**\*\*\*1AC Coast\*\*\***

**1AC Habeas**

**Contention one is Habeas:**

**Al Maqaleh was the end of the line for the great writ**

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For all the reasons he identifies, I think [Ben is quite right](http://www.lawfareblog.com/2012/10/comments-on-maqaleh-and-hamidullah/) that these rulings represent “the end of the line for the possibility of Bagram habeas jurisdiction.” At the same time (and, I suspect, contra Ben), **Judge Bates’s application of the D.C. Circuit’s decision in Al-Maqaleh**nicely (and helpfully) illuminates what to me are the three interrelated (and fundamental) flaws underlying the Court of Appeals’ reasoning–and the three reasons why, inasmuch as **these rulings are “the end of the line” for habeas at Bagram (and perhaps anywhere else outside the U**nited **S**tates **besides Guantanamo), they shouldn’t be**.

Flaw #1: Boumediene‘s Factors Should Not be Applied Formalistically

The first thing that jumps out from Judge Bates’ opinions in Al-Maqaleh II is his obeisance to the “three-factor test” that Boumediene purportedly articulated to assess whether the Suspension Clause should apply to the extraterritorial detention of non-citizens, i.e.:

(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner’s entitlement to the writ.

Critically, Justice Kennedy introduced these three factors (which he divined from the Court’s prior decisions) by emphasizing that “at least three factors are relevant in determining the reach of the Suspension Clause.” (emphasis added).  Nowhere did he suggest that these factors are either exclusive or dispositive, and Justice Kennedy was elsewhere at pains to emphasize that “the cases before us lack any precise historical parallel,” and that formal tests for jurisdiction, such as the de jure sovereignty-based theory advanced by the government, “raise[] troubling separation-of-powers concerns as well.” Whatever else one can say about Part IV of Justice Kennedy’s opinion for the Boumediene Court, I’m hard-pressed to see in it a demand that lower courts hew formally to the three relevant–but non-conclusive–factors going to the applicability vel non of the Suspension Clause.

Flaw #2: The “**Vast Differences” Between Guantanamo and Bagram**

**The reason why formalistic application of the three Boumediene factors denudes Boumediene of much of its force is because it fails to appreciate the extent to which functional considerations thoroughly influenced** Justice **Kennedy’s analysis** and application of those factors. For example, consider **the second factor, i.e., “the nature of the sites where apprehension and then detention took place**.” In applying this factor in Boumediene, Justice Kennedy wrote as follows:

[T]he detainees here are similarly situated to the Eisentrager petitioners in that the sites of their apprehension and detention are technically outside the sovereign territory of the United States. As noted earlier, this is a factor that weighs against finding they have rights under the Suspension Clause. But there are critical differences between Landsberg Prison, circa 1950, and the United States Naval Station at Guantanamo Bay in 2008. Unlike its present control over the naval station, the United States’ control over the prison in Germany was neither absolute nor indefinite. . . . The United States was therefore answerable to its Allies for all activities occurring there. The Allies had not planned a long-term occupation of Germany, nor did they intend to displace all German institutions even during the period of occupation.

As Judge Bates rightly summarizes in Al-Maqaleh II, “In this case, **the D.C. Circuit placed great weight on the fact that the United States’s control over the base at Bagram Airfield was less absolute than its control over Guantanamo Bay.” Because the Afghan government had more of an interest (and more directly participated) in the detentions at Bagram, the D.C. Circuit held that Boumediene could be distinguished**.

The problem with **this reasoning** is that it **elides the critical distinction between Afghanistan’s involvement in the detentions of Afghan citizens at Bagram, and its apparent lack of involvement in (if not outright opposition to) the detentions of non-Afghan citizen**s picked up outside Afghanistan (such as the petitioners in Al-Maqaleh II) there. Indeed, the petitioners made this very point in their [supplemental briefing](http://www.lawfareblog.com/wp-content/uploads/2012/09/Bakri_-RK-decl_-092412.pdf) in Al-Maqaleh II, along with the related argument that such an understanding is only further reinforced by the fact that the U.S. government has transferred control over countless Afghan detainees to the government of Afghanistan, without transferring such control over non-Afghan detainees. To this, Judge Bates replied simply that “the capacity the Afghan government is building to house and prosecute Afghan detainees may make it more likely that non-Afghan detainees can eventually be transferred to the Afghan government, if not to other countries.”

Even if that logic follows (and I don’t think it does), it’s beside the point. Functionally, **the driving principle behind the second factor in Boumediene is whether habeas is necessary to serve as a check on U.S. government decisionmaking, or whether the meaningful involvement and participation of foreign sovereigns necessarily serves the same purpose. To the extent that the United States is simply not “answerable” to the government of Afghanistan for the detentions of non-Afghans at Bagram (and the related extent to which the government of Afghanistan has no incentive to play such a role for non-Afghans captured outside of Afghanistan), the second Boumediene factor should militate in favor of habeas, not against it.**

Flaw #3: The Centrality of Practical Obstacles (of the Government’s Own Making)

Finally, and **driving home the** structural significance of the flawed formalistic approach, Judge **Bates revisited the petitioners’ claim that they were being held at Bagram solely to avoid the habeas jurisdiction of the federal courts. As Judge Bates wrote, “Even if this is true, it is unclear whether such purposeful evasion of habeas jurisdiction would affect the jurisdictional analysis. Executive manipulation is not an explicit factor in three-part Boumediene test**.” To be fair, Judge Bates nevertheless allowed for the possibility that such manipulation might be relevant, only to conclude that “the Court simply sees no way to accept petitioners’ argument under the framework laid out by the D.C. Circuit.”

That **the “framework laid out by the D.C. Circuit” requires the detainee to prove “potential executive manipulation** of habeas jurisdiction” again misses Boumediene‘s point. Yes, Justice Kennedy expressly suggested that, “if the detention facility were located in an active theater of war, arguments that issuing the writ would be ‘impracticable or anomalous’ would have more weight.” But he also emphasized that “The test for determining the scope of [the Suspension Clause] must not be subject to manipulation by those whose power it is designed to restrain.” Kennedy’s point, in short, was not that a detainee should have to prove executive manipulation of habeas jurisdiction; it was that the government should not be allowed–intentionally or not–to manipulate the factors that courts should apply in determining the existence of jurisdiction. Although the same certainly could not be said for individuals picked up in Afghanistan (and Afghan citizens arrested elsewhere), a conscious decision by the U.S. government to move non-Afghan detainees captured outside Afghanistan into a zone of active combat operations certainly at least appears to open the door to the very manipulation Justice Kennedy expressly decried in Boumediene. At the very least, one would think proper respect for Boumediene would make this a much closer call…

**Absent extraterritorial habeas rule of law and legitimacy will be eviscerated**

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(Dawinder, SHADOWING THE FLAG: EXTENDING THE HABEAS WRIT BEYOND GUANTÁNAMO, scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1597&context=wmborj)

**There is nothing in these foundational principles to indicate that the responsibility of the judiciary to check the Executive and thereby safeguard individual liberty is restricted by geography**. Nor is there any sense from them that the potential for the Executive to detain someone unlawfully—which provides the factual predicate necessitating the judiciary’s involvement—does not exist outside the territorial bounds of the United States. And **there is nothing that may be reasonably extracted from them that suggests that the Executive may act anywhere in the world, but that the supervisory need for the courts is confined to the borders of the United States. The remainder— or difference between the unbounded reach of executive power and the enclosed power of the courts—offers ample room for executive conduct to devolve into tyranny because the courts are unable to measure such conduct against the rule of law**. To fulfill the full promise of the writ of habeas corpus and identify arbitrary and wrongful imprisonments**, the judicial writ must shadow executive conduct. If the Executive summons the powers of its office and the government that it heads to imprison an individual in any part of the world, it subjects the detainee to the authority of the United States, including the oversight of the judicial branch of its federal government**. In other words, **the courts are awakened or agitated, by necessity, by the Executive to sanitize governmental conduct by way of law**. The proposition is quite simple: **where the Executive may act, so the courts may follow—otherwise, we condone a situation, intolerable to the Framers, in which Law is King inside the four corners of the U**nited **S**tates, **but where the American King is Law outside of it.** This understanding of the scope of the habeas writ is supported not only by the historical purposes of the writ and the constitutional tripartite checking scheme, but also by several ancillary arguments The first points to the common law. Even before the formation of an independent United States, the writ, which the American legal system imported from the AngloSaxon tradition, ran extraterritorially. As Sir William Blackstone explained with respect to the writ, “the king is at all times entitled to have an account, why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted.”159 Moreover, at common law “[e]ven those designated enemy aliens,” like the petitioners in al Maqaleh, “retained habeas corpus rights to challenge their enemy designation.”160 The second is a textual argument that the Suspension Clause—which “protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account”161 and, unless formally suspended, enables the judiciary to serve “as an important judicial check on the Executive’s discretion in the realm of detentions”162—is not restricted by territory by the Constitution’s own terms. Because “[t]he Suspension Clause contains no territorial limitation with respect to its scope,” argues Richard A. Epstein, “it’s a perfectly natural reading to say wherever the United States exerts power, there habeas corpus will run.”163 The third relates to the transcendence already of territorial barriers concerning the issuance of the writ. While the Supreme Court in Ahrens required district courts to issue the statutory habeas writ only if the petitioner was within its territorial jurisdiction,164 the Court subsequently departed from this restrictive view of jurisdiction to hold that habeas “petitioners’ absence from the district does not present a jurisdictional obstacle to the consideration of the claim.”165 The Court rejected the contention that a petitioner’s “presence within the territorial confines of the district is an invariable prerequisite” to the statutory habeas writ.166 The fourth identifies the proper focus of the writ. The focal point of the habeas petition is not the petitioner himself, but rather the government official holding him, namely the custodian. “The writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody,” the Court has explained.167 Accordingly, “[s]o long as the custodian can be reached by service of process, the court can issue a writ . . . even if the prisoner himself is confined outside the court’s territorial jurisdiction.”168 The emphasis on the jailer, rather than the petitioner, for purposes of habeas jurisdiction is in lockstep with the view, advanced thus far in this Article, that because the habeas writ is a means for the courts to check the Executive, and, specifically, to ensure that it detains an individual only in conformance with the law, the writ has the potential to run wherever the Executive is detaining an individual. Indeed, there can be little doubt that the custodian is but an agent of or proxy for the Executive itself169—the Executive makes the legal decision; the jailer holds the key.170 The fifth argument recognizes the trend of an increasingly broadening interpretation of habeas jurisdiction. “[T]he general spirit and genius of our institutions has tended to the widening and enlarging of the habeas corpus jurisdiction of the courts and judges of the United States,” according to the Court.171 An expansive view of the courts’ jurisdiction to hear habeas petitions, where geography and sovereignty are without preclusive effect on such jurisdiction, is consistent with this observation. The sixth enumerates an essential characteristic of the writ: its flexibility. The writ is an “inherently elastic concept”172 disentangled from formal restrictions.173 The seventh takes notice of the globalized world in which we live and within which the Executive may detain an individual. A rule by which habeas can follow the Executive wherever it acts comports with the realities of an increasingly globalized and technologically advanced world in which the Executive can detain—and has detained, as the post–9/11 campaigns demonstrate—individuals thousands of miles from the shores of the United States. **Nations will act outside of their territorial borders with greater regularity, frequency, and ease as the world becomes “smaller”—**confining judicial review to borders that are readily pierced leaves the rule of law in an outdated and stationary state while the Executive frolics both inside and outside his land and whisks away detainees at his whim. The relevance of the globalized world, marked by technology, is particularly salient today after 9/11. It should render less persuasive any suggestion that habeas be understood only as it was in 1789 or in Eisentrager, when technology and resources did not allow for the transnational, global activities that are commonplace today and thus call for evolving and more practically applicable meanings of habeas.177 “It must never be forgotten,” the Supreme Court wrote in 1939, “that the writ of habeas corpus is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired.”178 In short, geography and sovereignty should not impair the otherwise critical and constitutionally vital purposes of the habeas writ. C. Limiting Principles This framework contemplates a “worldwide writ,” one that is not necessarily held back by territorial borders or considerations of formal sovereignty. The concept of a “worldwide writ” was worrisome to the panel in al Maqaleh. In Judge David S. Tatel’s exchange with the petitioners’ counsel, for example, he remarked that, “you can extend habeas to Bagram, [but] I don’t see any limiting principle in your view.”179 Once you have extended it in this fashion, he continued, “you’ve extended it to every military base . . . in the world.”180 In its eventual opinion, the D.C. Circuit admitted that they were uncomfortable with the prospect of conferring habeas on “noncitizens held in any United States military facility in the world, and perhaps to an undeterminable number of other United States–leased facilities as well.”181 The court complained that petitioners’ counsel failed to soothe the court’s anxiety by providing any meaningful “limiting principle that would distinguish Bagram from any other military installation.” **My proposed framework posits that the habeas writ is assumed to run wherever the United States exerts power, to the extent that it restrains the liberty of another. Therefore, at least theoretically, under this framework, the writ may reach all military bases**. Given the possible number of applicable American facilities and the possibility that the writ has the potential to cover the globe, one can appreciate the concerns expressed by Judge Tatel and his brethren. But meditating on the purposes of the writ and the potential for individuals to be detained unlawfully throughout the world, among other ancillary considerations, should soften those concerns. This is not to say that all aliens apprehended or detained by the United States are automatically entitled to the writ. The assumption that they are so entitled may not be appropriate in light of the specific circumstances of a particular case. To wit: a detainee may not be entitled to the writ where the detainee has already received adequate process, such that the risk of erroneous detention is sufficiently mitigated. The statutory writ, for example, has been said to be open only to those prisoners to whom “adequate relief cannot be obtained in any other form or from any other court.” If a detainee has received an objective finding by a neutral body that the detention decision is supported by the facts and applicable law, and if the detainee has had a meaningful opportunity to contest the factual predicate for the status determination and the resulting legal conclusions, it generally may be fairly said that adequate process exists. To be sure, adequate process need not be monolithic or robust in all circumstances. Battlefield exigencies, in particular, may call for curtailed process. Apprehending purported enemies is “[a]n important incident to the conduct of war”186 and a reality of modern warfare. Accordingly, as noted in Hamdi v. Rumsfeld, when a detainee is captured on the battlefield, the subsequent proceedings “may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict.”187 In other words, battlefield captures may allow for only minimal process.188 It should be noted, however, that the limited procedures tied to battlefield exigencies may no longer be sufficient as time marches on; military and Executive claims to battlefield exigencies lose their force as those exigencies either pass with time or as time bestows on the military and the Executive an expanding and workable window within which to manage and prepare for more demanding process.189 This enhanced opportunity may give rise to traditional circumstances and thereby standard process. Process aside, but relatedly, the recognition of habeas rights may not be proper where practical obstacles do not permit the basic administration of habeas proceedings. Not all practical obstacles should have a preclusive effect on habeas proceedings. In this respect, the practical problems identified in Eisentrager may be divided into three categories. First, whether the military arm of the government would be drawn away from its critical functions in order to participate in the legal process, whether a safe space exists for the process, and whether the application of habeas to a particular petition would engender conflict with the host country are among the practical considerations that courts generally may find relevant in determining whether a habeas action is appropriate. Second, the Eisentrager Court was troubled by the other practical issues were habeas to run, including “allocation of shipping space, guarding personnel, billeting and rations,” and “transportation for whatever witnesses the prisoners desired to call as well as transportation for those necessary to defend legality of the sentence.”193 These burdens—however seemingly costly and onerous at the time—should have less resonance in today’s world, in light of the considerable resources available to the United States and the technological achievements that enable individuals and materials to be transferred from one end of the globe to the other with relative ease and swiftness. A third category of practical concerns is based on notions that our enemies and others will gain morally or optically from habeas actions. “Such trials,” it was said in Eisentrager, “would hamper the war effort and bring aid and comfort to the enemy. They would diminish the prestige of our commanders, not only with enemies but with wavering neutrals.” The resulting “conflict between judicial and military opinion,” the argument went, would be “highly comforting to enemies of the United States.” With due respect to the Eisentrager Court, statements relating to whether habeas proceedings would bring “comfort” to the enemy and others appear to be pure speculation; there does not seem to be any evidence to support such guesswork as to our enemies’ feelings. Moreover, to the extent that the United States **demonstrates fidelity to** **its first principles and** **an unflinching belief in the rule of law even during times of war**, a compelling argument can be made that **doing so enhances America’s “soft power” and furthers progress in the battle for hearts and minds**. In either case, deciding whether the judicial action of recognizing habeas rights may affect the foreign policy interests of the United States may be a political question beyond the purview of the courts. In assessing the weight of these practical barriers, the courts should be mindful of the overarching fact that the habeas writ is malleable and must adapt to given circumstances in order for its fundamental purposes to be carried out. “The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected,” the Court has noted. It is true that these limiting principles, or variations thereof, were suggested by the petitioners’ counsel to the D.C. Circuit in al Maqaleh. 199 The petitioners’ counsel’s proffers seemed to have at least some appeal to the panel,200 and the court ultimately was not persuaded that these limiting principles were sufficient to guard against the “worldwide writ” concerns that Judge Tatel and his colleagues had.201 Perhaps the panel felt it was unable to adopt the limiting principles without clear direction from the Supreme Court.202 If al Maqaleh is reviewed by the Supreme Court, or a similar case involving the extraterritorial reach of the writ “goes up” instead, the Justices will have the opportunity to consider and (hopefully) bless these limiting principles as to the scope of habeas rights. **This discussion yields the following standard: an individual detained by, and pursuant to the power of, the** United States **is assumed to possess the ability to challenge the legality of the detention by way of the writ of habeas corpus**, unless an individualized determination is made that either adequate process within which to make this challenge, commensurate with the circumstances, exists, or practical difficulties preclude the administration of necessary proceedings. The writ may be issued by a district court with jurisdiction over the custodian who may produce the petitioner.

