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**The United States federal judiciary should rule that the Suspension Clause entitles all persons indefinitely detained under the War Powers Authority of the President of the United States to habeas corpus that guarantees a meaningful review of the basis of their detention and habeas corpus entitles detainees to meaningful review prior to transfer to another country.**

#### Ruling on the Suspension Clause reaffirms the court’s independent authority and stops other branch circumvention AND lower court deference-ensuring meaningful review sufficiently revives habeas.

**Garrett, Virginia law professor, 2012**

(Brandon, “Habeas Corpus and Due Process”, 11-20, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2008746>, ldg)

The Suspension Clause has long cast a shadow over the regulation of detention. Now the Supreme Court has brought the Clause out of the shadows, giving it substance. It does not merely describe when the government may suspend the writ, nor does it solely reflect an important principle of constitutional avoidance in interpreting statutes that restrict judicial review of detention. Instead, the Clause affirmatively offers a simple but powerful form of process to detainees. Moreover, the Court emphasized a Suspension Clause concern with both legal and factual error. This Article has explored this new understanding of the Suspension Clause in light of the changing and unsettled relationship between two complex areas of law: due process and habeas corpus. Both “due process and habeas corpus are quite general, amorphous, and capacious” in their content.508 Despite ringing language uniting habeas and due process in a tradition dating back to Magna Carta, habeas and due process cover importantly different terrain. The Suspension Clause supplies process in circumstances where the Due Process Clause does not apply, while due process has varied applications outside areas covered by habeas corpus. In executive detentions, however, the Suspension Clause plays an outsized role. Taken seriously, the Court in Hamdi and Boumediene forged a relationship between the Suspension Clause and the Due Process Clause. Nelson Tebbe and Robert Tsai examined what circumstances justify “constitutional borrowing” and noted concerns where there is a lack of fit, a lack of transparency, and incomplete application from one area of constitutional law to another.509 In Boumediene, the Court was careful not to explicitly borrow due process standards. The Court’s caution was justified. While due process analysis focuses on adequacy of procedures, habeas process provides the authority for judges to examine the factual and legal authorization for detention. Though habeas process may be “skeletal” in its outlines, both at common law and in modern federal statutes, it provides judges a powerful tool. In significant ways, complex and sometimes poorly conceived distinctions in statutes nevertheless respect core habeas process, in part due to the judicial interventions. I have argued that Boumediene was no innovation, but rather it followed the longstanding view that habeas is at its most expansive concerning detention without a trial. The Suspension Clause demands that habeas corpus remain in full force where there was no adequate prior judicial process, particularly in the context of indefinite detentions. This places the judiciary in the uncomfortable position of reviewing broad congressional authorizations for detentions and changing executive procedures in factually and legally contested detainee petitions. Thrust into that difficult role, lower courts have often relied upon inapposite sources, hewing to some vision of a bare constitutional minimum rather than providing a meaningful habeas process. The D.C. Circuit approves a standard of proof that is too lenient as defined, if not also in application. Its approach unduly limits discovery and uses an odd harmless error rule. In other respects, rulings have done a better job harmonizing evidentiary and criminal procedure rules with habeas process. Careful application could avoid unfortunate rulings, with an exception: the decision not to extend habeas to Bagram was partially due to Boumediene’s misstep in adopting a multifactored jurisdictional test.510 Congress has preserved the central role of the judiciary in the contest over what procedures should govern review of national security detention. Although the National Defense Authorization Act for Fiscal Year 2012 contains broad authorization for detention, it does not alter or address procedural aspects of judicial review, despite calls to do so.511 Perhaps Congress has reached a stable equilibrium. Judges’ approaches to future detentions and detention legislation in future conflicts will focus on the Suspension Clause question. If Congress centers review in an enhanced version of CSRTs, if POWs receive military hearings and demand access to habeas, or if Congress creates a national security court with Article III judges but streamlined procedure, courts will ask whether each is an adequate and effective substitute for habeas, and not simply whether general procedures satisfy due process. In some cases, the answer might be the same under a habeas or due process approach, but only if judges retain the power to adequately review authorization for detentions. Moreover, Boumediene will continue to impact all of habeas corpus, ranging from judicial review under immigration statutes to central questions in postconviction law, including actual-innocence claims. The connection between habeas corpus and due process has been long celebrated. Daniel Meador heralded how “[f]lexibility to meet new problems is one of the characteristics of both due process and habeas corpus, and the value of the habeas corpus—due process combination as protection against arbitrary imprisonment—can hardly be exaggerated.”512 Yet the virtues of flexibility include the vices of malleability. The Suspension Clause jurisprudence forged in the wake of Hamdi and Boumediene suggests that connecting habeas corpus and due process requires great care. The structural role of the Suspension Clause is now firmly established. Contrary to expectations, after exerting its influence in the shadows for so long, the Clause anchors a process animating the operation of far-flung aspects of habeas corpus, ranging from military detention, to immigration detention, to postconviction review. While due process and habeas corpus overlap in some of the protections they provide, a judge asks different questions when examining a due process claim versus a habeas challenge to custody. A judge examining a due process claim will focus on the general adequacy of the procedures employed. A judge examining a habeas challenge will focus on the legal and factual authorization of an individual detention, and in more troubling cases, on the larger Suspension Clause question of whether federal judges have an adequate and effective ability to examine that question of authorization. The roles of habeas and due process are distinct and in important respects they share an inverse relationship—habeas corpus can fill the breach when due process is inadequate. The Suspension Clause ensures that habeas corpus serves a powerful, independent, and unappreciated role standing alone.

#### Executive can transfer detainees now without judicial review-that destroys habeas-their 1AC evidence

**Milko, Duquesne Law Review, 2012**

(Jennifer, “COMMENT: Separation of Powers and Guantanamo Detainees: Defining the Proper Roles of the Executive and Judiciary in Habeas Cases and the Need for Supreme Guidance”, Winter, 50 Duq. L. Rev. 173, lexis, ldg)

After the Boumediene and Munaf cases, it was clear that the United States district courts have habeas jurisdiction over detainee cases, and the District of Columbia Circuit has taken center stage in Guantanamo cases. n58 While many felt that Boumediene granted federal judges considerable control over the legal fate of detainees, the D.C. Circuit Court of Appeals used the Supreme Court's warning not to "second-guess" the Executive as its mantra in detainee cases. Though the district court ruled in several cases that a remedy, including actual release, was proper, the D.C. Circuit Court of Appeals has never approved such a release and has struck down district court orders seeking to control the fate of detainees. n59 1.Kiyemba I and Kiyemba III-Petitions for Release into the United States Following the Boumediene decision and after a determination by the Government that they were no longer "enemy combatants," seventeen Uighurs n60 detained at Guantanamo Bay for over seven years petitioned for the opportunity to challenge their detention as unlawful and requested to be released into the United States. n61 [\*182] Because they were no longer classified as "enemy combatants," the issue presented to the district court was "whether the Government had the authority to 'wind up' the petitioners' detention" or if the court could authorize the release of the Uighurs. n62 The district court decided that the Government's authority to "wind-up" the detentions ceased when "(1) detention becomes effectively indefinite; (2) there is a reasonable certainty that the petitioner will not return to the battlefield to fight against the United States; and (3) an alternative legal justification has not been provided for continued detention. Once these elements are met, further detention is unconstitutional." n63 Under this framework, the court decided that the time for wind-up authority had ended, and looked to the remedies the judiciary could utilize under its habeas jurisdiction. n64 The court concluded that based on separation of powers, the courts had authority to protect individual liberty, especially when the Executive Branch brought the person into the court's jurisdiction and then undermined the efforts of release. n65 Noting that the Executive could not have the power to limit the scope of habeas by merely assuring the court that it was using its best efforts to release the detainees, the court held that under the system of checks and balances and the importance of separation of powers to the protection of liberty, the motion for release was granted. n66 In the case renamed Kiyemba v. Obama on appeal, and commonly referred to as Kiyemba I, the D.C. Circuit Court of Appeals reversed, framing the issue as whether the courts had authority to issue release into the United States. n67 Because there was the potential that the Petitioners would be harmed if returned to their native China, the Government asserted that they had been undergoing extensive efforts to relocate the detainees in suitable third countries. n68 The court based its reversal on case law that held that the power to exclude aliens from the country was an inherent Executive power, and not one with which the courts should inter [\*183] fere. n69 Though Petitioners claimed that release was within the court's habeas power, the court of appeals noted that the Petitioners sought more than a "simple release"-they sought to be released into the United States, and habeas could not interfere with the Executive's power to control the borders. n70 The Supreme Court granted the Petitioner's writ of certiorari in which they argued that the courts had the authority to issue release of unlawfully detained prisoners under its habeas power and to hold otherwise constituted a conflict with Boumediene. n71 By the time the case reached the High Court for determination on the merits, all of the detainee-Petitioners received resettlement offers, and only five had rejected these offers. n72 Due to the possibility of a factual difference based on this new information, the Supreme Court remanded the case to the D.C. Circuit Court of Appeals. n73 The remanded case became known as Kiyemba III. n74 The court of appeals reinstated its former opinion from Kiyemba I. n75 The D.C. Circuit Court of Appeals noted that just prior to the Kiyemba I decision, the government filed information under seal which indicated that all seventeen Petitioners had received a resettlement offer, and this influenced the court's conclusion that the Government was engaging in diplomatic efforts to relocate the detainees when it decided Kiyemba I. n76 Even if the Petitioners had a valid reason to decline these offers, it did not change the underlying notion that habeas afforded no remedy to be released into the United States. n77 Additionally, the court determined that the Petitioners had no privilege to have the courts review the determinations made by the Executive regarding the locations of resettlement, as this was a foreign policy issue for the political branches to handle. n78 The five remaining petitioners filed a second petition for certiorari on December 8, 2010, asking the Supreme Court to decide [\*184] whether the courts had the power to release unlawfully detained aliens under its habeas jurisdiction. n79 2.Kiyemba II and Petitions Requesting Notice of Transfer Prior to Release While the Kiyemba I and Kiyemba III litigation was occurring, **a** separate Uighur petition was moving through the D.C. Circuit. Nine Uighurs petitioned the district court for a writ of habeas, and asked the court to require the government to provide 30 days' advance notice of any transfer from Guantanamo based on fear of torture, and the district court granted the petition. n80 The cases were consolidated on appeal and renamed Kiyemba v. Obama, which is referred to as Kiyemba II. The Kiyemba II case has been the source of much debate over both the proper allocation of power in the tripartite system and the D.C. Circuit Court of Appeals' use of Supreme Court precedent in detainee cases. The D.C. Court of Appeals analogized the Uighurs' claims in the Kiyemba II case to the 2008 Supreme Court decision Munaf v. Geren, which held that habeas corpus did not prevent the transfer of an American citizen in captivity in Iraq to face prosecution in a sovereign state. n81 The court of appeals analyzed the Uughurs' claims by comparing them to the Munaf petitioners. First, the court found that the Uighurs and the petitioners in Munaf sought an order of the district court to enjoin their transfer based on fear of torture in the recipient country. n82 As in Munaf, the court decided that if the United States Government had asserted that it was against its policy to transfer detainees to a location where they may face torture, the Judiciary could not question that determination. n83 In reaching that conclusion, the Kiyemba II court cited to the Munaf language that the Judiciary should not "second-guess" the Executive in matters of foreign policy. n84 [\*185] Just as the court rejected the fear of torture argument, the Petitioners' claims that transfer should be enjoined to prevent continued detention or prosecution in the recipient country was also denied based on Munaf. n85 As Munaf reasoned, detainees could not use habeas as a means to hide from prosecution in a sovereign country, and any judicial investigation into a recipient country's laws and procedures would violate international comity and the Executive Branch's role as the sole voice on foreign policy. n86 Additionally, because the 30 days' notice requirements were seen as an attempt by the courts to enjoin the transfer of a detainee, they, too, were impermissible remedies. n87 Judge Griffith, concurring and dissenting in part, opined that Munaf did not require total deference to the political branches in detainee matters, that privileges of detainees outlined in Boumediene required advance notice of any transfer from Guantanamo, and the opportunity to challenge the Government's determination that transfer to the recipient country would not result in torture or additional detainment. n88 The Judge distinguished Munaf from the present situation because in the former, the petitioners knew they were going to be transferred to Iraqi custody and had an opportunity to bring habeas petitions to challenge that transfer. n89 In closing, Judge Griffith believed that "the constitutional habeas protections extended to these petitioners by Boumediene would be greatly diminished, if not eliminated, without an opportunity to challenge the government's assurances that their transfers will not result in continued detention on behalf of the United States." n90 Following this reversal, the Petitioners filed a motion for rehearing and suggested a rehearing en banc, as well as a stay of the mandate of the D.C. Circuit Court of Appeals. n91 Both of these motions were denied, and the Petitioners filed a writ for a petition of certiorari on November 10, 2009. n92 The Supreme Court denied the writ on March 22, 2010. n93 [\*186]

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#### The Executive Branch of the United States federal government should release detainees who have won habeas hearings using National Security Waivers. The Executive Branch should clarify the reason for this action is the courts order for release to fulfill the detainees right to habeas corpus.

