## 1AC—Great Writ

### 1AC Plan

#### The United States federal judiciary should require that the executive cannot continue the detention of individuals in military detention who have 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.

#### 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

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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

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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

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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

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

#### Robust empirical data proves — hegemony stops the largest wars and human rights violations

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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

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

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

#### Independently, US rule of law leadership necessary to check authoritarian impulses in Russia—counter-terrorism policies are critical—that’s key to relations

Mendelson 9, Director of Human Rights and Security Initiative @ CSIS

[2009, Sarah E. Mendelson, Director, Human Rights and Security Initiative, Center for Strategic and International Studies, “U.S.-Russian Relations and the Democracy and Rule of Law Deficit,” CENTURY FOUNDATION REPORT, p. 3-4]

Since the collapse of the Soviet Union in 1991, every U.S. administration has considered Russia’s political trajectory a national security concern. Based on campaign statements and President Barack Obama’s early personnel choices, this perspective likely will affect policy toward Russia in some way for the foreseeable future. **While** the **Obama** administration **plans to cooperate with** Moscow on a number of issues, it will find that Russia’s current deficit in the areas of democracy and the rule of law complicate the relationship and may, in some cases, undermine attempts at engagement**.** The organizers of the Century Foundation Russia Working Group have labeled this policy problem “coping with creeping authoritarianism.” Results from nearly a dozen large, random sample surveys in Russia since 2001 that examine the views and experiences of literally thousands of Russians, combined with other research and newspaper reporting, all suggest the current democracy and rule of law deficit is rather stark. The deficit does not diminish the importance of Russia in international affairs, nor is it meant to suggest the situation is unique to Russia. The internal conditions of many states have negative international security implications. As Europeans repeatedly pointed out during the administration of George W. Bush, **U.S. departures from the rule of law made the** **U**nited **S**tates **increasingly problematic as a global partner**, whether through the use of force in Iraq or the manner in which the United States pursued and handled terrorist suspects. In fact, coping with authoritarian trends in Russia (and elsewhere) will involve changes in U.S. policies that have, on the surface, nothing to do with Russia. Bush administration counterterrorism policies that authorized torture, indefinite detention of terrorist suspects, and the rendering of detainees to secret prisons and Guantánamo have had numerous negative unintended consequences for U.S. national security, including serving as a recruitment tool for al Qaeda and insurgents in Iraq. Less often recognized, **these policies also have** undercut whatever leverage the United States had, as well as limited the effectiveness of American decision-makers**, to push back on authoritarian policies adopted by,** among others, the **Putin** administration. At its worst, **American departures from the rule of law** may **have enabled abuse inside Russia**. These departures certainly left human rights defenders isolated. **Repairing the damage to U.S. soft power and reversing the departure from** human rights norms that characterized the Bush administration’s counterterrorism policies will provide the Obama administration strategic and moral authority and improve the ability of the United States to work with allies. It also **can have positive consequences for Obama’s Russia policy**. The **changes** that **need to be made in U.S**. counterterrorism policies, however politically sensitive, are somewhat more straightforward than the adjustments that must be made to respond to the complex issues concerning Russia. The Obama administration must determine how best to engage Russian leaders and the population on issues of importance to the United States, given Russia’s poor governance structures, the stark drop in oil prices, Russia’s continued aspirations for great power status, and the rather serious resentment by Russians concerning American dominance and prior policies. The policy puzzle, therefore, is how to do all this without, at the same time, sacrificing our values and undercutting (yet again) U.S. soft power.

#### Democratic deficit in Russia specifically undermines cooperation on arms control and counter-terrorism

Mendelson 9, Director of Human Rights and Security Initiative @ CSIS

[2009, Sarah E. Mendelson, Director, Human Rights and Security Initiative, Center for Strategic and International Studies, “U.S.-Russian Relations and the Democracy and Rule of Law Deficit,” CENTURY FOUNDATION REPORT, p. 3-4]

What does any of this have to do with the Obama administration? The democracy and rule of law deficit in Russia has a range of security and human rights implications for the United States and our allies in Europe. For example, the Obama administration comes to office with a number of arms control goals. These plans may be complicated by the absence of Russian military reform that, in turn, correlates with abuse inside the army. (They are also complicated by continued government reliance on nonconventional forces: in September 2008, President Medvedev committed to modernizing the nuclear arsenal.30) Serious, joint counterterrorism efforts with the United States, Europe, and Russia are likely to remain illusive as long as the police and security services are corrupt and abusive, and the media, a potential source to expose that corruption, is largely controlled by the government. Even at the nongovernmental, track-two level, it is now difficult to have the sort of transatlantic policy dialogue on terrorism that has been common among other nations and societies since 2001.31 The most dire evidence suggests that security service personnel or contractors have been deployed abroad, in European cities, to eliminate Kremlin enemies. In the most famous example, British authorities have sought the extradition from Moscow of former KGB bodyguard and current Duma member Andrew Lugovoi for the murder by Polonium poisoning of Alexander Litvinenko in London in November 2006.32 Kremlin proxies, such as Chechnya’s Ramzan Kadyrov, may have agents doing the same on his behalf on the streets of Austria, also with apparent impunity.33 At a minimum, the Russian authorities seem to have drawn a red line at additional enlargement of Euro-Atlantic organizations. Instead of allowing states and societies to decide for themselves what alliances and security or economic arrangements they want, Russian officials speak of “zones of interest” and “neutral” spaces—presumably such as Ukraine. In the worst case scenario, the Kremlin might decide to probe the resolve of existing NATO and EU security commitments. Presumably, this realization led General James Craddock to request that NATO begin defense planning for the Baltic states.34 Some believe, although the evidence is not clear, that the May 2007 cyber attack on Estonian government agencies, banks, newspapers, and other organizations was a first probe by the Russian government.35 In the August 2008 war in Georgia, for which all sides deserve some blame, experts saw evidence of additional Russian government cyber attacks and a prime example of blatant disregard for international law as the Russian government sought to change an internationally recognized border by force.36 Meanwhile, existing Euro-Atlantic organizations are negatively and directly affected by Russia’s democracy and rule of law deficit. In recent years, the European Court of Human Rights has heard far more cases from Russia than any other country, effectively substituting for Russia’s domestic judiciary. Some European human rights lawyers argue that this situation is severely undermining the court’s efficacy and ability to handle cases from a broad range of countries. Moreover, the Russian government increasingly has failed to compensate victims or their families, apparently now risking its expulsion from the Council of Europe.37 According to numerous OSCE officials, the Kremlin has waged a systematic campaign to undercut the organization’s various monitoring efforts.38 The emergent norm of international election observation has been undermined by the Kremlin’s attempts to legitimize fraudulent elections at home and in neighboring states, supporting a wave of authoritarian governments in this region.