**The judiciary must clarify a meaningful right to habeas to preserve 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

**Only a court ruling solves cooperation**

**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 globalizatio**n. 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.**

**Legitimacy solves global peace — the alternative is great power transition wars**

**Kromah 9** [February 2009, Masters in IR, Lamii Moivi Kromah at the Department of International Relations

University of the Witwatersrand, “The Institutional Nature of U.S. Hegemony: Post 9/11”, http://wiredspace.wits.ac.za/bitstream/handle/10539/7301/MARR%2009.pdf?sequence=1]

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

**Only judicial review affirms habeas**

**Sidhu 11**, JD George Washington

(Dawinder, SHADOWING THE FLAG: EXTENDING THE HABEAS WRIT BEYOND GUANTÁNAMO, scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1597&context=wmborj)

**An appreciation for the writ, the separation of powers scheme,** and relevant Supreme Court pronouncements in this field **command that the rule of law** initially **attend any executive action that restrains individual liberty.** It so attends because the executive action may be made arbitrarily or in error. It so attends because the Executive may seek to oppress. **Any distance between the rule of law and executive action permits a misjudgment to lapse into a miscarriage of justice, and allows singular moments of oppression to degenerate into an** **unabated contagion of tyranny. To avert the specter of governmental abuse, courts must assume—**according to the Eisenstrager Court— **that the rule of law attaches to the executive decision to detain another, territory notwithstanding.** This assumption may not be appropriate in all circumstances. Courts must be mindful of special considerations that inhere in the wartime context. The law adjusts in times of war—it may speak with a “different voice,” but it is not silent. Battlefield exigencies may, for example, call for diminished, though legally sufficient process in assessing whether an individual has been properly detained. In addition, practical diffculties may preclude the administration of habeas proceedings. In other words, the assumption that an enemy prisoner has habeas rights may be rebutted by the presence of adequate substitute process or by realities on the ground. **The D.C. Circuit in al Maqaleh was unfaithful to the established and my proposed understanding of the scope of the habeas writ.** Worse than the legal errors is the practical consequence of the ruling—that is, **the D.C. Circuit placed Bagram** **beyond judicial review and consequently created** **room between the rule of law and the Executive for abuse to fester**, **the very abuse that the Framers feared and the very room that the writ was designed to occupy.**

**Strong judicial model prevents Russian loose nukes**

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

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

**Extinction**

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

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

\*GREEN

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

**1AC Afghanistan**

**Contention Two is Afghanistan:**

**Detention at Bagram will shatter the alliance and cause U.S. kickout – only a credible right to habeas solves**

**Rogers 11/14**, Christopher Rogers is a program officer for the Regional Policy Initiative on Afghanistan & Pakistan at Open Society Foundations. He focuses on conflict-related detentions and civilian protection, including research and reports on U.S. detentions at Bagram, Afghan national security detentions, and drone strikes in Pakistan. Prior to joining the Open Society Foundations, Rogers was the research fellow in Pakistan for the Campaign for Innocent Victims in Conflict (CIVIC), investigating civilian casualties from military operations, terrorism, and drone strikes and advocating for victim assistance programs. In law school he worked with UNHCR in Jordan on Iraqi refugee protection and the Palestinian Center for Human Rights in Gaza. He received a JD from Harvard Law School, MPhil from Oxford University, and BA from the University of Pennsylvania.

Afghanistan Post 2014: Closing Bagram, <http://justsecurity.org/2013/11/14/guest-post-afghanistan-post-2014-closing-bagram/>

**With the U.S. combat role in Afghanistan coming to an end**, and the Bilateral Security Agreement now [under review](http://www.theguardian.com/world/2013/oct/19/afghanistan-loya-jirga-us-troops-2014), **officials are under pressure to do something many observers may believe was already done: end U.S. detentions at the Detention Facility in Parwan** (DFIP), or Bagram. **Though the** U.S. **government**[**recently handed over**](http://www.bbc.co.uk/news/world-asia-21922047)**3,000 Afghan detainees, more than 60 third country nationals, or TCNs, remain in U.S. custod**y. U.S. officials have stated that resolving their cases is their goal, and that December 2014 is the deadline. But right now the United States will likely fail to do so, possibly leaving detainees in indefinite limbo, and **raising serious legal and political concerns for the U.S. presence in Afghanistan post-2014**.

Over the years, **many** have **criticized** U.S. **detentions as**[**inconsistent with applicable i**nternational **h**uman **r**ights **l**aw](http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2013/06/HRC23-Item4GD-Guantanamo.pdf)**and for failing to provide the**[**requisite level of due process**](http://www.humanrightsfirst.org/wp-content/uploads/pdf/Detained-Denied-in-Afghanistan.pdf)**—all of which will take on new urgency as the U**nited **S**tates **brings an end to** its **combat mission in 2014. So too will concern over** the **legality of** U.S. **detentions under Afghan law**, which has thus far received too little attention. **Such differences reflect deeper disagreement over post-2014 U.S. engagement**.

**Just last week, U.S. officials**[**criticized**](http://www.washingtonpost.com/world/national-security/afghan-review-panel-to-release-80-percent-of-high-security-detainees-pentagon-says/2013/11/08/eea5b498-48c8-11e3-bf0c-cebf37c6f484_story.html)**the Afghan government’s recommendation to release many transferred detainees because of lack of evidence to prosecute or continue their detention under Afghan law**. As outlined in a [report](http://www.opensocietyfoundations.org/reports/remaking-bagram-creation-afghan-internment-regime-and-divide-over-us-detention-power) last year by Open Society Foundations, an Afghan internment regime modeled on the U.S. system was initially proposed as part of the DFIP transfer, but appeared to violate several Afghan constitutional guarantees. The **dispute over the legality of the detention regime under Afghan law eventually led to**[**a suspension of the Bagram handover**](http://bigstory.ap.org/article/us-hands-over-bagram-prison-afghans)**and the Afghan government deciding against formally adopting such a regime**.

In consenting to U.S. detentions at the DFIP, the Afghan government has already been in violation of its own legal obligations under Afghan domestic law and constitution as well international human rights law. **With the U**nited **St**ates **bringing an end to its combat operations, and an Afghan presidential election on the horizon, Afghan leaders will likely view ongoing U.S. detentions as legally untenable and a political liability, which could jeopardize U.S.-Afghan relations at a critical time**.

**The BSA is on the brink --- cancellation causes Taliban surge, economic collapse, warlordism, and civil war**

**Saboory 11/5**, Hamid M. Saboory is a former employee of the Afghan National Security Council. Currently he teaches International Law at Kardan University. Mr. Saboory is a founding member of the Afghanistan Analysis and Awareness (A3), a Kabul-based think tank, <http://www.huffingtonpost.com/hamid-m-saboory/karzai-bilateral-security-agreement_b_4220151.html>

Additionally, **it has immense psychological impact on the public mindset particularly on economic activities**. Local private **investors are living in a limbo thinking that security condition may deteriorate** in the absence of international forces. **A recent Word Bank report predicts a**[**10 percent decrease**](http://www.reuters.com/article/2013/10/11/us-afghanistan-economy-idUSBRE99A0X120131011)**in economic growth** (Economic growth is expected to reach 3.1 percent this year and 3.5 percent in 2014, down sharply from 14.4 percent in 2012) in 2013 **because of waning security** conditions and withdrawal of international forces. **There are already signs of an economic downturn. This year, Afghan property markets are down, people are losing jobs and local investors are holding to their cash since all eyes are fixed on the status of the BSA**. It is seen as insurance for all kind of investments both political and economic. Interestingly, Afghan businessmen are not worried that Taliban may return, but rather scared that **if international forces fully withdraw, Afghan warlords would strip them off their properties and cash.**

**Sealing BSA is extensively linked to President Karzai's post 2014 legacy. BSA is widely perceived as the single reason preventing Afghanistan from relapse into** yet another **civil war**, and is **the physiological guarantor of peaceful political transition** in 2014 through democratic processes, elections. Although many notorious Afghan warlords are potential Presidential or Vice-President hopefuls, however, they can go rough and undermine the legitimacy and outcomes of the presidential elections in the absence of international forces, "President **Karzai can't allow another chaotic civil war** on his watch, and he is, undoubtedly, convinced that **he needs full support of international forces to make things rights for Afghanistan next year,"** said a close member of President Karzia's inner circle with the condition of anonymity. Qayum Karzai -- a potential presidential candidate and President Karzai's brother -- in an interview with a local TV channel [explicitly stressed on the importance of BSA](http://tolonews.com/en/afghanistan/12448-qayoum-karzai-stresses-kabul-washington-security-relationship), its economic benefits and importance to combat terrorism and bringing security for Afghanistan and the region.

**That causes multiple nuclear wars**

**Cronin 13** (Audrey Kurth Cronin is Professor of Public Policy at George Mason University and author of How Terrorism Ends and Great Power Politics and the Struggle over Austria. Thinking Long on Afghanistan: Could it be Neutralized? Center for Strategic and International Studies The Washington Quarterly • 36:1 pp. 55\_72 <http://dx.doi.org/10.1080/0163660X.2013.751650>)

**With ISAF withdrawal inevitable, a sea change is already underway: the question is whether the United States will be ahead of the curve or behind it.** Under current circumstances, key actions within Afghanistan by any one state are perceived to have a deleterious effect on the interests of other competing states, so the only feasible solution is to discourage all of them from interfering in a neutralized state. **As the U**nited **S**tates **draws down over the next two years, yielding to regional anarchy would be irresponsible. Allowing neighbors to rely on bilateral measures, jockey for relative position**, and pursue conflicting national interests **without regard for dangerous regional dynamics will result in a repeat of the pattern that has played out in Afghanistan for the past thirty years except this time the outcome could be not just terrorism but** **nuclear war**.

**Independently, Taliban take-over causes nuclear war**

**Downer 10**—Alexander Downer, Former Australian Foreign Affairs Minister, 7/19/10 (Advertiser "We can't leave yet", lexis)  
Afghanistan is now the longest war in which the United States has participated. I find that a quite chilling statistic. Many more may have died in World War II, the Vietnam War, the Korean War and in earlier conflicts, but none has gone on as long as this. What is more, there seems to be no end in sight and this makes people wonder whether the sacrifice of our and our allies' soldiers in Afghanistan is worthwhile. When making an assessment of war, we are always struck by the obvious: War is ugly and our people are dying, therefore we must stop fighting. But remember, **the quickest way to end a war is to lose it**. So before leaping to the conclusion that surrendering to the Taliban is the least bad option, think through the consequences of defeat. Think what would happen to Afghanistan, to its neighbourhood and well beyond. First, **the Taliban would seize control** of most of Afghanistan fairly **quickly. I doubt very much that** the government of President Hamid **Karzai would last long**. The President himself has been a disappointment. He is relatively weak and he has appointed many poor-quality governors and other leaders throughout the country. **This** hasn't helped his cause. The relatively benign Karzai regime would be replaced by militant extremists. SECOND, **the Taliban would once more allow Afghanistan to become a base for international Islamic extremist operations**. It would certainly become both an administrative and training base for al-Qaida but it would become more than that: **It would become the global focal point for Islamic extremism**. Islamic **fundamentalists would, in effect, have their own sovereign state from which they could launch operations anywhere in the world. Third, the collapse of the moderate Karzai administration in Afghanistan and its replacement by the Taliban would be a serious threat to the stability of Pakistan. Remember, the Taliban was established by the Pakistani intelligence services during the time of the Soviet occupation of Afghanistan**. There are still very close links between the Taliban and some elements of the Pakistani intelligence agency, ISI. It is possible that the Taliban and other **Islamic extremists could seize control of the government of Pakistan which, you will recall, has nuclear weapons**. It is not certain this would happen but it could. If it did, then **tensions between Pakistan and India would rise overnight, perhaps dangerously so. For the Indians, a combination of Islamic extremists and nuclear weapons on their border would be a potent mix**. Fourth, this would constitute a massive and unexpected victory for Islamic extremists. For all the pain we have been through over the past nine years since 9/11, there is no doubt that Islamic extremism is very much on the retreat outside Afghanistan. There has been no terrorist attack on American soil since then - although there have been attempts - nor has there been in this country. Al-Qaida networks have been broken up throughout the Western world and in the Middle East and South-East Asia. In Europe, governments are also having much greater success now in dealing with terrorism. A Taliban victory and takeover in Afghanistan would reverse all this. We would be back where we were in 2001. And if Pakistan were taken over by Islamic extremists, we would be a good deal worse off. Globally, Islamic extremism would be energised, its morale revitalised and its activities intensified. All this explains why it is not possible to abandon the struggle against the Taliban in Afghanistan. The war itself is bad, there is no doubt about that. No victory appears to be in sight any time soon, that is true. But the alternative is a great deal worse. The challenge in Afghanistan is not to try to control the country ourselves but to strengthen the capacity of the government in Kabul to control it. This means emphasising training and recruitment in the army, effective aid programs to give Afghanistan a reasonable economic base and encouraging President Karzai to appoint better-quality public administrators.

**1AC Rendition**

**Contention Three is Rendition:**

**First, it fails and backfires**

**Patel 13**, Khadija Patel is a staff writer at The Maverick which is South Africa’s fastest growing newspaper, 2/8/13, ‘Extraordinary Renditions’, aka How To Flout International Law With Impunity, <http://www.dailymaverick.co.za/article/2013-02-08-extraordinary-renditions-aka-how-to-flout-international-law-with-impunity/#.UnfpLfmkqvQ>

Known as “**extraordinary rendition**,” the practice **entails taking detainees to and from US custody without a legal process and often involves handing them over to countries that practice torture. The Open Society Foundation found 136 people had gone through the process of “extraordinary rendition**” and 54 countries were complicit in it, South Africa among them.

“However, to date, the **full** scale and **scope** of foreign government participation—as well as the number of victims—**remains unknown, largely because of the extreme secrecy maintained by the U**nited **S**tates and its partner governments,” Open Society Foundation investigator Amrit Singh wrote in the report.

The official use of rendition to combat terrorism began in June 1995. Former US President Bill Clinton responded to the 1993 terrorist bombing of the World Trade Centre by signing Presidential Decision Directive 39, which authorised rendition for the capture terrorists.

From August 1995 to September 2001, eight suspected terrorists were rendered to American custody. Among the eight were three men wanted for the 1998 bombing of the American Embassies in Kenya and Tanzania, where 224 people were killed and 4,500 were injured. One of the three Embassy bombers was captured here in South Africa; the other two were captured from undisclosed locations. All of them ended up in New York City, where they were held until they stood trial.

The war on terror, however, employs “extraordinary rendition”.

Theresa Blackledge, writing in [Global Review](http://sirgo.org/sites/default/files/GlobalReview_VolumeOne.pdf#page=7) in 2011, explains that previously, rendition was used to transfer an individual from one jurisdiction to another for the purpose of adjudicating criminal offences. But since 9/11, extraordinary rendition has been used primarily by the United States to capture individuals in one jurisdiction and render them to a third jurisdiction. Extraordinary rendition has been employed by the US to gain custody of individuals when there is no legal mechanism available, and for the purpose of detaining the individual for intelligence gathering purposes.

“Typically,” Blackledge says, “the U.S. renders the individual to a third party nation that is well known for committing human rights abuses, such as Jordan, Syria or Egypt. The third party nation accepts custody of the detainee and employs ‘enhanced interrogation’ methods to obtain intelligence.”

Bob Baer, an ex-undercover agent who worked for the CIA in the Middle East, put it like this: “If you want a serious interrogation, you send a prisoner to Jordan. If you want them to be tortured you send them to Syria. If you want someone to disappear – never to see them again – you send them to Egypt.”

More than one commentator has remarked at the irony of the US now demanding Syrian Bashar Al-Assad step down, when just a few years ago his inclination towards human rights abuses was actually exploited by US officials. Syria tortured terror suspects on behalf of the United States. The most famous case involves Maher Arar, a Canadian citizen snatched in 2002 by the U.S. at John F. Kennedy International Airport, before the CIA sent him to Syria under the mistaken impression he was a terrorist. In Syrian custody, Arar was “imprisoned for more than ten months in a tiny grave-like cell, beaten with cables, and threatened with electric shocks by the Syrian government,” Singh writes.