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#### Presidents will never comply with a direct court refutation of war time policy-he’ll always use extenuating justifications-this wrecks the Court’s institutional strength

**Pushaw, Pepperdine law professor, 2004**

(Robert, Defending Deference: A Response to Professors Epstein and Wells,” Missouri Law Review, lexis, ldg)

Civil libertarians have urged the Court to exercise the same sort of judicial review over war powers as it does in purely domestic cases—i.e., independently interpreting and applying the law of the Constitution, despite the contrary view of the political branches and regardless of the political repercussions.54 This proposed solution ignores the institutional differences, embedded in the Constitution, that have always led federal judges to review warmaking under special standards. Most obviously, the President can act with a speed, decisiveness, and access to information (often highly confidential) that cannot be matched by Congress, which must garner a majority of hundreds of legislators representing multiple interests.55 Moreover, the judiciary by design acts far more slowly than either political branch. A court must wait for parties to initiate a suit, oversee the litigation process, and render a deliberative judgment that applies the law to the pertinent facts.56 Hence, by the time federal judges (particularly those on the Supreme Court) decide a case, the action taken by the executive is several years old. Sometimes, this delay is long enough that the crisis has passed and the Court’s detached perspective has been restored.57 At other times, however, the war rages, the President’s action is set in stone, and he will ignore any judicial orders that he conform his conduct to constitutional norms.58 In such critical situations, issuing a judgment simply weakens the Court as an institution, as Chief Justice Taney learned the hard way.59 Professor Wells understands the foregoing institutional differences and thus does not naively demand that the Court exercise regular judicial review to safeguard individual constitutional rights, come hell or high water. Nonetheless, she remains troubled by cases in which the Court’s examination of executive action is so cursory as to amount to an abdication of its responsibilities—and a stamp of constitutional approval for the President’s actions.60 Therefore, she proposes a compromise: requiring the President to establish a reasonable basis for the measures he has taken in response to a genuine risk to national security.61 In this way, federal judges would ensure accountability not by substituting their judgments for those of executive officials (as hap-pens with normal judicial review), but rather by forcing them to adequately justify their decisions.62 This proposal intelligently blends a concern for individual rights with pragmatism. Civil libertarians often overlook the basic point that constitutional rights are not absolute, but rather may be infringed if the government has a compelling reason for doing so and employs the least restrictive means to achieve that interest.63 Obviously, national security is a compelling governmental interest.64 Professor Wells’s crucial insight is that courts should not allow the President simply to assert that “national security” necessitated his actions; rather, he must concretely demonstrate that his policies were a reasonable and narrowly tailored response to a particular risk that had been assessed accurately.65 Although this approach is plausible in theory, I am not sure it would work well in practice. Presumably, the President almost always will be able to set forth plausible justifications for his actions, often based on a wide array of factors—including highly sensitive intelligence that he does not wish to dis-close.66 Moreover, if the President’s response seems unduly harsh, he will likely cite the wisdom of erring on the side of caution. If the Court disagrees, it will have to find that those proffered reasons are pretextual and that the President overreacted emotionally instead of rationally evaluating and responding to the true risks involved. But are judges competent to make such determinations? And even if they are, would they be willing to impugn the President’s integrity and judgment? If so, what effect might such a judicial decision have on America’s foreign relations? These questions are worth pondering before concluding that “hard look” review would be an improvement over the Court’s established approach. Moreover, such searching scrutiny will be useless in situations where the President has made a wartime decision that he will not change, even if judicially ordered to do so. For instance, assume that the Court in Korematsu had applied “hard look” review and found that President Roosevelt had wildly exaggerated the sabotage and espionage risks posed by Japanese-Americans and had imprisoned them based on unfounded fears and prejudice (as appears to have been the case). If the Court accordingly had struck down FDR’s order to relocate them, he would likely have disobeyed it. Professor Wells could reply that this result would have been better than what happened, which was that the Court engaged in “pretend” review and stained its reputation by upholding the constitutionality of the President’s odious and unwarranted racial discrimination. I would agree. But I submit that the solution in such unique situations (i.e., where a politically strong President has made a final decision and will defy any contrary court judgment) is not judicial review in any form—ordinary, deferential, or hard look. Rather, the Court should simply declare the matter to be a political question and dismiss the case. Although such Bickelian manipulation of the political question doctrine might be legally unprincipled and morally craven, 67 at least it would avoid giving the President political cover by blessing his unconstitutional conduct and instead would force him to shoulder full responsibility. Pg. 968-970

#### Weakening the court prevents sustainable development

**Stein, New South Wales Court of Appeal former judge, 2005**

(Paul Stein, “Why judges are essential to the rule of law and environmental protection”, IUCN Environmental Policy and Law Paper No. 60, online, ldg)

The Johannesburg Principles state: “We emphasize that the fragile state of the global environment requires the judiciary, as the guardian of the Rule of Law, to boldly and fearlessly implement and enforce applicable international and national laws, which in the field of environment and sustainable development will assist in alleviating poverty and sustaining an enduring civilization, and ensuring that the present generation will enjoy and improve the quality of life of all peoples, while also ensuring that the inherent rights and interests of succeeding generations are not compromised.” There can be no argument that environmental law, and sustainable development law in particular, are vibrant and dynamic areas, both internationally and domestically. Judge Weeramantry (of the ICJ) has reminded us that we judges, as custodians of the law, have a major obligation to contribute to its development. Much of sustainable development law is presently making the journey from soft law into hard law. This is happening internationally but also it is occurring in many national legislatures and courts. Fundamental environmental laws relating to water, air, our soils and energy are critical to narrowing the widening gap between the rich and poor of the world. Development may be seen as the bridge to narrow that gap but it is one that is riddled with dangers and contradictions. We cannot bridge the gap with materials stolen from future generations. Truly sustainable development can only take place in harmony with the environment. Importantly we must not allow sustainable development to be duchessed and bastardized. A role for judges? It is in striking the balance between development and the environment that the courts have a role. Of course, this role imposes on judges a significant trust. The balancing of the rights and needs of citizens, present and future, with development, is a delicate one. It is a balance often between powerful interests (private and public) and the voiceless poor. In a way judges are the meat in the sandwich but, difficult as it is, we must not shirk our duty. Pg. 53-54

#### Extinction

**Barry, Wisconsin land resources PhD, 2013**

(Glen, “ECOLOGY SCIENCE: Terrestrial Ecosystem Loss and Biosphere Collapse”, 2-4, <http://forests.org/blog/2013/02/ecology-science-terrestrial-ec.asp>, ldg)

Blunt, Biocentric Discussion on Avoiding Global Ecosystem Collapse and Achieving Global Ecological Sustainability Science needs to do a better job of considering worst-case scenarios regarding continental- and global-scale ecological collapse. The loss of biodiversity, ecosystems, and landscape connectivity reviewed here shows clearly that ecological collapse is occurring at spatially extensive scales. The collapse of the biosphere and complex life, or eventually even all life, is a possibility that needs to be better understood and mitigated against. A tentative case has been presented here that terrestrial ecosystem loss is at or near a planetary boundary. It is suggested that a 66% of Earth's land mass must be maintained in terrestrial ecosystems, to maintain critical connectivity necessary for ecosystem services across scales to continue, including the biosphere. Yet various indicators show that around 50% of Earth's terrestrial ecosystems have been lost and their services usurped by humans. Humanity may have already destroyed more terrestrial ecosystems than the biosphere can bear. There exists a major need for further research into how much land must be maintained in a natural and agroecological state to meet landscape and bioregional sustainable development goals while maintaining an operable biosphere. It is proposed that a critical element in determining the threshold where terrestrial ecosystem loss becomes problematic is where landscape connectivity of intact terrestrial ecosystems erodes to the point where habitat patches exist only in a human context. Based upon an understanding of how landscapes percolate across scale, it is recommended that 66% of Earth's surface be maintained as ecosystems; 44% as natural intact ecosystems (2/3 of 2/3) and 22% as agroecological buffer zones. Thus nearly half of Earth must remain as large, connected, intact, and naturally evolving ecosystems, including old-growth forests, to provide the context and top-down ecological regulation of both human agroecological, and reduced impact and appropriately scaled industrial activities. Given the stakes, it is proper for political ecologists and other Earth scientists to willingly speak bluntly if we are to have any chance of averting global ecosystem collapse. A case has been presented that Earth is already well beyond carrying capacity in terms of amount of natural ecosystem habitat that can be lost before the continued existence of healthy regional ecosystems and the global biosphere itself may not be possible. Cautious and justifiably conservative science must still be able to rise to the occasion of global ecological emergencies that may threaten our very survival as a species and planet. Those knowledgeable about planetary boundaries—and abrupt climate change and terrestrial ecosystem loss in particular—must be more bold and insistent in conveying the range and possible severity of threats of global ecosystem collapse, while proposing sufficient solutions. It is not possible to do controlled experiments on the Earth system; all we have is observation based upon science and trained intuition to diagnose the state of Earth's biosphere and suggest sufficient ecological science–based remedies. If Gaia is alive, she can die. Given the strength of life-reducing trends across biological systems and scales, there is a need for a rigorous research agenda to understand at what point the biosphere may perish and Earth die, and to learn what configuration of ecosystems and other boundary conditions may prevent her from doing so. We see death of cells, organisms, plant communities, wildlife populations, and whole ecosystems all the time in nature—extreme cases being desertification and ocean dead zones. There is no reason to dismiss out of hand that the Earth System could die if critical thresholds are crossed. We need as Earth scientists to better understand how this may occur and bring knowledge to bear to avoid global ecosystem and biosphere collapse or more extreme outcomes such as biological homogenization and the loss of most or even all life. To what extent can a homogenized Earth of dandelions, rats, and extremophiles be said to be alive, can it ever recover, and how long can it last? The risks of global ecosystem collapse and the need for strong response to achieve global ecological sustainability have been understated for decades. If indeed there is some possibility that our shared biosphere could be collapsing, there needs to be further investigation of what sorts of sociopolitical responses are valid in such a situation. Dry, unemotional scientific inquiry into such matters is necessary—yet more proactive and evocative political ecological language may be justified as well. We must remember we are speaking of the potential for a period of great dying in species, ecosystems, humans, and perhaps all being. It is not clear whether this global ecological emergency is avoidable or recoverable. It may not be. But we must follow and seek truth wherever it leads us. Planetary boundaries have been quite anthropocentric, focusing upon human safety and giving relatively little attention to other species and the biosphere's needs other than serving humans. Planetary boundaries need to be set that, while including human needs, go beyond them to meet the needs of ecosystems and all their constituent species and their aggregation into a living biosphere. Planetary boundary thinking needs to be more biocentric. I concur with Williams (2000) that what is needed is an Earth System–based conservation ethic—based upon an "Earth narrative" of natural and human history—which seeks as its objective the "complete preservation of the Earth's biotic inheritance." Humans are in no position to be indicating which species and ecosystems can be lost without harm to their own intrinsic right to exist, as well as the needs of the biosphere. For us to survive as a species, logic and reason must prevail (Williams 2000). Those who deny limits to growth are unaware of biological realities (Vitousek 1986). There are strong indications humanity may undergo societal collapse and pull down the biosphere with it. The longer dramatic reductions in fossil fuel emissions and a halt to old-growth logging are put off, the worse the risk of abrupt and irreversible climate change becomes, and the less likely we are to survive and thrive as a species. Human survival—entirely dependent upon the natural world—depends critically upon both keeping carbon emissions below 350 ppm and maintaining at least 66% of the landscape as natural ecological core areas and agroecological transitions and buffers. Much of the world has already fallen below this proportion, and in sum the biosphere's terrestrial ecosystem loss almost certainly has been surpassed, yet it must be the goal for habitat transition in remaining relatively wild lands undergoing development such as the Amazon, and for habitat restoration and protection in severely fragmented natural habitat areas such as the Western Ghats. The human family faces an unprecedented global ecological emergency as reckless growth destroys the ecosystems and the biosphere on which all life depends. Where is the sense of urgency, and what are proper scientific responses if in fact Earth is dying? Not speaking of worst-case scenarios—the collapse of the biosphere and loss of a living Earth, and mass ecosystem collapse and death in places like Kerala—is intellectually dishonest. We must consider the real possibility that we are pulling the biosphere down with us, setting back or eliminating complex life. The 66% / 44% / 22% threshold of terrestrial ecosystems in total, natural core areas, and agroecological buffers gets at the critical need to maintain large and expansive ecosystems across at least 50% of the land so as to keep nature connected and fully functional. We need an approach to planetary boundaries that is more sensitive to deep ecology to ensure that habitable conditions for all life and natural evolutionary change continue. A terrestrial ecosystem boundary which protects primary forests and seeks to recover old-growth forests elsewhere is critical in this regard. In old forests and all their life lie both the history of Earth's life, and the hope for its future. The end of their industrial destruction is a global ecological imperative. Much-needed dialogue is beginning to focus on how humanity may face systematic social and ecological collapse and what sort of community resilience is possible. There have been ecologically mediated periods of societal collapse from human damage to ecosystems in the past (Kuecker and Hall 2011). What makes it different this time is that the human species may have the scale and prowess to pull down the biosphere with them. It is fitting at this juncture for political ecologists to concern themselves with both legal regulatory measures, as well as revolutionary processes of social change, which may bring about the social norms necessary to maintain the biosphere. Rockström and colleagues (2009b) refer to the need for "novel and adaptive governance" without using the word revolution. Scientists need to take greater latitude in proposing solutions that lie outside the current political paradigms and sovereign powers. Even the Blue Planet Laureates' remarkable analysis (Brundtland et al. 2012), which notes the potential for climate change, ecosystem loss, and inequitable development patterns neither directly states nor investigates in depth the potential for global ecosystem collapse, or discusses revolutionary responses. UNEP (2012) notes abrupt and irreversible ecological change, which they say may impact life-support systems, but are not more explicit regarding the profound human and ecological implications of biosphere collapse, or the full range of sociopolitical responses to such predictions. More scientific investigations are needed regarding alternative governing structures optimal for pursuit and achievement of bioregional, continental, and global sustainability if we are maintain a fully operable biosphere forever. An economic system based upon endless growth that views ecosystems necessary for planetary habitability primarily as resources to be consumed cannot exist for long. Planetary boundaries offer a profoundly difficult challenge for global governance, particularly as increased scientific salience does not appear to be sufficient to trigger international action to sustain ecosystems (Galaz et al. 2012). If indeed the safe operating space for humanity is closing, or the biosphere even collapsing and dying, might not discussion of revolutionary social change be acceptable? Particularly, if there is a lack of consensus by atomized actors, who are unable to legislate the required social change within the current socioeconomic system. By not even speaking of revolutionary action, we dismiss any means outside the dominant growth-based oligarchies. In the author's opinion, it is shockingly irresponsible for Earth System scientists to speak of geoengineering a climate without being willing to academically investigate revolutionary social and economic change as well. It is desirable that the current political and economic systems should reform themselves to be ecologically sustainable, establishing laws and institutions for doing so. Yet there is nothing sacrosanct about current political economy arrangements, particularly if they are collapsing the biosphere. Earth requires all enlightened and knowledgeable voices to consider the full range of possible responses now more than ever. One possible solution to the critical issues of terrestrial ecosystem loss and abrupt climate change is a massive and global, natural ecosystem protection and restoration program—funded by a carbon tax—to further establish protected large and connected core ecological sustainability areas, buffers, and agro-ecological transition zones throughout all of Earth's bioregions. Fossil fuel emission reductions must also be a priority. It is critical that humanity both stop burning fossil fuels and destroying natural ecosystems, as fast as possible, to avoid surpassing nearly all the planetary boundaries. In summation, we are witnessing the collective dismantling of the biosphere and its constituent ecosystems which can be described as ecocidal. The loss of a species is tragic, of an ecosystem widely impactful, yet with the loss of the biosphere all life may be gone. Global ecosystems when connected for life's material flows provide the all-encompassing context within which life is possible. The miracle of life is that life begets life, and the tragedy is that across scales when enough life is lost beyond thresholds, living systems die.

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#### Plan wrecks plenary immigration powers

**Rubenstein, Hofstra law professor, 2010**

(David, “Can a Federal Judge Order the Release of Nonmilitary Guantanamo Detainees into the United States?”, Preview of United States Supreme Court Cases, 37.6, proquest, ldg)

Finally, beyond the implications for Guantanamo detainees, an eventual ruling on the merits can reasonably be expected to spill into the immigration context more generally. Among other things, a ruling in favor of respondents might reinvigorate the political branches' historic assertion of plenary control over our borders, whereas a ruling in favor of petitioners might undermine such grand assertions.

