# 1AC

### 1AC Plan

#### The United States federal judiciary should rule that individuals in military detention who have won their habeas corpus hearing cannot be detained.

### 1AC Judicial Globalism

#### Contention 1 is Judicial Globalism

#### Status quo rulings make habeas useless—the judiciary has allowed for too much deference

Milko 12

[Winter, 2012, Jennifer L. Milko, “Separation of Powers and Guantanamo Detainees: Defining the Proper Roles of the Executive and Judiciary in Habeas Cases and the Need for Supreme Guidance”, 50 Duq. L. Rev. 173]

A. Arguments for a Remedy By urging deference to the Executive Branch, the D.C. Circuit Court of Appeals has scolded the district courts that have second-guessed the political branches' determinations about release and suitable transfers. Those in favor of judicial power have argued that the denial of the right to review the Executive's decisions is allowing too much deference to that branch and severely limiting the remedies that courts have had the power to issue in the past. Though the petitioners have made several arguments for relief, the main arguments for judicial power stem from the idea that the court of appeals has been improperly applying Supreme Court precedent. Petitioners have argued that the D.C. Court of Appeals expanded the scope of Munaf too broadly as the Supreme Court noted that the decision was limited to the facts of that case. n118 In Munaf, the Court was primarily concerned about allowing the Iraqi government to have the power to punish people who had committed crimes in that territory when fashioning its holding, and the petitioners in that case had the opportunity of notice because they were told about their transfer and were able to petition the court to try and prevent it. n119 Petitioners have argued that those facts are entirely different than cases such as Mohammed and Khadr were there was concern of torture in foreign nations but no need to allow those nations to have the ability to prosecute the detainees for crimes, there was potential for torture at the hands of non-government entities, and no notice of transfer was permitted. n120 [\*190] Additionally, Petitioners have argued that the use of Munaf has impermissibly limited Boumediene by preventing courts from fashioning equitable relief for habeas petitions. n121 There has been concern that the ability to use the writ of habeas will be essentially eliminated if there is no chance for a petitioner to challenge the Executive Branch's determinations regarding safe transfers. The Boumediene Court spent considerable time discussing the history of the writ n122 and noted that the tribunals implemented in that case to determine enemy combatant status were not a sufficient replacement for the writ of habeas because they lacked, in part, the authority to issue an order of release. n123 Here, the D.C. Circuit Court of Appeals has effectively prevented the other courts from determining if there is a right not to be transferred, which has been argued to be an inadequate statement of the right of habeas. n124 Similarly, it has been argued that by accepting the Executive Branch's assurances of its efforts to release the detainees, the courts are not properly using the power of habeas corpus that has been granted to them by the Constitution. n125 By refusing to question these assertions, the courts would be unable to offer a remedy to the petitioners who have the privilege of habeas corpus. n126 The Petitioners also argued a due process right to challenge transfers as the detainees have a right to a meaningful hearing to at least have the opportunity to challenge the Government's conclusions regarding safety. n127 By refusing to second-guess the Executive, the judiciary may be losing an important check on the former's power because there is no guarantee that the Executive is ensuring safety or making the best effort to protect the unlawfully kept detainees. Without allowing courts to have the power to enjoin a transfer in order to examine these concerns, there is the potential that the detainee could be harmed at the hands of foreign terrorists. Without the ability to challenge the Executive Branch through the judicial tool of habeas corpus, there has been genuine concern that the courts are losing too much power and that their authority [\*191] is being improperly limited, as they are not utilizing their constitutional power properly.

#### Judicial remedy authority is the test case for judicial leadership on the rule of law globally—undermining habeas rights causes global democratic backsliding

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**The precedent of this Court has** a significant impact on rule of law **in foreign states. Foreign governments, in particular foreign judiciaries,** notice and follow the example set by the U.S**.** in **upholding** the **rule of law**. As foreign governments and judiciaries grapple with new and challenging issues associated with upholding the rule of law during times of conflict, U.S. leadership on the primacy of law during the war on terror is particularly important**.** Recent decisions of this Court have reaffirmed the primacy of rule of law in the U.S. during the war on terror. As relates to the present case, a number of this Court’s decisions, **most notably Boumediene v. Bush**, 128 S.Ct. 2229 (2008), have **established clear precedent that Guantanamo detainees have a right to petition for habeas corpus relief. Despite a clear holding from this Court in Boumediene, the Court of Appeals sought in Kiyemba v. Obama to narrow Boumediene to such a degree as to render this Court’s ruling hollow**. 555 F.3d 1022 (D.C. Cir. 2009). **The** present **case is** thus a test of both the substance of the right granted in Boumediene and the role of this Court in ensuring faithful implementation of its prior decisions. Although this Court’s rulings only have the force of law in the U.S., foreign **governments will** take note of the decision in the present case and use the precedent set by this Court to guide their actions in times of conflict**. PILPG** has advised over two dozen foreign states on peace negotiations and post-conflict constitution drafting, as well as all of the international war crimes tribunals. Through providing pro bono legal assistance to foreign governments and judiciaries, PILPG has **observed the** important **role** this **Court and U.S. precedent serve in promoting rule of law in foreign states. In Uganda, for example, the precedent established by this Court in Hamdan v. Rumsfeld**, 548 U.S. 557 (2006), and Boumediene, **influenced judges and legislators to incorporate the principles of judicial review and enforceability in their domestic war crimes bill. In Nepal, this Court has served as a model for the nascent judiciary. In Somaliland, the government relied heavily on U.S. terrorism legislation when drafting terrorism legislation for the region. And in the South Sudan peace process, the Sudan People’s Liberation Movement/Army (SPLM/A), the leading political party in the Government of Southern Sudan, relied on U.S. precedent to argue for the primacy of law and the importance of enforceability of previous adjudicative decisions** in the5 Abyei Arbitration, one of the most important and contentious issues in the ongoing implementation of the peace agreement. **Foreign judges** also **follow the work of this Court closely**. In a number of the judicial training programs PILPG has conducted, foreign judges have asked PILPG detailed questions about the role of this Court in upholding rule of law during the war on terror. A review of foreign precedent confirms how closely foreign judges follow this Court. **In numerous foreign states, and in the international war crimes tribunals, judges** regularly cite the precedent of this Court to establish their own legitimacy, to shore up judicial authority against overreaching by powerful executives, and to develop a strong rule of law within their own legal systems**. Given** the **significant influence of this Court** on foreign governments and judiciaries, **a decision in Kiyemba implementing Boumediene will reaffirm this Court’s leadership in upholding the rule of law and promote respect for rule of law in foreign states during times of conflict**.6 ARGUMENT I. KIYEMBA v. OBAMA IS A TEST OF SUPREME COURT LEADERSHIP IN UPHOLDING RULE OF LAW IN TIMES OF CONFLICT. The precedent set by the Supreme Court in the present case will have a significant impact on the development of rule of law in foreign states. Foreign judicial, executive, and parliamentary bodies closely follow the work of this Court, and this Court’s previous decisions related to the war on terror have shaped how foreign states uphold the rule of law in times of conflict. Foreign governments and judiciaries will review this Court’s decision in the present case in light of those previous decisions. A decision in the present case implementing previous decisions of this Court granting habeas rights to Guantanamo detainees is an opportunity for this Court to reaffirm to foreign governments that the U.S. is a leader and role model in upholding the rule of law during times of conflict. Recent Supreme Court precedent established a clear role for the primacy of law in the U.S. war on terror. In particular, this Court’s landmark decision in Boumediene highlighted the critical role of the judiciary in a system dedicated to the rule of law, as well as the “indispensable” role of habeas corpus as a “time tested” safeguard of liberty. Boumediene v. Bush, 128 S.Ct. 2229, 2247, 2259 (2008). Around the globe, courts and governments took note of this Court’s stirring words: “Security subsists, too, in fidelity to freedom’s first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers. It is from these principles that the judicial authority to consider petitions for habeas corpus relief derives.” Id. at 2277. In contrast to the maxim silent enim leges inter arma (in times of conflict the law must be silent), this Court affirmed in Boumediene that “[t]he laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled, and in our system they are reconciled within the framework of the law.” Id. Boumediene held that the detainees in the military prison at Guantanamo Bay are “entitled to the privilege of habeas corpus to challenge the legality of their detentions.” Id. at 2262. Inherent in that privilege is the right to a remedy if the detention is found to be unlawful. In the present case, the Petitioners, who had been found not to be enemy combatants, sought to exercise their privilege of habeas corpus. The Executive Branch conceded that there was no legal basis to continue to detain the Petitioners, that years of diligent effort to resettle them elsewhere had failed, and that there was no foreseeable path of release. The District Court implemented Boumediene, ordering that the Petitioners be brought to the courtroom to impose conditions of release. In re Guantanamo Bay Detainee Litigation, 581 F. Supp. 2d 33, 42-43 (D.C. Cir. 2008). The Court of Appeals reversed, with the majority concluding that the judiciary had no “power to require anything more” than the Executive’s representations that it was continuing efforts to find a foreign country willing to admit Petitioners. Kiyemba v. Obama, 555 F.3d 1022, 1029 (D.C. Cir. 2009). The Court of Appeals’ decision effectively narrowed Boumediene to such a degree that it rendered the ruling hollow. Circuit Judge Rogers recognized this in her dissent, opining that the majority’s analysis “was not faithful to Boumediene.” Id. at 1032 (Roberts, J., dissenting). Given the Court of Appeals’ attempt to narrow Boumediene, Kiyemba v. Obama is a test of this Court’s role in upholding the primacy of law in times of conflict. A decision in favor of the Petitioners in Kiyemba will reaffirm this Court’s leadership in upholding the rule of law and promote respect for rule of law in foreign states during times of conflict. II. PILPG’S EXPERIENCE ADVISING FOREIGN GOVERNMENTS AND JUDICIARIES ILLUSTRATES THE IMPORTANCE OF SUPREME COURT PRECEDENT IN PROMOTING RULE OF LAW IN FOREIGN STATES DURING TIMES OF CONFLICT. During PILPG’s work providing pro bono legal assistance to foreign governments and judiciaries on the rule of law in conflict and post-conflict settings, clients frequently request guidance on U.S. laws and the role of the judiciary in the U.S. system of governance. In recent years, as states have watched the U.S. tackle the legal issues surrounding the war on terror, foreign governments and judiciaries have expressed keen interest in, and have demonstrated reliance on, the legal mechanisms the U.S. has adopted to address the challenges presented in this new form of conflict. The U.S. Government, under the guidance of this Court, has set a strong example for upholding the rule of law during times of conflict, and foreign governments have followed this lead. When states follow the example set by the U.S. Government, the U.S. can benefit greatly. The U.S. Government recognizes that foreign states with strong and independent judicial systems and a commitment to the rule of law make the most stable allies and partners. Stable allies and partners in turn create the best environment for U.S. business investments and commerce and provide the most safety for Americans traveling abroad. Through PILPG’s work with foreign governments, PILPG has observed that U.S. rule of law interests are best represented abroad when foreign governments view the U.S. as committed to the primacy of law. See Michael P. Scharf, International Law in Crisis: A Qualitative Empirical Contribution to the Compliance Debate, 31 Cardozo L. Rev. 45, 64-65 (2009).