After ten months in prison, the Canadian government intervened on behalf of Arar, and he was finally freed without being charged with any crimes. In September 2006, a Canadian investigation cleared Arar of all charges. Canada’s Prime Minister apologised for the acts committed by American officials and ordered Arar be paid $9.7 million in restitution.

The Indian author Arundhati Roy, in her book The Ordinary Person’s Guide to Empire, says about this canny exploitation of human rights violators:

“[Former US] Attorney General John Ashcroft has declared that US freedoms are ‘not the grant of any government or document, but … our endowment from God’. So, basically, we’re confronted with a country armed with a mandate from heaven. Perhaps this explains **why the U.S. government  refuses to judge itself by the same moral standards by which it judges others.”**

Singh says,” “**The U.S. government violated domestic and international law, thereby** **diminishing its moral standing and eroding support for its counterterrorism efforts** **worldwide as these abuses came to light.”**

Supporters of extraordinary rendition believe that it has been an effective ploy in efforts to fight terrorism. They point out that the US has successfully repelled a terror attack on American soil since 9/11. But those opposed to the programme point out that the technique of “**enhanced interrogation” has** **had dubious results**.

They point out the case of Ibn al Sheikh Al Libi, an Al Qaeda leader responsible for running terrorist training camps in Afghanistan. He was captured on the Afghan and Pakistan border in 2001 and immediately rendered to Cairo for a dose of enhanced interrogation. Initially, Al Libi did not give the interrogators the information they sought, so the pressure was “enhanced” until finally Al Libi established the link between Al Qaeda and Saddam Hussein he believed the interrogators wanted. This link was used by former U.S. President George W. Bush to justify the 2003 war against Iraq. His Secretary of State Colin Powell even included that snippet of intelligence in his report when he addressed the United Nations in February 2003.

We all know how that turned out.

Al Libi is said to have later recanted his statements, claiming the false intelligence was extracted under torture and it was provided to halt the interrogations.

High-ranking officials from the Bush administration have escaped responsibility for authorising human rights violations associated with secret detention and extraordinary rendition, and “the impunity that they have enjoyed to date remains a matter of significant concern,” Singh says in the report.

But Open Society notes as well that the US is not the only government in the world that must reveal the full extent of its complicity in extraordinary renditions. The report says, “[R]esponsibility for these violations does not end with the United States. Secret detention and extraordinary rendition operations, designed to be conducted outside the United States under cover of secrecy, could not have been implemented without the active participation of foreign governments. These governments too must be held accountable.”

One such government is our own.

Of the 136 cases of extraordinary renditions, two involve South Africa. The report notes that South Africa was implicated in the March 2003 extraordinary rendition of Saud Memon, a Pakistani national and suspect in the murder of Wall Street Journal journalist Daniel Pearl, who was beheaded on camera.

“In light of the secrecy associated with the abduction and the lack of any record in South Africa of his deportation or extradition, it appears that South Africa gave US intelligence agencies carte blanche to pursue his abduction and rendition from South Africa,” the report said.

“Investigators at Human Rights Watch believed he was held in CIA custody and then transferred to Pakistani intelligence agents.

“He was ultimately released in April 2007 in Pakistan in poor physical health and died within several weeks of his release.”

The other case documented in the report is the well-known case of Khalid Rashid, another Pakistani national. While it is still suspected that Rashid may have been handed over to U.S. agents, the report notes that it is not clear that the CIA was involved in this case. After a high-profile court case, in 2005, the South African Department of Home Affairs admitted to transferring Rashid to Pakistani authorities who travelled to South Africa to receive him.

“The South African minister of home affairs claimed that Rashid was arrested and deported because he resided in the country illegally.

“Rashid was flown from South Africa in a Gulfstream II owned by AVE, a company registered in Kyrgyzstan; the charter was arranged by the government of Pakistan.”

The report notes that, in 2009, South Africa’s Supreme Court of Appeal found that Rashid’s detention at the Cullinan police station without a warrant, his removal from that facility without a warrant and his deportation to Pakistan were unlawful.

Rashid was said to have been released in December 2007.

The Open Society report explains unequivocally that such practices of extraordinary rendition pervert the tenets of international law. “There can be no doubt that in today’s world, intergovernmental cooperation is necessary for combating terrorism. But such cooperation must be effected in a manner that is consistent with the rule of law,” the report says.

And yet in the cloud of secrecy around the extraordinary renditions programme and South Africa’s policy towards it, it is unknown how many other cases of extraordinary renditions occurred on South African soil. Indeed the extent of South Africa’s co-operation with this programme is entirely unknown.

What is clear from the Open Society report is that extraordinary renditions pose a serious threat to basic human rights: life, liberty, and the security of the person. And more worryingly, **the report is not** entirely **confident that the programme was halted by the Obama administration.**

**Although Obama issued an executive order** in 2009 **to halt** the **detention** of suspected terrorists without trial, **the order “did not apply to facilities used for short-term, transitory detention.” These short-term facilities are reported to still be flourishing in, among other places, Somalia. The Obama administration says it won’t transfer detainees to countries without a pledge from a host government not to torture them — but as Wired points out, Syria’s Assad made exactly that pledge to the U.S. before torturing Maher Arar**.

And as horrific as Arar’s experience was, he is perhaps lucky to have emerged from it alive and been compensated for his difficulties. Others have not been so lucky.

In December 2003, German citizen Khalid al Masri went on vacation to Macedonia and disappeared for five months. Al Masri was captured by CIA agents and rendered to a prison in Afghanistan where he claims he was interrogated, beaten, and placed in solitary confinement.

**The CIA’s capture of al Masri was a case of mistaken identity. The American Civil Liberties Union filed a lawsuit against the CIA and the Director of Central Intelligence George Tenet on behalf of al Masri. In October 2007, al Masri’s hopes for restitution were flouted when his case was refused by the US Supreme Court on the basis of protecting state secrets.**

**The practice of** outsourcing torture, meanwhile, continues – and few can be certain of its extent.

**Failure to apply the writ extraterritorially allows it – this erodes international law – only external court accountability solves**

**Satterthwaite 6**, Margaret Satterthwaite is Assistant Professor of Clinical Law at NYU School of Law and Faculty Director of the Center for Human Rights and Global Research, <http://jurist.law.pitt.edu/forumy/2006/03/rendered-meaningless-rule-of-law-in-us.php>

Since 9/11, the U.S. government has used the discourse and authorizing rules of the laws of war while simultaneously flouting the limiting and protective rules of that regime, labeling them “quaint” and inapplicable. At the same time, the Administration insists that human rights law is not applicable to this new “war,” arguing alternatively that the relevant norms do not apply to extraterritorial conduct, that there is no relevant implementing legislation requiring the U.S. to abide by its international obligations, and that human rights law does not apply in situations of armed conflict. As to those standards it does concede applicability – such as the prohibition on torture – the Administration has largely defined away the practice. The effect is to take U.S. actions in the “War on Terror” outside of both frameworks, **dealing a blow to** the **rule of law**. Among U.S. strategies **are practices aimed at avoiding the due process rules included both in the Geneva Conventions and in human rights treaties to which the U.S. is a party. Through extraordinary renditions and secret detentions, the U.S. attempts to avoid norms concerning due process by avoiding any process at all. Instead, it opts for procedures in which individuals are unilaterally and secretly determined to be a danger to the U.S.** On the basis of this determination, the U.S. sends individuals to be interrogated under torture by other governments, places them in secret detention, or ships them to Bagram air base, **where it presumably believes** U.S. **courts may not exercise jurisdiction**. In the process, **our government is rejecting not only the human rights norms against prolonged incommunicado detention, non-refoulement, and the prohibition on torture; it is also rejecting the framework of international justice that insists on accountability and the rule of law**. With the Council of Europe, the European Union and a variety of their Member States now focusing attention on these practices, the Administration may be heading into trouble. At the beginning of March, the Secretary-General of the Council of Europe, Terry Davis, reported publicly on the responses his office had received from 45 of the 46 States Parties to the European Convention on Human Rights concerning extraordinary rendition and secret detention. Under a mandatory procedure, the Council asked States to answer a short list of questions aimed not only at assessing each Member’s potential involvement in the practices, but also – more crucially – their procedures for ensuring that intelligence services stay within the bounds of human rights law. As the “war on terror” becomes the “long war,” this is one discussion that the legal community should focus on with diligence. “Extraordinary rendition” is not a legal term; it describes the perverted form of a practice already defined by its informality. Used by the U.S. since the Reagan era, rendition involves the extra-legal transfer of an individual from one state to another. While originally used to bring suspected terrorists into the United States so they could stand trial before federal courts, it morphed during the Clinton presidency into a procedure through which the U.S. would effect the transfer of suspects from one country to another where they were expected to stand trial. After 9/11, the process apparently took on a new purpose: intelligence-gathering. Instead of focusing on suspects with pending charges, the U.S. sent detainees to States known to “employ interrogation techniques that will enable them to obtain the requisite information,” as one alarmed F.B.I. agent explained. These were States that the U.S. had itself accused of widespread and systematic torture, including Syria, Egypt, and Morocco. Rendition to justice had become rendition to torture, or extraordinary rendition. Unlike extraordinary rendition, secret detention does not have clear predecessors in U.S. intelligence history. Instead, it appears to be a new practice for the U.S., in which individuals are held in “black sites” run entirely off the radar of normal civilian or military procedures. Such detentions are not monitored by the International Committee of the Red Cross, and they apparently involve transfers of prisoners from site to site to evade detection. Thus far, no one has argued that unacknowledged incommunicado detention by U.S. agents was authorized by presidents of a bygone era, or that the practice has long been an essential tool in the fight against terrorism. This is not surprising – clear norms exist to proscribe secret detentions under international human rights law. In the European, Inter-American, and United Nations human rights systems, a deep jurisprudence has developed against this practice – based on the lessons of Latin America’s “dirty war” – a practice more properly called enforced disappearance. Neither extraordinary rendition nor secret detention can be carried out without the cooperation of allied governments. This cooperation may range from involvement through intelligence-gathering or detainee handover to passive cooperation in the form of a blind eye turned to the real reason behind CIA flights or a no-questions-asked policy toward the use of military installations that could house detainees in secret. Suspicions that the latter two forms of acquiescence were being practiced by the Member States of the Council of Europe led to the Secretary-General’s inquiry initiated in November 2005. With a striking uniformity, States from across the many spectrums of the enlarged Europe appear to have inadequate safeguards for ensuring that intelligence services abide by the human rights obligations of their home States or the countries where they operate. As Terry Davis explained, “We need an appropriate regulatory framework providing for effective safeguards against abuse, democratic oversight by national Parliaments and judicial control in cases of alleged human rights violations.” Without such mechanisms, governments can answer, sometimes honestly, that they were not aware of the activities of their own agencies, or that they could not be held responsible for the actions of the U.S. CIA for missions conducted on their territory. **If core rights, such as due process and the right to be free from torture, are to have any real meaning, they must apply to the actions of those we have often thought of as operating “outside” the law**. Intelligence services have been asked to take on new and expanded roles in this untraditional “war”: they are detectives, investigating crimes and collecting evidence, and they are jailers, holding keys to a realm that we hear about only in shadowy bits, leaked information or the testimony of a former “disappeared” or rendered person like Khaled El-Masri or Maher Arar. **If democracies like ours do not exercise oversight and regulate these activities through enforceable laws, intelligence agencies will become judge and jury as well. At that point, the rule of law will have been rendered meaningless**.

**This destroys the entire framework for international justice**

**Malinowski 7**, Tom Malinowski, Washington Advocacy Director, Human Rights Watch, Washington, DC, Congressional Testimony, <http://www.gpo.gov/fdsys/pkg/CHRG-110shrg40379/html/CHRG-110shrg40379.htm>

Or, just for the sake of argument, imagine if the President of Russia declared that his country was engaged in a global war on terror, and that anyone with any connection to any group that supported separatist elements in places like Chechnya was a combatant in that war who could be detained or shot or poisoned wherever he was found, whether in Moscow or Berlin or just for the sake of argument, London. Clearly, we live in a world in which such things are possible. But do we want to live in a world where they are considered legitimate? That is **what is at stake** here. **Whether we will preserve the legal and moral rules we have struggled to develop over generations to limit what governments**--and here I mean not just the United States but all governments--**can** and can't **do** to people in their power. **And whether the United States will have the credibility to be the world's preeminent champion of those rules.** Now, it is important to note that nothing the administration has done can compare in its scale to what happens every day to victims of cruel dictatorship around the world. The United States is not Sudan or Cuba or North Korea. The United States is an open, democratic country with strong institutions--its Congress, its courts, its professional military leadership--which are striving to undo these mistakes and uphold the rule of law. But **the U**nited **S**tates **is** also **the most influential country on the face of the earth. The U**nited **S**tates **is a standard setter in everything it does, for better or for worse**. When Saddam Hussein tortures a thousand people in a dark dungeon, when Kim Jong Il throws a hundred thousand people in a prison camp without any judicial process, **no one says**: ``Hey, **if those dictators can do that, it's legitimate, and therefore so can we.'' But when the U**nited **S**tates **bends the rules to torture or to secretly and unlawfully detain even one person, when the country that is supposed to be the world's leading protector of human rights begins to do--and to justify--such things, then all bets are off. The entire framework upon which we depend to protect human rights--from the Geneva Conventions and treaties against torture--begins to fall apart**.

**Reversing Al Maqaleh solves – self-restraint isn’t trusted**

**Ghosh 12**, JD at Stanford Law, Boumediene Applied Badly: The Extraterritorial Constitution after Al Maqaleh v. Gates, <http://www.stanfordlawreview.org/sites/default/files/Ghosh-64-Stan-L-Rev-507.pdf>

Although Boumediene contemplated placing greater weight on the practical arguments against habeas review in active theaters of war, it also emphasized avoiding bright-line rules that could invite executive manipulation. **The Supreme Court noted that a “formal sovereignty-based test” for determining when the writ should apply raised “troubling separation-of-powers concerns**.”82 Based on these concerns, **Boumediene explicitly rejected the government’s suggestion that habeas extended only to those territories where the United States exercises formal (de jure) sovereignty**, since **such a rule would allow the government to deny noncitizens habeas simply by surrendering formal sovereignty over territory to a third party while retaining complete control over it.83 This danger, however, applies with equal force in Al Maqaleh. A bright-line rule declaring all combat zones to be habeas-free poses as much danger of executive abuse as a bright-line rule limiting the availability of habeas to de jure sovereign territory**. Both rules share a common problem: **when the President can identify an area of U.S.-controlled territory where habeas cannot reach, he is incentivized to move enemy combatants to that location and thereby avoid habeas review. Whether or not the President actually engages in such manipulation, the mere ability to do so is sufficient to raise serious concerns. Animated by a separation of powers concern**84 that the clear **demarcation of habeas-free zones would invite abuse**, Boumediene adopted a functional, pragmatic approach.85 The district court in Al Maqaleh followed that approach well, recognizing the separation of powers concerns behind it. Although it recognized that practical obstacles would accompany the extension of the writ into active combat theaters, the district court did not find these obstacles insurmountable and observed that judicial process had been provided in active theaters before.86 More importantly, the district court rightly concluded that refusing to extend the writ into active combat theaters would establish a precedent more dangerous than the risks attending its extension.87 **Even assuming that the President—in choosing to transfer the Al Maqaleh petitioners to Bagram—was not in this case motivated by the desire to avoid habeas review, the district court wisely recognized that creating habeas-free zones around all active theaters of combat would invite future executive abuse.88 This possibility is particularly troubling because each of the Al Maqaleh petitioners was captured outside of Afghanistan and brought into the theater of combat**. While detaining an enemy combatant captured within the Afghan theater at Bagram might make sense because of its proximity, these petitioners had been apprehended as far away as Dubai and Thailand. **The executive decision to transport the petitioners to a place where greater practical obstacles existed suggests the need for judicial scrutiny, not deference**. Although cognizant of this separation of powers problem, the D.C. Circuit marginalized it and never legitimately considered whether the practical obstacles could be overcome.89 Instead, **the circuit hastily deferred to the executive determination** that further judicial review would endanger military prerogatives and imperil relations with the Afghan government.90 **The D.C. Circuit failed to address the alarming plight of future detainees, who could similarly be captured beyond—but hauled into—active theaters of war91 to be deprived of access to the writ.92 Taking Al Maqaleh as guidance, a future President could order an alien captured anywhere outside the United States to be brought into an active theater of combat, declared an enemy combatant—in a nonadversarial proceeding not held before a neutral arbiter—and detained indefinitely.93 The judiciary would essentially have no means to evaluate the legality of the combatant’s detention, presenting a separation of powers problem just as compelling as that identified in Boumediene**. In conclusion, **the district court in Al Maqaleh correctly applied the Boumediene factors and arrived at the appropriate ruling—that the Suspension Clause should apply extraterritorially to the detainees held at Bagram—while the D.C. Circuit’s poor framing of the key issues unfortunately reversed that ruling.**

**And judicial review re-invigorates credibility**

Oona A. **Hathaway**, Counsel of Record, Brief of International Law Experts as Amici Curiae in Support of the Petitions, Jamal Kiyemba, et. Al., v. Barack H. Obama, et al., SCOTUS, No. 08-1234, 12—**9**, p. 35-38.

