# 1AC

**1AC Plan**

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

**1AC Legal Legitimacy**

**Contention one is Legal Legitimacy:**

**Lack of a credible remedy renders habeas useless**

**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.**

**Only the plan’s judicial clarification solves and maintains legitimacy**

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

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

**Unless the judiciary initiates remedial power the Court will be reduced to irrelevance**

**Tirschwell 9** [2009, Eric A. Tirschwell is the first listed lawyer on the brief, “ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT”, <http://ccrjustice.org/files/2009-12-04%20kiyemba_FINAL%20merits%20brief_0.pdf>]

**In Boumediene, the Court split over whether the petitioners had access**, through the DTA**, to an adequate substitute to the habeas remedy.** But **nine justices agreed about what habeas is: a remedial mechanism by which the Judiciary compels release.** The Court acknowledged the importance of the writ as a “vital instrument for the protection of individual liberty.” Id. at 2246 (collecting cases). **Because release is what the “instrument” achieves, the absence of an express release remedy** in the DTA **troubled the Court**, id. at 2271**, which saw in that absence one of the “constitutional infirmities” of the DTA regime**, id. at 2272. **The Chief Justice differed sharply with the majority— but not on the question of whether habeas requires release**. His opinion (joined by all of the dissenting justices) argued that the MCA’s jurisdictional strip did not violate the Suspension Clause, in part, because the DTA did afford a release remedy. 128 S. Ct. at 2291- 92. The majority concluded that **a “habeas court must have the power to order the conditional22 release of an individual unlawfully detained,**” **Boumediene**, 128 S. Ct. at 2266, while the Chief Justice **wrote similarly that “the writ requires most fundamentally an Article III court be able to hear the prisoner’s claims and**, when necessary, **order release,”** id. at 2283 (emphasis added). Thus **four dissenting justices**, like five in the majority, **agreed that release is fundamental to habeas and that the power to order it is of the essence of judicial power. This conclusion had been well established before**. See, e.g., In re Medley, 134 U.S. 160, 173 (1890) (“under the writ of habeas corpus we cannot do anything else than discharge the prisoner from wrongful confinement”); Ex Parte Watkins, 28 U.S. (3 Pet.) at 202 (Marshall, C.J.); Ex Parte Bollman, 8 U.S. (4 Cranch) 75, 136 (1807) (a habeas court that finds imprisonment unlawful “can only direct [the prisoner] to be discharged”); THE FEDERALIST NO. 84 at 629 (Alexander Hamilton) (John C. Hamilton ed. 1869) (habeas is “a remedy for [the] fatal evil” of “arbitrary imprisonments”).23 The government has never explained how it could be otherwise. **A habeas writ that did not conclusively end unlawful Executive imprisonment would protect neither the separation of powers**, **because it would not judicially check the Executive**; **nor the prisoner, who would obtain nothing from judicial review; nor the Judiciary, whose function would be** (and, since Boumediene, largely has been) **reduced to cheerleading, if not outright irrelevance**. **The** **writ and the constitutional plan require more of the Judiciary than to accept assurances from Executive jailers.** See Harris v. Nelson, 394 U.S. 286, 292 (1969) (no higher duty of a court than “the careful processing and adjudication of petitions for writs of habeas corpus”; **writ must “be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected”**); Bowen v. Johnston, 306 U.S. 19, 26 (1939) (habeas corpus the “precious safeguard of personal liberty”; “no higher duty than to maintain it unimpaired”).

**Otherwise global instability is inevitable – court re-affirmation of habeas stops global war**

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

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

**Specifically, it stops cascading ethnic conflicts which culminate in nuclear war**

**Crawford 9**, Dr. Crawford is the Associate Director of the Institute of European Studies and Lecture of International and Area Studies at UC Berkeley, Ethnic Conflict in Georgia: What Lies Ahead, http://rpgp. berkeley.edu/node/87)

Ironically, **at the same time that the demands of exclusive cultural groups for state sovereignty and "national self-determination" escalate around the globe, support for the international legal norms of established state sovereignty and non-intervention has also disappeared**. Together, **these** two **trends are dangerously explosive. We are likely to see more oppression of minorities in ethnically defined states**, more **slaughter of** innocent **civilians** caught in cultural conflicts, the **continued** **violent breakup of sovereign countries**, and **more invasions and occupation of disputed territory, as powerful countries--nursing other resentments and fears against one another**--seize the opportunity to **take sides. It will** thus **not be long until nuclear powers end up confronting one another. The** absurd **trigger for** this **conflict will be** the **nationalist demands of ethnic and sectarian political entrepreneurs**--who are often just thugs in disguise. Note the timing of the U.S. announcement of a missile defense pact with Poland, as Russian tanks rolled through Georgia to halt Georgia's military incursion into Ossetian territory. **Unless we act quickly to reach wider international agreement on global solutions to violent cultural disputes, more exclusive territorial claims of small and distinct cultural groups and violent responses to those claims will suck nuclear powers into deadly international conflict**. The crisis in **Georgia is not** an **isolated** one. **Across the globe we hear** the **battle cry of Kosovars, Tibetans, South Ossetians, Abkhazians, Kurds, Kashmiris and** so many **others**: “Give us a state of our own.” With few exceptions, that battle cry long ago slashed the world up into separate homogeneous ethnic and religious states, dislocating millions of people, sparking mass atrocities and forced expulsions, and igniting bouts of ethnic cleansing and genocide. In the remaining multi-ethnic societies of the 21st century, that battle cry threatens again; and with the non-intervention norm in tatters, the consequences will be disastrous. Because the earth does not hold enough land for each and every ethnic or religious group to own the piece that it thinks it deserves, secessionist attempts and communal conflicts over territory will escalate. The morally indignant will respond to this escalation with calls for humanitarian military missions to free one group from the oppression of another and support its "right" to exclusive territory. Those missions will be mired in the deadly consequences of communal conflict for long periods of time. Small secessionist groups will seek the "protection" of neighboring states, who are often only too eager to challenge their rivals. Tossing aside international law and claiming that they are on the side of the angels, powerful countries will continue to see disputed terrain as a strategic outpost for themselves, and they will help one ethnic or religious group oust the other. Cynically citing the international legal principle of non-intervention in the territory of a sovereign state, Russia opposed the U.S. when NATO bombed Serbia on behalf of ethnic Albanians there and again when it recognized Kosovo’s independence. But Russia--long before it granted diplomatic recognition of their independence--assisted South Ossetia and Abkhazia in their bid for secession from Georgia, with the knowledge that these groups could not exist on their own and would seek Russian protection--even annexation. And in that process, many innocent Georgians suffered--just as innocent Serbs suffered in Kosovo--people who just happened to be of the "wrong" ethnicity and living in the "wrong" place. **That suffering is rarely reported**. In 1993, in a war that was barely recognized and in a gruesome ethnic cleansing that boggles the imagination, 240,000 Georgians were expelled from Abkhazia. 100,000 Serbs were forced to leave Kosovo after 1999--another unrecognized ethnic clensing. Today, the homes and churches of the remaining Serbs living there are being destroyed by the Kosovars, who want the land for themselves alone. Gangs of Ossetian militias regularly destroy the homes of Georgians who have lived in the region for decades. In March we saw angry Tibetans, led by Buddhist monks, destroying the homes and shops of Chinese people living in Lhasa. Instead of supporting the human rights of all who live in multi-ethnic states and seeking to bring about sustainable harmony and justice, we have reached for a tempting but poisonous antidote to cultural conflict: the separation of ethnic and religious groups into new independent nation states. And though separation is sometimes warranted to halt communal violence, it creates new problems, does not solve the old ones, and chips away at the value of human equality. The **secession that separation entails leads to more bloodshed, more refugees, and more entrenched ethnic and religious hatred, more "humanitarian" intervention, more drawn-out military conflicts, more dangerous confrontations between powerful, nuclear-armed countries**. The same scenario will be acted out when we piously support dominant states who claim sovereignty over disputed territory and repress the secessionists. Repression leads to more violence as those who are oppressed are swayed to join the separatist cause. Instead of supporting ethnonationalist separatism in the guise of the right of “national self-determination” or opposing the intervention of others only when it suits our strategic interests, we need to take a consistent stand in support of human rights and equal treatment of all cultural groups within multiethnic societies. Of course this means both opposing oppression on the part of powerful states and opposing violent responses to that oppression. We can pressure China to halt abuses of Tibetans without abetting Tibetan secessionists; we can oppose Russia’s invasion of Georgia and its support for Ossetian secession without condoning Georgia’s military incursions into Ossetian territory. We must revive and strengthen the principle of non-intervention and at the same time, provide even stronger support for human rights in contested territory. **Only** the **revitalization and enforcement of international legal norms can halt the coming spiral of violent global confrontation triggered by ethnic and sectarian conflicts**.

**1AC Judicial Review**

**Contention two is Judicial Review:**

**Kiyemba undid Boumediene – rectifying this is a crucial test to maintain the court’s leadership as a model to be emulated**

**Scharf 9**, Professor Michael P. Slcharf, PILPG Managing Director, John Deaver Drinko — Baker & Hostetler Professor of Law and Director of the Frederick K. Cox International Law Center at the Case Western Reserve University School of Law, BRIEF OF THE PUBLIC INTERNATIONAL LAW & POLICY GROUP AS AMICUS CURIAE IN SUPPORT OF PETITIONERS, www.americanbar.org/content/dam/aba/publishing/preview/publiced\_preview\_briefs\_pdfs\_09\_10\_08\_1234\_PetitionerAmCuPILPG.authcheckdam.pdf

