# 1AC

### 1AC Plan

#### The United States federal judiciary should order that individuals who have won their habeas corpus hearing while in military detention should be released.

### 1AC Legal Legitimacy

**Contention one is Legal Legitimacy:**

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

**Milko 12** [Winter, 2012, Jennifer L. Milko, “Separation of Powers and Guantanamo Detainees: Defining the Proper Roles of the Executive and Judiciary in Habeas Cases and the Need for Supreme Guidance”, 50 Duq. L. Rev. 173]

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

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

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

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

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

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

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

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

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

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

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

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

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

**1AC Judicial Review**

**Contention two is Judicial Review:**

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

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

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

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

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

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

**A strong judiciary is the key factor**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**Extinction**

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

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

**Checks on escalation are insufficient**

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

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

**The plan is necessary for Nepalese modelling**

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

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

**That solves corruption**

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

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

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

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

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

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

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

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

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

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

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

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

**War over Nepal goes nuclear**

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

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

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

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

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

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

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

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

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

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

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

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

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

# 2AC

**2AC AT: Immigration Circumvent**

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

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

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

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

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

### 2AC Ev Standards

**Sufficiently limited standards means that the habeas trials are legit**

**Horowitz 13, J.D. Candidate, 2014, Fordham University School of Law**

(Colby P., Captain, U.S. Army, participating in the Funded Legal Education Program, “SYMPOSIUM: THE GOALS OF ANTITRUST: NOTE: CREATING A MORE MEANINGFUL DETENTION STATUTE: LESSONS LEARNED FROM HEDGES V. OBAMA” April, 2013 Fordham Law Review 81 Fordham L. Rev. 2853, Lexis)