#### Reaffirming habeas rights shapes global legal development through transnational judicial dialogue—aff’s precedent is key

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

#### Absent the plan, transitional states will turn to authoritarianism—the perception of a strong judiciary on detention issues is key to global democracy

CJA 4, Center for Justice and Accountability

[2004, The Center for Justice & Accountability (“CJA”) seeks, by use of the legal systems, to deter torture and other human rights abuses around the world., “BRIEF OF the CENTER FOR JUSTICE AND ACCOUNTABILITY, the INTERNATIONAL LEAGUE FOR HUMAN RIGHTS, and INDIVIDUAL ADVOCATES for the INDEPENDENCE of the JUDICIARY in EMERGING DEMOCRACIES as AMICI CURIAE IN SUPPORT OF PETITIONERS”, http://www.cja.org/downloads/Al-Odah\_Odah\_v\_US\_\_\_Rasul\_v\_Bush\_CJA\_Amicus\_SCOTUS.pdf]

A STRONG, INDEPENDENT JUDICIARY IS ESSENTIAL TO THE PROTECTION OF INDIVIDUAL FREEDOMS AND THE ESTABLISHMENT OF STABLE GOVERNANCE IN EMERGING DEMOCRACIES AROUND THE WORLD. A. Individual Nations Have Accepted and Are Seeking to Implement Judicial Review By A Strong, Independent Judiciary. Many of the newly independent governments that have proliferated over the past five decades have adopted these ideals. They have emerged from a variety of less-than-free contexts, including the end of European colonial rule in the 1950's and 1960's, the end of the Cold War and the breakup of the former Soviet Union in the late 1980's and 1990's, the disintegration of Yugoslavia, and the continuing turmoil in parts of Africa, Latin America and southern Asia. Some countries have successfully transitioned to stable and democratic forms of government that protect individual freedoms and human rights by means of judicial review by a strong and independent judiciary. Others have suffered the rise of tyrannical and oppressive rulers who consolidated their hold on power in part by diminishing or abolishing the role of the judiciary. And still others hang in the balance, struggling against the onslaught of tyrants to establish stable, democratic governments. In their attempts to shed their tyrannical pasts and to ensure the protection of individual rights, emerging democracies have consistently looked to the United States and its Constitution in fashioning frameworks that safeguard the independence of their judiciaries. See Ran Hirschl, The Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Four Constitutional Revolutions, 25 Law & Soc. Inquiry 91, 92 (2000) (stating that of the “[m]any countries . . . [that] have engaged in fundamental constitutional reform over the past three decades,” nearly all adopted “a bill of rights and establishe[d] some form of active judicial review”) Establishing judicial review by a strong and independent judiciary is a critical step in stabilizing and protecting these new democracies. See Christopher M. Larkins, Judicial Independence and Democratization: A Theoretical and Conceptual Analysis, 44 Am. J. Comp. L. 605, 605-06 (1996) (describing the judicial branch as having "a uniquely important role" in transitional countries, not only to "mediate conflicts between political actors but also [to] prevent the arbitrary exercise of government power; see also Daniel C. Prefontaine and Joanne Lee, The Rule of Law and the Independence of the Judiciary, International Centre for Criminal Law Reform and Criminal Justice Policy (1998) ("There is increasing acknowledgment that an independent judiciary is the key to upholding the rule of law in a free society . . . . Most countries in transition from dictatorships and/or statist economies recognize the need to create a more stable system of governance, based on the rule of law."), available at http://www.icclr.law.ubc.ca/Publications/Reports/RuleofLaw. pdf (last visited Jan. 8, 2004). Although the precise form of government differs among countries, “they ultimately constitute variations within, not from, the American model of constitutionalism . . . [a] specific set of fundamental rights and liberties has the status of supreme law, is entrenched against amendment or repeal . . . and is enforced by an independent court . . . .” Stephen Gardbaum, The New Commonwealth Model of Constitutionalism, 49 Am. J. Comp. L. 707, 718 (2001). This phenomenon became most notable worldwide after World War II when certain countries, such as Germany, Italy, and Japan, embraced independent judiciaries following their bitter experiences under totalitarian regimes. See id. at 714- 15; see also United States v. Then, 56 F.3d 464, 469 (2d Cir. 1995) (Calabresi, J., concurring) (“Since World War II, many countries have adopted forms of judicial review, which — though different from ours in many particulars — unmistakably draw their origin and inspiration from American constitutional theory and practice. See generally Mauro Cappelletti, The Judicial Process in Comparative Perspective (Oxford: Clarendon Press, 1989).”). It is a trend that continues to this day. It bears mention that the United States has consistently affirmed and encouraged the establishment of independent judiciaries in emerging democracies. In September 2000, President Clinton observed that "[w]ithout the rule of law, elections simply offer a choice of dictators. . . . America's experience should be put to use to advance the rule of law, where democracy's roots are looking for room and strength to grow." Remarks at Georgetown University Law School, 36 Weekly Comp. Pres. Doc. 2218 (September 26, 2000), available at http://clinton6.nara.gov/2000/09/2000-09-26- remarks-by-president-at-georgetown-international-lawcenter.html. The United States acts on these principles in part through the assistance it provides to developing nations. For example, the United States requires that any country seeking assistance through the Millenium Challenge Account, a development assistance program instituted in 2002, must demonstrate, among other criteria, an "adherence to the rule of law." The White House noted that the rule of law is one of the "essential conditions for successful development" of these countries. See http://www.whitehouse.gov/infocus/developingnations (last visited Jan. 8, 2004).12 A few examples illustrate the influence of the United States model. On November 28, 1998, Albania adopted a new constitution, representing the culmination of eight years of democratic reform after the communist rule collapsed. In addition to protecting fundamental individual rights, the Albanian Constitution provides for an independent judiciary consisting of a Constitutional Court with final authority to determine the constitutional rights of individuals. Albanian Constitution, Article 125, Item 1 and Article 128; see also Darian Pavli, "A Brief 'Constitutional History' of Albania" available at http://www.ipls.org/services/others/chist.html (last visited Janaury 8, 2004); Jean-Marie Henckaerts & Stefaan Van der Jeught, Human Rights Protection Under the New Constitutions of Central Europe, 20 Loy. L.A. Int’l & Comp. L.J. 475 (Mar. 1998). In South Africa, the new constitutional judiciary plays a similarly important role, following generations of an oppressive apartheid regime. South Africa adopted a new constitution in 1996. Constitution of the Republic of South Africa, Explanatory Memorandum. It establishes a Constitutional Court which “makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional.” Id. at Chapter 8, Section 167, Item (5), available at http://www.polity.org.za/html/govdocs/constitution/saconst.html?r ebookmark=1 (last visited January 8, 2004); see also Justice Tholakele H. Madala, Rule Under Apartheid and the Fledgling Democracy in Post-Apartheid South Africa: The Role of the Judiciary, 26 N.C. J. Int’l L. & Com. Reg. 743 (Summer 2001). Afghanistan is perhaps the most recent example of a country struggling to develop a more democratic form of government. Adoption by the Loya Jirga of Afghanistan's new constitution on January 4, 2004 has been hailed as a milestone. See http://www.cbsnews.com/stories/2004/01/02/world/main59111 6.shtml (Jan 7, 2004). The proposed constitution creates a judiciary that, at least on paper, is "an independent organ of the state," with a Supreme Court empowered to review the constitutionality of laws at the request of the Government and/or the Courts. Afghan Const. Art. 116, 121 (unofficial English translation), available at http://www.hazara.net/jirga/AfghanConstitution-Final.pdf (last visited January 8, 2004). See also Ron Synowitz, Afghanistan: Constitutional Commission Chairman Presents Karzai with Long-Delayed Draft Constitution (November 3, 2003), available at http://www.rferl.org/nca/features/2003/11/03112003164239.as p (last visited Jan. 8, 2004). B. Other Nations Have Curtailed Judicial Review During Times Of Crisis, Often Citing the United States' Example, And Individual Freedoms Have Diminished As A Result. While much of the world is moving to adopt the institutions necessary to secure individual rights, many still regularly abuse these rights. One of the hallmarks of tyranny is the lack of a strong and independent judiciary. Not surprisingly, where countries make the sad transition to tyranny, one of the first victims is the judiciary. Many of the rulers that go down that road justify their actions on the basis of national security and the fight against terrorism, and, disturbingly, many claim to be modeling their actions on the United States. Again, a few examples illustrate this trend. In Peru, one of former President Alberto Fujimori’s first acts in seizing control was to assume direct executive control of the judiciary, claiming that it was justified by the threat of domestic terrorism. He then imprisoned thousands, refusing the right of the judiciary to intervene. International Commission of Jurists, Attacks on Justice 2000-Peru, August 13, 2001, available at http://www.icj.org/news.php3?id\_article=2587&lang=en (last visited Jan. 8, 2004). In Zimbabwe, President Mugabe’s rise to dictatorship has been punctuated by threats of violence to and the co-opting of the judiciary. He now enjoys virtually total control over Zimbabweans' individual rights and the entire political system. R.W. Johnson, Mugabe’s Agents in Plot to Kill Opposition Chief, Sunday Times (London), June 10, 2001; International Commission of Jurists, Attacks on Justice 2002— Zimbabwe, August 27, 2002, available at http://www.icj.org/news.php3?id\_article=2695&lang=en (last visited Jan. 8, 2004). While Peru and Zimbabwe represent an extreme, the independence of the judiciary is under assault in less brazen ways in a variety of countries today. A highly troubling aspect of this trend is the fact that in many of these instances those perpetuating the assaults on the judiciary have pointed to the United States’ model to justify their actions. Indeed, many have specifically referenced the United States’ actions in detaining persons in Guantánamo Bay. For example, Rais Yatim, Malaysia's "de facto law minister" explicitly relied on the detentions at Guantánamo to justify Malaysia's detention of more than 70 suspected Islamic militants for over two years. Rais stated that Malyasia's detentions were "just like the process in Guantánamo," adding, "I put the equation with Guantánamo just to make it graphic to you that this is not simply a Malaysian style of doing things." Sean Yoong, "Malaysia Slams Criticism of Security Law Allowing Detention Without Trial," Associated Press, September 9, 2003 (available from Westlaw at 9/9/03 APWIRES 09:34:00). Similarly, when responding to a United States Government human rights report that listed rights violations in Namibia, Namibia's Information Permanent Secretary Mocks Shivute cited the Guantánamo Bay detentions, claiming that "the US government was the worst human rights violator in the world." BBC Monitoring, March 8, 2002, available at 2002 WL 15938703. Nor is this disturbing trend limited to these specific examples. At a recent conference held at the Carter Center in Atlanta, President Carter, specifically citing the Guantánamo Bay detentions, noted that the erosion of civil liberties in the United States has "given a blank check to nations who are inclined to violate human rights already." Doug Gross, "Carter: U.S. human rights missteps embolden foreign dictators," Associated Press Newswires, November 12, 2003 (available from Westlaw at 11/12/03 APWIRES 00:30:26). At the same conference, Professor Saad Ibrahim of the American University in Cairo (who was jailed for seven years after exposing fraud in the Egyptian election process) said, "Every dictator in the world is using what the United States has done under the Patriot Act . . . to justify their past violations of human rights and to declare a license to continue to violate human rights." Id. Likewise, Shehu Sani, president of the Kaduna, Nigeriabased Civil Rights Congress, wrote in the International Herald Tribune on September 15, 2003 that "[t]he insistence by the Bush administration on keeping Taliban and Al Quaeda captives in indefinite detention in Guantánamo Bay, Cuba, instead of in jails in the United States — and the White House's preference for military tribunals over regular courts — helps create a free license for tyranny in Africa. It helps justify Egypt's move to detain human rights campaigners as threats to national security, and does the same for similar measures by the governments of Ivory Coast, Cameroon and Burkina Faso." Available at http://www.iht.com/ihtsearch.php?id=109927&owner=(IHT)&dat e=20030121123259. In our uni-polar world, the United States obviously sets an important example on these issues. As reflected in the foundational documents of the United Nations and many other such agreements, the international community has consistently affirmed the value of an independent judiciary to the defense of universally recognized human rights. In the crucible of actual practice within nations, many have looked to the United States model when developing independent judiciaries with the ability to check executive power in the defense of individual rights. Yet others have justified abuses by reference to the conduct of the United States. Far more influential than the words of Montesquieu and Madison are the actions of the United States. This case starkly presents the question of which model this Court will set for the world. CONCLUSION Much of the world models itself after this country’s two hundred year old traditions — and still more on its day to day implementation and expression of those traditions. To say that a refusal to exercise jurisdiction in this case will have global implications is not mere rhetoric. Resting on this Court’s decision is not only the necessary role this Court has historically played in this country. Also at stake are the freedoms that many in emerging democracies around the globe seek to ensure for their peoples.

