# 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**

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**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**

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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**

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**The precedent of this Court has** a **significant impact on rule of law in foreign states. Foreign governments, in particular foreign judiciaries, notice and follow the example set by the U.S.** in **upholding** the **rule of law**. As foreign governments and judiciaries grapple with new and challenging issues associated with upholding the rule of law during times of conflict, **U.S. leadership on the primacy of law during the war on terror is particularly important.** Recent decisions of this Court have reaffirmed the primacy of rule of law in the U.S. during the war on terror. As relates to the present case, a number of this Court’s decisions, **most notably Boumediene v. Bush**, 128 S.Ct. 2229 (2008), have **established clear precedent that Guantanamo detainees have a right to petition for habeas corpus relief. Despite a clear holding from this Court in Boumediene, the Court of Appeals sought in Kiyemba v. Obama to narrow Boumediene to such a degree as to render this Court’s ruling hollow**. 555 F.3d 1022 (D.C. Cir. 2009). **The** present **case is** thus **a test of both the substance of the right granted in Boumediene and the role of this Court in ensuring faithful implementation of its prior decisions**. Although this Court’s rulings only have the force of law in the U.S., **foreign governments will take note of the decision in the present case and use the precedent set by this Court to guide their actions in times of conflict. PILPG has advised over two dozen foreign states on peace negotiations and post-conflict constitution drafting, as well as all of the international war crimes tribunals**. Through providing pro bono legal assistance to foreign governments and judiciaries, PILPG has **observed the** important **role** this **Court and U.S. precedent serve in promoting rule of law in foreign states. In Uganda, for example, the precedent established by this Court in Hamdan v. Rumsfeld**, 548 U.S. 557 (2006), and Boumediene, **influenced judges and legislators to incorporate the principles of judicial review and enforceability in their domestic war crimes bill. In Nepal, this Court has served as a model for the nascent judiciary. In Somaliland, the government relied heavily on U.S. terrorism legislation when drafting terrorism legislation for the region. And in the South Sudan peace process, the Sudan People’s Liberation Movement/Army (SPLM/A), the leading political party in the Government of Southern Sudan, relied on U.S. precedent to argue for the primacy of law and the importance of enforceability of previous adjudicative decisions** in the5 Abyei Arbitration, one of the most important and contentious issues in the ongoing implementation of the peace agreement. **Foreign judges** also **follow the work of this Court closely**. In a number of the judicial training programs PILPG has conducted, foreign judges have asked PILPG detailed questions about the role of this Court in upholding rule of law during the war on terror. A review of foreign precedent confirms how closely foreign judges follow this Court. **In numerous foreign states, and in the international war crimes tribunals, judges regularly cite the precedent of this Court to establish their own legitimacy, to shore up judicial authority against overreaching by powerful executives, and to develop a strong rule of law within their own legal systems. Given** the **significant influence of this Court** on foreign governments and judiciaries, **a decision in Kiyemba implementing Boumediene will reaffirm this Court’s leadership in upholding the rule of law and promote respect for rule of law in foreign states during times of conflict**.6 ARGUMENT I. **KIYEMBA v. OBAMA IS A TEST OF SUPREME COURT LEADERSHIP IN UPHOLDING RULE OF LAW IN TIMES OF CONFLICT**. **The precedent set by the Supreme Court in the present case will have a significant impact on the development of rule of law in foreign states.** **Foreign judicial, executive, and parliamentary bodies closely follow the work of this Court, and this Court’s previous decisions related to the war on terror have shaped how foreign states uphold the rule of law in times of conflict**. **Foreign governments and judiciaries will review this Court’s decision in the present case in light of those previous decisions**. **A decision in the present case implementing previous decisions of this Court granting habeas rights to Guantanamo detainees is an opportunity for this Court to reaffirm to foreign governments that the U.S. is a leader and role model in upholding the rule of law during times of conflict**. Recent Supreme Court precedent established a clear role for the primacy of law in the U.S. war on terror. In particular, this Court’s landmark decision in **Boumediene highlighted the critical role of the judiciary in a system dedicated to the rule of law, as well as the “indispensable” role of habeas corpus** as a “time tested” safeguard of liberty. Boumediene v. Bush, 128 S.Ct. 2229, 2247, 2259 (2008). **Around the globe, courts and governments took note of this Court’s stirring words**: “Security subsists, too, in fidelity to freedom’s first principles. **Chief among these are freedom from arbitrary and unlawful restraint and the personal 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**

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

**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.**

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

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**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**

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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.

**The plan is necessary for Nepalese modelling**

**Scharf 9**, Professor Michael P. Scharf, 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

II. PILPG’S EXPERIENCE ADVISING FOREIGN GOVERNMENTS AND JUDICIARIES ILLUS- TRATES THE IMPORTANCE OF SUPREME COURT PRECEDENT IN PROMOTING RULE OF LAW IN FOREIGN STATES DURING TIMES OF CONFLICT. During PILPG’s work providing pro bono legal assistance to foreign governments and judiciaries on the rule of law in conflict and post-conflict settings, clients frequently request guidance on U.S. laws and the role of the judiciary in the U.S. system of governance. In recent years, as **states** have **watched the U.S. tackle the legal issues surrounding the war on terror, foreign governments and judiciaries have expressed keen interest in, and have demonstrated reliance on, the legal mechanisms the U.S. has adopted to address the challenges presented in this new form of conflict. The** **U.S.** Government, **under the guidance of this Court, has set a strong example for upholding the rule of law during times of conflict, and foreign governments have followed this lead**. When states follow the example set by the U.S. Government, the U.S. can benefit greatly. The U.S. Government recognizes that foreign states with strong and independent judicial systems and a commitment to the rule of law make the most stable allies and partners. Stable allies and partners in turn create the best environment for U.S. business investments and commerce and provide the most safety for Americans traveling abroad. Through PILPG’s work with foreign governments, PILPG has observed that U.S. rule of law interests are best represented abroad when foreign governments view the U.S. as committed to the primacy of law. A. Foreign Governments Rely on U.S. Precedent to Promote Rule of Law in Times of Conflict. As noted above, PILPG has advised over two dozen states and governments on the negotiation and implementation of peace agreements and the drafting of post-conflict constitutions. PILPG has also advised all the international war crimes tribunals. PILPG frequently serves as pro bono counsel to foreign governments and judiciaries, advising those governments and judiciaries on important legal issues during times of transition. PILPG’s unique relationship with its clients provides the organization’s members with rare insight into the decision-making process of foreign governments and judiciaries and the influence that the U.S. and this Court have on promoting rule of law during times of conflict. The following examples, from Uganda, Nepal, Somaliland, and South Sudan, illustrate some of the ways in which foreign governments and judiciaries rely on the leadership of the U.S. and this Court to promote rule of law in their home states. i. Uganda In Uganda, the precedent established by this Court in Hamdan v. Rumsfeld, 548 U.S. 557 (2006), and Boumediene v. Bush, 128 S.Ct. 2229 (2008), influenced judges and legislators to incorporate the principles of judicial review and enforceability in their domestic war crimes bill. In 2008 members of PILPG began working with the Government of Uganda to establish a War Crimes Chamber within the Ugandan High Court to prosecute members of the Lord’s Resistance Army (LRA). The LRA is an insurgent group operating in Northern Uganda, which, over the past twenty-five years, has kidnapped over sixty thousand young Ugandan girls and boys, and forced them to be sex slaves and child soldiers. PILPG worked closely with the Ugandan government to establish a judicial mechanism to address this violence in accordance with international legal standards. After discussing with PILPG this Court’s holdings in Hamdan and Boumediene, the Ugandan government decided to include a provision in their bill establishing the War Crimes Chamber that provides for appeal to Uganda’s highest court. Following the example of the U.S., the Ugandans felt that it was important that such high profile and controversial cases involving war crimes and terrorism should be subject to the highest level of judicial review in order to promote independence, fairness, and legitimacy. Provided that this Court issues a robust interpretation of Boumediene, the Ugandan precedent is likely to be repeated by other countries, such as Liberia, which are also contemplating the establishment of judicial bodies to prosecute war crimes and terrorism. ii. Nepal **This Court** has also **served as a model for the nascent Nepal judiciary. Nepal’s 2006 Comprehensive Peace Agreement ended a decade-long civil conflict between Maoist insurgents and government forces. The Agreement provided for the election of a Constituent Assembly to serve as an interim government and to draft a new constitution for Nepal.** Elected in May 2008, the Constituent Assembly is currently in the midst of the constitution drafting process. PILPG is advising the Assembly’s drafting committees on a number of issues, among them the structure, composition, and role of the judiciary. **Members of the Assembly** have **repeatedly expressed the view that the judiciary is a crucial component to fully and effectively implementing the constitution and ensuring the balance of power in the new government.** In technical discussions with members of the Committee on the Judicial System, PILPG discussed several aspects of the U.S. judicial model, including: the U.S. federal and state judicial structures; the types of cases the Supreme Court can adjudicate; the powers and functions of the U.S. judicial branch; the devolution of judicial power in the U.S.; the role of the Supreme Court in establishing precedent for all U.S. courts; and the mechanisms used by the Supreme Court to ensure enforcement of its decisions in the lower courts. **Members of the Committee on the Judicial System were particularly interested in how the U.S. federal court system operates at the national level, and how the U.S. model could be applied in Nepal as Nepal moves towards decentralizing its court system. As the Constituent Assembly moves forward with developing constitutional and judicial structures for Nepal, members will continue to look to the functioning of this Court for guidance on the role of a high court in a federal system, particularly how this Court enforces key decisions in the lower courts**.

**That solves corruption**

**Sanghera 11,** Office of the High Commissioner for Human Rights in Nepal, Nepal Bar Association (NBA) Interaction on Independence of Judiciary for Human Rights, http://nepal.ohchr.org/en/resources/Documents/English/statements/HCR/Year2011/May/2011\_05\_26\_Speech\_NBA\_Interaction\_on\_Independence\_of\_Judiciary\_for\_HR\_E.pdf

• **It is crystal clear that judicial Independence is a matter of human rights. Independent judiciary is a must for rule of law and effective protection of fundamental** human **rights** and freedoms of the people. If we take a look at universal bills of human rights, we can see a number of references to independent judiciary. For instance, Article 8 of UDHR provides, “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.” • This has also been incorporated in ICCPR. Article 2(3) of the ICCPR obliges the State to ensure that the right to a remedy is determined by competent judicial, legal or administrative authorities while the Article 14 (1) of the ICCPR guarantees the right to equality before the courts and tribunals and right to a fair and public hearing by a competent, independent and impartial tribunal. In response to Gonzalez del Rio v. Peru (1992) case, the UN Human Rights Committee labeled this right as “an absolute PAGE: 2 right that may suffer no exception”. UN HRC further recognizes that the independence of judiciary consist of a number of things including "actual independence of the Judiciary from the executive branch and the legislative’. • Independence of judiciary has been recognized as an unchallengeable principle globally. This principle received considerable elaboration in the UN Basic Principles on the Independence of the Judiciary (1985), which urges the States to ensure institutional as well as functional independence of judiciary. In this regard, allow me to remind you what these principles mainly require: constitutional guarantee that the judiciary is independent of the other branches of government; non-interference in internal matters of judicial administration; independence in financial matters and a provision of sufficient funds to perform their functions efficiently; the duty of others to respect judicial independence and observe the judicial decisions; jurisdictional exclusivity over all issues of a judicial nature (ban on exceptional or military courts); finality of decisions, meaning that the decisions of the courts are not subject to any revision outside the judiciary; and right and duty of the Judiciary to ensure fair court proceedings and reasoned decisions. • In terms of functional independence, UN Principles on Independence of Judiciary stand for a transparent and representative system of appointments by an independent body based on professional qualifications and personal integrity; security of tenure and adequate remuneration; effective and independent disciplinary mechanisms; right of judges to join professional associations; independence of judges in the performance of professional duties; a right and a duty to decide cases according to law; promotion of judges on basis of objective factors; and removal only for reasons of ‘incapacity or behaviour that renders them unfit to discharge their duties’. • I am pleased to note that Nepal has a strong constitutional tradition of guaranteeing fundamental rights together with an independent judiciary as an immutable safeguard for such rights. Since the **ongoing Constitution-making process offers an historic opportunity to strengthen the foundation for the Nepalese State firmly grounded on respect for human rights and justice, it is crucial** that **the** Constituent **Assembly** further **strengthen the independence of the judiciary at the highest level in order to enable** PAGE: 3 **Nepali people to receive an appropriate remedy determined by competent and independent judicial institutions. In this regard, it is highly important to ensure an independent check and balance through judiciary against legislative and executive excesses encroaching upon fundamental rights and freedoms**. • Experience from around the world tells us that even the most perfectly drafted Constitution does not, in itself, guarantee the enjoyment of human rights. The **rights** recognized in the Constitution **must be given effect by independent bodies**. In this **regard, strong independent judiciary with sufficient power to hold the Government to account, and** national human rights institutions that can **adjudicate complaints of human rights violations are vital for effective accountability mechanisms**.