The subsections below focus on the three detention criteria listed in section 1021(b)(2) of the NDAA. Although these criteria were codified in the NDAA in late 2011, the D.C. courts struggled with their meaning in the years after the Boumediene decision in 2008. As one court admitted in [\*2873] 2010, "much of what our Constitution requires for this context remains unsettled." n152 A. What It Means To Be "Part Of" Al Qaeda or the Taliban There is general agreement among the courts that a person who is "part of" Al Qaeda or the Taliban can be lawfully detained without trial. n153 The more difficult question is what criteria should be used to determine who is actually a "part of" these organizations. Even as late as June of 2010 (six years after the Supreme Court authorized detention in Hamdi), the D.C. Circuit admitted that this was still an unresolved issue. n154 **One issue** that is relatively **settled is the evidentiary standard**. The courts generally agree that **a preponderance of the evidence** standard **should be used** **when** **evaluating** **habeas** corpus petitions. n155 **Courts** also **emphasize** that circumstantial **evidence should be viewed holistically** and it is legal error to take an "unduly atomized approach" that looks only at individual pieces of evidence in isolation. n156 1. The Command-Structure Test vs. the Functional Approach **The two major tests** used by the D.C. courts **to determine membership** **in** **Al Qaeda or the Taliban are** the **command-structure** test **and** the **functional** approach. The command-structure test was the initial way to determine membership, but courts eventually moved to the functional approach because it was less rigid and more holistic. a. The Emergence of the Command Structure Test The early test used by the D.C. District Court to determine if an individual was "part of" Al Qaeda or the Taliban was the command-structure test. The court explained that, under this test, "the key inquiry, then, is ... whether the individual functions or participates within or under the command structure of the organization - i.e., whether he receives and [\*2874] executes orders or directions." n157 The command-structure test was also used by one panel of the D.C. Circuit, although the court noted that this test was not the exclusive way to prove that an individual was "part of" Al Qaeda or the Taliban. n158 In Abdah v. Obama, n159 the district court granted the habeas corpus petition of a detainee at Guantanamo Bay because the government failed to prove that he was a member of Al Qaeda under the command-structure test. n160 The court determined that the detainee was not "part of" Al Qaeda even though the court acknowledged that, among other things, the detainee had "received money for his trip to Afghanistan from an individual who supported jihad" and "was with Al Qaeda members in the vicinity of Tora Bora after the battle that occurred there." n161 Similarly, in Mohammed v. Obama, n162 the district court granted the detainee's habeas corpus petition because he "had not yet acquired a role within the "military command structure' of al-Qaida and/or the Taliban ... ." n163 Even though the detainee had been recruited at a radical mosque and had traveled to Afghanistan for the purpose of fighting against U.S. forces, the court ruled that, at the time of capture, he had not yet fully become "part of" Al Qaeda or the Taliban. n164 b. The Transition to a Functional, Case-by-Case Approach The D.C. courts eventually moved away from the command-structure test to a more flexible approach. In Awad v. Obama, n165 the D.C. Circuit rejected the command-structure test as the sole method of proving that an individual is "part of" Al Qaeda or the Taliban. n166 Because the command-structure test was created by the district courts and was not derived from the AUMF or any other authority, the courts were comfortable departing from [\*2875] precedent. n167 The command-structure test was created by the D.C. District Court without "any meaningful guidance from Congress." n168 In the decisions that followed Awad, the D.C. Circuit continued to reject the command-structure test as the exclusive test for membership determinations. n169 The D.C. Circuit viewed the command-structure test as overly formalistic, and it transitioned to a case-by-case, functional evaluation of whether an individual is "part of" Al Qaeda or the Taliban. n170 **The command-structure test was rejected** (at least in part) **because** the **courts** realized that they **had little understanding** about **how** **groups** like Al Qaeda **were organized**. n171 The transition to a functional, case-by-case analysis has generally expanded the government's detention authority. The D.C. Circuit acknowledged that, under the functional approach, "it is impossible to provide an exhaustive list of criteria for determining whether an individual is "part of' al Qaeda." n172 Rather than looking at one factor in isolation, **courts must consider the evidence in its totality** **to** **see if it establishes a coherent "mosaic**" n173 or likely probability that an individual is "part of" Al Qaeda or the Taliban. n174 Thus, **the best way** to analyze the functional approach **is to examine** some of the **factors** **that appear in multiple cases**. **Evidence** **proving that a detainee fought alongside** Al Qaeda or the Taliban **is** widely considered **sufficient** to show that the detainee was "part of" these organizations. n175 **Additionally, evidence** **showing** that **a detainee received weapons** or tactics **training** at a training camp is usually sufficient [\*2876] to prove membership. n176 Even evidence of informal training conducted outside of a training camp may be sufficient to show that an individual was "part of" Al Qaeda or the Taliban. n177 Given that fighting alongside or training with Al Qaeda or the Taliban generally supports membership, what if an individual is detained before he reaches this stage? The paragraphs below examine factors that are less conclusive than fighting or training, but may nonetheless still persuade the courts that the detainee is "part of" Al Qaeda or the Taliban. **Evidence** **that a detainee stayed at a**n Al Qaeda or Taliban **guesthouse** **is** often **used** by the government to show that the detainee was en route to a training camp or the battlefield. n178 In Sulayman v. Obama, n179 the detainee submitted a declaration from a political science professor (who was an expert in Yemeni history) that stated that "there is nothing inherently suspicious or sinister about ... staying in guesthouses" in Pakistan or Afghanistan. n180 **While** **acknowledging** that **some innocent guesthouses** **might exist, the court found it "implausible** **that guesthouses being operated for the benefit of Taliban fighters** engaged in warfare **are** simultaneously **providing charitable lodging** to strangers in need, as the petitioner suggests." n181 Thus, staying at an Al Qaeda or Taliban affiliated guesthouse is strong evidence that an individual was "part of" these groups and was preparing to either train or fight. n182 Courts have held that traveling on a route frequently used by other Al Qaeda or Taliban members is "probative evidence" that an individual is a part of one of these organizations. n183 Additionally, courts have determined that individuals who interact or associate with members of Al Qaeda or the [\*2877] Taliban are likely to be members themselves. n184 In one example of membership by association, the court emphasized the petitioner's close familial ties to Osama bin Laden (including "two personal meetings" with bin Laden) n185 and, in another, the court focused on the fact that Al Qaeda had treated the petitioner "as one of their own." n186 **Courts disagree about** **whether suspicious travel circumstances are enough** to prove membership. In Al-Adahi v. Obama, n187 the court determined that it was strong corroborative evidence that the petitioner's travel to Afghanistan had been organized and paid for by an Al Qaeda affiliate. n188 In Mohammed, however, the court found that even though a jihadi recruiter had "paid for and arranged [the petitioner's] trip to Afghanistan," this was not enough to demonstrate membership without some evidence of fighting or training. n189 **Courts** also **disagree about the significance of lying about travel plans.