#### Liberal democracies ensure global peace

Kersch 6, Assistant Professor of Politics

[2006, Ken I. Kersch, Assistant Professor of Politics, Princeton University. B.A., Williams; J.D., Northwestern; Ph.D., Cornell. Thanks to the Social Philosophy and Policy Center at Bowling Green State University, where I was a visiting research scholar in the fall of 2005, and to the organizers of, and my fellow participants in, the Albany Law School Symposium, Albany Law School, “The Supreme Court and international relations theory.”, http://www.thefreelibrary.com/The+Supreme+Court+and+international+relations+theory.-a0151714294]

Liberal theories of international relations hold that international peace and prosperity are advanced to the degree that the world’s sovereign states converge on the model of government anchored in the twin commitment to democracy and the rule of law.52 Liberal “democratic peace” theorists hold that liberal democratic states anchored in rule of law commitments are less aggressive and more transparent than other types of states.53 When compared with non-liberal states, they are thus much better at cooperating with one another in the international arena.54 Because they share a market-oriented economic model, moreover, international relations liberals believe that liberal states hewing to the rule of law will become increasingly interdependent economically.55 As they do so, they will come to share a common set of interests and ideas, which also enhances the likelihood of cooperation.56 Many foreign policy liberals—sometimes referred to as “liberal internationalists”—emphasize the role that effective multilateral institutions, designed by a club or community of liberal-democratic states, play in facilitating that cooperation and in anchoring a peaceful and prosperous liberal world order.57 The liberal foreign policy outlook is moralized, evolutionary, and progressive. Unlike realists, who make no real distinctions between democratic and non-democratic states in their analysis of international affairs, liberals take a clear normative position in favor of democracy and the rule of law.58 Liberals envisage the spread of liberal democracy around the world, and they seek to advance the world down that path.59 Part of advancing the cause of liberal peace and prosperity involves encouraging the spread of liberal democratic institutions within nations where they are currently absent or weak.60 Furthermore, although not all liberals are institutionalists, most liberals believe that effective multilateral institutions play an important role in encouraging those developments.61 To be sure, problems of inequities in power between stronger and weaker states will exist, inevitably, within a liberal framework.62 “But international institutions can nonetheless help coordinate outcomes that are in the long-term mutual interest of both the hegemon and the weaker states.”63 Many foreign policy liberals have emphasized the importance of the judiciary in helping to bring about an increasingly liberal world order. To be sure, the importance of an independent judiciary to the establishment of the rule of law within sovereign states has long been at the core of liberal theory.64 Foreign policy liberalism, however, commonly emphasizes the role that judicial globalization can play in promoting democratic rule of law values throughout the world.65 Post-communist and post-colonial developing states commonly have weak commitments to and little experience with liberal democracy, and with living according to the rule of law, as enforced by a (relatively) apolitical, independent judiciary.66 In these emerging liberal democracies, judges are often subjected to intense political pressures.67 International and transnational support can be a life-line for these judges. It can encourage their professionalization, enhance their prestige and reputations, and draw unfavorable attention to efforts to challenge their independence.68 In some cases, support from foreign and international sources may represent the most important hope that these judges can maintain any sort of institutional power—a power essential to the establishment within the developing sovereign state of a liberal democratic regime, the establishment of which liberal theorists assume to be in the best interests of both that state and the wider world community.69 Looked at from this liberal international relations perspective, judicial globalization seems an unalloyed good. To many, it will appear to be an imperative.70 When judges from well-established, advanced western democracies enter into conversations with their counterparts in emerging liberal democracies, they help enhance the status and prestige of judges from these countries. This is not, from the perspective of either side, an affront to the sovereignty of the developing nation, or to the independence of its judiciary. It is a win-win situation which actually strengthens the authority of the judiciary in the developing state.71 In doing so, it works to strengthen the authority of the liberal constitutional state itself. Viewed in this way, judicial globalization is a way of strengthening national sovereignty, not limiting it: it is part of a state-building initiative in a broader, liberal international order.72 A liberal foreign policy outlook will look favorably on travel by domestic judges to conferences abroad (and here in the United States) where judges from around the world can meet and talk.73 It will not view these conferences as “junkets” or pointless “hobnobbing.” These meetings may very well encourage judges from around the world to increasingly cite foreign precedent in arriving at their decisions. Judges in emerging democracies will use these foreign precedents to help shore up their domestic status and independence. They will also avail themselves of these precedents to lend authority to basic, liberal rule-of-law values for which, given their relative youth, there is little useful history to appeal to within their domestic constitutional systems. Judges in established democracies, on the other hand, can do their part to enhance the status and authority of independent judiciaries in these emerging liberal democratic states by showing, in their own rulings, that they read and respect the rulings of these fledgling foreign judges and their courts (even if they do not follow those rulings as binding precedent).74 They can do so by according these judges and courts some form of co-equal status in transnational “court to court” conversations.75 It is worth noting that mainstream liberal international relations scholars are increasingly referring to the liberal democratic international order (both as it is moving today, and indeed, as read backward to the post-War order embodied in the international institutions and arrangements of NATO, Bretton Woods, the International Monetary Fund, the World Bank, and others) as a “constitutional order,” and, in some cases, as a “world constitution.”76 No less a figure than Justice Breyer—in a classic articulation of a liberal foreign policy vision—has suggested that one of the primary questions for American judges in the future will involve precisely the question of how to integrate the domestic constitutional order with the emerging international one.77 If they look at judicial globalization from within a liberal foreign policy framework (whether or not they have read any actual academic articles on liberal theories of foreign policy), criticisms of “foreign influences” on these judges, and of their “globe-trotting” will fall on deaf ears. They will be heard as empty ranting by those who don’t really understand the role of the judge in the post-1989 world. These judges will not understand themselves to be undermining American sovereignty domestically by alluding to foreign practices and precedents. And they will not understand themselves as (in other than a relatively small-time and benign way) as undermining the sovereignty of other nations. They will see the pay-off-to-benefit ratio of simply talking to other judges across borders, and to citing and alluding to foreign preferences (when appropriate, and in non-binding ways) as high. They will, moreover, see themselves as making a small and modest contribution to progress around the world, with progress defined in a way that is thoroughly consistent with the core commitments of American values and American constitutionalism. And they will be spurred on by a sense that the progress they are witnessing (and, they hope, participating in) will prove of epochal historical significance. Even if they are criticized for it in the short-term, these liberal internationalist judges will have a vision of the future which suggests that, ultimately, their actions will be vindicated by history. The liberal foreign policy outlook will thus fortify them against contemporary criticism.

#### Independently, US rule of law leadership on Kiyemba is key to judicial independence and stable democratization in Iraq

Scharf et al 9, PILPG Managing Director

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

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

#### Data proves Iraqi civil war is inevitable—only strong systems of governance can stabilize the country

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[09/09/13, Anthony H. Cordesman holds the Arleigh A. Burke Chair in Strategy at CSIS, and Sam Khazai is an Associate at CSIS,, “Violence in Iraq: The Growing Risk of Serious Civil Conflict”, https://csis.org/files/publication/120718\_Iraq\_US\_Withdrawal\_Search\_SecStab.pdf]

Iraq is a nation with great potential and its political divisions and ongoing low-level violence do not mean it cannot succeed in establishing stability, security, and a better life for its people. Iraq cannot succeed, however, by denying its growing level of violence and the responsibility of Iraq’s current political leaders for its problems. There are gaps in the data on Iraq’s current level of violence, its causes, and the responsibility of given actors. The data are still good enough, however, to warn that Iraq may be moving back to a level of civil conflict that will amount to a serious civil war. There is also substantial reporting to show that Iraq’s violence is not simply the product of extremists and terrorist groups. Iraq’s growing violence is also the result of the fact that Iraq is the scene of an ongoing struggle to establish a new national identity: one that can bridge across the deep sectarian divisions between its Shi’ites and Sunnis as well as the ethnic divisions between its Arabs and its Kurds and other minorities. Improving the quality and focus of Iraqi efforts at counterterrorism and internal security is a key priority, but it Iraq cannot end its violence through force or repression. Iraq’s leaders must build a new structure of political consensus. They must build an effective structure of governance, and social order that sharply reduces the problems caused by the mix of dictatorship, war, sanctions, occupation, and civil conflict that began in the 1970s and create the kind of national government that can give democracy real meaning and serve the needs of all the Iraqi people.. Iraq must also deal with deep underlying problems. It must cope with a steadily growing population, and diversify an economy that is so dependent on petroleum exports that they provide some 95% of its government revenues. If Iraq’s leaders fail, try to deal with this mix of political divisions and structural problems by denial, or continue their present factional struggles; the end result will be to delay Iraq’s progress by every year their present search for self-advantage continues. What is far worse is that their failures may cause a new major civil war or even divide the country.

#### Strengthened judicial independence is key to solve that – addresses alt causes

Pimental and Anderson 13, Associate and Assistant Professors of Law

[June 2013, David Pimentel is Visiting Associate Professor of Law, Ohio Northern University; Brian Anderson is a Reference Librarian and Assistant Professor, also at Ohio Northern University, “Judicial Independence in Post-Conflict Iraq: Establishing the Rule of Law in an Islamic Constitutional Democracy”, http://works.bepress.com/cgi/viewcontent.cgi?article=1013&context=david\_pimentel]

Contemporary Iraq is facing the full range of challenges that come with post-conflict transitional justice. That includes the backward-looking issues of restorative and retributive justice, for the atrocities and mass human rights violations they suffered during the Saddam Hussein regime and the conflict that followed his downfall.1 It also includes the forward-looking efforts, “paving the road toward peace and reconciliation” and establishing a functional state, characterized by the Rule of Law, in the society torn apart by conflict.2 Among the critical institutions demanding attention in the post-conflict reconstruction is the judiciary, particularly the need for an independent judiciary.3 There is increasing recognition that a functional legal system, one that protects rights and redresses wrongs, is vital to restoring the peace and stability to a war-torn society. Only with such a sound legal system— and a fair, impartial and independent judiciary—will people trust their disputes to the state, and refrain from the vigilante score-settling that signals the breakdown of the Rule of Law.

#### Global nuclear war

Morgan 7 (Former member of the British Labour Party Executive Committee, 3/4, "Better another Taliban Afghanistan, than a Taliban NUCLEAR Pakistan!?" http://www.electricarticles.com/display.aspx?id=639)

The nightmare that is now Iraq would take on gothic proportions across the continent. The prophesy of an arc of civil war over Lebanon, Palestine and Iraq would spread to south Asia, stretching from Pakistan to Palestine, through Afghanistan into Iraq and up to the Mediterranean coast. Undoubtedly, this would also spill over into India both with regards to the Muslim community and Kashmir. Border clashes, terrorist attacks, sectarian pogroms and insurgency would break out. A new war, and possibly nuclear war, between Pakistan and India could not be ruled out. Atomic Al Qaeda Should Pakistan break down completely, a Taliban-style government with strong Al Qaeda influence is a real possibility. Such deep chaos would, of course, open a “Pandora's box” for the region and the world. With the possibility of unstable clerical and military fundamentalist elements being in control of the Pakistan nuclear arsenal, not only their use against India, but Israel becomes a possibility, as well as the acquisition of nuclear and other deadly weapons secrets by Al Qaeda. Invading Pakistan would not be an option for America. Therefore a nuclear war would now again become a real strategic possibility. This would bring a shift in the tectonic plates of global relations. It could usher in a new Cold War with China and Russia pitted against the US.

### 1AC Legitimacy

#### Contention 1 is Legitimacy

#### The inability to order release of detainees undermines US moral high ground and breeds resentment—viewed as critical to habeas issues

Metcalf 09, Director of Arthur Liman Public Interest Program and Law Professor

[December 2009, Hope Metcalf is Director of the Arthur Liman Public Interest Program and teaches a clinic on prisoners’ rights in the United States. She formerly directed the National Litigation Project of the Allard K. Lowenstein International Human Rights Clinic, which was founded in 2002 to respond to infringements on civil liberties and human rights arising out of U.S. counterterrorism policy, “BRIEF OF INTERNATIONAL LAW EXPERTS AS AMICI CURIAE IN SUPPORT OF PETITIONERS”, http://www.law.yale.edu/documents/pdf/cglc/Kiyamba\_v\_Obama\_brief.pdf]

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

#### Perception of habeas rights is key to US soft power—court action is key

Sidhu 11

[2011, Dawinder S. Sidhu, J.D., The George Washington University; M.A., Johns Hopkins University; B.A., University of Pennsylvania, Judicial Review as Soft Power: How the Courts Can Help Us Win the Post-9/11 Conflict”, NATIONAL SECURITY LAW BRIEF, Vol. 1, Issue 1 http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1003&context=nslb]