THE **U**NITED **S**TATES **SHOULD LIVE UP TO THE STANDARDS OF INTERNATIONAL LAW TO WHICH IT HAS HELD OTHER COUNTRIES BY PROVIDING EFFECTIVE JUDICIAL REVIEW OF UNLAWFUL DETENTION Since the mid-1970s, the United States has compiled annual reports on the human rights practices of other countries**. By law, the reports reflect the Secretary of State’s assessment of the “status of internationally recognized human rights” in the states under review.23 These **reports have consistently criticized foreign countries for failing to provide effective judicial review of detention**. They have further made clear that the United States considers courts’ capacity to order release essential to effective judicial review. They therefore provide powerful evidence of the importance of the shared international norm requiring release upon a finding that a detention is unlawful. **If the U**nited **S**tates now **fails to live up to this shared norm, it will not only breed resentment but will also undermine its ability to encourage other countries to follow basic principles of international law** in the future. In evaluating other countries’ human rights practices, the United States has considered whether habeas corpus review is not simply available but is effective. The United States has criticized the Philippines for providing formal habeas corpus review but not making that process “effectively available to persons detained by the regime. . . .” See 1 Dep’t of State, Country Reports on Human Rights Practices 261 (1978). It has similarly criticized Cuba for “theoretically provid[ing] a safeguard against unlawful detention” but failing to provide any effective remedy. See 13 Dep’t of State, Country Reports on Human Rights Practices for 1988, at 520 (1989). The United States has criticized many other countries for providing ineffective habeas review, including Paraguay, 9 Dep’t of State, Country Reports on Human Rights Practices for 1984, at 637 (1985) (“the right of habeas corpus . . . can be ignored by government officials.”), Ethiopia, id. at 110 (“A writ of habeas corpus on [Ethiopia]’s statutes has not been successfully invoked in any known case.”), Ghana 8 Dep’t of State, Country Reports on Human Rights Practices for 1984, at 150 (1984) (“There has been no instance of the successful exercise of the right of habeas corpus.”), Afghanistan, 10 Dep’t of State, Country Report on Human Rights Practices for 1985, at 1166 (1986) (“nor is the right of habeas corpus respected”), and Bolivia, 4 Dep’t of State, Country Reports on Human Rights Practices for 1980, at 351 (1981) (“The Garcia Meza regime routinely violates constitutional provisions for habeas corpus.”). And the United States regularly criticizes countries for failing to provide effective judicial review for all detainees. See, e.g., 27 Dep’t of State, Country Reports on Human Rights Practices for 2002, at 345-46 (2003) (noting Liberia had incarcerated “an unknown number of persons . . . during [a] state of emergency as ‘illegal combatants,’ . . . and denied habeas corpus”); 13-A Dep’t of State, Country Reports on Human Rights Practices for 1988, at 844 (1989) (“[H]abeas corpus . . . does not apply to those [in South Korea] charged with violating the National Security Law.”). The United States’ criticisms of other countries further makes clear that it regards the power of the courts to order release as essential to effective judicial review. The United States criticized Ghana for responding to writs of habeas corpus by imposing “ex post facto preventive custody orders barring their release.” 10 Dep’t of State, supra, at 129. The United States similarly criticized Nepal for failing to release a prisoner after the Supreme Court issued a writ of habeas corpus. 27-B Dep’t of State, Country Reports on Human Rights Practices for 2002, at 2284 (2003). In discussing Zambia’s detention policies, the United States noted that “[h]abeas corpus is, in principle, available to persons detained under presidential order, but the Government is not obliged to accept the recommendation of the review tribunal.” 10 Dep’t of State, supra, at 383 (1986). The United States criticized Gambia when its “[p]olice ignored a December 31 court-ordered writ of habeas corpus to release [Gambian National Assembly Majority Leader Baba] Jobe and his co-detainees.” 28 Dep’t of State, Country Reports on Human Rights Practices for 2003, at 241 (2004). The United States has held other countries to account for their failure to live up to “internationally recognized human rights” including effective judicial review of detention. In reviewing the practices of other states, the United States has not regarded as sufficient a formal process allowing detainees to challenge their detention in court. The courts reviewing detention must also have the capacity to order release. The United States should now live up to its own high standards – standards it successfully fought to codify in international law and that it has long sought to encourage the rest of the world to follow.

**International law’s inevitable but U.S. compliance is necessary for effectiveness – that solves global peace**

**Avasarkar 12**, Dr. Daniel Ringuet (PhD) is currently a Sessional Lecturer at Griffith University Australia. The Relevance of **International Law** in **Promoting Global Peace** and Security , <http://www.preservearticles.com/2012071033180/the-relevance-of-international-law-in-promoting-global-peace-and-security.html>

International Law involves the **codification of rules by actors in the international system in a way that sets precedents and normative expectations.**

That is, it is a rule-based regime which aims at building order within the global community. It is asserted that the post-ontological era of mature and complex **international law (IL) provides a sound rationale for normative behaviour and therefore is of** **paramount relevance to achieving global peace and security**. The example of the United States' intervention in Iraq will be used to demonstrate the salience of this point.

It must first be acknowledged that IL is not always viewed so positively. This is largely due to the perception/reality gap which obscures the fact that military activity is the exception rather than the rule in international affairs.

In reality, **most of the time the majority of interactions occur peacefully and efficiently. IL is a key facilitator** of such.

Generally **speaking a number of factors demonstrate the move towards IL. These include the data collected in UN Treaty archives, the powerful influence of global economic regimes such as the World Trade Organisation, the sociology of the transnational legal process itself, and the growing importance of international institutions** and non-government organisations.

**Indeed, the USA is itself party to more than 10,000 treaties**. Additionally, the scope of IL is increasingly broad, covering things as diverse as arms control, the use of force, drug trafficking, immigration, human rights, environmental problems, trade and finance, and intellectual property.

**The USA** **has been chosen to demonstrate the extreme relevance of IL to the international security environment precisely because it often defies** or contravenes IL. This is based on the notion that if a principle of law withstands breaches - even by the USA - then its validity and potential longevity is reinforced. The USA has been highly contemptuous of IL at times, for example in its refusal to sign the Kyoto Protocol, its abandonment of the Anti-Ballistic Missile Treaty, its refusal to join the International Criminal Court (ICC), and its increasingly unilateral and hegemonic behaviours.

This emerging character appears to be founded on the presumption that a strong state such as the USA only needs IL as a 'club' to keep weaker states in line. However, as former Soviet Union leader Gorbachev would testify, even superpowers come and go. Consequently, it is argued that **the USA's situation demonstrates that respect for the burgeoning IL regime would likely allow the USA to achieve objectives that even its supreme power is incapable of realising. This indicates the paramount relevance of IL to global security.**

At the most fundamental level, the decision to go to war in Iraq, demonstrates IL's importance. This is in part due to the principle of 'stigmatisation'. **If you are an actor that is routinely perceived to be breaching IL, norms and standards in pursuit of national self-interest, then it is likely that stigmatisation will be of significant impact. This is because it makes justification and rationalisation necessary by raising issues of legitimacy and identity**.

Accordingly, states often go to great lengths to avoid stigmatisation. The USA demonstrates this clearly; George Bush Jr has regularly attempted to justify intervention in Iraq on the basis of Weapons of Mass Destructions (WMDs), the threat of the capacity to produce WMDs, human rights issues and the involvement of global terrorist networks. This indicates that the **stigmatisation related to breaches of IL affects even the most powerful of states. Clearly, this principle serves to place IL at the very centre of global security relations.**

The relevance of IL is also made apparent by the USA's difficulty in engendering support. For example, in 2003 the USA requested that other countries commit more troops to Iraq. However, even those states most likely to do so - France, Germany and India - refused their support unless a UN Security Council Resolution was obtained. That is, they required legal validations. The USA's difficulty in inviting support for its actions, or indeed winning the peace, depicts the importance of international legitimacy in achieving objectives.

In theory, only the most powerful of states who do not believe they will ever be weak choose to routinely abuse the principles of IL. In a setting where its strength is superior to any other states' across almost any measure of power, the USA should not be surprised that lesser states cling to the protection and predictability offerred by IL.

The importance of IL in global affairs is also demonstrated by the USA's ability (or inability) to engage and cooperate with other international actors. For example, large USA oil companies argued that they could not afford to continue investing heavily in Iraq, toward the goal of restarting the country's oil productions. They reasoned that this was due to the lack of legitimate political authority in Iraq and their fear that contracts signed would not carry the force of law.

Similarly, the **USA's refusal to abide by IL has greatly hampered relations and cooperation with the UN and its respective bodies.** **With UN support, the USA would have likely had more success with reconstruction and its 'peace-making' activities would have assumed a greater sense of legitimacy.** Clearly, accordance with **IL aids diplomacy**. It is asserted that if - it had the force of IL behind it - **the USA would have had far greater success in achieving the goals which even its supreme power is incapable of bringing within grasp**.

**Otherwise extinction is inevitable**

**Weeramantry 5**, Judge, International Law and Peace: A Peace Lesson, <http://lcnp.org/global/Law_and_Peace.pdf>

**International law is an essential tool for the abolition of war.** War has been a part of the human condition for thousands of years, but its abolition is now a necessity. **With w**eapons of **m**ass **d**estruction **becoming ever more readily available to state and non-state actors, the threat to a peaceful world being dragged into catastrophic conflict is so great that civilization itself is in peril. Misunderstanding and cross cultural ignorance are** among the **root causes of war. While global forces demolish geographical barriers and move the world toward a unified economy, clashes among cultures can have damaging impact on peace. International law draws upon** the **principles of peace** expressed by great peacemakers and embodied in ancient writings, religions, and disciplines, **and places them in the social and political context of today to dissipate the clouds of prejudice, ignorance and vested interests that stand in the way of world peace and harmony**.

**1AC Plan**

**The United States federal judiciary should restrict military detention without the ability to challenge the legality of detention by way of the writ of habeas corpus.**

**1AC Solvency**

**Obama complies**

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

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

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

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

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

**2AC N/U**

**Drone strikes are inevitable—any wind-downs are only rhetoric**

**Mazzetti and Landler 8/2** [08/02/13, Mark Mazzetti and Mark Landler, “Despite Administration Promises, Few Signs of Change in Drone Wars”, http://www.nytimes.com/2013/08/03/us/politics/drone-war-rages-on-even-as-administration-talks-about-ending-it.html?pagewanted=all&\_r=0]

WASHINGTON — There were more drone strikes in Pakistan last month than any month since January. Three missile strikes were carried out in Yemen in the last week alone. And after Secretary of State John Kerry told Pakistanis on Thursday that the United States was winding down the drone wars there, officials back in Washington quickly contradicted him. More than two months after President Obama signaled a sharp shift in America’s targeted-killing operations, there is little public evidence of change in a strategy that has come to define the administration’s approach to combating terrorism. Most elements of the drone program remain in place, including a base in the southern desert of Saudi Arabia that the Central Intelligence Agency continues to use to carry out drone strikes in Yemen. In late May, administration officials said that the bulk of drone operations would shift to the Pentagon from the C.I.A. But the C.I.A. continues to run America’s secret air war in Pakistan, where Mr. Kerry’s comments underscored the administration’s haphazard approach to discussing these issues publicly. During a television interview in Pakistan on Thursday, Mr. Kerry said the United States had a “timeline” to end drone strikes in that country’s western mountains, adding, “We hope it’s going to be very, very soon.” But the Obama administration is expected to carry out drone strikes in Pakistan well into the future. Hours after Mr. Kerry’s interview, the State Department issued a statement saying there was no definite timetable to end the targeted killing program in Pakistan, and a department spokeswoman, Marie Harf, said, “In no way would we ever deprive ourselves of a tool to fight a threat if it arises.” Micah Zenko, a fellow with the Council on Foreign Relations, who closely follows American drone operations, said Mr. Kerry seemed to have been out of sync with the rest of the Obama administration in talking about the drone program. “There’s nothing that indicates this administration is going to unilaterally end drone strikes in Pakistan,” Mr. Zenko said, “or Yemen for that matter.”

**2AC No Link**

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

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

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

**Impact**

**Can’t blow up like a bomb**

Richard **Muller** – physics prof Cal Berkeley – **2010**, Physics and Technology for Future Presidents

**Can a Reactor Explode Like an Atomic Bomb? An atomic bomb requires fast neutrons (not moderated) in order to have the entire 80 generations over with before the bomb blows itself apart. After 80 generations, the temperature reaches many millions of degrees. The only reason the bomb doesn’t blow apart at that point is that there isn’t enough time.** With moderated neutrons, the chain reaction is much slower, since the neutrons are slower. This is an important fact: **Commercial nuclear reactors depend on using slow neutrons.** The reason this is important is that **if the nuclear reactor begins to “run away”**—i.e., if the operator makes a mistake and the chain reaction begins to grow exponentially (doubling)—**then the slowness of the neutrons limits the size of the explosion**. **Once the temperature rises to a few thousand degrees K, the atoms arc moving faster than the neutrons, and so the neutrons can’t catch up to them them; the chain reaction stops**. The energy released will blow up the reactor, but that energy will he about the same that you would get from TNT. **It’s an explosion, but it is a million times smaller than a nuclear bomb. A chain reaction that depends on slow neutrons cannot give rise to a nuclear explosion**. For that reason**, a commercial nuclear reactor cannot blow up like a nuclear bomb.** It is important to know this and to be able to explain the logic to the public, since this fact is not widely known. There are real dangers from nuclear reactors (see the section The China Syndrome,” later in this chapter). Blowing up like a nuclear bomb is not one of them.

**Their meltdowns internal link just says they COULD target nuclear reactors, not that they will**

**Empirics prove no impact to meltdowns**

**Riedl 11** (Jonathon, assistant editor at The Blaze, quoting Jay Lehr, science director at the Heartland Institute, “‘THIS PANIC HAS BEEN HORRIBLY OVERBLOWN’: SCIENTIST DECRIES NUKE ‘FEAR MONGERING’” <http://www.theblaze.com/stories/this-panic-has-been-horribly-overblown-scientist-decries-nuke-fear-mongering/>]  
Jay Lehr, science director at the [Heartland Institute](http://heartland.org/), has some advice for doomsayers wondering if radiation from the crippled Japanese nuke plants could mean massive local deaths and even cross the Pacific and reach America: calm down. In an interview on Fox News today, Lehr told host Bill Hemmer that not only is the U.S. not at risk of experiencing nuclear fallout, but he also drew stark differences between atomic bombs and nuclear reactors. “We only have to look at the worst nuclear disaster in history, that was Chernobyl, where there was no containment structure,” he said. “10 years later when all the facts were in there were less than 10 fatalities from that explosion — only people right near the plant were affected by the radiation, 1,000 people got leukemia, 998 were cured … . It was predicted that tens of thousands of people would get cancer … [but] this never happened. This is not an atomic bomb and people don’t understand a nuclear reactor is something very different than an atomic bomb.”