**It’s accelerating now and will collapse Nepal**

**Brown 12**, [Seyom Brown](http://www.smu.edu/Dedman/FacultyAndStaff/Directory/BrownSeyom) is a professor of international politics and national security at Southern Methodist University. [Vanda Felbab-Brown](http://www.brookings.edu/experts/felbabbrownv.aspx) is a fellow in foreign policy at the Brookings Institution, **Nepal, On the Brink of Collapse**, http://www.nytimes.com/2012/06/06/opinion/nepal-on-the-brink-of-collapse.html?\_r=3&ref=opinion&

FOR more than two decades, Nepal, a resource-rich, impoverished country wedged between China and India, has teetered between paralysis and upheaval. Its people have witnessed the transition, in 1990, from an authoritarian Hindu kingdom to a constitutional monarchy; the massacre of members of the royal family in 2001 by the heir to the throne; a decade-long civil war between Maoist insurgents and the government that ended in a faltering peace agreement in 2006; and the removal of the monarchy altogether in 2008.

**Since the civil war ended**, after the loss of more than 16,000 lives, **a stalemate** has **ensued as each party caters to caste, class and ethnic divisions instead of national unity**. Many politicians are maneuvering to get their hands on money from foreign aid, tourism and hydropower; even the Maoists have become crony capitalists, reaping large profits for themselves and their ostensibly proletarian party. Meanwhile, the bureaucracy, army and police — historically dominated by privileged social groups that never held them accountable — are becoming even more politicized and corrupt.

Although **Nepal is no stranger to crises, the one currently seizing the country risks turning it into a failed state**. On May 27, the 601-member legislature, which had been directed to write a new constitution for what is now a democratic republic, missed its deadline for the fourth time since it was created in 2008. Hours before the deadline, after the Supreme Court refused to grant another extension, the Maoist prime minister, Babur/am Bhattarai, dissolved the legislature, known as the Constituent Assembly, and scheduled nationwide elections for Nov. 22. Although averting imminent political disaster and violence, the call for elections is unlikely to bring consensus among the self-interested and fractious political leaders, and is quite likely to produce an even more divided legislature.

The **fitful struggle to develop a constitution both epitomizes and exacerbates the country’s ethnic, religious, geographical, caste and class divisions. More than 90 languages are spoken in this country, about the size of Illinois. Buddhists and Muslims are sizable minorities among the largely Hindu population. Lower-caste people and rural residents have been historically marginalized**; the **grievances run deep**. However, instead of unifying the country, constitution-drafting has become a frenzied contest to secure special privileges for one’s own community.

By making promises they can’t fulfill, **politicians are losing control of the very animosities they’ve whipped up**. Political parties have organized paralyzing protests, with barricades and roadblocks, to demand, or oppose, separate ethnic- and caste-based states within a federal system. The **protests** have **shut down commercial activity across a country that can ill afford such losses: with a per-capita gross domestic product of $490, Nepal is one of the poorest countries in the world; unemployment is at 45 percent.**

The parties are using criminal groups to recruit stick-wielding youths to protest. Induced by a fistful of rupees, a rare treat of a meat meal and an illusion of empowerment, these youth have roughed up drivers and set fire to vehicles that attempt to pass the barriers. Some groups have attacked journalists. Reinforced by former fighters, the Maoist party is among the most effective in demonstrating its street might. Fearing a loss of power, the traditional economic and political elite, the Brahmin and Chhetri castes, who dominate the Nepali Congress Party, have begun to emulate the Maoists’ street tactics.

On Monday, in a move symptomatic of the mistrust and cynicism, dozens of political parties, including the Nepali Congress, raised suspicions about the Maoists’ motives in dissolving the Constituent Assembly and called for protests against its dissolution. Few Nepalis expect the present situation to explode into another civil war, but increasingly brazen and regular acts of violence in the capital demonstrate that lawlessness has reached crisis proportions.

**With most institutions malfunctioning and the system of patronage deeply ingrained, bribery and political connections rule the day. Individual acts of courage against corruption are cause for hope, but to fully restore the rule of law, and respect for it, Nepal needs to step up its efforts to improve public integrity**. A prominent anti-corruption agency has been leaderless for over a year as parties bicker over who should lead it.

**War over Nepal goes nuclear**

**Poudel 2** (Keshab, Looming Uncertainty, The National NewsMagazine, 21(34), 3-8,

http://www.nepalnews.com.np/contents/englishweekly/spotlight/2002/mar/mar08/national2.htm)

Following the September 11 terrorist attacks, however, the United States and western European countries have been expressing solidarity with Nepal. The visit of US Secretary of State Colin Powell and expressions of concern from other western powers over the last three months underscore how the dimensions of violence in Nepal has extended beyond its frontiers. After the government imposed the state of emergency and the Maoist launched deadly assaults in Achham and Salyan districts, **western powers have increased their interest in the kingdom**. The growing concern expressed by Washington and European powers is understandable, as **escalating violence and instability in Nepal could heighten the possibility of external intervention. Such intervention from** either of Nepal's two neighbors — **India and China — may trigger a direct conflict between the two. Even an indirect conflict** between the two Asian powers **could prove** to be **more dangerous than** the confrontation between **India and Pakistan**. Foreign-relations experts say the recent visit of British Foreign Office Minister Ben Bradshaw to Nepal and US Ambassador Michael E. Malinowski trip to Achham and Salyan are clear indicators of Nepal's geo-strategical importance. Another senior US diplomat, A. Peter Burleigh, spoke more candidly about US concerns over the possibility of a prolonged confrontation. "[W]hen situations arise that challenge that positive world order, and which can be addressed by a collective response, it is the responsibility and obligation of all of our countries to come together to restore and preserve the peace," said Ambassador Malinowski in an address to a seminar on South Asian Peace Operations. "Here in Nepal, as we all know, there is no peace. But I do believe that there are lessons for both those of us who live in Nepal and for the international community," he said. Nepal's Position in South Asia Nepal has been ensnared in political instability following the restoration of democracy in 1990. After the Maoist insurgency began in 1996, the kingdom's economic, security and political processes have been thrown into a tangle. According to the Central Bureau of Statistics, Nepal has a length of 885-km (east-west) and a non-uniform mean width of 193-km (north-south). The kingdom shares a frontier of more than 1400 km with China in north and more than 1600 km with India in the east, west and south. The Nepal-India border is open and easy to cross. Although the frontier with China is more or less open, it straddles rugged mountain terrain. It is impossible to build border posts along the border with either country. Therefore, **the geographical position of Nepal has been psychologically threatening** to both neighbors. "**China appears very sensitive towards** activities against her in neighboring countries, including **Nepal**. China's security concern is indicated from [the visits of its] defense minister, senior army officials and home ministry officials from time to time," says Hiranya Lal Shrestha, a foreign relations expert in his article "Nepal-India Relations: Security Issue" published in Policy Study Series by the Institute of Foreign Affairs (November 2000). "At the same time, **we** cannot **overlook** the **weaknesses of a landlocked state.** **Indian security perception regards the Himalayas as its sphere of influence**. Since 14.9 percent of Nepal's territory lies to the north of the Himalayas, we may have to be divided into two spheres of influence if the northern neighbour also puts forward similar logic concerning its security perception. Nepal, in brief, does not want to remain under anyone's sphere of influence," says Shrestha. Be it the British Raj or independent India, Chinese influence in Nepal has always been a matter of concern to leaders of the south neighbor. In the book, "Life of Brian Houghton Hodgson, the British Resident at the Court of Nepal", William Wilson Hunter mentions how the British government was worried about Nepal's relations with China in 18th century. "But my situation by no means so agreeable as it might be if these barbarians did but know their own good. Instead of which they are insolent and hostile and play off on us, as far as they can dare, the Chinese etiquette and foreign polity. The Celestial Emperor is their idol, and, by the way, whilst I write, the  [Nepalese] sovereign himself is passing by the Residency in all royal pomp to go three miles in order to receive a letter which has just reached Nepal from Pekin. There they go! Fifty chiefs on horseback, royalty and royalty's advisors and on eight elephants and three thousand troops before and behind the cavalcade! They have reached the spot. The Emperor's letter, enclosed in a cylinder covered with brocade, hangs round the neck of a chief; who mounted on a spare elephant, is placed at the head of the cavalcade, and the cortege," writes Hodgson in a letter. This reflected how assertive and powerful the Chinese were in the internal dimensions of Nepalese politics in the 18th century. After independence, Indian leaders have been equally concerned about security issues, considering Nepal and Tibet to be the soft underbelly of their own country's security. "This is altogether more inexplicable when one examines the rapidity with which Nehru reacted to events in Nepal in the mid-fifties, forcefully intervening there to restore the Nepalese monarchy. **Nepal** and Tibet were both Himalayan kingdoms, both were **of vital strategic importance to India**, and they were both afflicted, almost simultaneously, whether externally or internally, and yet India and its political leadership reacted differently," writes Indian Foreign Minister Jaswant Singh in his book "Defending India". Referring to India's security, Indian Prime Minister Jawahar Lal **Nehru once observed: "Now our interest in the internal conditions of Nepal became still more acute** and personal, if I may say so, **because of** the developments in China and **Tibet**, to be frank. And regardless, of our feelings about Nepal, we were interested in our country's border. We have had from immemorial time a magnificent frontier, that is to say, the Himalayas are concerned, and they lie on the other side of Nepal. Therefore, the principal barrier to India lies on the other side of Nepal. Therefore, the principal barrier to India lies on the other side of Nepal and we are not going to tolerate any person coming over that barrier. Therefore, much as we appreciate the independence of Nepal, we cannot risk our own security by anything going wrong in Nepal." For his part, Li Peng, the chairman of China's National People's Congress, openly expressed China's security concerns in Nepal during the visit of Sher Bahadur Deuba in 1998 as a former prime minister. **South Asia has three nuclear powers, India, China and Pakistan. Two powers, China and India, are competing for the status of regional power. Any form of direct confrontation between China and India in the south of the Himalayas will have far-reaching consequences.**

**High risk of nuclear war between India and China --- it’s on hair-trigger alert**

**Sullivan and Massa 10**, Mr. Sullivan is research fellow and program manager at the American Enterprise Institute's Center for Defense Studies. Mr. Mazza is a senior research associate at AEI, http://online.wsj.com/news/articles/SB10001424052748703384204575509163717438530

India and Pakistan are the two countries **most likely to engage in nuclear** war, or so goes the common wisdom. Yet **if recent events are any indication, the world's most vigorous nuclear competition may well erupt between** Asia's two giants: **India and China**.

Both countries already house significant and growing arsenals. China is estimated to have approximately 450 warheads; India, roughly 100. Though intensifying as of late, Sino-Indian nuclear competition has a long history: India's pursuit of a weapons program in the 1960s was triggered in part by China's initial nuclear tests, and the two have eyed one another's arsenals with mounting concern ever since. The competition intensified in 2007, when China began to upgrade missile facilities near Tibet, placing targets in northern India within range of its forces.

Yet **the stakes have been raised yet again** in recent months. **Indian defense minister** A.K. Antony **announced** last month that **the military will** soon **incorporate** into its arsenal **a new intermediate-range missile**, the Agni-III, which is **capable of reaching all of China's major cities**. Delhi is also reportedly considering redeploying survivable, medium-range Agni-IIs to its northeastern border. And just last month, India shifted a squadron of Su-30MKI fighters to a base just 150 kilometers from the disputed Sino-Indian border. An Indian Air Force official told Defense News these nuclear-armed planes could operate deep within China with midflight refueling.

For its part, **China continues to enhance the quality, quantity and delivery systems of its nuclear forces**. The Pentagon reported last month that the People's Liberation Army has replaced older, vulnerable ballistic missiles deployed in Western China with modern, survivable ones; this transition has taken place over the last four years. China's Hainan Island naval base houses new, nuclear-powered ballistic-missile submarines and affords those boats easy access to the Indian Ocean. China's military is also developing a new, longer range submarine-launched ballistic missile which will allow its subs to strike targets throughout India from the secure confines of the South China Sea.

