## 1AC

### 1AC Plan

#### The United States federal judiciary should require that the president cannot continue the detention of personnel that have successfully won a habeas corpus hearing.

### 1AC Legitimacy

#### Contention One is Legitimacy

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

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.

#### Kiyemba decisions undermined legitimacy of our commitment to the rule of law globally

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

In 2007, Ninth Circuit Judge A. Wallace Tashima observed that the rule of law—touted by the United States throughout the world since the end of World War II— has been “steadily undermined . . . since we began the so-called ‘War on Terror.’”185 “The American legal messenger,” Tashima notes, “has been regarded throughout the world as a trusted figure of goodwill, mainly by virtue of close identification with the message borne”—“that the rule of law is fundamental to a free, open, and pluralistic society,” that the United States represents “a government of laws and not of persons,” where “no one—not even the President—is above the law.”186 But, according to Tashima, the actions that the United States has “taken in the War on Terror, especially [in] our detention policies, have belied our commitment to the rule of law” and caused a “dramatic shift in world opinion,” so that the War on Terror has been greeted internationally with “increasing skepticism and even hostility.”187 Put differently, the United States has shot the messenger—and with it, goes the message, the commitment to the rule of law, and our international credibility.188 The primary assassin in this “assault on the role of law” is the argument “that the President is not bound by law—that he can flout the Constitution, treaties, and statutes of the United States as Commander-in-Chief during times of war.”189 Also wreaking havoc on the rule of law is the notion, described above, that the President’s actions in times of war are unreviewable, that the judiciary has no role to play in checking wartime policies. What is the likely reason for the executive to take such an approach as their legal defense, despite swearing, upon inauguration, to “preserve, protect[,] and defend the Constitution of the United States,”190 and despite constitutional directive that he “take Care that the Laws be faithfully executed”?191 Significantly, as Charles Fried and Gregory Fried observe, the oath of office does not mention defending national security.192 Rather, “the President’s duty is explicitly to the law, not [to] some vague goal beyond the law.”193 According to these authors, “the law is our defense against tyranny, the arbitrary imposition of one person’s will over all others, and against anarchy, the ungoverned conduct of many people’s wills.”194 If, as the executive has done since 9/11, “we cut down the laws to lay hold of our enemies,” where are we to “hide when the Devil turns round on us, armed with the power of the state?”195 As the Supreme Court so eloquently noted in Ex Parte Milligan,196 the Constitution “is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.”197 Central to this protection are the separation of powers, by which one branch of government is not permitted to go unchecked. Indeed, as Justice O’Connor stated in the Hamdi case, “[w]hatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.”198 And even the executive’s war power “does not remove constitutional limitations,” including the separation of powers, “safeguarding essential liberties.”199 Perhaps the most likely reason, then, for the position taken by the Bush administration has its roots in an old adage from the Nixon administration. As history will recall, in May 1977, former President Richard M. Nixon famously told British interviewer David Frost that “when the President does it, that means that it is not illegal.”200 The Bush administration, taking a page out of Nixon’s book, used various tactics to effectively “dismantle constitutional checks and balances and to circumvent the rule of law.”201 In so doing, the administration took advantage of 9/11 to assert “the most staggering view of unlimited presidential power since Nixon’s assertion of imperial prerogatives.”202 The D.C. Circuit’s reinstated opinion in Kiyemba III is, as we have noted, governing. That opinion, adopting a view that the government had argued all along, recharacterizes the law pertaining to detainees at Guantanamo Bay as a matter of immigration—an area of law in which the sovereign prerogative on which is admitted and excluded from entry into the United States is virtually immune from judicial review.203 This is not, as we explain below, a matter of immigration; instead, it is a matter of the executive’s power to imprison and detain, as the Supreme Court stated in Boumediene.204 The Bush administration long adopted the position that judicial review of its detention policies would frustrate its war efforts and its Commander-in-Chief authority. However, as the Boumediene Court explained, “the exercise of [the executive’s Commander-in-Chief powers] is vindicated, not eroded, when [or, if] confirmed” by the judiciary.205 As the Milligan Court stated, the founding fathers “knew—the history of the world told them—the nation they were founding, be its existence short of long, would be involved in war.”206 How frequently or of what length, “human foresight could not tell.”207 But, the founders knew that “unlimited power, wherever lodged at such a time, was especially hazardous to freemen.”208 For this reason, “they secured the inheritance they had fought to maintain, by incorporating in a written constitution the safeguards which time had proved were essential to its preservation.”209 These safeguards cannot be disturbed by any one branch, unless the Constitution so provides—and with the checks authorized therein.210 Indeed, “[t]o hold [that] the political branches have the power to switch the Constitution on or off at will . . . would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not [the courts] say ‘what the law is.’”211 “Our basic charter cannot be contracted away like this.”212 To the extent that it has been—through executive action, paired with judicial inaction—the rule of law is undermined. We can and we must do better—the Constitution, and those who drafted it, demand so.

#### The aff is key—perception of US provision of habeas rights is critical to US soft power—the vital aspect of US legal jurisprudence—court action is key

Sidhu 11

[2011, Dawinder S. Sidhu, J.D., The George Washington University; M.A., Johns Hopkins University; B.A., University of Pennsylvania, Judicial Review as Soft Power: How the Courts Can Help Us Win the Post-9/11 Conflict”, NATIONAL SECURITY LAW BRIEF, Vol. 1, Issue 1 http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1003&context=nslb]

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.

#### Indefinite detention is the key factor — prefer statistical data

Welsh 11, J.D. from University of Utah and Doctoral student

[March, 2011, David Welsh has a J.D. from the University of Utah. He is currently a doctoral student in the Eller School of Business at the University of Arizona where his research focuses on organizational fairness and ethics, "Procedural Justice Post-9/11: The Effects of Procedurally Unfair Treatment of Detainees on Perceptions of Global Legitimacy”, 9 U.N.H. L. Rev. 261]

Today, many individuals throughout the world question whether the United States has engaged in excess in response to the attacks of 9/11. A 2004 poll suggests that many people in France (57%), Germany (49%), and Britain (33%) felt that the United States overreacted in response to terrorism. n30 Among Middle Eastern countries, as many as three-fourths of individuals stated that the United States overreacted in the War on Terror. n31 Additionally, approximately two-thirds of citizens in France, Germany, Turkey, and Pakistan questioned the sincerity of the United States in the War on Terror. n32 Within the United States, nationwide confidence in the White House [\*267] dropped 40% between 2002 and 2004 while confidence in Congress fell by 25% during this period. n33 Although this worldwide drop in legitimacy is the result of multiple factors beyond the scope of this paper, such as the U.S. decision to invade Iraq, detention remains a controversial topic that continues to negatively affect global perceptions of the United States. Although this paper focuses specifically on the detention of suspected terrorists at the Guantanamo Bay Detention Camp (Guantanamo Bay), n34 this facility is but one of many detention centers holding suspected terrorists on behalf of the United States. n35 Today, approximately 250 prisoners (out of approximately 800) remain at this U.S.-run military base in Cuba that is outside U.S. legal jurisdiction. n36 However, it is critical to note that these 250 individuals represent a mere 1% of "approximately 25,000 detainees worldwide held directly or indirectly by or on behalf of the United States." n37 Prisoners have alleged torture, sexual degradation, religious persecution, n38 and many other specific forms of mistreatment while being detained. n39 In many detention facilities including Guantanamo Bay, Abu Ghraib, and Bagram, these allegations are substantiated by significant evidence and have gained worldwide attention. n40 [\*268] While some graphic and shocking cases of abuse have been brought to light, n41 a more typical example is the prosecution of sixteen-year-old Mohamed Jawad by Lt. Col. Darrel Vandeveld at Guantanamo Bay. n42 At first, the case against Jawad looked straightforward, as he had confessed to throwing a grenade that injured two U.S. soldiers and a translator in December 2002. n43 However, a deeper investigation "uncovered a confession obtained through torture, two suicide attempts by the accused, abusive interrogations, the withholding of exculpatory evidence from the defense," and other procedural problems. n44 Vandeveld discovered that the military had obtained confessions from two other individuals for the same offense; he ultimately left his post after attempts to provide "basic fair trial rights" failed. n45 In February 2006, the United Nations Working Group on Arbitrary Detention spoke out against international law and human rights violations at Guantanamo Bay, stating that the facility should be closed "without further delay." n46 This report paralleled earlier criticism from Amnesty International that Guantanamo Bay violates minimum standards for the treatment of individuals. n47 In response, the United States has argued that detainees are not prisoners of war but are rather "unlawful combatants" who are not entitled to the protections of the Geneva Convention because they do not act in accor [\*269] dance with the accepted rules of war. n48 Yet, regardless of the debatable legal merit of this argument, legitimacy is an "elusive quality" grounded in worldwide opinion that will not let the United States off the hook on a mere technicality when moral duties and international customs have been violated. n49 In the next section, I discuss the importance of legitimacy and the ways in which it has been undermined by U.S. conduct in the War on Terror. By understanding what drives global perceptions of U.S. legitimacy, current detention policies and their ramifications can be more accurately assessed and restructured. IV. Legitimacy: The Critical Missing Element in the War on Terror In the context of the War on Terror, legitimacy is the critical missing element under the current U.S. detention regime. Legitimacy can be defined as "a psychological property of an authority, institution, or social arrangement that leads those connected to it to believe that it is appropriate, proper, and just." n50 As far back as Plato and Aristotle, philosophers have recognized that influencing others merely through coercion and power is costly and inefficient. n51 Today, empirical evidence suggests that legitimacy, rather than deterrence, is primarily what causes individuals to obey the law. n52 Thus, while legal authorities may possess the immediate power to stop illegal action, long-term compliance requires that the general public perceives the law to be legitimate. n53 Terrorism is primarily an ideological war that cannot be won by technology that is more sophisticated or increased military force. n54 While nations combating terrorism must continue to address immediate threats by detaining suspected terrorists, they must also consider the prevention of future threats by analyzing how their policies are perceived by individuals throughout the world. Ultimately, in the War on Terror, "the benefits to be derived from maximizing legitimacy are too important to neglect." n55 Over time, perceptions of legitimacy create a "reservoir of support" for an institution that goes beyond mere self-interest. n56 In the context of government: Legitimacy is an endorphin of the democratic body politic; it is the substance that oils the machinery of democracy, reducing the friction that inevitably arises when people are not able to get everything they want from politics. Legitimacy is loyalty; it is a reservoir of goodwill that allows the institutions of government to go against what people may want at the moment without suffering debilitating consequences. n57 The widespread acceptance of highly controversial decisions by the U.S. Supreme Court illustrates the power of institutional legitimacy. n58 The Court itself noted that it "cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees." n59 "The Court's power lies, rather, in its legitimacy . . . ." n60 For example, by emphasizing "equal treatment," "honesty and neutrality," "gathering information before decision making," and "making principled, or rule based, decisions instead of political decisions," the Court maintained [\*271] legitimacy through the controversial abortion case Planned Parenthood of Southeastern Pennsylvania v. Casey in 1992. n61 Thus, although approximately half of Americans oppose abortion, n62 the vast majority of these individuals give deference to the Court's ruling on this issue. n63 In the post-World War II era, the United States built up a worldwide reservoir of support based upon four pillars: "its commitment to international law, its acceptance of consensual decision-making, its reputation for moderation, and its identification with the preservation of peace." n64 Although some U.S. policies between 1950 and 2001 did not align with these pillars, on a whole the United States legitimized itself as a world superpower during this period. n65 In the 1980s, President Ronald Reagan spoke of America as a "shining city on a hill," suggesting that it was a model for the nations of the world to look to. n66 While the United States received a virtually unprecedented outpouring of support from the international community following 9/11, a nation's reservoir of support will quickly evaporate when its government overreacts. Across the globe, individuals have expressed a growing dissatisfaction with U.S. conduct in the War on Terror, and by 2006, even western allies of the United States lobbied for the immediate closure of Guantanamo Bay, calling it "an embarrassment." n67 Former Secretary of State Colin Powell proclaimed that "Guantanamo has become a major, major problem . . . in the way the world perceives America and if it were up to me I would close Guantanamo not tomorrow but this afternoon . . . ." n68 Similarly, [\*272] President Obama noted in his campaign that "Guantanamo has become a recruiting tool for our enemies." n69 Current U.S. detention policies erode each of the four pillars on which the United States established global legitimacy. In fact, critics have argued that the "United States has **assumed** many of the very features of the 'rogue nations' against which it has rhetorically--and sometimes literally--done battle over the years." n70 While legitimacy cannot be regained overnight, the recent election of President Barack Obama presents a critical opportunity for a re-articulation of U.S. detention policies. Although President Obama issued an executive order calling for the closure of Guantanamo Bay only two days after being sworn into office, n71 significant controversy remains about the kind of alternate detention system that will replace it. n72 In contrast to the current model, which has largely rendered inefficient decisions based on ad hoc policies, I argue for the establishment of a domestic terror court (DTC) created specifically to deal with the unique procedural issues created by a growing number of suspected terrorists.