**The precedent of this Court has** a **significant impact on rule of law in foreign states. Foreign governments, in particular foreign judiciaries, notice and follow the example set by the U.S.** in **upholding** the **rule of law**. As foreign governments and judiciaries grapple with new and challenging issues associated with upholding the rule of law during times of conflict, **U.S. leadership on the primacy of law during the war on terror is particularly important.** Recent decisions of this Court have reaffirmed the primacy of rule of law in the U.S. during the war on terror. As relates to the present case, a number of this Court’s decisions, **most notably Boumediene v. Bush**, 128 S.Ct. 2229 (2008), have **established clear precedent that Guantanamo detainees have a right to petition for habeas corpus relief. Despite a clear holding from this Court in Boumediene, the Court of Appeals sought in Kiyemba v. Obama to narrow Boumediene to such a degree as to render this Court’s ruling hollow**. 555 F.3d 1022 (D.C. Cir. 2009). **The** present **case is** thus **a test of both the substance of the right granted in Boumediene and the role of this Court in ensuring faithful implementation of its prior decisions**. Although this Court’s rulings only have the force of law in the U.S., **foreign governments will take note of the decision in the present case and use the precedent set by this Court to guide their actions in times of conflict. PILPG has advised over two dozen foreign states on peace negotiations and post-conflict constitution drafting, as well as all of the international war crimes tribunals**. Through providing pro bono legal assistance to foreign governments and judiciaries, PILPG has **observed the** important **role** this **Court and U.S. precedent serve in promoting rule of law in foreign states. In Uganda, for example, the precedent established by this Court in Hamdan v. Rumsfeld**, 548 U.S. 557 (2006), and Boumediene, **influenced judges and legislators to incorporate the principles of judicial review and enforceability in their domestic war crimes bill. In Nepal, this Court has served as a model for the nascent judiciary. In Somaliland, the government relied heavily on U.S. terrorism legislation when drafting terrorism legislation for the region. And in the South Sudan peace process, the Sudan People’s Liberation Movement/Army (SPLM/A), the leading political party in the Government of Southern Sudan, relied on U.S. precedent to argue for the primacy of law and the importance of enforceability of previous adjudicative decisions** in the5 Abyei Arbitration, one of the most important and contentious issues in the ongoing implementation of the peace agreement. **Foreign judges** also **follow the work of this Court closely**. In a number of the judicial training programs PILPG has conducted, foreign judges have asked PILPG detailed questions about the role of this Court in upholding rule of law during the war on terror. A review of foreign precedent confirms how closely foreign judges follow this Court. **In numerous foreign states, and in the international war crimes tribunals, judges regularly cite the precedent of this Court to establish their own legitimacy, to shore up judicial authority against overreaching by powerful executives, and to develop a strong rule of law within their own legal systems. Given** the **significant influence of this Court** on foreign governments and judiciaries, **a decision in Kiyemba implementing Boumediene will reaffirm this Court’s leadership in upholding the rule of law and promote respect for rule of law in foreign states during times of conflict**.6 ARGUMENT I. **KIYEMBA v. OBAMA IS A TEST OF SUPREME COURT LEADERSHIP IN UPHOLDING RULE OF LAW IN TIMES OF CONFLICT**. **The precedent set by the Supreme Court in the present case will have a significant impact on the development of rule of law in foreign states.** **Foreign judicial, executive, and parliamentary bodies closely follow the work of this Court, and this Court’s previous decisions related to the war on terror have shaped how foreign states uphold the rule of law in times of conflict**. **Foreign governments and judiciaries will review this Court’s decision in the present case in light of those previous decisions**. **A decision in the present case implementing previous decisions of this Court granting habeas rights to Guantanamo detainees is an opportunity for this Court to reaffirm to foreign governments that the U.S. is a leader and role model in upholding the rule of law during times of conflict**. Recent Supreme Court precedent established a clear role for the primacy of law in the U.S. war on terror. In particular, this Court’s landmark decision in **Boumediene highlighted the critical role of the judiciary in a system dedicated to the rule of law, as well as the “indispensable” role of habeas corpus** as a “time tested” safeguard of liberty. Boumediene v. Bush, 128 S.Ct. 2229, 2247, 2259 (2008). **Around the globe, courts and governments took note of this Court’s stirring words**: “Security subsists, too, in fidelity to freedom’s first principles. **Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty7 that is secured by adherence to the separation of powers. It is from these principles that the judicial authority to consider petitions for habeas corpus relief derives.”** Id. at 2277. In contrast to the maxim silent enim leges inter arma (in times of conflict the law must be silent), this Court affirmed in Boumediene that “[t]he laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled, and in our system they are reconciled within the framework of the law.” Id. Boumediene held that the detainees in the military prison at Guantanamo Bay are “entitled to the privilege of habeas corpus to challenge the legality of their detentions.” Id. at 2262. Inherent in that privilege is the right to a remedy if the detention is found to be unlawful. In the present case, the Petitioners, who had been found not to be enemy combatants, sought to exercise their privilege of habeas corpus. The Executive Branch conceded that there was no legal basis to continue to detain the Petitioners, that years of diligent effort to resettle them elsewhere had failed, and that there was no foreseeable path of release. The District Court implemented Boumediene, ordering that the Petitioners be brought to the courtroom to impose conditions of release. In re Guantanamo Bay Detainee Litigation, 581 F. Supp. 2d 33, 42-43 (D.C. Cir. 2008). The Court of Appeals reversed, with the majority concluding that the judiciary had no “power to require anything more” than the Executive’s representations that it was continuing efforts to find a foreign country willing to admit Petitioners. Kiyemba v. Obama, 555 F.3d 1022, 1029 (D.C. Cir. 2009). **The Court of Appeals’ decision effectively narrowed Boumediene to such a degree that it rendered the ruling hollow**. Circuit Judge Rogers recognized this in her dissent, opining that the majority’s analysis “was not faithful to Boumediene.” Id. at 1032 (Roberts, J., dissenting). **Given the Court of Appeals’ attempt to narrow Boumediene, Kiyemba v. Obama is a test of this Court’s role in upholding the primacy of law in times of conflict**. **A decision in favor of the Petitioners in Kiyemba will reaffirm this Court’s leadership in upholding the rule of law and promote respect for rule of law in foreign states during times of conflict**. II. PILPG’S EXPERIENCE ADVISING FOREIGN GOVERNMENTS AND JUDICIARIES ILLUSTRATES THE IMPORTANCE OF SUPREME COURT PRECEDENT IN PROMOTING RULE OF LAW IN FOREIGN STATES DURING TIMES OF CONFLICT. **During PILPG’s work providing pro bono legal assistance to foreign governments and judiciaries on the rule of law in conflict and post-conflict settings, clients frequently request guidance on U.S. laws and the role of the judiciary in the U.S. system of governance**. In recent years, **as states have watched the U.S. tackle the legal issues surrounding the war on terror, foreign governments and judiciaries have expressed keen interest in, and have demonstrated reliance on, the legal mechanisms the U.S. has adopted to address the challenges presented in this new form of conflict**. The U.S. Government, under the guidance of this Court, has set a strong example for upholding the rule of law during times of conflict, and foreign governments have followed this lead.

**Re-affirming habeas shapes global legal development through judicial dialogue – a credible remedy is essential**

**Scharf et al 9** [Professor Michael P. Scharf is the PILPG Managing Director, John Deaver Drinko — Baker & Hostetler Professor of Law and Director of the Frederick K. Cox International Law Center at the Case Western Reserve University School of Law, “BRIEF OF THE PUBLIC INTERNATIONAL LAW & POLICY GROUP AS AMICUS CURIAE IN SUPPORT OF PETITIONERS”, [www.americanbar.org/content/dam/aba/publishing/preview/publiced\_preview\_briefs\_pdfs\_09\_10\_08\_1234\_PetitionerAmCuPILPG.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_09_10_08_1234_PetitionerAmCuPILPG.authcheckdam.pdf)]

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

**A strong judiciary is the key factor**

**Kalb 13** [Summer, 2013; Johanna Kalb is an Associate Professor of Law, Loyola University New Orleans College of Law, “The Judicial Role in New Democracies: A Strategic Account of Comparative Citation”, 38 Yale J. Int'l L. 423]

**The role of the judiciary in transitional regimes has received increasing attention in the last few decades** based largely on two historical developments. First, **constitutionalism and judicial review have become increasingly pervasive attributes** of late twentieth-century political transitions, **which has increased the predominance of the judicial role in most new democratic regimes**. Second, **a growing number of countries that once held democratic elections have regressed into authoritarian or semi-authoritarian rule** n38 or have simply failed to move beyond the thin electoral definition of democracy. n39 In this historical context, scholars have turned their focus to the role that courts can play in helping to consolidate or solidify the post-election transition to a democratic order. A. Diagonal Accountability According to Juan J. Linz and Alfred Stepan, democratic consolidation is complete when a government comes to power that is the direct result of a free and popular vote, when this government de facto has the authority to generate new policies, and [\*431] when the executive, legislative, and judicial power generated by the new democracy does not have to share power with other bodies de jure. n40 As is now widely acknowledged, **the project of democratic consolidation is inhibited by accountability failures in political institutions**. In other words, **democracy stalls** n41 or collapses **because institutional weaknesses undermine the processes by which governmental actors are held responsible for performing their appropriate functions. Courts can aid** in democratic consolidation **by reinforcing constitutional structures of accountability** across a number of different planes. First, **a credible and autonomous judiciary may serve as an important mechanism of horizontal accountability**. "In institutionalized democracies, **accountability runs ... horizontally across a network of relatively autonomous powers** (i.e. other institutions) **that can call into question, and** eventually **punish, improper ways of discharging** the **responsibility** of a given official." n42 **Given the primacy of judicial review** in most new regimes, **courts are well positioned to ensure that other governmental actors are subject to the constraints of the law**. **An effective judiciary may thus be a key institutional actor in preventing the reconsolidation of power** in the executive that has characterized so many nations in transition. n43 **Courts** also **play a role in vertical accountability, which can** be understood to **characterize the relationship between the citizenry and the national government**. In introducing this concept, Guillermo O'Donnell focuses on the methods by which nonstate actors in media and civil society can continue to hold state actors to account through regular election, social mobilization, and media oversight. n44 **An effective judiciary can protect and enable these processes of vertical accountability by ensuring governmental respect for the individual rights that underlie them** - for example, **by ensuring access to the voting booth and protecting freedom of speech and association.** [\*432] While O'Donnell's vertical axis ended with the national government, in the democracies of the last fifty years, the notion of vertical accountability arguably extends further to characterize the relationship between the domestic population, the national government, and the international community, which includes international courts, the governments of other nations, and international NGOs. Most **recent democratic transitions were in fact driven by pressures from both internal and external constituencies**, sometimes in concert. n45 For example, "**few would question the central role played by occupation forces in fostering democratic government** in Germany and Japan after World War II," while "the American security umbrella played a similar facilitating function for democracy in South Korea, and Taiwan." n46 In recent decades, international sanctions have helped to force internal political change (perhaps most notably in South Africa), while "the export of election monitoring technologies such as parallel vote tabulation and exit polls played a crucial role in bringing down Augusto Pinochet in Chile in 1988, unseating Slobodan Milo<hac s>evic in Serbia in 2000, and sparking the Orange Revolution in 2004." n47 In each of these cases, donor funding has helped to generate and preserve a global web of civil society groups, which has helped to inspire and operationalize the indispensable efforts of domestic advocates during transitions. n48 Moreover, even long after the formal democratic transition has occurred, new governments, particularly in the economically underdeveloped countries of the Global South, continue to confront pressures from the international community to maintain systems of democratic governance, to protect and promote human rights, and to facilitate economic integration. Thus, **governmental actions during the transitional period and beyond are under increased levels of scrutiny from both vertical and horizontal audiences**, which can mobilize each other in support of accountability at the national level. **The judiciary can also play a role in mediating these relationships by protecting the domestic rights that enable these transnational connections** - by protecting access to the Internet and to international travel, for example. **The ongoing activity along both of the axes creates the opportunity for the judiciary to engage in what we may describe as "diagonal accountability.**" **n49 In modern [\*433] regimes in transition, the judiciary must be responsive to activities on both the vertical and horizontal axes.** The challenge is in satisfying these different audiences that are sometimes in harmony and sometimes in conflict. **The courts**, given their responsibility for preserving the possible channels of horizontal and vertical accountability, **are uniquely positioned to manage this overlap** and can mobilize one axis "diagonally" in support of promoting accountability along the other. **Courts may draw on international support "vertically" to protect against encroachment from the other branches "horizontally**" - for example, by reaching out to influential international institutions to put pressure on the president to comply with judicial orders limiting executive authority. Alternatively, **courts may be well positioned to safeguard the authority of other domestic institutions along the horizontal axis by acting as a site of resistance against coercive international pressures** - for example, **by striking down as unconstitutional domestically unpopular legislation forced on the elected branches by international actors.**

**Democratic transitions are coming now but will fail absent Supreme Court leadership**

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

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

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

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

**CJA 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, t**he 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 U**nited **S**tates **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 f**ollowing 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 U**nited **S**tates **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** **U**nited **S**tates. **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.

**Strong democracy maintains global peace – the best research proves**

**Cortright 13**, David Cortright is the director of Policy Studies at the Kroc Institute for Peace Studies at the University of Notre Dame, Chair of the Board of Directors of the Fourth Freedom Forum, and author of 17 books, Kristen Wall is a Researcher and Analyst at the Kroc Institute, Conor Seyle is Associate Director of One Earth Future, Governance, Democracy, and Peace How State Capacity and Regime Type Influence the Prospects of War and Peace, http://oneearthfuture.org/sites/oneearthfuture.org/files//documents/publications/Cortright-Seyle-Wall-Paper.pdf

**Drawing from** the **empirical literature, this paper identifies** two **underlying pathways through which** state **governance** systems help to **build peace. These are: State capacity. If states lack** the **ability to execute** their **policy goals or to maintain security** and public order **in the face of potentially violent groups, armed conflict is more likely. State capacity refers to two significant aspects: security capacity and social capacity. Security capacity includes** the **ability to control territory and resist armed incursion from other states and nonstate actors. Social capacity includes the ability to provide social services and public goods. Institutional qxuality. Research suggests** that **not all governance systems are equally effective or capable of supporting peace. Governance systems are seen as more credible and legitimate, and are better at supporting peace, when** they are **characterized by inclusiveness, representativeness, transparency, and accountability**. In particular, systems allowing citizens to voice concerns, participate politically, and hold elected leaders accountable are more stable and better able to avoid armed conflict. **Both dimensions**—state capacity and quality—**are crucial to** the **prevention of armed conflict** and are the focus of part one of this paper. Part two of the paper focuses on **democracy as the most common way of structuring state government to allow for inclusive systems while maintaining state capacity. The** two **parts summarize important research findings on** the **features of governance that are most strongly associated with prospects for peace. Our analysis, based on** an **extensive review of empirical literature, seeks to identify** the **specific dimensions of governance** that are **most strongly associated with peace. We show evidence of a direct link between peace and a state’s capacity to both exert control over its territory and provide a full range of social services through effective governance institutions**. We apply a governance framework to examine three major factors associated with the outbreak of war—border disputes, ethnic conflict, and dependence on commodity exports—and emphasize the importance of inclusive and representative governance structures for the prevention of armed conflict.

