### 1AC Plan

#### The United States federal judiciary should order the release of individuals in military detention who have won their habeas corpus hearing.

### 1AC Judicial Democracy

#### Contention One is Judicial Democracy

#### In Kiyemba, the 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 the Court’s 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 were there was concern of torture in foreign nations but no need to allow those nations to have the ability to prosecute the detainees for crimes, there was potential for torture at the hands of non-government entities, and no notice of transfer was permitted. n120 [\*190] Additionally, Petitioners have argued that the use of Munaf has impermissibly limited Boumediene by preventing courts from fashioning equitable relief for habeas petitions. n121 There has been concern that the ability to use the writ of habeas will be essentially eliminated if there is no chance for a petitioner to challenge the Executive Branch's determinations regarding safe transfers. The Boumediene Court spent considerable time discussing the history of the writ n122 and noted that the tribunals implemented in that case to determine enemy combatant status were not a sufficient replacement for the writ of habeas because they lacked, in part, the authority to issue an order of release. n123 Here, the D.C. Circuit Court of Appeals has effectively prevented the other courts from determining if there is a right not to be transferred, which has been argued to be an inadequate statement of the right of habeas. n124 Similarly, it has been argued that by accepting the Executive Branch's assurances of its efforts to release the detainees, the courts are not properly using the power of habeas corpus that has been granted to them by the Constitution. n125 By refusing to question these assertions, the courts would be unable to offer a remedy to the petitioners who have the privilege of habeas corpus. n126 The Petitioners also argued a due process right to challenge transfers as the detainees have a right to a meaningful hearing to at least have the opportunity to challenge the Government's conclusions regarding safety. n127 By refusing to second-guess the Executive, the judiciary may be losing an important check on the former's power because there is no guarantee that the Executive is ensuring safety or making the best effort to protect the unlawfully kept detainees. Without allowing courts to have the power to enjoin a transfer in order to examine these concerns, there is the potential that the detainee could be harmed at the hands of foreign terrorists. Without the ability to challenge the Executive Branch through the judicial tool of habeas corpus, there has been genuine concern that the courts are losing too much power and that their authority [\*191] is being improperly limited, as they are not utilizing their constitutional power properly.

#### 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 4, Center for Justice and Accountability

[OCTOBER 2004, 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.

#### Detention 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#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#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#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#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#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**.

#### This sets a global precedent for dissident crackdowns — internal reforms don’t resolve the “loaded weapon” effect

Waxman 9, Law Professor, Matthew C, Professor of Law; Faculty Chair, Roger Hertog Program on Law and National Security, Legislating the War on Terror: An Agenda for Reform”, November 3, Book, p. 58

Opponents and skeptics of administrative detention rightly point out that creating new mechanisms for detention with procedural protections that are diluted compared with those granted criminal suspects may put liberty at risk. The most obvious concern is that innocent individuals will get swept up and imprisoned— the “false positive” problem. Civil libertarians rightly worry too that aside from the specific risk to particular individuals, any expansion of administrative detention— and I say “expansion” because, as noted earlier, it already exists in some nonterrorist contexts in U.S. law— risks eroding the checks on state power more generally. To some, the idea of administrative detention of suspected terrorists is the kind of “loaded weapon” that Justice Robert Jackson worried about at the time of Japanese internment. 52 Even if critics are satisfied that the U.S. government can use administrative detention responsibly, there are many unsavory foreign regimes that will not. The United States therefore needs to be cautious about justifying principles that might be used by less democratic regimes as a pretext to crack down, for example, on dissidents that they label “terrorists” or “national security threats.”

**Democracy greatly reduces the risk of war—the U.S. judicial model is a key factor**

**Kersch 6, Assistant Professor of Politics**

[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.**

### 1AC Legalism

#### Contention Two is Legalism:

#### Our demand for habeas stops extermination --- the status quo denies people their very humanity --- just the mere advocacy of this is necessary

**Ahmad 9**

[2009, Muneer I. Ahmad is a Clinical Professor of Law, Yale Law School, “RESISTING GUANTÁNAMO: RIGHTS AT THE BRINK OF DEHUMANIZATION”, Northwestern University Law Review, Vol. 103, p. 1683, American University, WCL Research Paper No. 08-65] we do not endorse gendered language