#### 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.

#### 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

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

Kromah 9, Masters in IR

[February 2009, Lamii Moivi Kromah, UN Civil Affairs Officer, Researcher @ Institute for Peace and Security Studies, MA from University of the Witwatersrand, “The Institutional Nature of U.S. Hegemony: Post 9/11”, http://wiredspace.wits.ac.za/bitstream/handle/10539/7301/MARR%2009.pdf]

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.

#### Robust empirical and statistical data proves — hegemony stops extinction

**Barnett 11** Former Senior Strategic Researcher and Professor in the Warfare Analysis & Research Department, Center for Naval Warfare Studies, U.S. Naval War College American military geostrategist and Chief Analyst at Wikistrat., worked as the Assistant for Strategic Futures in the Office of Force Transformation in the Department of Defense, “The New Rules: Leadership Fatigue Puts U.S., and Globalization, at Crossroads,” March 7 http://www.worldpoliticsreview.com/articles/8099/the-new-rules-leadership-fatigue-puts-u-s-and-globalization-at-crossroads

It is worth first examining the larger picture: **We live in a time of arguably the greatest structural change in the global order yet endured, with this historical moment's most amazing feature being its** relative and absolute **lack of mass violence**. That is something to consider when Americans contemplate military intervention in Libya, because **if we do take the step to prevent larger-scale killing by engaging in some killing of our own, we will not be adding to some fantastically imagined global death count stemming from the ongoing "megalomania" and "evil" of American "empire." We'll be engaging in** the same sort of **system-administering activity that has marked our stunningly successful stewardship of global order** since World War II. Let me be more blunt: **As the guardian of globalization, the U.S. military has been the greatest force for peace the world has ever known. Had America been removed from the global dynamics that governed the 20th century, the mass murder never would have ended. Indeed, it's entirely conceivable there would now be no identifiable human civilization left, once nuclear weapons entered the killing equation. But the world did not keep sliding down that path of perpetual war. Instead, America stepped up and changed everything by ushering in our now-perpetual great-power peace. We introduced the international liberal trade order known as globalization** and played loyal Leviathan over its spread. **What resulted was the collapse of empires, an explosion of democracy**, the **persistent spread of human rights, the liberation of women, the doubling of life expectancy**, a roughly **10-fold increase in adjusted global GDP and a profound and persistent reduction in battle deaths from state-based conflicts.** That is what American "hubris" actually delivered. Please remember that the next time some TV pundit sells you the image of "unbridled" American military power as the cause of global disorder instead of its cure. With self-deprecation bordering on self-loathing, we now imagine a post-American world that is anything but. Just watch who scatters and who steps up as the Facebook revolutions erupt across the Arab world. While we might imagine ourselves the status quo power, we remain the world's most vigorously revisionist force. **¶ As for the sheer "evil" that is our military-industrial complex, again, let's examine what the world looked like before that establishment reared its ugly head. The last great period of global structural change was the first half of the 20th century, a period that saw a death toll of about 100 million across two world wars.** That comes to an average of 2 million deaths a year in a world of approximately 2 billion souls. Today, with far more comprehensive worldwide reporting, researchers report an average of less than 100,000 battle deaths annually in a world fast approaching 7 billion people. Though admittedly crude**, these calculations suggest a 90 percent absolute drop and a 99 percent relative drop in deaths due to war. We are clearly headed for a world order characterized by multipolarity,** something the American-birthed system was designed to both encourage and accommodate. **But given how things turned out the last time we collectively faced such a fluid structure, we would do well to keep U.S. power, in all of its forms, deeply embedded in the geometry to come.¶** To continue the historical survey, after salvaging Western Europe from its half-century of civil war, **the U.S. emerged as the progenitor of a new, far more just form of globalization -- one based on actual free trade rather than colonialism. America then successfully replicated globalization further in East Asia over the second half of the 20th century, setting the stage for the Pacific Century now unfolding.**

### 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.

#### Democratic transitions are coming now — Supreme Court influence is the determining factor

Suto 11, Research Associate at Tahrir Institute and J.D.

[07/15/11, Ryan Suto is a Research Associate at Tahrir Institute for Middle East Policy, has degrees in degrees in law, post-conflict reconstruction, international relations and public relations from Syracuse Law, “Judicial Diplomacy: The International Impact of the Supreme Court”, http://jurist.org/dateline/2011/07/ryan-suto-judicial-diplomacy.php]

The Court is certainly the best institution to explain to scholars, governments, lawyers and lay people alike the enduring legal values of the US, why they have been chosen and how they contribute to the development of a stable and democratic society. A return to the mentality that one of America's most important exports is its legal traditions would certainly benefit the US and stands to benefit nations building and developing their own legal traditions, and our relations with them. Furthermore, it stands to increase the influence and higher the profile of the bench. The Court already engages in the exercise of dispensing justice and interpreting the Constitution, and to deliver its opinions with an eye toward their diplomatic value would take only minimal effort and has the potential for high returns. While the Court is indeed the best body to conduct legal diplomacy, it has been falling short in doing so in recent sessions. We are at a critical moment in world history. People in the Middle East and North Africa are asserting discontent with their governments. Many nations in Africa, Asia, and Eurasia are grappling with new technologies, repressive regimes and economic despair. With the development of new countries, such as South Sudan, the formation of new governments, as is occurring in Egypt, and the development of new constitutions, as is occurring in Nepal, it is important that the US welcome and engage in legal diplomacy and informative two-way dialogue. As a nation with lasting and sustainable legal values and traditions, the Supreme Court should be at the forefront of public legal diplomacy. With each decision, the Supreme Court has the opportunity to better define, explain and defend key legal concepts. This is an opportunity that should not be wasted.

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

#### The plan is key — indefinite detention emboldens global destruction of rights protection

**Chaffee 9, Advocacy Counsel at Human Rights First**, Dismantling Guantanamo: Facing the Challenges of Continued Detention and Repatriation: The Cost of Indefinitely Kicking the Can: Why Continued "Prolonged" Detention Is No Solution To Guantanamo, <http://www.lexisnexis.com/hottopics/lnacademic/?>

The Guantanamo detentions have shown that assessments of dangerousness based not on overt acts, as in a criminal trial, but on association are unreliable and will inevitably lead to costly mistakes. This is precisely why national security preventive detention schemes have proven a dismal failure in other countries. The potential **gains** from such schemes **are** simply **not great enough to warrant departure from hundreds of years of western criminal justice traditions**. [n15](http://www.lexisnexis.com/lnacui2api/frame.do?tokenKey=rsh-20.30065.195976206604&target=results_DocumentContent&returnToKey=20_T18200871754&parent=docview&rand=1379720049684&reloadEntirePage=true" \l "n15) The military leaders recognize the disagreeable company that the U.S. keeps when engaging in indefinite detention without trial. U.S. allies in Europe have implemented no comparable long term detention scheme in armed conflict or administrative preventive detention outside of the deportation context. [n16](http://www.lexisnexis.com/lnacui2api/frame.do?tokenKey=rsh-20.30065.195976206604&target=results_DocumentContent&returnToKey=20_T18200871754&parent=docview&rand=1379720049684&reloadEntirePage=true" \l "n16) The **governments of countries in Egypt, Malaysia, Zimbabwe, and Kenya** have **authorized indefinite or successive detention schemes in the name of fighting threats from terrorists or insurgents and all those schemes have resulted in violations of fundamental due process norms.****[n17](http://www.lexisnexis.com/lnacui2api/frame.do?tokenKey=rsh-20.30065.195976206604&target=results_DocumentContent&returnToKey=20_T18200871754&parent=docview&rand=1379720049684&reloadEntirePage=true" \l "n17) In response to this criticism, such governments have cited Guantanamo Bay detention policies to justify repressive schemes of prolonged****[\*191]  detention** without trial-schemes that the U.S. criticizes as authorized arbitrary detention. [n18](http://www.lexisnexis.com/lnacui2api/frame.do?tokenKey=rsh-20.30065.195976206604&target=results_DocumentContent&returnToKey=20_T18200871754&parent=docview&rand=1379720049684&reloadEntirePage=true" \l "n18)

**Indefinite detention regimes aimed at preventing security risks are known to foster human rights abuses and to create perverse incentives against bringing criminal charges against prisoners**. That is why the U.S. has been consistently critical of governments that detain indefinitely without charge, including regimes that involve successive review or unrestrained renewable time limits. [n19](http://www.lexisnexis.com/lnacui2api/frame.do?tokenKey=rsh-20.30065.195976206604&target=results_DocumentContent&returnToKey=20_T18200871754&parent=docview&rand=1379720049684&reloadEntirePage=true" \l "n19) **If** the **Obama** administration **continues to pursue a detention regime for former Guantanamo detainees that permits indefinite detention without charge, it will impact detention policies of governments throughout the world and will likely embolden other governments to circumvent the protections guaranteed in criminal trials by citing security concerns**.