**The converse is true, backsliding causes great power war**

**Gat 11**, Professor at Tel Aviv University, Ezer Weizman Professor of National Security at Tel Aviv University, Azar 2011, “The Changing Character of War,” in The Changing Character of War, ed. Hew Strachan and Sibylle Scheipers, p. 30-32

Since 1945, **the decline of major great power war has deepened** further. Nuclear weapons have concentrated the minds of all concerned wonderfully, but no less important have been the institutionalization of free trade and the closely related process of rapid and sustained economic growth throughout the capitalist world. The communist bloc did not participate in the system of free trade, but at least initially it too experienced substantial growth, and, unlike Germany and Japan, it was always sufﬁciently large and rich in natural resources to maintain an autarky of sorts. With the Soviet collapse and with the integration of the former communist powers into the global capitalist economy, the prospect of a major war within the developed world seems to have become very remote indeed. This is one of the main sources for the feeling that war has been transformed: its geopolitical centre of gravity has shifted radically. The modernized, economically developed parts of the world constitute a ‘zone of peace’. **War now seems to be conﬁned to the less-developed parts of the globe, the world’s ‘zone of war’,** **where countries that have** so far **failed to embrace modernization and its pacifying spin-off effects continue to be engaged in wars** among themselves, as well as with developed countries.¶ While the trend is very real, **one wonders if the** near **disappearance of armed conﬂict within the developed world is likely to** **remain as stark** **as it has been since the collapse of communism**. **The post-Cold War moment** may turn out to **be** a **ﬂeeting** one. **The probability of major wars within the developed world remains low**—because of the factors already mentioned: increasing wealth, economic openness and interdependence, and nuclear deterrence. **But the deep sense of change** prevailing since 1989 **has been based on the far more radical notion that the triumph of capitalism** also **spelled the irresistible ultimate victory of democracy**; and that in an afﬂuent and democratic world, major conﬂict no longer needs to be feared or seriously prepared for. **This notion**, however, **is** **fast eroding** **with the return of capitalist non-democratic great powers that have been absent from the international system since 1945**. Above all, there is the formerly communist and fast industrializing authoritarian-capitalist **China**, whose massive growth **represents the greatest change in the global balance of power. Russia**, too, **is retreating from its postcommunist liberalism and assuming an increasingly authoritarian character**.¶ **Authoritarian capitalism may be more viable than people tend to assume**. 8 The communist great powers failed even though they were potentially larger than the democracies, because their economic systems failed them. By contrast, the **capitalist authoritarian/totalitarian powers during the ﬁrst half of the twentieth century, Germany and Japan**, particularly the former, **were as efﬁcient economically as**, **and** if anything **more successful militarily than,** **their democratic counterparts**. They were defeated in war mainly because they were too small and ultimately succumbed to the exceptional continental size of the United States (in alliance with the communist Soviet Union during the Second World War). However, the **new non-democratic powers are both** **large and capitalist.** **China** in particular **is the largest player in the international system in terms of population and is showing spectacular economic growth** that within a generation or two is likely to make it a true non-democratic superpower.¶ Although **the return of capitalist non-democratic great powers** does not necessarily imply open conﬂict or war, it **might indicate that the democratic hegemony since the Soviet Union’s collapse could be** **short-lived** **and that** **a universal ‘democratic peace’ may still be far off**. The new capitalist authoritarian powers are deeply integrated into the world economy. They partake of the development-open-trade-capitalist cause of peace, but not of the liberal democratic cause. Thus, it is crucially important that any protectionist turn in the system is avoided so as to prevent a grab for markets and raw materials such as that which followed the disastrous slide into imperial protectionism and conﬂict during the ﬁrst part of the twentieth century. Of course, the openness of the world economy does not depend exclusively on the democracies. In time, China itself might become more protectionist, as it grows wealthier, its labour costs rise, and its current competitive edge diminishes.¶ With the possible exception of the sore Taiwan problem, China is likely to be less restless and revisionist than the territorially conﬁned Germany and Japan were. Russia, which is still reeling from having lost an empire, may be more problematic. However, **as China grows in power, it is likely to become more assertive,** **ﬂex its muscles, and behave like a superpower**, even if it does not become particularly aggressive. The **democratic and non-democratic powers may coexist more or less peacefully**, albeit warily, side by side, armed because of mutual fear and suspicion, as a result of the so-called ‘security dilemma’, and against worst-case scenarios. **But there is** also **the prospect of** **more antagonistic relations**, **accentuated ideological rivalry**, **potential and actual conﬂict,** **intensiﬁed arms races**, and even new cold wars, with spheres of inﬂuence and opposing coalitions. Although great power relations will probably vary from those that prevailed during any of the great twentieth-century conﬂicts, as conditions are never quite the same, they may vary less than seemed likely only a short while ago.

**Specifically, re-affirmation of rule of law principles on detention causes Iraqi modelling – that staves off civil war**

**Scharf et al 9**, PILPG Managing Director [Professor Michael P. Scharf is the PILPG Managing Director, John Deaver Drinko — Baker & Hostetler Professor of Law and Director of the Frederick K. Cox International Law Center at the Case Western Reserve University School of Law, “BRIEF OF THE PUBLIC INTERNATIONAL LAW & POLICY GROUP AS AMICUS CURIAE IN SUPPORT OF PETITIONERS”, [www.americanbar.org/content/dam/aba/publishing/preview/publiced\_preview\_briefs\_pdfs\_09\_10\_08\_1234\_PetitionerAmCuPILPG.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_09_10_08_1234_PetitionerAmCuPILPG.authcheckdam.pdf)]

As the foregoing examples illustrate, **foreign governments rely on the precedent set by the U.S. and this Court when addressing new and complex issues in times of conflict**. **Finding for the Petitioners in the present case will reaffirm this Court’s leadership in promoting respect for rule of law in foreign states during times of conflict.** B. **Foreign Judges Follow U.S. and Supreme Court Leadership in Times of Conflict.** In addition to its work advising foreign governments, **PILPG has been and continues to be involved in a number of judicial training initiatives in foreign states**. **These initiatives aim to foster independent and fair judicial systems in transitional and post-conflict states throughout Central and Eastern Europe, Africa, and the Middle East**. In these trainings, **PILPG frequently relies on the work of this Court to illustrate and promote adherence to the rule of law**. In 2004, for example, **PILPG led a week-long training session for Iraqi judges** in Dubai **on due process and civil liberties protections** to institute in the new post-Saddam legal system. Th**e training was seen as an important step toward the democratization of Iraq**, and something that would hasten the ability of the U.S. to withdraw its troops from Iraq. **On the second day** of the training program, local and **international media published the leaked photos of the abuses at Abu Ghraib.** **The Iraqi judges would not allow the training sessions to continue until PILPG answered to their satisfaction questions about whether the U.S. judicial system could ensure that the perpetrators would be brought to justice**, that the victims would be able to bring suit for their injuries, and that the abuses would be halted. When PILPG returned for another training session several months later, **the Iraqi judges had mixed reactions to the prosecutions of the Abu Ghraib perpetrators**. **Some judges perceived the U.S. Prosecutions of the perpetrators as not aggressive enough, which left the Iraqi judges with the impression that the U.S. was not leading by example**. Although other Iraqi judges appreciated and sought to follow the U.S. example to try those responsible for abuses before an independent tribunal, it was clear that **Abu Ghraib temporarily set back U.S. efforts to establish rule of law in Iraq.** A year later, in 2005, **PILPG conducted training sessions for the Iraqi high tribunal judges who would be presiding over the trial of Saddam Hussein** and other former leaders of the ba’athist regime. Even more than the human rights training of ordinary Iraqi judges discussed above, **the successful operation of the Iraqi high tribunal was seen as critical to suppressing the spread of sectarian violence and heading off a full-scale civil war in Iraq**. The objectives of the tribunal were twofold. First, the tribunal sought to bring those most responsible for the atrocities committed under the Ba’athist regime before an independent panel of judges to be tried under international standards of justice. Second, the tribunal sought to establish a model for upholding and implementing rule of law in Iraq and to demonstrate that the need for rule of law is greatest in response to the gravest atrocities. During the training sessions, **the Iraqi judges requested guidance on controlling disruptive defendants in the courtroom**. Specifically, **the judges asked whether they could bind and gag the defendants in the courtroom as they understood had been done to the defendants in the 1969 “Chicago Seven” trial in the U.S.** **PILPG explained that the U.S. Court of Appeals had ultimately overturned the convictions** in that case, in part because of the mistreatment of the defendants in the courtroom. United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972). **This information persuaded the Iraqi judges to seek less draconian means of control** in the trial of Saddam Hussein, which was televised gavel to gavel in Iraq. See generally Michael Newton and Michael Scharf, Enemy of the State: The Trial and Execution of Saddam Hussein (2008). **Foreign judicial interest in U.S. respect for rule of law during the war on terror is not limited to Iraqi judges**. In 2006, PILPG conducted sessions in a weeklong rule of law training program in Prague for fifty judges from former Soviet Bloc countries in Eastern Europe. At the start of the first session, one of the judges asked “Sobriaetes’ li vi goverit’ o slone v komnate?,” which translates to “Are you going to be addressing the elephant in the room?” Michael P. Scharf, The Elephant in the Room: Torture and the War on Terror, 37 Case W. Res. J. Int’l L. 145, 145 (2006). **The question referred to the so-called “White House Torture Memos,” released just before the training session began**, which asserted that Common Article 3 of the 1949 Geneva Conventions was not applicable to detainees held at Guantanamo Bay and which **provided justification for Military Commissions whose procedures would not meet the Geneva standards**. Id. at 145-46. **The group of judges asked PILPG to explain “how representatives of the U**nited **S**tates **could expect to be taken seriously in speaking about the importance of human rights law when the United States itself has recently done so much that is contrary to that body of law in the context of the so-called ‘Global War on Terror.**’” Id. at 145. PILPG addressed judges’ concerns by explaining that the President’s decision to establish Military Commissions via Executive Order, and whether those Commissions had to comport with the Geneva Conventions, was currently being reviewed by this Court in Hamdan v. Rumsfeld, 548 U.S. 557 (2006), and that the Executive Branch would be bound to follow the holding of this Court. Scharf, supra, at 148. **Foreign judges closely follow the work of this Court and the example set by the U.S. Government in upholding the rule of law during the war on terror**. **As these examples illustrate, when the U.S. upholds the rule of law, foreign judges are more likely to follow.**

**Democratic stability prevents outbreak of Middle Eastern war – the threat is under-estimated**

**Cordesman 13**, Anthony H. Cordesman holds the Arleigh A. Burke Chair in Strategy at CSIS, Iraq: The New Strategic Pivot in the Middle East, http://csis.org/publication/iraq-new-strategic-pivot-middle-east

**It is hard to determine why Iraq receives so little U.S. attention as it drifts towards sectarian conflict, civil war, and alignment with Iran. Tensions** in Iraq **have been rising** for well over a year, and **the UN warned** on June 1, 2013 that “1,045 Iraqis were killed and another 2,397 were wounded in acts of terrorism and acts of violence in May. The number of civilians killed was 963 (including 181 civilian police), and the number of civilians injured was 2,191 (including 359 civilian police). A further 82 members of the Iraqi Security Forces were killed and 206 were injured.”

This **neglect may be a matter of war fatigue**; the result of a conflict the United States “won” at a tactical level but seems to have lost at a strategic level. It may be the result of the fact the civil war in Syria is more intensive, produces more human suffering, and is more open to the media. The end result, however, is that that **the U**nited **S**tates **is just beginning to see how much of a strategic pivot Iraq has become**.

The **strategic map of the region is changing and Iraq’s role** in that change **is critical. It used to be possible to largely separate the Gulf and** the **Levant. One set of tensions focused on the Arab-Israel conflict versus tensions focused on the Gulf. Iraq stood between them. It sometimes became a crisis on its own but always acted as a strategic buffer between two major subregions in the Middle East.**

However, it has become clear over the last year that the upheavals in the Islamic and Arab world have become a clash within a civilization rather than a clash betweencivilizations. The Sunni vs. Alewite civil war in Syria is increasingly interacting with the **Sunni versus Shi’ite tensions in the Gulf that are edging Iraq back towards civil war. They also interact with the Sunni-Shi’ite, Maronite, and other** confessional **struggles in Lebanon**.

**The “Kurdish problem**” now **spreads from Syria to Iraq to Turkey to Iran**. The question of Arab identity versus Sunni or Shi’ite sectarian identity divides Iraq from the Arab Gulf states and pushes it towards Iran. **Instead of terrorism we have counterinsurgency, instability, and religious and ethnic conflict.**

**For all the current attention to Syria, Iraq is the larger and more important state**. Iraq **is a nation of 31.9 million** and Syria is a nation of 22.5 million. **Iraq has the larger economy**: Iraq has a GDP of $155.4 billion, and Syria had a GDP of $107.6 billion in 2011, the last year for which there are useful data. Most important, **Iraq is a critical petroleum state** and Syria is a cypher. Iraq has some 143 billion barrels worth of oil reserves (9 percent of world reserves) and Syria has 2.5 billion (0.2 percent). Iraq has 126.7 has trillioncubic meters of gas, and Syria has 10.1. **Iraq has a major impact on the overall security of the Gulf, and some 20 percent of the world oil** and LNG exports **go through the Gulf**.