** In Uthman v. Obama, n190 the court found it highly suspicious that the petitioner had lied about the details of his travel, n191 while in Bensayah v. Obama, n192 the court found that the petitioner's use of false travel documents was reasonable given his fear of persecution if forced to return to his home country. n193 2. Is It Possible To Disassociate from Al Qaeda or the Taliban? One question that remains unclear in detention law is whether an individual can effectively disassociate from Al Qaeda or the Taliban. n194 The primary issue is whether an individual who was once a member of these groups can effectively renounce his membership or sufficiently distance himself so that he is no longer subject to detention. In Salahi v. Obama, n195 the detainee had sworn an oath of allegiance to Al Qaeda in 1991. n196 As the court recognized, in 1991 "al-Qaida and the United States shared a common objective: they both sought to topple Afghanistan's Communist government." n197 The detainee argued that he "severed all ties with al-Qaida" in 1992 (well before Osama bin Laden issued his first fatwa [\*2878] against U.S. forces), and thus his capture and detention in 2001 was unjustified. n198 The court did not provide a clear legal standard **for** evaluating **claims of dissociation**, and instead simply stated that **a 1991 oath** to Al Qaeda , without more, **was unlikely to justify detention.** n199 The case was then remanded to the district court for further factfinding. n200 One year later, the D.C. District Court provided more guidance on the standard for dissociation. In Khairkhwa v. Obama, n201 an Afghan national and former senior Taliban official petitioned for habeas corpus because he claimed, among other things, that he had dissociated from the Taliban by the time of his capture and detention. n202 The court acknowledged that "it is not enough for the government to show simply that the petitioner was, at one time, a member of the Taliban," and "the petitioner must have been "part of' [the Taliban] at the time of his capture." n203 The court, however, did "not credit the petitioner's contention that he had disassociated himself from the Taliban prior to his capture." n204 The court held that the petitioner made no meaningful attempt to surrender, and the fact that he "was captured at the home of a hardline Taliban military commander greatly undermines [his] contention that he had disassociated himself from the Taliban prior to his apprehension." n205 The court noted that an individual must take "affirmative actions" to demonstrate dissociation n206 but did not provide examples (other than fully surrendering) n207 of these affirmative acts. In Khalifh v. Obama, n208 the court noted that **disassociation could be proven by affirmative actions or even a "compelling lengthy lapse in activity**." n209 The amount of time that qualifies as "lengthy" is still unclear. B. "Substantial Support" As a Basis for Detention Section 1021(b)(2) of the NDAA states that a "covered person" (who is subject to detention) includes not only those who were "part of" Al Qaeda, the Taliban, or associated forces but also those who "substantially [\*2879] supported" these groups. n210 Although most courts agree that an individual who is "part of" Al Qaeda or the Taliban can be lawfully detained, n211 courts disagree over whether providing "substantial support" to these organizations is a valid basis for detention. Thus, the "substantial support" category raises two issues that often intersect: first, is substantial support a valid basis for detention and, if so, what does it mean to provide substantial support? These questions are discussed in turn below. 1. Is Substantial Support a Valid Predicate for Detention? In 2009, two D.C. District Court opinions conflicted over whether substantial support could serve as an independent basis for detention. In Gherebi v. Obama, n212 the court held that **substantial support was a valid basis for detention**. n213 The court limited its holding, however, **to individuals who** **provide** substantial **support** **as** **members** **of the** enemy's **armed forces** **and,** therefore, mere "**sympathizers**, propagandists, and financiers" **could not be detained.** n214 The court also appeared to equate substantial support with the command structure test n215 - a test that the D.C. Circuit later rejected. n216 In contrast, in Hamlily v. Obama, n217 the court rejected the concept of support as an independent basis for detention. n218 The court decided that evidence of **support** **could be used to demonstrate** that **an individual was "part of" Al Qaeda** or the Taliban, **but** support **was not its own distinct** detention **category**. n219 This view was endorsed by another D.C. District Court opinion in 2009. n220 Although this court also held that detention based on substantial support "is simply not authorized by the AUMF itself or by the law of war," the court specifically stated that "future domestic legislation" might authorize detention based solely on substantial support. n221 Thus, the NDAA may have provided this legislative [\*2880] authorization when it specifically enumerated "substantial support" as an independent detention category. In 2010, the D.C. Circuit partially resolved this lower court split by holding that the Military Commissions Act of 2009 n222 provided congressional authority to detain those who "purposefully and materially supported hostilities." n223 Although this decision affirmed a separate detention category based on support, it did not specifically authorize detention based on "substantial support," n224 and no D.C. court has yet evaluated the meaning of "substantial support" under the NDAA. The D.C. Circuit had the opportunity to evaluate the meaning of "substantial support" in 2011. However, because the court found that the detainee was clearly "part of" Al Qaeda or the Taliban, it never reached the substantial support issue. n225 Additionally, lawyers in the Obama Administration appear divided over whether to use support as an independent legal justification for detention when defending against habeas petitions. The government lawyers try to avoid the issue, if possible, by first arguing that the detainee was "part of" Al Qaeda or the Taliban. n226 2. What Does It Mean To Provide Substantial Support? Even among courts that agree that support is a valid independent category for detention, there is little consensus about the meaning of support or what activities qualify as "substantial support." n227 The D.C. Circuit, while affirming detention based on material support, noted that it was a "standard whose outer bounds are not readily identifiable." n228 The meaning of "substantial support" is particularly unclear. n229 Absent a congressional definition of the term (which is lacking in the NDAA), courts are forced to evaluate "substantial support" on a case-by-case, ad hoc basis. n230 One judge noted that this is problematic because the term is [\*2881] "highly elastic" and could potentially cover everything from "core membership and support to vague affiliation and cheerleading." n231 C. What Is an "Associated Force"? The NDAA authorizes detention not only for persons who were a "part of" or "substantially supported" Al Qaeda or the Taliban, but also for those who were members of or substantially supported "associated forces" of these two organizations. Although there are some easy cases, determining whether a particular group (even an admitted terrorist organization) is an "associated force" of Al Qaeda or the Taliban can be difficult. This is especially true for Al Qaeda, a loosely organized group that has many affiliates and splinter groups. n232 In 2009, the **D.C. District Cour**t in Hamlily affirmed the government's power to detain members of associated forces and **defined** the concept of an **associated force as a "co-belligerent**," **or** a group that has become a "fully fledged **belligerent fighting in association** with one or more belligerent powers." n233 The court recognized that it was applying the term "co-belligerent" by analogy, because the concept came from the law of war and was usually applied in international armed conflicts involving nation-states. n234 The court also limited the definition of an associated force to those organizations that have an "actual association in the current conflict with al Qaeda or the Taliban," and excluded groups that only "share an abstract philosophy or even a common purpose with al Qaeda." n235 The Hamlily decision addressed threshold legal questions for a number of different detainees, and thus no specific organizations were identified as "associated forces." n236 Courts seem to faithfully apply the definition of "associated forces" established in Hamlily, limiting it those groups that actually fought alongside Al Qaeda or the Taliban. The 55th Arab Brigade n237 and the Hezb-i-Islami Gulbuddin, n238 for example, were found to be associated forces, and both organizations were actively involved in the conflict in Afghanistan. n239 Parhat v. Gates n240 is one of the only cases where the court [\*2882] determined that an organization was not an associated force. n241 In Parhat, the court held that the government failed to show that the East Turkistan Islamic Movement (ETIM) had any connection to Al Qaeda or the Taliban or that the ETIM was planning "terrorist activities against U.S. interests." n242 Thus, **courts have limited the definition of an "associated force"** **to** those groups that **actually engage in joint activities with Al Qaeda and the Taliban.**