Rights as Resistance.—**Habeas corpus**, whose history has been explored exhaustively by others,297 **translates as ―show me the body,‖ and captures the communitarian, corporeal, and testimonial dimensions of not just rights claims**, but citizenship. **For a judge to order the government to produce a defendant for the purposes of considering the legality of his detention is to recognize the defendant‘s a priori membership in the community**. **To require that the defendant himself—his corpus—be produced**, and not just reasons for his detention proffered, **is to acknowledge the physicality and inescapably human experience of an otherwise abstract liberty interest**. And **to permit the defendant to not only attend his own hearing, but to speak on his own behalf, is to credit his standing as an actor and agent.** Taken together, **the communitarian, corporeal, and testimonial bespeak a shared concern: human dignity**. It is this human dignity, the human as distinguished from the merely biological, with which Arendt was fundamentally concerned. For Arendt, **rights are indispensable to humanity, a protective membrane poised between the state and the individual**. **What she saw, and** Giorgio **Agamben** **has recently revived**,298 is **the idea that a confrontation between the state and the individual unmediated by rights reduces the individual to bare life, or naked life**,299 whic**h is life without humanity**. **It is this unmediated, unmitigated confrontation that both requires and enables the rendering of the human inhuman, animal, and savage**.300 **It is this rights-free confrontation that permits torture**—**the hand of the state encumbered by no law other than the laws of physics**. And it **is this unmediated confrontation that permits the transmogrification of a child into a terrorist.** For Arendt, **to be a citizen is to be human, and to be anything else is** merely, and **barely, life**. The conception of rights as a bare protection interposed between the individual and state violence is intuitively familiar to the anti-death penalty advocate301 and to criminal defense lawyers generally. But the American legal embodiment of citizenship as rights is Dred Scott.302 While Scott was suing for his freedom from slavery, the case turned upon his citizenship. The Supreme Court found that Scott was not a ―citizen of a State,‖ and therefore, under the jurisdictional limits of Article III of the Constitution, could not bring suit in federal court.303 Thus, the case removed Scott‘s right even to be heard, by removing him from the polity. **Like the Guantánamo prisoners, he had no right to have rights, and the negation of his political citizenship condemned him to the unmitigated violence of slavery**. **The denial of habeas to Omar and the other prisoners similarly placed them outside the communitarian consent that rights require.** **This expulsion from the polity authorizes the expulsion from humanity that torture represents**. Here, we must remember that **this expulsion was prefigured by the state iconography that placed the prisoners outside the realm of human understanding**, **and therefore outside of humanity itself**.304 **Stripped of the mediation of rights, Guantánamo reveals the essential and inescapable violence of law.** **Politics may dictate who is entitled to mediation and what form it will take**, but **all are subject to the force of the state that**, fundamentally, **animates law. The demand for rights is a plea to blunt state force, and not to** fundamentally **reorganize the structure of power**. With this understanding of rights in mind, I return to the litigation strategy we adopted in Omar‘s case. **By invoking rights, we sought recognition of Omar in a polity of significance.** In this way, **rights hailed Omar into the community**, though his admission would depend upon community consent. As Arendt‘s analysis suggests, **the demand for recognition is tantamount to a claim to humanity**. **To be human**, to rise above biological existence and to secure political and social life, **requires rights**. And yet, **once more, this bid was subject to political forces. No amount of rights-claiming could overcome a political will to deny the prisoners‘ humanity.** In light of this, **our strategy can be understood in a third way: rights as resistance.** By this account, **the rights claim sought not to escape the violence of the state, but to make that violence more costly to the state**. **To continue its brutal regime at Guantánamo, the government first would have to do violence to rights**; to lay its hands on Omar again, **the state would have to crash through his rights claims. Rather than avoid the state‘s confrontation with the individual, this strategy seeks to expose it**. **The onus** then **shifts from the prisoner trying to establish the existence of rights to the state establishing their nonexistence, from the individual establishing harm done to the state justifying its own violence**. In some respects, **this strategy has worked.** **So long as it could avoid any discussion of Guantánamo, as it long attempted to do, the government could enact violence without political cost**. But **rights claims force the government into discourse in which the violence of the state is put on display and must be justified.** **The claim of rights itself may interpose a membrane between the state and the individual even if the right itself ultimately is found not to exist.** Thus, **our rights-based strategy could be understood as interposing a protective membrane between Omar and the state**. In this way, we wanted to mediate, and moderate, the relationship between the state and Omar, with the hope of ultimately transforming the relationship from one of potentate and biological mass to one more recognizable as warden and prisoner. **This was a form of resistance to Omar‘s mistreatment, which required the state either to stop its violence or to engage in it in the public forum of the court**. **This approach had some success, as the worst of the mistreatment of Omar and the other prisoners stopped once the government was forced to grapple with it in the daylight of federal court**.305 And yet, Omar‘s other fundamental material conditions—indefinite detention, and trial before a substandard tribunal—remained the same, just as the fundamentals of Guantánamo have remained largely the same for the hundreds of other prisoners. At the end of the day, I believe our approach has not proven more successful because the fundamental question of political citizenship has not been resolved in the prisoners‘ favor, and as I have argued, the success of even first-order rights depends upon a priori political membership. When I have rehearsed these arguments for others, particularly lawyers, the response I have often gotten is that we did the best that we could, and that there was no alternative. To argue the existence of rights, and to do so forcefully, is to fulfill the professional obligation of a lawyer. But this strikes me as too weak a conception of professional obligation. I believe that the **rights-based approach** has been worthy and necessary, but not merely because it was a form of last-resort lawyering. Rather, the rightsbased lawyering **has performed an essential role of mounting resistance to the unbridled exercise of state violence, essential not because there is nothing else to be done, but because of the opportunities and potentialities that resistance creates**. **This is consistent with what Scott Cummings has termed ―constrained legalism,‖ 306 for it capitalizes on what law can accomplish, even as it recognizes what law cannot.**