This does not mean the conflict in Syria is not tragic or that it is not important. But from a practical strategic viewpoint, **Iraq divided Iran from the Arab Gulf states. Iraqi-Iranian tensions acted as a strategic buffer between Iran and the rest of the Middle East for half a century** between the 1950s and 2003. **Today, Iraq has s Shi’ite government with close links to Iran and is a military vacuum. Iraq’s Shi’ite leaders treat its Sunnis and Kurds more as a threat than as countrymen. Its Arab neighbors treat Iraq’s regime more as a threat than an ally, and the growing Sunni-Shi’ite tension in the rest of the region make things steadily worse in Iraq and drive it towards Iran.**

**If Iraq moves towards active civil war**, its **Shi’ites will be driven further towards Iran and Syria. If Assad survives and the Arab Gulf states continue to isolate Iraq**, the largely token U.S. presence in Iraq is likely to become irrelevant and **Iraq is likely to become part of a “Shi’ite” axis going from Lebanon to Iran. If Assad falls, and U.S. and Gulf Arab tensions with Iran continue to rise, Iran seems likely to do everything it can to replace its ties to Syria with influence in Iraq.**

If Iraq moves towards active civil war, its Shi’ites will be driven further towards Iran and Syria. If Assad survives and the Arab Gulf states continue to isolate Iraq, the largely token U.S. presence in Iraq is likely to become irrelevant and Iraq is likely to become part of a “Shi’ite” axis going from Lebanon to Iran. If Assad falls, and U.S. and Gulf Arab tensions with Iran continue to rise, Iran seems likely to do everything it can to replace its ties to Syria with influence in Iraq.

Arab and Turkish pressure on Iraq seems more likely to push Iraq towards Iran than away from it. **If Iraq becomes caught up in sectarian and ethnic civil war, this will push its Shi’ite majority towards Iran, push its Kurds toward separatism, and push the Arab states around Iraq to do even more to support Sunni factions in Lebanon, Syria, and Iraq while suppressing their own Shi’ites**.

The United States has limited cards to play. The U.S.-Iraqi Strategic Framework Agreement exists on paper, but it did not survive the Iraqi political power struggles that came as the United States left. The U.S. military presence has been reduced to a small U.S. office of military cooperation at the U.S. Embassy in Baghdad and it is steadily shrinking. The cumbersome U.S. arms transfer process has already pushed Iraq to buy arms from Russia and other suppliers. The U.S. State Department’s efforts to replace the military police training program collapsed before they really began. The United States is a marginal player in the Iraqi economy and economic development, and its only aid efforts are funded through money from past years. The State Department did not make an aid request for Iraq for FY2014.

However, it is far from clear that Prime Minister Nouri al-Maliki or most of the Shi’ite ruling elite really want alignment with Iran or that anyone in Iraq wants civil war. A revitalized U.S. office of military cooperation and timely U.S. arms transfer might give the United States more leverage, and U.S. efforts to persuade Arab Gulf states that it is far better to try to work with Iraq than isolate it might have a major impact. Limited and well-focused U.S. economic and governance aid might improve leverage in a country that may have major oil export earnings but whose economy needs aid in reform more than money and today has the per capita income of a poverty state, ranking only 162 in the world.

Making Iraq a major strategic focus in dealing with Turkey and our Arab friends and allies might avoid creating a strategic bridge between Iran and the Gulf states. It might limit the growing linkages between the tensions and conflicts in the Gulf and those in the Levant, and help secure Jordan, Lebanon, and Egypt. It would not be a major expense to give the State Department’s country team in Baghdad all of the aid resources it needs to move Iraq towards economic reform and a stable military.

Even limited success in damping down internal conflict in Iraq and helping Iraq keep a distance from Iran might save the United States far more, even in the short run, than substituting strategic neglect for strategic patience. It also might help prevent Iraq from becoming a far worse civil conflict than now exists in Syria, **fueling the religious war** between Sunnis and Shi’ites, **which can turn** a clash withina civilization **into a serious war and spill over into terrorism in the West**.

**Extinction**

**Russell 9** James, Senior Lecturer Department of National Security Affairs, Spring, “Strategic Stability Reconsidered: Prospects for Escalation and Nuclear War in the Middle East” Security Studies Center Proliferation Papers, http://www.analyst-network.com/articles/141/StrategicStabilityReconsideredProspectsforEscalationandNuclearWarintheMiddleEast.pdf

**Strategic stability in the region is thus undermined by various factors**: (1) **asymmetric interests in the bargaining framework that can introduce unpredictable behavior from actors;** (2) **the presence of non-state actors that introduce unpredictability into relationships** between the antagonists; (3) **incompatible assumptions about the structure of the deterrent relationship** that makes the bargaining framework strategically unstable; (4) **perceptions by Israel and the United States that its window of opportunity for military action is closing, which could prompt a preventive attack**; (5) **the prospect that Iran’s response to pre-emptive attacks could involve unconventional weapons, which could prompt escalation** by Israel and/or the United States; (6) **the lack of a communications framework to build trust and cooperation among framework participants.** These systemic weaknesses in the coercive bargaining framework all suggest that **escalation by any the parties could happen either on purpose or as a result of miscalculation or the pressures of wartime circumstance**. Given these factors, **it is disturbingly easy to imagine scenarios under which a conflict could quickly escalate in which the regional antagonists would consider the use of chemical, biological, or nuclear weapons. It would be a mistake to believe the nuclear taboo can somehow magically keep nuclear weapons from being used in the context of an unstable strategic framework. Systemic asymmetries between actors in fact suggest a certain increase in the probability of war – a war in which escalation could happen quickly and from a variety of participants. Once such a war starts, events would likely develop a momentum all their own and decision-making would consequently be shaped in unpredictable ways**. The international community must take this possibility seriously, and muster every tool at its disposal to prevent **such an outcome**, which **would be an unprecedented disaster for the peoples of the region, with substantial risk for the entire world.**

**Checks on escalation are insufficient**

**Singh 11**, Washington Institute director, 9/22, “What has really changed in the Middle East?”, http://shadow.foreignpolicy.com/posts/2011/09/22/what\_has\_really\_changed\_in\_the\_middle\_east

Third, and **most troubling, the Middle East is likely to be a more dangerous and volatile region in the future. For the past several decades, a relatively stable regional order has prevailed**, centered around Arab-Israeli peace treaties and close ties between the United States and the major Arab states and Turkey. **The region was not conflict-free by any means**, and Iran, Iraq, and various transnational groups sought to challenge the status quo, albeit largely unsuccessfully. **Now, however, the United States appears less able or willing to exercise influence in the region, and the leaders and regimes who guarded over the regional order are gone or under pressure. Sensing either the need or opportunity to act autonomously, states like Turkey, Saudi Arabia, and Iran are increasingly bold, and all are well-armed and aspire to regional leadership. Egypt**, once stabilized, **may join this group. While interstate conflict is not inevitable by any means, the risk of it has increased and the potential brakes on it have deteriorated**. Looming over all of this is Iran's quest for a nuclear weapon, which would shift any contest for regional primacy into overdrive.

**Strong judicial model prevents Russian loose nukes**

**Nagle**, Independent Research Consultant Specializing in the Soviet Union, 19**94** (Chad. “What America needs to do to help Russia avoid chaos” Washington Times, August 1, Lexis Nexis)

As things stand right now, **there is indeed potential for danger and instability in Russia**, as Mr. Criner notes. But this is not because America has failed to act as a "moral compass" in the marketplace. Rather, **Russia's inherent instability at present stems from the fact that** in all of its 1,000-year history**, it never had a strong, independent judiciary to act as a check on political power.** The overwhelming, monolithic power of the executive, whether czar or Communist Party, has always been the main guarantor of law and order. **Now, as a fragile multiparty democracy, Russia has no more than an embryo of a judiciary.** The useless Constitutional Court is gone, the Ministry of Justice is weak, and the court system is chaotic and ineffective. Hence, the executive determined the best safeguard against the recurrence of popular unrest, the kind that occurred in October 1993, to be the concentration of as much power as possible in its hands at the expense of a troublemaking parliament. Under a sane and benign president, Russia with a "super presidency" represents the best alternative for America and the West. The danger lies in something happening to cause Mr. Yeltsin's untimely removal from office. If Russia is ever to develop a respected legal system, it will need the protracted rule of a non-tyrannical head of state. In the meantime, **the United States can provide a model to Russia of a system in which the judiciary functions magnificently.** **America, the world's only remaining superpower, can provide advice and technical expertise to the Russians as they try to develop a law-based society.** We can also send clear signals to the new Russia instead of the mixed ones emanating from the Clinton administration**.** Now is the time for America to forge ahead with the "new world order," by promoting the alliance of the industrialized democracies of the Northern Hemisphere on American terms, not Russian. This constitutes the real "historical moment" to which Mr. Criner refers. Russia is not in a position to make threats to or demands of the United States any more so than when it ruled a totalitarian empire. It should learn to play by new rules as a first lesson in joining the family of nations. Coddling an aggressive Russia and giving it unconditional economic aid (as Alexander Rutskoi has called for) would be counterproductive, and might even encourage Russia to "manufacture" crises whenever it wanted another handout**. Russia is indeed a dangerous and unstable place. The prospect of ordinary Third World political chaos in an economically marginal country with a huge stockpile of intercontinental ballistic missiles is a nightmare.** However, Mr. Yeltsin is busily consolidating power, and the presidential apparatus is growing quickly. With his new team of gray, non-ideological figures intent on establishing order in the face of economic decline and opposition from demagogues (e.g. Vladimir Zhirinovsky and Mr. Rutskoi), Mr. Yeltsin is already showing signs of success. **Under such circumstances, the best America can do is stand firm, extend the hand of friendship** and pray for Mr. Yeltsin's continued good health.

**Extinction**

**Helfand and Pastore 9** [Ira Helfand, M.D., and John O. Pastore, M.D., are past presidents of Physicians for Social Responsibility.

March 31, 2009, “U.S.-Russia nuclear war still a threat”, <http://www.projo.com/opinion/contributors/content/CT_pastoreline_03-31-09_EODSCAO_v15.bbdf23.html>]

\*GREEN

President Obama and Russian President Dimitri Medvedev are scheduled to Wednesday in London during the G-20 summit. They must not let the current economic crisis keep them from focusing on one of **the greatest threats confronting humanity: the danger of nuclear war.** Since the end of the Cold War, many have acted as though the danger of nuclear war has ended. It has not. **There remain** in the world more than 20,000 nuclear weapons. Alarmingly, **more than 2,000 of these weapons in the U.S. and Russian arsenals remain on ready-alert status**, commonly known as hair-trigger alert. **They can be fired within five minutes and reach targets in** the other country **30 minutes** later.  **Just one** of these weapons **can destroy a city**. A war involving **a substantial number would cause devastation on a scale unprecedented in human history.** A study conducted by Physicians for Social Responsibility in 2002 showed that if only 500 of the Russian weapons on high alert exploded over our cities, **100 million Americans would die in the first 30 minutes.**  An attack of **this** magnitude also **would destroy the entire economic,** communications and transportation **infrastructure on which we all depend. Those who survived the initial attack would inhabit a nightmare landscape** with huge swaths of the country **blanketed with radioactive fallout and epidemic diseases rampant.** They would have no food, no fuel, no electricity, no medicine, and certainly no organized health care. In the following months it is likely the vast majority of the U.S. population would die. Recent studies by the eminent climatologists Toon and Robock have shown that such a war would have a huge and immediate impact on climate world wide. **If all of the warheads in the U.S. and Russian strategic arsenals were drawn into the conflict, the firestorms** they caused **would loft** 180 million **tons of soot and debris into the upper atmosphere — blotting out the sun. Temperatures across the globe would fall** an average of 18 degrees Fahrenheit **to levels not seen on earth since** the depth of **the last ice age,** 18,000 years ago. **Agriculture would stop, eco-systems would collapse, and many species, including perhaps our own, would become extinct.**  It is common to discuss nuclear war as a low-probabillity event. But is this true? **We know of five occcasions during the last 30 years when either the U.S. or Russia believed it was under attack and prepared a counter-attack.** The most recent of these near misses occurred after the end of the Cold War on Jan. 25, 1995, when the Russians mistook a U.S. weather rocket launched from Norway for a possible attack.  Jan. 25, 1995, was an ordinary day with no major crisis involving the U.S. and Russia. But, unknown to almost every inhabitant on the planet, a misunderstanding led to the potential for a nuclear war. The ready alert status of nuclear weapons that existed in 1995 remains in place today.