#### Decline in relations causes nuclear war

Allison and Blackwill, 11– \* director of the Belfer Center for Science and International Affairs at Harvard’s Kennedy School AND \*\* Henry A. Kissinger senior fellow for U.S. foreign policy at the Council on Foreign Relations (Graham and Robert, “10 reasons why Russia still matters,” Politico, http://www.politico.com/news/stories/1011/67178.html

That central point is that Russia matters a great deal to a U.S. government seeking to defend and advance its national interests. Prime Minister Vladimir Putin’s decision to return next year as president makes it all the more critical for Washington to manage its relationship with Russia through coherent, realistic policies. No one denies that Russia is a dangerous, difficult, often disappointing state to do business with. We should not overlook its many human rights and legal failures. Nonetheless, Russia is a player whose choices affect our vital interests in nuclear security and energy. It is key to supplying 100,000 U.S. troops fighting in Afghanistan and preventing Iran from acquiring nuclear weapons. Ten realities require U.S. policymakers to advance our nation’s interests by engaging and working with Moscow. First, Russia remains the only nation that can erase the United States from the map in 30 minutes. As every president since John F. Kennedy has recognized, Russia’s cooperation is critical to averting nuclear war. Second, Russia is our most consequential partner in preventing nuclear terrorism. Through a combination of more than $11 billion in U.S. aid, provided through the Nunn-Lugar Cooperative Threat Reduction program, and impressive Russian professionalism, two decades after the collapse of the “evil empire,” not one nuclear weapon has been found loose.

## 2AC

### 2AC Drone Shift DA

#### The aff only maintains the effectiveness of Boumediene—that doesn’t result in targeted killings

Vladeck 12 [10/01/12, Professor Stephen I. Vladeck of the Washington College of Law at American University, “Detention Policies: What Role for Judicial Review?”, <http://www.abajournal.com/magazine/article/detention_policies_what_role_for_judicial_review/>)]

The short chapter that follows aims to take Judge Brown’s suggestion seriously. As I explain, although Judge Brown is clearly correct that judicial review has affected the size of the detainee populations within the territorial United States and at Guantanamo, it does not even remotely follow that the jurisprudence of the past decade has precipitated a shift away from detention and toward targeted killings. To the contrary, the jurisprudence of Judge Brown’s own court has simultaneously (1) left the government with far greater detention authority than might otherwise be apparent where noncitizens outside the United States are concerned; and (2) for better or worse, added a semblance of legitimacy to a regime that had previously and repeatedly been decried as lawless. And in cases where judicial review prompted the government to release those against whom it had insufficient evidence, the effects of such review can only be seen as salutary. Thus, at the end of a decade where not a single U.S. military detainee was freed by order of a federal judge, it is more than a little ironic for Judge Brown to identify “take no prisoners” as Boumediene’s true legacy.

### 2AC XO CP

#### CP doesn’t solve- legal certainty is key

Guiora 12 (Professor of Law, S.J. Quinney College of Law, University of Utah; author of Freedom from Religion: Rights and National Security (2009). DUE PROCESS AND COUNTERTERRORISM EMORY INTERNATIONAL LAW REVIEW [Vol. 26 pg Lexis Nexis]

While President Obama signed an Executive Order ordering the closure of the Guantanamo Bay detention center26 for the purpose of discontinuing trials before Military Commissions, in April 2010 the Obama Administration reinstituted the Military Commissions.27 It is unclear whether this represents reversal of a policy previously articulated but not implemented, or a stopgap measure. Whatever the explanation, the Obama Administration has largely failed to satisfactorily address the rule-of-law questions essential to creating and implementing counterterrorism policy that ensures implementation of due process guarantees and obligations. For example, the Administration has failed to resolve whether Article III courts are the proper judicial forums for suspected terrorists.28 Perhaps this continuing failure is reflective of political infighting, as demonstrated in the backtracking with respect to Khalid Sheikh Mohammed’s trial.29 The result is a disturbing failure to ensure due process for individuals suspected of involvement in terrorism. More fundamentally, the status of individuals detained post-9/11 has not been uniformly or consistently articulated or applied. That is, varying definitions have been articulated at different times, reflecting legal and policy uncertainty directly affecting the ability to establish and consistently apply a legal regime based on due process.30 For thousands of individuals whose initial detention was based on questionable intelligence and subsequent, inadequate habeas protections, the current regime is inherently devoid of due process.31 I propose that detainees are neither prisoners of war nor criminals in the traditional sense; rather, they are a hybrid of both. To that end, I propose that the appropriate term for post-9/11 detainees is a combination—a convergence of the criminal law and law of war paradigms—best described as a hybrid paradigm.

