boumediene, **influenced judges and legislators to incorporate the principles of judicial review and enforceability in their domestic war crimes bill. In Nepal, this Court has served as a model for the nascent judiciary. In Somaliland, the government relied heavily on U.S. terrorism legislation when drafting terrorism legislation for the region. And in the South Sudan peace process, the Sudan People’s Liberation Movement/Army (SPLM/A), the leading political party in the Government of Southern Sudan, relied on U.S. precedent to argue for the primacy of law and the importance of enforceability of previous adjudicative decisions** in the5 Abyei Arbitration, one of the most important and contentious issues in the ongoing implementation of the peace agreement. **Foreign judges** also **follow the work of this Court closely**. In a number of the judicial training programs PILPG has conducted, foreign judges have asked PILPG detailed questions about the role of this Court in upholding rule of law during the war on terror. A review of foreign precedent confirms how closely foreign judges follow this Court. **In numerous foreign states, and in the international war crimes tribunals, judges** regularly cite the precedent of this Court to establish their own legitimacy, to shore up judicial authority against overreaching by powerful executives, and to develop a strong rule of law within their own legal systems**. Given** the **significant influence of this Court** on foreign governments and judiciaries, **a decision in Kiyemba implementing Boumediene will reaffirm this Court’s leadership in upholding the rule of law and promote respect for rule of law in foreign states during times of conflict**.6 ARGUMENT I. KIYEMBA v. OBAMA IS A TEST OF SUPREME COURT LEADERSHIP IN UPHOLDING RULE OF LAW IN TIMES OF CONFLICT. The precedent set by the Supreme Court in the present case will have a significant impact on the development of rule of law in foreign states. Foreign judicial, executive, and parliamentary bodies closely follow the work of this Court, and this Court’s previous decisions related to the war on terror have shaped how foreign states uphold the rule of law in times of conflict. Foreign governments and judiciaries will review this Court’s decision in the present case in light of those previous decisions. A decision in the present case implementing previous decisions of this Court granting habeas rights to Guantanamo detainees is an opportunity for this Court to reaffirm to foreign governments that the U.S. is a leader and role model in upholding the rule of law during times of conflict. Recent Supreme Court precedent established a clear role for the primacy of law in the U.S. war on terror. In particular, this Court’s landmark decision in Boumediene highlighted the critical role of the judiciary in a system dedicated to the rule of law, as well as the “indispensable” role of habeas corpus as a “time tested” safeguard of liberty. Boumediene v. Bush, 128 S.Ct. 2229, 2247, 2259 (2008). Around the globe, courts and governments took note of this Court’s stirring words: “Security subsists, too, in fidelity to freedom’s first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers. It is from these principles that the judicial authority to consider petitions for habeas corpus relief derives.” Id. at 2277. In contrast to the maxim silent enim leges inter arma (in times of conflict the law must be silent), this Court affirmed in Boumediene that “[t]he laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled, and in our system they are reconciled within the framework of the law.” Id. Boumediene held that the detainees in the military prison at Guantanamo Bay are “entitled to the privilege of habeas corpus to challenge the legality of their detentions.” Id. at 2262. Inherent in that privilege is the right to a remedy if the detention is found to be unlawful. In the present case, the Petitioners, who had been found not to be enemy combatants, sought to exercise their privilege of habeas corpus. The Executive Branch conceded that there was no legal basis to continue to detain the Petitioners, that years of diligent effort to resettle them elsewhere had failed, and that there was no foreseeable path of release. The District Court implemented Boumediene, ordering that the Petitioners be brought to the courtroom to impose conditions of release. In re Guantanamo Bay Detainee Litigation, 581 F. Supp. 2d 33, 42-43 (D.C. Cir. 2008). The Court of Appeals reversed, with the majority concluding that the judiciary had no “power to require anything more” than the Executive’s representations that it was continuing efforts to find a foreign country willing to admit Petitioners. Kiyemba v. Obama, 555 F.3d 1022, 1029 (D.C. Cir. 2009). The Court of Appeals’ decision effectively narrowed Boumediene to such a degree that it rendered the ruling hollow. Circuit Judge Rogers recognized this in her dissent, opining that the majority’s analysis “was not faithful to Boumediene.” Id. at 1032 (Roberts, J., dissenting). Given the Court of Appeals’ attempt to narrow Boumediene, Kiyemba v. Obama is a test of this Court’s role in upholding the primacy of law in times of conflict. A decision in favor of the Petitioners in Kiyemba will reaffirm this Court’s leadership in upholding the rule of law and promote respect for rule of law in foreign states during times of conflict. II. PILPG’S EXPERIENCE ADVISING FOREIGN GOVERNMENTS AND JUDICIARIES ILLUSTRATES THE IMPORTANCE OF SUPREME COURT PRECEDENT IN PROMOTING RULE OF LAW IN FOREIGN STATES DURING TIMES OF CONFLICT. During PILPG’s work providing pro bono legal assistance to foreign governments and judiciaries on the rule of law in conflict and post-conflict settings, clients frequently request guidance on U.S. laws and the role of the judiciary in the U.S. system of governance. In recent years, as states have watched the U.S. tackle the legal issues surrounding the war on terror, foreign governments and judiciaries have expressed keen interest in, and have demonstrated reliance on, the legal mechanisms the U.S. has adopted to address the challenges presented in this new form of conflict. The U.S. Government, under the guidance of this Court, has set a strong example for upholding the rule of law during times of conflict, and foreign governments have followed this lead. When states follow the example set by the U.S. Government, the U.S. can benefit greatly. The U.S. Government recognizes that foreign states with strong and independent judicial systems and a commitment to the rule of law make the most stable allies and partners. Stable allies and partners in turn create the best environment for U.S. business investments and commerce and provide the most safety for Americans traveling abroad. Through PILPG’s work with foreign governments, PILPG has observed that U.S. rule of law interests are best represented abroad when foreign governments view the U.S. as committed to the primacy of law. See Michael P. Scharf, International Law in Crisis: A Qualitative Empirical Contribution to the Compliance Debate, 31 Cardozo L. Rev. 45, 64-65 (2009).

#### Reaffirming habeas rights shape global legal development through transnational judicial dialogue—war on terror means the aff’s precedent now is key