### 2AC Prohibit

**Restriction is 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.

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

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

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

### 2AC DA

**Detention legal strategies make political movements effective—utilizing the courts brings national attention and leads to policy changes**

**Lobel 4, Professor of Law**

[December 2004, Jules Lobel is a Professor of Law, University of Pittsburgh Law School, “Courts as Forums for Protest”, 52 UCLA L. Rev. 477]

[\*556] I conclude with a discussion of **the litigation brought on behalf of the prisoners being held by the United States at Guantanamo Bay, Cuba. This important litigation fits comfortably within the courts as forums for protest model**, and illustrates many of the insights and contradictions of the model. In early 2002, the CCR challenged the Bush Administration's detention of suspected Taliban and Al Qaeda prisoners at Guantanamo Bay without affording them the protections or rights mandated by the Geneva Convention and human rights norms. n375 At the time, many individuals and organizations were timid about openly challenging the administration's antiterrorism policies. n376 Moreover, a case on behalf of the Guantanamo detainees presented a particularly difficult context to challenge the administration. These prisoners had been captured in and around Afghanistan as part of a popular war effort. The memory of September 11 was fresh in people's minds. The government claimed that what it was doing at Guantanamo was necessary to defend American national security and prevent future terrorist attacks, a claim that resonates particularly strongly with the courts. Most important, Johnson v. Eisentrager, n377 decided by the Supreme Court in 1950, held that nonresident enemy aliens, after being convicted of war crimes by a military tribunal (detained by the U.S. government outside of U.S. territory) had no right or privilege to avail themselves of the jurisdiction of a U.S. court to challenge their detentions. While **the legal and political climate was bleak, the CCR attorneys believed that Johnson was distinguishable and that it was possible to win in court. The CCR decided to take the risk. n378 The government's position was in clear violation of the Geneva Convention as well as due process and was in effect saying that no law applied to these detainees. But the CCR's objective [\*557] went beyond winning or losing in court. Its objective was to demonstrate that there was resistance to U.S. policy, to help publicize the injustice to, and plight of, the detainees, to keep the issue of the detainees in the public mind, and to use the case as part of a broader political movement against the administration's antiterrorism policies. The decision to litigate was not based on whether the CCR attorneys thought the litigation had a good chance of winning** in court. The CCR first filed a complaint with the Inter-American Commission of Human Rights of the Organization of American States, which ruled that the Guantanamo prisoners may not be held "entirely at the unfettered discretion of the United States government," and that the government must accord those prisoners a hearing to determine their legal status. n379 The Bush Administration predictably refused to comply with the Commission's ruling. Indeed, given the certainty that the administration would not comply with any unfavorable Commission ruling, the purpose of the complaint was to obtain an authoritative ruling, and to use that ruling to mobilize international and domestic public opinion against the administration's Guantanamo policies. The CCR also brought a federal lawsuit on behalf of several of the detained prisoners. The federal district court, and then the U.S. Court of Appeals for the District of Columbia Circuit, ruled unanimously in the government's favor. n380 Nonetheless, the CCR persisted, and the Supreme Court decided in November 2003 to hear its appeal. n381 The Guantanamo case had an impact even before the Supreme Court handed down its June 2004 decision reversing the court of appeals. For over two years, **the case helped keep the outrageous Guantanamo situation in the public eye and galvanized international protest**. News reports sparked outrage at keeping the detainees in what British judges termed a "legal black hole." n382 **Amicus briefs** submitted to the Supreme Court from former federal judges, former senior American diplomats, former American POWs, former Judge Advocates General of the Navy and top Marine Corps lawyers, the Bar Association representing the fifty-four nations of the former British Commonwealth, and the International Bar Association **reflected and fanned [\*558] the widespread protest against the U.S. Guantanamo policy. n383 That protest, combined with Supreme Court review, compelled the administration to release a number of the prisoners**, even before the Supreme Court announced its decision. n384 The question the case presented to the Supreme Court was narrow and involved only whether federal courts have jurisdiction to consider the detention of foreign nationals captured abroad and held at Guantanamo Bay. n385 Thus, at that stage of the litigation, the specific relief being requested of the Court was minimal (although the implications of the Court grant of that relief are significant), namely, a holding that federal courts have jurisdiction to hear plaintiffs' habeas petitions. On remand, the district court will determine what rights the plaintiffs have, and to what process they are entitled. Because the issue before the Court was solely jurisdictional, the plaintiffs were able to obtain a ruling articulating the basic norm that executive detentions, even in wartime, cannot be lawless. Yet because the issue was framed jurisdictionally, neither the plaintiffs nor the Court had to grapple immediately with the exact contours of the plaintiffs' rights and the potential remedies to which they may be entitled. **The Supreme Court's assertion of jurisdiction to hear the case is a tremendous victory.** It articulates and gives meaning to a fundamental constitutional principle: that executive detentions of prisoners outside the United States cannot operate entirely outside the law or without some legal process. While the Court's decision addresses only the applicability of the writ of habeas corpus to the detention of prisoners at Guantanamo Bay, Cuba, the implications of the Court's holding are broad; as Justice Scalia correctly notes in his dissent, the Court's decision potentially applies to prisoners held by the military in other places. Moreover, while the Court merely asserted federal court jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing, footnote fifteen of Justice Stevens' majority opinion states that the plaintiffs' claims "unquestionably describe "custody in violation of the Constitution or laws or treaties of the United States.'" n386 That footnote, in which Justice Stevens cities Justice Kennedy's concurrence in United States v. Verdugo-Urquidez, n387 [\*559] clearly indicates that on the merits, the plaintiffs have constitutional due process rights which a court must recognize. **The Court's mere assertion of jurisdiction in the Guantanamo case has dramatically affected governmental conduct.** Indeed, the Supreme Court's decision to hear the Guantanamo case had a strong impact on the government's behavior even before the Court announced its ruling, leading to the release of many prisoners and Secretary of Defense Rumsfeld's decision that some process would be established to determine whether a prisoner should continue to be detained. n388 Only eight days after the Supreme Court's decision, the Department of Defense announced that procedures to inform the Guantanamo prisoners of their rights and to review their detention would be implemented. n389 The government has thus moved quickly to establish some due process for the prisoners, although the prisoners' lawyers have severely criticized that process and seek hearings before federal district courts. Therefore, the process owed plaintiffs will be back before the courts fairly quickly. Finally, the Guantanamo case also illustrates the limitations of litigation to transform the public dialogue. For some of the lawyers at the CCR, the most fundamental issue involved in the case is the Executive's use of the wartime paradigm to detain and prosecute people who should be prosecuted under civilian law. These attorneys would want to challenge whether the "war against terrorism" truly fits within the definition of a war, or whether Al Qaeda should be treated as a criminal conspiracy and its members prosecuted under ordinary civilian law. n390 But a challenge in the Guantanamo case to whether the war against Al Qaeda is really a war for constitutional or international purposes would have little chance of success in the courts. n391 Therefore, these attorneys [\*560] are relegated to making that more fundamental point in their public speaking about the case, and not in court. However, **the filing and the arguing of the case at its various stages has resulted in a large amount of publicity in the United States and abroad, resulting in pressure on the government to discontinue this lawless policy. Such publicity can have various effects throughout society. It can encourage people to engage in** **discussion about their views on that particular situation. It can generate support for the movements advocating the various sides of the issue. It could even result in bringing new financial resources, and organizational or legal talent, to the movement. Thus, movement attorneys should realize that litigation and publicity** should go together hand in hand as part of an overall strategy that **will result in eventual success, even if that success is temporarily delayed** by defeats in the courts. The Guantanamo litigation is but a recent example of the long tradition in this country of using courts as one arena of protest. That case started as a lonely protest against an illegal government policy. The case was originally viewed as hopeless by most legal observers and rejected by the lower courts. Many observers might even initially have said that no reasonable lawyer could have any hope for success. The publicity and international outrage surrounding the Guantanamo policy helped force the Supreme Court to take the case seriously and eventually rule for the plaintiffs. Yet **the fundamental lesson of the Guantanamo case is not to be found in the important Supreme Court victory, but in the decision of a dedicated group of lawyers to litigate the case** in order to protest the administration's policy despite the seemingly difficult odds of success. Conclusion The courts as forums for protest model differs from the traditional, private dispute standard on institutional reform, the two models traditionally described by legal scholars. The reduced emphasis on winning or losing and the lesser role of the judge are two features that distinguish this model from the others. Our nation has seen a long tradition of litigators and movements using the courts as platforms for arguing controversial positions and garnering public support for them. From the Revolutionary period, through this country's struggle with the issues of slavery and women's suffrage, up until modern instances where private citizens and public officials have attempted to challenge governmental actions, **our system's courts have been used as forums to stir debate by the citizenry**. [\*561] Because of the importance of encouraging people to engage in discussion about current social issues, and because of the implications for freedom of speech, courts should not allow sanctions under Federal Rule of Civil Procedure 11 or other similar rules to stifle popular debate stirred by lawsuits that may be considered "frivolous" because they argue against precedent or are viewed as losing cases. Bringing a lawsuit to generate publicity for one's cause should not be viewed as an improper purpose under Rule 11. Under the Courts as Forums for Protest model, judges will often find themselves in a difficult position: they will be faced with a situation where legal precedent and social and political reality collide. Though articulating a legal principle while deciding a case without enforcing that principle may seem problematic, judges should feel comfortable doing so when it is necessary in order to encourage society and governmental actors to remedy an injustice which otherwise will continue unchecked.

