## 1AC

### 1AC Advantage

#### Contention \_\_ is legitimacy

#### The failure to uphold Habeas in the Kiyemba decision kills overall rule of law legitimacy – our policies are GLOBALLY MODELED.

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In 2007, Ninth Circuit Judge A. Wallace Tashima observed that the rule of law—touted by the United States throughout the world since the end of World War II— has been “steadily undermined . . . since we began the so-called ‘War on Terror.’”185 “The American legal messenger,” Tashima notes, “has been regarded throughout the world as a trusted figure of goodwill, mainly by virtue of close identification with the message borne”—“that the rule of law is fundamental to a free, open, and pluralistic society,” that the United States represents “a government of laws and not of persons,” where “no one—not even the President—is above the law.”186 But, according to Tashima, the actions that the United States has “taken in the War on Terror, especially [in] our detention policies, have belied our commitment to the rule of law” and caused a “dramatic shift in world opinion,” so that the War on Terror has been greeted internationally with “increasing skepticism and even hostility.”187 Put differently, the United States has shot the messenger—and with it, goes the message, the commitment to the rule of law, and our international credibility.188

The primary assassin in this “assault on the role of law” is the argument “that the President is not bound by law—that he can flout the Constitution, treaties, and statutes of the United States as Commander-in- Chief during times of war.”171 Also wreaking havoc on the rule of law is the notion, described above, that the President’s actions in times of war are unreviewable, and that the judiciary has no role to play in checking wartime policies—a notion perpetuated by placement of issues like those raised in Kiyemba within the immigration framework

How can the Executive take such an approach as its legal defense, despite swearing, upon inauguration, to “preserve, protect[,] and defend the Constitution of the United States,”172 and despite constitutional directive that he “take Care that the Laws be faithfully executed”?173 As distinguished co-authors Charles Fried and Gregory Fried observe, the oath of office does not mention defending national security.174 Rather, “the president’s duty is explicitly to the law, not [to] some vague goal beyond the law.”175 According to these authors, “[t]he law is our defense against tyranny, the arbitrary imposition of one person’s will over all others, and against anarchy, the ungoverned combat of many people’s wills.”176 If, as the Executive has done since 9/11, “we cut down the laws to lay hold of our enemies,” where are we to “hide when the Devil turns round on us, armed with the power of the state?”177 If a reminder of the oath undertaken, the values underlying it, and the need to engage all three branches of government in protecting those values were necessary, the Executive would need to look no further than the pages of the Supreme Court Reporter.

In Ex Parte Milligan,178 for example, the Supreme Court stated that the Constitution “is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.”179 Central to this protection is the separation of powers, by which one branch of government is not permitted to go unchecked. Indeed, as Justice O’Connor stated in the Hamdi case, “[w]hatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.”180 And even the Executive’s war power “does not remove constitutional limitations,” including the separation of powers, “safeguarding essential liberties.”181

According to the Milligan Court, the founding fathers “knew—the history of the world told them—the nation they were founding, be its existence short or long, would be involved in war.”182 How frequently or of what length, “human foresight could not tell.”183 But, the founders knew that “unlimited power, wherever lodged at such a time, was especially hazardous to freemen.”184 For this reason, “they secured the inheritance they had fought to maintain, by incorporating in a written constitution the safeguards which time had proved were essential to its preservation.”185 These safeguards cannot be disturbed by any one branch, unless the Constitution so provides—and with the checks authorized therein.186 Indeed, “[t]o hold [that] the political branches have the power to switch the Constitution on or off at will . . . would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not [the courts], say ‘what the law is.’”187 And “our basic charter cannot be contracted away like this.”188 To the extent that it has been—through executive action, paired with judicial inaction—the rule of law is undermined. We can and we must do better. The Constitution, and those who drafted it, would demand so.

By reconsidering the opportunities presented, and missed, by the Kiyemba v. Obama case, we might see ways that we could do better, ways that we could restore the rule of law to its rightful place in our system of government and in that government’s policy choices.

III. RE-CONSIDERING KIYEMBA V. OBAMA: THE ILLEGALITY OF INDEFINITE DETENTION, THE INAPPLICABILITY OF IMMIGRATION LAW, AND CHECKING THE UNCHECKED EXECUTIVE

A. The Illegality of Indefinite Detention and the Remedy Requirement The writ of habeas corpus, “derived from the Latin meaning ‘you have the body’” and incorporated into American law from the British common law, safeguards individual liberty “by affording people seized by the government the right to question the grounds for their detention before a judge.”189 The writ does more than “protect the freedom of the individual from unlawful restraint.”190 It also represents “an important structural function in our constitutional system,” ensuring “checks and balances among the branches” and “adherence to the rule of law.”191 Put simply, the writ protects against indefinite and unchecked detention

While the scope of the writ and its continued viability remain the subject of significant debate, most scholars and jurists agree that the Suspension Clause, the writ’s constitutional enshrinement, “protects the writ ‘as it existed in 1789.’”192 But as distinguished legal scholar Stephen Vladeck notes in a 2011 book review, however, “that limited point of consensus begs a separate question: what was the scope of the writ” at the time of the founding?193 While jurists and scholars have reached differing conclusions on that point, evidence suggests that habeas, as understood by the framers, included a guarantee of relief. Such evidence indicates that the habeas remedy, as much as access to the writ itself, is an essential part of the constitutional guarantee.194 Moreover, the early framers viewed habeas as “an essential check on executive power,”195 and the ultimate guarantor of individual liberties. Alexander Hamilton, quoting Blackstone, referred to habeas as “the bulwark of our liberties,” and, like others, thought habeas to be “such a powerful check on tyranny that a separate Bill of Rights was unnecessary.”196 Indeed, as Justice Salmon Chase noted in 1868, almost one hundred years after the founding, “The great writ of habeas corpus has been for centuries esteemed the best and only sufficient defense of personal freedom.”197 It has been, stated differently, the most esteemed of constitutional rights. It would make little sense, in view of this long history, for the right to come unaccompanied by a meaningful remedy.

#### A PROCEDURAL RULING preserving habeas corpus in is both NECESSARY and SUFFICIENT for US legitimacy. Only our ev cites ROBUST STATSTICAL ANALASYS

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

Today, many individuals throughout the world question whether the United States has engaged in excess in response to the attacks of 9/11. A 2004 poll suggests that many people in France (57%), Germany (49%), and Britain (33%) felt that the United States overreacted in response to terrorism. n30 Among Middle Eastern countries, as many as three-fourths of individuals stated that the United States overreacted in the War on Terror. n31 Additionally, approximately two-thirds of citizens in France, Germany, Turkey, and Pakistan questioned the sincerity of the United States in the War on Terror. n32 Within the United States, nationwide confidence in the White House [\*267] dropped 40% between 2002 and 2004 while confidence in Congress fell by 25% during this period. n33 Although this worldwide drop in legitimacy is the result of multiple factors beyond the scope of this paper, such as the U.S. decision to invade Iraq, detention remains a controversial topic that continues to negatively affect global perceptions of the United States.

Although this paper focuses specifically on the detention of suspected terrorists at the Guantanamo Bay Detention Camp (Guantanamo Bay), n34 this facility is but one of many detention centers holding suspected terrorists on behalf of the United States. n35 Today, approximately 250 prisoners (out of approximately 800) remain at this U.S.-run military base in Cuba that is outside U.S. legal jurisdiction. n36 However, it is critical to note that these 250 individuals represent a mere 1% of "approximately 25,000 detainees worldwide held directly or indirectly by or on behalf of the United States." n37 Prisoners have alleged torture, sexual degradation, religious persecution, n38 and many other specific forms of mistreatment while being detained. n39 In many detention facilities including Guantanamo Bay, Abu Ghraib, and Bagram, these allegations are substantiated by significant evidence and have gained worldwide attention. n40 [\*268]

While some graphic and shocking cases of abuse have been brought to light, n41 a more typical example is the prosecution of sixteen-year-old Mohamed Jawad by Lt. Col. Darrel Vandeveld at Guantanamo Bay. n42 At first, the case against Jawad looked straightforward, as he had confessed to throwing a grenade that injured two U.S. soldiers and a translator in December 2002. n43 However, a deeper investigation "uncovered a confession obtained through torture, two suicide attempts by the accused, abusive interrogations, the withholding of exculpatory evidence from the defense," and other procedural problems. n44 Vandeveld discovered that the military had obtained confessions from two other individuals for the same offense; he ultimately left his post after attempts to provide "basic fair trial rights" failed. n45

In February 2006, the United Nations Working Group on Arbitrary Detention spoke out against international law and human rights violations at Guantanamo Bay, stating that the facility should be closed "without further delay." n46 This report paralleled earlier criticism from Amnesty International that Guantanamo Bay violates minimum standards for the treatment of individuals. n47 In response, the United States has argued that detainees are not prisoners of war but are rather "unlawful combatants" who are not entitled to the protections of the Geneva Convention because they do not act in accor [\*269] dance with the accepted rules of war. n48 Yet, regardless of the debatable legal merit of this argument, legitimacy is an "elusive quality" grounded in worldwide opinion that will not let the United States off the hook on a mere technicality when moral duties and international customs have been violated. n49 In the next section, I discuss the importance of legitimacy and the ways in which it has been undermined by U.S. conduct in the War on Terror. By understanding what drives global perceptions of U.S. legitimacy, current detention policies and their ramifications can be more accurately assessed and restructured.