#### Detention legal strategies make political movements effective—utilizing the courts brings national attention and leads to policy changes

**Lobel 4**

[December 2004, Jules Lobel is a Professor of Law, University of Pittsburgh Law School, “Courts as Forums for Protest”, 52 UCLA L. Rev. 477]

[\*556] **I conclude with a discussion of the litigation brought on behalf of the prisoners being held by** the United States **at Guantanamo** Bay, Cuba. **This** important litigation **fits comfortably within the courts as forums for protest model, and illustrates many of the insights** and contradictions **of the model.** In early 2002, the CCR challenged the Bush Administration's detention of suspected Taliban and Al Qaeda prisoners at Guantanamo Bay without affording them the protections or rights mandated by the Geneva Convention and human rights norms. n375 At the time, many individuals and organizations were timid about openly challenging the administration's antiterrorism policies. n376 Moreover, a case on behalf of the Guantanamo detainees presented a particularly difficult context to challenge the administration. These prisoners had been captured in and around Afghanistan as part of a popular war effort. The memory of September 11 was fresh in people's minds. The government claimed that what it was doing at Guantanamo was necessary to defend American national security and prevent future terrorist attacks, a claim that resonates particularly strongly with the courts. Most important, Johnson v. Eisentrager, n377 decided by the Supreme Court in 1950, held that nonresident enemy aliens, after being convicted of war crimes by a military tribunal (detained by the U.S. government outside of U.S. territory) had no right or privilege to avail themselves of the jurisdiction of a U.S. court to challenge their detentions. **While the legal and political climate was bleak**, **the CCR attorneys believed that Johnson was distinguishable and that it was possible to win in court. The CCR decided to take the risk.** n378 The government's position was in clear violation of the Geneva Convention as well as due process and was in effect saying that no law applied to these detainees. But **the CCR's objective** [\*557] **went beyond winning or losing in court. Its objective was to demonstrate that there was resistance to U.S. policy, to help publicize the injustice to, and plight of, the detainees, to keep the issue of the detainees in the public mind, and to use the case as part of a broader political movement against the administration's antiterrorism policies**. **The decision to litigate was not based on whether the CCR attorneys thought the litigation had a good chance of winning in court.** **The CCR first filed a complaint with the Inter-American Commission of Human Rights** of the Organization of American States, **which ruled that the Guantanamo prisoners may not be held "entirely at the unfettered discretion of the United States government**," **and that the government must accord those prisoners a hearing to determine their legal status**. n379 **The Bush Administration** predictably **refused to comply with the Commission's ruling**. Indeed, given the certainty that the administration would not comply with any unfavorable Commission ruling, **the purpose of the complaint was to obtain an authoritative ruling, and to use that ruling to mobilize international and domestic public opinion against the administration's Guantanamo policies.** The CCR also brought a federal lawsuit on behalf of several of the detained prisoners. The federal district court, and then the U.S. Court of Appeals for the District of Columbia Circuit, ruled unanimously in the government's favor. n380 Nonetheless, the CCR persisted, and the Supreme Court decided in November 2003 to hear its appeal. n381 The Guantanamo case had an impact even before the Supreme Court handed down its June 2004 decision reversing the court of appeals. **For over two years, the case helped keep the outrageous Guantanamo situation in the public eye and galvanized international protest.** News reports sparked outrage at keeping the detainees in what British judges termed a "legal black hole." n382 **Amicus briefs** submitted to the Supreme Court **from former federal judges, former senior American diplomats, former American POWs, former Judge Advocates General of the Navy and top Marine Corps lawyers, the Bar Association representing the fifty-four nations of the former British Commonwealth, and the International Bar Association reflected and fanned [\*558] the widespread protest against the U.S. Guantanamo policy**. n383 **That protest, combined with Supreme Court review, compelled the administration to release a number of the prisoners, even before the Supreme Court announced its decision. n384** The question the case presented to the Supreme Court was narrow and involved only whether federal courts have jurisdiction to consider the detention of foreign nationals captured abroad and held at Guantanamo Bay. n385 Thus, **at that stage of the litigation, the specific relief being requested of the Court was minimal** (although the implications of the Court grant of that relief are significant), namely, a holding that federal courts have jurisdiction to hear plaintiffs' habeas petitions. On remand, the district court will determine what rights the plaintiffs have, and to what process they are entitled. Because the issue before the Court was solely jurisdictional, **the plaintiffs were able to obtain a ruling articulating the basic norm that executive detentions**, even in wartime, **cannot be lawless**. Yet because the issue was framed jurisdictionally, neither the plaintiffs nor the Court had to grapple immediately with the exact contours of the plaintiffs' rights and the potential remedies to which they may be entitled. **The Supreme Court's assertion of jurisdiction to hear the case is a tremendous victory. It articulates and gives meaning to a fundamental constitutional principle: that executive detentions of prisoners outside the United States cannot operate entirely outside the law** or without some legal process. While the Court's decision addresses only the applicability of the writ of habeas corpus to the