The “Great Wall” The writ of habeas corpus enables an individual to challenge the factual basis and legality of his detention,91 activating the judiciary’s review function in the separation of powers scheme.92 Because the writ acts to secure individual liberty by way of the judicial checking of unlawful executive detentions, the writ has been regarded as a bulwark of liberty. The Supreme Court has observed, for example, that “There is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus . . . .”93 The writ is seen as a vital aspect of American jurisprudence, and an essential element of the law since the time of the Framers.94 The United States is a conspicuous actor in the world theater, subject to the interests and inclinations of other players, and possessing a similar, natural desire to shape the global community in a manner most favorable to its own objects. The tendency to attempt to inﬂuence others is an inevitable symptom of international heterogeneity and, at present, the United States is mired in an epic battle with fundamentalists bent on using terrorism as a means to repel,95 if not destroy, America.96 American success in foreign policy depends on the internal assets available to and usable by the United States, including its soft power. The law in America is an aspect of its national soft power. In particular, the moderates in the Muslim world—the intended audience of America’s soft power— may ﬁnd attractive the American constitutional system of governance in which 1) the people are the sovereign and the government consists of merely temporary and recallable agents of the people, 2) federal power is diffused so as to diminish the possibility that any branch of the government, or any of them acting in tandem, can infringe upon the liberty of the people, 3) structural protections notwithstanding, the people are entitled to certain substantive rights including the right to be free of governmental interference with respect to religious exercise, 4) the diversity of interests inherent in its populace is considered a critical safeguard against the ability of a majority group to oppress the minority constituents, 5) the courts are to ensure that the people’s rights to life, liberty, and property are not abridged, according to law, by the government or others, and 6) individuals deprived of liberty have available to them the writ of habeas corpus to invoke the judiciary’s checking function as to executive detention decisions. The Constitution, in the eyes of Judge Learned Hand, is “the best political document ever made.”97 If the aforementioned constitutional principles are part of the closest approximation to a just and reasoned society produced by man, surely they may have some persuasive appeal to the rest of the world, including moderate Muslims who generally live in areas less respectful of minority rights and religious pluralism. Such reverence is to be expected and warranted only if the United States has remained true to these constitutional principles in practice, and in particular, in its behavior in the aftermath of the 9/11 attacks, when national stress is heightened and the option of deviating from such values in favor of an expedient “law of necessity” similarly tempting.98 The extent to which the United States has remained true to itself as a nation of laws—and thus may credibly claim such legal soft power—is the subject of the next section. II. THE COURTS AND SOFT POWER The Judiciary In Wartime The United States has been charged with being unfaithful to its own laws and values in its prosecution of the post-9/11 campaign against transnational terrorism. With respect to its conduct outside of the United States, following 9/11, America has been alleged to have tortured captured individuals in violation of its domestic and international legal obligations,99 and detained individuals indeﬁ nitely without basic legal protections.100 Closer to home, the United States is thought to have proﬁ led Muslims, Arabs, and South Asians in airports and other settings,101 conducted immigration sweeps targeting Muslims,102 and engaged in mass preventative detention of Muslims in the United States,103 among other things. These are serious claims. The mere perception that they bear any resemblance to the truth undoubtedly impairs the way in which the United States is viewed by Muslims around the world, including Muslim-Americans, and thus diminishes the United States’ soft power resources.104 The degree to which they are valid degrades the ability of the United States to argue persuasively that it not only touts the rule of law, but exhibits actual ﬁ delity to the law in times of crisis. These claims relate to conduct of the executive and/or the legislature in the aftermath of the 9/11 attacks. This Article is concerned, however, with the judiciary, that is whether the courts have upheld the rule of law in the post-9/11 context—and thus whether the courts may be a source of soft power today (even if the other branches have engaged, or are alleged to have engaged, in conduct that is illegal or unwise). As to the courts, it is my contention that the judiciary has been faithful to the rule of law after 9/11 and as such should be considered a positive instrument of American soft power. Prior to discussing post-9/11 cases supporting this contention, it is important to provide a historical backdrop to relationship between the courts and wartime situations because judicial decision-making in cases implicating the wars in Afghanistan and Iraq does not take occur on a blank slate, despite the unique and modern circumstances of the post-9/11 conﬂ ict.

#### Legitimacy key to make US leadership durable and effective—only judicial action solves

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

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

#### US benevolent leadership key to global peace—the alternative is major power wars that escalate

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

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

#### Judicial action creating a meaningful right to habeas is uniquely key to restore US legitimacy—comparatively more important than executive flexibility

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

The Bush Administration's detainee policy made clear that - due to America's power - the content of enforceable international law applicable to the detainees would largely depend on interpretation by the U.S. government. Under the classic realist paradigm, international law is less susceptible to judicial comprehension because it cannot be taken at face value; its actual, enforceable meaning depends on ever-shifting political dynamics and complex relationships among great powers. But in a hegemonic system, while enforceable international legal norms may still be political, their content is heavily influenced by the politics of one nation - the United States. n412 As an institution of that same government, the courts are well-positioned to understand and interpret international law that has been incorporated into U.S. law. Because the courts have the capacity to track international legal norms, there was no longer a justification for exceptional deference to the Administration's interpretation of the Geneva Conventions as applied to the detainees. Professors Posner and Sunstein have argued for exceptional deference on the ground that, unless the executive is the voice of the nation in foreign affairs, other nations will not know whom to hold accountable for foreign policy decisions. n413 But the Guantanamo litigation demonstrated that American hegemony has altered this classic assumption as well. The [\*154] transparent and accessible nature of the U.S. government made it possible for other nations to be informed about the detainee policy and, conceivably, to have a role in changing it. The Kuwaiti government hired American attorneys to represent their citizens held at Guantanamo. n414 In the enemy combatant litigation, the government was forced to better articulate its detainee policies, justify the detention of each detainee, and permit attorney visits with the detainees. n415 Other nations learned about the treatment of their citizens through the information obtained by attorneys. n416 Although the political climate in the U.S. did not enable other nations to have an effect on detainee policy directly - and Congress, in fact, acted twice to limit detainees' access to the courts n417 - this was an exceptional situation. Foreign governments routinely lobby Congress for favorable foreign affairs legislation, and are more successful with less politically-charged issues. n418 Even "rogue states" such as Myanmar have their lobbyists in Washington. n419 In addition, foreign governments facing unfavorable court decisions can and do appeal or seek reversal through political channels. n420 The accessibility and openness of the U.S. government is not a scandal or weakness; instead, it strengthens American hegemony by giving other nations a voice in policy, drawing them into deeper relationships that serve America's strategic interests. n421 In the Guantanamo litigation, the courts served as an important accountability mechanism when the political branches were relatively unaccountable to the interests of other nations. The hegemonic model also reduces the need for executive branch flexibility,

and the institutional competence terrain shifts toward the courts. The stability of the current U.S.-led international system depends on the ability of the U.S. to govern effectively. Effective governance depends on, among other things, predictability. n422 G. John Ikenberry analogizes America's hegemonic position to that of a "giant corporation" seeking foreign investors: "The rule of law and the institutions of policy making in a democracy are the political equivalent of corporate transparency and [\*155] accountability." n423 Stable interpretation of the law bolsters the stability of the system because other nations will know that they can rely on those interpretations and that there will be at least some degree of enforcement by the United States. At the same time, the separation of powers serves the global-governance function by reducing the ability of the executive branch to make "abrupt or aggressive moves toward other states." n424 The Bush Administration's detainee policy, for all of its virtues and faults, was an exceedingly aggressive departure from existing norms, and was therefore bound to generate intense controversy. It was formulated quickly, by a small group of policy-makers and legal advisors without consulting Congress and over the objections of even some within the executive branch. n425 Although the Administration invoked the law of armed conflict to justify its detention of enemy combatants, it did not seem to recognize limits imposed by that law. n426 Most significantly, it designed the detention scheme around interrogation rather than incapacitation and excluded the detainees from all legal protections of the Geneva Conventions. n427 It declared all detainees at Guantanamo to be "enemy combatants" without establishing a regularized process for making an individual determination for each detainee. n428 And when it established the military commissions, also without consulting Congress, the Administration denied defendants important procedural protections. n429 In an anarchic world characterized by great power conflict, one could make the argument that the executive branch requires maximum flexibility to defeat the enemy, who may not adhere to international law. Indeed, the precedents relied on most heavily by the Administration in the enemy combatant cases date from the 1930s and 1940s - a period when the international system was radically unstable, and the United States was one of several great powers vying for advantage. n430 But during that time, the executive branch faced much more exogenous pressure from other great powers to comply with international law in the treatment of captured enemies. If the United States strayed too far from established norms, it would risk retaliation upon its own soldiers or other consequences from [\*156] powerful rivals. Today, there are no such constraints: enemies such as al Qaeda are not great powers and are not likely to obey international law anyway. Instead, the danger is that American rule-breaking will set a pattern of rule-breaking for the world, leading to instability. n431 America's military predominance enables it to set the rules of the game. When the U.S. breaks its own rules, it loses legitimacy.

The Supreme Court's response to the detainee policy enabled the U.S. government as a whole to hew more closely to established procedures and norms, and to regularize the process for departing from them. After Hamdi, n432 the Department of Defense established a process, the CSRTs, for making an individual determination about the enemy combatant status of all detainees at Guantanamo. After the Court recognized habeas jurisdiction at Guantanamo, Congress passed the DTA, n433 establishing direct judicial review of CSRT determinations in lieu of habeas. Similarly, after the Court declared the military commissions unlawful in Hamdan, n434 this forced the Administration to seek congressional approval for commissions that restored some of the rights afforded at courts martial. n435 In Boumediene, the Court rejected the executive branch's foreign policy arguments, and bucked Congress as well, to restore the norm of habeas review. n436 Throughout this enemy combatant litigation, it has been the courts' relative insulation from politics that has enabled them to take the long view. In contrast, the President's (and Congress's) responsiveness to political concerns in the wake of 9/11 has encouraged them to depart from established norms for the nation's perceived short-term advantage, even at the expense of the nation's long-term interests. n437 As Derek Jinks and Neal Katyal have observed, "treaties are part of [a] system of time-tested standards, and this feature makes the wisdom of their judicial interpretation manifest." n438 At the same time, the enemy combatant cases make allowances for the executive branch's superior speed. The care that the Court took to limit the issues it decided in each case gave the executive branch plenty of time to [\*157] arrive at an effective detainee policy. n439 Hamdi, Rasul, and Boumediene recognized that the availability of habeas would depend on the distance from the battlefield and the length of detention. n440 The enemy combatant litigation also underscores the extent to which the classic realist assumptions about courts' legitimacy in foreign affairs have been turned on their head.

In an anarchic world, legitimacy derives largely from brute force. The courts have no armies at their disposal and look weak when they issue decisions that cannot be enforced. n441 But in a hegemonic system, where governance depends on voluntary acquiescence, the courts have a greater role to play. Rather than hobbling the exercise of foreign policy, the courts are a key form of "soft power." n442 As Justice Kennedy's majority opinion observed in Boumediene, courts can bestow external legitimacy on the acts of the political branches. n443 Acts having a basis in law are almost universally regarded as more legitimate

than merely political acts. Most foreign policy experts believe that the Bush Administration's detention scheme "hurt America's image and standing in the world." n444 The restoration of habeas corpus in Boumediene may help begin to counteract this loss of prestige. Finally, the enemy combatant cases are striking in that they embrace a role for representation-reinforcement in the international realm. n445 Although defenders of special deference acknowledge that courts' strengths lie in protecting the rights of minorities, it has been very difficult for courts to protect these rights in the face of exigencies asserted by the executive branch in foreign affairs matters. This is especially difficult when the minorities are alleged enemy aliens being held outside the sovereign territory of the United States in wartime. In the infamous Korematsu decision, another World War II-era case, the Court bowed to the President's factual assessment of the emergency justifying detention of U.S. citizens of Japanese ancestry living in the United States. n446 In Boumediene, the Court [\*158] pointedly declined to defer to the executive branch's factual assessments of military necessity. n447 The court may have recognized that a more aggressive role in protecting the rights of non-citizens was required by American hegemony. In fact, the arguments for deference with respect to the rights of non-citizens are even weaker because aliens lack a political constituency in the United States. n448 This outward-looking form of representation-reinforcement serves important functions. It strengthens the legitimacy of U.S. hegemony by establishing equality as a benchmark and reinforces the sense that our constitutional values reflect universal human rights. n449

#### Statistical evidence shows US policy towards indefinite detention is both necessary and sufficient

Welsh 11, J.D. from University of Utah and Doctoral student

[March, 2011, David Welsh has a J.D. from the University of Utah. He is currently a doctoral student in the Eller School of Business at the University of Arizona where his research focuses on organizational fairness and ethics, "Procedural Justice Post-9/11: The Effects of Procedurally Unfair Treatment of Detainees on Perceptions of Global Legitimacy”, 9 U.N.H. L. Rev. 261]