IV. Legitimacy: The Critical Missing Element in the War on Terror

In the context of the War on Terror, legitimacy is the critical missing element under the current U.S. detention regime. Legitimacy can be defined as "a psychological property of an authority, institution, or social arrangement that leads those connected to it to believe that it is appropriate, proper, and just." n50 As far back as Plato and Aristotle, philosophers have recognized that influencing others merely through coercion and power is costly and inefficient. n51 Today, empirical evidence suggests that legitimacy, rather than deterrence, is primarily what causes individuals to obey the law. n52 Thus, while legal authorities may possess the immediate power to stop illegal action, long-term compliance requires that the general public perceives the law to be legitimate. n53 Terrorism is primarily an ideological war that cannot be won by technology that is more sophisticated or increased military force. n54 While nations combating terrorism must continue to address immediate threats by detaining suspected terrorists, they must also consider the prevention of future threats by analyzing how their policies are perceived by individuals throughout the world. Ultimately, in the War on Terror, "the benefits to be derived from maximizing legitimacy are too important to neglect." n55

Over time, perceptions of legitimacy create a "reservoir of support" for an institution that goes beyond mere self-interest. n56 In the context of government:

Legitimacy is an endorphin of the democratic body politic; it is the substance that oils the machinery of democracy, reducing the friction that inevitably arises when people are not able to get everything they want from politics. Legitimacy is loyalty; it is a reservoir of goodwill that allows the institutions of government to go against what people may want at the moment without suffering debilitating consequences. n57

The widespread acceptance of highly controversial decisions by the U.S. Supreme Court illustrates the power of institutional legitimacy. n58 The Court itself noted that it "cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees." n59 "The Court's power lies, rather, in its legitimacy . . . ." n60 For example, by emphasizing "equal treatment," "honesty and neutrality," "gathering information before decision making," and "making principled, or rule based, decisions instead of political decisions," the Court maintained [\*271] legitimacy through the controversial abortion case Planned Parenthood of Southeastern Pennsylvania v. Casey in 1992. n61 Thus, although approximately half of Americans oppose abortion, n62 the vast majority of these individuals give deference to the Court's ruling on this issue. n63

In the post-World War II era, the United States built up a worldwide reservoir of support based upon four pillars: "its commitment to international law, its acceptance of consensual decision-making, its reputation for moderation, and its identification with the preservation of peace." n64 Although some U.S. policies between 1950 and 2001 did not align with these pillars, on a whole the United States legitimized itself as a world superpower during this period. n65 In the 1980s, President Ronald Reagan spoke of America as a "shining city on a hill," suggesting that it was a model for the nations of the world to look to. n66 While the United States received a virtually unprecedented outpouring of support from the international community following 9/11, a nation's reservoir of support will quickly evaporate when its government overreacts. Across the globe, individuals have expressed a growing dissatisfaction with U.S. conduct in the War on Terror, and by 2006, even western allies of the United States lobbied for the immediate closure of Guantanamo Bay, calling it "an embarrassment." n67 Former Secretary of State Colin Powell proclaimed that "Guantanamo has become a major, major problem . . . in the way the world perceives America and if it were up to me I would close Guantanamo not tomorrow but this afternoon . . . ." n68 Similarly, [\*272] President Obama noted in his campaign that "Guantanamo has become a recruiting tool for our enemies." n69

Current U.S. detention policies erode each of the four pillars on which the United States established global legitimacy. In fact, critics have argued that the "United States has assumed many of the very features of the 'rogue nations' against which it has rhetorically--and sometimes literally--done battle over the years." n70 While legitimacy cannot be regained overnight, the recent election of President Barack Obama presents a critical opportunity for a re-articulation of U.S. detention policies. Although President Obama issued an executive order calling for the closure of Guantanamo Bay only two days after being sworn into office, n71 significant controversy remains about the kind of alternate detention system that will replace it. n72 In contrast to the current model, which has largely rendered inefficient decisions based on ad hoc policies, I argue for the establishment of a domestic terror court (DTC) created specifically to deal with the unique procedural issues created by a growing number of suspected terrorists.

V. THE IMPORTANCE OF PROCEDURAL JUSTICE

In the context of detentions, “the fairness of the procedures” through which the United States exercises authority is the key element driving both national and international perceptions of U.S. legitimacy, and legitimacy ultimately determines the extent to which individuals comply with U.S. policies.73 Robust empirical evidence has “repeatedly documented a pattern of correlations consistent with a causal chain in which procedural fairness leads to perceived legitimacy, which leads to the acceptance of policies.”74 Research also suggests that procedural justice creates a “willingness to empower legal authorities to resolve issues of public controversy.”75 An analysis of how procedural justice has been applied in legal and institutional settings provides a framework for addressing the specific legitimacy problems associated with Guantanamo Bay and how fair process can be effectively incorporated into a DTC model.

Thirty-five years ago, the formal study of procedural justice was born when researchers discovered that individuals “care deeply about the fairness of the process that is used to resolve their encounter or dispute, separate and apart from their interest in achieving a favorable outcome.”76 This research indicates that individuals with control over the process (e.g., telling their side of the story, presenting evidence, and controlling the order and timing of presentation) view the process itself as fair.77 This outcome, known as the fair process effect, “is one of the most replicated findings in the [procedural] justice literature.”78 A meta-analysis of 120 empirical justice studies covering a twenty-five year period revealed that procedural justice is highly correlated with outcome satisfaction (.48), institutional commitment (.57), trust (.61), and evaluation of authority (.64).79 These findings indicate the degree of significance that procedural justice has on individuals

In the legal setting, an exploration of procedural justice in felony cases revealed that defendants’ evaluations of the judicial system did not depend exclusively on the favorability of sentencing.80 Even when verdicts involved incarceration and serious sanctions, litigant evaluations went beyond distributive outcomes to analyze their perceptions of the procedural fairness of the legal system.81 Additionally, while judges handling minor cases believed that litigants would ignore procedural issues when granted favorable outcomes, litigants’ concerns over process led to unanticipated hostilities when procedural shortcuts were used by the court to resolve cases.82 Thus, while outcomes cannot be entirely disregarded, the fairness of the process used to reach a given outcome is critical to perceptions of legitimacy.

Recent research highlights two reasons why procedural justice may be particularly important in the context of detentions. First, judgments of procedural fairness are particularly important to individuals experiencing uncertainty.83 Detainees lack the procedural certainties guaranteed in a regular criminal proceeding in that they frequently do not know how long they will be held, why they are being held, what evidence exists against them, and what degree of punishment they may face.84 Second, the greater the unfavorableness of the outcome and the larger the potential harm, the more individuals care about fair process.85 These findings are reflected in U.S. criminal law provisions requiring certain elements of procedural due process when serious sanctions are involved.86

It is also critical to extend procedural justice judgments beyond the individual detainee to the perspective of a worldwide audience. While it is easy to overlook how an alleged terrorist feels about the degree of procedural fairness he or she is receiving, the perceptions of governments, human rights organizations, political groups (including terrorist organizations), and millions of individuals (particularly those who closely identify with that individual’s race, religion, or nationality) cannot be ignored. Individuals become upset when they observe unfairness, and such observations motivate them to help victims of this unfairness.87 Thus, it would be a mistake to think that procedural injustice against a single individual will affect the perceptions of that individual alone.88 Additionally, efforts to hide procedural injustices, such as the abuse of detainees by U.S. soldiers,89 have only backfired by creating sympathy for the types of individuals that the United States seeks to dehumanize.90 In the next section, I identify six rules of procedural justice, evaluate the current detention regime based on these rules, and make recommendations about how these rules could be implemented in a DTC model.

#### Court rulings are the vital internal link to legitimacy – that solves global conflict – classical power dynamics mis-represent IR.

Knowles 09 (Robert, 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, October)

The 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.411 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.412 But the Guantánamo litigation demonstrated that ¶ American hegemony has altered this classic assumption as well. The ¶ 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 Guantánamo.413 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.414 Other nations learned about the treatment of ¶ their citizens through the information obtained by attorneys.415

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 courtsm 416—this was an exceptional ¶ situation. Foreign governments routinely lobby Congress for favorable ¶ foreign affairs legislation, and are more successful with less politically charged issues.417 Even “rogue states” such as Myanmar have their lobbyists ¶ in Washington.418 In addition, foreign governments facing unfavorable court ¶ decisions can and do appeal or seek reversal through political channels.419¶ 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.420 In the Guantánamo 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

Conclusion

When it comes to the constitutional regime of foreign affairs, geopolitics has always mattered. Understandings about America's role in the world have shaped foreign affairs doctrines. But the classic realist assumptions that support special deference do not reflect the world as it is today. A better, more realist, approach looks to the ways that the courts can reinforce and legitimize America's leadership role. The Supreme Court's rejection of the government's claimed exigencies in the enemy combatant cases strongly indicates that the Judiciary is becoming reconciled to the current world order and is asserting its prerogatives in response to the fewer constraints imposed on the executive branch. In other words, the courts are moving toward the hegemonic model. In the great dismal swamp that is the judicial treatment of foreign affairs, this transformation offers hope for clarity: the positive reality of the international system, despite terrorism and other serious challenges, permits the courts to reduce the "deference gap" between foreign and domestic cases.