detention of prisoners at Guantanamo Bay, Cuba, the implications of the Court's holding are broad; as Justice Scalia correctly notes in his dissent, the Court's decision potentially applies to prisoners held by the military in other places. Moreover, while the Court merely asserted federal court jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing, footnote fifteen of Justice Stevens' majority opinion states that the plaintiffs' claims "unquestionably describe "custody in violation of the Constitution or laws or treaties of the United States.'" n386 That footnote, in which Justice Stevens cities Justice Kennedy's concurrence in United States v. Verdugo-Urquidez, n387 [\*559] clearly indicates that on the merits, the plaintiffs have constitutional due process rights which a court must recognize. **The Court's mere assertion of jurisdiction in the Guantanamo case has dramatically affected governmental conduct**. Indeed, **the Supreme Court's decision to hear the Guantanamo case had a strong impact** on the government's behavior even before the Court announced its ruling, **leading to the release of many prisoners and** Secretary of Defense **Rumsfeld's decision that some process would be established to determine whether a prisoner should continue to be detained**. n388 Only eight days after the Supreme Court's decision, **the Department of Defense announced that procedures to inform the Guantanamo prisoners of their rights and to review their detention would be implemented.** n389 The government has thus moved quickly to establish some due process for the prisoners, although the prisoners' lawyers have severely criticized that process and seek hearings before federal district courts. Therefore, the process owed plaintiffs will be back before the courts fairly quickly. Finally, the Guantanamo case also illustrates the limitations of litigation to transform the public dialogue. For some of the lawyers at the CCR, the most fundamental issue involved in the case is the Executive's use of the wartime paradigm to detain and prosecute people who should be prosecuted under civilian law. These attorneys would want to challenge whether the "war against terrorism" truly fits within the definition of a war, or whether Al Qaeda should be treated as a criminal conspiracy and its members prosecuted under ordinary civilian law. n390 But a challenge in the Guantanamo case to whether the war against Al Qaeda is really a war for constitutional or international purposes would have little chance of success in the courts. n391 Therefore, these attorneys [\*560] are relegated to making that more fundamental point in their public speaking about the case, and not in court. However, **the filing and the arguing of the case at its various stages has resulted in a large amount of publicity in the United States and abroad**, **resulting in pressure on the government to discontinue this lawless policy.** **Such publicity can have various effects throughout society**. **It can encourage people to engage in discussion about their views on that particular situation. It can generate support for the movements advocating the various sides of the issue.** **It could even result in bringing new financial resources, and organizational or legal talent, to the movement**. Thus, movement attorneys should realize that **litigation and publicity should go together hand in hand as part of an overall strategy that will result in eventual success**, **even if that success is temporarily delayed by defeats in the courts.** The Guantanamo litigation is but a recent example of the long tradition in this country of using courts as one arena of protest. That case started as a lonely protest against an illegal government policy. **The case was originally viewed as hopeless by most legal observers and rejected by the lower courts**. Many observers might even initially have said that no reasonable lawyer could have any hope for success. **The publicity and international outrage surrounding the Guantanamo policy helped force the Supreme Court to take the case seriously and eventually rule for the plaintiffs**. Yet **the fundamental lesson of the Guantanamo case is not to be found in the important Supreme Court victory, but in the decision of a dedicated group of lawyers to litigate the case in order to protest the administration's policy despite the seemingly difficult odds of success.** Conclusion The courts as forums for protest model differs from the traditional, private dispute standard on institutional reform, the two models traditionally described by legal scholars. The reduced emphasis on winning or losing and the lesser role of the judge are two features that distinguish this model from the others. Our nation has seen a long tradition of litigators and movements using the courts as platforms for arguing controversial positions and garnering public support for them. From the Revolutionary period, **through this country's struggle with the issues of slavery and women's suffrage, up until modern instances where private citizens and public officials have attempted to challenge governmental actions, our system's courts have been used as forums to stir debate by the citizenry.** [\*561] **Because of the importance of encouraging people to engage in discussion about current social issues, and because of the implications for freedom of speech, courts should not allow sanctions under Federal Rule of Civil Procedure** 11 **or other similar rules to stifle popular debate stirred by lawsuits that may be considered "frivolous" because they argue against precedent or are viewed as losing cases**. Bringing a lawsuit to generate publicity for one's cause should not be viewed as an improper purpose under Rule 11. **Under the Courts as Forums for Protest model, judges will** often **find themselves in a difficult position**: **they will be faced with a situation where legal precedent and social and political reality collide.** Though articulating a legal principle while deciding a case without enforcing that principle may seem problematic, **judges should feel comfortable doing so when it is necessary in order to encourage society and governmental actors to remedy an injustice** which otherwise will continue unchecked.