#### That snowballs-leads to massive review of immigration policy and constitutional challenges

**Cox, Chicago law school lecturer, 2004**

(Adam, “Citizenship, Standing, and Immigration Law”, March, 92 Calif. L. Rev. 373, lexis, ldg)

The constitutional core of immigration law - the doctrine of Congress's plenary power over immigration - is in large part a doctrine of standing. This fact has gone generally unrecognized. Immigration scholars typically interpret plenary power doctrine as grounded either in the notion that certain constitutional constraints do not operate when Congress exercises its immigration power or in the notion that courts will not enforce those constraints in the context of immigration law. n12 As this Part shows, however, a third conception of the doctrine operates in constitutional [\*378] immigration law: courts often implicitly conceptualize the plenary power as grounded in the notion that aliens lack the right to seek meaningful judicial review of the constitutionality of immigration policy. For over a century, the doctrine of Congress's plenary power over immigration has largely insulated immigration law from constitutional challenge. n13 Both the substance and scope of this plenary power, as well as the judicial justifications for it, have developed unsteadily and remain incoherent in many respects. n14 As a result, the power's contours and underpinnings are the subject of substantial doctrinal confusion and extended academic criticism. n15 In fact, the term "plenary power" itself is an unfortunate and unhelpful phrase. The moniker does not explain what, if anything, is special about constitutional immigration law; Congress's power over many subjects is considered "plenary," but laws concerning other subjects are generally open to constitutional challenge. The term is, if anything, misleading, because it wrongly suggests that the doctrine is concerned solely with congressional "power." As this Part explains, however, the doctrine is far more conceptually complicated and ambiguous. While this complexity and ambiguity make the doctrine difficult to describe with precision, however, it is possible to identify the doctrine's basic thrust: pursuant to the doctrine, courts largely insulate immigration law from constitutional challenges.

#### Plenary powers key to prevent state regulation of immigration

**Schuck, Yalw law professor, 2007**

(Peter, “Taking Immigration Federalism Seriously”, 2007 U Chi Legal F 57, lexis, ldg)

Probably no principle in immigration law is more firmly established, or of greater antiquity, than the plenary power of the federal government to regulate immigration. n1 Equally canonical is the corollary notion, analogous to the dormant power doctrine in Commerce Clause jurisprudence, that this federal power is indivisible and therefore the states may not exercise any part of it without an express or implied delegation from Washington. Despite the plenary power doctrine's authority, it has been assailed over the years by many academics and defended, I think, by none. Questioning its source in the Constitution, fit with other bodies of law, institutional implications, internal coherence, specific applications, and policy merits, critics have called for abandoning or significantly limiting it. n2 Its detractors have also criticized the doctrine's failure to clarify how power is allocated between Congress and the President in situations where they disagree. An interesting feature of these critiques of the plenary power doctrine is that the critics seem to have no difficulty accepting its [\*58] corollary -- the principle that federal authority over immigration preempts the states from playing any independent role in the development and administration of immigration law and policy. Indeed, they enthusiastically affirm and defend it. This conjunction of positions, which might otherwise seem illogical or at least awkward, is probably best explained by ideology and politics. As I have explained elsewhere, the immigration law professoriate occupies a position at the extreme left in the national debate over immigration. n3 [\*59]

#### State immigration laws kill heg and cooperation key to solving free trade, proliferation and multilateral cooperation

**Steinberg, former Texas Public Affairs school dean, 2010**

(James, “Chapter 5 Foreign Relations”, <http://www.state.gov/documents/organization/194015.pdf>, ldg)

Second, H.B. 56 antagonizes foreign governments and their populations, both at home and in the United States, likely making them less willing to negotiate, cooperate with, or support the United States across a broad range of foreign policy issues. U.S. immigration policy and treatment of foreign nationals can directly affect the United States’ ability to negotiate and implement favorable trade and investment agreements, to secure cooperation on counterterrorism and counternarcotics trafficking operations, and to obtain desired outcomes in international bodies on priorities such as nuclear nonproliferation, among other important U.S. interests. Together with the other recently enacted state immigration laws, H.B. 56 is already complicating our efforts to pursue such interests. H.B. 56’s impact is liable to be especially acute, moreover, not only among our critical partners in the region but also among our many important democratic allies worldwide, as those governments are the most likely to be responsive to the concerns of their constituents and the treatment of their own nationals abroad. • Third, H.B. 56 threatens to undermine our standing in regional and multilateral bodies that address migration and human rights matters, and to hamper our ability to advocate effectively for the advancement of human rights and other U.S. values. Multilateral, regional, and bilateral engagement on human rights issues and international promotion of the rule of law are high priorities for the United States. Consistency in U.S. practices at home is critical for us to be able to argue for international law consistency abroad. By deviating from national policy in this area, H.B. 56 may place the United States in tension with our international obligations and commitments, and compromise our position in bilateral, regional, and multilateral conversations regarding human rights. 10. Furthermore, when H.B. 56 is considered in the context of the unprecedented surge in state legislative efforts to create state-specific immigration enforcement policies, each of these threats is significantly magnified, and several additional concerns arise. • First, by creating a patchwork of immigration regimes, states such as Alabama make it substantially more difficult for foreign nationals to understand their rights and obligations, rendering them more vulnerable to discrimination and harassment. • Second, this patchwork creates cacophony as well as confusion regarding U.S. immigration policy, and thereby undermines the United States’ ability to speak with one voice in the immigration area, with all its sensitive foreign policy implications. • Third, this patchwork fosters a perception abroad that the United States is becoming more hostile to foreign nationals, corroding a reputation for tolerance, openness, and fair treatment that is critical to our standing in international and multinational fora, our ability to attract visitors, students, and investment from overseas, our influence in a wide range of transnational contexts, and the advancement of our economic and other interests. 11. In light of these broad, overlapping, and potentially unintended ways in which immigration activities can adversely impact our foreign affairs, it is critically important that national immigration policy be governed by a uniform legal regime, and that decisions regarding the development and enforcement of immigration policy be made by the national government. In all matters that are closely linked to U.S foreign relations, including immigration, the United States is constantly engaged in weighing multiple competing considerations and choosing among priorities in order to develop an overall foreign policy strategy that will most effectively advance U.S. interests and values. The United States likewise is constantly seeking the support of foreign governments, through a delicately navigated process, across the entire range of U.S. policy goals. Only the federal government has the international relationships and information, and the national mandate and perspective, to be able to appropriately evaluate these choices on a continuing basis in response to fluctuating events on the world stage. The proliferation of state laws advancing state-specific approaches to immigration enforcement represents a serious threat to the national control over immigration policy that effective foreign policy demands.

#### Immigration reform key to hard power and soft power

Nye 12/10 Joseph S. Nye, a former US assistant secretary of defense and chairman of the US National Intelligence Council, is University Professor at Harvard University. His most recent book is The Future of Power. 12/10/12, Project Syndicate, Immigration and American Power, <http://www.project-syndicate.org/commentary/obama-needs-immigration-reform-to-maintain-america-s-strength-by-joseph-s--nye>

Equally important are immigration’s benefits for America’s soft power. The fact that people want to come to the US enhances its appeal, and immigrants’ upward mobility is attractive to people in other countries. The US is a magnet, and many people can envisage themselves as Americans, in part because so many successful Americans look like them. Moreover, connections between immigrants and their families and friends back home help to convey accurate and positive information about the US. Likewise, because the presence of many cultures creates avenues of connection with other countries, it helps to broaden Americans’ attitudes and views of the world in an era of globalization. Rather than diluting hard and soft power, immigration enhances both. Singapore’s former leader, Lee Kwan Yew, an astute observer of both the US and China, argues that China will not surpass the US as the leading power of the twenty-first century, precisely because the US attracts the best and brightest from the rest of the world and melds them into a diverse culture of creativity. China has a larger population to recruit from domestically, but, in Lee’s view, its Sino-centric culture will make it less creative than the US. That is a view that Americans should take to heart. If Obama succeeds in enacting immigration reform in his second term, he will have gone a long way toward fulfilling his promise to maintain the strength of the US.

#### American primacy reduces the likelihood of every scenario for great power war.

**Kagan 2007**

Robert, End of Dreams, Return of History, Hoover Institute, <http://www.hoover.org/publications/policy-review/article/6136>

The current order, of course, is not only far from perfect but also offers no guarantee against major conflict among the world ’s great powers. Even under the umbrella of unipolarity, regional conflicts involving the large powers may erupt. War could erupt between China and Taiwan and draw in both the United States and Japan. War could erupt between Russia and Georgia, forcing the United States and its European allies to decide whether to intervene or suffer the consequences of a Russian victory. Conflict between India and Pakistan remains possible, as does conflict between Iran and Israel or other Middle Eastern states. These, too, could draw in other great powers, including the United States. Such conflicts may be unavoidable no matter what policies the United States pursues. But they are more likely to erupt if the United States weakens or withdraws from its positions of regional dominance. This is especially true in East Asia, where most nations agree that a reliable American power has a stabilizing and pacific effect on the region. That is certainly the view of most of China ’s neighbors. But even China, which seeks gradually to supplant the United States as the dominant power in the region, faces the dilemma that an American withdrawal could unleash an ambitious, independent, nationalist Japan.

### 1NC

#### There will be a narrow ruling on Bond now but conservative advocates are pushing.

Donnelly 11-5-13 Tom, Constitutional Accountability Center’s Message Director and Counsel and former Climenko Fellow and Lecturer on Law at Harvard Law School, Constitutional law as soap opera: Bond v. United States http://blog.constitutioncenter.org/2013/11/constitutional-law-as-soap-opera-bond-v-united-states/

Colorful facts aside, in the conservatives’ rendering of Bond, the very fabric of the Republic is at stake. George Will has called it the Term’s “most momentous case,” arguing that the Roberts Court must step in to check a “government run amok.” The Heritage Foundation warns that the case challenges a key lesson that “Americans are taught from a young age” – that “our government is a government of limited powers.” And Ted Cruz frames the legal issue as follows: whether the “Treaty Clause is a trump card that defeats all of the remaining structural limitations on the federal government.” A scary proposition, indeed . . . But will the Court even get this far? Ms. Bond’s primary argument is that the chemical weapons treaty and its implementing statute should be read to exclude her conduct – a question of statutory interpretation and hardly the stuff of Tenthers’ dreams. If the Court decides the case on those grounds, Ms. Bond could very well prevail, while the ruling itself could be rather minor. The main reason that this case may prove “momentous” is that leading conservative academics, advocates, and legal groups are pushing the Roberts Court to turn this case from an interesting-but-far-from-historic statutory case into a monumental constitutional one. While the Court denied a request from Professor Nicholas Rosenkranz and the Cato Institute – the main proponents of the treaty-power-as-dangerous-trump-card theory – for time to press their argument during tomorrow’s hearing, the Court generally rejects such requests from amicus curiae, so we can’t read too much into that. And, following other recent cases addressing the scope of federal power – including, most prominently, the Affordable Care Act case – there is every reason to believe that the Court may wade into the important constitutional issues lurking just beneath the surface in Bond. The primary constitutional issue in the case involves the scope of the federal government’s treaty power – a power that was of central interest to George Washington and his Founding-era colleagues – and, in turn, Congress’s power under the Necessary and Proper Clause to pass laws to implement validly enacted treaties. However, in Bond, conservative legal groups have proceeded to turn the Constitution’s text and history on their head, arguing that the Constitution itself requires a ruling that sharply limits federal power and overturns nearly a century’s worth of precedent – dating back to a 1920 ruling by Justice Oliver Wendell Holmes. Indeed, Bond is just one of several cases this Term featuring an aggressive call by conservatives to overturn well-established precedent. Furthermore, a broad ruling by the Court’s conservatives could significantly limit Congress’s power to enact laws under the Necessary and Proper Clause, generally, opening up new challenges to various government programs and regulations. In the past, the right’s constitutional arguments may have gone unanswered. However, increasingly, leading progressive academics and practitioners have begun to stake their own claim to the Constitution’s text and history – the tired battle between the progressive community’s “living Constitution” and Justice Scalia’s “dead Constitution” replaced by new battles between the left and the right over the Constitution’s meaning. Bond is a clear example of this new dynamic. Rather than ceding the Constitution’s text and history to conservative legal groups, progressives have fought back in Bond with originalist arguments of their own in briefs authored by some of the progressive community’s leading lights, including Walter Dellinger, Marty Lederman, and Oona Hathaway. These briefs – as well as one filed by my organization, Constitutional Accountability Center – remind the Court that, in ditching the dysfunctional Articles of Confederation, the Founders sought to create a strong national government with the power to negotiate treaties with foreign nations, pass laws to fulfill those treaty obligations, and, in turn, enhance the young nation’s international reputation. With progressives fully engaged in the battle over the Constitution’s meaning, the question facing the Court in important constitutional cases is now less about whether the Constitution’s text and history should prevail and more about which side’s version rings truer.

#### Aff is a massive change – kills court capital and will be ignored by the President.

Devins 2010

Neal, Professor of Law at William and Mary, Talk Loudly and Carry a Small Stick: The Supreme Court and Enemy Combatants, http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1024&context=facpubs

Without question, there are very real differences between the factual contexts of Kiyemba and Bush-era cases. These differences, however, do not account for the striking gap between accounts of Kiyemba as likely inconsequential and Bush-era cases as "the most important decisions" on presidential power "ever., 20 In the pages that follow, I will argue that Kiyemba is cut from the same cloth as Bush-era enemy combatant decision making. Just as Kiyemba will be of limited reach (at most signaling the Court's willingness to impose further limits on the government without forcing the government to meaningfully adjust its policymaking), Bush-era enemy combatant cases were modest incremental rulings. Notwithstanding claims by academics, opinion leaders, and the media, Supreme Court enemy combatant decision making did not impose significant rule of law limits on the President and Congress. Bush-era cases were certainly consequential, but they never occupied the blockbuster status that so many (on both the left and the right) attributed to them. Throughout the course of the enemy combatant dispute, the Court has never risked its institutional capital either by issuing a decision that the political branches would ignore, or by compelling the executive branch to pursue policies that created meaningful risks to national security. The Court, instead, took limited risks to protect its turf and assert its power to "say what the law is." That was the Court's practice during the Bush years, and it is the Court's practice today.