#### Only legitimacy can foster ALLIANCE FORMATION and changes the INCENTIVE MODEL of adversaires

Gilber 08 (Douglas M Gibler 8, Department of Political Science University of Alabama, Tuscaloosa “The Costs of Reneging: Reputation and Alliance Formation” The Journal of Conflict Resolution, Vol. 52, No. 3, June, pp. 426-454)

More sophisticated treatments of the reputation logic have been produced by formal theorists, both in economics and in political science. In economics, the ability of firm reputation to deter competition has been well analyzed (see Kreps and Wilson, 1982; Wilson, 1989; and Weigelt and Camerer, 1988), and political scientists have adopted these theories as tools in understanding the types of signals leaders can send (see for example, Alt, Calvert, and Humes, 1988; Ordeshook, 1986; and Wagner, 1992). Sartori (2002) and Guisinger and Smith (2002) probably go furthest in arguing that leaders and their envoys have incentives to develop certain types of reputations in order to overcome the uncertainty endemic to crisis diplomacy. In these models, a reputation for honesty allows the sender to credibly give information that would otherwise be “cheap talk”, and thus, leaders may concede less important issues, without bluffing, in order to maintain a reputation for honesty when more important issues arise (Sartori, 2002: 122).

The sum argument of these statements and theoretical treatments is clear. Decision-makers argue and act, at least in part, based on reputations. Traditional deterrence theory suggests reputations should be pursued by leaders as important and manipulable tools, which are useful in future crises. Formal theorists agree; reputations provide valuable information when the costs of signaling are low.

#### US leadership is sustainable but the right policy choices are key – the alternative is power wars

Kempe 2012, Frederick Kempe, president and chief executive officer of the Atlantic Council, a foreign policy think tank and public policy group, President and Chief Executive Officer of the Atlantic Council since December 1, 2006, and is a Visiting Fellow at Oxford University's Saïd Business School, April 18, 2012, “Does America still want to lead the world?”, http://blogs.reuters.com/thinking-global/2012/04/18/does-america-still-want-to-lead-the-world/

For all their bitter differences, President Obama and Governor Romney share one overwhelming challenge. Whoever is elected will face the growing reality that the greatest risk to global stability over the next 20 years may be the nature of America itself. Nothing – not Iranian or North Korean nuclear weapons, not violent extremists or Mideast instability, not climate change or economic imbalances – will shape the world as profoundly as the ability of the United States to remzain an effective and confident world player advocating its traditional global purpose of individual rights and open societies. That was the conclusion of the Global Agenda Council on the United States, a group of experts that was brought together by the World Economic Forum and that I have chaired. Even more intriguing, our group tested our views on, among others, a set of Chinese officials and experts, who worried that we would face a world overwhelmed by chaos if the U.S. – facing resource restraints, leadership fatigue and domestic political dysfunction – disengaged from its global responsibilities. U.S. leadership, with all its shortcomings and missteps, has been the glue and underwriter of global stability since World War Two – more than any other nation. Even with the world experiencing its greatest shift of economic and political power since the 19th century, no other country is emerging – or looks likely to emerge – that would be as prepared or equipped to exercise leadership on behalf of the global good. Yet many in the world are questioning the role of U.S. leadership, the governance architecture it helped create and even the values for which the U.S. stands. Weary from a decade of war and strained financially, Americans themselves are rethinking whether they can afford global purpose. The election campaign is unlikely to shed much light on these issues, yet both candidates face an inescapable truth: How the U.S. evolves over the next 15 to 20 years will be most important single variable (and the greatest uncertainty) hovering over the global future. And the two most important elements that will shape the U.S. course, in the view of the Global Agenda Council on the United States, will be American intentions and the capability to act on them. In short, will Americans continue to see as part of their identity the championing of values such as individual opportunity and open societies that have contributed so richly to the global commons? Second, can the U.S. sufficiently address its domestic challenges to assure its economic, political and societal strength while the world changes at unprecedented velocity? Consider this: It took Great Britain 155 years to double its gross domestic product per capita in the 18th and 19th centuries, when it was the world’s leading power. It took the U.S. 50 years to do the same by 1950, when its population was 152 million. Both India and China have achieved the same growth on a scale and at a pace never experienced before. Both countries have more than a hundred times the population of Britain during its heyday, yet they are achieving similar outcomes in a tenth of the time. Although China will likely surpass the U.S. as the world’s largest economy by 2030, Americans retain distinct advantages that could allow them to remain the pivotal power. Think of Uncle Sam as a poker player sitting at a global table of cohorts, holding better cards than anyone else: a free and vibrant society, a history of technological innovation, an ability to attract capital and generate jobs, and a relatively young and regenerating population. However, it doesn’t matter how good your cards are if you’re playing them poorly. Put another way, the candidate who wins in November is going to be faced with the reality summed up by the cartoon character Pogo in 1971 as he was trying to make his way through a prickly primeval forest without proper footwear: “We have met the enemy and he is us.” Imagine two very different scenarios for the world, based on how America rises to its challenges. The positive scenario would require whoever is elected in November to be a unifier, someone who can rise above our current squabbles and galvanize not only the U.S. but also the world around a greater understanding of this historic moment. He would address the larger U.S. issues of failing infrastructure, falling educational standards, widening deficits and spiraling healthcare costs. He would partner more effectively with rising powers, and China in particular. And he would recognize and act upon the strategic stake the U.S. has in a politically confident, economically healthy Europe. The doubling of the global middle class by a billion people by 2030 plays into U.S. political and economic strengths, increasing demand for the products and services of information technology where the U.S. excels. Developments that improve the extraction of shale natural gas and oil provide the U.S. and some of its allies disproportionate benefits. Under this positive scenario, the U.S. could log growth rates of 2.7 percent or more each year, compared with 2.5 percent over the past 20 years. Average living standards could rise by 40 percent through 2030, keeping alive the American dream and restoring the global attractiveness of the U.S. model. The negative scenario results from a U.S. that fails to rise to its current challenges. Great powers decline when they fail to address the problems they recognize. U.S. growth could slow to an average of 1.5 percent per year, if that. The knock-on impact on the world economy could be a half-percent per year. The shift in the perception of the U.S. as a descending power would be more pronounced. This sort of United States would be increasingly incapable of leading and disinclined to try. It is an America that would be more likely to be protectionist and less likely to retool global institutions to make them more effective. One can already see hints of what such a world would look like. Middle Eastern diplomats in Washington say the failure of the U.S. to orchestrate a more coherent and generous transatlantic and international response to their region’s upheavals has resulted in a free-for-all for influence that is favoring some of the least enlightened players. Although the U.S. has responded to the euro zone crisis, as a result of its own economic fears, it hasn’t offered a larger vision for the transatlantic future that recognizes its enormous strategic stake in Europe’s future, given global shifts of influence. The U.S. played a dominant role in reconstructing the post-World War Two international order. The question is whether it will do so again or instead contribute to a dangerous global power vacuum that no one over the next two decades is willing or capable of filling.

#### Material power is irrelevant – only legitimacy can solve great power wars.

Finnemore 09 (Martha Finnemore 9, professor of political science and international affairs at George Washington University, January 2009, “Legitimacy, Hypocrisy, and the Social Structure of Unipolarity: Why Being a Unipole Isn’t All It’s Cracked Up to Be,” World Politics, Volume 61, Number 1)

Legitimacy is, by its nature, a social and relational phenomenon. One’s position or power cannot be legitimate in a vacuum. The concept only has meaning in a particular social context. Actors, even unipoles, cannot create legitimacy unilaterally. Legitimacy can only be given by others. It is conferred either by peers, as when great powers accept or reject the actions of another power, or by those upon whom power is exercised. Reasons to confer legitimacy have varied throughout history. Tradition, blood, and claims of divine right have all provided reasons to confer legitimacy, although in contemporary politics conformity with [End Page 61] international norms and law is more influential in determining which actors and actions will be accepted as legitimate. 9

Recognizing the legitimacy of power does not mean these others necessarily like the powerful or their policies, but it implies at least tacit acceptance of the social structure in which power is exercised. One may not like the inequalities of global capitalism but still believe that markets are the only realistic or likely way to organize successful economic growth. One may not like the P5 vetoes of the Security Council but still understand that the United Nations cannot exist without this concession to power asymmetries. We can see the importance of legitimacy by thinking about its absence. Active rejection of social structures and the withdrawal of recognition of their legitimacy create a crisis. In domestic politics, regimes suffering legitimacy crises face resistance, whether passive or active and armed. Internationally, systems suffering legitimacy crises tend to be violent and noncooperative. Post-Reformation Europe might be an example of such a system. Without at least tacit acceptance of power’s legitimacy, the wheels of international social life get derailed. Material force alone remains to impose order, and order creation or maintenance by that means is difficult, even under unipolarity. Successful and stable orders require the grease of some legitimation structure to persist and prosper.10

The social and relational character of legitimacy thus strongly colors the nature of any unipolar order and the kinds of orders a unipole can construct. Yes, unipoles can impose their will, but only to an extent. The willingness of others to recognize the legitimacy of a unipole’s actions and defer to its wishes or judgment shapes the character of the order that will emerge. Unipolar power without any underlying legitimacy will have a very particular character. The unipole’s policies will meet with resistance, either active or passive, at every turn. Cooperation will be induced only through material quid pro quo payoffs. Trust will be thin to nonexistent. This is obviously an expensive system to run and few unipoles have tried to do so.