#### More broadly, judicial constraints create a “dampening effect” on emergency power applications --- this lets us re-frame conflicts from repression

Colm **O’Cinneide 8**, Senior Lecturer in Law at University College London, “Strapped to the Mast: The Siren Song of Dreadful Necessity, the United Kingdom Human Rights Act and the Terrorist Threat,” Ch 15 in Fresh Perspectives on the ‘War on Terror,’ ed. Miriam Gani and Penelope Mathew, <http://epress.anu.edu.au/war_terror/mobile_devices/ch15s07.html>

This ‘symbiotic’ relationship between counter-terrorism measures and political violence, and the apparently inevitable negative impact of the use of emergency powers upon ‘target’ communities, would indicate that it makes sense to be very cautious in the use of such powers. However, the impact on individuals and ‘target’ communities can be too easily disregarded when set against the apparent demands of the greater good. Justice Jackson’s famous quote in Terminiello v Chicago [111] that the United States Bill of Rights should not be turned into a ‘suicide pact’ has considerable resonance in times of crisis, and often is used as a catch-all response to the ‘bleatings’ of civil libertarians.[112] The **structural factors** discussed above **that appear to drive the response of successive UK governments to terrorist acts seem to invariably result in a depressing repetition of mistakes**.¶ **However**, certain **legal processes appear to have some capacity to slow down the excesses of the counter-terrorism cycle**. What is becoming apparent in the UK context since 9/11 is that there are factors at play this time round that were not in play in the early years of the Northern Irish crisis. A series of parliamentary, **judicial** and transnational **mechanisms** are now in place that appear to **have some** moderate **‘dampening’ effect on the application of emergency powers.**¶ This phrase ‘dampening’ is borrowed from Campbell and Connolly, who have recently suggested that law can play a ‘dampening’ role on the progression of the counter-terrorism cycle before it reaches its end. **Legal processes can provide an avenue of political opportunity and mobilisation** in their own right, **whereby the** ‘relatively autonomous’ **framework of a legal system can be used to moderate the impact of the cycle of repression and backlash**. They also suggest that **this ‘dampening’ effect can ‘re-frame’ conflicts in a manner that shifts perceptions about the need for the use of violence or extreme state repression**.[113] **State responses** that have been **subject to this dampening effect may** have more legitimacy and **generate less repression**: the need for mobilisation in response may therefore also be diluted.

#### Neoconservatives like John Yoo rely on a strategy of being outside the law --- while imperfect, institutionalized rights protections are our best chance at stopping exploitation

Passavant 10

[11/26/10, Paul A. Passavant is the author of No Escape: Freedom of Speech and the Paradox of Rights (New York University Press, 2002), and Empire's New Clothes: Reading Hardt and Negri Routledge, 2004). He is also the author of numerous articles in law and political theory, “Yoo's Law, Sovereignty, and Whatever”, Volume 17, Issue 4, pages 549–571, December 2010]