#### Upholding Missouri v Holland is key to treaties but capital is key.

Spiro 2008

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

Even with respect to the Children’s Rights Convention, the balance may change. At both levels, the game is dynamic. On the international plane, as more attention is focused on human rights regimes, the costs of nonparticipation rise. Other countries and other international actors (human rights NGOs, for example) will train a more focused spotlight on U.S. nonparticipation.28 From a human rights perspective, it’s low-hanging fruit; the mere fact that the United States finds itself alone with Somalia outside the regime suffices to demonstrate the error of the American stance as a leading example of deplored American exceptionalism. For progressive advocacy groups focusing on children’s rights, the Convention is emerging as an agenda item.29 More powerful actors, including states and such major human rights groups as Amnesty International and Human Rights Watch, may be unlikely to put significant political resources into the effort, but there is the prospect of a drumbeat effect and accompanying stress to U.S. decisionmakers. 30 In the wake of international opprobrium associated with post-9/11 antiterror strategies, U.S. conformity with human rights has come under intensive international scrutiny. That scrutiny is spilling over into other human rights-related issues; there will be no more free passes for the United States when it comes to rights.31 Human rights may present the most obvious flash point along the Holland front, but it will not be the only one. As Antonia Chayes notes, “resentment runs deep” against U.S. treaty behavior.32 International pressure on the United States to fully participate in widely-subscribed international treaty regimes, some of which could constitutionally ride on the Treaty Power alone, will grow more intense. At the same time that the international price of non-participation rises, a subtle socialization may be working to lower the domestic cost of exercising Holland-like powers. Globalization is massaging international law into the sinews of American political culture. The United States may not have ratified the Convention on the Rights of the Child, for example, but it has acceded to Hague Conventions on abduction33 and adoption,34 as well as optional protocols to the Children’s Rights Convention itself,35 and has enthusiastically pursued an agreement on the transboundary recovery of child support.36 As international law becomes familiar as a tool of family law, the Children’s Convention will inevitably look less threatening even against America’s robust sentiments regarding federalism. Regimes in other areas should be to similar effect and will span the political divide. It is highly significant, for instance, that conservative Americans have become vocal advocates of international regimes against religious persecution, a key factor in the aggressive U.S. stance on Darfur.37 To the extent that conservatives see utility in one regime they will lose traction with respect to principled category arguments against others. Which is not at all to say that Holland will be activated with consensus support. A clear assertion of the Treaty Power against state prerogatives would surely provoke stiff opposition in the Senate and among anti-internationalist conservatives, setting the scene for a constitutional showdown.38 The adoption of a treaty regime invading protected state powers would require the expenditure of substantial political capital. Any president taking the Treaty Power plunge would be well advised to choose a battle to minimize policy controversy on top of the constitutional one. A substantively controversial regime depending on Holland’s authority (say, relating to the death penalty) would increase the risk of senatorial rebuke. Perhaps the best strategy would be to plant the seeds of constitutional precedent in the context of substantively obscure treaties, ones unlikely to attract sovereigntist flak. If a higher profile treaty implicating Holland were then put on the table, earlier deployments would undermine opposition framed in constitutional terms. Such was the case with the innovation of congressional-executive agreements, which, before their use in adopting major institutional regimes in the wake of World War II, had been used with respect to minor agreements in the interwar years.39 In contrast to the story of congressional-executive agreements, advocates of an expansive Treaty Power will have the advantage of Holland itself, that is, a Supreme Court decision on point and not superseded by a subsequent ruling. That would lend constitutional credibility to the proposed adoption of any agreement requiring the Treaty Power by way of constitutional support. But it wouldn’t settle the question in the face of the consistent practice described above. Holland is an old, orphaned decision, creating ample space for contemporary rejection. An anti-Holland posture, the decision’s status as good law notwithstanding, would also be bolstered by the highly credentialed revisionist critique.40 That of course begs the question of what the Supreme Court would do with the question were it presented. The Court could reaffirm Holland, in which case its resurrection would be official and the constitutional question settled, this time (one suspects) for good. That result would comfortably fit within the tradition of the foreign affairs differential (in which Holland itself is featured).41 One can imagine the riffs on Holmes, playing heavily to the imperatives of foreign relations and the increasing need to manage global challenges effectively. The opinion might not write itself, but it would require minimal creativity. Recent decisions, Garamendi notably among them,42 would supply an updated doctrinal pedigree. And since the question would come to the Court only after a treaty had garnered the requisite two-thirds’ support in the Senate, the decision would not likely require much in the way of political fortitude on the Court’s part. It would also likely draw favorable international attention, reaffirming the justices’ membership in the global community of courts.43 IV. CONCLUSION:CONSTITUTIONAL LIFE WITHOUT MISSOURI V. HOLLAND Holland’s judicial validation would hardly be a foregone conclusion. The Supreme Court has grown bolder in the realm of foreign relations. Much of this boldness has been applied to advance the application of international norms to U.S. lawmaking, the post-9/11 terror cases most notably among them.44 The VCCR decisions, on the other hand, have demonstrated the Court’s continued resistance to the application of treaty obligations on the states. In Medellín, where the Court found the President powerless to enforce the ICJ’s Avena decision on state courts, that resistance exhibited itself over executive branch objections. The Court rebuffed the President with the result of retarding the imposition of international law on the states and at the risk of offending powerful international actors.

#### Treaties are key to cooperation on every issue – solve extinction

Koh and Smith 2003

Harold Hongju Koh, Professor of International Law, and Bernice Latrobe Smith, Yale Law School; Assistant Secretary of State for Democracy, Human Rights and Labor, “FOREWORD: On American Exceptionalism,” May 2003, 55 Stan. L. Rev. 1479

Similarly, the oxymoronic concept of "imposed democracy" authorizes top-down regime change in the name of democracy. Yet the United States has always argued that genuine democracy must flow from the will of the people, not from military occupation. 67 Finally, a policy of strategic unilateralism seems unsustainable in an interdependent world. For over the past two centuries, the United States has become party not just to a few treaties, but to a global network of closely interconnected treaties enmeshed in multiple frameworks of international institutions. Unilateral administration decisions to break or bend one treaty commitment thus rarely end the matter, but more usually trigger vicious cycles of treaty violation. In an interdependent world, [\*1501] the United States simply cannot afford to ignore its treaty obligations while at the same time expecting its treaty partners to help it solve the myriad global problems that extend far beyond any one nation's control: the global AIDS and SARS crises, climate change, international debt, drug smuggling, trade imbalances, currency coordination, and trafficking in human beings, to name just a few. Repeated incidents of American treaty-breaking create the damaging impression of a United States contemptuous of both its treaty obligations and treaty partners. That impression undermines American soft power at the exact moment that the United States is trying to use that soft power to mobilize those same partners to help it solve problems it simply cannot solve alone: most obviously, the war against global terrorism, but also the postwar construction of Iraq, the Middle East crisis, or the renewed nuclear militarization of North Korea.

## Legitimacy

### 1NC

#### No spillover – multiple other violations.

McGinniss and Somin 2007

John, Law Prof @ Northwestern, and Ilya, Asst Law Prof @ George Mason, SHOULD INTERNATIONAL LAW BE PART OF OUR LAW? Stanford Law Review, Vol. 59, No. 5, pp. 1175-1247, March 2007

The aftermath of the Supreme Court’s decision in Hamdan v. Rumsfeld is likely to make the question of the status of raw international in domestic jurisprudence even more salient.10 In Hamdan, the Court did rely on international law to hold that the President lacked the authority to establish military commissions to try prisoners held at Guantanamo Bay for war crimes. But it invoked international law only because it held that Article 21 of the Uniform Code of Military Justice—a statute enacted by Congress-- conditioned the use of the tribunal on compliance with international law.11 Thus, the Court relied on domesticated international law, not raw international law, in reaching its decision. But reliance on international law endorsed by the political branches is unlikely to resolve the issues relating to the War on Terror that are likely to arise after Hamdan outside the context of military commissions. Examples of areas in which scholars have accused the Bush administration of violating international law include the rendition of suspects12 and interrogations of detainees.13 Moreover, the relevance of international law is not limited to the War on Terror. Emerging international law norms on a wide range of issues, such as hate speech,14 the death penalty,15 and labor unions,16 may conflict with domestic legal norms. Applying raw international law to create domestic rules of decision would have ever farther reaching consequences as the scope of international law grows. In concluding that raw international law should never displace domestic law because of its substantial democracy deficit, we provide a new justification for “dualism”—the proposition that international law and domestic law control only their respective legal spheres.17 Because American law derives from a political process and geopolitical position that is likely to benefit both Americans and foreigners more than raw international law, we also show that strict dualism is peculiarly suitable for the legal regime of a modern democratic superpower.

#### Can’t leverage hegemony

**Maher, Brown political science professor, 2011**

(Richard, “The Paradox of American Unipolarity: Why the United States May Be Better Off in a Post-Unipolar World”, Orbis, 55.1, Science Direct, ldg)

At the same time, preeminence creates burdens and facilitates imprudent behavior. Indeed, because of America’s unique political ideology, which sees its own domestic values and ideals as universal, and the relative openness of the foreign policymaking process, the United States is particularly susceptible to both the temptations and burdens of preponderance. For decades, perhaps since its very founding, the United States has viewed what is good for itself as good for the world. During its period of preeminence, the United States has both tried to maintain its position at the top and to transform world politics in fundamental ways, combining elements of realpolitik and liberal universalism (democratic government, free trade, basic human rights). At times, these desires have conflicted with each other but they also capture the enduring tensions of America’s role in the world. The absence of constraints and America’s overestimation of its own ability to shape outcomes has served to weaken its overall position. And because foreign policy is not the reserved and exclusive domain of the president---who presumably calculates strategy according to the pursuit of the state’s enduring national interests---the policymaking process is open to special interests and outside influences and, thus, susceptible to the cultivation of misperceptions, miscalculations, and misunderstandings. Five features in particular, each a consequence of how America has used its power in the unipolar era, have worked to diminish America’s long-term material and strategic position. Overextension. During its period of preeminence, the United States has found it difficult to stand aloof from threats (real or imagined) to its security, interests, and values. Most states are concerned with what happens in their immediate neighborhoods. The United States has interests that span virtually the entire globe, from its own Western Hemisphere, to Europe, the Middle East, Persian Gulf, South Asia, and East Asia. As its preeminence enters its third decade, the United States continues to define its interests in increasingly expansive terms. This has been facilitated by the massive forward presence of the American military, even when excluding the tens of thousands of troops stationed in Iraq and Afghanistan. The U.S. military has permanent bases in over 30 countries and maintains a troop presence in dozens more.13 There are two logics that lead a preeminent state to overextend, and these logics of overextension lead to goals and policies that exceed even the considerable capabilities of a superpower. First, by definition, preeminent states face few external constraints. Unlike in bipolar or multipolar systems, there are no other states that can serve to reliably check or counterbalance the power and influence of a single hegemon. This gives preeminent states a staggering freedom of action and provides a tempting opportunity to shape world politics in fundamental ways. Rather than pursuing its own narrow interests, preeminence provides an opportunity to mix ideology, values, and normative beliefs with foreign policy. The United States has been susceptible to this temptation, going to great lengths to slay dragons abroad, and even to remake whole societies in its own (liberal democratic) image.14 The costs and risks of taking such bold action or pursuing transformative foreign policies often seem manageable or even remote. We know from both theory and history that external powers can impose important checks on calculated risk-taking and serve as a moderating influence. The bipolar system of the Cold War forced policymakers in both the United States and the Soviet Union to exercise extreme caution and prudence. One wrong move could have led to a crisis that quickly spiraled out of policymakers’ control. Second, preeminent states have a strong incentive to seek to maintain their preeminence in the international system. Being number one has clear strategic, political, and psychological benefits. Preeminent states may, therefore, overestimate the intensity and immediacy of threats, or to fundamentally redefine what constitutes an acceptable level of threat to live with. To protect itself from emerging or even future threats, preeminent states may be more likely to take unilateral action, particularly compared to when power is distributed more evenly in the international system. Preeminence has not only made it possible for the United States to overestimate its power, but also to overestimate the degree to which other states and societies see American power as legitimate and even as worthy of emulation. There is almost a belief in historical determinism, or the feeling that one was destined to stand atop world politics as a colossus, and this preeminence gives one a special prerogative for one’s role and purpose in world politics. The security doctrine that the George W. Bush administration adopted took an aggressive approach to maintaining American preeminence and eliminating threats to American security, including waging preventive war. The invasion of Iraq, based on claims that Saddam Hussein possessed weapons of mass destruction (WMD) and had ties to al Qaeda, both of which turned out to be false, produced huge costs for the United States---in political, material, and human terms. After seven years of war, tens of thousands of American military personnel remain in Iraq. Estimates of its long-term cost are in the trillions of dollars.15 At the same time, the United States has fought a parallel conflict in Afghanistan. While the Obama administration looks to dramatically reduce the American military presence in Iraq, President Obama has committed tens of thousands of additional U.S. troops to Afghanistan. Distraction. Preeminent states have a tendency to seek to shape world politics in fundamental ways, which can lead to conflicting priorities and unnecessary diversions. As resources, attention, and prestige are devoted to one issue or set of issues, others are necessarily disregarded or given reduced importance. There are always trade-offs and opportunity costs in international politics, even for a state as powerful as the United States. Most states are required to define their priorities in highly specific terms. Because the preeminent state has such a large stake in world politics, it feels the need to be vigilant against any changes that could impact its short-, medium-, or longterm interests. The result is taking on commitments on an expansive number of issues all over the globe. The United States has been very active in its ambition to shape the postCold War world. It has expanded NATO to Russia’s doorstep; waged war in Bosnia, Kosovo, Iraq, and Afghanistan; sought to export its own democratic principles and institutions around the world; assembled an international coalition against transnational terrorism; imposed sanctions on North Korea and Iran for their nuclear programs; undertaken ‘‘nation building’’ in Iraq and Afghanistan; announced plans for a missile defense system to be stationed in Poland and the Czech Republic; and, with the United Kingdom, led the response to the recent global financial and economic crisis. By being so involved in so many parts of the world, there often emerges ambiguity over priorities. The United States defines its interests and obligations in global terms, and defending all of them simultaneously is beyond the pale even for a superpower like the United States. Issues that may have received benign neglect during the Cold War, for example, when U.S. attention and resources were almost exclusively devoted to its strategic competition with the Soviet Union, are now viewed as central to U.S. interests. Bearing Disproportionate Costs of Maintaining the Status Quo. As the preeminent power, the United States has the largest stake in maintaining the status quo. The world the United States took the lead in creating---one based on open markets and free trade, democratic norms and institutions, private property rights and the rule of law---has created enormous benefits for the United States. This is true both in terms of reaching unprecedented levels of domestic prosperity and in institutionalizing U.S. preferences, norms, and values globally. But at the same time, this system has proven costly to maintain. Smaller, less powerful states have a strong incentive to free ride, meaning that preeminent states bear a disproportionate share of the costs of maintaining the basic rules and institutions that give world politics order, stability, and predictability. While this might be frustrating to U.S. policymakers, it is perfectly understandable. Other countries know that the United States will continue to provide these goods out of its own self-interest, so there is little incentive for these other states to contribute significant resources to help maintain these public goods.16 The U.S. Navy patrols the oceans keeping vital sea lanes open. During financial crises around the globe---such as in Asia in 1997-1998, Mexico in 1994, or the global financial and economic crisis that began in October 2008--- the U.S. Treasury rather than the IMF takes the lead in setting out and implementing a plan to stabilize global financial markets. The United States has spent massive amounts on defense in part to prevent great power war. The United States, therefore, provides an indisputable collective good---a world, particularly compared to past eras, that is marked by order, stability, and predictability. A number of countries---in Europe, the Middle East, and East Asia---continue to rely on the American security guarantee for their own security. Rather than devoting more resources to defense, they are able to finance generous social welfare programs. To maintain these commitments, the United States has accumulated staggering budget deficits and national debt. As the sole superpower, the United States bears an additional though different kind of weight. From the Israeli-Palestinian dispute to the India Pakistan rivalry over Kashmir, the United States is expected to assert leadership to bring these disagreements to a peaceful resolution. The United States puts its reputation on the line, and as years and decades pass without lasting settlements, U.S. prestige and influence is further eroded. The only way to get other states to contribute more to the provision of public goods is if the United States dramatically decreases its share. At the same time, the United States would have to give other states an expanded role and greater responsibility given the proportionate increase in paying for public goods. This is a political decision for the United States---maintain predominant control over the provision of collective goods or reduce its burden but lose influence in how these public goods are used. Creation of Feelings of Enmity and Anti-Americanism. It is not necessary that everyone admire the United States or accept its ideals, values, and goals. Indeed, such dramatic imbalances of power that characterize world politics today almost always produce in others feelings of mistrust, resentment, and outright hostility. At the same time, it is easier for the United States to realize its own goals and values when these are shared by others, and are viewed as legitimate and in the common interest. As a result of both its vast power but also some of the decisions it has made, particularly over the past eight years, feelings of resentment and hostility toward the United States have grown, and perceptions of the legitimacy of its role and place in the world have correspondingly declined. Multiple factors give rise toanti-American sentiment, and anti-Americanism takes different shapes and forms.17 It emerges partly as a response to the vast disparity in power the United States enjoys over other states. Taking satisfaction in themissteps and indiscretions of the imposing Gulliver is a natural reaction. In societies that globalization (which in many parts of the world is interpreted as equivalent to Americanization) has largely passed over, resentment and alienation are felt when comparing one’s own impoverished, ill-governed, unstable society with the wealth, stability, and influence enjoyed by the United States.18 Anti-Americanism also emerges as a consequence of specific American actions and certain values and principles to which the United States ascribes. Opinion polls showed that a dramatic rise in anti-American sentiment followed the perceived unilateral decision to invade Iraq (under pretences that failed to convince much of the rest of the world) and to depose Saddam Hussein and his government and replace itwith a governmentmuchmore friendly to the United States. To many, this appeared as an arrogant and completely unilateral decision by a single state to decide for itselfwhen---and under what conditions---military force could be used. A number of other policy decisions by not just the George W. Bush but also the Clinton and Obama administrations have provoked feelings of anti-American sentiment. However, it seemed that a large portion of theworld had a particular animus for GeorgeW. Bush and a number of policy decisions of his administration, from voiding the U.S. signature on the International Criminal Court (ICC), resisting a global climate change treaty, detainee abuse at Abu Ghraib in Iraq and at Guantanamo Bay in Cuba, and what many viewed as a simplistic worldview that declared a ‘‘war’’ on terrorism and the division of theworld between goodand evil.Withpopulations around theworld mobilized and politicized to a degree never before seen---let alone barely contemplated---such feelings of anti-American sentiment makes it more difficult for the United States to convince other governments that the U.S.’ own preferences and priorities are legitimate and worthy of emulation. Decreased Allied Dependence. It is counterintuitive to think that America’s unprecedented power decreases its allies’ dependence on it. During the Cold War, for example, America’s allies were highly dependent on the United States for their own security. The security relationship that the United States had with Western Europe and Japan allowed these societies to rebuild and reach a stunning level of economic prosperity in the decades following World War II. Now that the United States is the sole superpower and the threat posed by the Soviet Union no longer exists, these countries have charted more autonomous courses in foreign and security policy. A reversion to a bipolar or multipolar system could change that, making these allies more dependent on the United States for their security. Russia’s reemergence could unnerve America’s European allies, just as China’s continued ascent could provoke unease in Japan. Either possibility would disrupt the equilibrium in Europe and East Asia that the United States has cultivated over the past several decades. New geopolitical rivalries could serve to create incentives for America’s allies to reduce the disagreements they have with Washington and to reinforce their security relationships with the United States.