#### 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.

#### 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

### Solvency

#### Personnel are people

Mirriam Webster 13 ("Personnel." Merriam-Webster.com. Merriam-Webster, n.d. Web. 29 Sept. 2013. <http://www.merriam-webster.com/dictionary/personnel>)

1¶ a : a body of [persons](http://www.merriam-webster.com/dictionary/persons) usually employed (as in a factory or organization) ¶ b personnel plural : [persons](http://www.merriam-webster.com/dictionary/persons) ¶ 2¶ : a division of an organization concerned with personnel

### 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.

### 2AC National Security Court CP

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

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

#### Perm do both

#### Statistics prove that it remains the critical obstacle to restoring goodwill—US legitimacy is derived from international law, consensual decisionmaking, moderation, and the preservation of peace—our detention policies directly erodes all four of those pillars—that’s Welsh

#### 1) NSC’s relaxed procedural and evidentiary rules undermine commitment to the rule of law – turns the aff

Cole 08, Professor of Law at Georgetown

(David, A CRITIQUE OF “NATIONAL SECURITY COURTS, www.constitutionproject.org/pdf/Critique\_of\_the\_National\_Security\_Courts.pdf)

Most importantly, there is the intrinsic and inescapable problem of definition. Whereas the argument for specialized courts for tax and patent law is that expert judges are particularly necessary given the complex subject-matter, proposals for specialized courts for terrorism trials are based on the asserted need for relaxed procedural and evidentiary rules and are justified on the ground that terrorists do not deserve full constitutional protections. This creates two fundamental constitutional problems. First, justifying departures from constitutional protections on the basis that the trials are for terrorists undermines the presumption of innocence for these individuals. Second, if a conviction were obtained in a national security court using procedural and evidentiary rules that imposed a lesser burden on the government, then the defendant would be subjected to trial before a national security court based upon less of a showing than would be required in a traditional criminal proceeding. The result would be to apply less due process to the question of guilt or innocence, which, by definition, would increase the risk of error. And, if the government must make a preliminary showing that meets traditional rules of procedure and evidence in order to trigger the jurisdiction of a national security court, such a showing would also enable it to proceed via the traditional criminal process.

#### 2) NSC due process deprivations spillover to the rest of the judicial system – magnifies rule of law degradation

Cole 08, Professor of Law at Georgetown

(David, A CRITIQUE OF “NATIONAL SECURITY COURTS, www.constitutionproject.org/pdf/Critique\_of\_the\_National\_Security\_Courts.pdf)

National security courts for criminal prosecutions are not just unnecessary; they are also dangerous. They run the risk of creating a separate and unequal criminal justice system for a particular class of suspects, who will be brought before such specialized courts based on the very allegations they are contesting. Such a system undermines the presumption of innocence for these defendants, and risks a broader erosion of defendants’ rights that could spread to traditional Article III trials. It was Justice Frankfurter who wrote that “It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people.” Committee members strongly believe that the shadow of terrorism must not be the basis for abandoning these fundamental tenets of justice and fairness.

#### 3) NSC’s discriminatory policy undermines international perception of legal legitimacy and devastates soft power

Shulman 09, Law Prof at Pace

(Mark, NATIONAL SECURITY COURTS: STAR CHAMBER OR SPECIALIZED JUSTICE?, ssrn.com/abstract=1328427)

National security or terrorist courts in other countries offer troubling lessons, mostly because of their implications for the respect for civil liberties generally—not only of the accused, but of the wider population. Existing proposals to create such a court in the United States inadequately account for this risk, or explain how it would be minimized or mitigated. Emergency systems in other countries have invariably reduced civil liberties for the general population. It is understandable that governments wish to be seen to be responding to the urgent threats posed by those who use violence to affect policy. However, it is important to recognize that these emergency systems in such diverse jurisdictions as Great Britain, Malaysia, and South Africa have diminished freedoms for society as a whole. This principle lesson derived of foreign experiences is not particularly surprising. Examples abound of domestic emergency measures taken to promote national security that have undermined the base norm presumption of innocence that lies at the center of America’s constitutional order. The largescale internment of Japanese-Americans during the Second World War provides a notorious example. In that case, the federal courts deferred to the Executive’s misguided policy and thereby created a new and heinous rule allowing for internment, displacement, and forced sales of property based on no more than the notion that citizens of a given race might seek to harm the United States. Although the United States has officially apologized for this shameful episode, Korematsu has not been overruled in the two generations since the Supreme Court handed down its 6-3 decision. The Korematsu precedent may have given some legal cover for the large scale detention of Americans of Moslem, Arab, or Middle-Eastern background in the months following September 11.62 These discriminatory policies undermine the soft power America otherwise derives from its role as a leader in promoting respect for human rights. In other countries, emergency powers have had a similarly deleterious effect on civil liberties. In the United Kingdom, in order to address violence originating in troubled Northern Ireland, the government revoked the right to trial by jury for criminal offenses; denied access to legal counsel; held prisoners without charge; and allowed coercive interrogation techniques and admitted confessions elicited because of them, among other measures. In Malaysia, the government transferred judges from their positions to avoid judicial review of its decisions or release of suspects arrested without even probable cause—in violation of well-established constitutional law. In apartheid South Africa, judicial review was revoked for interrogation purposes. These extra-judicial detentions lasted weeks. In addition to radical nationalists, they swept up completely harmless nuns and pastors urging more widespread equality and access to education. Three cases, of course, do not constitute a comprehensive survey or prove the point. Even the Akin Gump survey of 123 domestic cases can lead only to limited conclusions. However, these three examples do offer insights into the threats to liberty posed by special purpose terrorism courts. IV. QUO VADIS? Would a system of national security courts offer the kind of specialized justice necessary for addressing the threat posed by radical Islamists or others who seek to use terrorist means? Or, in a tragic parallel to the Stuart kings’ infamous Star Chamber, would these courts ultimately undermine the nation’s security by degrading both its legal system and the soft power derived from its cherished reputation as a model for justice? On the eve of the inauguration of Barack Obama, these critical questions remain unresolved in the court of “public opinion which alone can here protect the values of democratic government.”

### AT: Terror

#### The aff is key to win over muslim moderates—that’s critical to victory

Sidhu 11

[2011, Dawinder S. Sidhu, J.D., The George Washington University; M.A., Johns Hopkins University; B.A., University of Pennsylvania, Judicial Review as Soft Power: How the Courts Can Help Us Win the Post-9/11 Conflict”, NATIONAL SECURITY LAW BRIEF, Vol. 1, Issue 1 http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1003&context=nslb]

For soft power to move from the shadows to a place of prominence in American foreign policy with respect to the national struggle against terrorists, America must ﬁ rst determine what soft power resources are available to it. The universe of American soft power resources is indeed extensive and includes, for example, American popular culture, democracy, support of human rights, and its civic institutions.62 This Article is concerned with the law as an aspect of American soft power. Nye, in almost passing fashion, indicates that the law is subsumed under the banner of soft power.63 But he does not explicitly ﬂ esh out the precise features of the law in America that may attract others to our interests. The question therefore arises, what is it about law in America that may serve as soft power? Before attempting an answer, it is important to identify the audience of any soft power volley in the post-9/11 context. As Nye acknowledges, a prerequisite for the use of soft power is the existence of “willing receivers” of a nation’s particular message.64 The core fundamentalists absorbed by their warped take on Islam may be beyond reason and thus may not be receptive to a message on the intangible virtues of the American state. The moderate elements in Afghanistan, Iraq, and neighboring regions, however, may be amenable to persuasion and, if convinced, may be effective agents of the American narrative by subsequently and more meaningfully conveying it to the extremists. With the hardcore fundamentalists presumptively out of the reach of reasonable argument or enticement, “the ability to attract the moderates is critical to victory.65 Therefore, legal soft power must address and convince these moderates.

### 2AC Executive DA

#### Our internal link outweighs—hegemonic stability is based on security guarantees and trade relationships fostered by the US—ensuring the durability of that system depends states’ acceptance of the hegemon’s role—maintaining the order through military power alone exhausts resources and lead to counterbalancing

#### Our evidence is comparative—the hegemonic model reduces the need for executive branch flexibility, and the institutional competence terrain shifts toward the courts—because a governance in a hegemonic system depends on voluntary acquiescence, the courts are critical

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

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

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

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

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

Courts say that the nation must speak in "one voice" in its foreign policy; the executive can do this, while Congress and the courts cannot. They say that the executive has expertise and flexibility, can keep secrets, can efficiently monitor developments, and can act quickly and decisively; the other branches cannot. As emphasized in Chevron, the executive, unlike the judiciary, is politically accountable as well as uniquely knowledgeable ... . n78¶ This line of reasoning misses the mark in several important respects and, in our view, offers no good reason to augment the deference already accorded executive interpretations of international law. First, there is no reason to conclude that the current scope of judicial deference unacceptably impedes the ability of the President to respond to a crisis. Second, wholly adequate checking mechanisms limit the power of the courts to foist unwelcome interpretations of international law on the political branches. Consider a few examples. The political branches, in the course of negotiating, ratifying, performing, and otherwise implementing U.S. treaty obligations, undertake a series of actions that signal, and at times establish, the U.S. interpretation of specific treaty terms. When the United States has authoritatively and discernibly embraced an interpretation of its treaty obligations, courts give effect to this interpretation. n79 The President might also issue formal interpretations of U.S. treaty obligations through the proper exercise of his substantial lawmaking (or delegated rulemaking) n80 authority. n81 In addition, the President has the constitutional [\*1251] authority to execute the laws - this power almost certainly includes the authority to terminate, suspend, or withdraw from treaties in accordance with international law. Congress has the constitutional authority to abrogate, in whole or in part, U.S. treaty obligations via an ordinary statute - a lawmaking process that, of course, includes the President. Augmenting the law-interpreting (and lawbreaking) power of the President drastically diminishes the role of courts - thereby effectively depriving international law in the executive-constraining zone of its capacity to constrain meaningfully and, [\*1252] consequently, its status as enforceable "law." Such an expansion of the President's authority also subverts the institutional capacity (and hence, the political will) of Congress to regulate the executive in these domains. These themes merit some elaboration.¶ Exigency does not compel a rejection