**2AC XO**

**Can’t solve legitimacy or Geneva --- only external checks are trusted by foreign countries --- they fear abrupt executive moves --- accessibility to foreign parties makes the Courts vital accountability mechanisms necessary for legitimacy --- that’s Knowles**

**Can’t solve Russia based on legal precedent**

**Can’t solve habeas --- Ghosh says mere ability to revert means it’s not viewed as credible and Vladeck and Sidhu say only Court assertion demonstrates commitment to the writ**

**Can’t solve international law --- only external checks fulfill accountability norms --- that’s Sattherweitte --- Hathaway says only a court ruling can rebuild our reputation to pressure other countries**

**Congress blocks**

**Rosenberg 12** (Carol, 1-9-12, "Congress, rules keep Obama from closing Guantanamo Bay" The Miami Herald) www.mcclatchydc.com/2012/01/09/135179/congress-rule-keep-obama-from.html#.UjXQNcasiSo

**The last two prisoners to leave the U.S. detention center at Guantánamo Bay were dead.** On February 1, Awal Gul, a 48-year-old Afghan, collapsed in the shower and died of an apparent heart attack after working out on an exercise machine. Then, at dawn one morning in May, Haji Nassim, a 37-year-old man also from Afghanistan, was found hanging from bed linen in a prison camp recreation yard. In both cases, the Pentagon conducted swift autopsies and the U.S. military sent the bodies back to Afghanistan for traditional Muslim burials. These voyages were something the Pentagon had not planned for either man: Each was an “indefinite detainee,” categorized by the Obama administration’s 2009 Guantánamo Review Task Force as someone against whom the United States had no evidence to convict of a war crime but had concluded was too dangerous to let go. Today, this category of detainees makes up 46 of the last 171 captives held at Guantánamo. **The only guaranteed route out of Guantánamo these days for a detainee, it seems, is in a body bag. The responsibility lies** not so much with the White House but **with Congress, which has thwarted** President Barack **Obama’s plans to close the detention center**, which the Bush administration opened on Jan. 11, 2002, with 20 captives. **Congress has used its spending oversight authority both to forbid the White House from financing trials of Guantánamo captives on U.S. soil and to block the acquisition of a state prison in Illinois** to hold captives currently held in Cuba who would not be put on trial — a sort of Guantánamo North. The latest defense bill adopted by Congress moved to mandate military detention for most future al Qaida cases. The White House withdrew a veto threat on the eve of passage, and then Obama signed it into law with a “signing statement” that suggested he could lawfully ignore it. On paper, at least, the Obama administration would be set to release almost half the current captives at Guantánamo. The 2009 Task Force Review concluded that about 80 of the 171 detainees now held at Guantánamo could be let go if their home country was stable enough to help resettle them or if a foreign country could safely give them a new start. But **Congress has made it nearly impossible to transfer captives anywhere. Legislation passed since Obama took office has created a series of roadblocks that mean that only a federal court order** or a national security waiver issued by Secretary of Defense Leon Panetta **could trump Congress and permit the release of a detainee to another country.**

**Perm --- do both**

Solves politics because Obama won’t backlash against himself

Solves warfighting because cooperation means it doesn’t establish a non-deferential precedent

**CP’s object fiat --- ruins Aff ground because it devolves into “no war” and kills education because it avoids the central question of how to restrain the President**

**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?

**Links to politics**

**DeYoung 12/17**, Karen DeYoung is associate editor and senior national security correspondent for the Washington Post. In more than three decades at the paper, she has served as bureau chief in Latin America and London and correspondent covering the the White House, U.S. foreign policy and the intelligence community, as well as assistant managing editor for national news, national editor and foreign editor. She has won numerous awards for national and international reporting and is the author of “Soldier,” a biography of Colin Powell, and Goldman,

<http://www.washingtonpost.com/world/national-security/foreign-detainees-from-afghanistan-are-being-considered-for-military-trial-in-us/2013/12/17/d38f9254-6723-11e3-a0b9-249bbb34602c_story.html>

But **Schiff**, who said he had no specific knowledge of the administration’s plans, **warned of significant political fallout if Obama attempted an end run around Congress**.

“I think **the political reality is that there is so much resistance to bringing Guantanamo detainees here to be tried, we would face the same kind of resistance to bringing third-country nationals here from Afghanistan**,” he said.

**2AC --- Courts Key to Habeas**

**They result in uncertainty that dooms solvency**

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

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

**2AC AT: Constitutional Amendment CP**

**This is a voter — it steals the aff, causes stale process debates about something that never happens, and is multi-actor fiat — that’s not reciprocal or real-world**

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

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

**Can’t solve legitimacy:**

1. **De-politicization --- other nations fear abrupt moves --- stable interpretations are key to hegemonic sustainability since other nations know they can rely on those interpretations --- that’s Knowles**
2. **Accountability --- the court is uniquely accessible because countries to lodge complaints against the US --- that’s Knowles**

**They don’t send a stable signal**

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

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

**Can’t solve China — it’s premised on judicial exchanges**

**Causes massive delays**

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

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

**Decks court cred — means they solve none of the aff**

**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**.

**Fiating states is a voter --- robs our best offense, no solvency advocate exists, and they don’t specify which so we can’t read Das**

**African courts model the U.S. — challenging the executive solves authoritarianism**

**Fombad 11**, Professor of Law and Head of Department

[August, 2011; Charles Manga Fombad is a Professor of Law and Head of Department of Public Law, Faculty of Law, University of Pretoria. Licence en Droit (University of Yaounde), LL.M., Ph.D (University of London), “Constitutional Reforms and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects”, 59 Buffalo L. Rev. 1007]

In interpreting the law, judges must try to keep in step with the standards and values of the times. African constitutional systems have borrowed extensively from Western constitutional models in areas such as separation of powers, but these borrowed models have to be adjusted and adapted to the conditions unique to each country. n377 There is no reason, therefore, why the concept of judicial activism should be an exception. A passive judiciary in the face of Africa's overbearing executives and the constitutional weaknesses of the legislature, compounded by the looming phenomena of one party domination leading to the rubber stamping of legislation, does not augur well either for progressive or effective legislation. The timely intervention of the high courts in India and South Africa has not only resulted in defective legislation being promptly remedied. Additionally, new remedies and processes have been introduced to address serious social problems that the government and legislature have been too slow or indifferent to address. Thus, both in India and South Africa, the highest courts have devised imaginative means to facilitate access to courts by the poor and needy. In India, the courts sidetracked the rigid doctrine of locus standi by introducing the device of socio-legal [\*1088] commissions of inquiry in the cases of Morcha n378 and Gupta. n379 In South Africa, the Constitutional Court achieved a similar end by introducing the concept of class action in South African law in the Ngxuza n380 case. In the South African cases of Grootboom, n381 Modderskip, n382 and TAC, n383 the South African courts had no hesitation in taking decisions that compelled the government to urgently address the desperate social needs of the poor. To ensure that government effectively complied with court decisions, the South African courts in the TAC case exercised supervisory jurisdiction a circumstance where some courts would not. n384 [\*1089] They have also used the structural interdict in the August n385 and Strydom n386 cases to achieve a similar result; in similar circumstances, the Indian courts have adopted the policy of setting up a monitoring agency. Fearing that an amendment by the legislature of an unconstitutional piece of legislation may take too long to take effect and therefore cause undue hardship, the South African courts did not hesitate, in Jaftha v. Schoeman, n387 to remedy the defect by reading into legislation words that would make it conform to the Constitution. It is perhaps in the defense of constitutionalism that judicial activism in South Africa has manifested itself in the most endearing manner. In Makwanyane n388 and again in Bhe, n389 the Constitutional Court did not hesitate to provide clarity to ambiguities resulting from the inability of the Constitutional Assembly to agree on certain controversial issues. The main lesson that can be drawn from this brief discussion is that judicial activism is a powerful weapon which judges all over Africa can use not only to counter authoritarianism but also to promote policies that are socially and economically progressive. As B.O. Nwabueze has observed, "when the courts seek to confine their own function unduly by a narrow, positivist interpretation of the law, constitutionalism may be endangered." n390 However, the ability of judges to influence the direction of future constitutional developments will also depend on their willingness to look beyond the national frontiers and the national legal system to see what ideas can be borrowed from other jurisdictions. This raises the important question of the role of cross-systemic fertilization. [\*1090]

**Destroys regional stability and causes terrorism**

**UNNS 9/26,** UN News Service, <http://allafrica.com/stories/201309270860.html>

Collective efforts in the Sahel region of Africa must address urgent humanitarian needs as well as long-term development and security threats, United Nations officials stressed today in a meeting at the 68th session of the General Assembly in New York.

"We need to commit to the region through a holistic and unifying framework, capable of addressing humanitarian imperatives and long-term structural needs," Secretary-General Ban Ki-moon said at the High-Level Meeting on the Sahel.

The Sahel stretches from Mauritania to Eritrea, including Burkina Faso, Chad, Mali, Niger, Nigeria, Senegal and Sudan, a belt dividing the Sahara desert and the savannahs to the south.

Mr. Ban pointed out that **the situation** in the region has **improved** over the past year, but there are still many challenges to overcome.

Political instability and unconstitutional changes in governments have had significant economic and social consequences in the region; terrorist acts, and transnational organized crime, including arms and drug trafficking, threaten stability; and authorities have limited capacity to deliver basic services and foster dialogue and citizen participation.

In addition, 11 million people are at risk of hunger and 5 million children under five are at risk of acute malnutrition.

"We must particularly beware the evolution of appeal of radicalism and violent ideology among the region's youth," Mr. Ban said. "These challenges are interconnected."

**That escalates**

**Chidgey 10**, Lord Chidgey is the Vice Chair of the All Party Parliamentary Group on the Great Lakes region of Africa, Chairman of the International Advisory Board of the Commonwealth Policy Studies Unit, and a Liberal Democrat life Peer, Securing Democracy in Africa is Key, <http://www.theguardian.com/commentisfree/2010/jul/08/africa-great-lakes-stability-free-elections>

This apparent mismatch between the rise in economic development and, at best, a stall in democratic development, should be extremely concerning for those of us who believe that the future for Africa lies equally in the empowerment of its people through fair choices at the ballot-box and greater economic opportunity. Without this combination, the **potential for instability is even greater, particularly considering the massive growth in the population of the region, and the lack of resources to stabilise and underpin what is fast becoming a youth-led boom**.

**Take**, for example, **Kenya**. The Kenya of [Jomo Kenyatta](http://en.wikipedia.org/wiki/Jomo_Kenyatta) and even of[Daniel arap Moi](http://en.wikipedia.org/wiki/Daniel_arap_Moi) – together in power for nearly 40 years – **is being revolutionised by the fact that 75% of Kenyans are now under 30 years old. The majority of those who will be eligible to vote in the Kenyan election in 2012 will most likely have little or no recollection of, nor connection to, the time of Moi**, even though it ended only 10 years before. **This wind of demographic change is startling – and concurrent across the entire Great Lakes region.**

However, **many African leaders consider the economic success of one-party states from Asia to be a model** for East Africa and the Great Lakes. I, for one, do not believe that the African quest for economic growth should come at the expense of human rights and democracy. These are not fringe benefits, which can be jettisoned for the lure of jobs and money, but rather an essential part of the social contract between citizens and the state.

This view is shared across Westminster, and it will be a recurring theme when we debate post-conflict regional stabilisation endeavours on Thursday in the House of Lords.

Many of my colleagues will also be concerned that the British government is contemplating a reduction of its presence across the Great Lakes region at a time when political intelligence and diplomatic contacts are more critical than ever. If UK foreign policy and development initiatives in the region are to be successful, we cannot risk closing, for example, our small office in Burundi.

One thing that we learned from the political violence in Kenya in 2007 was that Africans care about their democratic rights. In East Africa, where the majority of citizens are under 30, protesters have taken to the streets to stand up for their rights – individual liberties they consider fundamental, and crucial to the prosperous future that they all desire.

With the five members of the East African community, plus the DRC, holding elections in the coming year, we must push for open and transparent polls. **We must also urge the victors to uphold both the economic and democratic rights of East Africa. It may well be that the future stability of the region depends on it**.

**That causes global war**

**Glick 7,** **Middle East fellow at the Center for Security Policy**, Condi’s African holiday,http://www.carolineglick.com/e/2007/12/condis-african-holiday.php?pf=yes

The Horn of Africa is a dangerous and strategically vital place. Small wars, which rage continuously, can easily escalate into big wars. Local conflicts have regional and global aspects. All of the conflicts in this tinderbox, which controls shipping lanes from the Indian Ocean into the Red Sea, can potentially give rise to regional, and indeed global conflagrations between competing regional actors and global powers.

**Self EXEC**

**Non-self-execution key to leadership**

**Ku 12, Law Prof at Yale**

(Julian, Taming Globalization: International Law, the U.S. Constitution, and the New World Order, pg. 112)

**Another important effect of non-self-execution is the reduction of judicial control over foreign policy. If treaties do not take automatic effect as domestic law, then courts must await further guidance from Congress and the President before their implementation. Policy concerning treaties and, through them, international relations will be set primarily by the decisions of the branches most directly accountable to the people through regular elections, rather than by an appointed federal judiciary that is designed to be highly insulated from popular wishes**. **This has important functional advantages**. While **courts** are the primary institutions in the U.S. system that interpret and apply laws, some of their **key features undercut their ability in foreign affairs. Courts have limited access to information and are unable to take into account the broader context for making foreign policy. These limitations** are not a general failing. They **are part of the inherent design of the federal court system, which is intended to be independent from politics, to allow parties to dictate the course of litigation, and to consider information in formal and narrow ways. These**

**characteristics** support the ability of the federal courts to be neutral in disputes between citizens and their government, but they **also make judges less-than- competent actors in achieving national goals in international relations. Take the gathering of information. Courts receive information almost entirely from litigating parties, which acquire it through the expensive process of discovery. Information provided to the court must survive evidentiary rules for relevance, credibility, and reliability. By contrast, the executive branch collects a wide variety of information through its own institutional experts and a wide network of contacts, unfiltered by courtroom rules of evidence**. **Courts cannot update their decisions to reflect new information, but must continue to enforce statutory or treaty mandates even if the national interest would be better served by a change in policy. They find it difficult to use that information to reach quick decisions, and the structure of the federal court system is not ideally designed to produce feedback that can lead to the swift correction of mistakes. The political branches, by contrast, have superior institutional competencies. Unlike generalist judges, the executive branch possesses expertise in complex areas such as foreign affairs. The defense, diplomatic, and intelligence agencies are large bureaucracies solely focused on developing and implementing foreign policy, and they maintain a broad network to gather and process information**. Congress also has a specialized staff that can engage in both formal and informal methods for fact-finding through hearings or political contacts. **Neither branch is required to consider problems through the narrow lens of a lawsuit, which may present anomalous parties and facts; instead, each branch can set policy with a broader perspective. Congress can enact nationwide rules more quickly than the courts, while the executive branch can respond with the greatest speed to changes in complex factual settings.** Which institutions ought to have the lead role should depend on their functional suitability and the normative goals for that subject area. In the area of civil liberties, for example, our legal system depends more heavily on courts because we have decided to provide the individual with protections against the actions of the majority. The institution most insulated from political influence reduces the government's advantages vis-a-vis the individual; devoting more resources to formal information gathering and deliberation at the expense of speed becomes a virtue, rather than a fault. In functional terms, we worry more about the costs of errors than the costs incurred in making the decision itself. Foreign policy, on the other hand, entails a different trade-off. The harms of reaching a decision too slowly may outweigh the costs of an erroneous policy. **If the United States must react quickly to an overseas threat or sudden change in circumstances, the delay of a decision itself may be costly.** The increased expense in using the judicial system to set policy may itself yield no reduction in errors, especially if the courts cannot access better information. Changes in foreign conditions require the United States to shift policies with speed, or to set policy with the broader national interest in view.

**Treaty implementation forms a core element of foreign policy. The United States may wish to sign treaties, but implement only some of them domestically. It may want to adopt provisions in a certain way in order to improve its bargaining position. It may want to retain the flexibility to apply treaty obligations in different ways depending on other outstanding issues between itself and another state. The United States may even want to preserve the ability to suspend the treaty, if the circumstances require it.** Domestic politics may demand that no change in internal laws occur in order to win approval of an agreement in the Senate**. Carrying out a treaty domestically**, in other words, **is intimately tied up with the question of whether the United States will fulfill international obligations and rules, or whether those obligations and rules even exist. Courts are poor institutional actors to make the type of delicate trade- offs and policy decisions involved. The political branches are better suited to international relations not just in terms of quality of information and speed of action, but also in balancing legal considerations against political, security, and economic values that are outside the judiciary's ken.**

**Non-self-execution erodes sovereignty – ensures global warfare**

**Ku 12, Law Prof at Yale**

(Julian, Taming Globalization: International Law, the U.S. Constitution, and the New World Order, pg. 21)

This would not be the unalloyed good that some scholars and advocates believe. Even if it was not always respected, **the Westphalian system reduced the areas of inter-state conflict, thereby creating more stable inter-state relations. For liberal democracies, Westphalian sovereignty can protect democratic political processes from outside interference**. As Jeremy Rabkin has argued, **the traditional system of Westphalian sovereignty has resulted in stable and fair governance across many different national systems. Nation-states have exercised their sovereign powers to build and maintain stable, orderly, liberal, and just societies**. All three elements of the system of **global governance** described above **can undermine Westphalian sovereignty**. As described in table 2.1, global governance undermines the main elements of Westphalian sovereignty. **In a global governance system, nation- states can no longer assume the absolute and exclusive power to determine domestic policy free of any externally imposed constraints**. Rather, market forces, international organizations, and NGOs can pressure nation-states to alter their domestic policies, especially economic ones. One might believe that our concerns are overwrought. Global governance may be more dream than certainty. Westphalian sovereignty may be merely a shibboleth for neo-isolationists, rather than a value worth protecting. As we readily admit, the institutions of global governance are only now emerging from their infancy. Some, such as the Security Council and the International Court of Justice, have existed since the adoption of the LIN Charter in 1945, but have sought to expand their reach only in the last few decades. Proposals for others, such as the World Trade Organization, took a half- century to actualize. A few, such as the International Monetary Fund and the World Bank, have reoriented their missions and become more interventionist in the domestic affairs of nations. Yet it is undeniable that new species of international cooperation have emerged. New multilateral agreements regulate the internal as well as external conduct of nation-states. Some have existed for some time, and some have been significant since at least the human rights treaties of the 1960s and 1970s, such as the International Covenant on Civil and Political Rights, or the International Covenant on Economic and Social Rights. But **what makes the current round of treaties different is their marriage of sweeping, universal rules with independent institutions of enforcement.** The latest version of the General Agreement on Tariffs and Trade, for example, not only requires national treatment for foreign imports; it also creates a rulemaking body (the World Trade Organization) to develop amendments to the treaty, and a court system (the Dispute Settlement Understanding) to resolve trade disputes. The Rome Statute not only outlaws war crimes and crimes against humanity; it also creates a prosecutor's office to investigate and prosecute crimes and a court system to try the defendants. The Law of the Sea Convention both sets out rules for the free navigation of the high seas, and creates an international tribunal for the resolution of disputes. The Chemical Weapons Convention creates a Secretariat that can ban new chemicals and conduct surprise inspections of domestic production sites. **Enforcement mechanisms** such as these, **as well as the international rules themselves, cause concern among those interested in protecting Westphalian sovereignty. These new forms of multilateral cooperation challenge sovereignty by transferring lawmaking authority from the organs of government established by the Constitution to international bodies**. **International agreements have yet to prompt the United States to hand over anything really serious**, such as assigning the authority to set monetary policy to an international central bank. **However, proposals for future climate change plans would be quick to change the status quo, since they call for the creation of an international agency to monitor national energy usage. The effort to create durable institutions with the ability to enforce international norms directly within the American legal system would end Westphalian sovereignty**

**.** Rabkin argues that **these developments intrude into the American constitutional system and undermine the capacity of nation-states to pursue their national interest**. He sees the world as one in which people form nations. **Clothed with full sovereignty, only nations can mobilize their people to defend themselves and to take action outside their borders to prevent the rise of dictatorial powers. Global governance disrupts the relationship between a people and their nation by transferring the locus of legislative and enforcement** authority to IOs. **National governments will be unable to call on their citizens, who will have divided loyalties, to take action in defense of national interests**. Rabkin believes that **this will cause a decline in global welfare, because** in his view **only nation-states retain the strength to stop aggression by authoritarian regimes** or to halt human rights catastrophes.