**No circumvention and the courts are effective—the executive will consent**

**Prakash and Ramsay 12, Professors of Law**

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

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

# 2AC

**DEF**

**Deference is dead**

**Skinner 8/23**, Professor of Law at Willamette

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

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

**We’re not a judicial expansion**

**Chow 11**, JD from Cardozo

(Samuel, THE KIYEMBA PARADOX: CREATING A JUDICIAL FRAMEWORK TO ERADICATE INDEFINITE, UNLAWFUL EXECUTIVE DETENTIONS, www.cjicl.com/uploads/2/9/5/9/2959791/cjicl\_19.3\_chow\_note.pdf)

Additionally, there are ever-present concerns surrounding separation of powers. The degree to which the Court is concerning itself with foreign relations issues is unprecedented, which means any application of a balancing test would be usurping powers of the political branches that were traditionally exercised without the possibility of judicial participation. **There is a general hesitation in potentially augmenting the courts authority in terrorist detentions. Yet, separation-of-powers concerns must be reconciled with the opposing, though equally compelling, counter-part—our government's system of checks and balances. Since the ideal of our tripartite government system is one where areas of authority are clearly defined, an augmentation of jurisdiction by the courts may seem suspicious.** However, the idea of an unchecked Executive with the authority to indefinitely detain individuals (who the government itself has determined have no legal basis for detention) is equally, if not more so, disquieting. Moreover, **the historical role of habeas courts as the final arbiter of a detention's legality provides a legitimate counter-argument that it is in fact the Executive that is intruding upon the judiciary's traditional authority. It does so by appropriating itself as the sole source of a functional remedy, thereby interfering with the courts habeas authority**.

**No spillover, it’s ideological --- the best data proves**

**Beerman 1/21**, Professor of Law and Harry Elwood Warren Scholar, Boston University School of Law, http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2382984

On the first angle, in an earlier article, 2 I presented data on Justices’ voting records. In that article, **I looked at all** of the **Supreme Court decisions during** Chief Justice **Roberts’** first four **terms** in which Chevron was applied by the majority or argued or in a dissent. What I found was that **the Court generally split along familiar ideological lines most of the time, with liberals deferring to liberal agency interpretations and conservatives deferring to conservative agency interpretations**. During that period, when there was disagreement on the Court “there were **six decisions by the conservative wing against deference, three decisions by the liberal wing against deference, two decisions by the conservative wing in favor of deference and four decisions by the liberal wing in favor of deference**.”3 Chief Justice Roberts and Justices Scalia and Alito voted contrary to the liberal/conservative divide most often, with Justice Scalia sometimes joining liberals to vote against deference and Justices Roberts and Alito sometimes joining liberals in favor of deference. “Justice Scalia’s eleven votes against deference was the highest number of votes among the Justices against deference. Justice Alito voted most often in favor of deference with ten votes[.]”4 Chief Justice Roberts voted with liberals twice, bringing his total in the period to eight votes in favor of deference. **The updated data** presented below **confirm this** general **pattern** although in recent years the Court has deferred to agency decisions in a higher proportion of the cases.

**2AC Immigration**

**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**

**2AC XO**

**Gets rolled back and can’t create norms**

**Swanson 9**, Chair of accountability and prosecution working group of United for Peace and Justice

(David, 1/25, Dangerous Executive Orders, www.opednews.com/articles/Dangerous-Executive-Orders-by-David-Swanson-090125-670.html)

The Center for Constitutional Rights has expressed concern that President Obama's executive order banning torture may contain a loophole. But **no president has any right to declare torture legal or illegal,** with or without loopholes. And **if we accept that presidents have such powers, even if our new president does good with them, then loopholes will be the least of our worries**. Torture is, and has long been, illegal in every case, without exception. It is banned by our Bill of Rights, the Universal Declaration of Human Rights, the Geneva Convention relative to the Treatment of Prisoners of War, the International Covenant on Civil and Political Rights, the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, and Title 18, U.S. Code, Section 2340A. Nothing any president can do can change this or unchange it, weaken it or strengthen it in any way. Preventing torture does not require new legislation from Congress or new orders from a new president. It requires enforcing existing laws. In fact, adherence to the Convention Against Torture, which under Article VI of our Constitution is the supreme law of the land, requires the criminal prosecution of torturers and anyone complicit in torture. Most of the seemingly noble steps taken by Congress in recent years and by President Obama in his first week have served to disguise the fact that torture always was, still is, and shall continue to be illegal. In 2005, John McCain championed the McCain Detainee Amendment to the Defense Appropriations bill for 2005, which passed the Congress and was signed into law by President Bush. This was yet another law banning torture. It was not needed, but no harm done, right? Wrong. Passing laws like this serves to create the illusion that torture was previously legal. And that allows the new laws to create exceptions. In fact, McCain allowed a major loophole for the CIA. And that would have been bad enough. But President Bush tacked on a "signing statement" throwing out the entire ban on torture. So, with Congress trying to ban torture, and the president eliminating the ban, people could hardly be blamed for believing torture was legal. President **Bush** also **signed executive orders and ordered the creation of legal opinions claiming that torture was legal.** President **Obama's new order revokes one of Bush's. But Obama has no more right to undo the legalization of torture than Bush had to legalize it in the first place.** Only Congress has or should have the power to legislate. Obama's new order requires adherence to laws, rather than claiming the right to violate them, and yet there is a wide gap between publishing an order requiring adherence to the laws and actually enforcing the laws by indicting violators**. The same order that President Obama uses to ban torture also orders the closure of all CIA detention facilities**. Congress never authorized the creation of such things in the first place. Ordering their closure is the right thing to do. **But if a president can give the order to close them, what is to prevent another president giving the order to reopen them?** The answer should be all of the laws and treaties violated. Obama's executive order largely orders the government to cease violating various laws. But in so doing, **rather than strengthening the laws, the new president weakens them almost to the point of nonexistence**. For, what power does a law have to control behavior if it is never enforced? What deterrent value can be found in a law the violation of which results merely in a formal order to begin obeying it? And what status are we supposed to give all the other violated laws for which no such formal orders have been given?

**---2AC Amendment CP**

**Their model destroys Nepali stability**

**Poudel 1** (Keshab, Ritualistic Respect, The National NewsMagazine, 21(19))

At a time when **the country is facing manifold challenges** in the field of social and economic transformation, **Nepalese politicians and intellectuals are involved in an unending debate on the Constitution** of Kingdom of Nepal1990 which has nothing to do with the overall development drive of the country. The Maoist insurgency broke out in 1996 following a decision by the Supreme Court to reinstate the House of Representatives. In the first five years under the new constitution, the country saw only two prime ministers. But after the Supreme Court's decision, Nepal has seen six prime ministers.  "**If efforts to amend the constitution are made, the country will be plunged into** further **chaos**," says a political analyst. "As there is a mechanism to internally improve the constitution, **touching the constitution is not going to fulfill the interest of any party,**" he says. After a few years of relative stability and peace, controversies have been arising regularly following the Supreme Court's misinterpretation of constitution in 1995. The decision also paved the way for seemingly   unending political uncertainty as well as chaos and violence. Although the  decision has been accepted by all, it has stripped the prime minister of his  ability to discipline members by dissolving the House of Representatives, which  is a leading cause of today's political instability. The Nepali Congress, which secured an absolute majority in the last election, has seen three prime ministers in its two and half years in  power. When a small misinterpretation by the court can bring such unbearable instability and chaos, **amending the constitution would open a Pandora's box. "The constitution must be allowed to evolve and develop**," said Taranath Ranabhat, speaker of the House of Representatives, addressing a program organized by the Society for Constitutional and Parliamentary Exercises (SCOPE) on the 11th anniversary of the promulgation of the constitution. "**There is no need to go for amendment**."

**The counter plan destroys democracy and foreign policy coherence**

**Dixon 11**, Prof at U Chicago Law School, Rosalind Dixon, Constitutional Amendment Rules: A Comparative Perspective, May

2011, <http://www.law.uchicago.edu/files/file/347-rd-comparative.pdf>

What reasons do we have to fear excessive constitutional mutability? **Existing comparative constitutional scholarship points to** two **broad reasons** why **constitutional stability may be valuable: first**, its **capacity to promote processes of democratic self-government** (see e.g. Holmes 1995; Eisgruber 2001; Issacharoff 2003); **and** second, its **capacity to facilitate** certain **valuable forms of constitutional pre-commitment, particularly** those **having to do with minor- ity rights and inclusion** (see e.g. Elster 2003; Ferejohn and Sager 2003; Sager 2001). When it comes to processes of democratic self-government, Stephen **Holmes likens constitu- tional amendment rules to rules of grammar in relation to processes of linguistic communication or exchange. ‘Far from simply handcuffing people’, Holmes suggests, ‘linguistic rules allow interlocutors to do many things they would not otherwise have been able to do or even thought of doing’**, and constitutions perform much the same function (Holmes 1995). As Christopher Eisgruber notes, **they ‘define pathways for action’** in a democracy, **without which a polity may be ‘unable to formulate policy about foreign affairs, the economy, the environment’ and all manner of other critically important issues of social and economic policy** (Eisgruber 2001: 13). **From this perspective**, the **danger of overly flexible processes of constitutional amendment is** that **they may lead to ‘a polity [to be] consumed with endless debates about how to structure its basic political institutions’ in a way that undermines** the **ability of a democracy to engage in** this kind of **collective action** (Eisgruber 2001: 13; Elster 2003: 1759). This is particularly so when one considers that, if constitutional amendments are sufficiently frequent, **this tends to suggest not only frequent debate about specific constitutional issues, but also** a **greater likelihood of whole- scale constitutional replacement** (see Lutz 1995; Elkins et al. 2009). **For most constitutional scholars,**

 **the idea of constitutional democracy** also **entails** some **basic level of political competition among political parties,** or at least political elites (see Schumpeter 1962), and from this perspective, **another danger of overly flexible constitutional amendment processes is that they may allow a temporary political majority to insulate itself against future political competition** (Elster 2003: 1776–9). Indeed, for many, ‘[t]he **fixing of** the **structural rules by which governance occurs, and** the **assurance** that **these will not be “gamed” by momentary majorities attempting to lock themselves in power is one of the hall- marks of constitutionalism**’ (Issacharoff 2003).

**Causes massive delays --- they should have to defend normal means which is necessary for aff ground**

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

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

**Decks court cred**

**Schaffner 5** (Joan, Associate Professor of Law – George Washington University Law School, “The Federal Marriage Amendment: To Protect the Sanctity of Marriage or Destroy Constitutional Democracy?”, American University Law Review , August, 54 Am. U.L. Rev. 1487, August, Lexis)

 [\*1525] Through amendment, the legislative branch has the power to enact laws that establish societal standards only so long as the laws enacted do not violate the constitutional rights of individuals. 222 **The legislature is not empowered to draft laws to enshrine illegitimate prejudices of the majority. Allowing the legislature,** with the endorsement of the executive, **to amend the Constitution to expressly overrule a decision of the judiciary**, which acted consistently with democratic principles by protecting the rights of a minority of the people, **destroys the delicate balance of power among the branches**.

**2AC Sec**

#### Social constructions are knowable --- prefer specificity

**Fluck, PhD in International Politics from Aberystwyth, ’10** (Matthew, November, “Truth, Values and the Value of Truth in Critical International Relations Theory” Millennium Journal of International Studies, Vol 39 No 2, SagePub)

Critical Realists arrive at their understanding of truth by inverting the post-positivist attitude; rather than asking what knowledge is like and structuring their account of the world accordingly, they assume that knowledge is possible and ask what the world must be like for that to be the case. 36 This position has its roots in the realist philosophy of science, where it is argued that scientists must assume that the theoretical entities they describe – atoms, gravity, bacteria and so on – are real, that they exist independently of thoughts or discourse. 37 Whereas positivists identify causal laws with recurrent phenomena, realists believe they are real tendencies and mechanisms. They argue that the only plausible explanation for the remarkable success of science is that theories refer to these real entities and mechanisms which exist independently of human experience. 38 Against this background, the Critical Realist philosopher Roy Bhaskar has argued that truth must have a dual aspect. On the one hand, it must refer to epistemic conditions and activities such as ‘reporting judgements’ and ‘assigning values’. On the other hand, it has an inescapably ontic aspect which involves ‘designating the states of affairs expressed and in virtue of which judgements are assigned the value “true’’’. In many respects the epistemic aspect must dominate; we can only identify truth through certain epistemic procedures and from within certain social contexts. Nevertheless, these procedures are oriented towards independent reality. The status of the conclusions they lead us to is not dependent on epistemic factors alone, but also on independently existing states of affairs. For this reason, Bhaskar argues that truth has a ‘genuinely ontological’ use. 39 Post-positivists would, of course, reply that whilst such an understanding of truth might be unproblematic in the natural sciences, in the social sciences the knower is part of the object known. This being the case, there cannot be an ontic aspect to the truths identified. Critical Realists accept that in social science there is interaction between subject and object; social structures involve the actions and ideas of social actors. 40 They add, however, that it does not follow that the structures in question are the creations of social scientists or that they are simply constituted through the ideas shared within society at a given moment. 41 According to Bhaskar, since we are born into a world of structures which precede us, we can ascribe independent existence to social structures on the basis of their pre-existence. We can recognise that they are real on the basis of their causal power – they have a constraining effect on our activity. 42 Critical Realists are happy to agree to an ‘epistemological relativism’ according to which knowledge is a social product created from a pre-existing set of beliefs, 43 but they maintain that the reality of social structures means that our beliefs about them can be more or less accurate – we must distinguish between the way things appear to us and the way they really are. There are procedures which enable us to rationally choose between accounts of reality and thereby arrive at more accurate understandings; epistemological relativism does not preclude judgemental rationalism. 44 It therefore remains possible to pursue the truth about social reality.