n of the status quo. Indeed, Posner and Sunstein's article is not concerned with whether the President can put boots on the ground without a statute; rather, it is addressed to litigation and what courts should do, typically years after the fact. Speed is often irrelevant. n82 So, too, is accountability. The legislature is just as accountable as the executive. And textually, of course, Congress has a strong role to play in the incorporation of international law into the domestic sphere, from its Article I, Section 8 powers to "declare War," to "make Rules concerning Captures on Land and Water," and to "punish ... Offences against the Law of Nations," to the Senate's Article II, Section 2 power to ratify treaties. n83¶ In one sense, then, our disagreement centers around default rules. Posner and Sunstein acknowledge that Congress can specify an antidelegation/ antideference principle. n84 Yet oddly, their whole article frames the relevant issue as the competence of the executive branch versus that of the judiciary. But given the fact that this tussle between the executive and the judiciary will always play out within a matrix set by the legislature, it is not quite appropriate to compare the foreign policy expertise of the executive branch with that of the courts. n85 After all, Congress could specify a prodelegation/prodeference policy [\*1253] most of the time as well. (In fact, it has repeatedly done so. n86) The more precise question is which entity is better suited to interpret a legislative act of some ambiguity, when international law principles would yield an answer that restrains the executive branch.¶ Once the question is properly framed, much of Posner and Sunstein's challenge to the status quo falls out. Most crucially, they fail to account for a dynamic statutory process - through which mistakes (if any) made by courts in the area can be corrected by the legislature. Such legislative corrections can take place in both the statutory and the treaty realm. If a court reads a statute in light of international law principles and Congress disagrees with those principles, it can rewrite the statute. And if a court reads a treaty to constrain the executive in a way Congress does not like, it can trump the treaty, in whole or in part, with a statute under the "last-in-time" rule. n87 More fundamentally, the Senate can define the role of courts up front - during the ratification process - by attaching to the instrument of ratification specific reservations, declarations, or understandings concerning the judicial enforceability of the treaty. n88¶ With a stylized account that criticizes the relative competence of the judiciary, Posner and Sunstein make it appear that a judicial decision in foreign affairs is the last word. But that set of events would rarely, if ever, unfold in this three-player game. If the courts err in a way that fails to give the executive enough power, Congress will correct them. Surely national security is not an area rife with process failures. In that sense, current law works better than the Posner and Sunstein proposal because it forces democratic deliberation before international law is violated.¶ For this reason, it obscures more than it illuminates to say that "the courts, and not the executive, might turn out to be the fox." n89 Such language assumes [\*1254] a stagnant legislative process, so that the choice is "court" versus "executive," when the real choice is really "court + Congress." That is to say, if the courts grab power in a way that undermines the executive, Congress can correct them. The relevant calculus turns on which type of judicial error is more likely to be resolved, one in which the court wrongly sides with the President (in which case Congress would have to surmount the veto) or one in which the court wrongly sides against the President (in which case the veto would be unlikely to be a barrier to corrective legislation).¶ Recall that Posner and Sunstein are not addressing their argument to constitutional holdings by courts, but statutory ones that are the subject of Chevron deference. There is much to criticize when courts declare government practices unconstitutional in the realm of foreign affairs, as those practices cannot then be resuscitated by the legislature absent a constitutional amendment. But when a court's holding centers on a statutory interpretation, the dynamic legislative process ensures that the judiciary will not have the last word.¶ Indeed, in this statutory area, the risks of judicial error are asymmetric - that is, judicial decisions that side with the President are far less likely to be the subject of legislative correction than those that side against him. While contemporary case law and theory have not taken the point into account, we believe that they provide a powerful reason to reject Posner and Sunstein's proposal. Our claim centers on the President's veto power and how the structure of the Constitution imposes serious hurdles when Congress tries to modify existing statutes to restrict presidential power.¶ Suppose that, for example, the President asserts that the Detainee Treatment Act, n90 sponsored by Senator John McCain and others to prohibit the torture of detainees, does not forbid a particular practice, such as waterboarding. A group of plaintiffs, in contrast, argue that standard principles of international law and treaties ratified by the Senate forbid waterboarding, and that these principles require reading the statute to forbid the practice. Now imagine that the matter goes to the Supreme Court. The risks from judicial error are not equivalent. If the Court sides with the plaintiffs, the legislature can - presumably with presidential encouragement - modify the statute to permit waterboarding, provided that a bare majority of Congress agrees. The [\*1255] prospect of legislative revision explains why many of the criticisms of the Supreme Court's involvement in the war on terror thus far are entirely overblown. n91¶ Now take the other possibility - that the Court sides with the President. In such a case, it is virtually impossible to alter the decision. That would be so even if everyone knew that the legislative intent at the time of the Act was to forbid waterboarding. Even if, after that Court decision, Senator McCain persuaded every one of his colleagues in the Senate to reverse the Court's interpretation of the Detainee Treatment Act and to modify the Act to prohibit waterboarding, the Senator would also have to persuade a supermajority in the House of Representatives. After all, the President would be able to veto the legislation, thus upping the requisite number of votes necessary from a bare majority to two-thirds. And his veto power functions ex ante as a disincentive even to begin the legislative reform process, as Senators are likely to spend their resources and time on projects that are likely to pass. n92¶ So what Posner and Sunstein seek is not a simple default rule, but one with a built-in ratchet in favor of presidential power. The President can take, under the guise of an ambiguous legislative act, an interpretation that gives him striking new powers, have that interpretation receive deference from the courts, and then lock the interpretation into place for the long term by brandishing his veto power. For authors who assert structural principles as [\*1256] their touchstone, Posner and Sunstein's omission of the veto is striking and provides a lopsided view of what would happen under their proposal.

#### There’s no impact even if a Court messes up foreign policy

Knowles 9 [Spring, 2009, Robert Knowles is an 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]

But there are limits. Although speed matters a great deal during crises, its importance diminishes over time and other institutional competences assume greater importance. When decisions made in response to emergencies are cemented into policy over the course of years, the courts' institutional capabilities - information-forcing and stabilizing characteristics - serve an important role in evaluating those policies. n394 Once a sufficient amount of time has passed, the amount of deference given to executive branch determinations should be reduced so that it matches domestic deference standards. One of the core realist arguments for deference, the risk of collateral consequences, carries far less weight under a hegemonic model. Court decisions have consequences for third parties in the domestic realm all of the time. Given the hierarchical nature of U.S. hegemony, the response from other nations is likely to be more similar to the response by domestic parties than in the past. A typical example invoked by deferentialists involves a court decision - for example, recognizing the government of Taiwan - that angers the Chinese government. n395 Although such a scenario is not out of the question, there are several reasons why the consequences would not be as dire as often predicted by deferentialists. American military dominance [\*151] makes it highly unlikely that war would result from such an incident. n396 Moreover, China, too, cares about legitimacy and is far more likely to retaliate in some other way, possibly harming the United States' interests, but through means that would capture attention in the U.S. domestic realm, leading to accountability opportunities. Assuming that the decision is non-constitutional, the Chinese government could seek to have its preferred interpretation enacted into law. Indeed, it is entirely possible that other nations would be content with conflicting decisions from different branches of the U.S. government. Suppose that the President roundly condemns the offensive court decision and declares the judge to be an "activist." If the damage done by the court decision was largely dignitary, an angry denouncement from the executive branch may be all that is needed. Past empires relied on multi-vocal signaling to maintain imperial rule. n397 But with the advent of globalization, intra-executive branch multi-vocality is much more difficult because advances in co mmunication permit various parts of the "rim" to communicate with one another. n398 The American separation-of-powers system provides a way around this problem, allowing the U.S. government to "speak in different voices" at once.

### AT: SCS

#### No South China Sea dispute – China moderated

Fravel, Professor PolSci MIT, 3-22-’12 (Taylor- Member MIT Security Studies Program, “All Quiet in the South China Sea” Foreign Affairs)

In recent years, China became increasingly ready to assert and defend its territorial and maritime claims in the South China Sea, where six other nations have competing claims. Beijing publicly challenged the legality of foreign oil companies' investments in Vietnam's offshore energy industry, emphasized its own rights over islands and waters far from the Chinese mainland, detained hundreds of Vietnamese fishermen near the Chinese-held Paracel Islands, and harassed Vietnamese and Philippine vessels conducting seismic surveys in waters that Beijing claims. Many East Asian countries saw China's behavior as a sign of the country's new willingness to adopt a more unilateral and confrontational posture in the region. Little noticed, however, has been China's recent adoption of a new -- and much more moderate -- approach. The primary goals of the friendlier policy are to restore China's tarnished image in East Asia and to reduce the rationale for a more active U.S. role there. The first sign of China's new approach came last June, when Hanoi dispatched a special envoy to Beijing for talks about the countries' various maritime disputes. The visit paved the way for an agreement in July 2011 between China and the ten members of the Association of Southeast Asian Nations (ASEAN) to finally implement a declaration of a code of conduct they had originally drafted in 2002 after a series of incidents in the South China Sea. In that declaration, they agreed to "exercise self-restraint in the conduct of activities that would complicate or escalate disputes." Since the summer, senior Chinese officials, especially top political leaders such as President Hu Jintao and Premier Wen Jiabao, have repeatedly reaffirmed the late Deng Xiaoping's guidelines for dealing with China's maritime conflicts to focus on economic cooperation while delaying the final resolution of the underlying claims. In August 2011, for example, Hu echoed Deng's approach by stating that "the countries concerned may put aside the disputes and actively explore forms of common development in the relevant sea areas." Authoritative Chinese-language media, too, has begun to underscore the importance of cooperation. Since August, the international department of People's Daily (under the pen name Zhong Sheng) has published several columns stressing the need to be less confrontational in the South China Sea. In January 2012, for example, Zhong Sheng discussed the importance of "pragmatic cooperation" to achieve "concrete results." Since the People's Daily is the official paper of the Central Committee of the Chinese Communist Party, such articles should be interpreted as the party's attempts to explain its new policy to domestic readers, especially those working lower down in party and state bureaucracies. In terms of actually setting aside disputes, China has made progress. In addition to the July consensus with ASEAN, in October China reached an agreement with Vietnam on "basic principles guiding the settlement of maritime issues." The accord stressed following international law, especially the UN Convention on the Law of the Sea. Since then, China and Vietnam have begun to implement the agreement by establishing a working group to demarcate and develop the southern portion of the Gulf of Tonkin near the disputed Paracel Islands. China has also initiated or participated in several working-level meetings to address regional concerns about Beijing's assertiveness. Just before the East Asian Summit last November, China announced that it would establish a three billion yuan ($476 million) fund for China-ASEAN maritime cooperation on scientific research, environmental protection, freedom of navigation, search and rescue, and combating transnational crimes at sea. The following month, China convened several workshops on oceanography and freedom of navigation in the South China Sea, and in January it hosted a meeting with senior ASEAN officials to discuss implementing the 2002 code of conduct declaration. The breadth of proposed cooperative activities indicates that China's new approach is probably more than just a mere stalling tactic. Beyond China's new efforts to demonstrate that it is ready to pursue a more cooperative approach, the country has also halted many of the more assertive behaviors that had attracted attention between 2009 and 2011. For example, patrol ships from the Bureau of Fisheries Administration have rarely detained and held any Vietnamese fishermen since 2010. (Between 2005 and 2010, China detained 63 fishing boats and their crews, many of which were not released until a hefty fine was paid.) And Vietnamese and Philippine vessels have been able to conduct hydrocarbon exploration without interference from China. (Just last May, Chinese patrol ships cut the towed sonar cable of a Vietnamese ship to prevent it from completing a seismic survey.) More generally, China has not obstructed any recent exploration-related activities, such as Exxon's drilling in October of an exploratory well in waters claimed by both Vietnam and China. Given that China retains the capability to interfere with such activities, its failure to do so suggests a conscious choice to be a friendlier neighbor. The question, of course, is why did the Chinese shift to a more moderate approach? More than anything, Beijing has come to realize that its assertiveness was harming its broader foreign policy interests. One principle of China's current grand strategy is to maintain good ties with great powers, its immediate neighbors, and the developing world. Through its actions in the South China Sea, China had undermined this principle and tarnished the cordial image in Southeast Asia that it had worked to cultivate in the preceding decade. It had created a shared interest among countries there in countering China -- and an incentive for them to seek support from Washington. In so doing, China's actions provided a strong rationale for greater U.S. involvement in the region and inserted the South China Sea disputes into the U.S.-Chinese relationship. By last summer, China had simply recognized that it had overreached. Now, Beijing wants to project a more benign image in the region to prevent the formation of a group of Asian states allied against China, reduce Southeast Asian states' desire to further improve ties with the United States, and weaken the rationale for a greater U.S. role in these disputes and in the region. So far, Beijing's new approach seems to be working, especially with Vietnam. China and Vietnam have deepened their political relationship through frequent high-level exchanges. Visits by the Vietnamese Communist Party general secretary, Nguyen Phu Trong, to Beijing in October 2011 and by the Chinese heir apparent, Xi Jinping, to Hanoi in December 2011 were designed to soothe spirits and protect the broader bilateral relationship from the unresolved disputes over territory in the South China Sea. In October, the two also agreed to a five-year plan to increase their bilateral trade to $60 billion by 2015. And just last month, foreign ministers from both countries agreed to set up working groups on functional issues such as maritime search and rescue and establish a hotline between the two foreign ministries, in addition to starting talks over the demarcation of the Gulf of Tonkin. Even if it is smooth sailing now, there could be choppy waters ahead. Months of poor weather have held back fishermen and oil companies throughout the South China Sea. But when fishing and hydrocarbon exploration activities resume in the spring, incidents could increase. In addition, China's new approach has raised expectations that it must now meet -- for example, by negotiating a binding code of conduct to replace the 2002 declaration and continuing to refrain from unilateral actions. Nevertheless, because the new approach reflects a strategic logic, it might endure, signaling a more significant Chinese foreign policy shift. As the 18th Party Congress draws near, Chinese leaders want a stable external environment, lest an international crisis upset the arrangements for this year's leadership turnover. And even after new party heads are selected, they will likely try to avoid international crises while consolidating their power and focusing on China's domestic challenges. China's more moderate approach in the South China Sea provides further evidence that China will seek to avoid the type of confrontational policies that it had adopted toward the United States in 2010. When coupled with Xi's visit to Washington last month, it also suggests that the United States need not fear Beijing's reaction to its strategic pivot to Asia, which entails enhancing U.S. security relationships throughout the region. Instead, China is more likely to rely on conventional diplomatic and economic tools of statecraft than attempt a direct military response. Beijing is also unlikely to be more assertive if that sustains Southeast Asian countries' desires to further deepen ties with the United States. Whether the new approach sticks in the long run, it at least demonstrates that China, when it wants to, can recalibrate its foreign policy. That is good news for stability in the region.