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

Goldsmith 13, Professor at Harvard Law

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

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

### 2AC Constitutional Amendment CP

**This is a voter — it steals the aff, causes stale process debates and is multi-actor fiat — that’s not reciprocal or real-world**

**Sullivan 95** (Kathleen M., Professor of Constitutional Law, Stanford Law School, and author of the influential Sullivan & Gunther Constitutional Law Casebook, Fall. (“Constitutional Amendments” – American Prospect) http://www.albionmonitor.com/1-12-96/amendmentitis.html)

**Our Constitution is extraordinarily difficult to amend. Article V** of the Constitution **provides** two routes, but both both require **large supermajorities**. First, Congress may propose amendments by a two-thirds vote of both houses. Second, the legislatures of two-thirds of the states may request that Congress call a constitutional convention. **Amendments** proposed **by either route become valid only when ratified by three-fourths** of the states. Once an amendment clears these hurdles into the Constitution, it is equally difficult to remove. The amendment that imposed Prohibition is the only one in our history ever to be repealed. **The Constitution** thus **remains a remarkably pristine document. More than 11,000** amendments have been **proposed, but only 33** have **received** the **necessary** congressional **supermajorities** and only 27 have been ratified by the states. **Half** of these amendments **were** enacted **under extraordinary circumstances**.

#### Causes massive delays

**Duggin 5** (Sarah, Professor of Law – Catholic University of America, and Mary Collins, Law Clerk, Boston University Law Review, February, 85 B.U.L. Rev. 53, Lexis)

**The process of amending the Constitution is often a lengthy one – the Twenty-seventh Amendment was adopted more than two hundred years after it was first proposed.** 513 **Recent Congresses have generally provided self-executing, seven-year sunset provisions in** the resolutions **proposing constitutional amendments**, 514 **but even an amendment on the fast track is likely to take several years to become part of the Constitution**. Preparations for Presidential elections begin long before the actual events, and the threat of a national crisis is all too immediate. Congress should take interim measures to decrease the impact of the uncertainty created by the natural born citizenship proviso over the eligibility of Congressional leaders and cabinet members to assume the office of Acting President.

**They don’t send a stable signal**

**Sullivan 95** (Kathleen M., Professor of Constitutional Law, Stanford Law School, and author of the influential Sullivan & Gunther Constitutional Law Casebook, Fall. (“Constitutional Amendments” – American Prospect) http://www.albionmonitor.com/1-12-96/amendmentitis.html)

For **there are strong structural reasons for amending the Constitution only** reluctantly and **as a last resort**. This strong presumption against constitutional amendment has been bedrock in our constitutional history, and there is no good reason for overturning it now. Proponents of the current wave of amendments suggest that it simply represents the appropriate product of a mobilized citizenry exercising popular sovereignty. We the People created the Constitution and, they imply, We the People are free to rewrite it as We please. Amendment advocates could, if they wished, cite Thomas Jefferson in their cause. Jefferson wrote in an 1816 letter, "Some men look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment." But, he urged, one should not "believe that one generation is not as capable as another of taking care of itself, and of ordering its own affairs." As Jefferson had put it years earlier in a letter to James Madison, "I hold that a little rebellion now and then is a good thing." Constitutional idolatry, of course, is not an attractive organizing principle. But Jefferson's position lost out in our constitutional history for good reasons that do not depend on fetishizing the Constitution or treating it as mystically sacred. **Stability is a key virtue of a Constitution** 1. Stability. James Madison, one of the principal architects of Article V, disagreed with Jefferson. In Madison's view, "a little rebellion now and then" is to be avoided. To be sure, Madison acknowledged in Federalist No. 43 that "useful alterations will be suggested by experience," and that amending the Constitution must not be made so difficult as to "perpetuate its discovered faults." But **Madison cautioned** too "**against** that **extreme facility" of constitutional amendment "which would render the Constitution too mutable." Implicit** in this caution is **the view that stability is a key virtue of a Constitution, and that excessive "mutability" would** thus **undercut the whole point of having a Constitution in the first place**. As Chief Justice John **Marshall put the point** similarly **in McCulloch** v. Maryland, **the Constitution is "intended to endure for ages to come.**" Keeping amendment relatively infrequent **thus preserves public confidence in the stability of the basic constitutional structure**.  While the Framers had to take the argument from stability on faith, **the argument looks stronger two centuries later. The relative success of the American constitutional regime**, one bloody civil war excepted, **supports** arguments along the lines of "**if it ain't broke don't fix it." Our** spare **Constitution has withstood the test of time. Anyone with** a Burkean trust in the **collective wisdom** embodied in custom and tradition **ought to be wary of a sudden shift to rapid constitutional revision**.  Prohibition, **the only modern amendment to enact a social policy, is also the only modern amendment to have been repealed.**