**---2AC Court Cap**

**Capital is bulletproof**

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

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

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

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

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

Theoretically, **attitudinalists could argue that** **judges rule in accordance with their own ideological preferences** honestly, **rather than strategically**, because for some reason judges simply are not capable of, or prefer not to, act strategically. In practice, however, **this is not what they say. Attitudinalists instead say that the factual environment renders strategic action unnecessary**, at least **for U.S. Supreme Court justices**, **because,** for example, federal judges have life tenure, **U.S. Supreme Court justices have no real ambition for higher office, and congressional overrides are rarely a realistic danger**. [n25](https://webgateway.dartmouth.edu/us/lnacademic/%2CDanaInfo%3Dwww.lexisnexis.com%2Bframe.do?tokenKey=rsh-20.940299.0671169885&target=results_DocumentContent&reloadEntirePage=true&rand=1248637360461&returnToKey=20_T7032636157&parent=docview#n25) "**The Supreme Court's rules** and structures, along with those of the American political system in general, **give** life-tenured **justices**  [\*696]  **enormous latitude to reach decisions based on their personal policy preferences**." [n26](https://webgateway.dartmouth.edu/us/lnacademic/%2CDanaInfo%3Dwww.lexisnexis.com%2Bframe.do?tokenKey=rsh-20.940299.0671169885&target=results_DocumentContent&reloadEntirePage=true&rand=1248637360461&returnToKey=20_T7032636157&parent=docview#n26) In other words, **both** strategic and attitudinal **models,** in practice, **assume that judges are willing and able to act strategically**. Where the two theories differ is in their factual assumptions: Strategic models support the belief that judges face various types of constraints that force them to support decisions that differ from their preferred policy points, while attitudinalists believe that **the institutional environment leaves** at least those judges that they study - generally **U.S. Supreme Court justices** - **free to make decisions that are exactly in accord with their preferred policies**. Similarly, followers of strategic theory could theoretically believe that judges act strategically to maximize achievement of some set of goals other than their ideological policy preferences. For example, perhaps judges could prefer "legalistic" goals like adherence to precedent, but would have to defect strategically from absolute adherence to those goals given the presence of other institutions with some clout, like the U.S. Congress. In practice, however, this is not what happens. Instead, strategic theorists virtually always model judges as strategically furthering sets of ideological policy goals, which are the exact same goals modeled by the attitudinal theorists. [n27](https://webgateway.dartmouth.edu/us/lnacademic/%2CDanaInfo%3Dwww.lexisnexis.com%2Bframe.do?tokenKey=rsh-20.940299.0671169885&target=results_DocumentContent&reloadEntirePage=true&rand=1248637360461&returnToKey=20_T7032636157&parent=docview#n27) What we have, then, are **two theories that in practice tend to collapse into one.** In both theories, actors are assumed: (1) to have preferences; and (2) to act strategically for the maximization of those preferences. [n28](https://webgateway.dartmouth.edu/us/lnacademic/%2CDanaInfo%3Dwww.lexisnexis.com%2Bframe.do?tokenKey=rsh-20.940299.0671169885&target=results_DocumentContent&reloadEntirePage=true&rand=1248637360461&returnToKey=20_T7032636157&parent=docview#n28) In addition, attitudinalists and strategic theorists both believe in a particular kind of rational choice theory: Specifically, the **actors' preferences are assumed to be solely ideological, policy-based goals** derived from the political realm. It is important to emphasize that both theories also believe that the  [\*697]  proper way to test judicial behavior is to look at what judges actually do, not at what they say: Thus, what matters is the outcome, not the reasoning of the case.

**Missouri v Holland fails and not key**

**Spiro 2008**

Peter J., Professor of Law, Temple University, Resurrecting Missouri v. Holland, Missouri Law Review http://law.missouri.edu/lawreview/files/2012/11/Spiro.pdf

**This brief essay sketches** the **constitutional dormancy of Missouri v. Holland and the potential for its activation**. The essay first describes how the treatymakers declined the Treaty Power offered them by the Court. In the near century since the ruling, no treaty appears to have depended on the deci- sion for authority. The **treatymakers** have **worked from contrary constitution- al premises, establishing a sort of parallel constitutional universe in which the ruling was never handed down.** Through these years, **Missouri v. Holland** has **failed accurately to represent prevailing constitutional norms on the question**. In other words, arguably, **the decision is no longer good law if it ever was**.

**The court will rule in favor of Bond and reclarify Holland**

**Constitutional Law Prof Blog 2013** (January 21, “Carol Anne Bond Going Back to the Supreme Court” <http://lawprofessors.typepad.com/conlaw/2013/01/carol-anne-bond-going-back-to-the-supreme-court.html>)

**On remand, the Third Circuit held that the Chemical Weapons Convention "falls comfortably within the Treaty Power**'s traditional subject matter limitation" and thus the implementing Act is "within the constitutional powers of the federal government under the Necessary and Proper Clause and the Treaty Power, unless it somehow goes beyond the Convention." **While the Circuit did find the prosecution of Bond puzzling, there was also much puzzlement over the statement in Missouri v. Holland that “[i]f [a] treaty is valid there can be no dispute about the validity of the statute** [implementing that treaty] under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government." **It seems the Supreme Court is ready to clarify - - - or attempt to - - - Missouri v. Holland's famous statement**.

**Winners Win**

Lawrence G. **Sager** Prof Law **’81** (Professor of Law, New York University) April, 1981 Constitutional Triage Columbia Law Review, Vol. 81, No. 3. pp. 707-719.

A second objection, to which Professor Choper has made himself more directly vulnerable, concerns the validity of those premises. **The assertion that deciding controversial cases dissipates the moral or political authority of the federal judiciary is far from self-evident,** and Professor Choper's arguments, balanced and reflective though they be (pp. 129-70), do not persuade me. Even quite **harrowing episodes like the Supreme Court's confrontation with Georgia over the status of the Cherokee Nation' may in the long run have accrued to the benefit of the Court's national prestige**. 5 [Footnote] 5. "Long run" may misstate the case. In the fall of 1832, with Georgia openly defying the decision of the Court in Worcester v. Georgia, and President Jackson unwilling—possibly unable—to do anything about it, John Marshall wrote to Justice Story, "1 yield slowly and reluctantly to the conviction that our Constitution cannot last." But within six months, Jackson had moved to denounce South Carolina's Nullification Ordinance and to request legislation giving the federal government power to act against states that defied Supreme Court authority, Congress had enacted such legislation (the Force Bill) amidst a clamor of support for the Court, and the Governor of Georgia had pardoned Samuel Worcester and Elizur Butler, who had in turn withdrawn their suit. Charles **Warren is thus moved to speak of the period, only months after the decision in Worcester, as one of "renewed confidence in the Court," with the Court finding itself in "a stronger position than it had been for the past fifteen years.**" 1 C. Warren, The Supreme Court in United States History 778 (1926). See generally id., at 729-79. Speculation about such questions is difficult, and there is a tendency to ignore an important variable in the factual equation. Much of the Court's ability to weather the storms of its unpopular decisions may well depend upon a popular sense that federal judges are obliged to decide constitutional controversies, and to decide them according to their best understanding of the dictates of the Constitution. Displays of political discretion, while a short-term means of avoiding controversy, may serve over time to erode public tolerance of the Court's controversial decisions.

**2AC Legit**

**Public perceptions ensure every ruling only increases court legitimacy—positivity frames cushion controversy**

**Kenyatta and Gibson 3**

[2003, Lester Kenyatta Spence And James L. Gibson, Political Sci, Washington University and Gregory A. Caldeira, Poli Sci, Ohio State University. “The Supreme Court and the US Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?” B.J.Pol.S. 33]

These results may reflect the bias of “positivity frames” when it comes to the Court (and perhaps judicial institutions in general), in the sense that exposure to courts — including exposure associated with controversial circumstances — enhances rather than detracts from judicial legitimacy, even among those who are disgusted with the Court’s ruling. When courts become salient, people become exposed to the symbolic trappings of judicial power – “the marble temple, the high bench, the purple curtain, the black robes.”38 When the news media covered the Court’s deliberations surrounding the election, it generally did so with the greatest deference and respect. The contrast in images of the “partisan bickering” in Florida and the solemn judicial process in Washington could not be more stark. No matter how one judges the outcome in Bush v. Gore, exposure to the legitimizing symbols of law and courts is perhaps the dominant process at play. Thus, the effect of displeasure with a particular court decision may be muted by contact with these legitimizing symbols. To know courts is indeed to love them, in the sense that to know about courts is to be exposed to these legitimizing symbols. One way to in

vestigate this conjecture is to compare the views of partisans in 1987 and 2001.39 Following the methodology reported in Kritzer,40 we display in Table 7 the relationship between party attachment and a two-item loyalty index (based on Table 2, above). The correlation between loyalty and party identification in 1987 is .05; in 2001, it is .20. Thus, our findings comport with Kritzer’s in the sense that attitudes toward the Court seem to be more partisan following the election of 2000 — but not greatly so. [PLACE TABLE 7 ABOUT HERE] The more interesting evidence has to do with whether our conclusion that legitimacy changed little between 1987 and 2001 is due to off-setting tendencies among Democrats and Republicans. That is, if Democrats reduced their support for the Court as a result of Bush v. Gore and Republicans increased their support, then the overall level of support would appear not to have changed. Support would, however, be more closely related to partisanship. Most important, this would be evidence that people were adjusting their loyalty on the basis of the Court’s ruling on the election. Table 7 reports data of considerable relevance to the hypothesis that loyalty frames reactions to individual decisions and that unwelcome decisions contribute little to the diminution of institutional loyalty The evidence in Table 7 indicates that, between 1987 and 2001, support for the Court did not decline among Democrats, even as it increased somewhat among Independents and Republicans. In 2001, 46.6 per cent of the Democrats gave two supportive replies to our questions; in 1987, this figure was insignificantly lower (43.0 per cent). That Democrats in the aggregate seem not to have been affected by the adverse ruling in Bush v. Gore is a finding compatible with the general view that institutional loyalty inoculates against an unwelcome policy decision. The data also reveal that Republican support for the Court was boosted by the decision. Thus, these data are compatible with the conclusion that the Court profits from a bias of positivity frames in the sense that the Court gets “credit” when it pleases people, but that it is not penalized when its actions are displeasing. DISCUSSION AND CONCLUDING COMMENTS Several significant conclusions have emerged from this analysis. In terms of substantive politics, we have shown that the Supreme Court decision in Bush v. Gore did not have a debilitating impact on the legitimacy of the US Supreme Court. Perhaps because the Court enjoyed such a deep reservoir of good will, most Americans were predisposed to view the Court’s involvement as appropriate, and therefore dissatisfaction with the outcome did not poison attitudes toward the institution. This finding is an important corrective to popular and scholarly views of the politics of the election. Nevertheless, no one can doubt that loyalty toward an institution is influenced by the policy outputs of that institution, at least in the long term.41 Neither should any one doubt that loyalty toward an institution can cushion the shock of a highly controversial decision. Within any given cross-section, the causal relationship between perceptions of an opinion and loyalty is surely reciprocal. Nonetheless, Bush v. Gore seems to have had a much smaller effect on the attitudes of Americans toward their Supreme Court than many expected. The various analyses presented in this paper support the view that the weak effect of the Supreme Court’s participation in the election is most likely due to pre-existing attitudes toward the Court that blunted the impact of disapproval of the Court’s involvement in the election. Thus, in general, the conclusions in which we have the greatest confidence are: (1) the ruling in Bush v. Gore did not greatly undermine the legitimacy of the Court, (2) probably because the effect of pre-existing legitimacy on evaluations of the decision was stronger than the effect of evaluations on institutional loyalty, and (3) institutional loyalty predisposed most Americans to view the decision as based on law and therefore legitimate. From a more theoretical viewpoint, we have posited the existence of a bias of positivity frames when it comes to popular perceptions of courts. In most areas of political and social life, negativity predominates. We have suggested that positive reactions result from exposure to the highly effective legitimizing symbols in which courts, and the Supreme Court in particular, typically drape themselves. Further research should more rigorously investigate exactly how—and under what conditions—symbols are effective at legitimizing judicial institutions.