For some on the left, it has become conventional to celebrate, if not cultivate, pluralism, whether this means multiple forms of being or multiple interpretive possibilities with regard to texts. It has also become conventional to be critical of “sovereignty” and of “law.” Multiplicity is thought to be a threat to sovereignty, and this threat is thought to be democratizing or a force that resists oppression. The Italian philosopher Giorgio Agamben exemplifies these tendencies within contemporary political and legal theory. In some of his earlier and less well-known work, he aspires toward a “coming community” that he calls “whatever being.” Whatever being embraces the infinite communicative possibilities of language as pure means beyond a preoccupation with true or false propositions. In his best-known work, Agamben links sovereignty to the production of rightless subjects and the Nazi death camps. He urges us to rethink the very ontological basis of politics in the West, creating a human being beyond sovereignty or law, in order to avoid perilous outcomes. One key to surpassing the logic of sovereignty, according to Agamben, is whatever being's positive relation to the singularities of life and the multiplicities of communication. Whatever being is also being outside of law. If “law” persists in this “coming community,” it would be a “law” that has become deactivated and deposed from its prior purposes. “Law” will have become an object for play – something to be toyed with the way that children might come upon a disused object and play with it by putting it to uses disconnected from whatever purpose this object might once have had. Why does the fact of playful communicative possibilities lead to either more democracy or a less brutal world? The most conservative United States Supreme Court justices have recently embraced the fact that texts are open to multiple interpretations. For example, Samuel Alito has suggested that the meaning of public monuments is open to multiple interpretations that may shift over time to avoid a potential First Amendment establishment clause problem over a monument of the Ten Commandments in a public park.1 Yet, as the late Justice Blackmun has written regarding state endorsement of religion, “government cannot be premised on the belief that all persons are created equal when it asserts that God prefers some.”2 Recognizing the possibility of multiple interpretations, as this instance shows, does not lead necessarily to outcomes friendly to democracy. In this essay, I investigate how playing with the multiplicity of communicative possibilities can, contrary to Agamben's expectations, actually facilitate aspirations for unitary sovereign power. My argument unfolds in the context of the legal arguments put forward by Bush administration lawyer John Yoo, particularly those enabling torturous interrogations. Those, like Agamben, who favor interpretive pluralism in itself rarely, if ever, have right-wing supporters of unchecked presidentialism in mind. Reading the scholarship and legal memoranda of John Yoo, formerly in the Bush administration's Office of Legal Counsel (OLC) and presently a University of California, Berkeley law professor, however, approaches an experience of pure mediality or of law that has become deposed or disconnected from its purposes. Yoo is well known as the author of the key legal memoranda asserting the president's discretionary power to make war, to engage in warrantless surveillance, and, most infamously, justifying torturous methods of interrogation. Some scholars refer to Lewis Carroll's Alice in Wonderland to describe the experience of reading Yoo's legal memos.3 Is John Yoo an exemplar of the whatever being and pure mediality that Agamben describes and to which he contends politics should aspire? In this paper, I describe how Yoo gestures toward pure mediality, as he indicates the experience of language itself as pure communicability or as pure means in his legal work when he emphasizes the openness of law to being exposed to new, different, flexible, or plural interpretive possibilities. I argue, however, that Yoo is not well described as whatever being. His work repeats too consistently in the direction of absolute presidential decisionism to be open to whatever. Instead, Yoo's work may capture a broader development within our society that Agamben describes as the emergence of whatever being. Without saying that there has been no resistance to the Bush administration's warrantless wiretapping and policies of torturous interrogations, the contrast between the response to the Nixon administration and the Bush administration is striking. Richard Nixon resigned one step ahead of impeachment in the midst of mass protests against his presidency. The articles of impeachment, for instance, addressed how Nixon engaged in warrantless wiretapping, and refused to execute laws passed by Congress faithfully while repeatedly engaging in conduct that violated the constitutional rights of citizens. Congress also passed major acts of legislation to prevent a president such as Nixon from ever again abusing power the way he had. These laws include the War Powers Act of 1973, the Budget Impoundment and Control Act of 1974, and the Foreign Intelligence Surveillance Act (FISA) of 1978. In contrast, almost no one seems to have noticed that the Bush administration claimed power to make war at the president's sole discretion. Additionally, upon learning that the Bush administration engaged in criminal acts of surveillance, Congress amended FISA in the summer of 2008 to expand the government's power to spy on Americans, while immunizing from legal accountability non-state actors who collaborated with the then-criminal acts of government officials who followed Bush's illegal orders. Congress tried to make it impossible for those detained to question, legally, their detention or to bring the torturous treatment they endured to a court's attention, while allowing the intelligence agencies to continue to engage in torturous acts by passing the Military Commissions Act of 2006 (MCA). This complicity on the part of Congress cannot be explained on partisan grounds as many Democrats voted in favor of the MCA, and upon becoming the majority party in Congress, they have not rescinded it. Indeed, it was a Democratic-controlled Congress that brushed the Bush administration's illegal surveillance under the rug in 2008.4 Moreover, upon taking power in 2006, the Democratic leadership immediately stated that they would not pursue impeachment. Former Reagan administration Department of Justice lawyer Bruce Fein has decried the lack of outrage at the Bush administration's illegalities by suggesting that the nation has become a collection of constitutional “illiterates.”5 Perhaps law is being deposed as Agamben suggests. Both Agamben's and Fein's observations may also indicate a failure of what Michel Foucault would call disciplinary power – the power to constitute subjects capable of exercising power, here the powers of liberal democracy – a failure that Gilles Deleuze has identified with the emergence of societies of control, and a subjective and ontological diversity that Michael Hardt and Antonio Negri call the “multitude.”6 They also indicate practices of textual “interpretation” where interpretative acts extricate legal texts from the narratives that once oriented their purposes and animated these texts for a republican and anti-monarchical polity. Robert Cover argues, however, that law is part of a narrative practice constitutive of subjects and a way of life.7 Insofar as interpretive practices become extricated from the possibility of narrative, then, we may indeed doubt the continuing existence of “law,” as Agamben posits. Psychoanalytic theory also identifies a loss of a structuring meaning in contemporary society and describes this as the decline of symbolic efficiency.8 In sum, there appears to be a phenomenon emerging in contemporary society that a variety of different theoretical and political perspectives are struggling to grasp and evaluate. While Agamben welcomes the failures of disciplinary powers as enabling the emergence of whatever being and the “coming community,” it is a cause for concern among those seeking to keep the faith with republicanism, with liberal democracy, or with a Constitution representing these aspirations. In this light, we can be more specific than Agamben about the kind of threat that whatever being poses to the state or to sovereignty. Contrary to Agamben's contentions, I find that whatever being is no threat at all to the kind of unitary sovereignty that Agamben uses to theorize the state in his book Homo Sacer. Why would it be? Whatever being would be equally at ease with the legal justifications on behalf of a “unitary” sovereignty as it would anything else. If we, however, give the achievements of the people their due and consider the question of sovereignty from the perspective of popular sovereignty, of the assemblies and assemblages of power through which liberal democratic states seek to extend themselves and to govern at a distance, then whatever being is very much a danger to this type of power. Whatever being can be understood as facilitating a process of deposing this law and this state. A relation of whatever to the installation of a state of unchecked presidential powers and torture can be the death knell of popular sovereignty dedicated to the purpose of opposing tyranny. Whatever being is not the enemy of any state or form of “sovereignty.” It is the enemy of popular sovereignty. Whatever ruins democracy. If we want more than unchecked presidential power and torture, then we will have to dedicate ourselves to certain purposes, like resisting tyranny and recalling that this was the purpose of the U.S. Constitution.