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TRANSNATIONAL JUDICIAL DIALOGUE CONFIRMS THIS COURT’S LEADERSHIP IN PROMOTING ADHERENCE TO RULE OF LAW IN TIMES OF CONFLICT. PILPG’s on-the-ground experience demonstrating the leadership of this Court is confirmed by a study of transnational judicial dialogue. Over the past halfcentury, the world’s constitutional courts have been engaged in a rich and growing transnational judicial dialogue on a wide range of constitutional law issues. See, e.g., Melissa A. Waters, Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law, 93 Geo. L.J. 487 (2005); Anne-Marie Slaughter, Judicial Globalization, 40 Va. J. Int’l L. 1103 (2000). Courts around the world consider, discuss, and cite foreign judicial decisions not out of a sense of legal obligation, but out of a developing sense that foreign decisions are valuable resources in elucidating complex legal issues and suggesting new approaches to common problems. See Waters, supra, at 493-94. In this transnational judicial dialogue, the decisions of this Court have exercised a profound — and profoundly positive — influence on the work of foreign and international courts. See generally Constitutionalism and Rights: The Influence of the United States Constitution Abroad (Louis Henkin & Albert J. Rosenthal eds., 1990); Anthony Lester, The Overseas Trade in the American Bill of Rights, 88 Colum. L. Rev. 537 (1988). As Anthony Lester of the British House of Lords has noted, “there is a vigorous overseas trade in the Bill of Rights, in international and constitutional litigation involving norms derived from American constitutional law. When life or liberty is at stake, the landmark judgments of the Supreme Court of the United States, giving fresh meaning to the principles of the Bill of Rights, are studied with as much attention in New Delhi or Strasbourg as they are in Washington, D.C.” Id. at 541. This Court’s overseas influence is not limited to the Bill of Rights. From Australia to India to Israel to the United Kingdom, foreign courts have looked to the seminal decisions of this Court as support for their own rulings upholding judicial review, enforcing separation of powers, and providing a judicial check on the political branches. Indeed, for foreign courts, this Court’s rulings in seminal cases such as Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803),4 Brown v. Board of Education, 347 U.S. 436 (1954),5 United States v. Nixon, 418 U.S. 683 (1974),6 and Roper v. Simmons, 543 U.S. 551 (2005)7 take on a special significance. Reliance on the moral authority of this Court can provide invaluable support for those foreign courts struggling to establish their own legitimacy, to shore up judicial authority against overreaching by powerful executives, and to develop a strong rule of law within their own national legal systems. This Court’s potential to positively influence the international rule of law is particularly important in the nascent transnational judicial dialogue surrounding the war on terrorism and the primacy of rule of law in times of conflict. As the world’s courts begin to grapple with the novel, complex, and delicate legal issues surrounding the modern-day war on terrorism, and as states seek to develop judicial mechanisms to address domestic conflicts, foreign governments and judiciaries are confronting similar challenges. In particular, foreign governments and judiciaries must consider how to accommodate the legitimate needs of the executive branch in times of war within the framework of the law. Although foreign courts are just beginning to address these issues, it is already clear that they are looking to the experience of the U.S., and to the precedent of this Court, for guidance on upholding the rule of law in times of conflict. In recent years, courts in Israel, the United Kingdom, Canada, and Australia have relied on the precedent of this Court in decisions addressing the rights of detainees.8 In short, as a result of this Court’s robust influence on transnational judicial dialogue, its decisions have proved extraordinarily important to the development of the rule of law around the world. International courts have similarly relied on the precedent of this Court in influential decisions. For example, in the important and developing area of international criminal law, the international war crimes tribunals for Yugoslavia and Rwanda both relied heavily on the precedent of this Court in their early opinions. In the first five years of the Yugoslav Tribunal, the first in the modern iteration of the war crimes tribunals, the justices cited this Court at least seventeen times in decisions establishing the fundamental legal principles under which the Tribunal would function.9 The International Criminal Tribunal for Rwanda similarly relied on this Court’s precedent, citing this Court at least twelve times in its first five years.10 The precedent of this Court has provided a crucial foundation for international criminal law. The reliance on the precedent of this Court speaks to the Court’s international leadership on the promotion of respect for the rule of law in times of conflict. By ruling in favor of the Petitioners, this Court will reaffirm the precedent established in its prior decisions granting habeas rights to Guantanamo detainees and, in doing so, demonstrate to these foreign courts, and to other courts who will be addressing these issues in the future, that all branches of government must be bound by the rule of law, even in the most challenging of times. CONCLUSION For the aforementioned reasons, this Court should reverse the decision of the Court of Appeals, thereby reaffirming this Court’s leadership in upholding the rule of law and promoting respect for rule of law in foreign states during times of conflict.

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

CJA 3, Center for Justice and Accountability

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

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

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

Kersch 6, Assistant Professor of Politics at Princeton

[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.

#### All empirical evidence supports democratic peace theory

Allen Dafoe and Bruce Russett, October 2013, Assistant Professor of Political Science at Yale and Dean Acheson Research Professor of International Relations and Political Science at Yale, Assessing the Capitalist Peace, p.110

The democratic peace—the empirical association between democracy and peace—is an extremely robust finding. More generally, many liberal factors are associated with peace and many explanations have been offered for these associations, including the effects of: liberal norms, democratic signaling, credible commitments, the free press, economic interdependence, declining benefits of conquest, signaling via capital markets, constraints on the state, constraints on leaders, and others. Scholars are still mapping the contours of the liberal peace, and we remain a long way from fully understanding the respective influence of these different candidate causal mechanisms. All this being said, the robustness of the democratic peace, as one interrelated empirical aspect of the liberal peace, is impressive. The democratic peace has been interrogated for over two decades and no one has been able to identify an alternative factor that accounts for it in cross-national statistical analyses. Democracy in any two countries (joint democracy) has been shown to be robustly negatively associated with militarized interstate disputes (MIDs), fatal MIDs, crises, escalation, and wars. The democratic peace is for good reason widely cited and regarded as one of the most productive research programs.

#### No circumvention

Landau 9, associate professor at Fordham Law

(Joseph, Associate-in-Law, Columbia Law School. MUSCULAR PROCEDURE: CONDITIONAL DEFERENCE IN THE EXECUTIVE DETENTION CASES Washington Law Review Vol. 84:661, 2009)

The executive detention cases of the past several years have prompted renewed debate over the proper scope of judicial deference to the executive branch’s claimed need to limit individual liberties during times of crisis. Some theorists argue that courts should resolve large policy questions raised by individual challenges to assertions of executive power.1 Others believe that courts should decide as little as possible, asking only whether executive action is grounded within statutory authority.2 However, a number of the post-9/11 national security decisions have accomplished a great deal without following either approach. In these cases, the Supreme Court and a number of lower courts have put procedural devices to surprisingly “muscular” uses. The decisions illustrate a rare but critical assertion of procedural law where the political branches fail to legislate or properly implement substantive law. This is “muscular procedure”—the invocation of a procedural rule to condition deference on coordinate branch integrity. The cases provide a framework for understanding the role of judicial review in the post-9/11 executive detention decisions, with implications for other fields of law as well.3 Many commentators have criticized the Supreme Court’s executive detention decisions as “merely” procedural rulings, pointing out that the Court has generally addressed itself to questions about adjective law or the ground rules of litigation: whether the Court has jurisdiction; whether detainees can access the courts; and whether the government is required to provide discovery, and if so, how much.4 Far fewer decisions have resolved substantive questions such as the scope of executive power and the content of individual liberty—that is, whom the Executive can hold and for how long, and the specific constitutional protections that apply. But regardless of whether a particular decision turns on “process” or “substance”—an age-old distinction that resists clear definition5—courts have affected the law of national security in profound ways by explicitly requiring the political branches to adhere to a judicially imposed standard of transparency and deliberation. In individual cases, rulings about seemingly mundane procedural issues such as discovery and evidentiary standards have accelerated the release of enemy combatant detainees who were held at Guantánamo Bay years after being cleared of any wrongdoing.6 More broadly, procedural devices have been used to smoke out and put in check Congress’s lack of oversight of the executive branch and its misguided interpretations and implementation of authorizing legislation.7 In a number of these cases, courts have resolved the merits of an enemy combatant8 challenge by scrutinizing the Executive’s adherence \ to baseline procedural safeguards—rejecting determinations based on absolute secrecy, innuendo, tentativeness, or multiple levels of hearsay, while affirming executive branch decisions satisfying minimal standards of reliability.9 In the process, the judiciary has rebuffed the President’s extreme interpretations of vague authorizing legislation,10 reexamined inadequately reasoned decisions by various arms of the executive branch in implementing a congressional delegation,11 and stimulated legislative action where Congress has failed to oversee executive decision-making through the legislative process.12 Throughout these decisions, procedure functions as a corrective to decision-making by one (or both) of the political branches that, if left undisturbed, would violate a judicially imposed standard requiring lucid, intelligible procedures.