Today, many individuals throughout the world question whether the United States has engaged in excess in response to the attacks of 9/11. A 2004 poll suggests that many people in France (57%), Germany (49%), and Britain (33%) felt that the United States overreacted in response to terrorism. n30 Among Middle Eastern countries, as many as three-fourths of individuals stated that the United States overreacted in the War on Terror. n31 Additionally, approximately two-thirds of citizens in France, Germany, Turkey, and Pakistan questioned the sincerity of the United States in the War on Terror. n32 Within the United States, nationwide confidence in the White House [\*267] dropped 40% between 2002 and 2004 while confidence in Congress fell by 25% during this period. n33 Although this worldwide drop in legitimacy is the result of multiple factors beyond the scope of this paper, such as the U.S. decision to invade Iraq, detention remains a controversial topic that continues to negatively affect global perceptions of the United States. Although this paper focuses specifically on the detention of suspected terrorists at the Guantanamo Bay Detention Camp (Guantanamo Bay), n34 this facility is but one of many detention centers holding suspected terrorists on behalf of the United States. n35 Today, approximately 250 prisoners (out of approximately 800) remain at this U.S.-run military base in Cuba that is outside U.S. legal jurisdiction. n36 However, it is critical to note that these 250 individuals represent a mere 1% of "approximately 25,000 detainees worldwide held directly or indirectly by or on behalf of the United States." n37 Prisoners have alleged torture, sexual degradation, religious persecution, n38 and many other specific forms of mistreatment while being detained. n39 In many detention facilities including Guantanamo Bay, Abu Ghraib, and Bagram, these allegations are substantiated by significant evidence and have gained worldwide attention. n40 [\*268] While some graphic and shocking cases of abuse have been brought to light, n41 a more typical example is the prosecution of sixteen-year-old Mohamed Jawad by Lt. Col. Darrel Vandeveld at Guantanamo Bay. n42 At first, the case against Jawad looked straightforward, as he had confessed to throwing a grenade that injured two U.S. soldiers and a translator in December 2002. n43 However, a deeper investigation "uncovered a confession obtained through torture, two suicide attempts by the accused, abusive interrogations, the withholding of exculpatory evidence from the defense," and other procedural problems. n44 Vandeveld discovered that the military had obtained confessions from two other individuals for the same offense; he ultimately left his post after attempts to provide "basic fair trial rights" failed. n45 In February 2006, the United Nations Working Group on Arbitrary Detention spoke out against international law and human rights violations at Guantanamo Bay, stating that the facility should be closed "without further delay." n46 This report paralleled earlier criticism from Amnesty International that Guantanamo Bay violates minimum standards for the treatment of individuals. n47 In response, the United States has argued that detainees are not prisoners of war but are rather "unlawful combatants" who are not entitled to the protections of the Geneva Convention because they do not act in accor [\*269] dance with the accepted rules of war. n48 Yet, regardless of the debatable legal merit of this argument, legitimacy is an "elusive quality" grounded in worldwide opinion that will not let the United States off the hook on a mere technicality when moral duties and international customs have been violated. n49 In the next section, I discuss the importance of legitimacy and the ways in which it has been undermined by U.S. conduct in the War on Terror. By understanding what drives global perceptions of U.S. legitimacy, current detention policies and their ramifications can be more accurately assessed and restructured. IV. Legitimacy: The Critical Missing Element in the War on Terror In the context of the War on Terror, legitimacy is the critical missing element under the current U.S. detention regime. Legitimacy can be defined as "a psychological property of an authority, institution, or social arrangement that leads those connected to it to believe that it is appropriate, proper, and just." n50 As far back as Plato and Aristotle, philosophers have recognized that influencing others merely through coercion and power is costly and inefficient. n51 Today, empirical evidence suggests that legitimacy, rather than deterrence, is primarily what causes individuals to obey the law. n52 Thus, while legal authorities may possess the immediate power to stop illegal action, long-term compliance requires that the general public perceives the law to be legitimate. n53 Terrorism is primarily an ideo [\*270] logical war that cannot be won by technology that is more sophisticated or increased military force. n54 While nations combating terrorism must continue to address immediate threats by detaining suspected terrorists, they must also consider the prevention of future threats by analyzing how their policies are perceived by individuals throughout the world. Ultimately, in the War on Terror, "the benefits to be derived from maximizing legitimacy are too important to neglect." n55 Over time, perceptions of legitimacy create a "reservoir of support" for an institution that goes beyond mere self-interest. n56 In the context of government: Legitimacy is an endorphin of the democratic body politic; it is the substance that oils the machinery of democracy, reducing the friction that inevitably arises when people are not able to get everything they want from politics. Legitimacy is loyalty; it is a reservoir of goodwill that allows the institutions of government to go against what people may want at the moment without suffering debilitating consequences. n57 The widespread acceptance of highly controversial decisions by the U.S. Supreme Court illustrates the power of institutional legitimacy. n58 The Court itself noted that it "cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees." n59 "The Court's power lies, rather, in its legitimacy . . . ." n60 For example, by emphasizing "equal treatment," "honesty and neutrality," "gathering information before decision making," and "making principled, or rule based, decisions instead of political decisions," the Court maintained [\*271] legitimacy through the controversial abortion case Planned Parenthood of Southeastern Pennsylvania v. Casey in 1992. n61 Thus, although approximately half of Americans oppose abortion, n62 the vast majority of these individuals give deference to the Court's ruling on this issue. n63 In the post-World War II era, the United States built up a worldwide reservoir of support based upon four pillars: "its commitment to international law, its acceptance of consensual decision-making, its reputation for moderation, and its identification with the preservation of peace." n64 Although some U.S. policies between 1950 and 2001 did not align with these pillars, on a whole the United States legitimized itself as a world superpower during this period. n65 In the 1980s, President Ronald Reagan spoke of America as a "shining city on a hill," suggesting that it was a model for the nations of the world to look to. n66 While the United States received a virtually unprecedented outpouring of support from the international community following 9/11, a nation's reservoir of support will quickly evaporate when its government overreacts. Across the globe, individuals have expressed a growing dissatisfaction with U.S. conduct in the War on Terror, and by 2006, even western allies of the United States lobbied for the immediate closure of Guantanamo Bay, calling it "an embarrassment." n67 Former Secretary of State Colin Powell proclaimed that "Guantanamo has become a major, major problem . . . in the way the world perceives America and if it were up to me I would close Guantanamo not tomorrow but this afternoon . . . ." n68 Similarly, [\*272] President Obama noted in his campaign that "Guantanamo has become a recruiting tool for our enemies." n69 Current U.S. detention policies erode each of the four pillars on which the United States established global legitimacy. In fact, critics have argued that the "United States has assumed many of the very features of the 'rogue nations' against which it has rhetorically--and sometimes literally--done battle over the years." n70 While legitimacy cannot be regained overnight, the recent election of President Barack Obama presents a critical opportunity for a re-articulation of U.S. detention policies. Although President Obama issued an executive order calling for the closure of Guantanamo Bay only two days after being sworn into office, n71 significant controversy remains about the kind of alternate detention system that will replace it. n72 In contrast to the current model, which has largely rendered inefficient decisions based on ad hoc policies, I argue for the establishment of a domestic terror court (DTC) created specifically to deal with the unique procedural issues created by a growing number of suspected terrorists.

### AT No Modeling

#### The aff is modeled—

#### a. The War on Terror—other countries are uniquely looking to US judicial developments on habeas and detention issues now to determine the direction the question of rule of law during times of conflict—that’s Scharf—independently, counterterrorism and detention justifies runaway executive authority—that’s CJA

#### b. Transnational Judicial Dialogue—international conferences, citing of foreign courts, and the development of legal scholarship on detention issues is occurring now—affirming court leadership on rule of law enables the US to shape rule of law—that’s Scharf

### 2AC Ban T

#### We meet—indefinite detention with a right to habeas corpus isn’t indefinite detention

#### Restriction includes a limitation

STATE OF ARIZONA, Appellee, v. JEREMY RAY WAGNER, April 10, 2008, Filed, Appellant., 1 CA-CR 06-0167, 2008 Ariz. App. Unpub. LEXIS 613, opinion by Judge G. MURRAY SNOW

P10 The term "restriction" is not defined by the Legislature for the purposes of the DUI statutes. See generally A.R.S. § 28-1301 (2004) (providing the "[d]efinitions" section of the DUI statutes). In the absence of a statutory definition of a term, we look to ordinary dictionary definitions and do not construe the word as being a term of art. Lee v. State, 215 Ariz. 540, 544, ¶ 15, 161 P.3d 583, 587 (App. 2007) ("When a statutory term is not explicitly defined, we assume, unless otherwise stated, that the Legislature intended to accord the word its natural and obvious meaning, which may be discerned from its dictionary definition.").

P11 The dictionary definition of "restriction" is "[a] limitation or qualification." Black's Law Dictionary 1341 (8th ed. 1999). In fact, "limited" and "restricted" are considered synonyms. See Webster's II New Collegiate Dictionary 946 (2001). Under these commonly accepted definitions, Wagner's driving privileges were "restrict[ed]" when they were "limited" by the ignition interlock requirement. Wagner was not only [\*7] statutorily required to install an ignition interlock device on all of the vehicles he operated, A.R.S. § 28-1461(A)(1)(b), but he was also prohibited from driving any vehicle that was not equipped with such a device, regardless whether he owned the vehicle or was under the influence of intoxicants, A.R.S. § 28-1464(H). These limitations constituted a restriction on Wagner's privilege to drive, for he was unable to drive in circumstances which were otherwise available to the general driving population. Thus, the rules of statutory construction dictate that the term "restriction" includes the ignition interlock device limitation.

#### C/I—War powers authority of indefinite detention is keeping people without being charges filed—the aff means he can no longer do that for a CATEGORY OF PEOPLE

The Committee on Federal Courts 4 [2004, The Committee on Federal Courts, “THE INDEFINITE DETENTION OF "ENEMY COMBATANTS": BALANCING DUE PROCESS AND NATIONAL SECURITY IN THE CONTEXT OF THE WAR ON TERROR \*”, 59 The Record 41, The Record of The Association of The Bar of the City of New York]

The President, assertedly acting under his "war power" in prosecuting the "war on terror," has claimed the authority to detain indefinitely, and without access to counsel, persons he designates as "enemy combatants," an as yet undefined term that embraces selected suspected terrorists or their accomplices.

Two cases, each addressing a habeas corpus petition brought by an American citizen, have reviewed the constitutionality of detaining "enemy combatants" pursuant to the President's determination:

- Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003), cert. granted, 124 S. Ct. 981 (Jan. 9, 2004) (No. 03-6696), concerns a citizen seized with Taliban military forces in a zone of armed combat in Afghanistan;

- Padilla ex. rel. Newman v. Bush, 233 F. Supp. 2d 564 (S.D.N.Y. 2002), rev'd sub nom., Padilla ex. rel. Newman v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003), cert. granted, 124 S. Ct. 1353 (Feb. 20, [\*42] 2004) (No. 03-1027), concerns a citizen seized in Chicago, and suspected of planning a terrorist attack in league with al Qaeda.

Padilla and Hamdi have been held by the Department of Defense, without any access to legal counsel, for well over a year. No criminal charges have been filed against either one. Rather, the government asserts its right to detain them without charges to incapacitate them and to facilitate their interrogation. Specifically, the President claims the authority, in the exercise of his war power as "Commander in Chief" under the Constitution (Art. II, § 2), to detain persons he classifies as "enemy combatants":

- indefinitely, for the duration of the "war on terror";

- without any charges being filed, and thus not triggering any rights attaching to criminal prosecutions;

- incommunicado from the outside world;

- specifically, with no right of access to an attorney;

- with only limited access to the federal courts on habeas corpus, and with no right to rebut the government's showing that the detainee is an enemy combatant.

#### Their interpretation overlimits to only one aff in each topic area—aff flex ensures innovative topics encouraging research skills and in depth discussions

#### Our interpretation is more precise by citing a court case—that means our limit is predictable and better reflects the topic

#### Default to reasonability—competing interpretations leads to a race to limit out affs at the expense of substance—affs need to know they’re topical

#### ID = no defined duration

Ulysses S. Smith - Winter, 2007, Candidate for J.D., Cornell Law School, 2007, "More Ours than Theirs" n1: The Uighurs, Indefinite Detention, and the Constitution, 40 Cornell Int'l L.J. 265, LexisNexis

The Court has found indefinite detention, a deprivation of liberty with no defined scope or duration, justified in very limited circumstances, and then only when governed by robust procedural safeguards. n45 The following discussion considers two broad contexts - civil and military - in which the Court has found indefinite detention justified, and the particular circumstances relevant to each context that warranted such an extreme measure. The discussion focuses on the Court's rationale in each instance, concluding that in both contexts, detention must be closely tied to its purpose, and that once the purpose of the detention - securing the alien's [\*273] removal, preventing his escape or commission of harm, or preventing his return to the battlefield - can no longer be met, detention must cease.