### 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.

#### Interbranch conflicts don’t spill over—individual court cases are decided on specific issues

Redish and Drizen 87, Professor of Law and Law Clerk

[April, 1987, Martin H. Redish (Professor of Law, Northwestern University) and Karen L. Drizin (Law Clerk to the Honorable Seymour Simon, Illinois Supreme Court) “CONSTITUTIONAL FEDERALISM AND JUDICIAL REVIEW: THE ROLE OF TEXTUAL ANALYSIS”. NEW YORK UNIVERSITY LAW REVIEW V. 62]

Dean Choper's fundamental assumption, then, is that Supreme Court abstention on issues of constitutional federalism would somehow increase, or at least curtail loss of, limited capital for the more vital area of individual liberty. However, even if one were to concede that judicial review is more fundamental to our constitutional scheme in the area of individual liberty than in matters of federalism, acceptance of Dean Choper's proposal would not necessarily follow. The problem is that it is neither intuitively nor empirically clear that the Court's so-called capital is transferable from one area of constitutional law to another. As one of the current authors has previously argued: It is difficult to imagine . . . that the widespread negative public reactions to Miranda v. Arizona, Engle v. Vitale, or Roe v. Wade would [\*37] have been affected at all by the Court's practices on issues of separation of powers and federalism. Rather, public reaction in each seems to have focused on the specific, highly charged issues of rights for criminals, prayer in public schools, and abortions. It is doubtful that the Court would have had an easier time if it had chosen to stay out of interbranch and intersystemic conflicts. 146

#### **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).

### 2AC AT: Warming

#### New scientific data shows no impact to warming

WSJ 12 (“No Need to Panic About Global Warming”, 1/27/12, <http://online.wsj.com/article/SB10001424052970204301404577171531838421366.html?mod=WSJ_Opinion_LEADTop>, 16 Scientists signed this letter - Claude Allegre, former director of the Institute for the Study of the Earth, University of Paris; J. Scott Armstrong, cofounder of the Journal of Forecasting and the International Journal of Forecasting; Jan Breslow, head of the Laboratory of Biochemical Genetics and Metabolism, Rockefeller University; Roger Cohen, fellow, American Physical Society; Edward David, member, National Academy of Engineering and National Academy of Sciences; William Happer, professor of physics, Princeton; Michael Kelly, professor of technology, University of Cambridge, U.K.; William Kininmonth, former head of climate research at the Australian Bureau of Meteorology; Richard Lindzen, professor of atmospheric sciences, MIT; James McGrath, professor of chemistry, Virginia Technical University; Rodney Nichols, former president and CEO of the New York Academy of Sciences; Burt Rutan, aerospace engineer, designer of Voyager and SpaceShipOne; Harrison H. Schmitt, Apollo 17 astronaut and former U.S. senator; Nir Shaviv, professor of astrophysics, Hebrew University, Jerusalem; Henk Tennekes, former director, Royal Dutch Meteorological Service; Antonio Zichichi, president of the World Federation of Scientists, Geneva.)