**2AC Alt Fails**

**Extralegal activism fails—grassroots movements leave existing social structures intact while promoting the illusion of change**

**Lobel 7, Assistant Professor of Law**

[February, 2007; Orly Lobel is an Assistant Professor of Law, University of San Diego. LL.M. 2000 (waived), Harvard Law School; LL.B. 1998, Tel-Aviv University, “THE PARADOX OF EXTRALEGAL ACTIVISM: CRITICAL LEGAL CONSCIOUSNESS AND TRANSFORMATIVE POLITICS”, 120 Harv. L. Rev. 937]

Both **the practical failures and the fallacy of** rigid boundaries generated by **extralegal activism rhetoric** **permit us to broaden our inquiry to the underlying assumptions of** current **proposals regarding transformative politics** - that is, **attempts to produce meaningful changes** in the political and socioeconomic landscapes. The suggested alternatives produce a new image of social and political action. **This vision rejects a shared theory of social reform, rejects formal programmatic agendas, and embraces a multiplicity of forms and practices**. Thus, it is described in such terms as a plan of no plan, n211 "a project of projects," n212 [\*984] "anti-theory theory," n213 politics rather than goals, n214 presence rather than power, n215 "practice over theory," n216 and chaos and openness over order and formality. As a result, **the contemporary message rarely includes a comprehensive vision of common social claims, but rather engages in the description of fragmented efforts**. As Professor Joel Handler argues, **the commonality of struggle and social vision that existed during the civil rights movement has disappeared**. n217 **There is no unifying discourse or set of values, but rather an aversion to any metanarrative** and a resignation from theory. Professor **Handler warns that this move away from grand narratives is self-defeating precisely because only certain parts of the political spectrum have accepted this new stance**: "**The opposition is not playing that game** ... . Everyone else is operating as if there were Grand Narratives ... ." n218 **Intertwined with the resignation from law and policy, the new bromide of "neither left nor right" has become axiomatic only for some**. n219 The contemporary critical legal consciousness informs the scholarship of those who are interested in progressive social activism, but less so that of those who are interested, for example, in a more competitive securities market. Indeed, an interesting recent development has been the rise of "conservative public interest lawyering." n220 Although "public interest law" was originally associated exclusively with liberal projects, **in the past three decades conservative advocacy groups have rapidly grown both in number and in their vigorous use of traditional legal strategies to promote their causes.** n221 **This growth in conservative advocacy** [\*985] **is particularly salient in juxtaposition to the decline of traditional progressive advocacy**. Most recently, some thinkers have even suggested that **there may be "something inherent in the left's conception of social change - focused as it is on participation and empowerment - that produces a unique distrust of legal expertise**." n222 Once again, **this conclusion reveals flaws parallel to the original disenchantment with legal reform**. **Although the new extralegal frames present themselves as apt alternatives to legal reform models** and as capable of producing significant changes to the social map, **in practice they generate very limited improvement in existing social arrangements.** Most strikingly, the cooptation effect here can be explained in terms of the most profound risk of the typology - that of legitimation. **The common pattern of extralegal scholarship is to describe an inherent instability in dominant structures by pointing**, for example, **to grassroots strategies**, n223 **and then to assume that specific instances of counterhegemonic activities translate into a more complete transformation**. **This celebration of multiple micro-resistances seems to rely on an aggregate approach - an idea that the multiplication of practices will evolve into something substantial**. In fact, **the myth of engagement obscures the actual lack of change being produced, while the broader pattern of equating extralegal activism with social reform produces a false belief in the potential of change**. **There are few instances of meaningful reordering of social and economic arrangements and macro-redistribution**. **Scholars write about decoding what is really happening, as though the scholarly narrative has the power to unpack more than the actual conventional experience will admit**. n224 **Unrelated efforts become related and part of a whole through mere reframing.** At the same time, **the elephant in the room - the rising level of economic inequality - is left unaddressed and comes to be understood as natural and inevitable**. n225 **This is precisely the problematic process that critical theorists decry as losers' self-mystification, through which marginalized groups come to see systemic losses as the** [\*986] **product of their own actions and thereby begin to focus on minor achievements as representing the boundaries of their willed reality. The explorations of micro-instances of activism are** often fundamentally **performative, obscuring the distance between the descriptive and the prescriptive**. **The manifestations of extralegal activism** - the law and organizing model; the proliferation of informal, soft norms and norm-generating actors; and the celebrated, separate nongovernmental sphere of action - **all produce a fantasy that change can be brought about through small-scale, decentralized transformation.** **The emphasis is local, but the locality is described as a microcosm of the whole and the audience is national and global**. In the context of the humanities, Professor Carol Greenhouse poses a comparable challenge to ethnographic studies from the 1990s, which utilized the genres of narrative and community studies, the latter including works on American cities and neighborhoods in trouble. n226 **The aspiration of these genres was that each individual story could translate into a "time of the nation" body of knowledge and motivation.** n227 **In contemporary legal thought, a corresponding gap opens between the local scale and the larger, translocal one**. In reality, **although there has been a recent proliferation of associations and grassroots groups**, few new local-state-national federations have emerged in the United States since the 1960s and 1970s, **and many of the existing voluntary federations that flourished in the mid-twentieth century are in decline.** n228 **There is**, therefore, **an absence of links between the local and the national, an absent intermediate public sphere**, which has been termed "the missing middle" by Professor Theda Skocpol. n229 **New social movements have for the most part failed in sustaining coalitions or producing significant institutional change through grassroots activism**. Professor Handler concludes that **this failure is due in part to the ideas of contingency, pluralism, and localism that are so embedded in current activism**. n230 Is the focus on small-scale dynamics simply an evasion of the need to engage in broader substantive debate? **It is important for next-generation progressive legal scholars, while maintaining a critical legal consciousness, to recognize that not all extralegal associational life is transformative**. **We must differentiate**, for example, **between inward-looking groups, which tend to be self-** [\*987] **regarding and depoliticized, and social movements that participate in political activities, engage the public debate, and aim to challenge and reform existing realities**. n231 We must differentiate between professional associations and more inclusive forms of institutions that act as trustees for larger segments of the community. n232 As described above, **extralegal activism tends to operate on a more divided and hence a smaller scale than earlier social movements, which had national reform agendas**. Consequently, **within critical discourse there is a need to recognize the limited capacity of small-scale action.** **We should question the narrative that imagines consciousness-raising as directly translating into action and action as directly translating into change**.