# 2AC

### AT: L&V

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

Jackson 12

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

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

### 2AC Suspension CP

**Permutation do the cp –**

**The United States federal judiciary should rule that the Suspension Clause entitles all persons indefinitely detained under the War Powers Authority of the President of the United States to habeas corpus that guarantees a meaningful review of the basis of their detention and habeas corpus entitles detainees to meaningful review prior to transfer to another country.**

#### The grounds were already declared in Boumediene – the aff is a remedy to the decision

Rosdeitcher and Oh 12, Constitution Project

(Sidney S. and Alex Young K., “On Writ Of Certiorari to the United States, Court of Appeals for the District of Columbia Circuit” http://www.constitutionproject.org/wp-content/uploads/2012/10/373.pdf)

This Court’s decision in Boumediene is controlling. In Boumediene, the Court struck down Section 7(a) of the Military Commissions Act of 2006 (“MCA”), which stripped federal courts of jurisdiction to issue the writ in all actions pertaining to Guantánamo detainees, as a de facto suspension of the writ in violation of the Suspension Clause. 128 S. Ct. at 2242-44. Even though Section 7(a) of the MCA “[did] not purport to be a formal suspension of the writ,” this Court held that a statute which effectively strips the courts of habeas jurisdiction will avoid a conflict with the Suspension Clause only if it provides adequate substitute procedures. Id. at 2262. The Court found that the MCA was intended to create a review procedure more limited than habeas, and that this procedure was not adequate— in part because it was ambiguous as to whether it would fail to empower the courts to order release as a remedy—to meet the requirements of the Suspension Clause. Id. at 2274. The MCA, therefore, unconstitutionally suspended the writ. Id. at 2266, 2274. The funding restrictions of the Appropriations Acts, if read to prevent Petitioners’ release in the United States despite their having been granted the writ of habeas corpus, would create the same de facto suspension of habeas that this Court struck down in Boumediene. Although the Appropriations Acts do not formally suspend the writ, they would deprive Petitioners of the remedy of release without leaving Petitioners an alternative remedy because, as Petitioners show, release in the United States is the only feasible way to bring a certain and timely end to their unlawful detention. Hence, a reading of the Acts to deny Petitioners such release plainly would violate the Suspension Clause under Boumediene and render the funding restrictions of the Acts unconstitutional.

**Perm do both**

**Doesn’t solve – kiyemba not challenged**

**Right to a remedy necessary – otherwise habeas = useless**

**This is the status quo**

### 2AC XO CP (0:55)

**Doesn’t solve legitimacy –**

**a) Stable interp – US structures unique for credibility, stability of law key because countries know they can rely on them, that’s Sidhu and Knowles**

**b) Accountability - uniquely accessible because its seen as an avenue for countries to lodge complaints against the US, that’s Knowles**

#### Doesn’t solve democracy –

**a) Deference – k2 restore balance between executive and counters view of judicial irrelevance, otherwise risks new states taking over their judiciaries, becomes authoritarian and prevents stable transition. That’s Milko, CJA, and Vaughn**

**b) Modelling – translational judiciary conferences and networks means only the judiciary is perceived by foreign governments, that encourages judicial independence, that’s Suto and Kersch**

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

#### Internal executive actions don’t restore legitimacy—still perceived as not credible independent of the action taken

Goldsmith 13, Professor at Harvard Law

[05/01/13, Jack Goldsmith teaches at Harvard Law School and is a member of the Hoover Institution Task Force on National Security and Law. He is the author , most recently, of Power and Constraint, “How Obama Undermined the War on Terror”, http://www.newrepublic.com/article/112964/obamas-secrecy-destroying-american-support-counterterrorism]

These are unhappy developments for the president who in his first inaugural address pledged with supercilious confidence that, unlike his predecessor, he would not expend the "rule of law" for "expedience's sake." Obama reportedly bristles at the legal and political questions about his secret war, and the lack of presidential trust that they imply. "This is not Dick Cheney we're talking about here," he recently pleaded to Democratic senators who complained about his administration's excessive secrecy on drones, according to Politico. And yet the president has ended up in this position because he committed the same sins that led Cheney and the administration in which he served to a similar place. The first sin is an extraordinary institutional secrecy that Obama has long promised to reduce but has failed to. In part this results from any White House's inevitable tendency to seek maximum protection for its institutional privileges and prerogatives. The administration's disappointing resistance to sharing secret legal opinions about the secret war with even a small subset of Congress falls into this category. MUCH OF WHAT THE ADMINISTRAT-ION SAYS ABOUT ITS SECRET WAR SEEMS INCOMPLETE, SELF-SERVING, AND ULTIMATELY NON-CREDIBLE. But the point goes deeper, for secrecy is the essence of the type of war that Obama has chosen to fight. The intelligence-gathering in foreign countries needed for successful drone strikes there cannot be conducted openly. Nor can lethal operations in foreign countries easily be acknowledged. Foreign leaders usually insist on non-acknowledgment as a condition of allowing American operations in their territories. And in any event, an official American confirmation of the operations might spark controversies in those countries that would render the operations infeasible. The impossible-to-deny bin Laden raid was a necessary exception to these principles, and the United States is still living with the fallout in Pakistan. For official secrecy abroad to work, the secrets must be kept at home as well. In speeches, interviews, and leaks, Obama's team has tried to explain why its operations abroad are lawful and prudent. But to comply with rules of classified information and covert action, the explanations are conveyed in limited, abstract, and often awkward terms. They usually raise more questions than they answer—and secrecy rules often preclude the administration from responding to follow-up questions, criticisms, and charges. As a result, much of what the administration says about its secret war—about civilian casualties, or the validity of its legal analysis, or the quality of its internal deliberations—seems incomplete, self-serving, and ultimately non-credible. These trust-destroying tendencies are exacerbated by its persistent resistance to transparency demands from Congress, from the press, and from organizations such as the aclu that have sought to know more about the way of the knife through Freedom of Information Act requests. A related sin is the Obama administration's surprising failure to secure formal congressional support. Nearly every element of Obama's secret war rests on laws—especially the congressional authorization of force (2001) and the covert action statute (1991)—designed for different tasks. The administration could have worked with Congress to update these laws, thereby forcing members of Congress to accept responsibility and take a stand, and putting the secret war on a firmer political and legal foundation. But doing so would have required extended political efforts, public argument, and the possibility that Congress might not give the president precisely what he wants. The administration that embraced the way of the knife in order to lower the political costs of counterterrorism abroad found it easier to avoid political costs at home as well. But this choice deprived it of the many benefits of public argumentation and congressional support. What Donald Rumsfeld said self-critically of Bush-era unilateralism applies to Obama's unilateralism as well: it fails to "take fully into account the broader picture—the complete set of strategic considerations of a president fighting a protracted, unprecedented and unfamiliar war for which he would need sustained domestic and international support." Instead of seeking contemporary congressional support, the administration has relied mostly on government lawyers' secret interpretive extensions of the old laws to authorize new operations against new enemies in more and more countries. The administration has great self-confidence in the quality of its stealth legal judgments. But as the Bush administration learned, secret legal interpretations are invariably more persuasive within the dark circle of executive branch secrecy than when exposed to public sunlight. On issues ranging from proper targeting standards, to the legality of killing American citizens, to what counts as an "imminent" attack warranting self-defensive measures, these secret legal interpretations—so reminiscent of the Bushian sin of unilateral legalism—have been less convincing in public, further contributing to presidential mistrust. Feeling the heat from these developments, President Obama promised in his recent State of the Union address "to engage with Congress to ensure not only that our targeting, detention, and prosecution of terrorists remains consistent with our laws and system of checks and balances, but that our efforts are even more transparent to the American people and to the world." So far, this promise, like similar previous ones, remains unfulfilled. The administration has floated the idea of "[shifting] the CIA's lethal targeting program to the Defense Department," as The Daily Beast reported last month. Among other potential virtues, this move might allow greater public transparency about the way of the knife to the extent that it would eliminate the covert action bar to public discussion. But JSOC's non-covert targeted killing program is no less secretive than the CIA's, and its congressional oversight is, if anything, less robust. A bigger problem with this proposed fix is that it contemplates executive branch reorganization followed, in a best-case scenario, by more executive branch speeches and testimony about what it is doing in its stealth war. The proposal fails to grapple altogether with the growing mistrust of the administration's oblique representations about secret war. The president cannot establish trust in the way of the knife through internal moves and more words. Rather, he must take advantage of the separation of powers. Military detention, military commissions, and warrantless surveillance became more legitimate and less controversial during the Bush era because adversarial branches of government assessed the president's policies before altering and then approving them. President Obama should ask Congress to do the same with the way of the knife, even if it means that secret war abroad is harder to conduct. Administration officials resist this route because they worry about the outcome of the public debate, and because the president is, as The Washington Post recently reported, "seen as reluctant to have the legislative expansion of another [war] added to his legacy." But the administration can influence the outcome of the debate only by engaging it. And as Mazzetti makes plain, the president's legacy already includes the dramatic and unprecedented unilateral expansion of secret war. What the president should be worried about for legacy purposes is that this form of warfare, for which he alone is today responsible, is increasingly viewed as illegitimate.