### 2AC Court Capital DA

#### Multiple controversies thump—the Court is taking an activist stance

Blum 9-5 (Bill, 9-5-13, "Supreme Court Preview: A Storm Is on the Horizon" Truth Dig) www.truthdig.com/report/page2/supreme\_court\_preview\_a\_storm\_is\_on\_the\_horizon\_20130905/

They’re b-a-c-k! As the war clouds gather over Washington in preparation for airstrikes against Syria, the nine justices who sit on the Supreme Court have returned from summer break and are preparing to kick up a legal storm of their own as they resume their quest to radically transform federal law and the Constitution. To be sure, there are four moderate to liberal voices on the high court, led by the frail but courageous Ruth Bader Ginsburg, who at the tender age of 80 has become the conscience of the tribunal. But with precious few detours, the court has become, in Ginsburg’s words, “one of the most activist courts in history.” So, as the court readies for the commencement of oral arguments next month in a brand new term, what can we expect from the gang of nine? Here are three cases slated for decisions on the merits with the potential to cause lasting social and political harm, and three more with sufficient weight to be added to the docket as the current term unfolds: Affirmative Action (Schuette v. Coalition to Defend Affirmative Action) From the great state of Michigan, set for oral argument on Oct. 15, comes this new challenge to the consideration of race in public higher-education admissions programs. Last term, the court dealt a mild setback to colleges that have chosen to adopt race-conscious programs when it remanded a case involving the University of Texas’ admissions plan back to a federal appellate panel for reconsideration under a more stringent and hard-to-meet constitutional test (Fisher v. Texas). This time, the question before the court is far more extensive: whether a state, by a legislative act or popular initiative, can prohibit affirmative action even if a university system chooses on its own to implement or maintain a race-based program. In 2006, Michigan voters ratified Proposition 2, which outlawed such programs. The U.S. Court of Appeals for the 6th Circuit, however, subsequently declared the proposition unconstitutional. Advertisement Currently, the country is sharply divided on the issue, as California and five other states besides Michigan, accounting for 28 percent of college admissions nationwide, have also outlawed the consideration of race. The 9th Circuit Court of Appeals, unlike the 6th, has upheld California’s ban. The Schuette case will resolve the split. Since liberal Justice Elena Kagan has recused herself from deliberations due to conflicts arising from her tenure as solicitor general, the court’s five conservatives appear to have the perfect vehicle to drive another nail into the heart of race-conscious plans. The conservative majority may not be ready to adopt the ever-vitriolic Justice Clarence Thomas’ characterization of affirmative action as a latter-day form of Jim Crow, but in the end, it is likely to vote alongside Thomas, who in the cruelest of ironies was a beneficiary of affirmative action at Yale Law School. Environmental Protection (Environmental Protection Agency v. EME Homer City Generation) At the request of the Obama administration, the American Lung Association and environmental groups, the court has agreed to take up a federal appellate ruling that had invalidated the Environmental Protection Agency’s Cross-State Air Pollution rule, which sought to enforce the Clean Air Act by setting much-needed limits on nitrogen oxides and sulfur dioxide emissions from coal-fired power plants in 28 eastern states. Although some observers see the court’s decision to hear the EME case as a sign of support for the EPA, the Roberts court has a dismal record on environmental protection, aligning itself time and again on the side of corporate interests and polluters. In 2008, in Exxon v. Baker, the court voted 5-3 to reduce the punitive damages awarded to the victims of the Valdez oil spill from $2.5 billion to $500 million, a mere pittance of the oil giant’s annual profits, leaving more than 30,000 people whose livelihoods and community were destroyed by the disaster with a sum completely inadequate to make up for their losses. Last term, the court continued its beneficence toward big business, ruling unanimously that farmers could not use Monsanto’s patented genetically altered soybeans to create new seeds without paying the company a hefty fee. Expect more of the same going forward, this time on behalf of coal companies. Federal Election Law (McCutcheon v. Federal Election Commission) Dubbed by some commentators as Citizens United 2.0, this mean-spirited piece of litigation was generated by the Republican National Committee and Alabama businessman Scott McCutcheon. Together, they seek to overturn current federal law that limits the aggregate amount of money any single person can contribute directly to candidates for federal office, political parties and political committees to $123,000 in any two-year election cycle. As the New York-based Brennan Center for Justice has argued in an amicus (friend of the court) brief filed in the case, the aggregate contribution limits are designed to inhibit political corruption. But as the Roberts court demonstrated with the original Citizens United ruling in 2010, it views campaign contributions as a form of individual expression protected under the First Amendment. In 2012, the court signaled its intention to elevate this perverse interpretation of the First Amendment to a new level of rigidity as it overturned a 100-year-old Montana law that prohibited corporations from spending funds to influence the outcome of state elections (American Tradition Partnership v. Bullock). In the United States of Corporate America, under the judicial stewardship of Chief Justice John Roberts, money talks, as loudly as possible. Three Cases Vying to Make the A-List Abortion Rights (Cline v. Oklahoma Coalition for Reproductive Justice) In 2011, Oklahoma enacted a law that would impose severe restrictions on the use of RU-486 (also known as mifepristone or Mifeprex) and any other “abortion-inducing drugs” as alternatives to pregnancy-terminating surgery. Although the Roberts court had agreed in June to resolve the law’s validity, it later sent the case back to the Oklahoma Supreme Court to clarify the meaning of the statute. If the clarifications are delivered by January, the Roberts court may schedule the case for oral argument before the current term ends. Although the case lacks the potential to overturn Roe v. Wade, a resolution in favor of Oklahoma could have major implications for the 16 states that have passed similar laws, sending yet another signal that Roe’s days may be numbered. Voting Rights (League of Women Voters of North Carolina et al. v. North Carolina, United States v. Texas) Within days of the court’s decision last term in Shelby County v. Alabama, gutting the historic Voting Rights Act, several states, including Texas and North Carolina, reinstated various voting suppression schemes—including gerrymandered redistricting plans, harsh voter ID requirements and new curbs on same-day voting—that never would have passed muster under the act’s now eviscerated “preclearance” provisions. Those provisions required states and localities with a legacy of electoral discrimination to obtain advance approval from the Justice Department or the courts before implementing new voting laws and procedures. Despite the broad sweep of Shelby’s holding, the Justice Department quickly brought suit to declare the Texas maneuvers unconstitutional while the ACLU initiated an action to block the North Carolina measures. Both suits rely on Section 2 of the Voting Rights Act, which prohibits discrimination generally in elections, as well as the rarely invoked Section 3 of the act, which permits a court to order continuous monitoring of a jurisdiction found to have engaged in intentional discrimination in much the same fashion as the old preclearance procedures. Given the novelty of the Section 3 claims and in view of the Supreme Court’s skepticism about the continued need for federal election oversight and the high political stakes involved in the struggle over voter suppression, one or both cases stand a strong chance of being added to the docket.