#### Global order is resilient

**Brooks et al., Dartmouth government professor, 2009**

(Stephen, “Reshaping the world order: how Washington should reform international institutions”, Foreign Affairs, Marhc/April, ebsco, ldg)

FOR ANALYSTS such as Zbigniew Brzezinski and Henry Kissinger, the key reason for skepticism about the United States' ability to spearhead global institutional change is not a lack of power but a lack of legitimacy. Other states may simply refuse to follow a leader whose legitimacy has been squandered under the Bush administration; in this view, the legitimacy to lead is a fixed resource that can be obtained only under special circumstances. The political scientist G.John Ikenberry argues in After Victory that states have been well positioned to reshape the institutional order only after emerging victorious from some titanic struggle, such as the French Revolution, the Napoleonic Wars, or World War I or II. For the neoconservative Robert Kagan, the legitimacy to lead came naturally to the United States during the Cold War, when it was providing the signal service of balancing the Soviet Union. The implication is that today, in the absence of such salient sources of legitimacy, the wellsprings of support for U.S. leadership have dried up for good. But this view is mistaken. For one thing, it overstates how accepted U.S. leadership was during the Cold War: anyone who recalls the Euromissile crisis of the 1980s, for example, will recognize that mass opposition to U.S. policy (in that case, over stationing intermediaterange nuclear missiles in Europe) is not a recent phenomenon. For another, it understates how dynamic and malleable legitimacy is. Legitimacy is based on the belief that an action, an actor, or a political order is proper, acceptable, or natural. An action - such as the Vietnam War or the invasion of Iraq - may come to be seen as illegitimate without sparking an irreversible crisis of legitimacy for the actor or the order. When the actor concerned has disproportionately more material resources than other states, the sources of its legitimacy can be refreshed repeatedly. After all, this is hardly the first time Americans have worried about a crisis of legitimacy. Tides of skepticism concerning U.S. leadership arguably rose as high or higher after the fall of Saigon in 1975 and during Ronald Reagan's first term, when he called the Soviet Union an "evil empire." Even George W. Bush, a globally unpopular U.S. president with deeply controversial policies,oversaw a marked improvement in relations with France, Germany, and India in recent years - even before the elections of Chancellor Angela Merkel in Germany and President Nicolas Sarkozy in France. Of course, the ability of the United States to weather such crises of legitimacy in the past hardly guarantees that it can lead the system in the future. But there are reasons for optimism. Some of the apparent damage to U.S. legitimacy might merely be the result of the Bush administration's approach to diplomacy and international institutions. Key underlying conditions remain particularly favorable for sustaining and even enhancing U.S. legitimacy in the years ahead. The United States continues to have a far larger share of the human and material resources for shaping global perceptions than any other state, as well as the unrivaled wherewithal to produce public goods that reinforce the benefits of its global role. No other state has any claim to leadership commensurate with Washington's. And largely because of the power position the United States still occupies, there is no prospect of a counterbalancing coalition emerging anytime soon to challenge it. In the end, the legitimacy of a system's leader hinges on whether the system's members see the leader as acceptable or at least preferable to realistic alternatives. Legitimacy is not necessarily about normative approval: one may dislike the United States but think its leadership is natural under the circumstances or the best that can be expected. Moreover, history provides abundant evidence that past leading states - such as Spain, France, and the United Kingdom - were able to revise the international institutions of their day without the special circumstances Ikenberry and Kagan cite. Spainfashioned both normative and positive laws to legitimize its conquest of indigenous Americans in the early seventeenth century; France instituted modern concepts of state borders to meet its needs as Europe's preeminent land power in the eighteenth century; and the United Kingdom fostered rules on piracy, neutral shipping, and colonialism to suit its interests as a developing maritime empire in the nineteenth century. As Wilhelm Grewe documents in his magisterial The Epochs of International Law, these states accomplished such feats partly through the unsubtle use of power: bribes, coercion, and the allure oflucrative long-term cooperation. Less obvious but often more important, the bargaining hands of the leading states were often strengthened by the general perception that they could pursue their interests in even less palatable ways - notably, through the naked use of force. Invariably, too, leading states have had the power to set the international agenda, indirectly affecting the development of new rules by defining the problems they were developed to address. Given its naval primacy and global trading interests, the United Kingdom was able to propel the slave trade to the forefront of the world's agenda for several decades after it had itself abolished slavery at home, in 1833. The bottom line is that the UnitedStates today has the necessary legitimacy to shepherd reform of the international system.

## Cal Modeling

### 1NC

#### No modeling –

#### Constitutional obsolescence

Law and Versteeg 2012

David S., University of Washington St. Louis Professor of Law and PoliSci, and Mila, UVA Law Professor, The Declining Influence of the United States Constitution New York University Law Review, Vol. 87, 2012 http://whatthegovernmentcantdoforyou.com/wp-content/uploads/2012/02/ssrn-id1923556.pdf

It is equally plausible, however, that responsibility for the declining appeal of American constitutionalism lies with the idiosyncrasies of the Constitution itself rather than the proclivities of the Suprme Court. As the oldest formal constitution still in force, and one of the most rarely amended constitutions in the world,276 the U.S. Constitution contains relatively few of the rights that have become popular in recent decades,277 while some of the provisions that it does contain may appear increasingly problematic, unnecessary, or even undesirable with the benefit of two hundred years of hindsight.278 It should therefore come as little surprise if the U.S. Constitution strikes those in other countries–or, indeed, members of the U.S. Supreme Court279 –as out of date and out of line with global practice.280 Moreover, even if the Court were committed to interpreting the Constitution in tune with global fashion, it would still lack the power to update the actual text of the document. Indeed, efforts by the Court to update the Constitution via interpretation may actually reduce the likelihood of formal amendment by rendering such amendment unnecessary as a practical matter. 281 As a result, there is only so much that the U.S. Supreme Court can do to make the U.S. Constitution an attractive formal template for other countries. The obsolescence of the Constitution, in turn, may undermine the appeal of American constitutional jurisprudence: foreign courts have little reason to follow the Supreme Court’s lead on constitutional issues if the Supreme Court is saddled with the interpretation of an unusual and obsolete constitution.282 No amount of ingenuity or solicitude for foreign law on the part of the Court can entirely divert attention from the fact that the Constitution itself is an increasingly atypical document.

#### No incentive and politics

Abebe and Posner 2011

Daniel and Eric, Assistant Professor and Kirkland & Ellis Professor, University of Chicago Law School, The Flaws of Foreign Affairs Legalism, VIRGINIA JOURNAL OF INTERNATIONAL LAW Vol. 51 http://www.vjil.org/assets/pdfs/vol51/issue3/51-3-Abebe\_Posner.pdf

A third account focuses on “networks” involving the subunits of national governments rather than the national governments themselves. These subunits include regulatory agencies and courts, which jointly develop policy, harmonize regulatory standards,38 and enforce international law. According to this account’s leading proponent, Anne-Marie Slaughter, democratic constitutional structures encourage dialogue among the executive, legislative, and judicial agencies of different countries.39 In particular, judges discuss issues common to their legal systems, cite decisions from other constitutional legal systems, and share social and professional networks, which may lead to convergence around shared legal norms to resolve general legal questions.40 Slaughter never clearly explains the mechanism of influence. “Transjudicial dialogue,” as she puts it,41 is a lofty way of referring to conversations that judges have with each other when they meet at international conferences. It is possible that these conversations cause judges to adopt the legal views of their counterparts, but it is just as possible that the conversations have no effect on their judicial activities or even lead to greater disagreement rather than convergence. Even if judges are influenced in a positive way by foreign counterparts, judges in most countries have very limited authority to make policy — much less so than in the United States.42 It seems doubtful that they could have more than a marginal effect on the foreign affairs of their countries. Moreover, judges in many countries have little or no independence. Thus, any attempt on their part to constrain their national governments and executives would fail. Like Benvenisti, Downs, and Koh, Slaughter advances a descriptive thesis, but she constructs dramatic normative implications on top of it. Judicial networks, she states, “could create a genuine global rule of law without centralized global institutions and could engage, socialize, support, and constrain government officials of every type in every nation.”43 As a global community of courts develops, judges view “themselves as capable of independent action in both international and domestic realms . . . [and] are increasingly coming to recognize each other as participants in a common judicial enterprise.”44 Again, the mechanism is obscure. Why would judges enforce global norms rather than national norms? Because Slaughter does not provide a theory of judicial motivation, it is hard to understand why she thinks that courts would compel national officials to comply with global norms. But the implications of her argument are clear: the courts, not the executives, have the primary role to play in advancing international law. They should constrain, not defer to, national executives.

### 1NC – A/T Democratic Peace

#### ---No correlation between democracy and peace.

Kupchan 2011

Charles A, Professor of International Affairs – Georgetown University, “Enmity into Amity: How Peace Breaks Out,” <http://library.fes.de/pdf-files/iez/07977.pdf>

Second, contrary to conventional wisdom, democracy is not a necessary condition for stable peace. Although liberal democracies appear to be better equipped to fashion zones of peace due to their readiness to institu­tionalize strategic restraint and their more open societies – an attribute that advantages societal integration and narrative/identity change – regime type is a poor predic­tor of the potential for enemies to become friends. The Concert of Europe was divided between two liberalizing countries (Britain and France) and three absolute monar­chies (Russia, Prussia, and Austria), but nevertheless pre­served peace in Europe for almost four decades. General Suharto was a repressive leader at home, but after taking power in 1966 he nonetheless guided Indonesia toward peace with Malaysia and played a leading role in the founding of ASEAN. Brazil and Argentina embarked down the path to peace in 1979 – when both countries were ruled by military juntas. These findings indicate that non-democracies can be reliable partners in peace and make clear that the United States, the EU, and de­mocracies around the world should choose enemies and friends on the basis of other states’ foreign policy behavior, not the nature of their domestic institutions.

# 2NC

### 2NC – Only SCOTUS Sets Precedent

#### Federal courts don’t set precedent – you don’t solve anything.

Dorf 2012

Michael, Cornell Law Professor, SDNY Indefinite Detention Decision Misunderstands Implications of Facial Invalidation, Dorf on Law, http://www.dorfonlaw.org/2012/09/sdny-indefinite-detention-decision.html

A ruling by a federal court that a law is unconstitutional "on its face" is one way of finding that the plaintiffs may not be subject to that law, but it is not authorization for issuing rulings applicable to persons who are not parties. Such persons can only take advantage of such a ruling by the ordinary means by which judicial decisions have force: (1) The ruling may be a precedent to be followed in other cases; or (2) The ruling may have issue-preclusive effect (under a doctrine formerly called collateral estoppel). Neither approach works here. A ruling of a single federal district judge has no binding precedential effect. It may be cited by litigants as persuasive precedent in subsequent cases involving other parties, but no judge must follow it in the way that a district court must follow the precedents of the appeals court in the circuit that encompasses the district court or that district courts and appeals courts must follow Supreme Court precedent. Indeed, a district judge's ruling in one case is not even binding as a matter of precedent on the very same judge in a subsequent case involving different parties (although a district judge would look rather foolish if she failed to follow her own prior decisions, absent some good reason for a change of heart). What about preclusion? Couldn't litigants in subsequent cases use the facial invalidation in the earlier case to preclude the government from re-litigating the law's validity? The short answer is no. The modern law of issue preclusion sometimes permits non-mutual issue preclusion--that is, it sometimes permits persons who were not party to an earlier case to use the result of that case to estop relitigation by the losing party in the earlier case--but non-mutual issue preclusion is not permitted against the government. The reason is that the government is involved in so much litigation, that it would not be fair or sensible to make the first case that happens to come to judgment decisive of all future cases.

### Trust doctrine

#### Court supported trust doctrine will be modeled. It is a powerful tool for environmental preservation

**Wood et al., Oregon law professor, 2009**

(Mary, “How to Sue for Climate Change: The Public Trust Doctrine”, Outlook, 10.2, ebsco, ldg)

Trust litigation, by contrast, draws upon fundamental principles that are increasingly invoked by today’s visionaries. In economic terms, the trust doctrine dovetails with principles of natural capitalism. On the moral level, trust principles reflect an ethic toward children and underscore the strong urge of human beings to pass estates along to future generations. On a political level, by defining the atmosphere as common property, the trust positions all nations of the world in a logical relationship to each other and towards Nature. The trust framework defines respective sovereign obligations in quantifiable, straightforward terms, and once presented in U.S. courts could be invoked by citizens of other countries. By defining the trust obligation in a litigation venue, courts may play a tremendous role in harnessing the collective momentum from various other realms in which a paradigm shift is necessary and already taking place. This issue explores various aspects of the public trust doctrine, climate change, and future generations, and also offers insights into one lawyer’s choice to work for sustainability and the environment. As lawyers we have a tremendous ability to bring about change, and the public trust doctrine offers a powerful tool for addressing the complex issue of climate change facing all of humanity.