**Links to []**

### Executive Circumvention 2AC

#### No circumvention –

#### a) strategy

Stimson 9

[09/25/09, Cully Stimson is a senior legal fellow at the Heritage Foundation and an instructor at the Naval Justice School former American career appointee at the Pentagon. Stimson was the Deputy Assistant Secretary of Defense for Detainee Affairs, “Punting National Security To The Judiciary”, http://blog.heritage.org/2009/09/25/punting-national-security-to-the-judiciary/]

So what is really going on here? To those of us who have either served in senior policy posts and dealt with these issues on a daily basis, or followed them closely from the outside, it is becoming increasingly clear that this administration is trying to create the appearance of a tough national-security policy regarding the detention of terrorists at Guantanamo, yet allow the courts to make the tough calls on releasing the bad guys. Letting the courts do the dirty work would give the administration plausible cover and distance from the decision-making process. The numbers speak for themselves. Of the 38 detainees whose cases have been adjudicated through the habeas process in federal court in Washington, 30 have been ordered released by civilian judges. That is close to an 80 percent loss rate for the government, which argued for continued detention. Yet, how many of these decisions has this administration appealed, knowing full well that many of those 30 detainees should not in good conscience be let go? The answer: one. Letting the courts do it for him gives the president distance from the unsavory release decisions. It also allows him to state with a straight face, as he did at the Archives speech, “We are not going to release anyone if it would endanger our national security, nor will we release detainees within the United States who endanger the American people.” No, the president won’t release detainees; he’ll sit back and let the courts to do it for him. And the president won’t seek congressional authorization for prolonged detention of the enemy, as he promised, because it will anger his political base on the Left. The ultra-liberals aren’t about to relinquish their “try them or set them free” mantra, even though such a policy threatens to put terrorists back on the battlefield. Moreover, the president would have to spend political capital to win congressional authorization for a prolonged detention policy. Obviously, he would rather spend that capital on other policy priorities. Politically speaking, it is easier to maintain the status quo and let the detainees seek release from federal judges. The passive approach also helps the administration close Gitmo without taking the heat for actually releasing detainees themselves.

#### b) dedication to rule of law

Prakash and Ramsay 12, Professors of Law

[2012, Saikrishna B. Prakash is a David Lurton Massee, Jr. Professor of Law and Sullivan and Cromwell Professor of Law, University of Virginia School of Law., and Michael D. Ramsey is a Professor of Law, University of San Diego School of Law; “The Goldilocks Executive”, Review of THE EXECUTIVE UNBOUND:AFTER THE MADISONIAN REPUBLIC. By Eric A. Posner & Adrian Vermeule, 90 Texas L. Rev. 973, <http://www.texaslrev.com/wp-content/uploads/Prakash-Ramsey-90-TLR-973.pdf>]

The Courts.—The courts constrain the Executive, both because courts are necessary to the Executive imposing punishments and because courts can enforce the Constitution and laws against the Executive. It is true, as Posner and Vermeule say, that courts often operate ex post and that they may defer to executive determinations, especially in sensitive areas such as national security. But these qualifications do not render the courts meaningless as a Madisonian constraint. First, to impose punishment, the Executive must bring a criminal case before a court. If the court, either via jury or by judge, finds for the defendant, the Executive does not suppose that it can nonetheless impose punishment (or even, except in the most extraordinary cases, continue detention). This is so even if the Executive is certain that the court is mistaken and that failure to punish will lead to bad results. As a result, the Executive’s ability to impose its policies upon unwilling actors is sharply limited by the need to secure the cooperation of a constitutionally independent branch, one that many suppose has a built-in dedication to the rule of law.84 And one can hardly say, in the ordinary course, that trials and convictions in court are a mere rubber stamp of Executive Branch conclusions. Second, courts issue injunctions that bar executive action. Although it is not clear whether the President can be enjoined,85 the rest of his branch surely can and thus can be forced to cease actions that judges conclude violate federal law or the Constitution.86 As a practical matter, while courts issue such injunctions infrequently, injunctions would be issued more often if an administration repeatedly ignored the law. Third, courts’ judgments sometimes force the Executive to take action, such as adhering to a court’s reading of a statute in areas related to benefits, administrative process, and even commission delivery. Though the claim in Marbury v. Madison87 that courts could issue writs of mandamus to executive officers was dicta,88 it was subsequently confirmed in Kendall v. United States ex rel. Stokes, 89 a case where a court ordered one executive officer to pay another.90 Finally, there is the extraordinary practice of the Executive enforcing essentially all judgments. The occasions in which the Executive has refused to enforce judgments are so few and far between that they are the stuff of legend. To this day, we do not know whether Andrew Jackson said, “John Marshall has made his decision, now let him enforce it.”91 Lincoln’s disobedience of Chief Justice Taney’s writ of habeas corpus is so familiar because it was so singular. Yet to focus on actual court cases and judgments is to miss the broader influence of the courts. Judicial review of executive action matters because the knowledge of such review affects what the Executive will do. Executives typically do not wish to be sued, meaning that they often will take measures designed to stave off such suits and avoid actions that raise the risk of litigation. The ever-present threat that someone will take a case to court and defeat the Executive acts as a powerful check on executive decision making. The Executive must take account of law, including law defined as what a court will likely order.