#### Capital is bulletproof

Gibson 12 (James L. Gibson, Sidney W. Souers Professor of Government (Department of Political Science), Professor of African and African-American Studies, and Director of the Program on Citizenship and Democratic Values (Weidenbaum Center on the Economy, Government, and Public Policy) at Washington University in St. Louis; and Fellow at the Centre for Comparative and International Politics and Professor Extraordinary in Political Science at Stellenbosch University (South Africa), 7/15/12, “Public Reverence for the United States Supreme Court: Is the Court Invincible?”, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2107587>)

Political scientists and legal scholars continue to be obsessed with the so-called countermajoritarian dilemma created by the United States Supreme Court’s lack of accountability, particularly when coupled with its immense policy-making powers. Especially when the Supreme Court makes decisions that seem to fly in the face of public preferences—as in Kelo v. New London 1 and Citizens United v. Federal Election Commission 2—concerns about the function of the institution within American democracy sharpen. Indeed, some seem to believe that by making policies opposed by the majority of the American people the Court undermines its fundamental legitimacy, its most valuable political capital. The underlying assumption of these worries about the Supreme Court’s legitimacy is that dissatisfaction with the Court’s decisions leads to the withdrawal, or at least diminution, of support for the institution. So when the Court decides a high profile case like Citizens United in a widely unpopular direction, it is logical to assume that the Court’s legitimacy suffers. Again, the assumption is that legitimacy flows from pleasing decisions, but it is undermined by displeasing decisions. At least some empirical evidence directly contradicts this assumption. In what is perhaps the most salient and politically significant decision of the last few decades, the Supreme Court’s decision in Bush v. Gore 3 effectively awarded the presidency to George W. Bush. One might have expected that this decision would undermine the Court’s legitimacy, at least with Democrats and probably with African-Americans as well. Yet several empirical research projects have indicated that, if anything, the Court’s legitimacy was boosted by this decision, even among Democrats and African-Americans. 4 Bush v. Gore had great potential to chip away at the Court’s legitimacy—it was a deeply divided 5-4 decision; divided by the justices’ partisanships as well; it extended the Court’s authority into an area of law in which the Court had generally deferred to the states; the decision was severely criticized by some, with many in the legal academy describing the decision as a “self-inflicted wound”; 5 and, of course, it was a decision of immense political importance. If Bush v. Gore did not subtract from the Court’s institutional legitimacy, it is difficult to imagine less momentous decisions undermining judicial legitimacy. Political scientists have been studying the legitimacy of the Supreme Court for decades now, and several well-established empirical findings have emerged. The findings relevant to the countermajoritarian dilemma can be summarized in a series of nutshells: ● The Supreme Court is the most legitimate political institution within the contemporary United States. Numerous studies have shown that the American mass public extends great legitimacy to the Court; typically, Congress is depicted as being dramatically less legitimate than the Supreme Court. Indeed, some have gone so far as to describe the Supreme Court as “bulletproof,” and therefore able to get away with just about any ruling, no matter how unpopular. And indeed, the United States Supreme Court may be one of the most legitimate high courts in the world.

#### **Public supports the plan**

Reuters 13 (Quoting John McCain, Republican Senator, 6-9-13, "Support growing to close Guantanamo prison: senator" Reuters) www.reuters.com/article/2013/06/09/us-usa-obama-guantanamo-idUSBRE9580BL20130609

Republican Senator John McCain said on Sunday there is increasing public support for closing the military prison at Guantanamo Bay, Cuba, and moving detainees to a facility on the U.S. mainland. "There's renewed impetus. And I think that most Americans are more ready," McCain, who went to Guantanamo last week with White House chief of staff Denis McDonough and California Democratic Senator Dianne Feinstein, told CNN's "State of the Union" program. McCain, a senior member of the Senate Armed Services Committee, said he and fellow Republican Senator Lindsey Graham, of South Carolina, are working with the Obama administration on plans that could relocate detainees to a maximum-security prison in Illinois. "We're going to have to look at the whole issue, including giving them more periodic review of their cases," McCain, of Arizona, said. President Barack Obama has pushed to close Guantanamo, saying in a speech in May it "has become a symbol around the world for an America that flouts the rule of law."

#### That boosts legitimacy

Durr et al 2K (Robert, “Ideological Divergence and Public Support for the Supreme Court,”, American Journal of Political Science, Volume 44, No. 4, October, p. 775)

We expect our improve measure of aggregate Supreme Court support will be useful to other students of the Court. Unlike support for other institutions, interest in Supreme Court support is driven not by a hypothesized electoral linkage, but by the expectation that the Court necessarily depends on public support as a source of institutional legitimacy and political capital. The level of support the Court enjoys has long been viewed as a crucial resource, both by helping engender a positive response to the Court’s decisions and by encouraging the successful execution of its proclamations, necessarily carried out by other actors and institutions (Caldeira 1986).

#### Judges don’t consider capital when deciding.

Landau, JD Harvard and clerk to US CoA judge, 2005

(David Landau, JD Harvard Law, clerk to Honorable Sandra L. Lynch, U.S. Court of Appeals for the First Circuit, 2005, “THE TWO DISCOURSES IN COLOMBIAN CONSTITUTIONAL JURISPRUDENCE: A NEW APPROACH TO MODELING JUDICIAL BEHAVIOR IN LATIN AMERICA” 37 Geo. Wash. Int'l L. Rev. 687)

Theoretically, attitudinalists could argue that judges rule in accordance with their own ideological preferences honestly, rather than strategically, because for some reason judges simply are not capable of, or prefer not to, act strategically. In practice, however, this is not what they say. Attitudinalists instead say that the factual environment renders strategic action unnecessary, at least for U.S. Supreme Court justices, because, for example, federal judges have life tenure, U.S. Supreme Court justices have no real ambition for higher office, and congressional overrides are rarely a realistic danger. [n25](https://webgateway.dartmouth.edu/us/lnacademic/,DanaInfo=www.lexisnexis.com+frame.do?tokenKey=rsh-20.940299.0671169885&target=results_DocumentContent&reloadEntirePage=true&rand=1248637360461&returnToKey=20_T7032636157&parent=docview#n25) "The Supreme Court's rules and structures, along with those of the American political system in general, give life-tenured justices  [\*696]  enormous latitude to reach decisions based on their personal policy preferences." [n26](https://webgateway.dartmouth.edu/us/lnacademic/,DanaInfo=www.lexisnexis.com+frame.do?tokenKey=rsh-20.940299.0671169885&target=results_DocumentContent&reloadEntirePage=true&rand=1248637360461&returnToKey=20_T7032636157&parent=docview#n26) In other words, both strategic and attitudinal models, in practice, assume that judges are willing and able to act strategically. Where the two theories differ is in their factual assumptions: Strategic models support the belief that judges face various types of constraints that force them to support decisions that differ from their preferred policy points, while attitudinalists believe that the institutional environment leaves at least those judges that they study - generally U.S. Supreme Court justices - free to make decisions that are exactly in accord with their preferred policies. Similarly, followers of strategic theory could theoretically believe that judges act strategically to maximize achievement of some set of goals other than their ideological policy preferences. For example, perhaps judges could prefer "legalistic" goals like adherence to precedent, but would have to defect strategically from absolute adherence to those goals given the presence of other institutions with some clout, like the U.S. Congress. In practice, however, this is not what happens. Instead, strategic theorists virtually always model judges as strategically furthering sets of ideological policy goals, which are the exact same goals modeled by the attitudinal theorists. [n27](https://webgateway.dartmouth.edu/us/lnacademic/,DanaInfo=www.lexisnexis.com+frame.do?tokenKey=rsh-20.940299.0671169885&target=results_DocumentContent&reloadEntirePage=true&rand=1248637360461&returnToKey=20_T7032636157&parent=docview#n27) What we have, then, are two theories that in practice tend to collapse into one. In both theories, actors are assumed: (1) to have preferences; and (2) to act strategically for the maximization of those preferences. [n28](https://webgateway.dartmouth.edu/us/lnacademic/,DanaInfo=www.lexisnexis.com+frame.do?tokenKey=rsh-20.940299.0671169885&target=results_DocumentContent&reloadEntirePage=true&rand=1248637360461&returnToKey=20_T7032636157&parent=docview#n28) In addition, attitudinalists and strategic theorists both believe in a particular kind of rational choice theory: Specifically, the actors' preferences are assumed to be solely ideological, policy-based goals derived from the political realm. It is important to emphasize that both theories also believe that the  [\*697]  proper way to test judicial behavior is to look at what judges actually do, not at what they say: Thus, what matters is the outcome, not the reasoning of the case.

### AT: Econ

#### No link between the economy and war – history proves

Ferguson 6, Professor of History @ Harvard

(Ferguson, Niall. "The Next War of the World." Foreign Affairs 85.5 (Sept-Oct 2006): 61. Expanded Academic ASAP.)

There are many unsatisfactory explanations for why the twentieth century was so destructive. One is the assertion that the availability of more powerful weapons caused bloodier conflicts. But there is no correlation between the sophistication of military technology and the lethality of conflict. Some of the worst violence of the century -- the genocides in Cambodia in the 1970s and central Africa in the 1990s, for instance -- was perpetrated with the crudest of weapons: rifles, axes, machetes, and knives. Nor can economic crises explain the bloodshed. What may be the most familiar causal chain in modern historiography links the Great Depression to the rise of fascism and the outbreak of World War II. But that simple story leaves too much out. Nazi Germany started the war in Europe only after its economy had recovered. Not all the countries affected by the Great Depression were taken over by fascist regimes, nor did all such regimes start wars of aggression. In fact, no general relationship between economics and conflict is discernible for the century as a whole. Some wars came after periods of growth, others were the causes rather than the consequences of economic catastrophe, and some severe economic crises were not followed by wars.

## 1AR

#### Hard power fails – the costs of war, growth of democracy, economic interdependence, and international institutions all make it an outdated system.