A candidate for public office in any contemporary democracy may have to consider what, if anything, to do about "global warming." Candidates should understand that the oft-repeated claim that nearly all scientists demand that something dramatic be done to stop global warming is not true. In fact, a large and growing number of distinguished scientists and engineers do not agree that drastic actions on global warming are needed. In September, Nobel Prize-winning physicist Ivar Giaever, a supporter of President Obama in the last election, publicly resigned from the American Physical Society (APS) with a letter that begins: "I did not renew [my membership] because I cannot live with the [APS policy] statement: 'The evidence is incontrovertible: Global warming is occurring. If no mitigating actions are taken, significant disruptions in the Earth's physical and ecological systems, social systems, security and human health are likely to occur. We must reduce emissions of greenhouse gases beginning now.' In the APS it is OK to discuss whether the mass of the proton changes over time and how a multi-universe behaves, but the evidence of global warming is incontrovertible?" In spite of a multidecade international campaign to enforce the message that increasing amounts of the "pollutant" carbon dioxide will destroy civilization, large numbers of scientists, many very prominent, share the opinions of Dr. Giaever. And the number of scientific "heretics" is growing with each passing year. The reason is a collection of stubborn scientific facts. Perhaps the most inconvenient fact is the lack of global warming for well over 10 years now. This is known to the warming establishment, as one can see from the 2009 "Climategate" email of climate scientist Kevin Trenberth: "The fact is that we can't account for the lack of warming at the moment and it is a travesty that we can't." But the warming is only missing if one believes computer models where so-called feedbacks involving water vapor and clouds greatly amplify the small effect of CO2. The lack of warming for more than a decade—indeed, the smaller-than-predicted warming over the 22 years since the U.N.'s Intergovernmental Panel on Climate Change (IPCC) began issuing projections—suggests that computer models have greatly exaggerated how much warming additional CO2 can cause. Faced with this embarrassment, those promoting alarm have shifted their drumbeat from warming to weather extremes, to enable anything unusual that happens in our chaotic climate to be ascribed to CO2. The fact is that CO2 is not a pollutant. CO2 is a colorless and odorless gas, exhaled at high concentrations by each of us, and a key component of the biosphere's life cycle. Plants do so much better with more CO2 that greenhouse operators often increase the CO2 concentrations by factors of three or four to get better growth. This is no surprise since plants and animals evolved when CO2 concentrations were about 10 times larger than they are today. Better plant varieties, chemical fertilizers and agricultural management contributed to the great increase in agricultural yields of the past century, but part of the increase almost certainly came from additional CO2 in the atmosphere. Although the number of publicly dissenting scientists is growing, many young scientists furtively say that while they also have serious doubts about the global-warming message, they are afraid to speak up for fear of not being promoted—or worse. They have good reason to worry. In 2003, Dr. Chris de Freitas, the editor of the journal Climate Research, dared to publish a peer-reviewed article with the politically incorrect (but factually correct) conclusion that the recent warming is not unusual in the context of climate changes over the past thousand years. The international warming establishment quickly mounted a determined campaign to have Dr. de Freitas removed from his editorial job and fired from his university position. Fortunately, Dr. de Freitas was able to keep his university job. This is not the way science is supposed to work, but we have seen it before—for example, in the frightening period when Trofim Lysenko hijacked biology in the Soviet Union. Soviet biologists who revealed that they believed in genes, which Lysenko maintained were a bourgeois fiction, were fired from their jobs. Many were sent to the gulag and some were condemned to death. Why is there so much passion about global warming, and why has the issue become so vexing that the American Physical Society, from which Dr. Giaever resigned a few months ago, refused the seemingly reasonable request by many of its members to remove the word "incontrovertible" from its description of a scientific issue? There are several reasons, but a good place to start is the old question "cui bono?" Or the modern update, "Follow the money." Alarmism over climate is of great benefit to many, providing government funding for academic research and a reason for government bureaucracies to grow. Alarmism also offers an excuse for governments to raise taxes, taxpayer-funded subsidies for businesses that understand how to work the political system, and a lure for big donations to charitable foundations promising to save the planet. Lysenko and his team lived very well, and they fiercely defended their dogma and the privileges it brought them. Speaking for many scientists and engineers who have looked carefully and independently at the science of climate, we have a message to any candidate for public office: There is no compelling scientific argument for drastic action to "decarbonize" the world's economy. Even if one accepts the inflated climate forecasts of the IPCC, aggressive greenhouse-gas control policies are not justified economically. A recent study of a wide variety of policy options by Yale economist William Nordhaus showed that nearly the highest benefit-to-cost ratio is achieved for a policy that allows 50 more years of economic growth unimpeded by greenhouse gas controls. This would be especially beneficial to the less-developed parts of the world that would like to share some of the same advantages of material well-being, health and life expectancy that the fully developed parts of the world enjoy now. Many other policy responses would have a negative return on investment. And it is likely that more CO2 and the modest warming that may come with it will be an overall benefit to the planet. If elected officials feel compelled to "do something" about climate, we recommend supporting the excellent scientists who are increasing our understanding of climate with well-designed instruments on satellites, in the oceans and on land, and in the analysis of observational data. The better we understand climate, the better we can cope with its ever-changing nature, which has complicated human life throughout history. However, much of the huge private and government investment in climate is badly in need of critical review. Every candidate should support rational measures to protect and improve our environment, but it makes no sense at all to back expensive programs that divert resources from real needs and are based on alarming but untenable claims of "incontrovertible" evidence.

### 2AC Deferrence DA

#### Deference on questions of executive war authority is a myth – the court has never adopted that practice and the Zivotofsky ruling is the death knell

Skinner 8/23, Professor of Law at Willamette

(13, Gwynne, Misunderstood, Misconstrued, and Now Clearly Dead: The 'Political Question Doctrine' in Cases Arising in the Context of Foreign Affairs, papers.ssrn.com/sol3/papers.cfm?abstract\_id=2315237)

Lower federal courts often erroneously cite the “political question doctrine” to dismiss as nonjusticiable individual rights claims arising in foreign or military affairs contexts, a trend that has increased since the 1962 case of Baker v. Carr. Similarly, lower courts have begun citing “special factors counselling hesitation” when dismissing constitutional claims (“Bivens claims”) in similar contexts, inappropriately treating “special factors” as a nonjusticiability doctrine. Lower federal courts should not cite either doctrine as a reason to avoid adjudicating individual rights claims arising **in the context of foreign or military affairs**. Rather, lower federal **courts should adjudicate these claims** on their merits **by deciding whether the political branch at issue had the power under the Constitution to act as it did. Doing so is consistent with the manner in which the Supreme Court has approached these types of cases for over 200 years. The Court affirmed this approach in the 2012 case of Zivotofsky v. Clinton, a case in which the Court once and for all rung the death knell for the application of the “political question doctrine”** as a nonjusticiability doctrinein cases involving individual rights – even those arising **in a foreign policy context.** In fact, **a historical review of Supreme Court cases demonstrates that the Supreme Court has never applied the** so-called “**political question doctrine**” as a true nonjusticiable doctrine **to dismiss individual rights claims** (and arguably, not to any claims at all), **even those arising in the context of foreign or military affairs**. This includes the seminal “political question” case of Marbury v. Madison. Rather, **the Supreme Court has almost always rejected the “political question doctrine” as a basis to preclude adjudication of individual rights claims, even in the context of foreign or military affairs**. Moreover, the Supreme Court has consistently admonished lower courts regarding the importance of the judiciary branch’s adjudication of individual rights claims, even in such contexts.13 That is not to say that from time to time the Court has not cited a “political question doctrine” in certain of its cases. However, a close review of those cases demonstrates that rather than dismissing such claims in those cases as “nonjusticiable,” the Court in fact adjudicated the claims by finding that either the executive or Congress acted constitutionally within their power or discretion. Moreover, **the post-9/11 Supreme Court cases of Hamdi** v. Rumsfeld, **Rasul** v. Bush, **and** Bush v. **Boumediene, in which the Supreme Court consistently found that the political branches overstepped their constitutional authority, clarified that the doctrine should not be used to dismiss** individual rights claims as nonjusticiable**, even those arising in a foreign or military affairs context. In case there remained any doubt, the Supreme Court in Zivotofsky rejected the “political question doctrine**” as a nonjusticiability doctrine, at least in the area individual rights, if not altogether. The Court found the case, involving whether the parents of a boy born in Jerusalem had the right to list Israel as his place of birth pursuant to a Congressional statute, was justiciable.17 The Court addressed the real issue, which was whether Congress had the authority to trump the President over whether Israel could be listed as the country of birth on passports where a person was born in Jerusalem, notwithstanding the President’s sole authority to recognize other governments. 18 In ruling as it did, the Court stayed true to many of its earlier cases involving “political questions” by adjudicating the claim through deciding whether one of the political branches took action that was within its constitutional authority. **In the case, the Court showed its willingness to limit the power of the President in the area of foreign affairs** rather than finding the claim nonjusticiable.