### Turns Case – JI/Legitimacy

#### Political branch counter measures would wreck judicial legitimacy

**Chesney, Texas law professor, 2009**

(Robert, “National Security Fact Deference”, 95 Va. L. Rev. 1361, lexis, ldg)

Judicial involvement in national security litigation, as noted at the outset, poses unusual risks for the judiciary as an institution. Such cases are more likely than most to involve claims of special, or even exclusive, executive branch authority. They are more likely than most to involve a perception - on the part of the public, the government, or judges themselves - of unusually high stakes. They are more likely than most to be in the media spotlight and hence in view of the public in a meaningful sense. These cases are, as a result of all this, especially salient as a political matter. And therein lies the danger for the courts. Because of these elements, an inappropriate judicial intervention in national security litigation is unusually likely to generate a response from the other branches or the public at large that might harm the institutional interests of the judiciary, either by undermining its prestige and authority or perhaps even by triggering some form of concrete political response.

#### Court stripping destroys judicial legitimacy and separation of powers---even unsuccessful backlash can put the entire edifice of judicial review in question

**Martin, Washington political science professor, 2001**

(Andrew, Statuatory Battles and Constitutional Wars: Congress and the Supreme Court, google books, ldg)

But the large policy payoff in the constitutional cases. What does the ability of the President and Congress to attack through overrides or other means constitutional court decisions imply in terms of the cost of the justices bear? If an attack succeeds and the court does not back down, it effectively removes the court from the policy game and may seriously or, even irrevocably harm its reputation, credibility, and legitimacy. Indeed, such an attack would effectively remove the court from policy making, thus incurring an infinite cost. With no constitutional prescription for judicial review, this power is vulnerable, and would be severely damaged if congress and the president were effective in attack on the Court. But even if the attack is unsuccessful, the integrity of the court may be damaged, for the assault may compromise its ability to make future constitutional decisions and, thus, more long-lasting policy. One does not have to peer as far back as scott v. sandford to find examples; Bush v. Gore (2000, U.S.) may provide one. To be sure, the new President and Congress did not attack the decision, but other members of government did of course, unsuccessfully at least in terms of the ruling’s impact. Yet, there seems little doubt that the critics (not to mention the decision itself) caused some major damage to the reputation of the court, the effects of which the justices may feel in the not-so-distant future.

#### Undermines global JI

**Gerhardt, William & Mary Law professor, 2005**

(Michael, "THE CONSTITUTIONAL LIMITS TO COURT-STRIPPING,", Lewis & Clark Review, 9 Lewis & Clark L. Rev. 347, Summer, lexis, ldg)

Beyond the constitutional defects with the Act, n40 it may not be good policy. It may send the wrong signals to the American people and to people around the world. It expresses hostility to our Article III courts, in spite of their special function in upholding constitutional rights and enforcing and interpreting federal law. If a branch of our government demonstrates a lack of respect for federal courts, our citizens and citizens in other countries may have a hard time figuring out why they should do otherwise. Rejecting proposals to exclude all federal jurisdiction or inferior court jurisdiction for some constitutional claims extends an admirable tradition within Congress and reminds the world of our hard-won, justifiable confidence in the special role performed by Article III courts throughout our history in vindicating the rule of law.

### a/t impact d

Turn outweighs solvency-without support activism crashes-legitimacy is a pre-requisite

Hirsch 4 (Ran Hirsch is an Associate Professor of Political Science and Law at the University of Toronto, “'Juristocracy' - Political, not Juridical,” Project Muse)

In sum, the existence of an active, non-deferential constitutional court is a necessary, but not a sufficient condition, for persistent judicial activism and the judicialization of mega politics. Assertion of judicial supremacy cannot take place, let alone be sustained, without the tacit or explicit support of influential political stakeholders. It is unrealistic, and indeed utterly naïve, to assume that core political questions such as the struggle over the nature of Canada as a confederation of two founding peoples, Israel's wrestling with the question of "who is a Jew?" and its status as a Jewish and democratic state, the struggle over the status of Islamic law in predominantly Muslim countries, or the transition to democracy in South Africa could have been transferred to courts without at least the tacit support of pertinent political stakeholders in these countries. And we have not yet said a word about the contribution of ineffective political institutions, the spread of litigation oriented NGOs, or opposition and interest group use of the courts to the judicialization of mega-politics. A political sphere conducive to judicial activism is at least as significant to its emergence and sustainability as the contribution of courts and judges. In short, judicial power does not fall from the sky. It is politically constructed. The portrayal of constitutional courts and judges as the major culprits in the all-encompassing judicialization of politics worldwide is simply too simple a tale.

### A2: Boumediene

#### Boumediene wasn’t a game changer

**Devins, William & Mary government professor, 2010**

(Neavl, “Talk Loudly and Carry a Small Stick: The Supreme Court and Enemy Combatants”, 12 U. Pa. J. Const. L. 491, lexis, ldg)

A Marked Departure or the Inevitable Next Step: Making Sense of Boumediene v. Bush. In March 2007, the first wave of constitutional challenges to the Military Commission Act made their way to the Supreme Court. n151 At that time, the Justices did not want to reenter this fray and, in April 2007, the Court denied certiorari. Justices Stevens and Kennedy attached a written explanation to the certiorari denial - stating that the Court ought to steer clear of this dispute until enemy combatants had made use of all legal remedies available to them under the congressionally approved military tribunal scheme. n152 This decision is very much consistent with prior Court rulings. The Court preserved a role for itself without formally entering the dispute and second-guessing the adequacy of Military Commission Act procedures. Two months later, the Court reversed course and agreed to rehear the case. n153 This reversal was a marked departure from normal Supreme Court practice. "In the absence of an intervening court decision or some other landscape-changing development," as Linda Greenhouse reported, the Court had only granted such rehearings on two occasions - "one [in] 1930 and the other [in] 1947." n154 In understanding the Court's about-face, there is little question that revelations about the inner-workings of Combatant Status Review Tribunals played a significant role. As discussed in Part I, the Court was presented with documents suggesting that CSRT proceedings were a sham. n155 The question remains: Did the Court break from its practice of issuing incremental decisions that did not fundamentally challenge the [\*520] President's enemy combatant initiative? Did Boumediene, unlike earlier rulings, risk national security or elected branch backlash? After all, the Court ruling - unlike earlier decisions - did speak to the constitutional merits of a military tribunal system that denied habeas corpus review to enemy combatants. Concluding that the writ of habeas corpus is an "essential mechanism in the separation-of-powers scheme," an "essential design of the Constitution," and a writ that generally "protects persons [not just] citizens," the Boumediene Court decisively repudiated the Military Commission Act's habeas-stripping provisions. n156 For this very reason, Boumediene was seen as "historic" n157 and "among the Court's most important modern statements on the separation of powers." n158 At a minimum, it was seen as the death knell to the military tribunal system championed by President Bush and the Congress that enacted the MCA. Upon closer inspection, however, Boumediene is a far less dramatic, far less consequential decision. While the Court certainly made broad pronouncements about the centrality of habeas corpus and the illegitimacy of the Bush administration campaign to substitute military tribunals for judicial review, the Justices had no reason to think that the practical consequences of their handiwork would meaningfully impede elected officials from pursuing their preferred policy on enemy combatants. Instead, Boumediene seemed more a rebuke of the policies and practices of the outgoing Bush administration, than an effect to fundamentally retool future executive branch practices. When the Court agreed to hear the case, Democrats (who were nearly unanimous in voting against the habeas-stripping provision in the MCA) controlled the Congress. More significant, when the Court decided the case, presumptive presidential candidates Barack Obama and John McCain had both promised to close Guantanamo Bay. n159 In commenting about the decision, Senator McCain - who had voted for the habeas-stripping provision - said the decision "obviously concerns me ... [but I have] always favored closing ... Guantanamo Bay." n160 Needless to say, congressional Democrats, including Senator Barack [\*521] Obama, expressed support for the Court's ruling. n161 Against this backdrop, the Court understood that its decision (issued less than five months before the presidential elections) would not trigger any type of political backlash. For much the same reason, the Court understood that its decision posed few national security risks. The Court said nothing about the President's power to indefinitely detain enemy combatants, nor did the Court detail how habeas proceedings were to be conducted. n162 The Court, moreover, said nothing about the availability of habeas corpus by enemy combatants held outside U.S. soil or at facilities (like Guantanamo) that were under the control of the United States. n163 Assuming that the next administration would close Guantanamo, the decision would only impact governmental practices for a short time. n164 More than that, the Court had been told by the Bush administration that "any reopening of the prisoners' right to habeas would not be swift, but would face a variety of "fundamental and unprecedented issues' complicating that process." n165 In other words, the Court understood that the Bush administration would do everything in its power to slow down the release of enemy combatants during its final months in office. n166 For all these reasons, Boumediene should not be seen as an attempt by the Court to meaningfully transform U.S. policy towards enemy combatants (a decision that might risk national security or prompt an elected government backlash). Instead, Boumediene principally served as a vehicle for the Court to make strong symbolic statements about the judicial power to "say what the law is" and, correspondingly, [\*522] the necessity of the political branches to respect the centrality of habeas corpus limits on governmental power. \* \* \* In November 2008, Boumediene's limited reach seemed secure. Barack Obama (who voted against the MCA and embraced Boumediene) won the presidency and the Democratic party expanded their control of Congress. By the summer of 2009, however, there was reason to question whether Guantanamo would be closed and whether the Obama administration would fully disavow the practices of its predecessor. n167 For its part, the Supreme Court initially steered clear of Obama-era practices. In the spring of 2009, they agreed to moot an ongoing dispute between the executive and an enemy combatant held at a U.S. army base; in the summer of 2009, they refused to act on a certiorari petition by fourteen Chinese Muslim Uighurs (parties to the original Boumediene litigation who had successfully filed a habeas petition but nevertheless remained at Guantanamo). n168 In the fall of 2009, the Court agreed to hear the Uighur petition but delayed oral argument until March 2010 (thereby allowing the Obama administration time to either close Guantanamo or relocate the Uighur petitioners). n169

### Solvency – 2NC

#### 3. More evidence-the Munaf case completely circumvents habeas-the CP resolves this by guaranteeing review prior to transfer.

**Sullivan et al., Loyola law professor, 2011**

(Barry, “The Executive's Authority Over Enemy Combatants: Due Process and its Limits”, 9-1, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1972446>, ldg)

Less attention was being paid to another issue, which also would have a major influence on the development of habeas jurisprudence. On the same day it decided Boumediene, the Supreme Court also decided Munaf v. Geren, the first case to address detainee transfers.96 In Munaf, two US citizens allegedly committed crimes in Iraq and were being held in that country by US forces.97 The detainees claimed that they were entitled to habeas relief because, if turned over to Iraq for criminal prosecution, they were likely to be tortured, contrary to US obligations under the Convention against Torture.98 They also claimed that they were entitled, as US citizens held by US military offi cials, to seek habeas relief in US courts.99 The Supreme Court held that US courts have jurisdiction over habeas claims by US citizens held by US forces overseas, but that US courts cannot prevent their transfer for criminal prosecution by another country.100 Because Iraq had a sovereign right to prosecute and punish those who commit crimes within its borders, relief was not available in Munaf.101 Due process does not “include a ‘[f]reedom from unlawful transfer’ that is ‘protected wherever the Government seizes a citizen,’” the Court stated, and the Constitution does not preclude “‘the Executive from transferring a prisoner to a foreign country for prosecution in an allegedly unconstitutional trial.’”102 The Court relied on two earlier decisions: Wilson v. Girard103 and Neely v. Henkel.104 The facts in Wilson were similar to those in Munaf. In Wilson, the US agreed to transfer to Japan a US soldier stationed in Japan who was to be tried in connection with the death of a Japanese woman.105 The Supreme Court granted review after the soldier’s habeas petition was denied, but held that the soldier, although entitled to file the petition while in US custody, could not be granted relief because the Executive was entitled to respect the right of “a sovereign nation … to punish offenses against its laws committed within its borders, unless it … consents to surrender its jurisdiction.”106 Thus, Wilson involved judicial deference to the Executive’s foreign affairs power, and that was the point upon which the Court in Munaf relied.107 There were several important distinctions between the two cases which went unnoticed in Munaf, however. In a joint statement appended to the decision in Wilson, the Secretaries of State and Defense observed that “all the facts…must now be weighed by the Japanese court, just as they would by a US court-martial, if trial were held under U.S. jurisdiction.”108 The joint statement further explained that, under a treaty between the US and Japan, the soldier was entitled to a prompt trial, the assistance of a lawyer chosen by him and paid for by the US, full access to the charges against him, the right to confront the witnesses against him, the right to compulsory process, the right to a competent interpreter, the right to consult with US authorities, and the presence of an official US trial observer to monitor the fairness of the proceeding.109 Unlike Wilson, there was no treaty in Munaf that guaranteed the rights of US citizens; nor was there other evidence to show that the detainees would enjoy rights similar to those enjoyed by the soldier in Wilson. Of course, the decision in Wilson did not mention the factors identified in the Secretaries’ statement, but those factors provided the context in which Wilson was decided. By omitting those facts from its decision, the Wilson Court risked having the decision read more broadly by a subsequent court, as it was in Munaf. The Munaf Court dealt with these differences by relying on Neely v. Henkel, a case decided 50 years before Wilson (and more than 100 years before Munaf). In Neely, the US detained a US citizen alleged to have embezzled money in Cuba.110 The citizen sought habeas relief, claiming that Cuba would not adequately protect his constitutional rights.111 The Court denied relief, holding that the citizen could be transferred to Cuba because the US Constitution conferred no rights on citizens charged with extraterritorial violations of foreign law.112 Thus, Neely and Wilson both involved claims that habeas petitioners were entitled to the protection of the US Constitution in non-US criminal prosecutions. Munaf involved a different claim, namely, that US officials had due process obligations to those they detained. After discussing Neely and Wilson, the Munaf Court addressed the petitioners’ fear of torture in Iraq. According to the Court, that concern was for “the political branches, not the Judiciary,”113 because any judicial intervention would trench on the Executive’s foreign affairs power.114 Thus, the courts must accept the Executive’s assurance that a detainee will not be tortured upon transfer, at least absent a well documented probability of torture.115 Munaf was the first Supreme Court case in 50 years to address transfer issues. The Court addressed broad issues of sovereignty, habeas corpus, and foreign affairs, and it did so in light of Wilson and Neely, which were decided 50 and 100 years ago, respectively. But the Court took no account of the particular circumstances of those cases. Moreover, it is the Court’s sweeping conclusion – that the transfer decision cannot be reviewed if the Executive represents that torture is not likely – that opens the door to the possibility that prisoners will be transferred simply to avoid judicial “interference.” The Court’s holding in Munaf – that courts have no role to play unless there is a well-documented probability of torture – appears to grant nearly unbridled power to the Executive with respect to the fate of alien detainees. The ramifi cations of that approach were made clear in a trilogy of cases that were begun days after Munaf was decided.