Gallarotti 13, Professor of Government @ Wesleyan University

(Giulio M. Gallarotti, John Andrus Center for Public Affairs, Professor of Government, Environmental Studies, and Social Studies, ex-Visiting Professor of Economic Theory @ University of Rome, “Smart Power: what it is, why it’s important, and the conditions for its effective use”, Division II Faculty Publications Paper 129, presented at “Smart Power: Transforming Militaries for 21st Century Missions” @ SAFTI Military Institute, Feb. 2013, http://wesscholar.wesleyan.edu/div2facpubs/129/)

First, the costs of using or even threatening force among nuclear powers have ¶ skyrocketed. Indeed, current leading scholarship in the field of security has proclaimed that the ¶ nuclear revolution has been instrumental in creating a new age of a “security community,” in ¶ which war between major powers is almost unthinkable because the costs of war have become ¶ too great (Jervis 1988, 1993, 2002). Mueller (1988) reinforces and modifies the nuclear¶ deterrent argument by introducing the independent deterrent of conventional war in an age of ¶ advanced technology. In short, the utility of respect, admiration and cooperation (i.e., soft power) ¶ has increased relative to the utility of coercion with respect to the usefulness of the instruments ¶ of statecraft. Moreover, the exorbitant dangers that the hard resources of military technology ¶ have produced require far greater use of the instruments of soft power in order for nations to ¶ achieve sustainable security in the long run. ¶ Second, the growth of democracy in the world system has served to compound the ¶ disutility of coercion and force as the actors bearing the greatest burden of such coercion and ¶ force (the people) have political power over decisionmakers. In this respect, the process of ¶ democratic peace has altered power relations among nations (Doyle 1997, Russett and Oneal ¶ 2001, and Ray 1995). As individuals become politically empowered, they can generate strong ¶ impediments to the use of force and coercion. But even beyond the enfranchisement effect, ¶ democratic cultural naturally drives national leaders towards the liberal principles manifest in the ¶ cannons of soft power. Hence, national leaders are much more constrained to work within softer ¶ foreign policy boundaries, boundaries that limit the use of force, threat and bribery. Rather, ¶ outcomes are engineered through policies more consistent with liberal democratic legitimacy. ¶ Third, the diminishing utility of hard power is partly the result of a specific political, ¶ social and economic context created by modernization: that context is interdependence (Herz ¶ 1957, Osgood and Tucker 1967, Keohane and Nye 1989, and Nye 2004a). Using sticks, or ¶ whatever kinds of coercive methods, generate considerable costs in an interdependent world. ¶ Indeed in such an interpenetrated world, punishing or threatening other nations is tantamount to self-punishment. In such an environment strategies for optimizing national wealth and influence ¶ have shifted from force and coercion to cooperation. But even more elusive than the quest to ¶ limit the fallout from coercion and force in such an environment, is the quest to impose some¶ specific outcomes onto targeted actors. In an interpenetrated world, targeted actors have many ¶ more avenues of escape. Transnational actors and national leaders could avoid being compelled ¶ by carrots or sticks because of their free reign and access to the international political economy. ¶ They can merely escape coercion or buy-offs by taking refuge in numerous possible international ¶ havens. In one important respect, this modern day “economic feudalism” created by¶ interdependence is shifting the nexus of power from the territorial state to transnational networks ¶ (Nye 2002, p. 75). Globalization has strongly compounded the effects of interdependence by enhancing the ¶ process of social and economic interpenetration in the international system. The global age has ¶ given civil societies the capacity to receive and transmit information, as well as move across ¶ nations with ever greater speed and magnitude. These greater links compound the ¶ interdependence among networks containing both transnational actors and national¶ governments. As the international stakes of these transnational actors grow, so do their ¶ incentives to expend political capital within their own domestic political systems to reinforce the ¶ economic ties between their nations (Milner 1988). This enhanced access to foreign ¶ governments and citizens created by globalization also compounds the effects of democratization ¶ in creating political impediments to the use of hard power (Haskel 1980). These forces have ¶ both diminished possibilities of political conflict and have thus shifted the epicenter of¶ competition away from force, threat, and bribery (Rosecrance 1999 and Nye 2004b. p. 31). Fourth, social and political changes have made modern populations more sensitive to ¶ their economic fates, and consequently far less enamored of a “warrior ethic” (Jervis 2002 and ¶ Nye 2004b, p. 19). This “prosperous society” has compounded the influence of economics and ¶ made economic interdependence that much more compelling as a constraint to the utility of hard ¶ power. With the rise of this welfare/economic orientation and the spread of democracy, national ¶ leaders have been driven more by the economic imperative and less by foreign adventurism as a ¶ source of political survival (Gallarotti 2000 and Ruggie 1983). This prosperous society, through ¶ the political vehicle of democracy, has shifted not only domestic but also foreign policy ¶ orientations. The economic welfare concern has put a premium on cooperation that can deliver ¶ economic growth and employment, and worked against hard power policies that might undercut ¶ such goals. ¶ Finally, the growth of international organization and regimes in the post-war period has ¶ embedded nations more firmly in networks of cooperation: in effect nations are increasingly ¶ functioning in a world of law and norms. In such a world, unilateral actions that disregard these ¶ institutions become far more costly. Such institutions have effectively raised the minimum level ¶ of civil behavior in international politics, and consequently raised the importance of soft power ¶ significantly. Consequently, the networks of cooperation have made nations far less likely to ¶ extract compliance in what are considered illegitimate ways, i.e., through force, coercion, or ¶ bribery (Krasner 1983 and Keohane and Nye 1989)¶

#### **Soft power solves leadership, global relations, and spread of US interests.**

Gallarotti 13, Professor of Government @ Wesleyan University

(Giulio M. Gallarotti, John Andrus Center for Public Affairs, Professor of Government, Environmental Studies, and Social Studies, ex-Visiting Professor of Economic Theory @ University of Rome, “Smart Power: what it is, why it’s important, and the conditions for its effective use”, Division II Faculty Publications Paper 129, presented at “Smart Power: Transforming Militaries for 21st Century Missions” @ SAFTI Military Institute, Feb. 2013, http://wesscholar.wesleyan.edu/div2facpubs/129/)

While Realists have traditionally looked at a nation’s influence in the world as a function ¶ ¶ of these tangible and coercive sources of power (threat and force), Nye has highlighted the ¶ ¶ influence that derives from a more intangible and enlightened source: a positive image in world ¶ ¶ affairs that endears nations to other nations in the world polity. This positive image derives from ¶ ¶ a number of sources: the domestic and foreign policies that nations follow, the actions they ¶ ¶ undertake, and/or national qualities that are independent of specific policies or actions (e.g., such ¶ ¶ as culture).9¶ ¶ This positive image generates respect and admiration, which in turn render nations ¶ ¶ that have soft power more endearing in the eyes of other nations. The endearment can be so ¶ ¶ strong that other nations may even attempt to emulate the policies and/or actions of soft power ¶ ¶ nations, domestic and/or foreign.10 Endearment serves to enhance the influence of soft power nations as other nations will more readily defer to their wishes on international issues, and ¶ ¶ conversely avoid confrontations. Hence, decisions about issues affecting the soft power nations ¶ ¶ will be bounded within a somewhat favorable range of options for the soft power nations.11 In a ¶ ¶ similar vein, emulation creates a system of nations that are comporting themselves (actions, ¶ ¶ policies, goals) in a manner consistent with the interests of the role-model nations. In these ¶ ¶ ways, soft power ultimately configures the context within which other nations make decisions in ¶ ¶ ways that favor the interests of soft power nations (i.e., meta-power, discussed below). The principal difference between hard and soft power can be understood in the following ¶ ¶ way: hard power extracts compliance principally through reliance on tangible power ¶ ¶ resources—more direct and often coercive methods (either their symbolic use through threat or ¶ ¶ actual use), soft power cultivates it through a variety of policies, qualities, and actions that ¶ ¶ endear nations to other nations—more indirect and non-coercive methods. In this respect, hard ¶ ¶ power exhibits a greater conflict of interests relative to soft power. Hard power contemplates ¶ ¶ nations compelling other nations to do what the latter would ordinarily not otherwise do (Dahl’s ¶ ¶ [1957] classic definition of power). Soft power, on the other hand, conditions the target nations¶ ¶ to voluntarily do what soft power nations would like them to do, hence there is far less conflict ¶ ¶ of interests in the process of soft power. ¶ ¶ Soft power represents a form of meta-power. Meta-power describes situations in which ¶ ¶ power relations themselves are embedded within some greater constellation of social relations ¶ ¶ that influence those relations and thereby influence final outcomes that derive from the ¶ ¶ interactions among actors (Hall 1997, p. 405). The structures of the bargaining boundaries are ¶ ¶ determined by the processes going on in the greater social relations within which they are ¶ ¶ embedded (i.e., endogenous rather than exogenous). Under conditions of meta-power, little can ¶ ¶ be inferred about the balance of power in a bargaining process merely by simply looking at the ¶ ¶ equilibria within the existing bargaining space. One actor may seem to be moving the other actor ¶ ¶ closer to his/her preferred position within the a bargaining space without in fact enjoying much ¶ ¶ influence over the seemingly compliant actor. Since the preferences or objectives are ¶ ¶ endogenous, and therefore the result of some greater constellation of social relations, the ¶ ¶ bargaining space itself can be the outcome of some greater configuration of power that has set possible equilibria in a range highly consistent with the interests or preferences of the seemingly ¶ ¶ compliant actor. Hence, even losing a struggle for immediate power within the prevailing ¶ ¶ bargaining space may in fact still be winning the bargaining game if some greater set of social ¶ ¶ relations can skew the bargaining space in favor of the compliant actor. This would be a case of ¶ ¶ losing a battle but winning the war

#### **Iran won’t be aggressive with nukes.**

Pillar 11, National Intelligence Officer @ Strategic Studies Institute

[Paul, Strategic Studies Institute, National Intelligence Officer for the Near East and South Asia, has served in a variety of analytical and managerial positions, including chief of analytic units covering portions of the Near East, the Persian Gulf, and South Asia, 12/22/11, “Worst-Casing and Best-Casing Iran,” http://nationalinterest.org/blog/paul-pillar/worst-casing-best-casing-iran-6307]

Kroenig's article, like other war-promoting pieces, never provides any analysis to support the oft-repeated notion, which Kroenig himself repeats, that possession of nuclear weapons would somehow lead to Iran behaving more aggressively in its region even if it never actually fired the weapons. Walt notes that nuclear weapons simply don't work that way. I have examined this particular question with regard to Iran . Rather than analysis, **the notion of greater Iranian aggressiveness is supported by nothing more than a vague sense that somehow those nukes ought to make such a difference. Kroenig imparts a patina of Cold War respectability to some of his assertions by stating that Iran** and Israel **lack many** of the “**safeguards”** that kept the United States and the USSR out of a nuclear exchange. But actually **his piece ignores the rich and extensive body of strategy and doctrine developed during the Cold War that explains things like escalation dominance and that underlies Walt's correct observation about what nuclear weapons can and cannot do**. Herman Kahn, **the Cold War's foremost guru of escalation, would be rolling over in his sizable grave if he could see what passes for analysis** in Kroenig's piece.