**Obama complies**

Stephen I. **Vladeck 9**, Professor of Law and Associate Dean for Scholarship at American University Washington College of Law, senior editor of the peer-reviewed Journal of National Security Law and Policy, Supreme Court Fellow at the Constitution Project, and fellow at the Center on National Security at Fordham University School of Law, JD from Yale Law School, 3-1-2009, “The Long War, the Federal Courts, and the Necessity / Legality Paradox,” http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1002&context=facsch\_bkrev

Moreover, even if one believes that suspensions are unreviewable, there is a critical difference between the Suspension Clause and the issue here: at least with regard to the former, there is a colorable claim that the Constitution itself ousts the courts from reviewing whether there is a “Case[ ] of Rebellion or Invasion [where] the public Safety may require” suspension––and even then, only for the duration of the suspension.179 In contrast, Jackson’s argument sounds purely in pragmatism—courts should not review whether military necessity exists because such review will lead either to the courts affirming an unlawful policy, or to **the potential that the political branches will simply ignore a judicial decision invalidating such a policy**.180 Like Jackson before him, Wittes seems to believe that the threat to liberty posed by judicial deference in that situation pales in comparison to the threat posed by judicial review. ¶ The problem is that such a belief **is based on a series of assumptions that Wittes does not attempt to prove**. First, **he assumes that the executive branch would ignore a judicial decision invalidating action that might be justified by military necessity.181 While Jackson may arguably have had credible reason to fear such conduct** (given his experience with both the Gold Clause Cases182 and the “switch in time”),183 **a lot has changed in the past six-and-a-half decades, to the point where I,** at least, **cannot imagine a contemporary President possessing the political capital to squarely refuse to comply** with a Supreme Court decision. But perhaps I am naïve.184

**Courts create an observer effect – empirically forces Obama to comply**

**Deeks 10/21** (Ashley, Ashbley Deeks served as an attorney-adviser in the Office of the Legal Adviser at the U.S. Department of State. She worked on issues related to the law of armed conflict, including detention, the U.S. relationship with the International Committee of the Red Cross, conventional weapons, and the legal framework for the conflict with al-Qaeda. Courts Can Influence National Security Without Doing a Single Thing <http://www.newrepublic.com/article/115270/courts-influence-national-security-merely-watching>)

While **courts rarely intervene directly in national security disputes, they nevertheless play a significant role in shaping Executive branch security policies. Let’s call this the “observer effect.”** Physics teaches us that observing a particle alters how it behaves. Through psychology, we know that **people act differently when they are aware that someone is watching** them. In the national security context, the “observer effect” can be thought of as the impact on **Executive policy-setting** of pending or probable court consideration of a specific national security policy. The Executive’s **awareness of likely judicial oversight** over particular national security policies—an awareness that ebbs and flows—**plays a significant role as a forcing mechanism. It drives the Executive to alter, disclose, and improve those policies before courts actually review them. Take,** for example, **U.S. detention policy in Afghanistan. After several detainees held by the United States asked U.S courts to review their detention, the Executive changed its policies to give detainees in Afghanistan a greater ability to appeal** their detention—a change made in response to the pending litigation and in an effort to avoid an adverse decision by the court. The Government went on to win the litigation. A year later, the detainees re-filed their case, claiming that new facts had come to light. Just before the government’s brief was due in court, the process repeated itself, with the Obama Administration revealing another rule change that favored the petitioners. Exchanges between detainees and their personal representatives would be considered confidential, creating something akin to the attorney-client privilege. Thus **we see the Executive shifting its policies in a more rights-protective direction without a court ordering it to do so**.

**2AC AT: Rendition**

**Fiat solves renditions – the precedent solves**

**Richards 6** [Nelson, JD Cand @ Berkeley, “The Bricker Amendment and Congress’s Failure to Check the Inflation of the Executive’s Foreign Affairs Powers,” 94 Calif. L. Rev. 175, January, LN]

H. Jefferson Powell has posited that **the Supreme Court has all but ceded the creation of a foreign affairs and national security legal framework to the OLC**. Indeed, he goes so far as to assert that OLC legal opinions, not Supreme Court opinions, are the first sources the executive branch looks to when researching foreign affairs and national security law. Another set of John Yoo's writings support the validity of Powell's claim: the infamous memos declaring enemy combatants outside the protection of the Geneva Conventions. These, combined with the "Torture Memos," **the expanding practice of "extraordinary rendition**," and the current Administration's blase response to the Supreme Court's ruling that prisoners held at Guantanamo Bay are entitled to judicial access, **have brought peculiar focus to the weight and seriousness** of the OLC's legal authority. In the realm of foreign affairs, **the Court has written off its obligation**, claimed in Marbury, as the authoritative interpreter of the Constitution. While it may have reviewed some of the legal premises put forth in the above-mentioned OLC opinions, it has not curbed the OLC's claim to power over foreign affairs. **The Court is more than capable of challenging the President**. It has the power to send messages to the President, but it has done so only in two narrow contexts: when U.S. citizens are labeled enemy combatants (Hamdi v. Rumsfeld ) and when prisoners are held in U.S. facilities (Rasul v. Bush). The Hamdi and Rasul decisions, which amount to piecemeal restraints on the President's freedom to act, accord with the Court's general failure to check the executive's use of power abroad.

# 2AC

**T**

**The President’s war power authority is his ability to conduct war**

Gerald G. **Howard** - Spring, **2001**, Senior Notes and Comments Editor for the Houston Law Review, COMMENT: COMBAT IN KOSOVO: IGNORING THE WAR POWERS RESOLUTION, 38 Hous. L. Rev. 261, LexisNexis

 [\*270] **The issue,** then, **becomes one of defining** and monitoring **the authority of the** political **leader** in a democratic nation. **Black's Law Dictionary defines "war power" as "the constitutional authority** of Congress to declare war and maintain armed forces, and **of the President to conduct war as commander-in-chief."** n45 **The** power and **authority of United States political leaders to conduct war stems from** two documents: **the** United States **Constitution and** the **War Powers Resolution**. n46 One must understand each of these sources of authority to properly assess the legality of the combat operations in Kosovo.

**Indefinite detention is military custody without a clear time period of release**

**Physicians for Human Rights** – June **2011**, Punishment Before Justice: Indefinite Detention in the US, Executive Summary, http://www.judiciary.senate.gov/resources/transcripts/upload/022912RecordSubmission-Franken.pdf

**Indefinite detention refers to a situation in which the government places individuals in custody without informing the detainee when—if ever—the detainee will be released. Indefinite detention** therefore creates a situation of profound uncertainty that sets it apart from other types of governmental custody. The term **encompasses other custody arrangements, including** “preventive detention,” “executive custody,” “security detention,” “**military detention,” “**prolonged detention,” “administrative detention,” “conditional detention,” or, under the March 7 Executive Order, “continued law of war detention.” **The US currently has** approximately 170 **individuals indefinitely detained at Guantánamo Bay.** While only 15 of these individuals have been designated “high value detainees,”2 many of these detainees have already spent roughly 7-9 years3 in the harshest, most restrictive, and isolating conditions available4 and were subjected to torture.5 The US government also indefinitely detains thousands of refugee and nonrefugee immigrants, detentions whose purported justifications include national security, immigration, and foreign policy concerns.6 Many asylum seekers arrive on US soil traumatized by persecution in their home country as well as by the act of exile, while many non-refugee seekers have languished in detention for years vainly waiting for the day that they will finally be deported

**War power is military action**

David I. **Lewittes** - Winter **1992**, Associate, Rogers & Wells, New York City; J.D., New York University School of Law, ARTICLE: CONSTITUTIONAL SEPARATION OF WAR POWERS: PROTECTING PUBLIC AND PRIVATE LIBERTY., 57 Brooklyn L. Rev. 1083, Brooklyn Law Review, LexisNexis

The next question should be: **What is the executive war power?**

 B. The Commander-in-Chief Power Justice Frankfurter once said: "The war power is the war power." n129 This fine explanation apparently did not help Justice Jackson who, four years later, expressed puzzlement over the meaning of the constitutional provision granting the President [\*1115] the commander-in-chief power: These cryptic words have given rise to some of the most persistent controversies in our constitutional history. Of course, they imply something more than an empty title. But just what authority goes with the name has plagued presidential advisers who would not waive or narrow it by nonassertion yet cannot say where it begins or ends. **It undoubtedly puts the Nation's armed forces under presidential command. Hence, this loose appellation is** sometimes **advanced as support for any presidential action, internal or external, involving use of force**, **the idea being that it vests power to do anything, anywhere, that can be done with an army or navy.**

**The aff is not an immigration issue:**

**a) Location - The aff definitionally cannot deal with immigration authority because all detainees who won their habeas trial are in Gitmo which is in the US**

**Vaughn and Williams 13, Law Profs at Maryland**

(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)

**The district judge presiding over the Uighurs’ petitions was prepared to order their release**, pending a hearing on the precise contours of that release. The release remedy certainly would have been conditional, as the Uighurs would have no immigration status. As a statutory matter, however**, release would have been possible under the Executive’s parole power**. The Immigration and Nationality Act226 gives the Executive the authority to exercise the parole power when a significant public interest or urgent humanitarian concern is implicated.227 Both factors are present in the Uighurs’ case. First, a strong argument can be made that the Uighurs’ situation presents a significant public interest: Their continued detention has been judicially declared unlawful. Consistent with adherence to the rule of law, they should have been released as soon as judiciallydetermined conditions were established.228 Second, as for the urgency of the humanitarian concern, **it was the Executive’s action in prosecuting its “War on Terror” that created this situation—not the conduct of the Uighurs**. Moreover, the duration of their detention, particularly in light of the fact that they are not now nor were they ever really enemy combatants, adds urgency to the humanitarian concern. Thus, an Executive grant of parole would have been a viable option in this case, if the Executive was ever serious about facilitating the Uighurs’ release through the immigration law mechanism. Moreover, **the Supreme Court has stated previously that an individual paroled into the United States is not considered to have been admitted or gained immigration status**. As such, the D.C. Circuit’s rationale about a judge’s inability to accord them immigration status simply does not figure into a judicially-ordered release remedy. In any event, though **assignment of an immigration status is not required to facilitate the Uighurs’ release**, the fact is that, **in Boumediene, the Supreme Court determined that the Guantanamo Bay naval base is, as a functional matter, a part of the sovereign territory of the United States**, such that the Suspension Clause must run there. **Because Guantanamo Bay, the site of the Uighurs’ detention, has been deemed a part of the territory of the United States**, the proverbial ship, to wit, **the idea that the Uighurs’ release involves “admission” into U.S. territory, has already sailed**

**b) DC Circuit’s dead wrong**

**Vaughn and Williams 13, Law Profs at Maryland**

(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)

**The** now-controlling **D.C. Circuit opinion offers one viewpoint: habeas relief, when it involves release into the continental United States, is an immigration matter** where, by virtue of the branch’s plenary power, the Executive’s decisions govern. The courts, in the D.C. Circuit’s view, have no part to play because immigration issues fall squarely within the Executive’s sovereign prerogative. This approach, I believe, sanctions whatever political remedy the Executive may select—here, diplomatically negotiated resettlement outside of the United States—as a substitute for the legal remedy of release. **The D.C. Circuit’s view cannot be correct**, I argue, because it would mean that, although a court may find that a detainee’s imprisonment is unlawful, that court might be powerless to remedy the unlawful imprisonment. Thus, I offer a view contrary to the D.C. Circuit: in order to accord complete habeas relief particularly where, as here, relocation efforts remain long-ongoing, a habeas court must have the authority to admit foreign nationals into the interior of the United States as a remedy for their unlawful detention. Historically, “the writ of habeas corpus was conceived and used as a control against the unlawful use of executive power.”11 And traditionally, custody of the body transfers to the court in habeas proceedings so that the court may order “the immediate and non-discretionary release of an illegally detained person.”12 Such authority ensures that the courts of this country are able to act in a way that restores the rule of law, so deeply damaged in the months and years following September 11. This Article proceeds as follows. In Part I, I provide the factual and procedural history of the Kiyemba litigation. In Part II, I consider Kiyemba’s context, looking to historical perspectives on the role of courts in wartime, the Supreme Court’s post-September 11 jurisprudence, and the development of “national security fundamentalism” in the D.C. Circuit after September 11. In so doing, I discuss how, in the months and years following September 11, the Executive asserted inherent power that rendered it nearly unreviewable and that, through the acquiescence of some courts, significantly undermined the rule of law. In Part III, I reconsider Kiyemba, highlighting the illegality of indefinite detention and the right to a corresponding remedy. **Contrary to the position taken by the D.C. Circuit, the rights-remedy gap is not an unreviewable facet of the Executive’s plenary power over immigration**. Instead, it is a practical and necessary reality to be handled by the federal courts. **The judiciary’s failure to assert its constitutional role in this area**, I argue, **may be the result of judicial abstention caused by political and practical influences on the Court**. I staunchly believe that the habeas right is accompanied by a release remedy. Where there is no threat to the public safety, and where other release options are not available, that remedy must be release into the United States. And **above all,** I believe that **this case is not an immigration matter** subject to the prerogatives of the political branches.13 However, accepting that the practical and political influences described above may continue to prevent courts from awarding such relief, there is nonetheless a need for recognition of the damage that the political remedy of indefinite detention inflicts on the rule of law. Thus, in Part IV, I make a case for the value of an opinion dissenting from the Supreme Court’s per curiam dismissal in Kiyemba I—a reminder, however small, but unquestionably important, that the rule of law remains.