### **AT: Warming Impact**

### 2AC Plenary Powers DA (1:30)

#### Plenary powers authority over detention issue is a myth—immigration authority is under congress in the status quo and has been disproven for centuries

Tirschwell 9

[2009, Eric A. Tirschwell is the first listed lawyer on the brief, “ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT”, <http://ccrjustice.org/files/2009-12-04%20kiyemba_FINAL%20merits%20brief_0.pdf>]

The core theory of the Kiyemba panel majority was that detention power could be located in plenary Ex-ecutive control of the border—that is, in an immanent power separate from the Constitution or statute. Pet.App.4a-7a. The panel majority traced this power to Chae Chan Ping v. United States (“The Chinese Exclusion Case”), 130 U.S. 581 (1889).39 Pet.App.6a. The precarious foundations of that decision eroded more than a century ago, see Wong Wing v. United States, 163 U.S. 228, 237 (1896) (invalidating law authorizing imprisonment of any Chinese citizen in the U.S. illegally), and today have collapsed where detention power is claimed. As the Court explained in Martinez, “the security of our borders” is for Congress to attend to, consistent with the requirements of habeas and the Due Process Clause. 543 U.S. at 386 (emphasis added); see also Zadvydas, 533 U.S. at 696 (no detention power incident to border prerogative without express congressional grant, which is subject to constitutional limits); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 640 (1952) (Jackson, J., concurring) (“[T]he executive branch, like the Federal Government as a whole, possesses only delegated powers. The purpose of the Constitution was not only to grant power, but to keep it from getting out of hand.”); Pet.App.29a (collecting cases). The “whole volume” of history, to which the government refers, Cert. Opp’n at 14, actually describes “the power of Congress” over regulating admission and deportation, see Galvan v. Press, 347 U.S. 522, 531 (1954) (emphasis added). The border gives the Executive no plenary power to detain. If an extra-constitutional Executive border power existed, one might have expected some treatment of it in United States v. Libellants of Amistad, 40 U.S. 518 (1841), the last of many cases argued before this Court by John Quincy Adams. Aboard a schooner that arrived off Montauk, Long Island in August, 1839 were Africans. Kidnapped by Spanish slavers, they had killed the crew and seized control of the ship. At Spain’s request, President Van Buren prosecuted treaty-based salvage claims for the vessel and, on the theory that the latter were slaves of Spaniards, the Africans themselves. The Executive asserted significant Article II interests grounded in foreign relations with Spain. Yet neither diplomatic concerns (no less urgent to the Executive of the day than the control-of-theborder interest asserted here) nor a vague notion of security (the Africans had committed homicides) dissuaded Justice Story from ordering the Africans released into Connecticut, thence to travel where they liked. 40 U.S. at 592-97.40 Nor did any notion of plenary power over immigration, which received no mention at all.

#### Democracy solves the impact and plenary powers aren’t key—their impact assumes cold war era fears

Spiro 2, Professor at Hofstra Law School

[Winter 2002, Peter J. Spiro is a Professor, Hofstra Law School, “Explaining the End of Plenary Power”, 16 Geo. Immigr. L.J. 339]

Building on those two girders, one can describe how plenary power was generated by the international context from which it emerged. That context was historically characterized by the proto-anarchical nature of relations among states and the resulting need to centralize foreign policymaking in non-judicial institutions. Immigration policy inherently implicated foreign relations, and those relations were, up until recently, characterized by great instability and risk. In the late nineteenth century, nations still routinely made war on each other, for reasons of pure power projection; there was little in the way of a normative or institutional superstructure to act as a brake on conflict. That conflict posed a serious threat, not the least to the not-yet-superpower United States. In a world in which the use of force remained a legitimate means of extending state power, foreign relations were the ultimate high-stakes arena. The world that bore plenary power was also one that demanded unitary decisionmaking. In the face of potentially catastrophic downside risk, the state needed to centralize the formulation of foreign policy. The courts were least suited to assume that institutional task. As famously propounded in Curtiss-Wright, traditional foreign policymaking required speed, secrecy, and singular responsibility, qualities antithetical to judicial process. n42 Nor could the courts claim any substantive competence in the area. Foreign relations were an area that could not tolerate judicial freelancing. n43 In the worst scenario, a court would make the wrong call for want of accurate information and foreign policy expertise, leading us into conflict with another country with all the dangers such conflict posed. n44 Alternatively, the [\*350] courts would make their rulings and have them ignored by the political branches, diminishing critical institutional capital in the process. n45 Either way, there were powerful incentives for the courts to remain on the sidelines when it came to foreign relations. Hence the political question doctrine in matters involving foreign relations, of which plenary power is a variant. n46 Indeed, all of the major plenary power cases stress the foreign relations element of immigration lawmaking and the dangers posed by judicial intervention in such matters. n47 Until recent years, that abnegation was justifiable, if not always justified. Even in such cases as Knauff and Mezei, which have appropriately fallen into disrepute with the passage of time, there were ways of filling out the picture that would have dictated restraint, given the magnitude of the perceived threat. n48 So strong was the judicial reticence that the Court refused anything more than cursory constitutional review even where an immigration controversy implicated no apparent foreign policy sensitivities. n49 The Court feared, perhaps, that to impose constitutional constraints in an innocuous case might dictate their application in ones involving greater foreign policy dangers (or, alternatively, give rise to transparently unprincipled decisional criteria that [\*351] could be used to undermine rights in the domestic context). Better to stay out of the area altogether. And that the Court has largely done until the cases this past Term. n50 There is nothing in the cases themselves to suggest that the shift is owed to the international context. But the context has witnessed an architectural transformation away from those features that sustained plenary power. First, the world is a far less dangerous place today, at least as between states (bracketing for a moment the problem of terrorism). In its traditional conception, war has become something of an anachronism. Democracies have been shown not to make war on each other as a historical matter, n51 and as the realm of democracy expands, so too does the zone of peace. That has lowered the stakes of foreign relations. The downside risk of upsetting relations among nations is now significantly less daunting than in the heyday of plenary power. Compared to the context in which plenary power was spawned (the late nineteenth century), there are more effective institutional brakes on the way to armed conflict. The chances of the United States finding [\*352] itself in real war with a major power -- of the sort of the World Wars -- is virtually nil. Compared to the context in which plenary power found its most extreme form, during the Cold War, the strength of hostile adversaries is not nearly as threatening. It is easy to forget the Cold War perception that the world stood at the brink of nuclear annihilation. That fear has dissipated. The fact that foreign relations no longer pose its historical dangers makes it a less weighty interest relative to individual rights. Foreign relations, in theory, used to pose the ultimate threat, with survival in the balance. That rendered it almost an incommensurable value, a trump against which all others lost. Now that major conflict is unlikely and annihilation improbable (at least as undertaken by another country), it no longer presents a showstopper. Foreign relations interests can be assessed and balanced. They can also be incorrectly assessed and balanced without risk of catastrophic results. It is no longer so easy to frame these interests as imperatives, qualitatively distinguishable from other societal concerns. The transformed nature of foreign relations also puts less of a premium on the decisionmaking anomalies that distinguished it from other areas of lawmaking. The hallmarks of centralization, secrecy, and dispatch no longer present a clear functional advantage. On the contrary, most of the issues that have come to the fore in the new global order (human rights, environmental protection, health, trade, market regulation, etc.) demand a counter-approach at both the domestic and international levels. These issues are, first of all, better addressed through decentralized institutional mechanisms, both governmental and non-governmental. Anne-Marie Slaughter has highlighted the "disaggregation" of central governments in international policymaking. n53 No longer do foreign ministries hold a monopoly on foreign policymaking; other kinds of agencies are forming decisionmaking networks among their international counterparts and undertaking international policy with only marginal participation of diplomatic corps. Beyond the decentralization of central government actors, other entities, including subnational governments and non-governmental organizations, are also emerging as independent players on the international stage. n54 Secrecy is antithetical to efficient decisionmaking on most of the new global issues; one cannot make good policy with respect to environmental protection, for instance, without the full dissemination of relevant data. This observation ties into the decentralization phenomenon. As entities other than foreign ministries come to play an important part in international decisionmaking they need to be afforded full information; [\*353] traditional national security classification schemes pose an impediment to efficient decisionmaking rather than a premise to it. n55 Finally, speed is no longer of the essence in most international policymaking. Because it poses less of a competitive proposition (at least among nation-states), international affairs no longer require the battlefield agility -- real and proverbial -- of earlier times. These developments -- the diminished risks of foreign relations and the changed nature of international decisionmaking -- are what allow the retreat from plenary power and the more vigorous participation of the courts in immigration lawmaking. The diminished risks of foreign relations (again, bracketing for now the question of terrorism) reduce the risk of judicial error. No longer, as they did in the Cold War, do the courts have to fret that a misstep on their part will lead us into World War III or irretrievably undermine national security in the traditional sense of protecting against state adversaries. Nor do they have to conceive of foreign policy as a finely calibrated enterprise not admitting of multiple actors. American judges are themselves increasingly active on the international stage and are developing sustained relationships with their foreign counterparts. n56 In the immigration realm that translates into greater possible institutional discretion for the courts. First, it will allow courts to entertain constitutional challenges to elements of the immigration law regime that have only an attenuated connection to foreign policy. n57 The Fiallo and Nguyen cases present examples. Although both involved foreign nationals (as do all immigration cases), the cases could not have been of much concern to other countries. n58 In the past, such cases might have been avoided for fear of impacting foreign policy in even a marginal fashion or for fear of making judicial involvement unavoidable in other cases with more apparent foreign policy implications. But even such cases that do have a clear foreign policy element are fair judicial game. Because the stakes are lower and because foreign policymaking is now a multilevel game, the courts can assert themselves in the way they assert themselves in other contexts. Zadvydas presents an example. The case clearly involved foreign policy; the United States had been negotiating for [\*354] the return of the detained aliens with their homeland governments. n59 But that no longer posed an obstacle to review, as it almost surely would have in the past.