#### Rejection of the state makes everything worse, it’s not a monolithic entity and alternatives are worse

Pasha 96 [July-Sept. 1996, Mustapha Kamal, Professor and Chair of the Department of Politics and International Relations at the University of Aberdeen, “Security as Hegemony”, Alternatives: Global, Local, Political, Vol. 21, No. 3, pp. 283-302, JSTOR]

An attack on the postcolonial state as the author of violence and its drive to produce a modern citizenry may seem cathartic, without producing the semblance of an alternative vision of a new political community or fresh forms of life among existing political communities. Central to this critique is an assault on the state and other modern institutions said to disrupt some putatively natural flow of history. Tradition, on this logic, is uprooted to make room for grafted social forms; modernity gives birth to an intolerant and insolent Leviathan, a repository of violence and instrumental rationality's finest speci- men. Civil society - a realm of humaneness, vitality, creativity, and harmony - is superseded, then torn asunder through the tyranny of state-building. The attack on the institution of the state appears to substitute teleology for ontology. In the Third World context, especially, the rise of the modern state has been coterminous with the negation of past histories, cultures, identities, and above all with violence. The stubborn quest to construct the state as the fount of modernity has subverted extant communities and alternative forms of social organization. The more durable consequence of this project is in the realm of the political imaginary: the constrictions it has afforded; the denials of alternative futures. The postcolonial state, however, has also grown to become more heterodox - to become more than simply modernity's reckless agent against hapless nativism. The state is also seen as an expression of **greater capacities against want, hunger, and injustice**; as an escape from the arbitrariness of communities established on narrower rules of inclusion/exclusion; as identity removed somewhat from capri- cious attachments. No doubt, the modern state has undermined tra- ditional values of tolerance and pluralism, subjecting indigenous so- ciety to Western-centered rationality. But tradition can also conceal particularism and oppression of another kind. Even the most elastic interpretation of universality cannot find virtue in attachments re- furbished by hatred, exclusivity, or religious bigotry. **A negation of the state is no guarantee that a bridge to universality can be built.** Perhaps the task is to rethink modernity, not to seek refuge in a blind celebration of tradition. Outside, the state continues to inflict a self-producing "security dilemma"; inside, it has stunted the emergence of more humane forms of political expres- sion. But there are always sites of resistance that can be recovered and sustained. **A rejection of the state** as a superfluous leftover of modernity that continues to straitjacket the South Asian imagination **must be linked to the project of creating an ethical and humane order** based on a restructuring of the state system that privileges the mighty and the rich over the weak and the poor.74 Recognizing the constrictions of the modern Third World state, **a reconstruction** of state-society re- lations **inside the state appears to be a more fruitful avenue than wishing the state away, only to be swallowed by Western-centered globalization and its powerful institutions.** A **recognition of the patent failure of other institutions either to deliver the social good or to procure more just distributional rewards in the global political economy may provide a sobering reassessment of the role of the state.** An appreciation of the scale of human tragedy accompanying the collapse of the state in many local contexts may also provide **im- portant points of entry into rethinking the one-sided onslaught on the state**. Nowhere are these costs borne more heavily than in the postcolonial, so-called Third World, where time-space compression has rendered societal processes more savage and less capable of ad- justing to rhythms dictated by globalization.

#### \*Talking about the legal system is good --- understanding the law both allows us to develop skills, increase individual agency, and reform the law

**Donohue 13** [2013 Nation al Security Pedagogy: The Role of Simulations, Associate Professor of Law, Georgetown Law, <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2172&context=facpub>]

C ONCLUDING R EMARKS The legal academy has, of late, been swept up in concern about the econom ic conditions that affect the placement of law school graduates. The image being conveyed , however, does not resonate in every legal field. I t is particularly inapposite to the burgeoning opportunities presented to students in national security. That th e conversation about legal education is taking place now should come as little surprise. Quite apart from economic concern is the traditional introspection that follows American military engagement. It makes sense: **law overlaps** **substantially with political power**, **being at once both the** **expression of government authority and the effort to limit the same**. **The one - size fits all approach** **currently dominating** **the conversation in** legal **education** , however, **appears ill - suited** to this realm. **Instead of looking at law across the** **board**, **greater insight can be gleaned by looking at the specific demands** of the different fields themselv es. **This does not mean** **that the goals identified are exclusive** **to**, for instance, national security **law** , **but it does suggest a greater nuance with regard to** **how the pedagogical skills present**. With this approach in mind, **I have here suggested six pedagogical goals** for national security . For following graduation, s tudents must be able to perform in each of the areas identified — i.e., (**1 ) understanding the law as applied** , (**2) dealing with factual** chaos and **uncertainty**, (3**) obtaining critical distance**, (**4) developing nontraditional written and oral communication skills**, (**5) exhibiting leadership, integrity, and good judgment in a high - stakes, highly - charged environment, and (6) creating continued opportunities for self - learning** . **They** also **must learn how to integrate these different skills into one** **experience**, **ensuring that they will be most effective** when they enter the field. **The problem with the current structures** in l egal education **is that they fall short**, in important ways, **from helping students to obtain these goals**. Doctrinal courses may incorporate a range of experiential learning components, such as hypotheticals, doctrinal problems, single exercises, extended or continuing exercises, and tabletop exercises49 These are important devices to introduce into the classroom. T he amount of time required for each varies, as does the object of the exercise itself. But **where they fall short is in providing a more holistic approach** to national security law, **which allows for the maximum conveyance of required skills**. Total immersion **simulations**, which have not yet been addressed in the secondary literature for civilian education in national security law, here **may provide an important way forward**. **Such simulations also help to address shortcomings in other areas of e**xperiential **education**, such as clinics and moot court. It is in an effort to address these concerns that I developed the **simulation** The approach draws on the strengths of doctrinal courses and embeds a total immersion simulation within it . **I t makes use of technology and physical space to engage students in a multi - day exercise, in which they are given agency and responsibility for their decision making**, **resulting in a steep learning curve** . While further adaptation of this model is undoubtedly necessary, **it suggests one potential direction for t he years to come**.model above. NSL Sim 2.0 ce rtainly **is not the only solution**, **but it does provide a starting point for moving forward**.