**Judicial intervention on detention inevitable**

**Chesney 13**, Law Prof at UT

(November, Robert, BEYOND THE BATTLEFIELD, BEYOND AL QAEDA: THE DESTABILIZING LEGAL ARCHITECTURE OF COUNTERTERRORISM, 112 Mich. L. Rev. 163)

**The government will not be able to** simply **ride out the legal friction generated by the fragmentation of al Qaeda and the shift toward shadow war. Those trends** do not merely shift unsettled questions of substantive law to the forefront of the debate; they also **greatly increase the prospects for a new round of judicial intervention focusing on those substantive questions**. 1. Military Detention Consider military detention first. **Fresh judicial intervention regarding the substantive law of detention is a virtual certainty.** It will come in connection with the lingering Guantanamo population, and it will come as well in connection with any future detainees taken into custody on a long-term basis, regardless of where they might be held. a. Existing Guantanamo Detainees Most of the existing **Guantanamo detainees have** already **had a shot at habeas** relief, **and many lost** on both the facts and the law. **But some of them can and will pursue a second shot**, should changing conditions call into question the legal foundation for the earlier rulings against them. n202 **The first round of Guantanamo habeas decisions depended in almost every instance on the existence of a meaningful tie to ongoing hostilities in Afghanistan**, as did the Supreme Court's 2004 decision in Hamdi. Indeed, Justice O'Connor in Hamdi was at pains to caution that at some point in the future this baseline condition making LOAC relevant could unravel. n203 **The declining U.S. role in combat operations in Afghanistan goes directly to that point. This decline will open the door to a second wave of Guantanamo litigation,**

 **with detainees arguing that neither LOAC nor the relevant statutory authorities continues to apply**. This argument may or may not succeed on the merits. At first blush, the NDAA FY12 would seem to present a substantial obstacle to the detainees. That statute expressly codifies detention authority as to members (and supporters) of al Qaeda, the Afghan Taliban, and "associated forces," n204 thus grounding detention authority directly in domestic law rather than requiring courts to impute such authority into the 2001 AUMF by implication from LOAC (as the Supreme Court had to do in [\*214] Hamdi itself). But it is not quite so simple. The same section of the NDAA FY12 relinks the question of detention authority to LOAC after all. It specifies that statutory detention authority as an initial matter exists solely "pending disposition under the law of war." n205 And although it then lists long-term military detention as a possible disposition option, the statute specifically defines this authority as "detention under the law of war without trial until the end of the hostilities authorized by the [AUMF]." n206 A court confronted with this language might interpret it in a manner consistent with the government's borderless-conflict position, such that the drawdown in Afghanistan would not matter. But it might not. The **repeated references to the "law of war" in the statute**--that is to LOAC--**might lead at least some judges to conduct a fresh field-of-application analysis regarding the extent to which LOAC remains applicable in light of the drawdown**, and judges might then read the results back into the NDAA FY12. I am not saying that this is the likely outcome or that any such analysis would necessarily reject the government's borderless-conflict position. I am just saying that **judges eventually will decide these matters** without real guidance from Congress (unless Congress clarifies its intentions in the interim). Note, too, that **any such judicial interpretations may well have far broader implications than just the fate of the particular detainee in question; a ruling that LOAC has no application in a given situation would cast a long shadow over any other LOAC-based actions the U.S. government might undertake in the same or similar contexts (including targeting measures**). **Regardless of what occurs in Afghanistan, the existing Guantanamo detainee population might also find occasion to come back to court should the decline of the core al Qaeda organization continue to the point where it can plausibly be described as defunct**. In such a case, it is likely that at least some current al Qaeda detainees would revive their habeas petitions in order to contend that the demise of the organization also means the demise of detention authority over members of the defunct group. This argument would be particularly likely to come from those who were held on the ground of membership in al Qaeda but who the government had not shown to have been otherwise involved in hostile acts. This would be a challenging argument to make; the government would surely respond that al Qaeda would no longer be defunct if some of its members were set free. But setting that possible response aside, such a petition could compel the government to litigate the question of whether the continuing existence of various "franchises," like AQAP or al-Shabaab, suffices to preserve detention authority over al Qaeda members. That is, **such a challenge could lead a judge to weigh in on the organizational boundary question.**

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

**Fitzgerald 12/28**

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

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

**Tech solves.**

**McNeill, history prof- Georgetown, 05 (J.R., Diamond in the Rough: Is There a Genuine Environmental Threat to Security?, Intl Security, 30.1)**

With all this in mind, it seems hard to dispute **that the current ecological regime** with its existing trends **is radically unsustainable.** **Yet does this necessarily imply collapse,** either generally or for this state or that society? **I think not. First of all, the trends will change.** **It is nearly impossible that the next hundred years will see**, for example, **a fourfold expansion of human population as did the last century**. No one forecasts a world with 25 billion people in the year 2100. Economists normally expect **the price mechanism to intervene in decisive ways, bringing us,** for example, **new energy sources when oil gets more expensive**, as they brought alternative construction materials when and where timber ran short. **This will indeed surely happen, on some (unknowable) scale** [End Page 188] **and at some (unknowable) pace. It** is of course faith-based economics to assume that substitutions will happen soon enough and broadly enough to avoid immiseration and political turbulence. But **it is** equally **unwise to assume they will not**. Second, as optimists expect, **science and technology will resolve some of our ecological vulnerabilities. This has already happened in some cases and will surely happen again**. **The hole in the ozone** shield, for example, grew very rapidly from the 1960s to the 1990s. It **implied various forms of peril** for many life forms on Earth, including us. **But** in the 1970s atmospheric scientists detected the hole, explained it, recognized its dangers, and made a compelling public case about them. **This provoked effective political action, which in turn spurred technical change** in the industries that used chlorofluorocarbons (the agents that, when released into the atmosphere and after drifting to the stratosphere, rupture ozone molecules). **In this case it turned out to be an easy nut to crack, both politically and technically.** Others, such as climate change, have proven much tougher. Some of **our ecological vulnerabilities will surely be resolved in happy ways on account of scientific understanding and technological change**, presumably the easiest cases first. **There are encouraging trends in postindustrial economies,** in which less ore, less fuel, less timber, and so on are required to generate a given dollar of gross national product. In the United States, Japan, and most of Europe, a fairly rapid "dematerialization" of the economy is under way, and a "decarbonization" too, partly as a result of technological change and partly owing to sectoral shifts toward services and a knowledge economy. But there will surely be some ecological vulnerabilities that resist technological solution.

### Plenary

**No arms races**

**Waltz Poli Sci Cal‘3**

**(Kenneth, Adjunct Senior Research Scholar at Columbia University, The Spread of Nuclear Weapons: A Debate Renewed, p. 29-30)**

**One may believe that** old American and Soviet military doctrines set the pattern that **new nuclear states** will follow. One may also believe that they will suffer the fate of the United States and the former Soviet Union, that they **will compete in building larger and larger nuclear arsenals** while continuing to accumulate conventional weapons. **These are doubtful beliefs**. One can infer the future from the past only insofar as future situations may be like past ones. For three main reasons, **new nuclear states are likely to decrease**, rather than to increase, **their military spending**.

First, **nuclear weapons alter the dynamics of arms races**. In a competition of two or more parties, it may be hard to say who is pushing and who is being pushed, who is leading and who is following. If one party seeks to increase its capabilities, it may seem that others must too. The dynamic may be built into the competition and may unfold despite a mutual wish to resist it. But need this be the case in a strategic competition among nuclear countries? It need not be if the conditions of competition make deterrent logic dominant. Deterrent logic dominates if the conditions of competition make it nearly impossible for any of the competing parties to achieve a first- strike capability. Early in the nuclear age, the implications of deterrent strategy were clearly seen. "**When dealing with the absolute weapon**," as William T. R. Fox put it, **"arguments based on relative advantage lose their point**."29 The United States has sometimes designed its forces according to that logic. Donald A. Quarles, when he was President Eisenhower's secretary of the Air Force, argued that "sufficiency of air power" is determined by "the force required to accomplish the mission assigned." Avoidance of total war then does not depend on the "relative strength of the two opposed forces." Instead, it depends on the "absolute power in the hands of each, and in the substantial invulnerability of this power to interdiction." 30 In other words, **if no state can launch a disarming attack with high confidence, force comparisons are irrelevant. Strategic arms races are then pointless. Deterrent strategies offer this great advantage: Within wide ranges neither side need respond to increases in the other side's military capabilities**.

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

**Tirschwell 9**

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

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

**The aff doesn’t undermine immigration authority—they aren’t seeking admission and parole power maintains plenary powers**

**NIJC et al 9**

[December 11, 2009, NATIONAL IMMIGRANT JUSTICE CENTER, AMERICAN IMMIGRATION LAWYERS [\*\*5] ASSOCIA-TION, ADVOCATES FOR HUMAN RIGHTS, NORTHWEST IMMIGRANT RIGHTS PROJECT, CENTRAL AMERICAN RESOURCE CENTER, IMMIGRANT LAW CENTER OF MINNESOTA, THE FLORENCE IMMI-GRANT AND REFUGEE RIGHTS PROJECT, AND PENNSYLVANIA IMMIGRATION RESOURCE CENTER, “ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.”, 2008 U.S. Briefs 1234; 2009 U.S. S. Ct. Briefs LEXIS 1537]