**2AC Politics**

**Court shield**

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

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

**Not an opportunity cost --- a rational policymaker can do both --- key to portable decision-making skills**

**Nothing will pass and Obama has no capital**

**Walsh, 12/31** --- longtime chief White House correspondent for U.S. News & World Report (12/31/2013, Kenneth T., “Miscues of 2013 Loom Over 2014 for Obama,” <http://www.usnews.com/news/blogs/Ken-Walshs-Washington/2013/12/31/miscues-of-2013-loom-over-2014-for-obama>))

**There was a moment of hope for a new spirit of compromise at the end of 2013** when both major parties in Congress agreed on a modest budget compromise, which Obama endorsed. It did little to solve the country's fundamental fiscal problems but it did avoid another messy confrontation and a government shutdown, so it was deemed progress of a sort.

Yet **the differences between Democrats and Republicans are so deep, and Obama has shown such an inability to bridge them, that the outlook for 2014 is for more battles on issues ranging from the budget to the debt ceiling and the minimum wage**. Senate Republicans also are upset because majority Democrats, with White House support, changed a key rule and made it easier to win approval for Obama's nominations for judgeships and other offices. GOP leaders billed this as a power grab.

**Dimming the prospects for compromise are the midterm elections** in November. The **major parties are expected to cater as much as possible to their bases to generate turn**out rather than reach out to each other or appeal to the political center. And **this will probably harden positions all around**.

Overall, **Obama's popularity is waning**. The latest Washington Post-ABC News poll finds that only 43 percent of Americans approve of his job performance, 11 percentage points below his favorable rating from a year ago. Fifty-five percent disapprove. **The job approval of Congress is worse, but Obama's poor ratings mean many legislators won't fear him if he takes them on, minimizing his influence.**

**He is also suffering from a decline in the number of Americans who believe he is trustworthy**, partly a result of false promises he made that Americans could keep their health insurance policies if they liked them under Obamacare. A Wall Street Journal/NBC News poll found that only 37 percent of Americans believe he is honest and straightforward, a drop of 10 percentage points from the start of 2013. Adding to his problems were leaks of classified information by former National Security Agency contractor Edward Snowden that revealed a vast government surveillance operation that troubled many citizens.

**2ac Unemployment Benefits Thumper**

**Obama pressuring congress now to extend jobless aid**

**Trujillo, 1/1** (Mario, 1/1/2014, “WH ups pressure for passage of jobless aid,” <http://thehill.com/blogs/blog-briefing-room/news/194226-white-house-ups-pressure-for-passage-of-jobless-aid>))

**The White House** on Wednesday **increased its pressure on Congress to extend long-term jobless aid, when it reconvenes next week.**

Gene **Sperling, the director of the National Economic Council, said the administration is behind** Majority Leader Harry **Reid’s** (D-Nev.) **vow to bring up a cloture vote on a temporary extension when the Senate reconvenes Monday**.

“This New Year’s Day, there is likely less joy and more fear and distress in the homes of 1.3 million Americans who this week have seen their unemployment insurance suddenly cut off,” Sperling said in a statement.

The long-term aid expired Saturday, after Congress failed to include an extension in the budget deal hashed out in December.

Sperling said the extension of benefits has never been allowed to lapse in the past with long-term unemployment as high as it is today.

“In more than 50 years, we have never cut off emergency unemployment insurance when the rate of long-term unemployment was even above 50 percent of its current level, even though none of those recessions were nearly as deep as the one we are now recovering from,” he said.

Sperling warned 4.9 million workers would be directly affected if the aid were not extended through the end of the year. He also asserted an extension would lead to 200,000 new jobs that would increase economic growth by a percentage point.

He pointed out the long-term federal aid is only needed as long as the unemployment rate remains high and is only provided to those actively seeking work.

**Reid** told The Associated Press he **would schedule a vote on a three-month extension to the program on Monday**. The proposal is sponsored by Sens. Jack Reed (D-R.I.) and Dean Heller (R-Nev.).

**Reid said he hoped the Senate could get it done but offered no prediction of its chances in the House.**

Republican leaders in the House have not weighed in but have insisted the cost of any renewal of the jobless benefits be offset. The Senate bill provides no offsets and comes with a $6.4 billion price tag, according to the Congressional Budget Office.

“We urge every member of Congress to support this vitally important bill,” Sperling said.

**2ac Minimum Wage Thumper**

**Minimum wage increase is top priority --- GOP opposition**

**PBS, 12/30** (News Desk, 12/30/2013, “Democrats focus on minimum wage strategy for 2014,” <http://www.pbs.org/newshour/rundown/2013/12/democrats-focus-on-minimum-wage-strategy-for-2014.html>))

**Democrats are putting raising the minimum wage on top of the legislative agenda for 2014**, the New York Times reports.

After taking a beating for the rocky roll out of the Affordable Care Act, Obama and congressional Democrats are trying to use increasing public support of raising the minimum wage against a Republican opposition and to expand the voting base for 2014 midterm elections.

The legislation under consideration would raise the federal minimum wage from $7.25 an hour to $10.10 an hour by 2015. This legislative move is part of Obama's steps to combat rising economic inequality in the United States, an issue he declared would be the top priority of his legislative agenda for the rest of his presidency. The New York Times report that economic inequality will be a focus of the president's 2014 State of the Union address. In Obama's 2013 State of the Union Speech, he said the Republican-controlled house refused to a minimum wage increase.

**Top Republicans say an increase in the minimum wage will make it more difficult for small businesses to hire people, thus hampering economic recovery.**

A CBS poll last month showed 64 percent of Independents, 57 percent of Republicans, and 70 percent of self-described "moderates" said they supported a minimum wage increase.

**\*\*\*2ac Immigration Reform**

**Won’t pass --- Boehner won’t wave Hastert Rule**

**Poppe, 1/2** (Ryan, 1/2/2013, “Castro Sees Challenges Ahead For Congress On Immigration & Farm Bill,” <http://tpr.org/post/castro-sees-challenges-ahead-congress-immigration-farm-bill>))

**U.S. Congressman** Joaquín **Castro of San Antonio said he fears the nation will not see the passage of** several key bills, including comprehensive **immigration reform.**

Castro said **despite majority support** for a comprehensive immigration bill, **it will be tough to get something passed on Capitol Hill because of rulemaking**.

"So really the big issue is: **Is** the speaker (Rep. John **Boehner**, R-Ohio) **going to stick to the Hastert Rule**, which says he won’t allow a piece of legislation to come to the floor unless it has the support of the majority of the majority?" Castro said.

Castro said **that would require a "yes" vote from the entire conference of Republicans**.

"With immigration, it’s interesting," Castro said. "There’s already enough votes for it to pass in the House of Representatives and so if the speaker would allow that bill to come to the floor for a vote, many of us are convinced it would pass."

**!**

**No bioterror**

**Leitenberg 5** (MILTON LEITENBERG is a senior research scholar at the University of Maryland and is the author of "Assessing the Biological Weapons and Bioterrorism Threat." LA Times – Feb 17th – lexis)

A pandemic flu outbreak of the kind the world witnessed in 1918-19 could kill hundreds of millions of people. **The only lethal biological attack in the United States -- the anthrax mailings -- killed five. But the annual budget for combating bioterror is more than $7 billion**, while Congress just passed a $3.8-billion emergency package to prepare for a flu outbreak. **The exaggeration of the bioterror threat began more than a decade ago after** the Japanese **Aum Shinrikyo** group **released sarin gas in the Tokyo subways** in 1995. **The scaremongering has grown more acute since 9/11** and the mailing of anthrax-laced letters to Congress and media outlets in the fall of 2001. **Now an edifice of institutes, programs and publicists with a vested interest in hyping the bioterror threat has grown, funded by the government and by foundations.** Last year, for example, Senate Majority Leader Bill **Frist described**

**bioterrorism as "the greatest existential threat we have in the world today." But how could he justify such a claim? Is bioterrorism a greater** existential **threat** than global climate change, global poverty levels, **wars and conflicts**, nuclear proliferation, ocean-quality deterioration, deforestation, desertification, depletion of freshwater aquifers or the balancing of population growth and food production? Is it likely to kill more people than the more mundane scourges of AIDS, tuberculosis, malaria, measles and cholera, which kill more than 11 million people each year? So what substantiates the alarm and the massive federal spending on bioterrorism? There are two main sources of bioterrorism threats: first, from countries developing bioweapons, and second, from terrorist groups that might buy, steal or manufacture them. **The first threat is declining. U.S. intelligence estimates say the number of countries that conduct offensive bioweapons programs has fallen** in the last 15 years from 13 to nine, as South Africa, Libya, Iraq and Cuba were dropped. There is no publicly available evidence that even the most hostile of the nine remaining countries -- Syria and Iran -- are ramping up their programs. And, **despite the fear that a hostile nation could help terrorists get biological weapons, no country has ever done so** -- even nations known to have trained terrorists.

**Couldn’t be dispersed anyway**

**Stimson Center 7** The Henry L. Stimson Center, 7 (Biological and Chemical Weapons, “Frequently Asked Question: Likelihood of Terrorists Acquiring and Using Chemical or Biological Weapons”, http://www.stimson.org/cbw/?sn=CB2001121259#cwuse)

How easy would it be for terrorists to disperse a biological agent effectively? **Terrorists cannot count on just filling the delivery system with agent**, pointing the device, and flipping the switch to activate it. **Facets that must be deciphered include the concentration of agent in the delivery system, the ways in which the delivery system degrades the potency of the agent, and the right dosage to incapacitate or kill human or animal targets. For open-air delivery, the meteorological conditions must be taken into account. Biological agents have extreme** sensitivity to sunlight, humidity, pollutants in the atmosphere, temperature, and even exposure to oxygen, all of which can kill the microbes.Biological agents can be dispersed in either dry or wet forms. **Using a dry agent can boost effectiveness** because drying and milling the agent can make the particles very fine, a key factor since particles must range between 1 to 10 ten microns, ideally to 1 to 5, to be breathed into the lungs. **Drying an agent, however, is done through a complex and challenging process that requires a sophistication of equipment and know-how that terrorist organizations are unlikely to possess. The alternative is to develop a wet slurry, which is much easier to produce but a great deal harder to disperse effectively.** Wet slurries can clog sprayers and undergo mechanical stresses that can kill 95 percent or more of the microorganisms.

**Court ptx**

**2AC Econ**

**No econ impact**

**Zakaria** Editor Newsweek **‘9**

(Fareed-, Dec. 12, Newsweek, “The Secrets of Stability”, http://www.newsweek.com/id/226425/page/1; Jacob)

One year ago, the world seemed as if it might be coming apart. The global financial system, which had fueled a great expansion of capitalism and trade across the world, was crumbling. All the certainties of the age of globalization—about the virtues of free markets, trade, and technology—were being called into question. Faith in the American model had collapsed. The financial industry had crumbled. Once-roaring emerging markets like China, India, and Brazil were sinking. Worldwide trade was shrinking to a degree not seen since the 1930s.

Pundits whose bearishness had been vindicated predicted we were doomed to a long, painful bust, with cascading failures in sector after sector, country after country. In a widely cited essay that appeared in The Atlantic this May, Simon Johnson, former chief economist of the International Monetary Fund, wrote: "The conventional wisdom among the elite is still that the current slump 'cannot be as bad as the Great Depression.' This view is wrong. What we face now could, in fact, be worse than the Great Depression."

Others predicted that these economic shocks would lead to political instability and violence in the worst-hit countries. At his confirmation hearing in February, the new U.S. director of national intelligence, Adm. Dennis Blair, cautioned the Senate that "the financial crisis and global recession are likely to produce a wave of economic crises in emerging-market nations over the next year." Hillary Clinton endorsed this grim view. And she was hardly alone. Foreign Policy ran a cover story predicting serious unrest in several emerging markets.

Of one thing everyone was sure: nothing would ever be the same again. Not the financial industry, not capitalism, not globalization.

One year later, how much has the world really changed? Well, Wall Street is home to two fewer investment banks (three, if you count Merrill Lynch). Some regional banks have gone bust. There was some turmoil in Moldova and (entirely unrelated to the financial crisis) in Iran. Severe problems remain, like high unemployment in the West, and we face new problems caused by responses to the crisis—soaring debt and fears of inflation. But overall, things look nothing like they did in the 1930s. The predictions of economic and political collapse have not materialized at all.

A key measure of fear and fragility is the ability of poor and unstable countries to borrow money on the debt markets. So consider this: the sovereign bonds of tottering Pakistan have returned 168 percent so far this year. All this doesn't add up to a recovery yet, but it does reflect a return to some level of normalcy. And that rebound has been so rapid that even the shrewdest observers remain puzzled. "The question I have at the back of my head is 'Is that it?' " says Charles Kaye, the co-head of Warburg Pincus. "We had this huge crisis, and now we're back to business as usual?"

This revival did not happen because markets managed to stabilize themselves on their own. Rather, governments, having learned the lessons of the Great Depression, were determined not to repeat the same mistakes once this crisis hit. By massively expanding state support for the economy—through central banks and national treasuries—they buffered the worst of the damage. (Whether they made new mistakes in the process remains to be seen.) The extensive social safety nets that have been established across the industrialized world also cushioned the pain felt by many. Times are still tough, but things are nowhere near as bad as in the 1930s, when governments played a tiny role in national economies.

It's true that the massive state interventions of the past year may be fueling some new bubbles: the cheap cash and government guarantees provided to banks, companies, and consumers have fueled some irrational exuberance in stock and bond markets. Yet these rallies also demonstrate the return of confidence, and confidence is a very powerful economic force. When John Maynard Keynes described his own prescriptions for economic growth, he believed government action could provide only a temporary fix until the real motor of the economy started cranking again—the animal spirits of investors, consumers, and companies seeking risk and profit.

Beyond all this, though, I believe there's a fundamental reason why we have not faced global collapse in the last year. It is the same reason that we weathered the stock-market crash of 1987, the recession of 1992, the Asian crisis of 1997, the Russian default of 1998, and the tech-bubble collapse of 2000. The current global economic system is inherently more resilient than we think. The world today is characterized by three major forces for stability, each reinforcing the other and each historical in nature.

The first is the spread of great-power peace. Since the end of the Cold War, the world's major powers have not competed with each other in geomilitary terms. There have been some political tensions, but measured by historical standards the globe today is stunningly free of friction between the mightiest nations. This lack of conflict is extremely rare in history. You would have to go back at least 175 years, if not 400, to find any prolonged period like the one we are living in. The number of people who have died as a result of wars, civil conflicts, and terrorism over the last 30 years has declined sharply (despite what you might think on the basis of overhyped fears about terrorism). And no wonder—three decades ago, the Soviet Union was still funding militias, governments, and guerrillas in dozens of countries around the world. And the United States was backing the other side in every one of those places. That clash of superpower proxies caused enormous bloodshed and instability: recall that 3 million people died in Indochina alone during the 1970s. Nothing like that is happening today.

Peace is like oxygen, Harvard's Joseph Nye has written. When you don't have it, it's all you can think about, but when you do, you don't appreciate your good fortune. Peace allows for the possibility of a stable economic life and trade. The peace that flowed from the end of the Cold War had a much larger effect because it was accompanied by the discrediting of socialism. The world was left with a sole superpower but also a single workable economic model—capitalism—albeit with many variants from Sweden to Hong Kong.