### 1AC Framework

#### The third contention is how we view debate.

#### The primary purpose of debate should be to improve our skills as decision-makers.

#### Transferability of skills – We are all private decision-makers who make choices every day that affect us and those around us. Debate is most productive as a method for teaching us to weigh the advantages and disadvantages of any decision we make in life. We have an obligation to the people affected by our decisions to use debate as a method for honing these critical thinking abilities.

#### Best route to better personal politics – The skills to decide between courses of action also help us make more informed, critically-examined choices about how we will view and engage with the world. Critical decision-making is the internal link to private political decisions.

#### The best route to decision-making is through discussion about public policy

#### Mutually accessible information – There is a wide swath of literature on public policy topics – that ensures there will be informed, predictable, and in depth debate over the aff’s decision. Private policymaking is highly variable depending on the person, and is inaccessible for sustained, researched argumentation.

#### Harder decisions make better decisionmakers – The problems facing public policymakers are a magnitude greater than private decisions. We all know the plan doesn’t actually happen, but flexing our muscles in the high-stakes games of public policymaking makes other decisionmaking easier. It’s like practicing with a heavy bat so you hit a homerun during the game.

#### Specifically, through discussing paths of government action, debate teaches us to be better organizational decision makers. Learning about the uniquely different considerations of organizations is necessary to affecting change in a world overwhelmingly dominated by institutions.

Algoso 2011 – Masters in Public Administration (May 31, Dave, “Why I got an MPA: Because organizations matter” <http://findwhatworks.wordpress.com/2011/05/31/why-i-got-an-mpa-because-organizations-matter/>)

Because organizations matter. Forget the stories of heroic individuals written in your middle school civics textbook. Nothing of great importance is ever accomplished by a single person. Thomas Edison had lab assistants, George Washington’s army had thousands of troops, and Mother Teresa’s Missionaries of Charity had over a million staff and volunteers when she passed away. Even Jesus had a 12-man posse. In different ways and in vastly different contexts, these were all organizations. Pick your favorite historical figure or contemporary hero, and I can almost guarantee that their greatest successes occurred as part of an organization. Even the most charismatic, visionary and inspiring leaders have to be able to manage people, or find someone who can do it for them. International development work is no different. Regardless of your issue of interest — whether private sector investment, rural development, basic health care, government capacity, girls’ education, or democracy promotion — your work will almost always involve operating within an organization. How well or poorly that organization functions will have dramatic implications for the results of your work. A well-run organization makes better decisions about staffing and operations; learns more from its mistakes; generates resources and commitment from external stakeholders; and structures itself to better promote its goals. None of this is easy or straightforward. We screw it up fairly often. Complaints about NGO management and government bureaucracy are not new. We all recognize the need for improvement. In my mind, the greatest challenges and constraints facing international development are managerial and organizational, rather than technical. Put another way: the greatest opportunities and leverage points lie in how we run our organizations. Yet our discourse about the international development industry focuses largely on how much money donors should commit to development and what technical solutions (e.g. deworming, elections, roads, whatever) deserve the funds. We give short shrift to the questions around how organizations can actually turn those funds into the technical solutions. The closest we come is to discuss the incentives facing organizations due to donor or political requirements. I think we can go deeper in addressing the management and organizational issues mentioned above. This thinking led me to an MPA degree because it straddles that space between organizations and issues. A degree in economics or international affairs could teach you all about the problems in the world, and you may even learn how to address them. But if you don’t learn how to operate in an organization, you may not be able to channel the resources needed to implement solutions. On the flip side, a typical degree in management offers relevant skills, but without the content knowledge necessary to understand the context and the issues. I think the MPA, if you choose the right program for you and use your time well, can do both.

#### This necessitates using an institutional understanding of politics --- because institutions like the law, the state, and other countries exist

**Wight – Professor of IR @ University of Sydney – 6**

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

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