# 2AC

### 2AC CP

#### Multiple condo is a voting issue—aff can’t read their best offense because the neg can just kick their argument and can cross-apply offense, kills competitive equity—they can advocate contradictory positions, kills education and advocacy skills—one condo solves their offense—if they win condo is good we should get to advocate perms

#### Status quo relocation offers are not a meaningful remedy in practice even if it is in theory

Vaughn and Williams, Professors of Law, 13 [2013, Katherine L. Vaughns B.A. (Political Science), J.D., University of California at Berkeley. Professor of Law, University of Maryland Francis King Carey School of Law, and Heather L. Williams, B.A. (French), B.A. (Political Science), University of Rochester, J.D., cum laude, University of Maryland Francis King Carey School of Law, “OF CIVIL WRONGS AND RIGHTS: 1 KIYEMBA V. OBAMA AND THE MEANING OF FREEDOM, SEPARATION OF POWERS, AND THE RULE OF LAW TEN YEARS AFTER 9/11”, Asian American Law Journal, Vol. 20, 2013, http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2148404]

Petitioners’ reasons for rejecting available relocation offers are varied, but not without cause. For example, Bahtiyar Mahnut refused to accept Palau’s offer of relocation because that country refused to accept his brother, Arkin Mahmud, who had developed severe mental health problems at Guantanamo after spending considerable time in solitary confinement, due to its purported inability to treat those problems within its borders.63 And as noted in petitioners’ letter brief to the Court, “[t]he consequences of solitary confinement are psychologically brutal,” and therefore likely to require significant treatment options.64 Other detainees rejected relocation offers because the proposed locations were not home to an established Uighur community.65 The group of Uighurs relocated to Albania shortly before the Supreme Court oral argument in the Kiyemba case, illustrate the problems that may arise from relocation to foreign lands. The Uighurs now living in Albania live in a refugee camp, monitored by armed guards, and surrounded by razor wire.66 There is no established Uighur community in Albania, and the Uighurs do not speak the language, making social integration difficult, if not impossible.67 Moreover, relocated Uighurs have often reported social and community alienation due to their political status, and the assumption that either their original designation as “enemy combatants” or their time spent at Guantanamo means that they are violent or dangerous. Apparently in the eyes of the Court, however, the Uighurs are “too picky” in their relocation wishes, refusing perfectly good resettlement offers.68 This undoubtedly is a problematic position. The government wasn’t “very discriminating when [it] scooped them up in Afghanistan, and carried them away,” ultimately detaining the Uighurs for nearly a decade.69 As one commentator has noted, “[i]s the idea that as long as they aren’t being tortured they should be pleased to find themselves wherever we might put them next? How about a research station in Antarctica?”70 I believe that habeas relief must be accompanied by a meaningful remedy, in this case, physical freedom, without the restrictions associated with life, albeit in the “least restrictive conditions” available, at the Guantanamo Bay naval base. It also must be accompanied by other rights that the detainees long have been denied, including the right to have some say in the ultimate location where they will live. The Uighurs’ detention has been found to be unlawful; their designation as “enemy combatants” was declared unjustified. They must be relocated from the site of their detention. Surely we cannot blame them for wanting some choice in where they end up. At the very least, pending permanent relocation to an “appropriate country,” mutually selected, the Uighurs could be resettled in an established Uighur community in the United States.71

#### The aff only forces detainees to be released but allows executive discretion to how that occurs—this maintain habeas but avoids their immigration DAs

Roberts 9, Visiting Professor of Law

[August 2009, Caprice L. Roberts is a Visiting Professor of Law, The Catholic University of America; Professor of Law, West Virginia University, “Rights, Remedies, & Habeas Corpus -- The Uighurs, Legally Free but Actually Imprisoned”, http://works.bepress.com/caprice\_roberts/2/]

The nature of the Uighurs’ status, however, should save them from this dismal body of immigration jurisprudence. The distinguishing feature for the Uighurs is that the United States brought the Uighurs to Guantánamo against their will. The Boumediene Court found that the United States has de facto control of Guantánamo. Because the United States government hauled the Uighurs to an American-controlled location, the Uighurs’ case is distinguishable from the traditional immigration cases regarding exclusion in which individuals arrived, for example, voluntarily on Ellis Island. In fairness, the Uighurs were voluntarily in Afghanistan and then traveled to Pakistan where the United States military took custody of them. So, for the sake of argument, one could assume that the United States had authority to capture and detain the Uighurs initially and the same problem might have inevitably arisen once it became clear that the United States no longer had authority to hold them. The problem is not, however, the same as the Uighurs’ present conundrum. If the United States military had discovered its error early, it could have let the Uighurs go in Afghanistan. The Uighurs had assumed the risk of being in Afghanistan (and arguably Pakistan); the Uighurs did not assume the risk of being in Guantanamo, which possesses unique geographic and stigmatic consequences. An analogy to tort law—specifically to voluntarily assuming a duty of care—may aid the analysis. In the American tradition, one who walks by an injured individual on the side of the road owes no duty to stop and help.195 If one opts to stop and take the individual into her garage to render aid, however, one assumes a duty to the victim.196 Similarly, the United States government had no duty to assist the Uighurs plight against their alleged oppressor, the Chinese government. The United States chose to pay a bounty for the Uighurs, transferred them to de facto United States territory, and wrongfully detained them at Guantánamo. Further, pursuant to the principle of non-refoulment, the United States possesses an affirmative obligation in certain immigration cases to not return individuals to areas where they will again face persecution. These facts alter the relationship such that the United States affirmatively assumed a responsibility for the care and placement of the Uighurs. In an ideal world, we could attain full corrective justice by returning the Uighurs to their homeland. The Uighurs assert real threats of persecution by China. Given their good-faith claim of persecution, returning the Uighurs to China, Afghanistan, or Pakistan is morally unacceptable even if feasible. Other countries are also unwilling to accept the Uighurs due to fears of uneasy diplomatic relations with or retaliation by China.197 Despite the genuine practical difficulties, the United States owes a duty to the Uighurs. The judiciary need not take a position on the appropriate avenue for placement. The factual reality that the United States may be the only locale that might work does not render the federal judiciary powerless to exercise jurisdiction and order release for an ongoing habeas corpus violation. Even if the voluntariness of arrival is not dispositive, the federal appellate court erred in automatically converting the Uighurs’ case into an immigration matter that raises a nonremediable political question. The case as filed in the federal district court was a habeas action that sought to challenge confinement as unlawful. Jurisdiction over this issue exists. The federal district court possessed the authority to declare the detainment an arbitrary exercise of government power as well as a violation of the Uighurs’ individual rights to be free from unlawful confinement. The court’s jurisdiction should include the power to issue a remedy for the unlawful confinement. The district court’s order that the government release the Uighurs into the United States triggered the potential classification of the case as an immigration issue. Thus, although perhaps limited by the Uighurs’ remedial request, the court should have ordered a termination of the unlawful confinement and a release of the Uighurs from Guantánamo within a specified time period. The time limit creates the necessary pressure but balances the powers appropriately because the court leaves the details of administering the remedy to the government. Only an injunction ordering release will remedy the irreparable harm being done. Such an injunction order would not have activated the trip-wire of immigration. It would not render the case a zerosum game per the appellate court’s rigid logic. The order could leave the intricate decisionmaking regarding the how and where questions to the branches best suited to tailor the relief – the political branches. This remedial path would preserve the government’s plenary power over immigration, the judiciary’s review and remedial power, and the significance of habeas corpus. The court might be warranted in issuing a more robust remedy. The Uighurs’ case poses a genuine conundrum for relief. The intersection of habeas corpus with immigration exclusion policy creates an arena of potentially overlapping branch powers. In this “zone of twilight,”198 the balance of the equities may tip in favor of the court issuing an order of release into the United States because of the role the United States played in creating the problem. The judiciary would be wise, however, to leave the details of implementation to the political branches. The government could fashion the relief on historical precedent such as: President Jimmy Carter’s refugee camps for the port of Mariel Cuban refugees199 or the Attorney General’s use of parole authority to grant temporary stays to aliens who otherwise appear unqualified for admission.200 The political branches have creative tools at their disposal. Congress and the Executive should determine the proper course. The judiciary, however, must maintain its authority to rectify an ongoing habeas corpus violation. The right to habeas is clear, and the consequences of no remedy are dire for the rule of law and for the individual Uighurs. How far the court may go in crafting a remedy is a delicate matter, but at minimum the court should exercise jurisdiction, check the government’s abuse, and order release.

## Plenary Powers DA

### 2AC N/U

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

Tirschwell 9

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

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

### 2AC No Impact/Case O/W

#### Democracy solves the impact and exec flex isn’t key—their impact assumes cold war era fears

Spiro 2, Professor at Hofstra Law School

[Winter 2002, Peter J. Spiro is a Professor, Hofstra Law School, “Explaining the End of Plenary Power”, 16 Geo. Immigr. L.J. 339]

Building on those two girders, one can describe how plenary power was generated by the international context from which it emerged. That context was historically characterized by the proto-anarchical nature of relations among states and the resulting need to centralize foreign policymaking in non-judicial institutions. Immigration policy inherently implicated foreign relations, and those relations were, up until recently, characterized by great instability and risk. In the late nineteenth century, nations still routinely made war on each other, for reasons of pure power projection; there was little in the way of a normative or institutional superstructure to act as a brake on conflict. That conflict posed a serious threat, not the least to the not-yet-superpower United States. In a world in which the use of force remained a legitimate means of extending state power, foreign relations were the ultimate high-stakes arena. The world that bore plenary power was also one that demanded unitary decisionmaking. In the face of potentially catastrophic downside risk, the state needed to centralize the formulation of foreign policy. The courts were least suited to assume that institutional task. As famously propounded in Curtiss-Wright, traditional foreign policymaking required speed, secrecy, and singular responsibility, qualities antithetical to judicial process. n42 Nor could the courts claim any substantive competence in the area. Foreign relations were an area that could not tolerate judicial freelancing. n43 In the worst scenario, a court would make the wrong call for want of accurate information and foreign policy expertise, leading us into conflict with another country with all the dangers such conflict posed. n44 Alternatively, the [\*350] courts would make their rulings and have them ignored by the political branches, diminishing critical institutional capital in the process. n45 Either way, there were powerful incentives for the courts to remain on the sidelines when it came to foreign relations. Hence the political question doctrine in matters involving foreign relations, of which plenary power is a variant. n46 Indeed, all of the major plenary power cases stress the foreign relations element of immigration lawmaking and the dangers posed by judicial intervention in such matters. n47 Until recent years, that abnegation was justifiable, if not always justified. Even in such cases as Knauff and Mezei, which have appropriately fallen into disrepute with the passage of time, there were ways of filling out the picture that would have dictated restraint, given the magnitude of the perceived threat. n48 So strong was the judicial reticence that the Court refused anything more than cursory constitutional review even where an immigration controversy implicated no apparent foreign policy sensitivities. n49 The Court feared, perhaps, that to impose constitutional constraints in an innocuous case might dictate their application in ones involving greater foreign policy dangers (or, alternatively, give rise to transparently unprincipled decisional criteria that [\*351] could be used to undermine rights in the domestic context). Better to stay out of the area altogether. And that the Court has largely done until the cases this past Term. n50 There is nothing in the cases themselves to suggest that the shift is owed to the international context. But the context has witnessed an architectural transformation away from those features that sustained plenary power. First, the world is a far less dangerous place today, at least as between states (bracketing for a moment the problem of terrorism). In its traditional conception, war has become something of an anachronism. Democracies have been shown not to make war on each other as a historical matter, n51 and as the realm of democracy expands, so too does the zone of peace. That has lowered the stakes of foreign relations. The downside risk of upsetting relations among nations is now significantly less daunting than in the heyday of plenary power. Compared to the context in which plenary power was spawned (the late nineteenth century), there are more effective institutional brakes on the way to armed conflict. The chances of the United States finding [\*352] itself in real war with a major power -- of the sort of the World Wars -- is virtually nil. Compared to the context in which plenary power found its most extreme form, during the Cold War, the strength of hostile adversaries is not nearly as threatening. It is easy to forget the Cold War perception that the world stood at the brink of nuclear annihilation. That fear has dissipated. The fact that foreign relations no longer pose its historical dangers makes it a less weighty interest relative to individual rights. Foreign relations, in theory, used to pose the ultimate threat, with survival in the balance. That rendered it almost an incommensurable value, a trump against which all others lost. Now that major conflict is unlikely and annihilation improbable (at least as undertaken by another country), it no longer presents a showstopper. Foreign relations interests can be assessed and balanced. They can also be incorrectly assessed and balanced without risk of catastrophic results. It is no longer so easy to frame these interests as imperatives, qualitatively distinguishable from other societal concerns. The transformed nature of foreign relations also puts less of a premium on the decisionmaking anomalies that distinguished it from other areas of lawmaking. The hallmarks of centralization, secrecy, and dispatch no longer present a clear functional advantage. On the contrary, most of the issues that have come to the fore in the new global order (human rights, environmental protection, health, trade, market regulation, etc.) demand a counter-approach at both the domestic and international levels. These issues are, first of all, better addressed through decentralized institutional mechanisms, both governmental and non-governmental. Anne-Marie Slaughter has highlighted the "disaggregation" of central governments in international policymaking. n53 No longer do foreign ministries hold a monopoly on foreign policymaking; other kinds of agencies are forming decisionmaking networks among their international counterparts and undertaking international policy with only marginal participation of diplomatic corps. Beyond the decentralization of central government actors, other entities, including subnational governments and non-governmental organizations, are also emerging as independent players on the international stage. n54 Secrecy is antithetical to efficient decisionmaking on most of the new global issues; one cannot make good policy with respect to environmental protection, for instance, without the full dissemination of relevant data. This observation ties into the decentralization phenomenon. As entities other than foreign ministries come to play an important part in international decisionmaking they need to be afforded full information; [\*353] traditional national security classification schemes pose an impediment to efficient decisionmaking rather than a premise to it. n55 Finally, speed is no longer of the essence in most international policymaking. Because it poses less of a competitive proposition (at least among nation-states), international affairs no longer require the battlefield agility -- real and proverbial -- of earlier times. These developments -- the diminished risks of foreign relations and the changed nature of international decisionmaking -- are what allow the retreat from plenary power and the more vigorous participation of the courts in immigration lawmaking. The diminished risks of foreign relations (again, bracketing for now the question of terrorism) reduce the risk of judicial error. No longer, as they did in the Cold War, do the courts have to fret that a misstep on their part will lead us into World War III or irretrievably undermine national security in the traditional sense of protecting against state adversaries. Nor do they have to conceive of foreign policy as a finely calibrated enterprise not admitting of multiple actors. American judges are themselves increasingly active on the international stage and are developing sustained relationships with their foreign counterparts. n56 In the immigration realm that translates into greater possible institutional discretion for the courts. First, it will allow courts to entertain constitutional challenges to elements of the immigration law regime that have only an attenuated connection to foreign policy. n57 The Fiallo and Nguyen cases present examples. Although both involved foreign nationals (as do all immigration cases), the cases could not have been of much concern to other countries. n58 In the past, such cases might have been avoided for fear of impacting foreign policy in even a marginal fashion or for fear of making judicial involvement unavoidable in other cases with more apparent foreign policy implications. But even such cases that do have a clear foreign policy element are fair judicial game. Because the stakes are lower and because foreign policymaking is now a multilevel game, the courts can assert themselves in the way they assert themselves in other contexts. Zadvydas presents an example. The case clearly involved foreign policy; the United States had been negotiating for [\*354] the return of the detained aliens with their homeland governments. n59 But that no longer posed an obstacle to review, as it almost surely would have in the past.