#### Inevitable power diffusion makes Material Power irrelevant—institutional cred solves major global problems

Nye 09 — Joseph S. Nye, Jr., University Distinguished Service Professor and Former Dean of the Kennedy School of Government at Harvard University, served as Assistant Secretary of Defense for International Security Affairs, Chair of the National Intelligence Council, and Deputy Under Secretary of State for Security Assistance, Science and Technology, holds a Ph.D. in Political Science from Harvard University, 2009 (“American Power in the Twenty-First Century,” *Project Syndicate*, September 10th, Available Online at http://www.project-syndicate.org/print/american-power-in-the-twenty-first-century)

The United States government’s National Intelligence Council projects that American dominance will be “much diminished” by 2025, and that the one key area of continued American superiority – military power – will be less significant in the increasingly competitive world of the future. Russian President Dmitri Medvedev has called the 2008 financial crisis a sign that America’s global leadership is coming to an end. The leader of Canada’s opposition Liberal Party, Michael Ignatieff, suggests that US power has passed its mid-day. How can we know if these predictions are correct?

One should beware of misleading metaphors of organic decline. Countries are not like humans with predictable life spans. For example, after Britain lost its American colonies at the end of the eighteenth century, Horace Walpole lamented Britain’s reduction to “as insignificant a country as Denmark or Sardinia.” He failed to foresee that the industrial revolution would give Britain a second century of even greater ascendency.

Rome remained dominant for more than three centuries after the apogee of Roman power. Even then, Rome did not succumb to another state, but suffered a death of a thousand cuts inflicted by various barbarian tribes. Indeed, for all the fashionable predictions of China, India, or Brazil surpassing the US in the coming decades, the classical transition of power among great states may be less of a problem than the rise of modern barbarians – non-state actors. In an information-based world of cyber-insecurity, power diffusion may be a greater threat than power transition

So, what will it mean to wield power in the global information age of the twenty-first century? What resources will produce power? In the sixteenth century, control of colonies and gold bullion gave Spain the edge; seventeenth-century Holland profited from trade and finance; eighteenth-century France gained from its larger population and armies; and nineteenth-century British power rested on its industrial primacy and its navy.

Conventional wisdom has always held that the state with the largest military prevails, but in an information age it may be the state (or non-state) with the best story that wins. Today, it is far from clear how the balance of power is measured, much less how to develop successful survival strategies.

In his inaugural address in 2009, President Barack Obama stated that “our power grows through its prudent use; our security emanates from the justness of our cause, the force of our example, the tempering qualities of humility and restraint.” Shortly thereafter, Secretary of State Hillary Clinton said, “America cannot solve the most pressing problems on our own, and the world cannot solve them without America. We must use what has been called ‘smart power,’ the full range of tools at our disposal.” Smart power means the combination of the hard power of command and the soft power of attraction.

Power always depends on context. The child who dominates on the playground may become a laggard when the context changes to a disciplined classroom. In the middle of the twentieth century, Josef Stalin scornfully asked how many divisions the Pope had, but four decades later, the Papacy was still intact while Stalin’s empire had collapsed.

In today’s world, the distribution of power varies with the context. It is distributed in a pattern that resembles a three-dimensional chess game. On the top chessboard, military power is largely unipolar, and the US is likely to remain the only superpower for some time. But on the middle chessboard, economic power has already been multi-polar for more than a decade, with the US, Europe, Japan, and China as the major players, and others gaining in importance.

The bottom chessboard is the realm of cross-border transactions that occur outside of government control. It includes diverse non-state actors, such as bankers electronically transferring sums larger than most national budgets, and, at the other extreme, terrorists transferring weapons or hackers threatening cyber-security. It also includes new challenges like pandemics and climate change.

On this bottom board, power is widely dispersed, and it makes no sense to speak of unipolarity, multipolarity, hegemony, or any other cliché. Even in the aftermath of the financial crisis, the giddy pace of technological change is likely to continue to drive globalization and transnational challenges.

The problem for American power in the twenty-first century is that there are more and more things outside the control of even the most powerful state. Although the US does well on military measures, there is much going on that those measures fail to capture.

Under the influence of the information revolution and globalization, world politics is changing in a way that prevents America from achieving all its international goals acting alone. For example, international financial stability is vital to Americans’ prosperity, but the US needs the cooperation of others to ensure it. Global climate change, too, will affect Americans’ quality of life, but the US cannot manage the problem alone.

In a world where borders are more porous than ever to everything from drugs to infectious diseases to terrorism, America must help build international coalitions and institutions to address shared threats and challenges. In this sense, power becomes a positive sum game.

It is not enough to think in terms of power over others. One must also think in terms of power to accomplish goals. On many transnational issues, empowering others can help to accomplish one’s own goals. In this world, networks and connectedness become an important source of relevant power. The problem of American power in the twenty-first century is not one of decline, but of recognizing that even the most powerful country cannot achieve its aims without the help of others.

### 1AC Advantage

#### Contention \_\_ is Democracy

#### Democratic liberalism is backsliding now---the US model of an unrestrained executive causes collapse

Diamond 09 (Larry Diamond 9, Professor of Political Science and Sociology @ Stanford, “The Impact of the Global Financial Crisis on Democracy”, Presented to the SAIS-CGD Conference on New Ideas in Development after the Financial Crisis, Conference Paper that can be found on his Vita)

Concern about the future of democracy is further warranted by the gathering signs of a democratic recession, even before the onset of the global economic recession. During the past decade, the global expansion of democracy has essentially leveled off and hit an equilibrium While freedom (political rights and civil liberties) continued to expand throughout the post-Cold War era, that progress also halted in 2006, and 2007 and 2008 were the worst consecutive years for freedom since the end of the Cold War, with the number of countries declining in freedom greatly outstripping the number that improved. Two-thirds of all the breakdowns of democracy since the third wave began in 1974 have occurred in the last nine years, and in a number of strategically important states like Russia, Nigeria, Venezuela, Pakistan and Thailand. Many of these countries have not really returned to democracy. And a number of countries linger in a twilight zone between democracy and authoritarianism. While normative support for democracy has grown around the world, it remains in many countries, tentative and uneven, or is even eroding under the weight of growing public cynicism about corruption and the self-interested behavior of parties and politicians. Only about half of the public, on average, in Africa and Asia meets a rigorous, multidimensional test of support for democracy. Levels of distrust for political institutions—particularly political parties and legislatures, and politicians in general—are very high in Eastern Europe and Latin America, and in parts of Asia. In many countries, 30-50 percent of the public or more is willing to consider some authoritarian alternative to democracy, such as military or one-man rule. And where governance is bad or elections are rigged and the public cannot rotate leaders out of power, skepticism and defection from democracy grow. Of the roughly 80 new democracies that have emerged during the third wave and are still standing, probably close to three-quarters are insecure and could run some risk of reversal during adverse global and domestic circumstances. Less at risk—and probably mostly consolidated—are the more established developing country democracies (India, Costa Rica, Botswana, Mauritius), and the more liberal democracies of this group: the ten postcommunist states that have been admitted to the EU; Korea and Taiwan; Chile, Uruguay, Panama, Brazil, probably Argentina; a number of liberal island states in the Caribbean and Pacific. This leaves about 50 democracies and near democracies—including such big and strategically important states as Turkey, Ukraine, Indonesia, the Philippines, South Africa, certainly Pakistan and Bangladesh, and possibly even Mexico—where the survival of constitutional rule cannot be taken for granted. In some of these countries, like South Africa, the demise of democracy would probably come, if it happened, not as a result of a blatant overthrow of the current system, but rather via a gradual executive strangling of political pluralism and freedom, or a steady decline in state capacity and political order due to rising criminal and ethnic violence. Such circumstances would also swallow whatever hopes exist for the emergence of genuine democracy in countries like Iraq and Afghanistan and for the effective restoration of democracy in countries like Thailand and Nepal.

#### Promoting a strong judiciary is necessary to make those transitions stable and democratic—detention policies specifically allow for global authoritarianism – specifically in Africa & Malasia

CJA 03 (Center for Justice and Accountability, OCTOBER 2003, The Center for Justice & Accountability (“CJA”) seeks, by use of the legal systems, to deter torture and other human rights abuses around the world., “BRIEF OF the CENTER FOR JUSTICE AND ACCOUNTABILITY, the INTERNATIONAL LEAGUE FOR HUMAN RIGHTS, and INDIVIDUAL ADVOCATES for the INDEPENDENCE of the JUDICIARY in EMERGING DEMOCRACIES as AMICI CURIAE IN SUPPORT OF PETITIONERS”, <http://www.cja.org/downloads/Al-Odah_Odah_v_US___Rasul_v_Bush_CJA_Amicus_SCOTUS.pdf>)

A STRONG, INDEPENDENT JUDICIARY IS ESSENTIAL TO THE PROTECTION OF INDIVIDUAL FREEDOMS AND THE ESTABLISHMENT OF STABLE GOVERNANCE IN EMERGING DEMOCRACIES AROUND THE WORLD.