#### **Every case since 9/11 non-uniques your link**

Flaherty 12, Leitner Professor of International Law, Fordham Law School

(Martin S., “ARTICLE: Judicial Foreign Relations Authority After 9/11” 2New York Law School Law Review 56 N.Y.L. Sch. L. Rev. 119, Lexis)

For a time the forces of judicial isolationism appeared to have gained traction and may yet carry the day. It is all the more surprising, then, that the Supreme Court reasserted the judiciary's traditional foreign affairs role in the areas in which its opponents assert deference is most urgent--national security, terrorism, and war. Yet so far, in every major case arising out of 9/11, the Court has rejected the position staked out by the executive branch, even when supported by Congress. At critical points, moreover, each of these rejections involved the Court reclaiming its primacy in legal interpretation, an area in which advocates of judicial deference have appeared to make substantial progress. The Court nonetheless rejected deference in statutory construction in Rasul v. Bush. n16 It took the same tack with regard to treaties in Hamdan v. Rumsfeld. n17 It further rejected deference in constitutional interpretation in both Hamdi v. Rumsfeld n18 and Boumediene v. Bush. n19 Together, these cases represent a stunning reassertion of the judiciary's proper role in foreign relations. Whether reassertion will mean restoration, however, still remains to be seen.

#### The plan has no negative effect on the military – Boumediene should have already caused the link

ACLU 09 [American Civil Liberties Union]

(Brief Amicus Curiae of the American Civil Liberties Union in Support of Petitioners, www.americanbar.org/content/dam/aba/publishing/preview/publiced\_preview\_briefs\_pdfs\_09\_10\_08\_1234\_PetitionerAmCuACLU.authcheckdam.pdf)

The third Boumediene factor, the practical obstacles involved, again weighs more heavily in favor of these Petitioners than it did in Boumediene. In Boumediene, the Court acknowledged that recognizing habeas jurisdiction in domestic courts for Guantanamo detainees could impose some costs — both economic and non-economic — on the military. But it stressed that Boumediene did not pose the risks that the Eisentrager Court apparently perceived regarding 'judicial interference with the military's efforts to contain 'enemy elements, guerilla fighters, and "were-wolves,"' noting that although the detainees were "deemed enemies of the United States," who might be "dangerous ... if released," they were "contained in a secure prison facility located on an isolated and heavily fortified military base." Id. at 2261 (quoting Eisentrager, 339 U.S. at 784). In this case, allowing the Petitioners to assert their due process claim would add nothing, or virtually nothing, to the economic and procedural burdens that the Government already faces by virtue of the Petitioners' undeniable right to habeas corpus. Nor would it interfere with the military's activities against our enemies, since the United States does not even claim that the Petitioners are enemies — or, for that matter, that the military has any desire to continue to detain them. Finally, neither this case nor Boumediene raises the specter of "friction with the host government," because the United States is "answerable to no other sovereign for its acts on the "answerable to no other sovereign for its acts on the base." Id. at 2261. The Boumediene factors, then, show that recognizing the Petitioners' due process right to be free from indefinite arbitrary detention raises fewer and less substantial functional concerns (if any) than recognizing the Boumediene petitioners' habeas rights did. Nor do any other factors from the Court's extraterritoriality cases — such as the possibility of cultural or legal incompatibility between the right recognized and the location of the person asserting that right, see, e.g., Dowries, 182 U.S. at 282 — raise any significant obstacle to recognizing the due process right at issue here. Boumediene s anatysis thus compels the conclusion that the Petitioners are entitled to challenge their ongoing detention under the Due Process Clause.10

#### **Plan creates a dialogue which legitimates executive actions**

Gatmaytan 10, Associate Professor, University of the Philippines

(Dante, “Crafting Policies for the Guantánamo Bay Detainees: An Interbranch Perspective” DEPAUL!RULE!OF!LAW!JOURNAL!