This consensus enabled the expansion of the global economy; in fact, it created for the first time a single world economy in which almost all countries across the globe were participants. That means everyone is invested in the same system. Today, while the nations of Eastern Europe might face an economic crisis, no one is suggesting that they abandon free-market capitalism and return to communism. In fact, around the world you see the opposite: even in the midst of this downturn, there have been few successful electoral appeals for a turn to socialism or a rejection of the current framework of political economy. Center-right parties have instead prospered in recent elections throughout the West.

The second force for stability is the victory—after a decades-long struggle—over the cancer of inflation. Thirty-five years ago, much of the world was plagued by high inflation, with deep social and political consequences. Severe inflation can be far more disruptive than a recession, because while recessions rob you of better jobs and wages that you might have had in the future, inflation robs you of what you have now by destroying your savings. In many countries in the 1970s, hyperinflation led to the destruction of the middle class, which was the background condition for many of the political dramas of the era—coups in Latin America, the suspension of democracy in India, the overthrow of the shah in Iran. But then in 1979, the tide began to turn when Paul Volcker took over the U.S. Federal Reserve and waged war against inflation. Over two decades, central banks managed to decisively beat down the beast. At this point, only one country in the world suffers from -hyperinflation: Zimbabwe. Low inflation allows people, businesses, and governments to plan for the future, a key precondition for stability.

Political and economic stability have each reinforced the other. And the third force that has underpinned the resilience of the global system is technological connectivity. Globalization has always existed in a sense in the modern world, but until recently its contours were mostly limited to trade: countries made goods and sold them abroad. Today the information revolution has created a much more deeply connected global system.

Managers in Arkansas can work with suppliers in Beijing on a real-time basis. The production of almost every complex manufactured product now involves input from a dozen countries in a tight global supply chain. And the consequences of connectivity go well beyond economics. Women in rural India have learned through satellite television about the independence of women in more modern countries. Citizens in Iran have used cell phones and the Internet to connect to their well-wishers beyond their borders. Globalization today is fundamentally about knowledge being dispersed across our world.

This diffusion of knowledge may actually be the most important reason for the stability of the current system. The majority of the world's nations have learned some basic lessons about political well-being and wealth creation. They have taken advantage of the opportunities provided by peace, low inflation, and technology to plug in to the global system. And they have seen the indisputable results. Despite all the turmoil of the past year, it's important to remember that more people have been lifted out of poverty over the last two decades than in the preceding 10. Clear-thinking citizens around the world are determined not to lose these gains by falling for some ideological chimera, or searching for a worker's utopia. They are even cautious about the appeals of hypernationalism and war. Most have been there, done that. And they know the price.

**Single Decision**

**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.

**2AC Theory False**

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

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

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

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

**2AC June**

**End of term release shields the link**

**Mondak 92** [Jeffery J., assistant professor of political science @ the University of Pittsburgh. “Institutional legitimacy, policy legitimacy, and the Supreme Court.” American Politics Quarterly, Vol. 20, No. 4, Lexis]

The process described by the political capital hypothesis acts as expected in the laboratory, and the logic of the link between institutional and policy legitimacy has thus gained strong empirical corroboration. However, the dynamic's pervasiveness defies precise estimation due to the limitations of available public opinion data. Still, the results reported here are provocative. First, this view of legitimation may apply to institutions beyond the Supreme Court. Consequently, efforts to use this theory in the study of other institutions may yield evidence supportive of a general process. A second concern is how the Court responds to its institutional limits. Specifically, **strategy within the Court can be considered from the context of legitimacy.** For example, **what tactics may the Court employ to reduce the erosion of political capital? By releasing controversial rulings at the end of a term**, for instance, **the Court may afford itself a healing period, a time to repair damaged credibility prior to the next round of efforts at conferring policy legitimacy**. This suggests a third issue, the manner in which institutional approval is replenished. Does institutional support return to some equilibrium once dispute surrounding a particular ruling fades, or must the Court release popular edicts to offset the effects of its controversial actions?

**No war --- recent statistical evidence proves**

**Drezner 12** --- The Fletcher School of Law and Diplomacy at Tufts University (October 2012, Daniel W., “THE IRONY OF GLOBAL ECONOMIC GOVERNANCE: THE SYSTEM WORKED,”

[www.globaleconomicgovernance.org/wp-content/uploads/IR-Colloquium-MT12-Week-5\_The-Irony-of-Global-Economic-Governance.pdf](http://www.globaleconomicgovernance.org/wp-content/uploads/IR-Colloquium-MT12-Week-5_The-Irony-of-Global-Economic-Governance.pdf))

The final outcome addresses **a dog that hasn’t barked: the effect of the Great Recession on cross-border conflict and violence**. During the initial stages of the crisis, **multiple analysts asserted that the financial crisis would lead states to increase their use of force as a tool for staying in power**.37 Whether through greater internal repression, diversionary wars, arms races, or a ratcheting up of great power conflict, **there were genuine concerns that the global economic downturn would lead to an increase in conflict**. Violence in the Middle East, border disputes in the South China Sea, and even the disruptions of the Occupy movement fuel impressions of surge in global public disorder.

**The aggregate data suggests otherwise, however. The Institute for Economics and Peace has constructed a “Global Peace Index” annually since 2007. A key conclusion they draw from the 2012 report is that “The average level of peacefulness in 2012 is approximately the same as it was in 2007.”**38 **Interstate violence** in particular **has declined since the start of the financial crisis** – as have military expenditures in most sampled countries. **Other studies confirm that the Great Recession has not triggered any increase in violent conflict**; the secular decline in violence that started with the end of the Cold War has not been reversed.39 Rogers **Brubaker concludes, “the crisis has not to date generated the surge in protectionist nationalism or ethnic exclusion** that might have been expected.”40

None of these data suggest that the global economy is operating swimmingly. Growth remains unbalanced and fragile, and has clearly slowed in 2012. Transnational capital flows remain depressed compared to pre-crisis levels, primarily due to a drying up of cross-border interbank lending in Europe. Currency volatility remains an ongoing concern. Compared to the aftermath of other postwar recessions, growth in output, investment, and employment in the developed world have all lagged behind. But the Great Recession is not like other postwar recessions in either scope or kind; expecting a standard “V”-shaped recovery was unreasonable. **One financial analyst characterized the post-2008 global economy as in a state of “contained depression.”**41 The key word is “contained,” however. **Given the severity, reach and depth of the 2008 financial crisis, the proper comparison is with Great Depression. And by that standard, the outcome variables look impressive.** As Carmen Reinhart and Kenneth Rogoff concluded in This Time is Different: “that its macroeconomic outcome has been only the most severe global recession since World War II – and not even worse – must be regarded as fortunate.”42

**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.**

**1AR Thumpers**

**The court will rule on all of the things**

**Pieklo 9/17 (**[Jessica Mason Pieklo](http://rhrealitycheck.org/author/jessica-pieklo/), Senior Legal Analyst, RH Reality Check. “6 Supreme Court Cases to Watch This Term” http://rhrealitycheck.org/article/2013/09/17/six-supreme-court-cases-to-watch-this-term/)

**The United States Supreme Court term begins in October**, and while the entire docket has not yet been set, already **it’s shaping up to be a historic term, with decisions on abortion protests, legislative prayer, and affirmative action**, just to name a few. Here are the key cases we’re keeping an eye on as the term starts up. 1. Cline v. Oklahoma Coalition for Reproductive Justice **The Supreme Court looks poised to re-enter the abortion debate**, **and it could do so** **as early as this year** if it takes up Cline, the first of the recent wave of state-level restrictions to reach the high court. Cline involves a [challenge to an Oklahoma statute](http://rhrealitycheck.org/article/2013/06/28/scotus-poised-to-enter-medical-abortion-ban-debate/) that requires abortion-inducing drugs, including [RU-486](http://rhrealitycheck.org/tag/ru-486/), to be administered strictly according to the specific Food and Drug Administration labeling despite the fact that new research and best practices make that labeling out of date. Such “off-label” use of drugs is both legal and widespread in the United States as science, standards of care, and clinical practice often supercede the original FDA label on a given drug. In the case of cancer drugs, for example, the American Cancer Society [notes](http://www.cancer.org/treatment/treatmentsandsideeffects/treatmenttypes/chemotherapy/off-label-drug-use) that “New uses for [many] drugs may have been found and there’s often medical evidence from research studies to support the new use [even though] the makers of the drugs have not put them through the formal, lengthy, and often costly process required by the FDA to officially approve the drug for new uses.” Off-label use of RU-486 is based on the most recent scientific findings that suggest lower dosages of the drug and higher rates of effectiveness when administered in conjunction with a follow-up drug (Misoprostol). According to trial court findings, the alternative protocols are safer for women and more effective. But, according to the state and defenders of the law, there is great uncertainty about these off-label uses and their safety. When the issue reached the supreme court of Oklahoma, the court held in a very brief opinion that the Oklahoma statute was facially invalid under [Planned Parenthood v. Casey](http://www.oyez.org/cases/1990-1999/1991/1991_91_744). In Casey, a plurality of justices held that a state may legitimately regulate abortions from the moment of gestation as long as that regulation does not impose an undue burden on a woman’s right to choose an abortion. Later, in [Gonzales v. Carhart](http://www.oyez.org/cases/2000-2009/2006/2006_05_380), a majority of the Supreme Court, led by Justice Anthony Kennedy, interpreted Casey to allow state restrictions on specific abortion procedures when the government “reasonably concludes” that there is medical uncertainty about the safety of the procedure and an alternative procedure is available. Cline, then, could present an important test on the limits of Casey and whether, under Gonzales, the Court will permit states to ban medical abortions. But it’s not entirely clear the Court will actually take up Cline. At the lower court proceedings, the challengers argued that the Oklahoma statute bars the use of RU-486’s follow-up drug (Misoprostol) as well as the use of Methotrexate to terminate an ectopic pregnancy. If so, the statute then bars both any drug-induced abortion and eliminates the preferred method for ending an ectopic pregnancy. Attorneys defending the restriction deny the law has those effects, and do not argue that if it did such restrictions would be constitutional. With this open question of state law—whether the statute prohibits the preferred treatment for ectopic pregnancies—the Supreme Court told the Oklahoma Supreme Court those disputed questions of state law. So a lot depends on how the Oklahoma Supreme Court proceeds. Should the Oklahoma Supreme Court hold that the Oklahoma statute is unconstitutional because it prohibits the use of Misoprostol and Methotrexate, this case could be over without the Supreme Court weighing in. But if the Oklahoma Supreme Court invalidates the law insofar as it prohibits alternative methods for administering RU-486, the Supreme Court will almost certainly take a look. 2. Town of Greece v. Galloway **The Roberts Court is set to weigh in on** the issue of when, and **how,** [**government prayer**](http://rhrealitycheck.org/article/2013/05/24/reason-for-concern-as-roberts-court-agrees-to-hear-government-prayer-case/) **practices can exist** without violating the Establishment Clause’s ban on the intermingling of church and state. In [Marsh v. Chambers](http://www.oyez.org/cases/1980-1989/1982/1982_82_23), the Supreme Court upheld Nebraska’s practice of opening each legislative session with a prayer, based largely on an unbroken tradition of that practice dating back to the framing of the Constitution. In Marsh, the Court adopted two apparent limits to a legislative prayer practice: The government may not select prayer-givers based on a discriminatory motive, and prayer opportunities may not be exploited to proselytize in favor of one religion or disparage another. Prior to 1999, the town of Greece, New York, opened every legislative session with a moment of silence. Then, in 1999 and at the request of the town’s supervisor, the town switched to opening its legislative sessions with a prayer. Nearly all of those prayers were delivered by Christian clergy members and, unlike other city councils, there was no requirement that the prayers be inclusive or non-denominational. City officials selected speakers off a list of local religious leaders provided by the Greece Chamber of Commerce. From 1999 through 2007, Christians delivered every single invocation prayer, in part because the list provided by the area Chamber of Commerce included only Christian religious officials despite the fact that other denominations exist in the community. The practice was challenged by a group of citizens who argued it violated the Establishment Clause. The U.S. Court of Appeals for the Second Circuit acknowledged that the Town of Greece had not violated either of Marsh’s limits in its practices, but still invalidated the town’s practices. Applying the “reasonable observer” standard drawn from [County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter](http://www.oyez.org/cases/1980-1989/1988/1988_87_2050), the court concluded that a reasonable observer would view the town as endorsing Christianity over other religions, because its process of composing a list of prayer-givers from clergy within its geographic boundaries and volunteers virtually guaranteed the person delivering the prayer would be a Christian, because most of the prayers contained uniquely Christian references, and because prayer-givers invited participation and town officials participated in the prayers. The reasonable observer test appears headed for a fall. In County of Alleghany, Justice Kennedy in his dissent criticized the reasonable observer test as insensitive to traditions and unworkable for governments and courts to apply. He argued that religious accommodations are consistent with the Establishment Clause as long as they do not coerce attendance at, or participation in, a religious observance, or directly fund religion. Justice Kennedy’s perspective is an important one. To begin with, the makeup of the Court is different now than the last time it considered these issues. Justice Sandra Day O’Connor has been replaced by Justice Samuel Alito, for example, and the Court has veered hard to the right. **It is conceivable then that the Court could** view this case as an opportunity to **abandon**, or at least reconsider and revise**, the reasonable observer test.** If so, **the decision could affect** not only the **constitutionality of** legislative prayers, but also **all religious accommodations**, including the public display of religious symbols. It could also offer a glimpse into the Court’s thinking on another religious accommodation likely to come before it this term: the challenges under the [Religious Freedom Restoration Act](http://www.law.cornell.edu/uscode/text/42/chapter-21B) to the [contraception benefit](http://rhrealitycheck.org/tag/birth-control-benefit/) in the Affordable Care Act. 3. McCullen v. Coakley Regardless of whether or not the Supreme Court ultimately takes up Cline v. Oklahoma Coalition for Reproductive Justice, the Court will take up the issue of abortion clinic protests in [McCullen v. Coakley](http://www.scotusblog.com/case-files/cases/mccullen-v-coakley/), a challenge that looks at the constitutionality of Massachusetts’ clinic buffer zone law. The last time the Supreme Court looked at the issue of clinic buffer zones was in [Hill v. Colorado](http://www.oyez.org/cases/1990-1999/1999/1999_98_1856). In Hill, the Court held that a law limiting protest and “sidewalk counseling” within eight feet of a person entering a health-care facility in order to protect persons entering the facility from unwanted speech did not violate the First Amendment. Critical to the Court’s decision in Hill was its conclusion that the prohibition was content neutral because it arguably prevented both pro-choice and anti-choice speakers from entering the eight-foot zone. The Massachusetts statute at issue in McCullen takes a different approach to get to the same purpose as the law upheld in Hill. The Massachusetts law prohibits anyone from entering a public sidewalk within 35 feet of a reproductive health-care facility, but exempts from that buffer employees of the facility acting within the scope of employment. The Massachusetts statute raises questions not resolved in Hill, including whether the employee exemption renders the Massachusetts statute content-based, meaning that it places a limitation on free speech depending on the subject matter, since arguably employees can use the exemption to deliver pro-choice messages. The Massachusetts statute differs in two other potentially significant differences also. First it applies only to reproductive health-care facilities, making its abortion-specific purpose more apparent, and has a larger buffer zone, making conversational speech more difficult. Ultimately, this case may end up being more about whether the Supreme Court sympathizes with anti-abortion protestors rather than the differences between the Massachusetts statute and Hill. In Hill, the justices in the majority were especially sympathetic to the plight of patients who want to undergo a private medical procedure in peace, without being subjected to the emotional turmoil of confrontational protests. The dissenters in Hill now find themselves in the conservative majority under the Roberts Court, a fact that could drive the outcome here. In Hill, conservative justices like Antonin Scalia ignored the plight of patients and instead accused the majority of creating a special brand of reduced First Amendment protection for abortion protesters that would be viewed as intolerable if applied to any other speaker. And that perspective shift—from concerns over patients’ rights to concerns over protesters’ rights—could make all the difference in this case. 4. McCutcheon v. Federal Election Commission **If you thought Citizens United was bad**, **just wait until you hear about** [**McCutcheon v. Federal Election Commission**](http://www.scotusblog.com/case-files/cases/mccutcheon-v-federal-election-commission/) (FEC). In [Citizens United v. FEC](http://www.oyez.org/cases/2000-2009/2008/2008_08_205), the Court held that restrictions on independent campaign expenditures that prohibited corporations from direct election spending violate the First Amendment. As bad as that decision was, it left intact the underlying holding in [Buckley v. Valeo](http://www.oyez.org/cases/1970-1979/1975/1975_75_436) that Congress may limit campaign contributions on the reasoning that limits on campaign contributions are thought to impinge less on First Amendment freedoms and have a stronger nexus to preventing corruption. At issue in McCutcheon is this underlying holding in Buckley when the Court considers the constitutionality of federal aggregate contribution limits—that is, the total amount that can be contributed to all candidates, party committees, or political action committees (PACs). Those are in contrast to base limits on candidate contributions that set limits on individual donations. In Buckley, the Court summarily upheld aggregate contribution limits as a means of preventing circumvention of the base limits on candidate contributions. The rationale was that, without aggregate limits, persons could circumvent the base limits on candidate contributions through massive un-earmarked contributions to political committees likely to contribute to a person’s favored candidate. The Roberts Court appears eager to take up aggregate limits because they limit not only the amount a person can contribute to a candidate, but the number of persons to whom a person can make a full base-level contribution. These kinds of restrictions appear all but certain to fall in a post-Citizens United world. At the time Buckley was decided, there were no base limits on party committees or PACs. Now there are. If the Supreme Court feels those new base limits adequately address the risk of circumvention that justified Buckley’s upholding aggregate contribution limits, then by Supreme Court logic there’s no reason to keep the aggregate limits in place. **The Obama administration is defending** the **aggregate limits,** arguing it is just as easy now to circumvent the base limits as when Buckley was decided, which is why the aggregate limits are necessary. Given the slow unwind of campaign finance law by the Roberts Court**, it seems unlikely they will be persuaded by** the **Obama** administration’s reasoning. 5. Schuette v. Coalition to Defend Affirmative Action If **the Roberts Court** appears set on dismantling individual contribution limits, it also **appears set to strike another blow to affirmative action plans**. Last summer, in [Fisher v. University of Texas at Austin](http://www.law.cornell.edu/supct/cert/11-345), the Court held that universities have limited authority to consider race in admissions to further diversity. At issue in [Schuette](http://www.scotusblog.com/case-files/cases/schuette-v-coalition-to-defend-affirmative-action/) is whether or not Michigan violated the Equal Protection Clause by amending its constitution to prohibit race- and sex-based discrimination or preferential treatment in public university admissions decisions. In 2006, Michigan voters approved the Michigan Civil Rights Initiative (MCRI), a measure that amended the state constitution to prohibit all use of race in public university admissions, as well as in public contracting and employment. A coalition of African-American student groups, faculty members, and public-sector labor unions immediately challenged the MCRI as a violation of the Fourteenth Amendment. In answering that question, the Court will have to tackle the restricting doctrine. Under the restricting doctrine, a state may not remove authority to decide a racial issue from one political entity and lodge it in another when doing so creates a more burdensome political hurdle. The Court has applied that doctrine only twice, first in [Hunter v. Erickson](http://holmes.oyez.org/cases/1960-1969/1968/1968_63), to invalidate a reallocation of authority over the decision to prohibit racial discrimination in housing, and then in [Washington v. Seattle School District No. 1](http://www.oyez.org/cases/1980-1989/1981/1981_81_9), to invalidate a reallocation of authority over the decision whether to bus students to achieve racial integration in the schools. The question before the Roberts Court is whether the political restructuring doctrine invalidates the MCRI. The Sixth Circuit Court of Appeals held that it did, because affirmative action is a racial issue of particular concern to racial minorities, and it is more difficult for minorities to obtain favorable action through the constitutional amendment process. In defending the MCRI, Michigan argues the political restructuring doctrine applies to reallocations of authority over measures to ensure equal opportunity, not those that give racial preference. It’s difficult to see the distinction, especially given the connection between graduating college and economic opportunity, but it is a distinction Michigan stands by. Michigan also argues that the political restructuring doctrine should not apply to admission decisions made by unelected university officials because they are not part of any “political process” as envisioned in earlier decisions. Should the Court accept Michigan’s argument, voters in any state dissatisfied with the affirmative action policies at their state universities could follow Michigan’s lead and vote to eliminate them through constitutional amendment. On the other hand, a decision finding the MCRI did in fact violate equal protection guarantees of the 14th Amendment would protect current policies from falling victim to voter dissatisfaction like in Michigan. 6. Township of Mount Holly v. Mount Holly Gardens Citizens in Action The Supreme Court is also poised to gut federal housing discrimination protections when it considers [whether to limit the federal housing discrimination law](http://www.scotusblog.com/case-files/cases/mount-holly-v-mt-holly-gardens-citizens-in-action-inc/) to cases of actual and proven bias against racial minorities. Mount Holly, New Jersey, argues it cannot be held liable for housing discrimination for redeveloping a depressed neighborhood and reducing the number of homes that are available to African Americans and Latinos. Specifically, the Roberts Court will examine whether the Fair Housing Act forbids actions by cities or mortgage lenders that have a “discriminatory effect” on racial minorities. According to census data, Mount Holly has a white majority. The town council decided that one neighborhood of about 330 homes was “in need of redevelopment.” Known as Mount Holly Gardens, this neighborhood was home to most of the Black and Latino residents in the town. The town council then voted to buy all the homes in the Gardens area for prices ranging from $32,000 to $49,000. They were to be replaced with new homes ranging from $200,000 to $250,000. In 2008, a community group representing the Gardens residents sued the city, arguing that its redevelopment plan was discriminatory and illegal because it would have a disparate impact on low-income African Americans and Latinos. City officials counter that they were not trying to displace minorities—rather, they were trying to improve a blighted part of town, not engage in illegal discrimination. Furthermore, they claim, the [Fair Housing Act](http://www.justice.gov/crt/about/hce/title8.php) does not cover these kinds of discrimination claims. **Given the Roberts Court’s willingness to severely restrict** the scope of other key pieces of **civil rights legislation**, like Title VII and the Voting Rights Act, there’s plenty of reason to believe **the F**air **H**ousing **A**ct **is the next to get gutted**. In addition to these high-profile challenges, the Supreme Court will also look at whether individual government workers can be held liable for [age discrimination claims](http://www.scotusblog.com/case-files/cases/madigan-v-levin/), whether or not federal labor laws allow employees to [change clothes at work](http://www.scotusblog.com/case-files/cases/sandifer-v-united-states-steel-corporation/), and the extent of President Obama’s [recess appointment powers](http://www.scotusblog.com/case-files/cases/national-labor-relations-board-v-noel-canning/). In many ways, **the Roberts Court is picking up** right **where it left off last term**—with an eye toward narrowing as much as possible the reach and effect of the greatest achievements of the civil rights movement.