A. Individual Nations Have Accepted and Are Seeking to Implement Judicial Review By A Strong, Independent Judiciary.

Many of the newly independent governments that have proliferated over the past five decades have adopted these ideals. They have emerged from a variety of less-than-free contexts, including the end of European colonial rule in the 1950's and 1960's, the end of the Cold War and the breakup of the former Soviet Union in the late 1980's and 1990's, the disintegration of Yugoslavia, and the continuing turmoil in parts of Africa, Latin America and southern Asia. Some countries have successfully transitioned to stable and democratic forms of government that protect individual freedoms and human rights by means of judicial review by a strong and independent judiciary. Others have suffered the rise of tyrannical and oppressive rulers who consolidated their hold on power in part by diminishing or abolishing the role of the judiciary. And still others hang in the balance, struggling against the onslaught of tyrants to establish stable, democratic governments.

In their attempts to shed their tyrannical pasts and to ensure the protection of individual rights, emerging democracies have consistently looked to the United States and its Constitution in fashioning frameworks that safeguard the independence of their judiciaries. See Ran Hirschl, The Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Four Constitutional Revolutions, 25 Law & Soc. Inquiry 91, 92 (2000) (stating that of the “[m]any countries . . . [that] have engaged in fundamental constitutional reform over the past three decades,” nearly all adopted “a bill of rights and establishe[d] some form of active judicial review”) Establishing judicial review by a strong and independent judiciary is a critical step in stabilizing and protecting these new democracies. See Christopher M. Larkins, Judicial Independence and Democratization: A Theoretical and Conceptual Analysis, 44 Am. J. Comp. L. 605, 605-06 (1996) (describing the judicial branch as having "a uniquely important role" in transitional countries, not only to "mediate conflicts between political actors but also [to] prevent the arbitrary exercise of government power; see also Daniel C. Prefontaine and Joanne Lee, The Rule of Law and the Independence of the Judiciary, International Centre for Criminal Law Reform and Criminal Justice Policy (1998) ("There is increasing acknowledgment that an independent judiciary is the key to upholding the rule of law in a free society . . . . Most countries in transition from dictatorships and/or statist economies recognize the need to create a more stable system of governance, based on the rule of law."), available at http://www.icclr.law.ubc.ca/Publications/Reports/RuleofLaw. pdf (last visited Jan. 8, 2004). Although the precise form of government differs among countries, “they ultimately constitute variations within, not from, the American model of constitutionalism . . . [a] specific set of fundamental rights and liberties has the status of supreme law, is entrenched against amendment or repeal . . . and is enforced by an independent court . . . .” Stephen Gardbaum, The New Commonwealth Model of Constitutionalism, 49 Am. J. Comp. L. 707, 718 (2001).

This phenomenon became most notable worldwide after World War II when certain countries, such as Germany, Italy, and Japan, embraced independent judiciaries following their bitter experiences under totalitarian regimes. See id. at 714- 15; see also United States v. Then, 56 F.3d 464, 469 (2d Cir. 1995) (Calabresi, J., concurring) (“Since World War II, many countries have adopted forms of judicial review, which — though different from ours in many particulars — unmistakably draw their origin and inspiration from American constitutional theory and practice. See generally Mauro Cappelletti, The Judicial Process in Comparative Perspective (Oxford: Clarendon Press, 1989).”). It is a trend that continues to this day. It bears mention that the United States has consistently affirmed and encouraged the establishment of independent judiciaries in emerging democracies. In September 2000, President Clinton observed that "[w]ithout the rule of law, elections simply offer a choice of dictators. . . . America's experience should be put to use to advance the rule of law, where democracy's roots are looking for room and strength to grow." Remarks at Georgetown University Law School, 36 Weekly Comp. Pres. Doc. 2218 (September 26, 2000), available at http://clinton6.nara.gov/2000/09/2000-09-26- remarks-by-president-at-georgetown-international-lawcenter.html. The United States acts on these principles in part through the assistance it provides to developing nations. For example, the United States requires that any country seeking assistance through the Millenium Challenge Account, a development assistance program instituted in 2002, must demonstrate, among other criteria, an "adherence to the rule of law." The White House noted that the rule of law is one of the "essential conditions for successful development" of these countries. See http://www.whitehouse.gov/infocus/developingnations (last visited Jan. 8, 2004).12

A few examples illustrate the influence of the United States model. On November 28, 1998, Albania adopted a new constitution, representing the culmination of eight years of democratic reform after the communist rule collapsed. In addition to protecting fundamental individual rights, the Albanian Constitution provides for an independent judiciary consisting of a Constitutional Court with final authority to determine the constitutional rights of individuals. Albanian Constitution, Article 125, Item 1 and Article 128; see also Darian Pavli, "A Brief 'Constitutional History' of Albania" available at http://www.ipls.org/services/others/chist.html (last visited Janaury 8, 2004); Jean-Marie Henckaerts & Stefaan Van der Jeught, Human Rights Protection Under the New Constitutions of Central Europe, 20 Loy. L.A. Int’l & Comp. L.J. 475 (Mar. 1998).

In South Africa, the new constitutional judiciary plays a similarly important role, following generations of an oppressive apartheid regime. South Africa adopted a new constitution in 1996. Constitution of the Republic of South Africa, Explanatory Memorandum. It establishes a Constitutional Court which “makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional.” Id. at Chapter 8, Section 167, Item (5), available at http://www.polity.org.za/html/govdocs/constitution/saconst.html?r ebookmark=1 (last visited January 8, 2004); see also Justice Tholakele H. Madala, Rule Under Apartheid and the Fledgling Democracy in Post-Apartheid South Africa: The Role of the Judiciary, 26 N.C. J. Int’l L. & Com. Reg. 743 (Summer 2001).

Afghanistan is perhaps the most recent example of a country struggling to develop a more democratic form of government. Adoption by the Loya Jirga of Afghanistan's new constitution on January 4, 2004 has been hailed as a milestone. See http://www.cbsnews.com/stories/2004/01/02/world/main59111 6.shtml (Jan 7, 2004). The proposed constitution creates a judiciary that, at least on paper, is "an independent organ of the state," with a Supreme Court empowered to review the constitutionality of laws at the request of the Government and/or the Courts. Afghan Const. Art. 116, 121 (unofficial English translation), available at http://www.hazara.net/jirga/AfghanConstitution-Final.pdf (last visited January 8, 2004). See also Ron Synowitz, Afghanistan: Constitutional Commission Chairman Presents Karzai with Long-Delayed Draft Constitution (November 3, 2003), available at http://www.rferl.org/nca/features/2003/11/03112003164239.as p (last visited Jan. 8, 2004).

B. Other Nations Have Curtailed Judicial Review During Times Of Crisis, Often Citing the United States' Example, And Individual Freedoms Have Diminished As A Result.

While much of the world is moving to adopt the institutions necessary to secure individual rights, many still regularly abuse these rights. One of the hallmarks of tyranny is the lack of a strong and independent judiciary. Not surprisingly, where countries make the sad transition to tyranny, one of the first victims is the judiciary. Many of the rulers that go down that road justify their actions on the basis of national security and the fight against terrorism, and, disturbingly, many claim to be modeling their actions on the United States.

Again, a few examples illustrate this trend. In Peru, one of former President Alberto Fujimori’s first acts in seizing control was to assume direct executive control of the judiciary, claiming that it was justified by the threat of domestic terrorism. He then imprisoned thousands, refusing the right of the judiciary to intervene. International Commission of Jurists, Attacks on Justice 2000-Peru, August 13, 2001, available at http://www.icj.org/news.php3?id\_article=2587&lang=en (last visited Jan. 8, 2004).

In Zimbabwe, President Mugabe’s rise to dictatorship has been punctuated by threats of violence to and the co-opting of the judiciary. He now enjoys virtually total control over Zimbabweans' individual rights and the entire political system. R.W. Johnson, Mugabe’s Agents in Plot to Kill Opposition Chief, Sunday Times (London), June 10, 2001; International Commission of Jurists, Attacks on Justice 2002— Zimbabwe, August 27, 2002, available at http://www.icj.org/news.php3?id\_article=2695&lang=en (last visited Jan. 8, 2004).

While Peru and Zimbabwe represent an extreme, the independence of the judiciary is under assault in less brazen ways in a variety of countries today. A highly troubling aspect of this trend is the fact that in many of these instances those perpetuating the assaults on the judiciary have pointed to the United States’ model to justify their actions. Indeed, many have specifically referenced the United States’ actions in detaining persons in Guantánamo Bay.

For example, Rais Yatim, Malaysia's "de facto law minister" explicitly relied on the detentions at Guantánamo to justify Malaysia's detention of more than 70 suspected Islamic militants for over two years. Rais stated that Malyasia's detentions were "just like the process in Guantánamo," adding, "I put the equation with Guantánamo just to make it graphic to you that this is not simply a Malaysian style of doing things." Sean Yoong, "Malaysia Slams Criticism of Security Law Allowing Detention Without Trial," Associated Press, September 9, 2003 (available from Westlaw at 9/9/03 APWIRES 09:34:00).

Similarly, when responding to a United States Government human rights report that listed rights violations in Namibia, Namibia's Information Permanent Secretary Mocks Shivute cited the Guantánamo Bay detentions, claiming that "the US government was the worst human rights violator in the world." BBC Monitoring, March 8, 2002, available at 2002 WL 15938703.