First, **for purposes of immigration law**, **it is significant that the Uighurs did not come within the jurisdiction of the United States voluntarily**. **Immigration law**, at its base, **is about the admission or expulsion of non-citizens from the jurisdiction of the United States**. **The petitioners** here **are not seeking admission to the United States and**, moreover, the term "**admission" is a statutorily defined term**. 8 U.S.C. § 1101(a)(13)(A). **The petitioners were captured by bounty hunters** in Pakistan, **ransomed to the U.S. military, and imprisoned for** almost **seven years in** territory dominated by and under the indefinite control of **the United States.** Pet. App. 41a; J.A. 28a-29a, 33a-34a, 164a-166a. **The Govern-ment transported the Uighurs to a territory that "while technically not part of the United** [\*\*10] **States**, **is under the** **complete and total control" of the United States Government**. Boumediene v. Bush, 128 S. Ct. 2229, 2262 (2008). Because the Uighur prisoners have unwillingly found themselves in the jurisdiction of the United States, see id. at 2261; Rasul v. Bush, 542 U.S. 466, 480 (2004), **they would not** immediately **fall within the purview of immigration law as non-citizens seeking admission merely because they are released into the United States under the habeas power**. United States v. Brown, 148 F. Supp. 2d 191, 198 (E.D.N.Y. [\*6] 2001), abrogated on other grounds by United States v. Garcia Jurado, 281 F. Supp. 2d 498 (E.D.N.Y. 2003); Matter of Badalamenti, 19 I. & N. Dec. 623, 627 (BIA 1988); see also Matter of Yam, 16 I. & N. Dec. 535, 536--37 (BIA 1978) ("[a]n alien does not effect an entry into the United States unless, while free from actual or constructive restraint, he crosses into the territory of the United States;" where non-citizen had not entered the United States voluntarily, the "immigration judge was without jurisdiction to de-termine the [\*\*11] issue of deportability"). **The decision in Sale v. Haitian Centers** Council, Inc., 509 U.S. 155 (1993), superseded in part by statute, Illegal Immigration Reform and Immigrant Responsibility Act of 1998, Pub. L. No. 104-208, 110 Stat. 3009, **does not address the situation of the petitioners.** Opp. to Cert. at 19. **The migrants in Sale were arguing for statutory rights while inter-cepted on the high seas, not while at Guantanamo Bay, and were** desperately and voluntarily **trying to enter the United States to seek asylum protection** when they were diverted. See Sale, 509 U.S. at 162--63. Because Sale addresses non-citizens willingly seeking to enter the United States, **it has nothing to say about non-citizens involuntarily brought to the United States.** The Board's decision in Matter of Badalamenti is the sole relevant authority on this particular legal and policy point. **The Uighurs' habeas petition did not request admission, nor did the District Court purport to order that remedy**. **The District Court did not order the Government to "admit" or "parole" the Uighurs as those terms are used in immigration law, and it** [\*7] **expressed** [\*\*12**] no opinion on the eventual application of the immigration laws to the Uighurs. Nor did the District Court make a determination regarding the immigration status of the Uighurs**. It did not prohibit the institution of removal proceedings at any point, and it made no final orders regarding when, or under what conditions, the Uighur detainees could be brought into DHS custody. Opinion 10-17, J.A. 1609-16. Rather, the District Court exer-cised its authority in habeas corpus proceedings. Opinion 10-17, Pet. App. 57a-59a. Thus, **rather than impermissibly intruding on the power of the Executive, the District Court's order maintained the status quo of the Uighurs' immigration status**. Second, **the concept of the geographic United States** -- while relevant at a basic level of analysis in immigration law -- **is**, in this situation, **a distraction**. **The Government relies heavily on the notion that the District Court's Order would blur what it describes as "the previously clear distinction between aliens** outside the United States **and aliens inside this** country or at its borders." Opp. to Cert. at 22. **While the physical location of the non-citizen may have carried a broader significance** at some point in [\*\*13] **the historical development of our nation's immigration laws,** today **it is clearly only significant to the basic questions of immigration law -- none of which are implicated here. Geographic location has not been a determinative feature under immigration law for some time.** Notably, the "entry fiction," Rosales-Garcia v. Holland, 322 F.3d 386, 391 n.2 (6th Cir. 2003), superseded in part by statute, Illegal Immigration Reform and Immi-grant Responsibility Act of 1998, Pub. L. No. 104-208, 110 Stat. 3009, [\*8] explains that **a non-citizen may be physically within the geographic borders, but not "within the United States" for purposes of immigration law.** See Leng May Ma v. Barber, 357 U.S. 185, 186 (1958) (holding that a non-citizen who was paroled within the geographic bound-aries of the United States was not "in the United States" for purposes of immigration law). Conversely, **Congress has acted to expand the power of admissibility review to non-citizens located beyond the geographic United States**. In 1996, **Congress created an extra-territorial power to make admissibility determinations.** Under 8 U.S.C. § 1225a [\*\*14] , an immigration officer may engage in the most basic immigration function of determining admissibility at any one of several pre-inspection stations located outside the country. See U.S. Customs and Border Protection, Border Patrol Sectors, http://www.cbp.gov/xp/cgov/border\_security/border\_patrol/border\_patrol\_sectors (listing various reinspection stations) (last visited Dec. 9, 2009). Section 8 U.S.C. § 1225(a)(3)(C) authorizes removal proceedings even when a non-citizen resides abroad. **The definition of what it means to be "admitted" to the United States turns not on geogra-phy, but on legality.** 8 U.S.C. § 1101(a)(13)(A); Title VII of the Consolidated Natural Resources Act of 2008 ("CNRA"), Pub. L. No. 110-229, § 702(a), 122 Stat. 754, 853 (2008) (providing that U.S. immigration laws will apply to the Com-monwealth of the Northern Mariana Islands beginning November 28, 2009); see also Electronic System for Travel Authorization, https://esta.cbp.dhs.gov/esta/esta.html (pushing admissibility review to the home of the non-citizen by means of the Internet) (last visited Dec. 9, 2009). [\*9] Third, **Congress has provided** [\*\*15] **a statutory tool to maintain the status quo on the petitioners' immigration question even if their release from unlawful custody is required**. Thus, **the Government's argument posits a false hypo-thetical when it asks whether Judge Urbina's order was inside or outside the immigration law framework. The habeas power and the immigration power are not in competition.**

 **This Court has made clear that federal courts have the authority to order the release of non-citizens from deten-tion** into the United States -- **including non-citizens inadmissible under the immigration laws.** See Boumediene, 128 S. Ct. 2229; Clark v. Martinez, 543 U.S. 371 (2005). Under the Court's rulings in both Martinez and Boumediene, **federal courts have the authority in habeas corpus proceedings to order the release from detention of inadmissible non-citizens if that is what is required to give effect to a** statutory or constitutional **prohibition on non-lawful detention**. n2 n2 The Government seeks to distinguish Martinez by asserting that it applied a provision of the immigration laws that is not at issue in this case. But the relevance of Martinez lies in its holding that an individual's lack of immigration status cannot supply indefinite detention authority to the Government. Martinez followed the simple principle that when the Government lacks a con-tinued statutory basis for detaining someone, even an inadmissible non-citizen, it must release them. **The Court having already interpreted the statute to provide no authority to detain,** see Zadvydas v. Davis, 533 U.S. 678, 699 (2001), **the presence or ab-sence of a statutory "status" which could be applied to a non-citizen upon release was not relevant to the appropriate remedy**. [\*\*16] [\*10] However **the Government may choose to effectuate a valid habeas release order, the immigration statute serves to implement the lawful order, not to obstruct it**. 8 U.S.C. § 1182(d)(5)(A). Section 1182(d)(5)(A) authorizes the physical transfer or entry of a person into the United States while maintaining the immigration status quo. A "parole" under that section would not effect an admission of the Uighurs into the United States, 8 U.S.C. § 1182(d)(5)(A) ("[S]uch parole of such alien shall not be regarded as an admission of the alien . . . ."), create any substantive rights they do not already possess, or favor them under the immigration statute in any meaningful way. **An individual who is pa-roled may be detained, deported, granted admission, or authorized to stay, among other results.** With the creation of the parole power, Congress meant to eliminate the conflict that the Government asserts exists. **It is a common sense statute created by Congress for the precise purpose presented here: when a human being must come into the United States but the immigration question is still one to be reserved, he may be paroled**. Thus, **the question** [\*\*17] **of admissibility is not properly before the judicial branch at this time; and, further-more, the statutory process under** 8 U.S.C. § 1229a **would likely resolve any disputes which arose.** In the meantime, **granting habeas release into the United States does not upend the immigration apple-cart. Were the Government to parole the petitioners into the United States, the Government would retain every power under the Immigration and Na-tionality Act that it holds now**. See Leng May Ma, 357 U.S. at 190, superseded in part by statute, Illegal Immigration Reform and Immigrant Responsibility [\*11] Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 ("The parole of al-iens seeking admission is simply a device through which needless confinement is avoided while administrative pro-ceedings are conducted. It was never intended to affect an alien's status."); Kaplan v. Tod, 267 U.S. 228, 229--30 (1925) (inadmissible alien paroled into the United States for over ten years held not to have made "entry" under immi-gration law). Accordingly, **the Uighurs' § 1182 admissibility is irrelevant to the determination of whether they could [\*\*18] be released into the United States under habeas corpus.**

**Release happened so no net ben**

**Goldman 12/31**

[12/31/13, Adam Goldman, “Final three Uighur prisoners moved from U.S. military prison at Guantanamo Bay”, <http://www.washingtonpost.com/world/national-security/final-three-uighur-prisoners-moved-from-us-military-prison-at-guantanamo-bay/2013/12/31/834c1eea-7220-11e3-8def-a33011492df2_story.html>]

**The United States has transferred three Uighur** Muslim **detainees to Slovakia from the military prison at Guantanamo Bay**, Cuba, U.S. officials said Tuesday. **They were the last members of the ethnic minority from China to be held at the military prison.** The trio had languished at Guantanamo for more than a decade since their capture in Pakistan after the Sept. 11, 2001, attacks — despite prior military assessments that they had no ties to al-Qaeda or the Taliban.

**other countries**

**AP 12**

(“US settles 2 Chinese Uighurs from Guantanamo to El Salvador amid diplomatic struggle” April 20, 2012, http://uyghuramerican.org/article/us-settles-2-chinese-uighurs-guantanamo-el-salvador-amid-diplomatic-struggle.html)

U.S. courts and officials blocked efforts to settle the men in the U.S. and the prisoners were left in limbo. **Through** painstaking **diplomatic efforts,** **Uighur prisoners** from **have settled in** **Albania, Bermuda, Switzerland**, the Pacific island of **Palau** **and elsewhere**. Eric Tirschwell, another lawyer for Razakah, said all those released to date are “living peaceful, productive lives and many have been reunited with or started families.” Memet, 33, and Razakah , who is in his mid-30s, are the first Guantanamo prisoners to be released or transferred in more than a year as a result of new restrictions imposed by Congress. Those restrictions did not apply to the men because a U.S. federal judge had ordered their release because they had not been determined to be “enemy combatants” who can be detained at the U.S. base in Cuba.

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# 1AR (aka Mimi SMASH!)

**AT: Rollback**

**No circumvention and the courts are effective—the executive will consent**

**Prakash and Ramsay 12, Professors of Law**

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

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

**Congress will defer to court rulings—politicians will only talk**

**Devins 6, Goodrich Prof of Law**

[2006, Neal Devins is a Goodrich Professor of Law and Professor of Government, College of

William and Mary, “Should the Supreme Court Fear Congress?”, <http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1158&context=facpubs&sei-redir=1&referer=http%3A%2F%2Fscholar.google.com%2Fscholar%3Fq%3Dcourt%2Bcongress%2Bstripping%2Bdetention%26btnG%3D%26hl%3Den%26as_sdt%3D0%252C5#search=%22court%20congress%20stripping%20detention%22>]

That the Roberts Court need not worry about jurisdiction stripping legislation is important, but ultimately does not answer the question of whether the Court should fear Congress. Congress, after all, can slap the courts down in other ways.132 Nevertheless, **changes in Congress over the past twenty years suggest that the Roberts Court has less reason to fear Congress** than did the Warren or Burger Courts. As detailed in Part II, **today's lawmakers are less engaged in constitutional matters and less interested in asserting their prerogative to independently interpret the Constitution.** Correspondingly, **lawmakers place relatively more emphasis on expressing their opinions than on advancing their policy preferences**. Consequently, **even though the Rehnquist Court invalidated more federal statutes than any other Supreme Court, Congress did not see the Court's federalism revival as a fundamental challenge to congressional power**. 133 **Lawmakers**, instead, **preferred to appeal to their base by speaking out on divisive social issues-launching rhetorical attacks against lower federal courts and state courts.**

**The president believes he’s constrained—internal forces supersedes their takeout**

**Prakash and Ramsay 12, Professors of Law**

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The Executive’s Perception of Legal Constraint.—**A final feature of modern practice that is inconsistent with Posner and Vermeule’s description is that the Executive Branch feels constrained by law**. In part this can be seen from the way it behaves. As discussed above, the Executive Branch asks Congress to enact legislation and make appropriations rather than doing so independently. **The Executive Branch brings alleged wrongdoers before courts for punishment** rather than punishing independently. **The Executive Branch obeys court orders to act or refrain from acting**, as implicitly required by the Constitution. But **also of significance is the Executive Branch’s internal recognition of legal constraints**. **The President employs an enormous and growing staff of lawyers** spread among all executive offices and agencies. Anecdotal evidence suggests that **legal determinations made within the Executive Branch have the effect of constraining Executive Branch action.** In one particular episode in the Bush Administration, the **Office of Legal Counsel (OLC) reportedly refused to approve the legality of a surveillance program strongly favored by the White House, culminating in a showdown in the Attorney General’s hospital room**.97 Apparently, **when the Attorney General backed the OLC conclusions, the President acquiesced**. More generally, Trevor Morrison argues that OLC legal conclusions are reached with a sense of independence from presidential policy preferences and have substantially influenced presidential decision making.98 To be sure, **Executive Branch lawyers often may seek to justify presidential actions under law. They may identify with the Executive and hope to expand its legal discretion.** But that role in itself undermines Posner and Vermeule’s claims, for if the President is truly unbound by law, why expend resources dealing with the law’s nonexistent bounds? We accept that **the President’s lawyers search for legal arguments to justify presidential action, that they find the President’s policy preferences legal more often than they do not, and that the President sometimes disregards their conclusions.** But the **close attention the Executive pays to legal constraints suggests that the President** (who, after all, is in a good position to know) **believes himself constrained by law.** Perhaps Posner and Vermeule believe that the President is mistaken. But we think, to the contrary, **it represents the President’s recognition of the various constraints we have listed and his appreciation that attempting to operate outside the bounds of law would trigger censure from** Congress, **courts**, and the public.