Certainly **not every cultural description is political.** Indeed, **it is questionable whether forms of activism that are opposed to programmatic reconstruction of a social agenda should even be understood as social movements**. In fact, **when groups are situated in opposition to any form of institutionalized power, they may be simply mirroring what they are fighting against and merely producing moot activism that settles for what seems possible within the narrow space that is left in a rising convergence of ideologies. The original vision is consequently coopted, and contemporary discontent is legitimated through a process of self-mystification.**

**2AC AT Legal Cooption**

**The alt gets co-opted too—you should affirm an optimistic outlook towards the law to reform and redefine it for positive purposes**

**Lobel 7, Assistant Professor of Law**

[February, 2007; Orly Lobel is an Assistant Professor of Law, University of San Diego. LL.M. 2000 (waived), Harvard Law School; LL.B. 1998, Tel-Aviv University, “THE PARADOX OF EXTRALEGAL ACTIVISM: CRITICAL LEGAL CONSCIOUSNESS AND TRANSFORMATIVE POLITICS”, 120 Harv. L. Rev. 937]

**A critique of cooptation often takes an uneasy path. Critique has** always **been and remains not simply an intellectual exercise but a political and moral act. The question we must constantly pose is how critical accounts of social reform models contribute to our ability to produce scholarship and action that will be constructive. To critique the ability of law to produce social change is inevitably to raise the question of alternatives.** In and of itself, **the exploration of the limits of law and the search for new possibilities is an insightful field of inquiry.** However, **the contemporary message that emerges from critical legal consciousness analysis has often resulted in the distortion of the critical arguments themselves.** **This distortion denies the potential of legal change in order to illuminate what has yet to be achieved or even imagined**. Most importantly, **cooptation analysis is not unique to legal reform but can be extended to any process of social action and engagement**. **When claims of legal cooptation are compared to possible alternative forms of activism, the false necessity embedded in the contemporary** [\*988] **story emerges - a story that privileges informal extralegal forms as transformative while assuming that a conservative tilt exists in formal legal paths.** In the triangular conundrum of "law and social change," **law is regularly the first to be questioned, deconstructed, and then critically dismissed.** The other two components of the equation - social and change - are often presumed to be immutable and unambiguous. **Understanding the limits of legal change reveals the dangers of absolute reliance on one system and the need**, in any effort for social reform, **to contextualize the discourse, to avoid evasive, open-ended slogans, and to develop greater sensitivity to indirect effects and multiple courses of action.** Despite its weaknesses, however, **law is an optimistic discipline**. It operates both in the present and in the future. Order without law is often the privilege of the strong. **Marginalized groups have used legal reform precisely because they lacked power. Despite limitations, these groups have often successfully secured their interests through legislative and judicial victories**. **Rather than experiencing a disabling disenchantment with the legal system, we can learn from both the successes and failures of past models, with the aim of constantly redefining the boundaries of legal reform and making visible law's broad reach.**

**Legal restraints work---exception theory is self-serving and wrong**

William E. **Scheuerman 6**, Professor of Political Science at Indiana University, Carl Schmitt and the Road to Abu Ghraib, Constellations, Volume 13, Issue 1

Yet this argument relies on Schmitt’s controversial model of politics, as outlined eloquently but unconvincingly in his famous Concept of the Political. To be sure, there are intense conflicts in which it is naïve to expect an easy resolution by legal or juridical means. But the argument suffers from a troubling circularity: **Schmitt** occasionally **wants to define “political” conflicts as those irresolvable by legal** or juridical **devices in order** then **to argue against legal** or juridical **solutions** to them. **The claim** also **suffers from** a certain **vagueness** and lack of conceptual precision. At times, it seems to be directed against trying to resolve conflicts in the courts or juridical system narrowly understood; at other times it is directed against any legal regulation of intense conflict. The former argument is surely stronger than the latter. After all, **legal devices have undoubtedly played a positive role in taming** or at least minimizing the potential dangers of harsh **political antagonisms**. In the Cold War, for example, international law contributed to the peaceful resolution of conflicts which otherwise might have exploded into horrific violence, even if attempts to bring such conflicts before an international court or tribunal probably would have failed.22¶ Second, Schmitt dwells on the legal inconsistencies that result from modifying the traditional state-centered system of international law by expanding protections to non-state fighters. His view is that irregular combatants logically enjoyed no protections in the state-centered Westphalian model. By broadening protections to include them, international law helps undermine the traditional state system and its accompanying legal framework. Why is this troubling? The most obvious answer is that Schmitt believes that the traditional state system is normatively superior to recent attempts to modify it by, for example, extending international human rights protections to individuals against states. 23 But what if we refuse to endorse his nostalgic preference for the traditional state system? Then a sympathetic reading of the argument would take the form of suggesting that the project of regulating irregular combatants by ordinary law must fail for another reason: it rests on a misguided quest to integrate incongruent models of interstate relations and international law. We cannot, in short, maintain core features of the (state-centered) Westphalian system while extending ambitious new protections to non-state actors.¶ This is a powerful argument, but it remains flawed. Every modern legal order rests on diverse and even conflicting normative elements and ideals, in part because human existence itself is always “in transition.” When one examines the so-called classical liberal legal systems of nineteenth-century England or the United States, for example, one quickly identifies liberal elements coexisting uneasily alongside paternalistic and authoritarian (e.g., the law of slavery in the United States), monarchist, as well as republican and communitarian moments. The same may be said of the legal moorings of the modern welfare state, which arguably rest on a hodgepodge of socialist, liberal, and Christian and even Catholic (for example, in some European maternity policies) programmatic sources. In short, **it is by no means self-evident that trying to give coherent legal form to a transitional** political and social **moment is always doomed to fail**. Moreover, there may be sound reasons for claiming that the contemporary transitional juncture in the rules of war is by no means as incongruent as Schmitt asserts. In some recent accounts, **the general trend** towards extending basic protections to non-state actors **is** plausibly interpreted in a more **positive – and by no means incoherent** – light.24¶ Third, Schmitt identifies a deep tension between the classical quest for codified and stable law and the empirical reality of a social world subject to permanent change: “The tendency to modify or even dissolve classical [legal] concepts…is general, and in view of the rapid change of the world it is entirely understandable” (12). Schmitt’s postwar writings include many provocative comments about what contemporary legal scholars describe as the dilemma of legal obsolescence. 25 In The Partisan, he suggests that the “great transformations and modifications” in the technological apparatus of modern warfare place strains on the aspiration for cogent legal norms capable of regulating human affairs (17; see also 48–50). Given the ever-changing character of warfare and the fast pace of change in military technology, it inevitably proves difficult to codify a set of cogent and stable rules of war. The Geneva Convention proviso that legal combatants must bear their weapons openly, for example, seems poorly attuned to a world where military might ultimately depends on nuclear silos buried deep beneath the surface of the earth, and not the success of traditional standing armies massed in battle on the open field. “Or what does the requirement mean of an insignia visible from afar in night battle, or in battle with the long-range weapons of modern technology of war?” (17).¶ As I have tried to show elsewhere, these are powerful considerations deserving of close scrutiny; Schmitt is probably right to argue that the enigma of legal obsolescence takes on special significance in the context of rapid-fire social change.26 Unfortunately, he seems uninterested in the slightest possibility that we might successfully adapt the process of lawmaking to our dynamic social universe. To be sure, he discusses the “motorization of lawmaking” in a fascinating 1950 publication, but only in order to underscore its pathological core.27 Yet **one** possible **resolution** of the dilemma he describes **would be** to figure how **to reform the process** whereby rules of war are adapted to novel changes in military affairs in order **to minimize the danger of** anachronistic or **out-of-date law. Instead, Schmitt** simply **employs the dilemma of legal obsolescence as a battering ram** against the rule of law and the quest to develop a legal apparatus suited to the special problem of irregular combatants.