Nor is this disturbing trend limited to these specific examples. At a recent conference held at the Carter Center in Atlanta, President Carter, specifically citing the Guantánamo Bay detentions, noted that the erosion of civil liberties in the United States has "given a blank check to nations who are inclined to violate human rights already." Doug Gross, "Carter: U.S. human rights missteps embolden foreign dictators," Associated Press Newswires, November 12, 2003 (available from Westlaw at 11/12/03 APWIRES 00:30:26). At the same conference, Professor Saad Ibrahim of the American University in Cairo (who was jailed for seven years after exposing fraud in the Egyptian election process) said, "Every dictator in the world is using what the United States has done under the Patriot Act . . . to justify their past violations of human rights and to declare a license to continue to violate human rights." Id.

Likewise, Shehu Sani, president of the Kaduna, Nigeriabased Civil Rights Congress, wrote in the International Herald Tribune on September 15, 2003 that "[t]he insistence by the Bush administration on keeping Taliban and Al Quaeda captives in indefinite detention in Guantánamo Bay, Cuba, instead of in jails in the United States — and the White House's preference for military tribunals over regular courts — helps create a free license for tyranny in Africa. It helps justify Egypt's move to detain human rights campaigners as threats to national security, and does the same for similar measures by the governments of Ivory Coast, Cameroon and Burkina Faso." Available at http://www.iht.com/ihtsearch.php?id=109927&owner=(IHT)&dat e=20030121123259.

In our uni-polar world, the United States obviously sets an important example on these issues. As reflected in the foundational documents of the United Nations and many other such agreements, the international community has consistently affirmed the value of an independent judiciary to the defense of universally recognized human rights. In the crucible of actual practice within nations, many have looked to the United States model when developing independent judiciaries with the ability to check executive power in the defense of individual rights. Yet others have justified abuses by reference to the conduct of the United States. Far more influential than the words of Montesquieu and Madison are the actions of the United States. This case starkly presents the question of which model this Court will set for the world.

CONCLUSION

Much of the world models itself after this country’s two hundred year old traditions — and still more on its day to day implementation and expression of those traditions. To say that a refusal to exercise jurisdiction in this case will have global implications is not mere rhetoric. Resting on this Court’s decision is not only the necessary role this Court has historically played in this country. Also at stake are the freedoms that many in emerging democracies around the globe seek to ensure for their peoples.

#### Rule of law and detention policy is key to malay political stability

ALRC 03 (Asian Legal Resource Centre, “21. Political detention under Malaysia's Internal Security Act”, [E/CN.4/2003/NGO/93]<http://www.alrc.net/doc/mainfile.php/59written_item11f/187/>)

Political detention under Malaysia's Internal Security Act

1. In its written statement on National Security Laws in Asia submitted to the fifty-eighth session of the Commission (E/CN.4/2002/NGO/78), the Asian Legal Resource Centre addressed the use of Malaysia's Internal Security Act (ISA) as a political tool. Beginning from April 2001, nearly thirty reformist and political activists from opposition political parties and non-government organizations were arrested and detained without trial under the ISA. To date, four of those activists remain in detention, despite a Federal Court ruling that their initial 60-day detention was unlawful. The grounds used by the Federal Court to permit their continued detention do massive damage to the rule of law in Malaysia.

2. Malaysia's ISA was re-enacted in 1960, an inheritance from the British colonial regime. It provides for indefinite detention without charge or trial. Section 73 empowers police to arrest those suspected of committing activities prejudicial to national security and allows for initial detention of up to 60 days. After the expiry of this period, the police may recommend that the Minister for Home Affairs issue a two-year renewable detention order under section 8.

3. Since the events of 11 September 2001, the Government of Malaysia has used the global security environment to justify its continued use of the ISA against political opponents. The October 2002 Bail bombing in Indonesia and more recent arrests of alleged terrorists in Singapore have given it fresh impetus. Whereas in the past thousands of people were detained under Malaysia's ISA on the grounds of being procommunist, now they may be detained without trial on allegations of being involved in militant Islamic movements or other terrorist organizations. Currently there are over 100 ISA detainees in Malaysia, however most pose a political and not a security threat.

4. Over the last 20 years, political power in Malaysia has become increasingly concentrated in the hands of Prime Minister Dr Mahathir Mohamad. Mahathir's government has long been criticized both locally and overseas for its use and abuse of the ISA. Amid growing political instability, on 10 April 2001 the Mahathir regime began to arrest nearly 30 political opponents on the grounds that they were plotting to overthrow the government by militant means. Among them, five remained under detention up to September 2002: the leaders of the National Justice Party (keADILan) Tian Chua, Mohd Ezam Mohd Nor and Saari Sungib; Malaysiakini columnist Hishamuddin Rais; and, Free Anwar Campaign director Raja Petra Raja Kamaruddin.

#### Malaysia will determine the future of the “arc of instability.” It will make or break the region’s democratic transition

Ding 13 - Senior editor with People's Daily stationed in Bangkok [Ding Gang, “Malaysia sets democratic example in SE Asia,” Global Times | 2013-5-8 20:18:01, pg. http://www.globaltimes.cn/content/780236.shtml#.Uk1LRiQZ8eM

Malaysia has a population of 29 million, 55 percent of which are **Malaysian Muslims** who **have played an** important role **in the country's** political traditions**, especially legal systems**.   
Meanwhile, **Malaysia is a multi-ethnic federal constitutional elective monarchy, with the Malays, Chinese and Indians as the main ethnic groups**.  
For a long time, the bumiputra (native Malays) have taken a dominant position in the country's politics, and some policies considered discriminatory to other ethnic groups have been issued. The ethnic Chinese **are particularly discontent** with it.   
Many members of the Chinese elite thus went abroad, resulting in the stagnation of the Malaysian economy. This partly explains why Malaysia cannot escape the middle-income trap.  
Nonetheless, **among Muslim-majority countries, Malaysia has kept a stable and swift development**. Together with Indonesia and Thailand, **it** is one of **the** three **core** countries **in** ASEAN in terms of economic development.  
T**he geopolitical status of Malaysia is** more **important**. **It is situated at the borderland of Muslim countries**. **Northward are** Buddhist countries such as **Thailand, Myanmar and Cambodia. Its eastern border lies close to** **the** mostly Catholic **Philippines. The whole region**, due to its religious and ethnic complexities, **is** often called **the "**arc of instability."  
**In southern Thailand, Muslim separatists carry out bombings almost every day. In Myanmar, religious violence** between Buddhists and Muslims **is increasingly fierce**. In Bangladesh, a recent Muslim protest has led to dozens of deaths. **Frictions between Muslims and Christians are constant in Indonesia**, and in the Philippines, although the Moro Islamic Liberation Front, a Muslim rebel group, has agreed with the government on a cease-fire, attacks occasionally take place.   
In recent years, development in **Malaysia** has **serve**d **as a** stabilizer in Southeast Asia. Not long ago, **the Malaysian government was actively involved in** mediating the peace talks **between** the **Thailand** and **the Philippines** governments **and** their **Islamic separatists.**   
Therefore, **the** political evolvement **of Malaysia**, **especially whether it can** progress in developing the economy, curing corruption and **narrow**ing **ethnic discrepancies**, **has particular implications for the region and even the whole Muslim world.  
For multi-ethnic countries** such as Myanmar, Malaysia's experiment **in drawing more ethnic groups** to involve **into the** current **political system** so as **to realize progressive rather than radical reforms is worth trying for too.**In the future, **the key for Malaysi**a's stable development **may be turning religious and ethnic conflicts into orderly competition** under its elective political system, and pushing forward manageable reforms at a time of greater political awareness.

#### China and other great powers will get drawn in. Sealanes of communication are at risk

Beazley 03 – Member of the Australian House of Representatives [Kim C. Beazley, “Arc of Instability,” National Observer, No. 57, Winter 2003, pg. http://www.nationalobserver.net/2003\_winter\_107.htm

Can I say that I believe that emphatically not to be the case? **The** success of Indonesia's democratic experiment as a unified Republic **is in Australia's interest**. The environment that would be created by its decomposition would pose major diplomatic, security and economic issues for this country. One of the vital planks of Australian security for at least the last forty years has been the fact that we have confronted a benign neighbour, determined to contribute to broader regional stability. **A policy to experiment with alternatives would be,** in security and in human terms, **disastrous.** This is so for the following reasons.

Bloody though East Timor's separation was, it would be nothing compared to this process. Secessionists in West Irian and elsewhere **would be vigorously and bloodily resisted**.

**The environment with dissipating central control would be a fertile field for** piracy, trans-national crime and terrorism.

**This process would destabilise Southeast Asia**, with large refugee flows to Malaysia and Singapore, and possibly also to us. These flows might link up with insurgency in the Philippines.

China might be activated **(if this were accompanied by persecution of Chinese nationalists — some seven million) with** the possibility ofother powers being drawn **into the vortex**.

**Serious problems would arise for the** shipping lanes **through which pass some** fifty per cent of the world’s trade.

Of course none of this would happen overnight — **it would be a long, drawn out process with manifestations** of the problem and the complication of our policy **continuing for years. It would be very difficult not to see pressures emerging for** Australian **military engagement** in some of this. We are already committed practically to East Timor, and Indonesian fragmentation would substantially increase the economic and security problems associated with that commitment. We have recognised from the outset Timor's ability to enjoy a reasonable relationship with a stable Indonesia as central to ensuring the sustainability of that commitment.