NW

**Nuke war causes extinction**

**Wickersham ’10** - University of Missouri adjunct professor of Peace Studies and a member of The Missouri University Nuclear Disarmament Education Team, author book about nuclear disarmament education (Bill, 4/11/10, “Threat of ‘nuclear winter’ remains New START treaty is step in right direction.” <http://www.columbiatribune.com/news/2010/apr/11/threat-of-nuclear-winter-remains/>)

In addressing the environmental consequences of nuclear war, Columbian Steve Starr has written a summary of studies published by the Bulletin of the International Network of Engineers and Scientists Against Proliferation, which concludes: **“U.S. researchers have confirmed the scientific validity of the concept of ‘nuclear winter’** and have demonstrated that any conflict which targets even a tiny fraction of the global arsenal will cause catastrophic disruptions of the global climate.” In another statement on his Web site, Starr says: “If 1% of the nuclear weapons now ready for war were detonated in large cities, they would utterly devastate the environment, climate, ecosystems and inhabitants of Earth. A war fought with thousands of strategic nuclear weapons **would leave the Earth uninhabitable**.”

**Capital DA**

**1NC Warming Frontline**

**Developing countries, lax regulation, and profit maximization means warming is inevitable**

**Porter 2013** - writes the Economic Scene column for the Wednesday Business section (March 19, Eduardo, “A Model for Reducing Emissions” <http://www.nytimes.com/2013/03/20/business/us-example-offers-hope-for-cutting-carbon-emissions.html?_r=1&>)

**Even if every American coal-fired power plant were to close**, t**hat would not make up for the coal-based generators being built in developing countries** like India and China. “**Since 2000, the growth in coal has been 10 times that of renewables**,” said Daniel Yergin, chairman of IHS Cambridge Energy Research Associates.¶ Fatih Birol, chief economist of the International Energy Agency in Paris, points out that **if civilization is to avoid catastrophic climate change, only about one third of the** 3,000 gigatons of **CO2** contained **in** the world’s **known reserves of oil, gas and coal can be released into the atmosphere**.¶ But **the** world **economy does not work as if this were the case** — not governments, nor businesses, nor consumers.¶ “**In all my experience as an oil company manager, not a single oil company took into the picture the problem of CO2,” said** Leonardo Ma**ugeri, an energy expert at Harvard** who until 2010 was head of strategy and development for Italy’s state-owned oil company, Eni. “**They are all totally devoted to replacing the reserves they consume every year.**”

**No impact – empirics**

**Willis et. al, ’10** [Kathy J. Willis, Keith D. Bennett, Shonil A. Bhagwat & H. John B. Birks (2010): 4 °C and beyond: what did this mean for biodiversity in the past?, Systematics and Biodiversity, 8:1, 3-9, <http://www.tandfonline.com/doi/pdf/10.1080/14772000903495833>, ]

**The most recent climate models and fossil evidence for the early Eocene Climatic Optimum** (53–51 million years ago) **indicate that during this time interval atmospheric CO2 would have exceeded 1200 ppmv and tropical temperatures were between 5–10 ◦ C warmer than modern values** (Zachos et al., 2008). **There is** also **evidence for relatively rapid intervals of extreme global warmth and massive carbon addition when global temperatures increased by 5 ◦ C in less than 10 000 years** (Zachos et al., 2001). So **what was the response of biota to these ‘climate extremes’ and do we see the large-scale extinctions** (especially in the Neotropics) **predicted by some of the most recent models associated with future climate changes** (Huntingford et al., 2008)? In fact **the fossil record for the early Eocene Climatic Optimum demonstrates the very opposite.** All the evidence from low-latitude records indicates that, **at least in the plant fossil record, this was one of the most biodiverse intervals of time in the Neotropics** (Jaramillo et al., 2006). It was also a time when **the tropical forest biome was the most extensive in Earth’s history, extending to mid-latitudes in both the northern and southern hemispheres – and there was also no ice at the Poles and Antarctica was covered by needle-leaved forest** (Morley, 2007). **There were certainly novel ecosystems, and an increase in community turnover with a mixture of tropical and temperate species in mid latitudes and plants persisting in areas that are currently polar deserts**. [It should be noted; however, that **at the earlier Palaeocene–Eocene Thermal Maximum (PETM) at 55.8 million years ago in the US Gulf Coast, there was a rapid vegetation response to climate change**. There was major compositional turnover, palynological richness decreased, and regional extinctions occurred (Harrington & Jaramillo, 2007). Reasons for these changes are unclear, but they may have resulted from continental drying, negative feedbacks on vegetation to changing CO2 (assuming that CO2 changed during the PETM), rapid cooling immediately after the PETM, or subtle changes in plant–animal interactions (Harrington & Jaramillo, 2007).]

**Resil**

**Bush v Gore disproves all their arguments**

**Balkin 1**

[Jack, Knight Professor of Constitutional Law and the First Amendment, Yale Law School, Bush v. Gore and the Boundary Between Law and Politics, June 2001, L/N]

**The Court's legitimacy is often described in terms of** its "**political capital."** n143 The term "political capital" is generally not defined. It is likely that it has many facets. One element of political capital might be the likelihood that people will follow the Court's decisions and treat them as binding law, especially in controversial cases. Yet if the question is merely whether the Court's decisions will be obeyed, **it seems clear that** its **capital was hardly damaged at all. No one doubted** for a second that **Al Gore would obey the Court's orde**r, or that the Florida Supreme Court would cease the recounts immediately. **The Court's ability to command obedience remains largely unaffected by Bush v. Gore**. **There is little doubt that people will continue to follow the Supreme Court's decisions**. Lawyers will continue to cite them, and lower courts and legal officials will continue to apply them as before. Thus, if legitimacy or political capital means only brute [\*1451] acceptance of the Court and its decisions as a going concern, **the Court will not lose any legitimacy as a result of its decision in Bush v. Gore**. If the Court's political capital is judged by whether politicians are well-or ill-disposed toward the Supreme Court, then the Supreme Court may well have increased its political capital in the short term by halting the recounts. n144 After all, there is now a Republican president, and Republicans control both houses of Congress. They are no doubt delighted with the Supreme Court's exercise of judicial review, for it guarantees them a period of one-party rule. As a result, they are probably much more favorably disposed to granting the Justices the pay raise that Chief Justice Rehnquist has been requesting for several years. n145 Judged in raw political terms, the Supreme Court made much more powerful friends than enemies when it decided Bush v. Gore. n146 Nevertheless, legitimacy might mean something more than the two senses of "political capital" that I have just described. When people speak of "legitimacy" - not in a rigorously philosophical sense but in an everyday sense of the word - they are often referring to basic questions of trust and confidence in public officials: Do people believe that public officials are honest and trustworthy, and do they have confidence that public officials will act in the public interest and not for purely partisan or selfish reasons? These forms of legitimacy are crucial to the courts because the courts rely so heavily on the appearance of fairness and reasonableness. To be sure, sometimes people speak of "moral legitimacy" - whether what government officials do is in fact just and fair - and "procedural legitimacy" - whether government officials have employed fair procedures. But often people do not know what government officials are doing - for example, most people do not read judicial opinions - and even then what is actually just and fair is often difficult to determine. So in practice when [\*1452] people speak of a court's "moral legitimacy" or "procedural legitimacy," they may not mean whether courts actually are fair and just but whether people believe that they are fair and just. According to this analysis, moral and procedural legitimacy are elements of trust and confidence in public officials - in this case, trust and confidence that these officials are upright and honest and will do the right thing. Understood in this broader sense, the question of the Court's legitimacy concerns whether people will continue to have faith in the Court as a fair-minded arbiter of constitutional questions, whether they trust the Court, whether they have confidence in its decisions, and whether they believe its decisions are principled and above mere partisan politics. That sort of confidence and trust probably has been shaken, particularly among lawyers and legal academics, but also in portions of the public at large. Even so, the effects of Bush v. Gore on the Court's legitimacy may differ markedly for different populations and social groups. Perhaps trust and confidence have been damaged among Democratic voters - who are a sizeable proportion of the population - and within the legal academy, which tends to be liberal. But in other groups, the evidence of a loss of faith is quite mixed. Republican politicians like Tom DeLay and Trent Lott probably now have renewed confidence in the Court. After Bush v. Gore, they know that they can rely on the Court to do the right thing (in all the different senses of the word "right"). Although liberal legal academics have been badly shaken by the decision, conservative legal academics have come to the Court's defense, and one expects that we will see more spirited endorsements in the future. n147 Finally, most Americans are not privy to the niceties of constitutional argument and so may not be able to judge whether the Court has played fast and loose with the law. Indeed, the polling data do not seem to suggest a sharp drop off in the Court's approval ratings. A Gallup Poll conducted from January 10 to 14, 2001, indicated that 59% of those surveyed approved of how the Court was handling its job while 34% disapproved, only a three percentage point drop from its 62% approval rating in a similar poll taken from August 29 to September 5, 2000, long before the Florida controversy occurred. n148 Make no mistake: Many people are very, very angry at the Supreme Court, and the Court probably has lost their trust and confidence. But these citizens may not constitute a majority [\*1453] of all Americans. Perhaps more importantly, the persons who are currently in power like what the Court is doing just fine. In any case, **there is no doubt in my mind that the Supreme Court will eventually regain whatever trust and confidence among the American public that it lost** in Bush v. Gore. **The Supreme Court has often misbehaved and squandered its political capital foolishly.** It has done some very unjust and wicked things in the course of its history, and yet people still continue to respect and admire it. If the Court survived Dred Scott v. Sandford, **it can certainly survive this.**