**c) Status - War powers authority doesn’t end once they’ve been declared not enemy combatants**

**Vaughn and Williams 13, Law Profs at Maryland**

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

In 2009, the Obama administration began to pursue fertile avenues for transferring the Uighurs into the continental interior of the United States. But, “in the face of congressional objections,” largely registered by Republican critics, reigniting fear-mongering notions about releasing terrorists into our midst,0 “the White House lost its nerve.”1 These concerns, however, are a political matter—and should not influence the courts, as I describe below. **Once a habeas court has determined that detention is unlawful, political opposition to release locations should not alter the legal requirement to release them immediately,** at the very least, as I have noted, pending the completion of external relocation negotiations.162 **Any other result undermines Boumediene**, undermines the rule of law, **and affords the Executive, in contravention of the separation of powers, unreviewable discretion to control the detention of individuals captured during the War on Terror—even individuals long-ago found to be innocent of wrongdoing.**

**2AC Politics**

**NO ECON COLLAPSE EV**

**Court shield**

**Stimson 9** [09/25/09, Cully Stimson is a senior legal fellow at the Heritage Foundation and an instructor at the Naval Justice School former American career appointee at the Pentagon. Stimson was the Deputy Assistant Secretary of Defense for Detainee Affairs., “Punting National Security To The Judiciary”, http://blog.heritage.org/2009/09/25/punting-national-security-to-the-judiciary/]

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

**It’s released in June**

**Ward 10** (Jake, “Bilski Decision Tomorrow (Thursday, June 17th)? Maybe?”, Anticipate This! (Patent and Trademark Law Blog), 6-17, http://anticipatethis.wordpress.com/2010/06/16/bilski-decision-tomorrow-thursday-june-17th-maybe/)

**In mid-May until the end of June, the Supreme Court of the U**nited **S**tates (**SCOTUS) releases orders and opinions.  SCOTUS has yet to issue a number of decisions this term**, however, **and it is rapidly moving toward summer recess.**  Most notable from a patent law perspective is that the decision in [Bilski v. Kappos](http://anticipatethis.wordpress.com/?s=bilski), which was argued in November 2009, has yet to be decided.

**Not a loss**

**Gerstein 1/28** [,Josh. White House reporter for POLITICO, specializing in legal and national security issues. “State of the Union Guantanamo Bay Prison” January 28, 2014. http://www.politico.com/story/2014/01/state-of-the-union-guantanamo-bay-prison-102765.html

**President Barack Obama used his State of the Union address Tuesday to put new urgency behind his drive to close the Guantanamo Bay prison**, raising the issue before a joint session of Congress for the first time in nearly five years. “With the Afghan war ending, **this needs to be the year Congress lifts the remaining restrictions on detainee transfers and we close the prison at Guantanamo Bay – because we counter terrorism not just through intelligence and military action, but by remaining true to our Constitutional ideals, and setting an example for the rest of the world**,” Obama was to say, according to his prepared remarks. His high-profile mention of the issue was notable not just because he did not bring up the issue during his four previous State of the Union addresses, but because **any discussion of the subject is a reminder of one of the most obvious broken promises of Obama’s early presidency: his vow to close the prison within his first year in office. “Guantanamo will be closed no later than one year from now,”** Obama declared as he signed an executive order in the Oval Office on the subject on the first full day of his presidency. Obama never made that one-year pledge in front of Congress, but did speak in his February 2009 speech there — one not considered a State of the Union — of having ordered the closing of the prison. **The president announced the plan to close the prison in a year confidently and with little controversy, but essentially abandoned it after lawmakers put up resistance to bringing detainees to the U.S and White House aides decided to focus on other priorities like health care reform and the sluggish economy.** During his first term, Obama grudgingly signed a series of bills containing language making it virtually impossible to move detainees from Guantanamo to the U.S. and making it difficult to transfer detainees to other countries without extraordinary confidence they would not later engage in terrorism. This essentially stalled the closure process. However, late last year, Congress passed a defense bill that slightly eased the transfer restrictions. **The effort to shrink Gitmo’s ranks has also gained a small amount of momentum in recent months, with eight prisoners sent home or elsewhere abroad since August.** Obama’s comments Tuesday were in line with those of some legal scholars, who’ve argued that the legal basis for holding the men at Guantanamo will erode or disappear after the U.S. is no longer involved in active combat in Afghanistan —something the president has pledged to bring to an end this year. Courts have upheld the detentions at Guantanamo under the Authorization for Use of Military Force passed by Congress three days after the Sept. 11, 2001, terrorist attacks. That resolution refers to the “nations, organizations, or persons he determines planned, authorized, committed, or aided” those strikes.

**Losers lose is wrong**

**Sargent, 9/10** (Greg, 9/10/2013, Washington Post.com, “No, a loss on Syria would not destroy the Obama presidency,” Factiva))

Get ready for a lot more of this sort of thing, should Congress vote No on Syria strikes:

The fate of President Obama's second term hangs on his Tuesday speech to the nation about Syria.

This is a particularly cartoonish version of what much of the punditry will be like if Obama doesn't get his way from Congress, but make no mistake, the roar of such punditry will be deafening. Jonathan Bernstein offers a much needed corrective:

There's one permutation that absolutely, no question about it, would destroy the rest of Barack Obama's presidency is: a disastrous war. Ask Lyndon Johnson or George W. Bush. Or Harry Truman. Unending, seemingly pointless wars are the one sure way to ruin a presidency.

Now, I'm not saying that's in the cards; in fact, I don't think it is. I'm just saying: that's the kind of thing that really does matter a lot to presidencies. And if you do believe that the administration is going down a path that winds up there, or a path that has a high risk of winding up there, then you should be very worried about the health of this presidency.

If not? None of the other permutations here are anywhere close to that kind of threat to the Obama presidency. **Presidents lose key votes which are then mostly forgotten all the time. They pursue policies which poll badly, but are then mostly forgotten, all the time.**

Look, there is no question that **if Obama loses Syria vote**, the coverage will be absolutely merciless. But let's bring some perspective. The public will probably be relieved, and **eventually all the "Obama is a loser" talk will sink out of the headlines and be replaced by other big stories** with potentially serious ramifications for the country.

It's key to distinguish between two things here. One question is: How would a loss impact the credibility of the President and the United States with regard to upcoming foreign policy crises and confrontations? That's not the same as asking: How would a loss impact Obama's relations with Congress in upcoming domestic battles?

And on that latter score, there's a simple way to think about it: Look at what's ahead on the calendar. The two looming items are **the government shutdown and debt ceiling battles, and when it comes down to it, there's no reason to believe a loss on Syria would substantially alter the dynamics on either. Both are ultimately about whether House Republicans can resolve their own internal differences.**

Will a Syria loss weaken Obama to the point where Republicans would be even more reluctant than they are now to reach a deal to continue funding the government? Maybe, but even if a shutdown did result, would a loss on Syria make it any easier for the GOP to dodge blame for it? It's hard to see how that work in the eyes of the public. Same with the debt limit. **Is the argument really going to be, See, Obama lost on Syria, so we're going to go even further in threatening to unleash economic havoc in order to defund Obamacare and/or force cuts to popular entitlements? There's just no reason why a Congressional vote against Syria strikes would make the "blame game" on these matters any easier for Republicans.**

**Is it possible that a loss on Syria will make Congressional Dems less willing to draw a hard line along with the president in these talks, making a cave to the GOP more likely? I doubt it.** It will still be in the interests of Congressional Dems to stand firm, because the bottom line remains the same: House Republicans face potentially unbridgeable differences over how far to push these confrontations, and a united Dem front exploits those divisions. Syria doesn't change any of that. If a short term deal on funding the government is reached, the prospects for a longer term deal to replace the sequester will be bleak, but they've been bleak for a long time. Syria will fade from public memory, leaving us stuck in the same stalemate -- the same war of attrition -- as before.

What about immigration? The chances of comprehensive reform passing the House have always been slim. Could a Syria loss make House Republicans even less likely to reach a deal? Maybe, but so what? Does anyone really imagine Latinos would see an Obama loss on Syria as a reason to somehow become less inclined to blame the GOP for killing reform? The House GOP's predicament on immigration will be unchanged.

**Whatever happens on Syria, and no matter how much "Obama is weak" punditry that results from it, all of the remaining battles will be just as perilous for the GOP as they appeared before the Syria debate heated up. Folks making the case that a Syria loss throws Obama's second term agenda into serious doubt -- as if Congressional intransigence were not already about as bad as it could possibly get -- need to explain what they really mean when they say that. It's not clear even they know.**

**Won’t pass ---**

1. **election pressures**

**Delamaide, 2/5** --- political columnist for MarketWatch (2/5/2014, Darrell, MarketWatch, “Election jockeying will stall action on trade, GSEs; Opinion: A do-nothing Congress set to break its own dubious record,” Factiva))

WASHINGTON (MarketWatch) — **This polarized Congress has little capacity for passing legislation in the best of times and now the prospect of campaigning for a crucial midterm election promises to stall progress on any significant action before November.**

The **fast-track trade authority** sought by the White House and supported by many Republicans **is foundering on opposition from** Senate Majority Leader Harry **Reid** of Nevada, **who sees proposed trade pacts** with the Pacific Rim and Europe **as major campaign issues**.

Another election-year casualty is likely to be reform of mortgage giants Fannie Mae and Freddie Mac , which were placed in conservatorship by the Bush administration at the height of the financial crisis and have remained there more or less comfortably since then.

Indeed, a bill to wind down the two erstwhile government-sponsored enterprises and replace them with a new federal home-loan insurance agency has failed to gain much traction since it was introduced last June by Sens. Bob Corker, R-Tenn., and Mark Warner, D-Va.

But no one seems really too unhappy with this state of affairs, despite some ritual moaning and groaning about gridlock.

The fact is **there is precious little political consensus on** either of **these issues no matter how much big business wants the trade pacts** and mortgage bankers want the GSE reform.

**In terms of the midterm campaign, Democrats are keen to portray the trade pacts as a giveaway of American jobs**, much as the North American Free Trade Agreement has been.

And no one is in a hurry to jeopardize the fixed-rate 30-year mortgage that has taken on the status of a constitutional right in this country. Fund manager Bruce Berkowitz, for one, has cast his vote for keeping Fannie and Freddie, saying these mortgages would not be possible without them.

Former Treasury Secretary Hank Paulson, currently touring the country to tout the release of a documentary giving his side of the financial crisis, is telling audiences like one in Washington this week that the stalled reform of the mortgage giants is a bigger concern in his view than banks too big to fail.

But of course he would, since the man who placed Fannie and Freddie in conservatorship to begin with — a former chief executive of Goldman Sachs — still blames “flawed government policies” for the financial crisis rather than any wrongdoing by the banks.

In any case, Paulson isn’t commanding a lot of headlines these days and he’s not running for re-election.

He may be right that Fannie and Freddie have remained in government care for too long and can’t stay there forever, but it’s unlikely anything will be done about it this year.

Other prickly issues like immigration reform are also likely to languish as the 113th Congress, which set a record for the fewest pieces of legislation passed last year, seems on course to beat its own record this year.

**Not only are lawmakers keen to avoid controversy in an election year, they want to spend less time in Washington and more time on the campaign trail.**

The House, according to the calendar set by the Republican majority, will be in session 97 days before breaking in early October for the final campaigning ahead of the Nov. 4 election, and 112 days in all. Last year, it was in session for 135 days.

At stake is not only preserving the Republican majority in the House but the GOP’s hope to gain control of the Senate and the Democrats’ determination to prevent that from happening.

With 36 Senate seats up for election and Democrats defending 21 of them, Republicans hope to pick up the six seats that would give them the majority, especially given President Barack Obama’s low favorability ratings.

A lot can happen between now and November. The U.S. economy could continue its resurgence or Federal Reserve action to trim monetary stimulus could lead to contraction. The tailspin of emerging market currencies could be a passing phenomenon or the beginning of a new international crisis. And so on.

**One thing that is not likely to happen**, however, **is the passage in Congress of controversial legislation on trade**, or GSE reform or anything else.

1. **Tea Party, declining Dem support**

**Mauldin & Hughes, 2/6** (William Mauldin and Siobhan Hughes, 2/6/2014, Dow Jones Top North American Equities Stories, “Trade Bill's Path Gets Bumpier,” Factiva))

**Opposition from the Senate's top Democrat** to the White House's trade agenda has **highlighted** a broader reality: **The quest for new overseas deals has a diminishing number of friends in Congress**.

In the 12 years since the legislature last granted a president special trade powers, Capitol Hill has changed significantly. Republicans, especially **many tea-party-backed newcomers, are increasingly leery on the trade front and reluctant to grant** President Barack **Obama** negotiating powers known as **fast track**. **The Senate** also **has lost many of its strongest pro-trade voices**, and another -- Max Baucus (D., Mont.) -- is leaving the Senate.

And within his own party, Mr. Obama may have to rally support without backup either from Senate Majority Leader Harry Reid, who announced his opposition last week, or Rep. Nancy Pelosi, the top Democrat in the House, who has expressed reservations.

Political obstacles in Washington are threatening to derail two sets of trade negotiations -- the near-complete talks with Asian-Pacific nations, including Japan, and early-stage ones with the European Union.

"If the president is going to go after something that's this politically difficult, he's got to use a 2-by-4," said Bill Brock, former U.S. trade representative in the Reagan administration.

Smooth passage of overseas trade negotiations has depended for decades on fast-track powers. The authority allows an administration to submit trade deals to Congress for an up-or-down vote, without amendments, and it can reassure U.S. negotiating partners of broad Washington support.

The previous fast-track bill, in 2002, passed the House by three votes. That authority expired in 2007, but a bill introduced in January would reauthorize fast-track status for global trade negotiations for four years.