In recent times **analysts have extended the "**arc of instability**"** to incorporate deeply troubled Melanesia as well. **The stark assessment of the Australian Strategic Policy Institute** last year **was**, "**Unless the quality of government** in the South West Pacific **can be restored**, and social and economic development resumed, **we risk seeing our neighbourhood degenerate into lawless badlands, ruled** **more by criminals than by legitimate governments."**

#### Crisis risks wars with the US, Japan and India. China’s paranoia about the SLOCs will overwhelm cooperation

Blumenthal & Lin 06 - Resident fellow in Asian studies @ American Enterprise Institute & Researcher @ AEI [DAN BLUMENTHAL & JOSEPH LIN, “Oil obsession: Energy appetite fuels Beijing’s plans to protect vital sea lines,” Armed Forces Journal, June 2006, pg. <http://www.armedforcesjournal.com/2006/06/1813592/>

This central fact has become a near-obsession for the Chinese leadership; almost as important as President Hu Jintao’s recent visit to Washington were his further stops in Nigeria — where China’s state oil company just completed a $2 billion deal — and Saudi Arabia. **Beijing’s** growing **dependency on foreign energy** supplies **casts a shadow over its** continued economic **growth and**, crucially, the future of a communist government whose **legitimacy** is tied to that growth’s sustainability. Chinese officials and scholars are concerned that **the** regime cannot survive a major disruption in imports and have begun taking steps to redress what they view as their greatest vulnerabilities.

In thinking through the problem of their energy insecurity, Chinese strategists are taking a page from the American book. Listening in on the conversations of these strategists as expressed in their internal papers and publications, they sound like no one more than Alfred Thayer Mahan, the godfather of the modern U.S. Navy. Seeing the maritime world through Chinese eyes begins to make sense of what the People’s Liberation Army Navy is doing in its frenetic modernization program.

**A focus** **of Chinese concern has been** on the security — or, more properly, **the** **insecurity** — **of the** sea lines of communication (**SLOC**) **upon which** almost all of **China’s energy imports travel. China’s strategists are aware** they do not exercise naval superiority through the seas linking their ports to the major oil producers in the Middle East, and **that they remain dependent upon the willingness of other major powers not to disrupt their imports**. In November 2003, **Hu** reportedly **used a closed government working session to** declare that “certain major powers” were trying to dominate the Strait of Malacca, through which 80 percent of China’s energy imports pass. In response, Hu **call**ed **for the** development of new sources of crude oiland the adoption of measures **to overcome** what the Chinese media termed **China’s “Malacca Dilemma**.”

It should come as little surprise that the certain major power **Chinese strategists are** most suspicious of is the U.S., **which exercises control over the major choke points** on the world’s SLOCs. As Zhao Nianyu of the Shanghai Institute of International Studies points out in “The Three Major Challenges to China’s Energy Strategy,” in the event of a crisis between Washington and Beijing over Taiwan, the U.S. could blockade the Malacca Strait and hold China’s oil supply hostage. As evidence of such a scenario, Zhao and his colleagues point to the April 2004 “Regional Military Security Initiative” as a first step by the U.S. military to “garrison the Strait” under the guise of “counterterrorist measures.”

**Zhao also fingers** Japan **as one** of the major obstacles **to** Chinese **energy security**, **pointing out that** it faces the same “energy bottleneck” in **the zero-sum game of energy imports, a dilemma that will worsen over time**. And if Japan is viewed as an immediate competitor, **Chinese strategists are concerned about** India’s intentions as well. In “Will India Become a New Barrier to Obstruct China?” Lan Jianxue of the Chinese Academy of Social Sciences voices his suspicions that the U.S. will use India as a “potential balancing force against China.” Beijing cannot be expected to welcome India’s measures to upgrade its naval facilities at the Andaman and Nicobar Islands or post-Sept. 11 joint patrols of the Malacca Strait with the U.S.

**Even if China manages its relations with the great powers, it could still be at risk**. Academy scholar Zhang Jie argues in “The Malacca Factor of China’s Energy Security” that the combination of Islamic terrorism and piracy could threaten maritime traffic in the Malacca Strait and even the stability of such Muslim littoral states as Indonesia and Malaysia.

As the U.S. did before it was unable to project global naval power, China’s first line of strategy has been diplomacy. In response to these myriad energy-security challenges, these scholars argue for a range of policies, most of which focus (in the near term) on **diplomatic efforts** **to shore up** stability in energy-producing regions and affect **energy cooperation** with other consumers. The main problem with these proposals is they **are** conceptually undermined by the paranoia **that drives Chinese thinking on energy security**.

The Academy’s Zhang Jie, for example, argues that China should oppose deployment of foreign soldiers to the Malacca Strait while developing an “ASEAN+3” (Association of Southeast Asian Nations plus South Korea, Japan and China) framework to maintain security in the Strait. She also suggests China take the lead in creating an “Energy Community” among China, Japan and Korea in order to manage energy competition in northeast Asia.

Likewise, Xia Liping of the Shanghai Institute argues in “The Current U.S. International Energy Strategy and Sino-U.S. Cooperation” that there is great **potential** for **cooperation between the U.S. and China.** He argues for a Sino-American led multilateral framework **to coordinate international energy policies** in order to stabilize international oil-market prices, joint anti-piracy and anti-terrorism efforts to ensure the safety of the SLOCs, and cooperation to develop nuclear energy and clean coal technology. But these ideas **are** countered by deeply rooted Chinese suspicions **about the U.S. and its allies**. Zhao of SIIS, for example, argues that the U.S. attempt to dominate the world’s energy artery would doom any prospects of Sino-American cooperation.

Â… AND BUILD A BIG STICK

**China’s mistrust of America’s control of the SLOCs, and** global **leadership more generally, is on display when Chinese scholars debate** long-term “solutions” to the **energy-security** problem. One part of **Beijing’s answer is** to build pipelines as an alternative to SLOCs, and the other is **to create a 21st century “risk fleet,” a force capable** **of** complicating, if not openly challenging, American maritime supremacy**.**

The most ambitious proposal is put forward by the Academy’s Zhang Jie, who proposes a comprehensive set of measures to bypass the Strait of Malacca by focusing on energy pipelines and development of the Kra Isthmus of Thailand. While these proposals would avoid the Strait of Malacca, Zhang admits that they remain dependent on the volatile Middle East region and susceptible to the intervention of major powers. Zhang suggests the only real solution that would give China a measure of energy independence is the diversification of energy providers. She credits the May 2004 Sino-Kazakhstan deal that would construct the Atasu-Alashankou oil pipeline between western Kazakhstan with China as a step in the right direction.

What these scholars gingerly avoid is the implicit challenge that their view of energy independence poses to the U.S.-led international system. **If China** truly **does not trust the U.S**. and **its allies** to provide for the security of the SLOCs **and is too suspicious to join in common efforts** over the long term, **it must** develop the military capabilities to challenge them.

Western analysts have documented China’s naval buildup over recent years, and some have suggested that **China is attempting to develop naval capabilities that would allow it to provide security for its oil shipments and** project power **into the Indian and Pacific oceans**. Some Chinese analysts refer to a shift in naval strategy from coastal and littoral defense to “maritime defense capabilities,” a goal Americans recognize as a blue-water navy. The key components of this navy appear to be an increasingly robust nuclear submarine force and exploration of an aircraft carrier. The Pentagon also identifies a Chinese “string of pearls” strategy, consisting of a network of naval ports and military relationships that project Chinese sea power into the Indian Ocean and the Middle East.

THE NEXT CHINESE CHALLENGE?

At the end of the 19th century, Mahan was taken with the link between great power status and sea control. He argued that for a commercial power — even a continental one — sea control and power projection were essential to secure access to foreign trade. His ideas were taken up by nationalists such as Teddy Roosevelt and Henry Cabot Lodge, and America embarked on the construction of a battleship navy that could compete with that of England.

By the Spanish-American War, that Navy contributed mightily to the acquisition of new American possessions stretching to the Philippines. Americans cheered as our Great White Fleet made its way around the world in a show of strength. A few years ago, the Chinese navy made a similar round-the-world expedition, to the delight of Chinese nationalists.

**The combination of perceived military necessity and an intense sense of national pride may** already **be leading China to** its own variant of **sea control**. **American offers of cooperation** **or**, as international-relations theorists put it, **attempts to “reduce security dilemmas,” may well be** overpowered by the nationalist instinct to control one’s own trade. If that is the case, attempts to convince China not to compete with America for sea control may be akin to convincing Roosevelt that America did not need a blue-water navy.

#### Nuclear winter

Wittner 11 - Professor of History @ State University of New York-Albany. [Lawrence S. Wittner, “Is a Nuclear War with China Possible?,” Huntington News, Monday, November 28, 2011 - 18:37 pg. http://www.huntingtonnews.net/14446]

While nuclear weapons exist, there remains a danger that they will be used. After all, **for centuries** national conflicts have led to wars**, with** nations employing **the**ir **deadliest weapons**. The current **deterioration of U.S. relations with China might** end up **provid**ing **us with** yet **another example** of this phenomenon.