International\*Human\*Rights\*Law\*Institute, Fall 2010, http://laworgs.depaul.edu/journals/RuleofLaw/Documents/Gatmaytan\_-\_Guantanamo%20final.pdf)

The Petitioners in Boumediene were aliens detained at Guantánamo after being captured during the war on terror. They were then classified as enemy combatants by the CSRTs.81 Every petitioner sought a writ of habeas corpus in United States District Court for the District of Columbia district court, which dismissed the cases for lack of jurisdiction because Guantánamo is outside of the United States. 82 The D.C. Circuit then concluded that the MCA stripped away its jurisdiction to consider the habeas applications of the petitioners. As a result, the petitioners were not entitled to habeas proceedings and therefore the court did not need to determine whether the DTA provided an adequate substitute for habeas.83 On June 12, 2008, the Supreme Court decided Boumediene v. Bush. 84 It ruled that the detainees were not barred from seeking habeas merely because they had been designated as enemy combatants or held at Guantánamo Bay.85 Again, while the Supreme Court took a position opposed to the Executive, its language did not seem to reflect a degree of condemnation. Rather, its language may be interpreted as part of a continuing dialogue that urged the executive and legislative branches to fashion a policy consistent with its view: We acknowledge, moreover, the litigation history that prompted Congress to enact the MCA. In Hamdan the Court found it unnecessary to address the petitioner’s Suspension Clause arguments but noted the relevance of the clear statement rule in deciding whether Congress intended to reach pending habeas corpus case. This interpretive rule facilitates a dialogue between Congress and the Court. If the Court invokes a clear statement rule to advise that certain statutory interpretations are favored in order to avoid constitutional difficulties, Congress can make an informed legislative choice either to amend the statute or to retain its existing text. If Congress amends, its intent must be respected even if a difficult constitutional question is presented. The usual presumption is that Members of Congress, in accord with their oath of office, considered the constitutional issue and determined the amended statute to be a lawful one; and the Judiciary, in light of that determination, proceeds to its own independent judgment on the constitutional question when required to do so in a proper case.86 If this ongoing dialogue between and among the branches of Government is to be respected, we cannot ignore that the MCA was a direct response to Hamdan’s holding that the DTA’s jurisdiction-stripping provision had no application to pending cases….87 Later, the Court stated: Our opinion does not undermine the Executive’s powers as Commander in Chief. On the contrary, the exercise of those powers is vindicated, not eroded, when confirmed by the Judicial Branch. Within the Constitution’s separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person. Some of these petitioners have been in custody for six years with no definitive judicial determination as to the legality of their detention. Their access to the writ is a necessity to determine the lawfulness of their status, even if, in the end, they do not obtain the relief they seek. Because our Nation’s past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury. This result is not inevitable, however. The political branches, consistent with their independent obligations to interpret and uphold the Constitution, can engage in a genuine debate about how best to preserve constitutional values while protecting the Nation from terrorism.88 That the Supreme Court believed it was engaged in dialogue with the other branches of government is unmistakably clear. Indeed, the Court’s language since Hamdan has been explicit. But the successive losses suffered by the Bush administration as well as its refusal to acquiesce to the Supreme Court’s paradigm suggests that there was in fact no dialogue occurring–a quarrel perhaps, but not a dialogue. This policy debate therefore raises questions regarding the usefulness of the interbranch framework. Still as the analysis that follows illustrates, the apparent animosity between the executive and legislative branches on one hand and the Judiciary on the other was a court-led attempt to bring the branches together in genuine dialogue.

### 2AC AT: Nuke Deterrence

## Nukes aren’t an effective deterrent- the umbrella strategy risks nuclear destruction globally

### Crandell ’09 [Steven, Director of Development & Public Affairs for the Nuclear Age Peace Foundation, July 13, “Start a Revolution With A Video -- A 17 Year-Old Wins National Competition” <http://www.huffingtonpost.com/steven-crandell/start-a-revolution-with-a_b_247941.html>]

**Last century, the United States and other nuclear nations created an international power system based on the perverse idea that we could keep our countries safe by developing and deploying weapons of mass destruction** that target large numbers of civilians. **This century the fallacy of that argument has become apparent. Proliferation has become the norm while nuclear security grows more and more problematic**. Developing nuclear power is deemed a right of all countries and yet it is also the first step on the path to developing nuclear weapons. **There is a sense of increasing danger and vulnerability. As the world becomes more unstable** under the influences of poverty, injustice, environmental degradation, resource scarity and climate change, **the post-modern idea of a nuclear weapons defensive "umbrella" grows more ridiculous and risky. These weapons can only do harm -- whether through being detonated or by detonating arms races around the world as new nations push to join the Nuclear Bullies' Club. This is no protective umbrella, but the means to seed clouds of destruction with black rain**. **So the first step is to discard the old idea of nuclear weapons as essential to the world order. Cold War thinking that nuclear weapons protect us must be identified for what it is- -- old-fashioned, misguided and just plain false.**

### 2AC Flex DA

### 2AC AT: Terror

#### Plan solves – wins over muslim moderates k2 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.

#### No impact to terror—terrorism is shifting to “homegrown” efforts which have no risk for major escalation

Bergen and Sterman 9/10/13 [Peter Bergen is CNN's national security analyst and a director at the New America Foundation. David Sterman is a graduate student at Georgetown University's National Security Studies Program, “Jihadist terrorism in America since 9/11”, http://www.cnn.com/2013/09/09/opinion/bergen-terrorism-since-9-11/index.html]