#### 4. Ensuring meaningful review is key-otherwise habeas is just a rubber stamp-it is happening in the status quo

**Hafetz et al., Seton Hall law professor, 2012**

(Jonathan, “NO HEARING HABEAS: D.C. CIRCUIT RESTRICTS MEANINGFUL REVIEW”, 5-1, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2145554>, ldg)

It is an open secret that Boumediene v. Bush’s promise of robust review of the legality of the Guantanamo detainees’ detention has been effectively negated by decisions of the United States Court of Appeals for the District of Columbia Circuit, beginning with Al-Adahi v. Obama. This Report examines the outcomes of habeas review for Guantanamo detainees, the right to both habeas and “a meaningful review” of the evidence having been established in 2008 by the Supreme Court in Boumediene. There is a marked difference between the first 34 habeas decisions and the last 12 in both the number of times that detainees win habeas and the frequency in which the trial court has deferred to the government’s factual allegations rather than reject them.1 The difference between these two groups of cases is that the first 34 were before and the remaining 12 were after the July 2010 grant reversal by the D.C. Circuit in Al-Adahi. Detainees won 59% of the first 34 habeas petitions. Detainees lost 92% of the last 12. The sole grant post-Al-Adahi in Latif v. Obama has since been vacated and remanded by the D.C. Circuit. The differences were not limited merely to winning and losing. Significantly, the two sets of cases were different in the deference that the district courts accorded government allegations. In the 34 earlier cases, courts rejected the government’s factual allegations 40% of the time. In the most recent 12 cases, however, the courts rejected only 14% of these allegations. The effect of Al-Adahi on the habeas corpus litigation promised in Boumediene is clear. After Al-Adahi, the practice of careful judicial fact-finding was replaced by judicial deference to the government's allegations. Now the government wins every petition.

#### 5. Meaningful opportunity is key-otherwise balancing tests will always hose detainees

**Tutt et al., Yale JD, 2012**

(Andrew, “NOTE: Evidentiary Rules Governing Guantanamo Habeas Petitions: Their Effects and Consequences”, Fall, 31 Yale L. & Pol'y Rev. 185, lexis, ldg)

Since Boumediene, the courts within the D.C. Circuit have heard over sixty habeas petitions from detainees at Guantanamo Bay. n9 At first, many writs were granted. The lower courts applied a functional framework for determining the admissibility, credibility, and probity of evidence, holding the government to the ordinary burden of preponderance of the evidence. n10 However, as the government and detainees began to appeal habeas decisions on the basis of adverse evidentiary rulings, the Court of Appeals announced binding evidentiary rules limiting the district courts' discretion to admit, exclude, weigh, and consider evidence as the district courts saw fit. n11 This Note argues that these evidentiary rules deny detainees a "meaningful opportunity" to contest the factual basis of their detention. n12 The D.C. Circuit maintains that it holds the government to a preponderance standard n13 and has cast its reversals of the District Court's grants of habeas corpus as mere corrections in judging evidentiary probity. n14 However, in substance, the Court of Appeals' evidentiary rules have quietly but significantly eroded the evidentiary burden. [\*188] The way in which the evidentiary standard and the evidentiary rules interact to weaken Boumediene has, for the most part, escaped scrutiny. n15 Many have praised the D.C. Circuit for striking an appropriate balance between the needs of national security and the rights of those wrongfully detained. n16 But this underestimates the combined significance of the D.C. Circuit's evidentiary rulings. Boumediene's central purpose was to withhold from the executive branch the unchecked power to detain whomever it deems a threat. n17 Yet the D.C. Circuit's evidentiary rules have empowered the government to detain upon so little evidence that the habeas hearing no longer serves the checking role the Boumediene Court intended. n18 The D.C. Circuit has tacitly reduced the amount and quality of evidence necessary to establish the lawfulness of detention through three powerful mechanisms: (1) all but eliminating corroboration requirements and restrictions on the admissibility of hearsay evidence, no matter how unreliable; n19 (2) establishing that courts consider the evidence in the "whole record" when determining whether a petitioner meets the requirements for detention - a determination that often reduces to the Court of Appeals' deciding that the District Court [\*189] wrongly refused to credit sufficient government evidence; n20 and (3) developing irrefutable presumptions of detainability in which a single fact once established - such as a stay at an al-Qaeda affiliated guesthouse - is dispositive on the question of detention, even when other facts in the record point strongly in the opposite direction. n21 That these rules operate to significantly reduce the government's burden, and thereby deprive detainees of a meaningful opportunity to contest the factual basis of their detention, is not readily apparent from the D.C. Circuit's decisions. Rather, the D.C. Circuit has framed its successive evidentiary decisions as meeting Boumediene's goal of striking a careful and necessary balance between the significant burdens that a higher evidentiary requirement would impose on the military during wartime, and the minimal impact that these decisions would have on the substantive rights of detainees in habeas proceedings. n22

#### More evidence-bunch of alt causes only the CP can solve for.

**Hafetz, Seton Hall law professor, 2012**

(Jonathan, “Assessing Length: The Blind Spot in Habeas Review of Guantanamo Detentions”, 6-21, <http://opiniojuris.org/2012/06/21/assessing-length-the-blind-spot-in-habeas-review-of-guantanamo-detentions/>, ldg)

The Supreme Court’s denial of certiorari last week in seven Guantanamo detainee cases marks the end of an important chapter in the post-9/11 habeas corpus litigation. It leaves in place the D.C. Circuit’s narrow construction of the constitutional habeas right the Court recognized in Boumediene v. Bush and underscores the Court’s seeming reluctance to intervene to articulate rules surrounding war-on-terrorism detentions. I describe in a forthcoming article various ways that the D.C. Circuit has undermined Boumediene’s mandate of meaningful review, including by affording a presumption of accuracy to government intelligence reports (Latif); reversing district judges for scrutinizing the government’s allegations too closely (Adahi); rejecting that the law-of-war informs the scope of the government’s detention power (Al-Bihani); and denying judges’ authority to remedy unlawful detention by ordering a prisoner’s release (Kiyemba).

#### 2. Remedy’s aren’t key-they misread habeas and Boumediene-plan causes a huge fight over separation of powers.

**Feith, Yale JD, 2012**

(Daniel, “Restraining Habeas: Boumediene, Kiyemba, and the Limits of Remedial Authority”, 7-22, <http://harvardnsj.org/2012/07/restraining-habeas-boumediene-kiyemba-and-the-limits-of-remedial-authority/>, ldg)

Judged according to the Modern Understanding of habeas, Kiyemba is a troubling decision. Its facts and law challenge the Modern Understanding’s core principles. The Modern Understanding marries habeas with due process rights; Kiyemba decouples them. The Modern Understanding sees vindicating those rights as the writ’s core purpose; the Kiyemba petitioners remain confined three years after the government conceded it lacked authority to detain them.[71] Whereas the Modern Understanding conceives of habeas corpus as a remedy to unlawful imprisonment, Kiyemba limits the remedial authority of habeas courts even at the price of the Uighurs’ freedom. These tensions, moreover, seem to place Kiyemba in conflict with Boumediene’s holding that the judicial power to issue habeas must include authority “to formulate and issue appropriate orders for relief, including, if necessary, an order directing the prisoner’s release.”[72] In this Section, I argue that contrary to initial appearances, Kiyemba and Boumediene are doctrinally coherent.[73] Whatever its normative appeal, the Modern Understanding misapprehends Boumediene, which emphasized, above all, that the purpose of habeas is to preserve the separation of powers. The remainder of this Section demonstrates how Kiyemba is faithful to that imperative. Part of the difficulty in determining whether Kiyemba’s view of limited judicial remedial authority comports with Boumediene is that the Boumediene Court itself hedged in stating what remedial authority is constitutionally required. The Court noted that habeas is, “above all, an adaptable remedy”[74] and that “release need not be the exclusive remedy and is not the appropriate one in every case in which the writ is granted.”[75] On the other hand, the Court categorically declared that “the habeas court must have the power to order the conditional release of an individual unlawfully detained.”[76] It even described this imperative as a holding.[77] Can Kiyemba be squared with this holding? Boumediene’s holding regarding remedial authority ought to be contextualized within its larger discussion of the purpose of habeas corpus. As described in Section I.B, Boumediene understood habeas corpus primarily as an instrument for preserving the “delicate balance of governance . . . ”—which is to say, the separation of powers—“that is itself the surest safeguard of liberty.”[78] Notwithstanding the common charge that Boumediene is a “sweeping assertion of judicial supremacy,”[79] the majority understood its assertion of authority in defensive terms. It viewed the government’s claim that formal sovereignty determines the Suspension Clause’s application as an overreach of the political branches’ proper authority at the expense of the Court’s power.[80] Its rejection of that position aimed to restore constitutional balance. Thus, Boumediene’s understanding of habeas is—pace Professor Calabresi—as a common law for the age of the Constitution. That is, Boumediene understood habeas according to pre-1789 English common law, but with the modifications necessary to make habeas work within a constitutional framework of separated powers. The judicial power, in particular, changed from the common law to the Constitution. Article III replaced the king’s prerogative as the source of courts’ authority.[81] Instead of having the run of the road, as in England, the American judiciary must stay in its lane. Boumediene emphasized this obligation only vis-à-vis the political branches, but that is because in that instance, the Court thought the political branches were trenching on judicial authority, not vice-versa. It would be absurd to read Boumediene, which invoked the separation of powers more than ten times,[82] to exempt the judiciary from the obligation to respect the inter-branch boundaries of power.[83] Therefore, insofar as remedial authority in habeas cases is a subset of judicial power, that obligation should inform our understanding of Boumediene’s command that habeas courts “must have the power to order the conditional release of an individual unlawfully detained.” In other words, remedial authority—like judicial power generally—must respect the coordinate branches’ prerogatives. This point is especially relevant to Kiyemba. Professor Stephen Vladeck has suggested that if the D.C. Circuit had “tak[en] seriously the flexibility of the writ as a means of promoting equity,” it would have found it within its authority “to order the government to release the prisoner within a specified, finite period of time, and to sanction the government if it failed to do so.”[84] Such arguments about the equitable nature of the Great Writ, however, beg the question of the constitutional limits on the authority of a habeas court to fashion an equitable remedy. The D.C. Circuit faced precisely that question in Kiyemba. Ordering the detainees’ release into the United States, thereby fulfilling Boumediene’s letter, would encroach on the “exclusive province of the political branches”[85] to control entry at our borders, thereby violating Boumediene’s logic. By holding that it lacked the power to issue such an order, the Kiyemba Court reconciled Boumediene’s letter to its logic. Kiyemba’s recognition that the separation of powers limits habeas courts’ remedial authority also accords with the Supreme Court’s ruling on Munaf v. Geren,[86] a case decided the same day as Boumediene. Munaf involved two American citizens arrested and detained by the U.S. military in Iraq who filed habeas petitions to prevent their transfer to Iraqi authorities to stand trial for alleged crimes, citing the risk of torture.[87] In a unanimous opinion, the Court held that the petitioners are entitled to habeas but denied them relief. Rejecting petitioners’ fear of torture as grounds for relief, the Court “recognized that it is for the political branches, not the Judiciary, to assess practices in foreign countries and to determine national policy in light of those circumstances.”[88] Munaf, in other words, recognized that even the authority of habeas courts has limits. Reading Boumediene together with Munaf reinforces the validity of Kiyemba’s conclusion that its remedial authority must respect the prerogatives of its coordinate branches of government.[89] Conclusion This article has argued that, contrary to the claim that Kiyemba and Boumediene present conflicting views of habeas courts’ remedial authority, the two cases are actually consistent. Boumediene departed from the modern, prisoner-focused, rights-based understanding of habeas and embraced an understanding focused on the legality of the jailer’s authority. Rooted in the English common law, this Historical Understanding views habeas in the American constitutional context primarily as an instrument for preserving the separation of powers. This understanding underpinned the Boumediene Court’s assertion that the Suspension Clause reaches Guantanamo—a ruling widely derided as an assertion of judicial supremacy. Yet this understanding also compelled the Kiyemba Court’s recognition of limits to its remedial authority—a holding widely derided as an act of judicial abdication. There is a further irony to Boumediene’s Historical Understanding: the impoverishment of the very writ it celebrated. By placing the political branches’ authority at the center of the habeas inquiry, the Historical Understanding cuts detainees and their rights out of the analysis. It is now possible, as in Kiyemba, to fulfill the writ’s core purpose—assessing the lawfulness of detention—without fashioning a remedy. From a systemic perspective, this may be fine. From the detainees’ perspective, it is devastating. Kiyemba identifies troubling limits to the Great Writ’s remedial power, but they are limits of the Supreme Court’s own making.

#### 3. Habeas is worthless-empirics prove it can’t be the basis of judicial supremacy

**Huq, Chicago law professor, 2010**

(Aziz, “What Good is Habeas?”, 4-27, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1596963>, ldg)

Even once the political change in the White House is accounted for, the data presented in Section II still pose a complex interpretive challenge. Even setting aside problems with data released by the government, changes in detention policy cannot be causally linked to activity in the courts without considerable hesitation. Nevertheless, it is possible to draw some general conclusions, and to attempt some more granular speculation about the likely influence of habeas upon policy. One central finding stands out: While the data is in many respects ambiguous, it strongly suggests that the effect of Boumediene on detention policy was not significant. It is striking that at the most, less than four percent of releases from the Cuban base have followed a judicial order of release—and even in these case it is not wholly clear that release would not have happened sooner or later. Moreover, the annualized number of releases drops after Boumediene. Even in those few cases in which the habeas writ has been granted, nagging questions persist about the scope and effective force of the federal court’s remedial authority. Courts to date (with a few exceptions) have been reluctant to direct outright release, and have instead issued delicately phrased pleas to “try harder” to the Executive (although in more than two dozen cases, the data in Table 2 show, the Executive heeds this plea). From a distance, therefore, habeas seems far from an effective tool for checking executive authority. The ambitious claims made in the literature for and against Boumediene are thus misguided. Further, there is no positive relationship between the doctrinal consequences of Boumediene and its progeny on the one hand, and the “fundamental political” liberty celebrated by Justice Kennedy. The black-letter law of detention, and the implementation of that law by the government, is no clearer, no more stable, and no more coherent than it was before Boumediene. The latter case cast some doubt on the guiding force of Hamdi, while the D.C. Circuit’s Al-Bihani decision blew past Hamdi in its haste to embrace legislative language from 2006 and 2009. The Al-Bihani Court’s methodology invites post hoc gerrymandering of detention policy by Congress. The net result is bleak on either one of Boumediene’s metric: Habeas is not central to the protection of physical liberty, at least in the experience of the Guantánamo detainees. And “fundamental political” liberty, to the extent that it is deepened by judicial confirmation of clear bounds to executive authority, has been disserved, if not wholly displaced, by the combination of Boumediene’s fecklessness and Al-Bihani’s invitation to mischief. Federal courts, it seems, are too hesitant and circumspect in their approach to executive detention decisions to vindicate “fundamental political” liberty via the elaboration of black-letter rules. The data, on this reading, should be little comfort for those who claim to value the separation of power. Neither part of Boumediene’s justifying logic, in other words, has yielded much by way of practical result. Its consequences are on the one hand doctrinal ambiguity and on the other practically uncertain.