**AT Rana K\*\*\***

**2AC FW**

**Absent institutional concerns the alt is useless**

**Wight – Professor of IR @ University of Sydney – 6**

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

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

#### A focus on policy is necessary to learn the pragmatic details of powerful institutions – acting without this knowledge is doomed to fail in the face of policy professionals who make the decisions that actually affect outcomes

McClean, Adjunct Professor of Philosophy at Molloy College in New York, 2001

(David E., “The Cultural Left and the Limits of Social Hope”, Conference of the Society for the Advancement of American Philosophy, http://www.americanphilosophy.org/archives/past\_conference\_programs/pc2001/)

Or we might take Foucault who, at best, has provided us with what may reasonably be described as a very long and eccentric footnote to Nietzsche (I have once been accused, by a Foucaltian true believer, of "gelding" Foucault with other similar remarks). Foucault, who has provided the Left of the late 1960s through the present with such notions as "governmentality," "Limit," "archeology," "discourse" "power" and "ethics," creating or redefining their meanings, has made it overabundantly clear that all of our moralities and practices are the successors of previous ones which derive from certain configurations of savoir and connaisance arising from or created by, respectively, the discourses of the various scientific schools. But I have not yet found in anything Foucault wrote or said how such observations may be translated into a political movement or hammered into a political document or theory (let alone public policies) that can be justified or founded on more than an arbitrary aesthetic experimentalism. In fact, Foucault would have shuddered if any one ever did, since he thought that anything as grand as a movement went far beyond what he thought appropriate. This leads me to mildly rehabilitate Habermas, for at least he has been useful in exposing Foucault's shortcomings in this regard, just as he has been useful in exposing the shortcomings of others enamored with the abstractions of various Marxian-Freudian social critiques. Yet for some reason, at least partially explicated in Richard Rorty's Achieving Our Country, a book that I think is long overdue, leftist critics continue to cite and refer to the eccentric and often a priori ruminations of people like those just mentioned, and a litany of others including Derrida, Deleuze, Lyotard, Jameson, and Lacan, who are to me hugely more irrelevant than Habermas in their narrative attempts to suggest policy prescriptions (when they actually do suggest them) aimed at curing the ills of homelessness, poverty, market greed, national belligerence and racism. I would like to suggest that it is time for American social critics who are enamored with this group, those who actually want to be relevant, to recognize that they have a disease, and a disease regarding which I myself must remember to stay faithful to my own twelve step program of recovery. The disease is the need for elaborate theoretical "remedies" wrapped in neological and multi-syllabic jargon. These elaborate theoretical remedies are more "interesting," to be sure, than the pragmatically settled questions about what shape democracy should take in various contexts, or whether private property should be protected by the state, or regarding our basic human nature (described, if not defined (heaven forbid!), in such statements as "We don't like to starve" and "We like to speak our minds without fear of death" and "We like to keep our children safe from poverty"). As Rorty puts it, "When one of today's academic leftists says that some topic has been 'inadequately theorized,' you can be pretty certain that he or she is going to drag in either philosophy of language, or Lacanian psychoanalysis, or some neo-Marxist version of economic determinism. . . . These futile attempts to philosophize one's way into political relevance are a symptom of what happens when a Left retreats from activism and adopts a spectatorial approach to the problems of its country. Disengagement from practice produces theoretical hallucinations"(italics mine).(1) Or as John Dewey put it in his The Need for a Recovery of Philosophy, "I believe that philosophy in America will be lost between chewing a historical cud long since reduced to woody fiber, or an apologetics for lost causes, . . . . or a scholastic, schematic formalism, unless it can somehow bring to consciousness America's own needs and its own implicit principle of successful action." Those who suffer or have suffered from this disease Rorty refers to as the Cultural Left, which left is juxtaposed to the Political Left that Rorty prefers and prefers for good reason. Another attribute of the Cultural Left is that its members fancy themselves pure culture critics who view the successes of America and the West, rather than some of the barbarous methods for achieving those successes, as mostly evil, and who view anything like national pride as equally evil even when that pride is tempered with the knowledge and admission of the nation's shortcomings. In other words, the Cultural Left, in this country, too often dismiss American society as beyond reform and redemption. And Rorty correctly argues that this is a disastrous conclusion, i.e. disastrous for the Cultural Left. I think it may also be disastrous for our social hopes, as I will explain. Leftist American culture critics might put their considerable talents to better use if they bury some of their cynicism about America's social and political prospects and help forge public and political possibilities in a spirit of determination to, indeed, achieve our country - the country of Jefferson and King; the country of John Dewey and Malcom X; the country of Franklin Roosevelt and Bayard Rustin, and of the later George Wallace and the later Barry Goldwater. To invoke the words of King, and with reference to the American society, the time is always ripe to seize the opportunity to help create the "beloved community," one woven with the thread of agape into a conceptually single yet diverse tapestry that shoots for nothing less than a true intra-American cosmopolitan ethos, one wherein both same sex unions and faith-based initiatives will be able to be part of the same social reality, one wherein business interests and the university are not seen as belonging to two separate galaxies but as part of the same answer to the threat of social and ethical nihilism. We who fancy ourselves philosophers would do well to create from within ourselves and from within our ranks a new kind of public intellectual who has both a hungry theoretical mind and who is yet capable of seeing the need to move past high theory to other important questions that are less bedazzling and "interesting" but more important to the prospect of our flourishing - questions such as "How is it possible to develop a citizenry that cherishes a certain hexis, one which prizes the character of the Samaritan on the road to Jericho almost more than any other?" or "How can we square the political dogma that undergirds the fantasy of a missile defense system with the need to treat America as but one member in a community of nations under a "law of peoples?" The new public philosopher might seek to understand labor law and military and trade theory and doctrine as much as theories of surplus value; the logic of international markets and trade agreements as much as critiques of commodification, and the politics of complexity as much as the politics of power (all of which can still be done from our arm chairs.) This means going down deep into the guts of our quotidian social institutions, into the grimy pragmatic details where intellectuals are loathe to dwell but where the officers and bureaucrats of those institutions take difficult and often unpleasant, imperfect decisions that affect other peoples' lives, and it means making honest attempts to truly understand how those institutions actually function in the actual world before howling for their overthrow commences. This might help keep us from being slapped down in debates by true policy pros who actually know what they are talking about but who lack awareness of the dogmatic assumptions from which they proceed, and who have not yet found a good reason to listen to jargon-riddled lectures from philosophers and culture critics with their snobish disrespect for the so-called "managerial class."