#### There’s no link—the aff only mandates that they detention is over, their evidence assumes forced release into the US—if their UQ is true, the Judiciary will craft the decision to avoid plenary powers

#### Internal link turn – The plenary powers doctrine results in phantom norm decisions that effectively undermine political immigration authority and lead to more intrusive judicial action in areas where it’s actually not critical—star this argument

Motomura 90, Associate Professor of Law

[Hiroshi Motomura is an Associate Professor of Law at the University of Colorado School of Law, “Immigration Law After a Century of Plenary power,” Yale Law Journal, December, 100 Yale L.J. 545]

Apart from awkwardness or unpredictability, subconstitutional phantom norm decisions, once established in response to problems of constitutional dimensions, set a precedent for excessive review of routine matters. By "exces- sive," I do not necessarily suggest "more" or "less" judicial review; explicit adoption of constitutional norms certainly would invite judicial scrutiny of agency decisions. Rather, I mean "excessive" in that the judicial habit of review not tied to real constitutional norms is open-ended and unbounded. As a result, courts may be least likely to intervene in agency decisionmaking when they can help most, and most likely to intervene when they can help least. The problem goes back as far as Fong Haw Tan, which by calling for interpretation of deportation statutes in the light most favorable to the alien, often asks courts to limit deference to agency interpretation of statutes. Much more recently, Jean v. Nelson330 derived limits on INS discretion in parole decisions from phan- tom constitutional considerations, when the subconstitutional texts contained no express limitations. Under a narrow reading of Jean, the INS abuses its parole discretion if it considers factors that conflict with phantom constitutional norms, whether or not a court would squarely hold unconstitutional a statute that expressly made those factors pertinent.332 Thus, it is an abuse of discretion to consider race in parole decisions, even if it is not directly unconstitutional. But it is difficult to avoid slipping into a slightly broader reading of Jean, especially (but not only) the reading that the INS abuses its discretion by considering factors not expressly authorized by statute or regulation. This reading is entirely understandable, since the prevailing view of Jean has not been to analyze it as a "phantom norm decision." Such a phantom norm analysis of Jean might help contain judicial review of agency action, but unless Jean is so limited, this slightly broader reading creates an open-ended and therefore troubling precedent for excessive judicial intrusion into agency decisionmaking. As Justice Marshall wrote in his dissent in Jean: "The Court's restrictive view of the Attorney General's discretionary authority with respect to parole decisions, adopted in the face of no authoritative statements limiting such discretion, will presumably affect the scope of his permissible discretion in areas other than parole deci-sions.... This is indeed a costly way to avoid deciding constitutional issues."333 INS v. Rios-Pineda,334 decided by the Court just six weeks before it decid- ed Jean, reflects the more typical framework for judicial review of agency deci- sions. The Court said that it was not an abuse of discretion to deny certain motions to reopen suspension of deportation proceedings. The Court also emphasized that agencies must be free to base decisions on factors that relate generally to the law entrusted to it-in this case, "legitimate concerns about administration of the immigration laws."335 These aspects of Rios-Pineda merely continued a tradition of judicial decisions that had established broad discretion for the INS.336 Two prominent examples are United States ex rel. Hintopoulos v. Shaughnessy337 and Jay v. Boyd,338 both of which involved the discretionary denial of aliens' requests for suspension of deportation. INS v. Abudu, a 1988 Supreme Court decision, adopts a similar approach,339 as have numerous lower court decisions.34 Courts that get into the habit of using expanded "abuse of discretion" and similar subconstitutional constructs to apply phantom constitutional norms indirectly are likely to succumb to the temptation to define "legitimate" so broadly that they in effect try to run the agency. While this may be under- standable in light of the record of the INS,341 judicial review still represents the commitment of a precious resource. Review of the wrong type is an uncer- tain improvement over no judicial review at all.342 And the problem is com- pounded when judicial review is not only misdirected but also imposes cumber- some or unworkable procedures.343 Plenary power has prevented the growth of a coherent constitutional frame- work for immigration la

w, within which its subconstitutional levels-statutes, regulations, agency directives, and so forth-can develop and be administered fairly and predictably. There is a paradox here. On the one hand, the courts adopted the plenary power doctrine to insulate immigration decisions from constitutional judicial review. Judicial sensitivity to the need to maintain the flexibility to respond to unexpected contingencies, especially pertaining to foreign policy, may explain some of the plenary power doctrine's persistence- for example, the Supreme Court decided Knauff, Mezei, and Harisiades at the height of the nation's preoccupation with the perceived Communist threat. The irony is that the steady erosion of the plenary power doctrine through phantom norm decisionmaking may, precisely because no coherent body of constitutional norms exists to anchor and thus limit judicial review in immigration cases, lead to subconstitutional decisions that intrude into executive or legislative opera- tions even more aggressively. There may be times when agency decision- making, to reach the best results, should be able to apply expertise, discretion, and flexibility after considering the unusual and the unpredictable.3" Since Mandel, the most negative effects of phantom norm decisions have been to impede the sound exercise of executive branch discretion. Tight supervision may correct short-run problems, but in the long run it also prevents immigration law from maturing and thus continues its traditional isolation-albeit isolation of a different character-from the mainstream of our public law.