# 1NR

## Democracy

### Modeling

#### Stats prove influence waning

Liptak 2008

Adam, New York Times, U.S. Court Is Now Guiding Fewer Nations, 9-18-2008, http://users.polisci.wisc.edu/hendley/PS%20617/Supplemental%20Readings/American%20Influence.pdf

WASHINGTON — Judges around the world have long looked to the decisions of the United States Supreme Court for guidance, citing and often following them in hundreds of their own rulings since the Second World War. But now American legal influence is waning. Even as a debate continues in the court over whether its decisions should ever cite foreign law, a diminishing number of foreign courts seem to pay attention to the writings of American justices. “One of our great exports used to be constitutional law,” said Anne-Marie Slaughter, the dean of the Woodrow Wilson School of Public and International Affairs at Princeton. “We are losing one of the greatest bully pulpits we have ever had.” From 1990 through 2002, for instance, the Canadian Supreme Court cited decisions of the United States Supreme Court about a dozen times a year, an analysis by The New York Times found. In the six years since, the annual citation rate has fallen by half, to about six. Australian state supreme courts cited American decisions 208 times in 1995, according to a recent study by Russell Smyth, an Australian economist. By 2005, the number had fallen to 72. The story is similar around the globe, legal experts say, particularly in cases involving human rights. These days, foreign courts in developed democracies often cite the rulings of the European Court of Human Rights in cases concerning equality, liberty and prohibitions against cruel treatment, said Harold Hongju Koh, the dean of the Yale Law School. In those areas, Dean Koh said, “they tend not to look to the rulings of the U.S. Supreme Court.” The rise of new and sophisticated constitutional courts elsewhere is one reason for the Supreme Court’s fading influence, legal experts said. The new courts are, moreover, generally more liberal than the Rehnquist and Roberts courts and for that reason more inclined to cite one another. Another reason is the diminished reputation of the United States in some parts of the world, which experts here and abroad said is in part a consequence of the Bush administration’s unpopularity around the world. Foreign courts are less apt to justify their decisions with citations to cases from a nation unpopular with their domestic audience. “It’s not surprising, given our foreign policy in the last decade or so, that American influence should be declining,” said Thomas Ginsburg, who teaches comparative and international law at the University of Chicago.

### AT: Democratic Peace Theory

#### ---Democratic peace theory is statistically flawed.

Rosato 2011

Sebastian, Dept of Political Science at Notre Dame. “The Handbook on the Political Economy of War”, pg. 290-291

 15.3.2 Militarized Disputes There are at least two reasons to doubt the claim that pairs of democracies are less prone to conflict than other pairs of states. First, despite their assertions, it is not clear that democratic peace theorists have established the existence of a powerful association between joint democracy and peace. Second, there is good evidence that factors other than democracy -many of them consistent with realist expectations - account for the peace among democratic states.14 Significance Democratic peace theorists have yet to provide clearcut evidence that there is a significant relationship between their independent and dependent variables, joint democracy and peace. It is now clear, for example, that Maoz and Russett's analysis of the Cold War period, which claims to establish the existence of a joint, separate peace, does not in fact do so. In a reassessment of that analysis, which follows the original as closely as possible save for the addition of a control for economic interdependence, Oneal ct al. (1996) find that a continuous measure of democracy is not significantly correlated with peace. Moreover, a supplementary analysis of contiguous dyads those that experience most of the conflicts also finds no significant relationship between a continuous measure of joint democracy and peace whenever a control for economic interdependence is included or not. This finding is particularly damaging because democratic peace theorists argue that "most theoretical explanations of the separate peace imply a continuous effect: the more democratic a pair of states, the less likely they are to become involved in conflict" (Oneal and Ray 1997, p. 752). Oneal and Ray (1997, pp. 756-7) conclude that the original Maoz and Russett finding does not survive reanalysis because it is based on a joint democracy variable that, although widely used, is poorly calculated and constructed- and they therefore propose a new democracy measure that they claim does achieve statistical significance. Their new measure of joint democracy uses the democracy score of the less democratic state in a dyad on the assumption that conflict is a function of the regime type of the less constrained of two interacting states. This "weak link" specification appears to provide powerful support for the democratic peace finding: "As the less democratic state becomes more democratic, the likelihood of conflict declines. This is clear evidence of the pacific benefits of democracy." The new variable provides "corroboration of the democratic peace" (Oneal and Ray 1997, pp. 764-5). Oneal and Russett concur with this conclusion in a separate analysis that also uses the weak link assumption. An increase in democracy in the state that is "freer lo resort to violence, reduces the likelihood of dyadic conflict" (Oneal and Russett 1997, p. 279). Although the weak link measure is widely accepted as the gold standard in studies of the relationship between democracy and a variety of international outcomes, it does not provide evidence that joint democracy is significantly related to peace. Even as they developed it, Oneal and Ray admitted that the weak link was not a pure measure of joint democracy. What it really revealed was that the probability of conflict was "a function of the average level of democracy in a dyad ... [and] also the political distance separating the states along the democracy-autocracy continuum" (1997, p. 768, emphsis added). The problem, of course, is that the logics advanced to explain the democratic peace refer to the effects of democracy on state behavior; none refer to the effects of political similarity. Thus findings generated using the weak link specification - which is to say all the major assessments of the democratic peace - may not actually support the central democratic peace claim that it is something about the norms and institutions of democracies that enables them to remain at peace. This is precisely the conclusion that Errol Henderson reaches in his compelling assessment of Oneal and Russctt's work. His analysis replicates theirs precisely with two minor modifications: he includes only the first year of any dispute because democratic peace theory is about the incidence of disputes, not their duration, and he introduces a political similarity variable in order to disentangle the effects of joint democracy and political distance on conflict. His central result is striking: democracy ;\*is not significantly associated with the probability of dispute onset." "What is apparent from the results," he concludes, "is that in the light of quite reasonable, modest, and straightforward modifications of Oneal and Russett's . . . research design, there is no statistically significant relationship between joint democracy and a decreased likelihood of militarized interstate conflict" (Henderson 2002, pp. 37-9). Mark Souva (2004) reaches essentially the same conclusion in an analysis of the relationship between domestic institutions and interstate conflict using the weak link specification. In a model that includes variables for political and economic institutional similarity, both of which are significantly associated with peace, there is no significant relaationship between joint democracy and the absence of conflict.

## Plenary Powers

### o/v

#### Proliferation causes nuclear war.

**Kroenig, Georgetown University Government assistant professor, 2012**

(Matthew, Assistant Professor of Government at Georgetown University and Stanton Nuclear Security Fellow at Council on Foreign Relations, “The History of Proliferation Optimism: Does It Have A Future?”, 5-26, http://www.npolicy.org/article.php?aid=1182andrtid=2)

The proliferation optimist position, while having a distinguished pedigree, has several major problems. Many of these weaknesses have been chronicled in brilliant detail by Scott Sagan and other contemporary proliferation pessimists.[34] Rather than repeat these substantial efforts, I will use this section to offer some original critiques of the recent incarnations of proliferation optimism. First and foremost, proliferation optimists do not appear to understand contemporary deterrence theory. I do not say this lightly in an effort to marginalize or discredit my intellectual opponents. Rather, I make this claim with all due caution and with complete sincerity. A careful review of the contemporary proliferation optimism literature does not reflect an understanding of, or engagement with, the developments in academic deterrence theory in top scholarly journals such as the American Political Science Review and International Organization over the past few decades.[35] While early optimists like Viner and Brodie can be excused for not knowing better, the writings of contemporary proliferation optimists ignore the past fifty years of academic research on nuclear deterrence theory. In the 1940s, Viner, Brodie, and others argued that the advent of Mutually Assured Destruction (MAD) rendered war among major powers obsolete, but nuclear deterrence theory soon advanced beyond that simple understanding.[36] After all, great power political competition does not end with nuclear weapons. And nuclear-armed states still seek to threaten nuclear-armed adversaries. States cannot credibly threaten to launch a suicidal nuclear war, but they still want to coerce their adversaries. This leads to a credibility problem: how can states credibly threaten a nuclear-armed opponent? Since the 1960s academic nuclear deterrence theory has been devoted almost exclusively to answering this question.[37] And, unfortunately for proliferation optimists, the answers do not give us reasons to be optimistic. Thomas Schelling was the first to devise a rational means by which states can threaten nuclear-armed opponents.[38] He argued that leaders cannot credibly threaten to intentionally launch a suicidal nuclear war, but they can make a “threat that leaves something to chance.”[39] They can engage in a process, the nuclear crisis, which increases the risk of nuclear war in an attempt to force a less resolved adversary to back down. As states escalate a nuclear crisis there is an increasing probability that the conflict will spiral out of control and result in an inadvertent or accidental nuclear exchange. As long as the benefit of winning the crisis is greater than the incremental increase in the risk of nuclear war, threats to escalate nuclear crises are inherently credible. In these games of nuclear brinkmanship, the state that is willing to run the greatest risk of nuclear war before back down will win the crisis as long as it does not end in catastrophe. It is for this reason that Thomas Schelling called great power politics in the nuclear era a “competition in risk taking.”[40] This does not mean that states eagerly bid up the risk of nuclear war. Rather, they face gut-wrenching decisions at each stage of the crisis. They can quit the crisis to avoid nuclear war, but only by ceding an important geopolitical issue to an opponent. Or they can the escalate the crisis in an attempt to prevail, but only at the risk of suffering a possible nuclear exchange. Since 1945 there were have been many high stakes nuclear crises (by my count, there have been twenty) in which “rational” states like the United States run a risk of nuclear war and inch very close to the brink of nuclear war.[41] By asking whether states can be deterred or not, therefore, proliferation optimists are asking the wrong question. The right question to ask is: what risk of nuclear war is a specific state willing to run against a particular opponent in a given crisis? Optimists are likely correct when they assert that Iran will not intentionally commit national suicide by launching a bolt-from-the-blue nuclear attack on the United States or Israel. This does not mean that Iran will never use nuclear weapons, however. Indeed, it is almost inconceivable to think that a nuclear-armed Iran would not, at some point, find itself in a crisis with another nuclear-armed power and that it would not be willing to run any risk of nuclear war in order to achieve its objectives. If a nuclear-armed Iran and the United States or Israel have a geopolitical conflict in the future, over say the internal politics of Syria, an Israeli conflict with Iran’s client Hezbollah, the U.S. presence in the Persian Gulf, passage through the Strait of Hormuz, or some other issue, do we believe that Iran would immediately capitulate? Or is it possible that Iran would push back, possibly even brandishing nuclear weapons in an attempt to deter its adversaries? If the latter, there is a real risk that proliferation to Iran could result in nuclear war. An optimist might counter that nuclear weapons will never be used, even in a crisis situation, because states have such a strong incentive, namely national survival, to ensure that nuclear weapons are not used. But, this objection ignores the fact that leaders operate under competing pressures. Leaders in nuclear-armed states also have very strong incentives to convince their adversaries that nuclear weapons could very well be used. Historically we have seen that in crises, leaders purposely do things like put nuclear weapons on high alert and delegate nuclear launch authority to low level commanders, purposely increasing the risk of accidental nuclear war in an attempt to force less-resolved opponents to back down.

### PP Strong

#### Plenary power is strong now

**Lindsay, Baltimore law professor, 2010**

(Matthew, “Article: Immigration as Invasion: Sovereignty, Security, and the Origins of the Federal Immigration Power”, Winter, 45 Harv. C.R.-C.L. L. Rev. 1, lexis, ldg)

Although the Supreme Court in recent decades has muted some of the more severe aspects of the plenary power doctrine, n23 the constitutional exceptionalism of the immigration power, as well as its core legal rationale, remain fundamentally intact. As the passages quoted from the Kim decision indicate, the Court continues to define federal authority over immigration with reference to national sovereignty in matters of war, foreign affairs, and the preservation of republican government. n24 It perpetuates the wholesale presumption that all laws regulating immigration are part and parcel of the conduct of national security, even though the social and political judgments that historically appeared to justify such a presumption--specifically, the Court's literal equation in the late nineteenth century between foreign pauper labor and foreign aggression--would strike most contemporary policymakers and judges as anachronistic. n25

#### Plenary power doctrine strong now – even critics agree

Leak and Maltz 12

Deborah A. Leak, Rutgers University - Camden Earl Maltz, Rutgers University, 2012, "THE DEVIL MADE ME DO IT: THE PLENARY POWER DOCTRINE AND THE MYTH OF THE CHINESE EXCLUSION CASE", http://works.bepress.com/deborah\_leak/1/

Despite the best efforts of academic commentators, the plenary power doctrine–the idea that decisions related to immigration law should be immune from normal constitutional constraints—remains entrenched in the Supreme Court’s immigration law jurisprudence.1 The modern Court has not made any sustained effort to provide a principled defense of the plenary power doctrine. Instead the justices have defended their continued adherence to the doctrine primarily in terms of fidelity to precedent. Thus, in Kleindeinst v. Mandel,2 the Court conceded that "were we writing on a clean slate," "much could be said for the view” that the Constitution imposes significant substantive restraints on federal legislative authority over immigration. Nonetheless, citing a group of late nineteenth century cases, the Court also observed that

But the slate is not clean. As to the extent of the power of Congress under review, there is not merely 'a page of history'. . . but a whole volume. Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. . . . But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government.3

Despite their distaste for the plenary power doctrine itself, commentators have almost uniformly agreed with the Court’s description of the source of the doctrine. In particular, scholars–like the Court itself--have contended that the doctrine finds its origins in what might be described as an unholy trinity of cases decided between 1889 and 1893–Chae Chan Ping v. United States,4 Nishimura Ekiu v. United States,5 and Fong Yue Ting v. United States.6 They assert that these decisions were based on the principle that congressional regulation of immigration-related issues was entirely immune from ordinary constitutional constraints,7 and that the Court retreated from its earlier decisions in Yamataya v. Fisher,8 which held that the structure of deportation proceedings must be consistent with the requirements of procedural due process imposed by the Fifth Amendment.9

### Link – 2NC

#### The plan decimates plenary powers over immigration

Kagan, 10

(Former US Solicitor General, Kiyemba v. Obama, Brief of Respondent to US Supreme Court, Feb. 5, No. 08-1234, Lexis)

Further, this Court has recognized in Boumediene, as well as in Munaf v. Geren, 128 S. Ct. 2207 (2008), that habeas is an equitable remedy that takes account of relevant practical and legal constraints on the disposition of habeas petitioners. Here, **legal constraints prevent the courts from ordering that petitioners be** brought to and **released** in the United States. To permit the habeas court to grant such extraordinary relief would be inconsistent with constitutional principles governing control over the Nation’s borders. As this Court has long affirmed, **the power to admit or exclude aliens is a sovereign prerogative vested in the political Branches, and “it is not within the province of any court, unless expressly authorized by law, to review [that] determination**.” United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950). Congress has exercised that power by imposing detailed restrictions on the entry of aliens under the immigration laws, as well as specific restrictions on the transfer of individuals detained at Guantanamo Bay to the United States. In light of these statutes and constitutional principles, **neither Boumediene nor the law of habeas corpus justifies granting petitioners the relief they seek**. And the Due Process Clause does not confer a substantive right to enter the United States in these circumstances. Finally, even assuming arguendo that a judicial order compelling the Executive to bring an alien into the United States were justified in some circumstances, the government’s sustained and successful efforts to resettle petitioners should preclude such an order in this case. Indeed, in light of the government’s success in resettling most of the Uighurs and in obtaining offers to resettle the rest, the Court may wish to dismiss the writ of certiorari as improvidently granted.