Mr. Obama's top trade adviser, Michael Froman, acknowledged the legislative challenges. "When I'm in town and Congress is in town, I'm spending basically every day up there, and have been for months," Mr. Froman said.

In 2002, 27 of 222 House Republicans voted "no" on whether to give President George W. Bush fast-track authority. This time, **some 60 House Republicans might oppose the legislation**, according to estimates from two people following the matter.

Republicans have traditionally backed trade measures, trumpeting what they say are broad benefits to business and the economy, while Democrats have tended to be more cautious, amid warnings from key union backers that expanded trade can mean jobs are shipped overseas.

House Speaker John **Boehner** (R., Ohio) **has asked for the support of at least 50 House Democrats to move a bill to the floor, suggesting he is concerned about broad defections in his party**.

Trade votes are usually easier in the Senate, but Mr. Reid's move to break with Mr. Obama last week showed that more Democrats are cooling to the legislation. Sens. Sherrod Brown of Ohio, Tammy Baldwin of Wisconsin and Sheldon Whitehouse of Rhode Island are among at least seven Senate Democrats who oppose fast-track power and hold seats that once belonged to lawmakers who voted in favor.

"The trade model isn't working," said Rep. Marcy Kaptur (D., Ohio), who confronted Mr. Obama at a Tuesday meeting with House Democrats about the process for approving trade deals. She is urging a "pro-American" trade policy that would make sure "we have more exports going out than imports coming in."

The Democratic skeptics are joined by a growing number of Republicans wary of international entanglements, including newer lawmakers like Sen. Rand Paul of Kentucky.

**The current House attitude toward fast track is similar to when** President Bill **Clinton, in 1998, failed to win renewal in an election year amid opposition** from recently elected Republicans and Democrats not afraid to break with the president.

1. **Wyden will block**

**Needham, 2/6** (Vicki, 2/6/2014, “How Wyden is slowing Obama on trade,” <http://thehill.com/blogs/on-the-money/trade/197610-sen-wyden-says-not-so-fast-on-trade>))

**The next chairman of the Senate Finance Committee is making it plain to** President **Obama that he will not rush forward with “fast-track”** legislation that would spur on the White House’s trade agenda.

Sen. Ron **Wyden** (D-Ore.) **has no plans to take up the fast-track bill written by outgoing Chairman** Max **Baucus** (D-Mont.), who was nominated by Obama to be U.S. ambassador to China.

Instead, he says he will hear out other senators on trade, a policy area he says has changed tremendously since the last time a fast-track bill was approved, in 2002.

 “Senators want to examine the changes in global commerce and how it affects both the process and substantive agreements, so I’m going to spend some time listening to senators,” Wyden told The Hill.

**Other Democrats on the Finance panel say Wyden is signaling that fast-track** — which Obama called for in his State of the Union address last week — **is on ice for now**.

Sen. Sherrod Brown (D-Ohio), a member of the panel who has been critical of free-trade policies, said his view is that Wyden will ditch the bill Baucus wrote with Sen. Orrin Hatch (Utah), the top Republican on Finance, and House Ways and Means Committee Chairman Dave Camp (R-Mich.).

Brown expects Wyden to start from scratch.

“We’re not going to pass a 2002 fast-track and that’s pretty much what the Hatch-Camp-Baucus bill was,” he told The Hill. “It was dressing up the pig to make it look a little better ... but nothing more than that.

“It has to be fundamentally different,” Brown said of a future bill.

Sen. Ben **Cardin** (D-Md.), **another Finance member, cited concerns in the Democratic Caucus and said he expects Wyden will “take a new look” at the authority**. Cardin wants U.S. Trade Representative Michael Froman to testify before the committee and address Democratic concerns.

**Obama’s hopes for fast-track already looked to be in trouble, given** Senate Majority Leader Harry **Reid’s** (D-Nev.) **dismissal of quick action last week**.

But **the comments from Wyden, Brown and Cardin are a second blow** for an issue that has been championed by business groups and could serve as a rare opportunity for compromise between Obama and congressional Republicans.

Hatch warned that the White House’s ambitious trade agenda would likely collapse without fast-track — also known as trade promotion authority (TPA) — which makes it easier to negotiate trade deals by preventing them from being amended and installing time limits on congressional consideration.

“We’re not going to make any of these trade agreements without TPA and the other countries know that,” Hatch said.

**Obama not spending sufficient PC**

**Mauldin, 2/4** (William, 2/4/2014, Dow Jones Institutional News, “Fast Track Opponents Rally Support -- WSJ Blog,” Factiva))

**A coalition opposed to overseas trade agreements is building grassroots support, gathering more than half a million signatures and making tens of thousands of calls to lawmakers to argue against trade legislation in Congress.**

Unions, environmental groups, and political organizations--working under the umbrella site StopFastTrack.com--have gathered nearly 600,000 supporters through electronic petitions and similar efforts and made more than 40,000 phone calls to Congress. They are opposed to a trade measure, known as fast track or trade promotion authority, that aims to smooth congressional passage of trade deals currently being negotiated in Asia and Europe.

Fast track authority, which expired in 2007 but President Barack Obama is seeking to renew, sets up a process where Congress holds a yes-or-no vote on trade pacts without amendments or procedural delays.

Unions are worried a trade deal with Asia-Pacific countries, known as the Trans-Pacific Partnership, could result in U.S. job losses to countries such as Vietnam if the pact doesn't include strong rules on labor rights and environmental protections. Other opponents don't want an agreement that puts long-term intellectual property protections on U.S. patents and name-brand medicines used overseas.

Mr. Obama touted the importance of fast track and the trade negotiations in his State of the Union address last week. A day later Senate Majority Leader Harry Reid (D., Nev.) announced his opposition to fast track, which was introduced last month.

**Some Republicans say** Mr. **Obama isn't doing enough personally to push the case for trade agreements with Congress and the public. Marshalling support on Capitol Hill has fallen largely to U.S. Trade Representative** Michael **Froman**.

"There is openness to supporting trade on both sides of the aisle, providing we achieve a high-standards and comprehensive agreement," Mr. Froman said Tuesday in an interview from Lima, Peru. "When I'm in town and Congress is in town, I'm spending basically every day up there, and have been for months."

Separately, a political organization called Democracy for America said it and allies have gathered 125,000 electronic signatures calling on the top House Democrat, Rep. Nancy Pelosi, to follow in Sen. Reid's footsteps by publicly opposing the fast-track bill.

**2AC AT: Econ Decline --> War**

**Decline doesn’t cause war**

**Drezner 14**, Daniel W. Drezner is a professor of international politics at the Fletcher School of Law and Diplomacy at Tufts University, Global Economic Governance during the Great Recession, http://muse.jhu.edu/journals/world\_politics/v066/66.1.drezner.html

The final significant outcome addresses **a dog that hasn’t barked: the effect of the Great Recession on cross-border conflict and violence**. During the initial stages of the crisis, multiple **analysts asserted** that the **financial crisis would lead states to increase** their **use of force** as a tool for staying in power.42 They voiced genuine concern that the global economic downturn would lead to an increase in conflict—whether through greater internal repression, diversionary wars, arms races, or a ratcheting up of great power conflict. Violence in the Middle East, border disputes in the South China Sea, and even the disruptions of the Occupy movement fueled impressions of a surge in global public disorder.

The **aggregate data suggest otherwise**, however. The **Institute for Economics and Peace** has **concluded** that “the **average level of peacefulness in 2012 is approximately the same as it was in 2007**.”43 **Interstate violence** in particular has **declined since the start of the financial crisis, as have military expenditures in most** sampled **countries. Other studies confirm** that **the Great Recession has not triggered any increase in violent conflict**, as Lotta Themnér and Peter Wallensteen conclude: “[**T]he pattern is** one of **relative stability** when we consider the trend for the past five years.”44 The secular decline in violence that started with the end of the Cold War has not been reversed. Rogers Brubaker observes that “**the crisis has not to date generated the surge in protectionist nationalism or ethnic exclusion that might have been expected**.”45 [End Page 134]

**AT: Fight to Defend --- Drone Thumper**

**Drone restrictions pound**

Greg **Miller 1-15**-14 – Intelligence Staff writer for the Washington Post, “Lawmakers seek to stymie plan to shift control of drone campaign from CIA to Pentagon”, Washington Post,

http://www.washingtonpost.com/world/national-security/lawmakers-seek-to-stymie-plan-to-shift-control-of-drone-campaign-from-cia-to-pentagon/2014/01/15/c0096b18-7e0e-11e3-9556-4a4bf7bcbd84\_story.html

**Congress has moved to block** President **Obama’s plan to shift control of the** U.S. **drone** **campaign** from the CIA **to** the **Defense** Department, inserting a secret provision in the massive government spending bill introduced this week that would preserve the spy agency’s role in lethal counterterrorism operations, U.S. officials said.¶ **The measure**, included in a classified annex to the $1.1 trillion federal budget plan, **would restrict the** use of **any** **funding to transfer** unmanned aircraft or **the authority to carry out drone strikes** from the CIA **to the Pentagon**, officials said.¶ **The provision represents an unusually direct intervention by lawmakers** into the way covert operations are run, **impeding an administration plan** aimed at returning the CIA’s focus to traditional intelligence gathering and possibly bringing more transparency to drone strikes.

**2AC AT: Mattei**

**Absent institutional concerns the alt is useless**

**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’.

**No link — we don’t impose change, we *allow for* other countries to model us --- that’s distinct**

**Twining 4**

(William, “DIFFUSION OF LAW: A GLOBAL PERSPECTIVE1” http://jlp.bham.ac.uk/volumes/49/twining-art.pdf)

(h) **There is a tendency in the literature to assume that most diffusion, at least in modern times, involves movement from the imperial or other powerful centre to a colonial or less developed periphery. The paradigm example is export by a ‘parent’ common law** or civil law system to a less developed dependent (e.g. colonial) or adolescent (e.g. ‘transitional’) system.44 To be sure **imperialism, and neo-imperialism form an important part of the picture. But this patronising view hardly fits the story of the spread of law as part of the baggage of colonists, migrants, refugees, and others or of the great religious diasporas throughout history, nor of interaction within countries, regions or alliances. Exclusive concentration on the spread of state law tends to go hand-in–hand with a formalistic and technocratic top-down perspective that underestimates the importance of informal processes of interaction**.

**We aren’t stupid — internal checks stop endless war**

**Buchanan 7**, Professor of Philosophy and Public Policy at Duke, 2007 (Preemption: military action and moral justification, pg. 128)

The intuitively plausible idea behind the 'irresponsible act' argument is that, other things being equal, **the higher the stakes in acting and in particular the greater the moral risk, the higher are the epistemic requirements for justified action. The decision to go to war is generally a high stakes** decision par excellence and the moral risks are especially great, for two reasons. First, unless one is justified in going to war, one's deliberate killing of enemy combatants will he murder, indeed mass murder. Secondly, at least in large-scale modem war, it is a virtual certainty that one will kill innocent people even if one is justified in going to war and conducts the war in such a way as to try to minimize harm to innocents. Given these grave moral risks of going to war, quite apart from often substantial prudential concerns, some types of justifications for going to war may simply be too subject to abuse and error to make it justifiable to invoke them. The 'irresponsible act' objection is not a consequentialist objection in any interesting sense. It does not depend upon the assumption that every particular act of going to war preventively has unacceptably bad consequences (whether in itself or by virtue of contributing lo the general acceptance of a principle allowing preventive war); nor does it assume that it is always wrong lo rely on a justification which, if generally accepted, would produce unacceptable consequences. Instead, the "irresponsible act' objection is more accurately described as an agent-centered argument and more particularly an argument from moral epistemic responsibility. **The 'irresponsible act' objection to preventive war is highly plausible if— but only if—one assumes that the agents who would invoke the preventive-war justification are, as it were, on their own** in making the decision to go to war preventively. In other words, the objection is incomplete unless the context of decision-making is further specified. Whether the special risks of relying on the preventive-war justification are unacceptably high will depend, *inter alia,* upon whether **the decision-making process includes effective provisions for redu­cing those special risks**. Because the special risks are at least in significant part epistemic—due to the inherently speculative character of the preventive war-justification—the epistemic context of the decision is crucial. Because **institutions can improve the epistemic performance of agents**, it is critical to know what the institutional context of the preventive-war decision is, before we can regard the 'irresponsible agent' objection as conclusive. Like the 'bad practice' argument, this second objection to preventive war is inconclusive because it does not consider— and rule out—the possibility that **well-designed institutions for decision-making could address the problems that would otherwise make it irresponsible for a leader to invoke the preventive-war justification**.