### 2AC AT: Root Cause

#### No root cause

Sharpe 10**,** lecturer, philosophy and psychoanalytic studies, and Goucher, senior lecturer, literary and psychoanalytic studies – Deakin University, ‘10

(Matthew and Geoff, Žižek and Politics: An Introduction, p. 231 – 233)

We realise that this argument, which we propose as a new ‘quilting’ framework to explain Žižek’s theoretical oscillations and political prescriptions, raises some large issues of its own. While this is not the place to further that discussion, we think its analytic force leads into a much wider critique of ‘Theory’ in parts of the latertwentieth- century academy, which emerged following the ‘cultural turn’ of the 1960s and 1970s in the wake of the collapse of Marxism. Žižek’s paradigm to try to generate all his theory of culture, subjectivity, ideology, politics and religion is psychoanalysis. But a similar criticism would apply, for instance, to theorists who feel that the method Jacques Derrida developed for criticising philosophical texts can meaningfully supplant the methodologies of political science, philosophy, economics, sociology and so forth, when it comes to thinking about ‘the political’. Or, differently, thinkers who opt for Deleuze (or Deleuze’s and Guattari’s) Nietzschean Spinozism as a new metaphysics to explain ethics, politics, aesthetics, ontology and so forth, seem to us candidates for the same type of criticism, as a reductive passing over the empirical and analytic distinctness of the different object fields in complex societies. In truth, we feel that Theory, and the continuing line of ‘master thinkers’ who regularly appear particularly in the English- speaking world, is the last gasp of what used to be called First Philosophy. The philosopher ascends out of the city, Plato tells us, from whence she can espie the Higher Truth, which she must then bring back down to political earth. From outside the city, we can well imagine that she can see much more widely than her benighted political contemporaries. But from these philosophical heights, we can equally suspect that the ‘master thinker’ is also always in danger of passing over the salient differences and features of political life – differences only too evident to people ‘on the ground’. Political life, after all, is always a more complex affair than a bunch of ideologically duped fools staring at and enacting a wall (or ‘politically correct screen’) of ideologically produced illusions, from Plato’s timeless cave allegory to Žižek’s theory of ideology.

We know that Theory largely understands itself as avowedly ‘post- metaphysical’. It aims to erect its new claims on the gravestone of First Philosophy as the West has known it. But it also tells us that people very often do not know what they do. And so it seems to us that too many of its proponents and their followers are mourners who remain in the graveyard, propping up the gravestone of Western philosophy under the sign of some totalising account of absolutely everything – enjoyment, différance, biopower . . . Perhaps the time has come, we would argue, less for one more would- be global, allpurpose existential and political Theory than for a multi- dimensional and interdisciplinary critical theory that would challenge the chaotic specialisation neoliberalism speeds up in academe, which mirrors and accelerates the splintering of the Left over the last four decades. This would mean that we would have to shun the hope that one method, one perspective, or one master thinker could single- handedly decipher all the complexity of socio- political life, the concerns of really existing social movements – which specifi cally does not mean mindlessly celebrating difference, marginalisation and multiplicity as if they could be suffi cient ends for a new politics. It would be to reopen critical theory and non- analytic philosophy to the other intellectual disciplines, most of whom today pointedly reject Theory’s legitimacy, neither reading it nor taking it seriously.

**2AC AT: SVio**

**War turns structural violence**

**Goldstein 1**—Prof PoliSci @ American University, Joshua, War and Gender , P. 412

First, peace activists face a dilemma in thinking about causes of war and working for peace. Many peace scholars and activists support the approach, "**if you want peace, work for justice**". Then if one believes that sexism contributes to war, one can work for gender justice specifically (perhaps among others) in order to pursue peace. This approach brings strategic allies to the peace movement (women, labor, minorities), but **rests on the assumption that injustices cause war. The evidence in this book suggests that causality runs at least as strongly the other way. War is not a product of capitalism, imperialism, gender, innate aggression, or any other single cause, although all of these influences wars' outbreaks and outcomes. Rather, war has in part fueled and sustained these and other injustices**. So, "if you want peace, work for peace." Indeed, **if you want justice** (gener and others), **work for peace**. Causality does not run just upward through the levels of analysis from types of individuals, societies, and governments up to war. It runs downward too. Enloe suggests that **changes in attitudes toward war and the military may be the most important way to "reverse women's oppression**" The dilemma is that peace work focused on justice brings to the peace movement energy, allies and moral grounding, yet, in light of this book's evidence, the emphasis on injustice as the main cause of war seems to be empirically inadequate.

### 2AC AT: Ethics

#### Extinction first

**Kateb**, Professor of Politics at Princeton University, ‘**92** (George, The Inner Ocean, pg. 141)

To sum up the lines of thought that Nietzsche starts, I suggest first that it is epistemologically impossible for humanity to arrive at an estimation of the worth of itself or of the rest of nature: it cannot pretend to see itself from the outside or to see the rest, as it were, from the inside. Second, after allowance is made for this quandary, which is occasioned by the death of God and the birth of truth, humanity, placed in a position in which it is able to extinguish human life and natural life on earth, must simply affirm existence as such. Existence must go on but not because of any particular feature or group of features. The affirmation of existence refuses to say what worth existence has, even from just a human perspective, from any human perspective whatever. It cannot say, because existence is indefinite; it is beyond evaluating; being undesigned it is unencompassable by a defined and definite judgment. (The philosopher Frederick A. Olafson speaks of "the stubbornly unconceptualizable fact of existence.") The worth of the existence passed on to the unborn is not measurable but indefinite. The judgment is minimal: no human purpose or value within existence is worth more than existence and can ever be used to justify the risk of extinction.

Third, from the moral point of view, existence seems unjustifiable because of the pain and ugliness in it, and therefore the moral point of view must be chastened if it is not to block attachment to existence as such. The other minimal judgment is that whatever existence is, it is better than nothing. For the first time, in the nuclear age, humanity can fully perceive existence from the perspective of nothing, which in part is the perspective of extinction.

# 1AR

### K

**Indefinite detention as a war power means detention of enemy combatants – prefer our interpretation – relies on administration position – most predictable**

**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.**

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

**Twining 4**

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

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