### 2AC Court Capital DA (1:20)

#### Supreme court action on NSA war powers inevitable—triggers the link

Fitzgerald 12/28

[12/28/13, Sandy Fitzgerald, “Supreme Court May Have to Break NSA Surveillance Stalemate”, <http://www.newsmax.com/Newsfront/nsa-surveillance-contradictory-supreme/2013/12/28/id/544180#ixzz2pI4aAjrN>]

It may be up to the U.S. Supreme Court to decide whether the National Security Agency's collection of Americans' phone data is constitutional, after two federal judges issued contradictory landmark rulings on the matter. The American Civil Liberties Union already plans to appeal Friday's decision by U.S. District Judge William Pauley III in New York that said the agency's bulk telephone metadata is not only legal but necessary, reports cruxialcio.com. Pauley said the metadata, which includes records of the numbers that were called and how long calls last while not recording the content of the calls is a vital tool for capturing terrorists. "The bulk telephony metadata collection program represents the government's counter-punch: connecting fragmented and fleeting communications to reconstruct and eliminate al-Qaeda's terror network," Pauley said. But his ruling came less than two weeks after another federal judge, U.S. District Court Judge Richard Leon in Washington, D.C., said the metadata collection was a likely violation of citizens' rights to privacy. The American Civil Liberties Union, which claimed the program is unconstitutional and sued the government, said it would appeal the ruling. "We are extremely disappointed with this decision, which misinterprets the relevant statutes, understates the privacy implications of the government’s surveillance and misapplies a narrow and outdated precedent to read away core constitutional protections," said Jameel Jaffer, ACLU deputy legal director. The appeals would be filed in courts in New York and Washington on either case, and if the split remains, will likely head to the Supreme Court after that, The New York Times reports. Even Pauley, while making his ruling, admitted that the NSA's data collection, revealed by whistleblower Edward Snowden, "imperils the civil liberties of every citizen," but still might have captured the terrorists before the 9-11 attacks on the Pentagon and World Trade Center. But he said it is up to the president and Congress to end the NSA's activities, not the courts. Pauley also said that it is not up to him to say if the law will be appealed at the Supreme Court level. "The Supreme Court has instructed lower courts not to predict whether it would overrule a precedent even if its reasoning has been supplanted by later cases," noted Pauley.

#### **The DC District Court would order release**

Schroeder et al 9, retired federal judges

(James C., GARY A. ISAAC Counsel of Record STEPHEN J. KANE STEPHEN S. SANDERS CHAD M. CLAMAGE JOSHUA M. GRENARD, “On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit” <http://www.oyez.org/sites/default/files/cases/briefs/pdf/brief__08-1234__6.pdf>)

All nine members of the Boumediene Court recognized that the power to order release is a fundamental element of the Article III courts’ habeas jurisdiction. “[T]hough release need not be the exclusive remedy and is not the appropriate one in every case in which the writ is granted,” nevertheless “the habeas court must have the power to order the conditional release of an individual unlawfully detained.” 128 S. Ct. at 2266 (emphasis added).6 Accord id. at 2271 (“when the judicial power to issue habeas corpus properly is invoked the judicial officer must have adequate authority \* \* \* to formulate and issue appropriate orders for relief, including, if necessary, an order directing the prisoner’s release”) (emphasis added); id. at 2283 (Roberts, C.J., dissenting) (“the writ requires most fundamentally an Article III court able to hear the prisoner’s claims and, when necessary, order release”).Thus, Boumediene makes clear that the petitioners were entitled to petition for a writ of habeas corpus to challenge their imprisonment at Guantanamo. Boumediene makes plain as well that, at the very least, the Article III courts adjudicating such petitions must have, and do have, “the power to order the conditional release of an individual unlawfully detained.” Boumediene, 128 S. Ct. at 2266 (emphasis added).

#### Legitimacy is resilient—the newest and best data proves—single decisions don’t impact it

Gibson and Nelson 13, Professor of Government

[2013, James L. Gibson is a Sidney W. Souers Professor of Government at the Department of Political Science and Professor of African and African American Studies and Director, Program on Citizenship and Democratic Values at the Weidenbaum Center on the Economy, Government, and Public Policy, and Michael J. Nelson is a Ph.D. Candidate at the Department of Political Science Graduate Student Associate, Center for Empirical Research in the Law, “IS THE U.S. SUPREME COURT’S LEGITIMACY GROUNDED IN PERFORMANCE SATISFACTION AND IDEOLOGY?\*”, presented at the Paper American Political Science Association 2013 Annual Meeting, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2300515>]

The overwhelming weight of the evidence we present in this paper is that the legitimacy of the U.S. Supreme Court is not much dependent upon the Court making decisions that are pleasing to the American people. The Court’s legitimacy seems not to be grounded in policy agreement with its decisions, nor is it connected to the ideological and partisan cross-currents that so wrack contemporary American politics. Whether desirable or undesirable, it seems that the current Supreme Court has a sufficiently deep reservoir of goodwill that allows it to rise above the contemporary divisions in the American polity. These empirical conclusions have enormous theoretical importance. It seems that the Court as currently configured is unlikely to consistently disappoint either the left or the right. As we have documented above, the current Supreme Court makes fairly conservative policy, but it clearly does not make uniformly conservative policy. Thus, even the Rehnquist and Roberts Courts have made many decisions that should be pleasing to liberals, even if conservatives should be slightly more pleased with the Court. Perhaps a court closely divided on ideology cannot produce the consistent decisional fuel needed to ignite a threat to the institution’s legitimacy. Some worry that an ideologically divided Court undermines the institution’s legitimacy (e.g. Liptak 2011). Perhaps the truth is exactly the opposite: an ideologically divided Court is able to please both liberals and conservatives with its decisions, and therefore decisional displeasure does not build to the point of challenging the institution’s legitimacy. This then takes us to the Court’s so-called countermajoritarian dilemma, a problem in which many legal scholars are currently interested. At least a portion of this rekindled interest has been stimulated by the Court’s decision in Citizens United. Pildes (2010) declares that “Citizens United is the most countermajoritarian decision invalidating national legislation on an issue of high public salience in the last quarter century” (157). The countermajoritarian nature of the decision is reflected in evidence that the American people, by a fairly substantial majority, disagree with the substance of the Court’s ruling. Let us assume that people do not question the legitimacy of decisions made by courts when they agree with those decisions. Legitimacy only comes into play when there is an objection precondition. So we will assume that the 27 % of the American people (according to an interest group poll conducted in February 2010, cited by Pildes) who agree with the Court’s decision cede legitimacy to the institution. Nearly two-thirds (64 %) of the American people oppose the ruling. But let us assume that about half of this two-thirds extends legitimacy to the Supreme Court and is therefore willing to accept decisions with which they disagree. If we add this 32 % to the 27 % supporting the decision, then a fairly sizeable 59 % is unlikely to be willing to support schemes to attack the Court or to try to overrule its decision. Thus, the constituency for curbing the Court on most decisions is the fairly small minority who oppose the decision and who do not extend legitimacy to the Court. These calculations explain why a coalition for attacking the Court is difficult to assemble, and, in conjunction with the evidence that the Court today is issuing both liberal and conservative opinions, may provide a clue as to why the Court’s legitimacy is currently so stable. The Supreme Court is a majoritarian institution, not in the sense that it is typically in substantive policy agreement with its constituents, the American people, but rather in the sense that it is dependent upon a majority granting legitimacy to the institution. And, as Clark (2009; 2011) has so ably shown, the Court seems aware of this requirement and acts to protect its core legitimacy. Thus, the Supreme Court need not make decisions pleasing to the majority all or even most of the time, and in that sense it is not a majoritarian institution (unlike, for instance, a legislature). But because the Court currently attracts legitimacy from the majority, its ability to rule against the people’s preferences, even up to one-half or so of the time, is secure. Thus, this “new math” of institutional legitimacy goes some considerable distance toward accounting for the efficacy and the seeming invincibility of the current Supreme Court.