**Resolving hypocrisy solves, the plan causes democracy from below, and rule oflaw solves exploitation**

**Stack 10**, Professor of Anthropology at University of Aberdeen (Trevor, “Review Essay A Just Rule of Law” aura.abdn.ac.uk/bitstream/2164/2175/1/Trevor\_Stack\_Review\_Essay\_A\_Just\_Rule\_of\_Law\_Social\_Anthropology.doc Trevor Stack Review Essay A Just Rule of Law Social Anthropology.doc)

Reading **Mattei** and Nader as well as Holston, I came to feel that I was wrong to advise the Citizen Power leader to take law more seriously. **In** **showing how unjust** **the rule of law can** **be,** however, the authors **give** all the **more reason to take it seriously** **rather than** simply **ignoring it.** **Their** **books** also **hint at the** following **paths towards a just rule of law**: **Championing** local or indigenous or **popular law Mattei** **and Nader** **do not** quite **give up** on the rule of law. **Their subtitle hints** **that the rule of law is not always illegal** **and may** even **be just.** Firstly, **although they** spend much of the book **accus**ing **the U**nited **S**tates **of** using the rule of **law as a means to** the end of **plunder**, both in colonial and post-colonial times and in recent years, **they note** that **during the Cold War the United States** did **stand for the rule of law** and democracy, **as a counter to Soviet** totalitarianism and **imperialism**. In other words, **the** **Cold War was a** kind of “**special period**” during **which the U**nited **S**tates **showed the political** **will required to hold itself** **and others to law** (200-1). Secondly, **Mattei** and Nader **contemplate** the **counter-hegemonic rule of** law. Their final chapter takes up the cause of the various non-imperial uses of law that I have already mentioned: …it lies outside the purview of state law or cosmopolitan law. It might involve alliances or exploit counter-hegemony, but it remains a different force not grounded, as is the imperial rule of law, in the needs of corporate capitalist development masked as efficiency… **Their efforts are legitimized by social necessity**. Innovative **legal** **restructuring may be what will allow** **us to pass this planet on** to our grandchildren (211). In other words, salvation may come from sources of law other than those of the imperial state and its allies. For example, Mattei and Nader observe of the wave of protests in the Mexican state of Oaxaca in August 2006 by a coalition of teachers, peasants, workers, directed at removing the state governor from office, that: “People [in those protests] began to contemplate their relations with the state based on indigenous Oaxacan understandings of collective responsibility and customary law” (205). **Being local** and/or collective **is** of course **no guarantee of being just**. There are local hegemonies and states have sometimes undone them, while **local collectives often turn out to be complicit in state hegemony**. **Mexico’s agrarian reform is an example**. On the one hand, the federal government undid the local hegemonies of hacienda-owners. On the other hand, it **replaced** those **local hegemonies** **with** **corporatism**: peasant collectives were bound into the “peasant sector” of the ruling party, not least because they had only use rights to the lands, which remained state property. More broadly, the political scientist José Antonio Aguilar has complained that the Mexican state left power in the hands of all kinds of collectives, many of them local: it did so both by sins of commission, preferring to work through often unscrupulous leaders, and of omission, by failing to provide public services as well as security and justice. In this context, community autonomy has been used to justify a variety of nefarious practices: imprisoning Protestant converts for not contributing to Catholic town festivals, for example (Aguilar Rivera 2004). Seeking post hoc legalisation Holston observes that the illegal settling of São Paulo’s peripheries helped to unsettle the hierarchy of Brazilian society. Citizens went beyond the law in order to build (literally) a measure of autonomy or indeed to survive: “[t]he very illegality of house lots in peripheries makes land accessible to those who cannot afford the higher sale or rental prices of legal residence” (207). Moreover, the never-ending work of building their homes, known as autoconstrução, gave settlers a sense of entitlement – they had played their part in building the city. That sense of entitlement made for a kind of “insurgent citizenship”, one that challenged the inequality of “historical citizenship” and fuelled, for example, the election of Lula, who was from the urban peripheries (5-6). If illegal residence is a road to justice, it is not the rule of law’s road to justice. Arguably peripheral settlers were themselves profiting from illegality. But Holston notes that the **urban poor had not** yet **given up on** **law**: residential **illegality** eventually **prompts a confrontation with legal authorities in** **which residents** generally **succeed**, after long and arduous struggle, **in legalizing** their precarious **land claims**. Illegal residence is, therefore, a common and ultimately reliable way for the urban working classes to gain access to land and housing and to turn their possession into property. (207) **The experience of “illegality**” **pushed** them **back to** **national law, to “make law an asset”**, even if simply to keep that law at bay (207). That is classic counter-hegemony. However, Holston is ambivalent about post hoc legalisation. **Legal limbo** had historically **kept people unequal** and, even when used by subalterns, **could** still **mean** **violence** and impunity (271-5). My fieldwork in Mexico suggests likewise the need to distinguish between legalisation as a move toward a just rule of law and legalisation that simply creates opportunities to profit from illegality. Elites were fully complicit in the “informality” about which they liked to complain: they themselves hired workers without giving them legal benefits; politicians and leaders lived off the protection they afforded to informal businesses; lawyers, of course, had a field day. Organised crime has been parasitic on the informality of so many people’s livelihoods - the first to be charged protection by the formidable mafias were street sellers of pirate music and imitation clothing. Recent attempts at a government crackdown on organised crime, itself bypassing law, has unleashed an extraordinary wave of violence. In turn, lynch mobs in lower-class and rural areas as well as armed self-defence groups in wealthy suburbs claim to dispense the justice that the government has failed to provide. Holding power to (state) law **Three other possible roads to a just rule of law** are less explicit in the books under review. Mattei and Nader largely dismiss the traditional idea of the rule of law: to hold sovereigns – and by extension all power - to law. Holston seems ambivalent: the law was not just to begin with. The legal anthropologist Julia Eckert, though, is more optimistic. She notes, on the one hand, that **legal anthropologists** have **focused on** the **multiple sources of law:** not just the local legal traditions celebrated by Mattei and Nader but also **globalised traditions** **such** **as human rights.** On the other hand, Eckert’s informants among the urban poor of Delhi had turned increasingly to state law and with some success. “**Legalism from below**”, as she terms it, includes seeking post hoc legalisation, but it also **includes holding government and other kinds of power –** such as business **- to law**. She quotes one of her informants: “Law makes us illegal, but **the business others make from us being illegal is even more illegal.** **We want to use the law against them**” (Eckert 2006). That was part of my idea in suggesting that Citizen Power take law seriously. Mexicans have long tried to hold power to law but have only succeeded on occasion. In fact, the movement that gave birth to Citizen Power, Civic Alliance, tried during the 1990s to protest the lack of transparency in government by applying for injunctions called amparos (literally, protections) on the grounds of their constitutional rights to petition and information (201-3). The attempt failed and it is worth noting that the same legal procedure, often celebrated as the ultimate defence from arbitrary government, is used much more often to drag out proceedings to the detriment of the poor. It also serves to keep the rich out of prison: a good (and usually expensive) lawyer can get an amparo against an arrest warrant on the constitutional grounds of habeas corpus rights. Making formal equalities significant I have mentioned Aguilar’s complaint that the Mexican state has sacrificed individual rights to loyal collectives and their leaders: not just to local communities but also to trade unions and social movements, often linked to political parties. O’Donnell insists, in a similar vein, that the rule of law rests ultimately in “the formal but not insignificant equality of legal persons that are attributed autonomous and responsible agency (and…the basic dignity and obligation of human respect that derive from this attribution…)” (emphasis added). O’Donnell notes that political rights in Latin America have in recent years, through electoral competition, been grounded increasingly in the formal equality of “one person, one vote”. But he laments that civil rights such as access to justice have not followed suit – equality before the law is undermined by the appalling state of the justice system in many Latin American countries (O'Donnell 1999). Mattei and Nader are sceptical of formal equalities, arguing that US champions of individual rights such as Chief Justice Warren were simply furthering the imperial rule of law, by opposing affirmative action for example (138). Holston has been ambivalent. Holston and Caldeira agreed with O’Donnell in an earlier essay that civil rights in Brazil had lagged behind political rights, but had difficulty accepting O’Donnell’s distinction between those formal equalities and the broader social justice of wealth redistribution (Caldeira and Holston 1999). In the book under review, Holston argues that formal equalities (whether before the law or as Brazilian citizens) co-existed with a grossly unequal substantive distribution of rights as well as broader social inequality (7). I feel that O’Donnell’s point is still provocative. **Social** **scientists are** no doubt **right to highlight** the social **inequality** **and unequal rights** that often surround formal equalities, **while** also **defending** the **distribution** **of rights** to collectives as well as individuals. **But** perhaps **they risk losing** **sight** **of** those **formal equalities** in the process, **which is why** **O’Donnell insists on them**. Movements like Citizen Power could, as O’Donnell suggests, expand on the formal equalities of voting rights by extending them to civil rights such as freedom from arbitrary imprisonment, while at the same time working to address social inequalities through the substantive distribution of rights to health and education, for example. Civil sphere ruling through law While Eckert and Aguilar write of state law, the sociologist Jeffrey Alexander has argued that law can be just if it is under the thumb of the civil sphere. The civil sphere is made up, for Alexander, of organisations like the NAACP that fight for civic values in non-civil spheres such as politics, the market, family, community and religion. Being civil is about behaving in a way not dictated by self-interest or by some kind of dogma or by loyalty to a particular community. The civil sphere achieves its power over non-civil spheres through “communicative institutions” such as the media and “regulative institutions” that include voting, office and the law. With respect to law: [L]aw comes in different guises, and in this sense it is misleading to speak of “law” per se. Law often concerns itself with functional adaptation… with creating more efficient means of administration in order to allow actors more effectively to secure material goals or communities to promote their particular values… Mattei and Nader also note the stress on “efficiency” in many versions of the rule of law, but Alexander continues: these **noncivil purposes** and effects **do not exhaust what law is about**… **The aspiration toward** which **democratic law aims** **is a civil society**. In fact, to the degree that the civil sphere gains authority and independence, **obedience to law** **is** seen not as subservience to authority, whether administrative or communal, but as **commitment to rules that allow solidarity** and autonomy… (152) In other words, the **civil sphere’s rule of law differs from counter-hegemonic uses of state law** in that **it contests the state monopoly of law and also binds itself to law.** Firstly, law is “democratic”, for Alexander, when it is subject to the power of civil organisations rather than being a mere instrument of the state. Secondly, if the “civil sphere” itself has power – as Alexander insists it must – it must hold its own power to the law. Civil-sphere organisations are themselves committed to law and that is part of what makes them civil. Alexander does not spell this out but the **civil rule of law must extend** beyond legislation - having a say in law-making - **to** include **how law is geared to constitutional principles, such as** the **civil rights** on which O’Donnell insists, **as** **well as how law is implemented** and how justice is accessed. That may sound utopic but Alexander insists that the **US civil sphere has made headway in subjecting law to the civil** –the role of the NAACP in the civil rights struggle is a key example. Mattei and Nader and Holston would query aspects of Alexander’s argument. Holston does posit an egalitarian drive in US society although he does not necessarily identify it with civil society. In any case, Alexander’s account of the inclusivity of the US civil sphere sits uncomfortably with Holston’s account of the exclusivity of US citizenship, although the ACLU has defended immigrant rights in recent years. Meanwhile, **Mattei** and Nader **treat Guantánamo as the plunder of liberty** in the name of law, which makes Alexander sound rather optimistic: [t]he nature and limits of torture for military prisoners have…been intensely debated in the American civil sphere, and efforts have been mounted to curtail the conservative government’s violations of the Geneva Convention, culminating in Congressionally-supported legal guarantees (Alexander 2008) (189) **Mattei** and Nader **would** also **worry** **about** Alexander’s **focus on the US and** **the fact that he refers to other countries** mainly **to note their lack of civility** and rule of law. They might also whether the civil rule of law is sustainable in the urban peripheries of Brazil or India or Mexico; whether it is dependent on US-style courts and, more broadly, on the common law tradition; and what happens to the sovereignty that arguably makes law, law. I believe that Alexander’s account of the **push on law by US civil-sphere organisations** **could** still **inspire** their Mexican **counterparts**. My informants shared many of Alexander’s civic values although inflected by Catholicism. Some of the more successful civil organisations also operated under the auspices of the Church – Citizen Power was sponsored by a Jesuit university and relied on the support of local parishes. That might seem to jibe with Alexander, who lists religion as a non-civil sphere, but he qualifies that by conceding that religion can often be quite civil (191). More problematically, I have noted that Citizen Power, together with many of my informants, was deeply sceptical of law as a road to justice. There were, again, good reasons for that scepticism: I have mentioned the difficulties faced by Civil Alliance in using the amparo to achieve their civil ends. To give another example, a local human rights group to which I belonged in 1999 responded to the rape of a minor by trying to “spread the word” since the prospects for judicial repair were so remote, not least because the perpetrator worked for the municipal government. Rather than admit defeat, leaving law to a state that has shown little commitment to it, I feel that civil**-sphere organisations** like Citizen Power **could bring to bear on law the deep civic commitments** shown by my informants. Conclusions Both books suggest, then, that movements like Citizen Power as well as disciplines such as anthropology should take the rule of law quite seriously. The authors show how unjust the rule of law can be, as I have said, but they also hint at paths to a just rule of law that the Citizen Power leader should not dismiss so readily - and toward which anthropology might yet contribute.