**They are ahistorical**

**Chemerinsky 99** (Erwin, Professor of Law – USC, South Texas Law Review, Fall, 40 S. Tex. L. Rev. 943, Lexis)

Interestingly, though, **the Supreme Court has been immune from** that **cynicism**. At a time when other government institutions are often held in disrepute, the Court's credibility is high. Professors John M. Scheb and Williams Lyons set out to measure and determine this. [2](http://www.lexis.com/research/retrieve?_m=0effd92084fac48f67935d88a05d02d0&docnum=59&_fmtstr=FULL&_startdoc=51&wchp=dGLzVzz-zSkAW&_md5=239ef674acc9939fafe9043b5f3a0a84&focBudTerms=federalism%20or%20state%21%20right%20or%20commerce%20clause%20w/35%20institutional%20capital%20or%20political%20capital&focBudSel=all#n2) They conducted a survey to answer the question: "How do the American people regard the U.S. Supreme Court?" [3](http://www.lexis.com/research/retrieve?_m=0effd92084fac48f67935d88a05d02d0&docnum=59&_fmtstr=FULL&_startdoc=51&wchp=dGLzVzz-zSkAW&_md5=239ef674acc9939fafe9043b5f3a0a84&focBudTerms=federalism%20or%20state%21%20right%20or%20commerce%20clause%20w/35%20institutional%20capital%20or%20political%20capital&focBudSel=all#n3) Their conclusion is important: According to the survey data, Americans render a relatively positive assessment of the U.S. Supreme Court. Not surprisingly, the Court fares considerably better in public opinion than does Congress. The respondents are almost twice as likely to rate the Court's performance as "good' or "excellent'  [\*945]  as they are to give these ratings to Congress. By the same token, they are more than twice as likely to rate Congress' performance as "poor.' [4](http://www.lexis.com/research/retrieve?_m=0effd92084fac48f67935d88a05d02d0&docnum=59&_fmtstr=FULL&_startdoc=51&wchp=dGLzVzz-zSkAW&_md5=239ef674acc9939fafe9043b5f3a0a84&focBudTerms=federalism%20or%20state%21%20right%20or%20commerce%20clause%20w/35%20institutional%20capital%20or%20political%20capital&focBudSel=all#n4) This survey was done in 1994, [5](http://www.lexis.com/research/retrieve?_m=0effd92084fac48f67935d88a05d02d0&docnum=59&_fmtstr=FULL&_startdoc=51&wchp=dGLzVzz-zSkAW&_md5=239ef674acc9939fafe9043b5f3a0a84&focBudTerms=federalism%20or%20state%21%20right%20or%20commerce%20clause%20w/35%20institutional%20capital%20or%20political%20capital&focBudSel=all#n5) before the recent events that likely further damaged Congress' public image. Strikingly, Scheb and Lyons found that the "Court is fairly well-regarded across the lines that usually divide Americans." [6](http://www.lexis.com/research/retrieve?_m=0effd92084fac48f67935d88a05d02d0&docnum=59&_fmtstr=FULL&_startdoc=51&wchp=dGLzVzz-zSkAW&_md5=239ef674acc9939fafe9043b5f3a0a84&focBudTerms=federalism%20or%20state%21%20right%20or%20commerce%20clause%20w/35%20institutional%20capital%20or%20political%20capital&focBudSel=all#n6) For example, there are no significant differences between how Democrats and Republicans rate the Court's performance. In short, the Court is a relatively highly regarded institution, more so certainly than Congress or the presidency. [7](http://www.lexis.com/research/retrieve?_m=0effd92084fac48f67935d88a05d02d0&docnum=59&_fmtstr=FULL&_startdoc=51&wchp=dGLzVzz-zSkAW&_md5=239ef674acc9939fafe9043b5f3a0a84&focBudTerms=federalism%20or%20state%21%20right%20or%20commerce%20clause%20w/35%20institutional%20capital%20or%20political%20capital&focBudSel=all#n7) This is not a new phenomena. **Throughout this century, the Court has handed down controversial rulings. Yet the Court has retained its legitimacy** and its rulings have not been disregarded. Judge John Gibbons remarked that the "historical record suggests that far from being the fragile popular institution that scholars like Professor Choper... and Alexander Bickel have perceived it to be, judicial review is in fact quite robust." [8](http://www.lexis.com/research/retrieve?_m=0effd92084fac48f67935d88a05d02d0&docnum=59&_fmtstr=FULL&_startdoc=51&wchp=dGLzVzz-zSkAW&_md5=239ef674acc9939fafe9043b5f3a0a84&focBudTerms=federalism%20or%20state%21%20right%20or%20commerce%20clause%20w/35%20institutional%20capital%20or%20political%20capital&focBudSel=all#n8) In fact, **even at the times of the most intense criticism of the Supreme Court, the institution has retained its credibility**. For example, opposition to the Court was probably at its height in the mid-1930s. In the midst of a depression, the Court was striking down statutes thought to be necessary for economic recovery. In an attempt to change the Court's ideology, President Franklin D. Roosevelt - fresh from a landslide reelection - proposed changing the size of the Court. This "Court packing" plan received little public support. The Senate Judiciary Committee, controlled by Democrats, rejected the proposal and strongly reaffirmed the need for an independent judiciary: Let us now set a salutary precedent that will never be violated. Let us, of the Seventy-fifth Congress,... declare that we would rather have an independent Court, a fearless Court, a Court that will dare to announce its honest opinions in what it believes to be the defense of the liberties of the people, than a Court that, out of fear or sense of obligation to the appointing power, or  [\*946]  factional passion, approves any measure we may enact. [9](http://www.lexis.com/research/retrieve?_m=0effd92084fac48f67935d88a05d02d0&docnum=59&_fmtstr=FULL&_startdoc=51&wchp=dGLzVzz-zSkAW&_md5=239ef674acc9939fafe9043b5f3a0a84&focBudTerms=federalism%20or%20state%21%20right%20or%20commerce%20clause%20w/35%20institutional%20capital%20or%20political%20capital&focBudSel=all#n9) This is a telling quotation and a powerful example because if anything should have undermined the Court's legitimacy, it was an unpopular Court striking down popular laws enacted by a popular administration in a time of crisis. Public opinion surveys reflect that this Committee report reflected general support for the Supreme Court, despite the unpopularity of its rulings. In 1935 and 1936, most respondents, 53% and 59% respectively, did not favor limiting the power of the Supreme Court in declaring laws unconstitutional. [10](http://www.lexis.com/research/retrieve?_m=0effd92084fac48f67935d88a05d02d0&docnum=59&_fmtstr=FULL&_startdoc=51&wchp=dGLzVzz-zSkAW&_md5=239ef674acc9939fafe9043b5f3a0a84&focBudTerms=federalism%20or%20state%21%20right%20or%20commerce%20clause%20w/35%20institutional%20capital%20or%20political%20capital&focBudSel=all#n10) Indeed, **the Court's high regard**, described by Professors Scheb and Lyons, **has been remarkably constant over time**. [11](http://www.lexis.com/research/retrieve?_m=0effd92084fac48f67935d88a05d02d0&docnum=59&_fmtstr=FULL&_startdoc=51&wchp=dGLzVzz-zSkAW&_md5=239ef674acc9939fafe9043b5f3a0a84&focBudTerms=federalism%20or%20state%21%20right%20or%20commerce%20clause%20w/35%20institutional%20capital%20or%20political%20capital&focBudSel=all#n11) Professor Roger Handberg studied public attitudes about the Supreme Court over several decades and concluded that **public support for the institution has not changed significantly and that the "Court has a basic core of support which seems to endure despite severe shocks**." [12](http://www.lexis.com/research/retrieve?_m=0effd92084fac48f67935d88a05d02d0&docnum=59&_fmtstr=FULL&_startdoc=51&wchp=dGLzVzz-zSkAW&_md5=239ef674acc9939fafe9043b5f3a0a84&focBudTerms=federalism%20or%20state%21%20right%20or%20commerce%20clause%20w/35%20institutional%20capital%20or%20political%20capital&focBudSel=all#n12) Professor John Hart Ely noted this and observed: The possibility of judicial emasculation by way of popular reaction against constitutional review by the courts has not in fact materialized in more than a century and a half of American experience. The warnings probably reached their peak during the Warren years; they were not notably heeded; yet nothing resembling destruction materialized. In fact, the Court's power continued to grow and probably never has been greater than it has been over the past two decades. [13](http://www.lexis.com/research/retrieve?_m=0effd92084fac48f67935d88a05d02d0&docnum=59&_fmtstr=FULL&_startdoc=51&wchp=dGLzVzz-zSkAW&_md5=239ef674acc9939fafe9043b5f3a0a84&focBudTerms=federalism%20or%20state%21%20right%20or%20commerce%20clause%20w/35%20institutional%20capital%20or%20political%20capital&focBudSel=all#n13) Why has the Court maintained its legitimacy even when issuing highly controversial rulings? Social science theories of legitimacy offer some explanation. The renowned sociologist Max Weber wrote that there are three major bases for an institution's legitimacy: tradition, rationality and affective ties. [14](http://www.lexis.com/research/retrieve?_m=0effd92084fac48f67935d88a05d02d0&docnum=59&_fmtstr=FULL&_startdoc=51&wchp=dGLzVzz-zSkAW&_md5=239ef674acc9939fafe9043b5f3a0a84&focBudTerms=federalism%20or%20state%21%20right%20or%20commerce%20clause%20w/35%20institutional%20capital%20or%20political%20capital&focBudSel=all#n14) That which historically has existed tends to be accepted as legitimate. Therefore, 200 years of  [\*947]  judicial review grants the Court enormous credibility. Additionally, that which is rational is likely to be regarded as legitimate. The judiciary's method of giving detailed reasons for its conclusions thus helps to provide it credibility. Finally, that which is charismatic, things to which people have strong affective ties, are accorded legitimacy. It has long been demonstrated that people feel great loyalty to the Constitution. The Court's relationship to the document and its role in interpreting it likely also enhances its legitimacy. More specifically, I suggest that the Court's robust public image is a result of its processes and its producing largely acceptable decisions over a long period of time. The Court is rightly perceived as free from direct political pressure and lobbying, bound by the convention of reaching rational decisions that are justified in opinions, and capable of protecting people from arbitrary government. Social scientists have shown that an institution receives legitimacy from following established procedures. The Court's legitimacy, in part, is based on the perception and reality that it does not decide cases based on the personal interests of the Justices or based on external lobbying and pressures. In a recent book highly critical of the Court, Edward Lazarus lambastes the current Justices, yet he never even suggests a single instance of improper influence or conflict of interest. [15](http://www.lexis.com/research/retrieve?_m=0effd92084fac48f67935d88a05d02d0&docnum=59&_fmtstr=FULL&_startdoc=51&wchp=dGLzVzz-zSkAW&_md5=239ef674acc9939fafe9043b5f3a0a84&focBudTerms=federalism%20or%20state%21%20right%20or%20commerce%20clause%20w/35%20institutional%20capital%20or%20political%20capital&focBudSel=all#n15) The Court's credibility is a product of the correct perception that it decides cases based on a formalized procedure: it reads briefs, hears arguments, deliberates, and writes opinions. Indeed, the very process of opinion writing, regardless of their content, is crucial because it makes the Court's decisions seem a product of reason, not simply acts of will. Although the Court's high credibility is a result of this process, I believe that this is necessary for its institutional legitimacy, but not sufficient. The Court also has produced a large body of decisions, that over a long period of time, have generally been accepted by the public. If the Court were to produce a large number of intensely unpopular rulings over a long period of time, its credibility would suffer. In the short-term, its processes ensure its continued legitimacy; in the long-term, overall acceptability of its decisions is sufficient to preserve this credibility. Recognition of the Court's robust legitimacy is important in the on-going debate over judicial review. Many, including those as  [\*948]  prominent as Felix Frankfurter, Alexander Bickel, and Jesse Choper, have proclaimed a need for judicial restraint so as to preserve the Court's fragile institutional legitimacy. [16](http://www.lexis.com/research/retrieve?_m=0effd92084fac48f67935d88a05d02d0&docnum=59&_fmtstr=FULL&_startdoc=51&wchp=dGLzVzz-zSkAW&_md5=239ef674acc9939fafe9043b5f3a0a84&focBudTerms=federalism%20or%20state%21%20right%20or%20commerce%20clause%20w/35%20institutional%20capital%20or%20political%20capital&focBudSel=all#n16) They argue that the Court must depend on voluntary compliance with its rulings from the other branches of government and that this will not occur unless the Court preserves its fragile legitimacy. Justice Frankfurter dissented in Baker v. Carr, the Supreme Court's landmark decision holding that challenges to malapportionment were justiciable, arguing that the Court was putting its fragile legitimacy at risk. [17](http://www.lexis.com/research/retrieve?_m=0effd92084fac48f67935d88a05d02d0&docnum=59&_fmtstr=FULL&_startdoc=51&wchp=dGLzVzz-zSkAW&_md5=239ef674acc9939fafe9043b5f3a0a84&focBudTerms=federalism%20or%20state%21%20right%20or%20commerce%20clause%20w/35%20institutional%20capital%20or%20political%20capital&focBudSel=all#n17) Frankfurter urged restraint, stating: "The Court's authority - possessed of neither the purse nor the sword - ultimately rests on public confidence in its moral sanction." [18](http://www.lexis.com/research/retrieve?_m=0effd92084fac48f67935d88a05d02d0&docnum=59&_fmtstr=FULL&_startdoc=51&wchp=dGLzVzz-zSkAW&_md5=239ef674acc9939fafe9043b5f3a0a84&focBudTerms=federalism%20or%20state%21%20right%20or%20commerce%20clause%20w/35%20institutional%20capital%20or%20political%20capital&focBudSel=all#n18) **Choper**, for example, **concludes** from this premise that **the Court should not rule** **on federalism** or separation of powers issues so **as to not squander its political capital** in these areas that he sees as less important than individual rights cases. Bickel argued that the Court should practice the "passive virtues" and use justiciability doctrines to avoid highly controversial matters so as to preserve its political capital. [19](http://www.lexis.com/research/retrieve?_m=0effd92084fac48f67935d88a05d02d0&docnum=59&_fmtstr=FULL&_startdoc=51&wchp=dGLzVzz-zSkAW&_md5=239ef674acc9939fafe9043b5f3a0a84&focBudTerms=federalism%20or%20state%21%20right%20or%20commerce%20clause%20w/35%20institutional%20capital%20or%20political%20capital&focBudSel=all#n19) Other scholars reason from the same assumption. Daniel Conkle, for example, speaks of the "fragile legitimacy that attaches to Supreme Court pronouncements of constitutional law." [20](http://www.lexis.com/research/retrieve?_m=0effd92084fac48f67935d88a05d02d0&docnum=59&_fmtstr=FULL&_startdoc=51&wchp=dGLzVzz-zSkAW&_md5=239ef674acc9939fafe9043b5f3a0a84&focBudTerms=federalism%20or%20state%21%20right%20or%20commerce%20clause%20w/35%20institutional%20capital%20or%20political%20capital&focBudSel=all#n20) **I am convinced that these scholars are wrong and that the public image of the Court is not easily tarnished**, and preserving it need not be a preoccupation of the Court or constitutional theorists. **There is no evidence to support their assertion of fragile public legitimacy and almost 200 years of judicial review refute it**.

**Even if its not resilient, one decision don’t do shit**

**Hansford & Spriggs ’06**

(Thomas, Assistant Professor of Political Science at the University of South Carolina; James, Associate Professor of Political Science at the University of California, Davis, The Politics of Precedent on the U.S. Supreme Court, 25-26)

It is important for us to clarify the assumptions underlying the connection between legal vitality and legitimacy. First, we assume that the legal vitality of cited precedents affects the legitimacy of individual decisions. We do not assume that the Court’s use of precedent in any one opinion will affect the Court’s overall institutional legitimacy. Since **most people will not be familiar with the manner in which the Court uses precedent** in any given opinion, **it is unlikely that one decision will greatly affect the Court’s overall legitimacy**. For individuals who are aware of a particular decision, however, we suggest that there perception of its legitimacy is likely to differ based on the Court’s use of precedent in it.