#### Increasing the quantity of cases on the docket enables the court to rule against the executive more—status quo depletion ensures excessive executive influence

Owens and Simon 12, Assistant Professor of Political Science and a Fellow at Harvard Law

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In addition to unsettled law and a hampered Court, a small docket may lead to the excessive influence of certain parties or interests. Scholars often complain that organized interests exert too much control in politics and upon the Court.171 Copyright law scholars, for example, lament how Disney single-handedly induced Congress to extend copyright protection by twenty years.172 In administrative law, special interest groups often “capture” agencies in areas ranging from gun regulation173 to aviation rules174 to copyright policy. Recently, Richard Lazarus highlighted the potential capture of the Supreme Court. He argued that the Supreme Court bar—a highly specialized and powerful group of attorneys—substantially influences the Court’s decision to grant or deny cert.176 To show this, Lazarus studied cert petition grant rates from 1980 to 2008. Specifically, he examined the rate at which the Court granted cert when “expert Supreme Court advocate[s]”177 sought review.178 He found that, over the years, expert practitioners continually gained influence over the Court’s docket.179 In 1980, for example, the Court granted cert in 5.8 percent of cases brought by expert practitioners.180 By 2007 and 2008, that rate had increased to 53.8 percent and 55.5 percent, respectively.181 This capture, Lazarus fears, skews the Court’s docket toward issues that are not “truly the most important for the nation.”182 Instead, the cases that the Court hears reflect the preferences of a small cadre of lawyers and their clients.183 The Justices and their clerks cannot pay close attention to the thousands of cert petitions filed each year.184 What constitutes an information deficit for the Justices, then, becomes a “tactical advantage” for the Supreme Court bar.185 They have the reputation, forum, and experience to argue persuasively that their cases are the ones the Court should hear. Lazarus is not alone; additional empirical evidence drives home the point that elite attorneys can influence Justices. Consider the work of Kevin McGuire, who examined the success of Washington, D.C. attorneys.186 McGuire found that Washington, D.C.-based attorneys are much more likely than non-Washington attorneys to succeed before the Court.187 In a similar work, McGuire found that attorneys who are more experienced than their opposing counsel are more likely to win their cases.188 Although there are a host of factors that lead to their victories—such as the incentive to provide more credible information and the ability to key in on the Justices’ individual proclivities—the unmistakable fact is that elite attorneys observe more victories before the Court and, thus, are in a position to exert heightened influence over Justices.189 When the Court’s docket is small, the proportion of influence these attorneys exert over federal law grows dramatically. Of course, no attorney can compare to attorneys in the Office of the Solicitor General (OSG) in terms of influencing the Court. A smaller Court docket surely, then, promises to increase the influence of the executive branch. Consider recent work by Ryan Black and Ryan Owens.190 The authors examined every case coming from a federal court of appeals in which the OSG filed an amicus curiae brief at the agenda stage between the 1970 and 1993 Terms.191 They analyzed each Justice’s general ideological views as well as his or her theoretically expected agenda vote in the case.192 They then examined whether each Justice cast a vote consistent with the recommended action of the OSG.193 The findings are remarkable. Even those Justices most likely to disagree with the OSG—both in a general ideological sense and in the particulars of the case before them—still followed the OSG’s recommendation more than 35 percent of the time.

194 Put in more personal terms, the results demonstrated that Justice Thurgood Marshall, a staunch liberal, followed a recommendation made by President Reagan’s Solicitor General Rex Lee thirty-five times out of one hundred, even when Marshall totally disagreed with the OSG recommendation in the case. That Justices followed OSG recommendations to such a degree even when they had so little agreement with the OSG provided, the authors believed, strong evidence of OSG influence.195 Additional work on the OSG suggests that the executive branch might disproportionately benefit from a smaller docket. In a forthcoming book by Black and Owens,196 the authors use cutting-edge matching methods to find evidence of OSG influence. The authors compare the success of OSG attorneys with the success of attorneys who formerly worked in the OSG, and with the success of attorneys who never worked in the OSG.197 They matched observations such that OSG attorneys and non-OSG attorneys were as identical as possible in terms of experience, resources, amicus assistance, and other factors.198 The goal was to ensure that the two different groups of attorneys were identical, save for the fact that in one set of cases, the OSG argued before the Court, whereas in the other set of cases a non-OSG attorney argued before the Court. The results are compelling. In terms of success before the Court, an OSG attorney is 12 percent more likely to win than an otherwise identical non-OSG attorney who formerly worked in the OSG, and 14 percent more likely to win than an otherwise identical non-OSG attorney who never worked in the OSG.199 Moreover, the Court’s majority opinions are significantly more likely to borrow language from the OSG’s briefs than from otherwise identical non-OSG attorney’s briefs.200 Finally, the Court is much more likely to positively or negatively interpret precedent when the OSG makes such a recommendation versus an identical case in which it does not.201 In short, the OSG wields considerable influence across the Court’s decision-making process. Such influence, we believe, will be magnified exponentially with a depleted docket.

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### Court Stripping

#### **Obama’s pushing the plan now and Congress already took a first step**

WP 1/3 (“Guantanamo breakthrough shows President Obama is serious about closing the prison” http://www.washingtonpost.com/opinions/president-obamas-guantanamo-breakthrough/2014/01/03/9f016784-74a1-11e3-8def-a33011492df2\_story.html)

The transfer to Slovakia of the last three Uighurs consequently was a breakthrough and an encouraging sign of progress in President Obama’s renewed effort to close the prison. After more than two years of virtual passivity in the face of restrictions imposed by Congress, the president last year appointed senior officials at the State and Defense departments to coordinate the transfer of prisoners cleared for release and ordered long-delayed reviews of cases of the remaining detainees to begin. Including the Uighurs, 11 men have left Guantanamo since August. Congress made it easier last month by lessening the restrictions it had previously placed on transfers, though it continued an irrational ban on the movement of prisoners to the United States, where they could be held and prosecuted far more simply and cheaply. Slovakia, like El Salvador, Switzerland, Albania, Bermuda and Palau before it, deserves recognition for resisting pressure from China not to accept the Uighurs. Beijing reportedly succeeded in blocking the prisoners’ previously planned transfer to Costa Rica.