**this is Obama’s strategy – hasn’t contested any habeas appeals, wants the court to take the blame but would comply**

**Prefer, specific to mandate of aff**

Huz 12, Assistant Professor of Law

[August 2012, Aziz Z. Huq is an Assistant Professor of Law, University of Chicago Law School, “BINDING THE EXECUTIVE (BY LAW OR BY POLITICS)”, <http://www.law.uchicago.edu/files/file/400-ah-binding.pdf>]

But why should Presidents attend to statutory constraints or Congress in the first place? What stops Henry Paulson from proceeding with the bailout without waiting for new appropriations? Or President Obama from sua sponte issuing new debt or transferring Guantánamo detainees? The political economy developed in The Executive Unbound suggests that executive branch officials have no reason to heed legal and institutional constraints absent the possibility of credibility gains. PV also suggest that legislators and judges defer to the executive because of the latter’s superior institutional competence (pp 107–08).103 Recognizing the “inevitable” (p 103), they stay their hand rather than needlessly expend effort. This account of executive dominance, however, rests on an incomplete theory of political actors’ and judges’ motivations.104 PV’s rendition of the relevant motivations rests on rational choice foundations. Rational choice models take individuals as the central unit of analysis.105 They assume individuals “form rational beliefs, including beliefs about the options available to them” and then take actions that maximize preferences “given [those] beliefs.” 106 Rational choice explanations come in “thick” and “thin” forms.107 Thin forms make no assumptions about the content of individuals’ preferences; thick accounts do.108 The strong law/politics dichotomy rests on “thick” rational choice assumptions.109 Political actors and judges are not only utility maximizers, their utilities also have defined content. Specifically, they have preferences over first-order policy outcomes, but not over second-order goals such as legality and constitutionality.110 This distinction between first-order and second-order preferences is not explicitly stated in The Executive Unbound. But it is omnipresent. The sole reason the President recognizes constraints is to obtain credibility that yields further “power” to achieve particular policy ends (p 153). Legislators capitulate before executive initiatives because they recognize them to be “inescapable” (p 108). Judges “remain quiet” because they recognize the “sharp pragmatic limits” on what they can do (pp 35–37). In all these arguments, political actors and judges are characterized as acting on the basis of expected policy outcomes. The possibility that their choices will reflect normative preferences for legality and constitutionality with a “dimension of ‘oughtness’” 111 does not enter the analysis.112 This account of first-order preferences, which underwrites the law/politics dichotomy, embodies controversial assumptions. Notice, at the threshold, that arguments from inevitability or inescapability cannot be literally true either for the courts or the legislative branch. It is not impossible for judges to issue timely preliminary injunctions. Nor is Congress necessarily disabled from quick action, as its firstblush response to 9/11 demonstrates. Rather, the inevitability argument relies on an implicit, unstated claim that judges and legislators accept comparative institutional competence argumentsin favor of executive-branch primacy. 113 Courts and Congress, that is, are said to refrain from acting because they recognize that “institutional capacities” make it “inevitable” for the executive to take the lead (p 105).114 But it is not at all clear whether judges and legislators accept the “essentially normative” claim that “our nation would be safer. . . if judges [or Congress] appropriately deferred to their [] presidents.” 115 What judges and legislators believe is an empirical question, a question on which The Executive Unbound adduces no evidence. Absent an empirical foundation, it nonetheless seems implausible (at least to me) to assert that federal judges and legislators have uniformly internalized a controversial logic that teaches them their own impotence.116 Equally peculiar, the strong law/politics dichotomy omits normative preferences respecting legality and constitutionality from political actors’ calculus. It thus rests on a strong assumption about the narrowly consequential nature of executive branch actors’ utility function. This is of concern for three reasons. First, a model that makes the predicate assumption that political actors do not have preferences overlegality or constitutionality will always find political restraints to be more effective than legal ones. It is not clear law can ever explain fully official behavior if political actors have preferences over policy outcomes, but not over the legality of the methods used to obtain those outcomes. H.L.A. Hart famously argued that law rests ultimately on the fact that “officials of the system” view it as the source of “common standards of official behaviour” against which they “appraise critically their own and each other’s deviations as lapses.” 117 If Hart’s claim is correct, officials’ “acceptance” of normative standards is the sociological fact upon which a modern legal system necessarily rests.118 Absent such normative preferences, law has no grasp upon official behavior. In The Executive Unbound, it is categorically excluded from the domain of possible causes. By bracketing off normative preferences, the book thus stacks the explanatory deck against law. Second, the omission of normative preferences about legality is in tension with the historical record.119 Ample evidence shows executive-branch officials to have normative preferences about legality and constitutionality. Deliberation on legal and constitutional questions within the executive branch is highly structured along channels that are reportedly entrenched.120 Recent insider accounts of national security lawmaking hence underscore thick “cultural norms” respecting the law within the executive branch, although they can also be read to suggest that the commitment to legality was occasionally uneven. 121 Even the Bush administration, which has been accused of a cavalier attitude to the law, appeared to insist on the legality and constitutionality of its most controversial actions at some cost. 122 There is also an extensive literature documenting how lawyers within the Justice Department take account of the normative force of law even when their clients within the executive branch are more cavalier. 123 Of course, it is possible that all such anecdotal evidence reflects an optimistic hindsight bias on the part of insiders seeking to burnish their own credentials. I doubt this.124 It would indeed be surprising if federal officials did not generally take the law seriously given the normative force accorded to constitutional and legal norms in contemporary American society. 125 All federal officers—not just lawyers within the Department of Justice—also swear or affirm a mandatory oath “to support this Constitution” before exercising their powers.126 Certainly it is conceivable that no federal official taking this oath has meaningful preferences over the constitutionality of his or her actions. This skeptical conclusion would be surprising, though, in light of the weak evidence that such oaths are routinely ignored.127 Alternatively, it may be that expressions of legalistic preferences are held only by lower-level officials, while senior policy makers have no illusions about the weak effect of the law. But recall that some of the examples of law talk I canvassed in the introduction came from senior policy makers, such as the President and the secretary of the treasury.128 To conclude that all use of legalism by senior officials is merely cheap talk without some substantial evidence on that score seems again incautious. This is especially so since both the President and the secretary of the treasury arguably paid a price in terms of nonattainment of policy preferences by sticking to their constitutional guns. Third, where The Executive Unbound does take into account normative preferences, it does so by assimilating them to purely instrumental judgments about consequences. For example, PV claim courts will stay their hand because they lack “legitimacy.” Judges know they are ill-equipped to second-guess executive policy judgments, and so do not act for fear of losing public support (pp 30–31). 129 This equates legitimacy with efficacy. It assumes judgments of legitimacy are correlated to policy outcomes. But that equation is inconsistent with available evidence. Studies of legitimacy do not show that views of, for example, the Supreme Court are a function of outcomes. To the contrary, support for the Court “has little to do with ideology or partisanship” but “is grounded in broader commitments to democratic institutions and processes.” 130 And external legitimacy judgments of law enforcement bodies, even in the fraught context of national security, are not driven by perceptions of efficiency but by ideals of fairness and procedural justice. 131 Scholars of all ideological stripes tend to endorse the notion that “a reputation for restraint and commitment to the rule of law” will “legitimate the extraordinary powers the President must exercise in the long term” against national security threats.132 Cross-national studies of legitimacy also identify a complex bundle of legitimacy predictors, including participation rights, welfare rights, and accountability.133 The Executive Unbound’s view of legitimacy is in any event symptomatic of a more diffuse skepticism of normative preferences. No doubt this captures the standpoint of some official actors, who really do take the perspective of a Holmesian bad man. But that seems inadequate as a more general description of contemporary political actors’ beliefs and motivations. Foolishly or not, American officials often appear to hold strong views about legality and the Constitution. A positive political economy of executive constraint and discretion is surely incomplete without an accounting of those preferences.

#### Illegitimate NSC detention trials worse than the SQ – no adherence, no constitutional rights and

#### a) Relaxed evidentiary rules

Vladeck 09, Law Prof at American

(Stephen, THE CASE AGAINST NATIONAL SECURITY COURTS, willamette.edu/wucl/resources/journals/review/pdf/Volume%2045/WLR45-3\_Vladeck.pdf)

A national security court, in contrast, would be marked by relaxed evidentiary rules, including the ability to introduce hearsay testimony and perhaps even evidence that is produced by governmental coercion. As importantly, the government would also be able, under most proposals, to use classified information as evidence without fully disclosing such to the defendant. Otherwise, as McCarthy and Velshi describe in their proposal: [P]eople who commit mass murder, who face the death penalty or life imprisonment, and who are devoted members of a movement whose animating purpose is to damage the United States, are certain to be relatively unconcerned about violating court orders (or, for that matter, about being hauled into court at all). Our congenial rules of access to attorneys, paralegals, investigators and visitors make it a very simple matter for accused terrorists to transmit what they learn in discovery to their confederates—and we know that they do so.

#### b) No jury trial or adequate defense counsel

Rittgers 09, Attorney, decorated former Army Special Forces officer, and legal policy analyst at Cato

(David, National Security Court: Reinventing the Wheel, Poorly, www.cato.org/publications/commentary/national-security-court-reinventing-wheel-poorly)

In Sulmasy’s proposed “national security court,” suspected terrorists would be tried in front of a panel of three federal judges, violating their Sixth Amendment right to a jury trial. Defendants would be detained, tried, and imprisoned on military bases, a practice out of step with a federal statutory bar to the military’s direct participation in domestic law enforcement. The Bush administration kept its military commissions more palatable for the public by keeping American citizens and aliens detained in the United States out of Guantanamo. Sulmasy proposes that we bring Gitmo home and open its doors to citizens and non-citizens alike. Sulmasy does endeavor to solve one perceived problem with the military commissions that military lawyers have expressed to me: few courts-martial deal with contested felony charges, so most military lawyers have little courtroom experience. We are now entrusting them with the biggest trials of our time. Sulmasy proposes to fix this by using veteran federal prosecutors instead. The catch? The defense counsel would be those same military lawyers he says are not up to the task of prosecuting the case, unless the defendant could afford his own attorney with a high-level security clearance. Sulmasy also reduces the core protections of defendants by barring the use of the exclusionary rule, the doctrine that bars evidence collected illegally or otherwise in violation of the law. Without the prospect of excluding evidence collected in ways barred by federal courts, there is no incentive for law enforcement officers to follow any rules. Looking for terrorists? No warrant? No problem.

#### Perception key

Shulman 09, Law Prof at Pace

(Mark, NATIONAL SECURITY COURTS: STAR CHAMBER OR SPECIALIZED JUSTICE?, ssrn.com/abstract=1328427)

The seventh and most complicated set of issues arises out of the complex relationship between the Bush Administration’s detention policies and actual national security. The Bush Administration consistently claimed that its policies were correctly designed and properly implemented in order to ensure security. Those detained were the worst of the worst, and their detention was both essential and effective. Conditions were appropriate. Methods of interrogation were both lawful and necessary. Any exceptions were aberrations attributable to a few bad apples. On the other hand, critics argued that the detentions and interrogations were in great part unlawful and that they undermined national security by inflaming tensions and alienating the United States in the world court of public opinion. Most experts who are not currently serving in the Bush Administration conclude that torture does not produce useful information. And while the federal courts have resolved many of the legal questions (at least for now), the security question may ultimately prove impossible to resolve. Justice Stewart’s view that public opinion plays a critical role in assessing the legality of national security measures can be extended to drawing conclusions about their effectiveness. Indeed, their effectiveness reinforces assessments of their legitimacy. However, Justice Stewart’s concurrence addressed the relatively specific question of prior censorship and writing in 1971; he could not reasonably take into account only the opinion of the American public. Today, the United States depends on global good will that in turn rests on its reputation for fairness. To the extent the United States is viewed as responsible for torture and other serious insults inflicted at Abu Ghraib and Guantánamo, it is alienating people and possibly fostering terrorism. If this political/strategic conclusion is correct, then the question of whether to create national security courts should be approached with great caution. If they appear unfair—ad hoc, less lawful, discriminatory, or hypocritical—they may diminish America’s soft power.