**And Hedges**

**Downing 9/3** [09/03/13, Larry Downing, “Supreme Court to rule on fate of indefinite detention for Americans under NDAA”, http://rt.com/usa/ndaa-scotus-hedges-suit-359/]

The United States Supreme Court is being asked to hear a federal lawsuit challenging the military’s legal ability to indefinitely detain persons under the National Defense Authorization Act of 2012, or NDAA. According to Pulitzer Prize-winning journalist Chris Hedges — a co-plaintiff in the case — attorneys will file paperwork in the coming days requesting that the country’s high court weigh in on Hedges v. Obama and determine the constitutionality of a controversial provision that has continuously generated criticism directed towards the White House since signed into law by President Barack Obama almost two years ago and defended adamantly by his administration in federal court in the years since. Should the Supreme Court reject the plaintiffs’ plea, Hedges said it could signal the “obliteration of our last remaining legal protections.” With the inking of his name to the annual Pentagon spending bill nearly two years ago, President Obama awarded his military the power to imprison persons suspected of ties to terrorist groups until the vaguely-defined “end of hostilities.” Journalists and human rights workers were among those to immediately oppose the Dec. 31, 2011 signing of the NDAA — and one provision in particular, Section 1021(e) — because they said the US government could manipulate the law in order to detain anyone alleged to have “substantially supported” a group that’s considered an enemy of America, without trial, until the end of persistent and consistently expanding warfare.

**2AC Theory False**

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

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

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

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

**1AR Compartmentalization**

**No spillover --- there’s no reason \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ would be picked for make-up. The Court would choose another case that requires capital**

**Issues are compartmentalized**

**Redish 87** (Martin H., Professor of Law – Northwestern University, and Karen L. Drizin, Clerk – Illinois State Supreme Court, New York University Law Review, April, Lexis)

a. **The fallacy of the concept of fungible institutional capital**. The basis for Dean Choper's suggested judicial abstention on issues of federalism [143](http://www.lexis.com/research/retrieve?_m=11c71424f02a19dd3fddea3d6d214ae5&docnum=9&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlb-zSkAb&_md5=29cb5075b93d84858cb8ef752799c5b9&focBudTerms=supreme%20court%20w/35%20political%20capital%20or%20institutional%20capital%20w/35%20strong%20or%20strength%20or%20increas%21%20or%20abundan%21&focBudSel=all#n143) is the desire "to ease the commendable and crucial task of judicial review in cases of individual consitutional liberties. It is in the latter that the Court's participation is both vitally required and highly provocative." [144](http://www.lexis.com/research/retrieve?_m=11c71424f02a19dd3fddea3d6d214ae5&docnum=9&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlb-zSkAb&_md5=29cb5075b93d84858cb8ef752799c5b9&focBudTerms=supreme%20court%20w/35%20political%20capital%20or%20institutional%20capital%20w/35%20strong%20or%20strength%20or%20increas%21%20or%20abundan%21&focBudSel=all#n144) **Judicial efforts** in the federalism area, **he asserts, "have expended large sums of institutional capital.** This is prestige desperately **needed elsewhere**." [145](http://www.lexis.com/research/retrieve?_m=11c71424f02a19dd3fddea3d6d214ae5&docnum=9&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlb-zSkAb&_md5=29cb5075b93d84858cb8ef752799c5b9&focBudTerms=supreme%20court%20w/35%20political%20capital%20or%20institutional%20capital%20w/35%20strong%20or%20strength%20or%20increas%21%20or%20abundan%21&focBudSel=all#n145) Dean Choper's fundamental assumption, then, is that Supreme Court abstention on issues of constitutional federalism would somehow increase, or at least curtail loss of, limited capital for the more vital area of individual liberty. However, even if one were to concede that judicial review is more fundamental to our constitutional scheme in the area of individual liberty than in matters of federalism, acceptance of Dean Choper's proposal would not necessary+ly follow. The problem is **that it is neither intuitively nor empirically clear that the Court's so-called capital is transferable from one area of constitutional law to another**. As one of the current authors has previously argued: **It is difficult to imagine . . . that the widespread negative public reactions to** Miranda v. Arizona, Engle v. Vitale, or **Roe** v. Wade **would**  [\*37]  **have been affected at all by the Court's practices on issues of separation of powers and federalism. Rather, public reaction in each seems to have focused on the specific, highly charged issues** of rights for criminals, prayer in public schools, and abortions. **It is doubtful that the Court would have had an easier time if it had chosen to stay out of** interbranch and intersystemic **conflicts**. [146](http://www.lexis.com/research/retrieve?_m=11c71424f02a19dd3fddea3d6d214ae5&docnum=9&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlb-zSkAb&_md5=29cb5075b93d84858cb8ef752799c5b9&focBudTerms=supreme%20court%20w/35%20political%20capital%20or%20institutional%20capital%20w/35%20strong%20or%20strength%20or%20increas%21%20or%20abundan%21&focBudSel=all#n146)

**2AC Winners Win**

**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.

### 1AR Winners Win

**Turn — inaction decks capital**

**Weinberg 94** [Fall, 1994, Louise Weinberg is a Wynne Professor in Civil Jurisprudence, The University of Texas, “IRA C. ROTHGERBER, JR. CONFERENCE ON CONSTITUTIONAL LAW: GUARANTEEING A REPUBLICAN FORM OF GOVERNMENT: POLITICAL QUESTIONS AND THE GUARANTEE CLAUSE”, 65 U. Colo. L. Rev. 887]

Some writers trace concerns of the kind we have been discussing to one overriding concern, the need to preserve the prestige and authority of the Supreme Court. It is thought that the Court must [\*907] husband these priceless assets for the historic occasions when they must be deployed. Though we associate these views today with the "neutral principles" theorists of another day, n73 about whose teachings we have become skeptical, n74 these are not trivial concerns. Insofar as the rule of law depends on courts, and especially on the Supreme Court, it depends too on our reverence for the Court and our continuing consent to be governed by its decisions. There are those in every generation who oppose judicial review and do not comprehend it as an organic feature of the Constitution. But I think most Americans do share such reverence and consent. It is, perhaps, a civic religion. n75 It might be that this shared faith is essential to the survival of the republic under the Constitution. n76 Perhaps when President Nixon obeyed Judge Sirica's order even though it made inevitable his resignation from his presidency, it was in part this faith that informed his understanding of the importance to the country of his obedience. I doubt very much that the prudential principles of judicial restraint which an earlier generation of writers urged upon us are what keep this faith alive, as they imagined. To the contrary, I think Americans are stirred to believe in the courts because the courts have the courage to act and do act, not because they deny action. Recall the Supreme Court's effort to protect the rights of individuals in the wake of the Civil War, days of martial law and bills of attainder. n77 Recall how the Radical Republicans in Congress tried to [\*908] bring articles of impeachment against President Andrew Johnson, failed, and reacted by cutting back to seven the number of Justices of the Supreme Court, and thus -- killing two birds with one stone -- carving back as a practical matter the President's power of nomination. In this atmosphere of crisis and confrontation, the question became whether the Court would stick to its guns in opposing the forcible "Reconstruction" of the South. The significant test probably was the famous case of Ex parte McCardle. n78 McCardle first came to the Court as an appeal from a denial of habeas corpus. McCardle was a Mississippi newspaper editor, held in military custody for writing bad things about Reconstruction. By challenging the authority of his military custodians to deprive him of a civil trial by jury, he challenged the validity of the new Reconstruction Acts. n79 The Attorney General argued for an expedited appeal in McCardle's case, advising -- perhaps on the instructions of President Andrew Johnson -- that in his opinion the Reconstruction Acts were unconstitutional, and that he had so instructed the military commanders. n80 The Court did grant expedited review in McCardle's case, and heard four days of oral argument, making unusual allowances of time in appreciation of the importance of the case. Interestingly, the Johnson administration itself now backed off, as it had in Mississippi v. Johnson. n81 Now the Government argued that the Court should not decide McCardle's case because it presented a political question. Congress placed no bets on the government's position. Rather, Congress famously changed the Supreme Court's jurisdictional statutes, n82 over President Johnson's veto, in order to deny the Court the possibility of using McCardle's case to pronounce on the validity of Reconstruction. The issue in McCardle's case now became the one for which we remember it: whether Congress had power to strip the [\*909] Court of its statutory jurisdiction over a pending, argued case awaiting decision. At this crucial juncture the Court simply took an early adjournment -- early by a few days -- without decision. Thus, the Court put McCardle off for a year. n83 This seemingly discreet retirement probably was as inglorious n84 as its numerous critics would have us understand. The Court in this way avoided decision until after the elections of April 14-16, 1868. Charles Fairman takes the position that, if there ever was a historical moment for invalidation of the first Reconstruction Acts, this was it -- and the Court let it slip by. In Fairman's view, a decision on the merits in the following year would have been without practical consequences, coming "too late to interfere with the Congressional program." n85 In the event, the Court avoided the merits in the following year as well, sustaining the power of Congress to strip it of the particular head of jurisdiction. n86 This, in effect, was a decision to leave Reconstruction in place. But it was the earlier adjournment without decision, as Professor Fairman suggests, that was perceived by contemporary observers as the decision to leave Reconstruction in place. Thus, in a famous letter, McCardle's counsel, Jeremiah Black, wrote of this quiet adjournment that the Court had "knuckled under," adding: "The Court stood still to be ravished and did not even hallo while the thing was being done." n87 This sort of strategic withdrawal, far from preserving the Court's institutional capital, seems to me to squander it. Some will always be found to praise the Court for its prudence when it backs away from the judicial duty to decide even a sensitive issue; but others will recognize the circumspect retreat for what it is: pusillanimity. Professor [\*910] Choper, a proponent of judicial discretion to refuse to decide, seems to share this recognition himself, when he gives us, in no tone of admiration, the sorry record of confrontations in which the Court has backed down. n88 In Baker v. Carr, a central concern of Justice Frankfurter's dissent was that requiring reapportionment of the legislature of Tennessee could compromise the Court's authority. Effective relief might prove impossible, and the Court's mandate would be flouted. n89 But the Court seems to have come unbruised out of its intervention in state legislative malapportionment, and Congress authorized judicial enforcement for the brunt of the job in the Voting Rights Act of 1965. Indeed, in 1992, in United States Department of Commerce v. Montana, n90 the Supreme Court held unanimously, in an opinion written by Justice Stevens, that when Congress reapportions seats to a state after a fresh census, the validity of that reapportionment is not a political question confided to Congress, but is judicially examinable under Article I, Section 2. The Court relied, in part, on Baker v. Carr. n91 It is time to recognize that the Court's "legitimacy" never was a real issue. The Supreme Court, and the judicial power of the United States, are established by the Constitution of the United States. In deciding cases under federal law, courts usurp nothing. Rather, they conform to their oaths of office and the Supremacy Clause. It is time to understand that it is the Supreme Court itself that legitimizes and delegitimizes. That is what we pay it to do.