### 2AC No Link—Not Immigration

#### There’s no link—the aff only mandates that they detention is over, their evidence assumes forced release into the US—if their UQ is true, the Judiciary will craft the decision to avoid plenary powers

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

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

First, for purposes of immigration law, it is significant that the Uighurs did not come within the jurisdiction of the United States voluntarily. Immigration law, at its base, is about the admission or expulsion of non-citizens from the jurisdiction of the United States. The petitioners here are not seeking admission to the United States and, moreover, the term "admission" is a statutorily defined term. 8 U.S.C. § 1101(a)(13)(A). The petitioners were captured by bounty hunters in Pakistan, ransomed to the U.S. military, and imprisoned for almost seven years in territory dominated by and under the indefinite control of the United States. Pet. App. 41a; J.A. 28a-29a, 33a-34a, 164a-166a. The Govern-ment transported the Uighurs to a territory that "while technically not part of the United [\*\*10] States, is under the complete and total control" of the United States Government. Boumediene v. Bush, 128 S. Ct. 2229, 2262 (2008). Because the Uighur prisoners have unwillingly found themselves in the jurisdiction of the United States, see id. at 2261; Rasul v. Bush, 542 U.S. 466, 480 (2004), they would not immediately fall within the purview of immigration law as non-citizens seeking admission merely because they are released into the United States under the habeas power. United States v. Brown, 148 F. Supp. 2d 191, 198 (E.D.N.Y. [\*6] 2001), abrogated on other grounds by United States v. Garcia Jurado, 281 F. Supp. 2d 498 (E.D.N.Y. 2003); Matter of Badalamenti, 19 I. & N. Dec. 623, 627 (BIA 1988); see also Matter of Yam, 16 I. & N. Dec. 535, 536--37 (BIA 1978) ("[a]n alien does not effect an entry into the United States unless, while free from actual or constructive restraint, he crosses into the territory of the United States;" where non-citizen had not entered the United States voluntarily, the "immigration judge was without jurisdiction to de-termine the [\*\*11] issue of deportability"). The decision in Sale v. Haitian Centers Council, Inc., 509 U.S. 155 (1993), superseded in part by statute, Illegal Immigration Reform and Immigrant Responsibility Act of 1998, Pub. L. No. 104-208, 110 Stat. 3009, does not address the situation of the petitioners. Opp. to Cert. at 19. The migrants in Sale were arguing for statutory rights while inter-cepted on the high seas, not while at Guantanamo Bay, and were desperately and voluntarily trying to enter the United States to seek asylum protection when they were diverted. See Sale, 509 U.S. at 162--63. Because Sale addresses non-citizens willingly seeking to enter the United States, it has nothing to say about non-citizens involuntarily brought to the United States. The Board's decision in Matter of Badalamenti is the sole relevant authority on this particular legal and policy point. The Uighurs' habeas petition did not request admission, nor did the District Court purport to order that remedy. The District Court did not order the Government to "admit" or "parole" the Uighurs as those terms are used in immigration law, and it [\*7] expressed [\*\*12] no opinion on the eventual application of the immigration laws to the Uighurs. Nor did the District Court make a determination regarding the immigration status of the Uighurs. It did not prohibit the institution of removal proceedings at any point, and it made no final orders regarding when, or under what conditions, the Uighur detainees could be brought into DHS custody. Opinion 10-17, J.A. 1609-16. Rather, the District Court exer-cised its authority in habeas corpus proceedings. Opinion 10-17, Pet. App. 57a-59a. Thus, rather than impermissibly intruding on the power of the Executive, the District Court's order maintained the status quo of the Uighurs' immigration status. Second, the concept of the geographic United States -- while relevant at a basic level of analysis in immigration law -- is, in this situation, a distraction. The Government relies heavily on the notion that the District Court's Order would blur what it describes as "the previously clear distinction between aliens outside the United States and aliens inside this country or at its borders." Opp. to Cert. at 22. While the physical location of the non-citizen may have carried a broader significance at some point in [\*\*13] the historical development of our nation's immigration laws, today it is clearly only significant to the basic questions of immigration law -- none of which are implicated here. Geographic location has not been a determinative feature under immigration law for some time. Notably, the "entry fiction," Rosales-Garcia v. Holland, 322 F.3d 386, 391 n.2 (6th Cir. 2003), superseded in part by statute, Illegal Immigration Reform and Immi-grant Responsibility Act of 1998, Pub. L. No. 104-208, 110 Stat. 3009, [\*8] explains that a non-citizen may be physically within the geographic borders, but not "within the United States" for purposes of immigration law. See Leng May Ma v. Barber, 357 U.S. 185, 186 (1958) (holding that a non-citizen who was paroled within the geographic bound-aries of the United States was not "in the United States" for purposes of immigration law). Conversely, Congress has acted to expand the power of admissibility review to non-citizens located beyond the geographic United States. In 1996, Congress created an extra-territorial power to make admissibility determinations. Under 8 U.S.C. § 1225a [\*\*14] , an immigration officer may engage in the most basic immigration function of determining admissibility at any one of several pre-inspection stations located outside the country. See U.S. Customs and Border Protection, Border Patrol Sectors, http://www.cbp.gov/xp/cgov/border\_security/border\_patrol/border\_patrol\_sectors (listing various reinspection stations) (last visited Dec. 9, 2009). Section 8 U.S.C. § 1225(a)(3)(C) authorizes removal proceedings even when a non-citizen resides abroad. The definition of what it means to be "admitted" to the United States turns not on geogra-phy, but on legality. 8 U.S.C. § 1101(a)(13)(A); Title VII of the Consolidated Natural Resources Act of 2008 ("CNRA"), Pub. L. No. 110-229, § 702(a), 122 Stat. 754, 853 (2008) (providing that U.S. immigration laws will apply to the Com-monwealth of the Northern Mariana Islands beginning November 28, 2009); see also Electronic System for Travel Authorization, https://esta.cbp.dhs.gov/esta/esta.html (pushing admissibility review to the home of the non-citizen by means of the Internet) (last visited Dec. 9, 2009). [\*9] Third, Congress has provided [\*\*15] a statutory tool to maintain the status quo on the petitioners' immigration question even if their release from unlawful custody is required. Thus, the Government's argument posits a false hypo-thetical when it asks whether Judge Urbina's order was inside or outside the immigration law framework. The habeas power and the immigration power are not in competition. This Court has made clear that federal courts have the authority to order the release of non-citizens from deten-tion into the United States -- including non-citizens inadmissible under the immigration laws. See Boumediene, 128 S. Ct. 2229; Clark v. Martinez, 543 U.S. 371 (2005). Under the Court's rulings in both Martinez and Boumediene, federal courts have the authority in habeas corpus proceedings to order the release from detention of inadmissible non-citizens if that is what is required to give effect to a statutory or constitutional prohibition on non-lawful detention. n2 n2 The Government seeks to distinguish Martinez by asserting that it applied a provision of the immigration laws that is not at issue in this case. But the relevance of Martinez lies in its holding that an individual's lack of immigration status cannot supply indefinite detention authority to the Government. Martinez followed the simple principle that when the Government lacks a con-tinued statutory basis for detaining someone, even an inadmissible non-citizen, it must release them. The Court having already interpreted the statute to provide no authority to detain, see Zadvydas v. Davis, 533 U.S. 678, 699 (2001), the presence or ab-sence of a statutory "status" which could be applied to a non-citizen upon release was not relevant to the appropriate remedy. [\*\*16] [\*10] However the Government may choose to effectuate a valid habeas release order, the immigration statute serves to implement the lawful order, not to obstruct it. 8 U.S.C. § 1182(d)(5)(A). Section 1182(d)(5)(A) authorizes the physical transfer or entry of a person into the United States while maintaining the immigration status quo. A "parole" under that section would not effect an admission of the Uighurs into the United States, 8 U.S.C. § 1182(d)(5)(A) ("[S]uch parole of such alien shall not be regarded as an admission of the alien . . . ."), create any substantive rights they do not already possess, or favor them under the immigration statute in any meaningful way. An individual who is pa-roled may be detained, deported, granted admission, or authorized to stay, among other results. With the creation of the parole power, Congress meant to eliminate the conflict that the Government asserts exists. It is a common sense statute created by Congress for the precise purpose presented here: when a human being must come into the United States but the immigration question is still one to be reserved, he may be paroled. Thus, the question [\*\*17] of admissibility is not properly before the judicial branch at this time; and, further-more, the statutory process under 8 U.S.C. § 1229a would likely resolve any disputes which arose. In the meantime, granting habeas release into the United States does not upend the immigration apple-cart. Were the Government to parole the petitioners into the United States, the Government would retain every power under the Immigration and Na-tionality Act that it holds now. See Leng May Ma, 357 U.S. at 190, superseded in part by statute, Illegal Immigration Reform and Immigrant Responsibility [\*11] Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 ("The parole of al-iens seeking admission is simply a device through which needless confinement is avoided while administrative pro-ceedings are conducted. It was never intended to affect an alien's status."); Kaplan v. Tod, 267 U.S. 228, 229--30 (1925) (inadmissible alien paroled into the United States for over ten years held not to have made "entry" under immi-gration law). Accordingly, the Uighurs' § 1182 admissibility is irrelevant to the determination of whether they could [\*\*18] be released into the United States under habeas corpus.

### 2AC No Spillover

#### Have a high threshold for their impact evidence—ending plenary power doesn’t end all power to regulate immigration

Motomura 92, Professor of Law

[November 1992, Hiroshi Motomura is a professor of law at the University of Colorado School of Law, “The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights”, Columbia Law Review, Vol. 92, No. 7, Nov., 1992]

Although extending substantive constitutional rights to aliens would spell the end of the plenary power doctrine, abandoning the doctrine would not force the political branches to relinquish all power to regulate immigration. Congress and the executive branch would continue to regulate immigration, sometimes in ways that might not survive constitutional judicial review in a nonimmigration law context. I fully accept the view that the constitutional community must have boundaries to establish itself in the first place. By definition, boundaries separate insiders from outsiders, and outsiders may justifiably not enjoy the full incidents of membership in the community. My objection to the plenary power doctrine is not that it functions to limit entry to our community, but rather that it represents a "singularity"389 in our public law, a place in which the usual rules no longer apply. Simply because insiders need to distinguish themselves from outsiders does not mean that insiders must abandon the usual rules and language that they use among themselves to answer important public questions.