The good news is that the number of "homegrown" jihadist extremists who have been indicted or convicted has steadily declined over the past few years, according to New America Foundation data. Where there were 41 cases in 2009, there have been six so far this year. The number of individuals indicted for plotting actual attacks within the United States -- as opposed to other terrorism-related crimes such as raising money for a terrorist group -- also declined from 12 in 2011 to only three so far in 2013. In recent years, extremists plotting attacks against the United States have also shown little, if any, connection to foreign groups. None of the 21 homegrown extremists involved in plots against the United States from 2011 to so far in 2013 is known to have received training abroad. Of these extremists, only one, Tamerlan Tsarnaev, one of the alleged Boston bombers, is reported to have had contact with foreign militant operatives, but it remains unclear to what extent, if any, those contacts played a role in the Boston attack. This lack of coordination between domestic extremists and overseas groups is likely the result of two factors. First, the ability of terrorist organizations to coordinate with extremists in the United States has been reduced by policing efforts inside the country and counterterrorism operations abroad. Second, Internet use among jihadist extremists enables them to come into contact with extremist communities abroad and be radicalized without face-to-face meetings. Of the 45 "homegrown" jihadist extremists who were indicted, convicted or killed from 2011 to now, 18 are known to have communicated with other extremists over the Internet or posted materials related to their radicalization online. The shift to plotting by individuals who lack ties to foreign groups poses a distinct type of threat -- plots and attacks that are more difficult to detect but are also likely to be of a smaller scale. And because of the measures now in place to prevent the acquisition of precursor chemicals and materials suitable for making conventional explosives, homegrown extremists have also often struggled to produce effective bombs. Before the Boston Marathon bombings, homegrown jihadists in the United States had shown little success at producing explosives. Joseph Jeffrey Brice -- who has professed admiration for Osama bin laden and Oklahoma City bomber Timothy McVeigh -- almost killed himself in April 2010 when a homemade bomb he was constructing exploded prematurely. A month later, Faisal Shahzad's car bomb failed to explode in Times Square, even though he had received explosives training in Pakistan. If the Tsarnaev brothers built the bombs used in the Boston attack without guidance from jihadists abroad, it suggests that the difficulties other "homegrown" militants have had building or detonating explosives may have been overcome. On the other hand, the Tsarnaevs' successful bombmaking could just as easily have been a fluke. While the number of terrorism-related indictments fell between 2009 and 2013, the number of terrorist incidents has stayed about the same -- about one per year -- though not all of them have been lethal: -- In June 2009, Abdulhakim Mujahid Muhammad killed a soldier outside a recruiting station in Little Rock, Arkansas. -- Five months later, Major Nidal Malik Hasan shot and killed 13 people at Fort Hood in Killeen, Texas. -- Shahzad's 2010 attempt to bomb Times Square was foiled when his bomb did not ignite properly. -- Yonathan Melaku's drive-by shooting of military facilities in Northern Virginia in 2011 produced no casualties. -- The Boston Marathon bombers killed four and wounded hundreds of others in April 2013. The incidents carried out by homegrown extremists continue to be limited in their lethality, and major operations such as the 9/11 attacks are well beyond the skills of even the most capable domestic extremists. Additionally, no homegrown jihadist militant in the United States is known to have acquired or used chemical, biological, radiological or nuclear (CBRN) weapons in the past twelve years. This point bears repeating, as there has been considerable overheated commentary on this subject over the past decade. Of the 221 individual cases of jihadist extremism since 9/11, not one case involved an allegation of CBRN acquisition, manufacture or use.

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**No risk of nuclear terror – loose nukes are unlikely and non-state actors can’t get their act together.**

**Gavin, 2010**

[Francis J., Tom Slick Professor of International Affairs and Director of the Robert S. Strauss Center for International Security and Law, Lyndon B. Johnson School of Public Affairs, University of Texas at Austin, “Same As It Ever Was: Nuclear Alarmism, Proliferation, and the Cold War.” International Security, Vol. 34, No. 3 (Winter 2009/10), pp. 7–37, Google Scholar] CMR

Experts disagree on whether nonstate actors have the scientific, engineering, financial, natural resource, security, and logistical capacities to build a nuclear bomb from scratch. According to terrorism expert Robin Frost, **the danger of a “nuclear black market” and loose nukes from Russia may be overstated**.Even if a terrorist group did acquire a nuclear weapon, delivering and detonatingit against a U.S. target would present tremendous technical and logistical difaculties.51 Finally, the feared nexus between terrorists and rogue regimes may be exaggerated. As nuclear proliferation expert Joseph Cirincione argues, states such as Iran and North Korea are “not the most likely sources for terror- ists since their stockpiles, if any, are small and exceedingly precious, and hence well-guarded.”52 Chubin states thatthere “is no reason to believe that Iran to- day, any more than Sadaam Hussein earlier, would transfer WMD [weapons of mass destruction] technology to terrorist groups like al-Qaida or Hezbollah.”53 Even if a terrorist group were to acquire a nuclear device, expert Michael Levi demonstrates that effective planning can prevent catastrophe: for nuclear terrorists, what “can go wrong might go wrong, and when it comes to nuclear terrorism, a broader, integrated defense, just like controls at the source of weapons and materials, can multiply, intensify, and compound the possibili- ties of terrorist failure, possiblydriving terrorist groups to reject nuclear terror- ism altogether.” Warning of the danger of a terrorist acquiring a nuclear weapon, most analyses are based on the inaccurate image of an “infallible ten- foot-tall enemy.” This type ofalarmism, writes Levi, impedes the development of thoughtful strategies that could deter, prevent, or mitigate a terrorist attack: “Worst-case estimates have their place, but the possible failure-averse, conser- vative, resource-limited ave-foot-tall nuclear terrorist, who is subject not only to the laws of physics but also to Murphy’s law of nuclear terrorism, needs to become just as central to our evaluations of strategies.”54