### 2AC Phanton Norm T/

#### The plenary powers doctrine results in phantom norm decisions that effectively undermine political immigration authority and lead to more intrusive judicial action in areas where it’s actually not critical—star this argument

Motomura 90, Associate Professor of Law

[Hiroshi Motomura is an Associate Professor of Law at the University of Colorado School of Law, “Immigration Law After a Century of Plenary power,” Yale Law Journal, December, 100 Yale L.J. 545]

Apart from awkwardness or unpredictability, subconstitutional phantom norm decisions, once established in response to problems of constitutional dimensions, set a precedent for excessive review of routine matters. By "exces- sive," I do not necessarily suggest "more" or "less" judicial review; explicit adoption of constitutional norms certainly would invite judicial scrutiny of agency decisions. Rather, I mean "excessive" in that the judicial habit of review not tied to real constitutional norms is open-ended and unbounded. As a result, courts may be least likely to intervene in agency decisionmaking when they can help most, and most likely to intervene when they can help least. The problem goes back as far as Fong Haw Tan, which by calling for interpretation of deportation statutes in the light most favorable to the alien, often asks courts to limit deference to agency interpretation of statutes. Much more recently, Jean v. Nelson330 derived limits on INS discretion in parole decisions from phan- tom constitutional considerations, when the subconstitutional texts contained no express limitations. Under a narrow reading of Jean, the INS abuses its parole discretion if it considers factors that conflict with phantom constitutional norms, whether or not a court would squarely hold unconstitutional a statute that expressly made those factors pertinent.332 Thus, it is an abuse of discretion to consider race in parole decisions, even if it is not directly unconstitutional. But it is difficult to avoid slipping into a slightly broader reading of Jean, especially (but not only) the reading that the INS abuses its discretion by considering factors not expressly authorized by statute or regulation. This reading is entirely understandable, since the prevailing view of Jean has not been to analyze it as a "phantom norm decision." Such a phantom norm analysis of Jean might help contain judicial review of agency action, but unless Jean is so limited, this slightly broader reading creates an open-ended and therefore troubling precedent for excessive judicial intrusion into agency decisionmaking. As Justice Marshall wrote in his dissent in Jean: "The Court's restrictive view of the Attorney General's discretionary authority with respect to parole decisions, adopted in the face of no authoritative statements limiting such discretion, will presumably affect the scope of his permissible discretion in areas other than parole deci-sions.... This is indeed a costly way to avoid deciding constitutional issues."333 INS v. Rios-Pineda,334 decided by the Court just six weeks before it decid- ed Jean, reflects the more typical framework for judicial review of agency deci- sions. The Court said that it was not an abuse of discretion to deny certain motions to reopen suspension of deportation proceedings. The Court also emphasized that agencies must be free to base decisions on factors that relate generally to the law entrusted to it-in this case, "legitimate concerns about administration of the immigration laws."335 These aspects of Rios-Pineda merely continued a tradition of judicial decisions that had established broad discretion for the INS.336 Two prominent examples are United States ex rel. Hintopoulos v. Shaughnessy337 and Jay v. Boyd,338 both of which involved the discretionary denial of aliens' requests for suspension of deportation. INS v. Abudu, a 1988 Supreme Court decision, adopts a similar approach,339 as have numerous lower court decisions.34 Courts that get into the habit of using expanded "abuse of discretion" and similar subconstitutional constructs to apply phantom constitutional norms indirectly are likely to succumb to the temptation to define "legitimate" so broadly that they in effect try to run the agency. While this may be under- standable in light of the record of the INS,341 judicial review still represents the commitment of a precious resource. Review of the wrong type is an uncer- tain improvement over no judicial review at all.342 And the problem is com- pounded when judicial review is not only misdirected but also imposes cumber- some or unworkable procedures.343 Plenary power has prevented the growth of a coherent constitutional frame- work for immigration law, within which its subconstitutional levels-statutes, regulations, agency directives, and so forth-can develop and be administered fairly and predictably. There is a paradox here. On the one hand, the courts adopted the plenary power doctrine to insulate immigration decisions from constitutional judicial review. Judicial sensitivity to the need to maintain the flexibility to respond to unexpected contingencies, especially pertaining to foreign policy, may explain some of the plenary power doctrine's persistence- for example, the Supreme Court decided Knauff, Mezei, and Harisiades at the height of the nation's preoccupation with the perceived Communist threat. The irony is that the steady erosion of the plenary power doctrine through phantom norm decisionmaking may, precisely because no coherent body of constitutional norms exists to anchor and thus limit judicial review in immigration cases, lead to subconstitutional decisions that intrude into executive or legislative opera- tions even more aggressively. There may be times when agency decision- making, to reach the best results, should be able to apply expertise, discretion, and flexibility after considering the unusual and the unpredictable.3" Since Mandel, the most negative effects of phantom norm decisions have been to impede the sound exercise of executive branch discretion. Tight supervision may correct short-run problems, but in the long run it also prevents immigration law from maturing and thus continues its traditional isolation-albeit isolation of a different character-from the mainstream of our public law.

## DA

### 2AC N/U—Lawsuits

#### Judicial intervention into detention is inevitable – a wave of lawsuits is on the way

Chesney 13, Law Prof at UT

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

The government will not be able to simply ride out the legal friction generated by the fragmentation of al Qaeda and the shift toward shadow war. Those trends do not merely shift unsettled questions of substantive law to the forefront of the debate; they also greatly increase the prospects for a new round of judicial intervention focusing on those substantive questions. 1. Military Detention Consider military detention first. Fresh judicial intervention regarding the substantive law of detention is a virtual certainty. It will come in connection with the lingering Guantanamo population, and it will come as well in connection with any future detainees taken into custody on a long-term basis, regardless of where they might be held. a. Existing Guantanamo Detainees Most of the existing Guantanamo detainees have already had a shot at habeas relief, and many lost on both the facts and the law. But some of them can and will pursue a second shot, should changing conditions call into question the legal foundation for the earlier rulings against them. n202 The first round of Guantanamo habeas decisions depended in almost every instance on the existence of a meaningful tie to ongoing hostilities in Afghanistan, as did the Supreme Court's 2004 decision in Hamdi. Indeed, Justice O'Connor in Hamdi was at pains to caution that at some point in the future this baseline condition making LOAC relevant could unravel. n203 The declining U.S. role in combat operations in Afghanistan goes directly to that point. This decline will open the door to a second wave of Guantanamo litigation, with detainees arguing that neither LOAC nor the relevant statutory authorities continues to apply. This argument may or may not succeed on the merits. At first blush, the NDAA FY12 would seem to present a substantial obstacle to the detainees. That statute expressly codifies detention authority as to members (and supporters) of al Qaeda, the Afghan Taliban, and "associated forces," n204 thus grounding detention authority directly in domestic law rather than requiring courts to impute such authority into the 2001 AUMF by implication from LOAC (as the Supreme Court had to do in [\*214] Hamdi itself). But it is not quite so simple. The same section of the NDAA FY12 relinks the question of detention authority to LOAC after all. It specifies that statutory detention authority as an initial matter exists solely "pending disposition under the law of war." n205 And although it then lists long-term military detention as a possible disposition option, the statute specifically defines this authority as "detention under the law of war without trial until the end of the hostilities authorized by the [AUMF]." n206 A court confronted with this language might interpret it in a manner consistent with the government's borderless-conflict position, such that the drawdown in Afghanistan would not matter. But it might not. The repeated references to the "law of war" in the statute--that is to LOAC--might lead at least some judges to conduct a fresh field-of-application analysis regarding the extent to which LOAC remains applicable in light of the drawdown, and judges might then read the results back into the NDAA FY12. I am not saying that this is the likely outcome or that any such analysis would necessarily reject the government's borderless-conflict position. I am just saying that judges eventually will decide these matters without real guidance from Congress (unless Congress clarifies its intentions in the interim). Note, too, that any such judicial interpretations may well have far broader implications than just the fate of the particular detainee in question; a ruling that LOAC has no application in a given situation would cast a long shadow over any other LOAC-based actions the U.S. government might undertake in the same or similar contexts (including targeting measures). Regardless of what occurs in Afghanistan, the existing Guantanamo detainee population might also find occasion to come back to court should the decline of the core al Qaeda organization continue to the point where it can plausibly be described as defunct. In such a case, it is likely that at least some current al Qaeda detainees would revive their habeas petitions in order to contend that the demise of the organization also means the demise of detention authority over members of the defunct group. This argument would be particularly likely to come from those who were held on the ground of membership in al Qaeda but who the government had not shown to have been otherwise involved in hostile acts. This would be a challenging argument to make; the government would surely respond that al Qaeda would no longer be defunct if some of its members were set free. But setting that possible response aside, such a petition could compel the government to litigate the question of whether the continuing existence of various "franchises," like AQAP or al-Shabaab, suffices to preserve detention authority over al Qaeda members. That is, such a challenge could lead a judge to weigh in on the organizational boundary question.

## ritik

### 2AC Framework

#### Framework—the primary purpose of debate should be to improve our skills as decisionmakers through a discussion of public policy

#### Decisionmaking skills are necessary to decide between individual courses of action that affect us on a daily basis—flexing our muscles in the high-stakes games of public policymaking is necessary to make those individual decisions easier

#### The neg must connect their alternative to policy concerns and institutional practices—absent these questions shifts in knowledge production are useless – governments’ obey institutional logics that exist independently of individuals and constrain decisionmaking

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

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

#### Neolib solves war and collapse causes it – historical evidence and studies prove

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John A. Tures, Associate Professor of Political Science at LaGrange College, 2003, “ECONOMIC FREEDOM AND CONFLICT REDUCTION: EVIDENCE FROM THE 1970S, 1980S, AND 1990S”, Cato Journal, Vol. 22, No. 3. http://www.cato.org/pubs/journal/cj22n3/cj22n3-9.pdf

The last three decades have witnessed an unprecedented expansion of market-based reforms and the profusion of economic freedom in the international system. This shift in economic policy has sparked a debate about whether free markets are superior to state controls. Numerous studies have compared the neoliberal and statist policies on issues of production capacity, economic growth, commercial vol- umes, and egalitarianism. An overlooked research agenda, however, is the relationship between levels of economic freedom and violence within countries. Proponents of the statist approach might note that a strong gov- ernment can bend the market to its will, directing activity toward policies necessary to achieve greater levels of gross domestic product and growth. By extracting more resources for the economy, a pow- erful state can redistribute benefits to keep the populace happy. Higher taxes can also pay for an army and police force that intimidate people. Such governments range from command economies of totali- tarian systems to autocratic dictators and military juntas. Other eco- nomically unfree systems include some of the authoritarian “Asian tigers.” A combination of historical evidence, modern theorists, and statis- tical findings, however, has indicated that a reduced role for the state in regulating economic transactions is associated with a decrease in internal conflicts. Countries where the government dominates the commercial realm experience an increase in the level of domestic violence. Scholars have traced the history of revolutions to explain the relationship between statism and internal upheavals. Contemporary authors also posit a relationship between economic liberty and peace. Statistical tests show a strong connection between economic freedom and conflict reduction during the past three decades.

#### Liberal democracy promotion is delinked with neoliberalism

Youngs, Director-General FRIDE, ’11 [February 2011, Richard- Professor Politics University of Warwick, “Misunderstanding The Maladies Of Liberal Democracy Promotion” <http://www.eurasiareview.com/misunderstanding-the-maladies-of-liberal-democracy-promotion-18022011/>]

Third, central to critical perspectives is the contention that liberal democracy is joined at the hip with economic liberalism, of a type that works against the interests of non-Western states. This is the essence of the increasingly popular neo-Gramscian line. This would claim that all the discourse on supporting social justice and accepting other models of democracy is entirely disingenuous – a feint to hide what is in fact a self-interested, narrow preference for liberal democracy. The financial crisis has also nourished a resurgent Marxist critique. Slavoj Zizek sees in this crisis proof that not only is market liberalism the flip side of political liberalism, but that tension between the two is inherent to liberalism itself. He contends that the financial crisis shows that the political economy of class is back as the prime shaper of struggle, negating the notion that liberal norms are universal. This influential thinker advocates that the left return to the Hegelian notion of a strong state and move away from support for liberal individual empowerment.10 It is absolutely true, and vital to highlight, that many injustices are carried out in the name of democracy support, and that the latter can easily be used as a cloak for self-centred Western economic interest in a way that militates against high quality political pluralism. However, the detailed policy record once again shows a more varied picture than is often painted. In most cases, Western states are more than happy to delink the commercial and democracy agendas. The EU is currently negotiating a large number of trade deals with autocratic regimes, without any apparent worries over the absence of democracy in these states. And conversely, the main post-financial crisis trend is that the West is pulling back from support for trade liberalisation. The Doha round is stuck; most bilateral trade deals are in fact ‘trade light’. Another point of relevance in response to the ‘elitist democracy’, Marxian critique is that the one sector rarely included in democracy initiatives is the business sector – trade unions get far more support from Western democracy promotion agencies. None of this is to argue that neo-imperial dynamics do not exist. But it is a plea for greater forensic rigour in determining what kind of policy outcomes can be attributed to such dynamics. Western governments are often admonished for striking commercial deals with autocrats, but then also for ‘democratic imperialism’ when they do emphasise liberal norms in their foreign relations – damned if we do, damned if we don’t, some diplomats might feel. A good dose of imperialism could be said to lie in the convenient sidelining of democracy more than any pernicious liberal understanding of political reform. Research suggests that people in autocratic states see ‘imperialism’ in Western double-standards – sometimes supporting, sometimes deferring democracy – more than in any adherence to a particular conceptual model of democratic reform.11