**The gathering tension** between the United States and China **is clear** enough. Disturbed by China’s growing economic and military strength, **the U.S. government recently challenged China**’s claims **in the** S**outh** C**hina** S**ea, increased the U.S. military presence in Australia, and deepened U.S. military ties** with other nations **in the Pacific** region. According to Secretary of State Hillary Clinton, the United States was “asserting our own position as a Pacific power.” But need this lead to nuclear war?

Not necessarily. And yet, there are signs that it could. After all, **both the U**nited **S**tates **and China possess large numbers of nuclear weapons**. The U.S. government threatened to attack China with nuclear weapons during the Korean War and, later, during the conflict over the future of China’s offshore islands, Quemoy and Matsu. In the midst of the latter confrontation, President Dwight Eisenhower declared publicly, and chillingly, that U.S. nuclear weapons would “be used just exactly as you would use a bullet or anything else.”

Of course, China didn’t have nuclear weapons then. Now that it does, perhaps the behavior of national leaders will be more temperate. But the **loose nuclear threats of U.S. and Soviet** government **officials** during the Cold War, when both nations had vast nuclear arsenals, **should convince us that, even as the military ante is raised, nuclear saber-rattling persists**.

Some pundits argue that nuclear weapons prevent wars between nuclear-armed nations; and, admittedly, there haven’t been very many—at least not yet. But the Kargil War of 1999, between nuclear-armed India and nuclear-armed Pakistan, should convince us that such wars can occur. Indeed, in that case, the conflict almost slipped into a nuclear war. Pakistan’s foreign secretary threatened that, if the war escalated, his country felt free to use “any weapon” in its arsenal. During the conflict, Pakistan did move nuclear weapons toward its border, while India, it is claimed, readied its own nuclear missiles for an attack on Pakistan.

At the least, though, don’t nuclear weapons deter a nuclear attack? Do they? Obviously, NATO leaders didn’t feel deterred, for, throughout the Cold War, NATO’s strategy was to respond to a Soviet conventional military attack on Western Europe by launching a Western nuclear attack on the nuclear-armed Soviet Union. Furthermore, **if U.S.** government officials really **believed that nuclear deterrence worked, they would not** have resorted to **champion**ing “Star Wars” and its modern variant, national **missile defense**. Why are these vastly expensive—and probably unworkable—military defense systems needed if other nuclear powers are deterred from attacking by U.S. nuclear might?

Of course, the bottom line for those Americans convinced that nuclear weapons safeguard them from a Chinese nuclear attack might be that the U.S. nuclear arsenal is far greater than its Chinese counterpart. Today, it is estimated that the U.S. government possesses over five thousand nuclear warheads, while the Chinese government has a total inventory of roughly three hundred. Moreover, only **about forty** of these **Chinese nuclear weapons can reach the U**nited **S**tates. Surely the United States would “win” any nuclear war with China.

But what would that “victory” entail? **A nuclear attack by China would immediately slaughter at least 10 million Americans** in a great storm of blast and fire, while leaving many more dying horribly of sickness and radiation poisoning. **The Chinese death toll** in a nuclear war **would be far higher**. Both nations would be reduced to smoldering, radioactive wastelands. Also, **radioactive debris** sent aloft by the nuclear explosions **would** blot out the sun and **bring on a “**nuclear winter**” around the globe—destroying ag**riculture, [**and] creating worldwide famine**, and generating chaos and destruction.

Moreover, in another decade the extent of this catastrophe would be far worse. The Chinese government is currently expanding its nuclear arsenal, and by the year 2020 it is expected to more than double its number of nuclear weapons that can hit the United States. The U.S. government, in turn, has plans to spend hundreds of billions of dollars “modernizing” its nuclear weapons and nuclear production facilities over the next decade.

**To avert the enormous disaster of a U.S.-China nuclear war**, **there are** two **obvious actions that can be taken**. The first is to get rid of nuclear weapons, as the nuclear powers have agreed to do but thus far have resisted doing. The second, conducted while the nuclear disarmament process is occurring, is to improve U.S.-China relations. If the American and Chinese people are interested in ensuring their survival and that of the world, they should be working to encourage these policies.

#### Democratic backsliding causes great power war

Gat 11 (Azar Gat 11, the Ezer Weizman Professor of National Security at Tel Aviv University, 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.

#### Resolving the Kiyemba dispute will serve a TEST CASE for future implementation of decisions by the court.

Scarf 09 (Michael P. Scharf et al., Counsel of Record, Brief of the Public International Law & Policy Group as Amicus Curiae in Support of the Petitioners, Jamal Kiyemba, et. Al., v. Barack H. Obama, et al., SCOTUS, No. 08-1234, 12—09, p. 3-8.)

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 the 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.

ARGUMENT I. KIYEMBA v. OBAMA IS A TEST OF SUPREME COURT LEADERSHIP IN UPHOLDING RULE OF LAW IN TIMES OF CONFLICT

The precedent set by the Supreme Court in the present case will have a significant impact on the development of rule of law in foreign states. Foreign judicial, executive, and parliamentary bodies closely follow the work of this Court, and this Court’s previous decisions related to the war on terror have shaped how foreign states uphold the rule of law in times of conflict. Foreign governments and judiciaries will review this Court’s decision in the present case in light of those previous decisions. A decision in the present case implementing previous decisions of this Court granting habeas rights to Guantanamo detainees is an opportunity for this Court to reaffirm to foreign governments that the U.S. is a leader and role model in upholding the rule of law during times of conflict. Recent Supreme Court precedent established a clear role for the primacy of law in the U.S. war on terror. In particular, this Court’s landmark decision in Boumediene highlighted the critical role of the judiciary in a system dedicated to the rule of law, as well as the “indispensable” role of habeas corpus as a “time tested” safeguard of liberty. Boumediene v. Bush, 128 S.Ct. 2229, 2247, 2259 (2008). Around the globe, courts and governments took note of this Court’s stirring words: “Security subsists, too, in fidelity to freedom’s first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers. It is from these principles that the judicial authority to consider petitions for habeas corpus relief derives.” Id. at 2277. In contrast to the maxim silent enim leges inter arma (in times of conflict the law must be silent), this Court affirmed in Boumediene that “[t]he laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled, and in our system they are reconciled within the framework of the law.” Id. Boumediene held that the detainees in the military prison at Guantanamo Bay are “entitled to the privilege of habeas corpus to challenge the legality of their detentions.” Id. at 2262. Inherent in that privilege is the right to a remedy if the detention is found to be unlawful. In the present case, the Petitioners, who had been found not to be enemy combatants, sought to exercise their privilege of habeas corpus. The Executive Branch conceded that there was no legal basis to continue to detain the Petitioners, that years of diligent effort to resettle them elsewhere had failed, and that there was no foreseeable path of release. The District Court implemented Boumediene, ordering that the Petitioners be brought to the courtroom to impose conditions of release. In re Guantanamo Bay Detainee Litigation, 581 F. Supp. 2d 33, 42-43 (D.C. Cir. 2008). The Court of Appeals reversed, with the majority concluding that the judiciary had no “power to require anything more” than the Executive’s representations that it was continuing efforts to find a foreign country willing to admit Petitioners. Kiyemba v. Obama, 555 F.3d 1022, 1029 (D.C. Cir. 2009). The Court of Appeals’ decision effectively narrowed Boumediene to such a degree that it rendered the ruling hollow. Circuit Judge Rogers recognized this in her dissent, opining that the majority’s analysis “was not faithful to Boumediene.” Id. at 1032 (Roberts, J., dissenting). Given the Court of Appeals’ attempt to narrow Boumediene, Kiyemba v. Obama is a test of this Court’s role in upholding the primacy of law in times of conflict. A decision in favor of the Petitioners in Kiyemba will reaffirm this Court’s leadership in upholding the rule of law and promote respect for rule of law in foreign states during times of conflict.

### 1AC Solvency

#### Functional release is a pre-requisite to the effectiveness of habeas corpus rulings – it’s necessary to distinguish the case of Kiyemba, absent giving the courts the authority; Habeas Corpus won’t be followed

Chow 11 (Samuel, JD Benjamin N. Cardozo School of Law, “THE KIYEMBA PARADOX: CREATING A JUDICIAL FRAMEWORK TO ERADICATE INDEFINITE, UNLAWFUL EXECUTIVE DETENTIONS”, 19 Cardozo J. Int'l & Comp. L. 775 2011)

V. AN ALTERNATIVE APPROACH: THE FUNCTIONAL RELEASE THESIS

It seemed the Supreme Court, in Boumediene, had the goal of creating a constitutional regime for the application of habeas review. Human rights organizations have since labeled that intended result a "myth" after the D.C. Circuit Court issued the Kiyemba decision. 189 While the government in Kiyemba did not explicitly concede to such, it did not contend that detainees, who are constitutionally entitled to habeas, also have a right to release if it has been determined their detention is unlawful.'91 It did argue, however, that release as it was guaranteed by habeas corpus was different from the release that the petitioners sought. 19' Because Kiyemba posed a traditional example of unlawful executive detention, the appropriate remedy should logically conform to the traditional approach-namely release. For habeas to be meaningful, indeed for the courts' role in national security to be meaningful, the courts must be able to order functional release-even if it means release into the United States. This alternative approach is necessary for two overarching reasons. First, as a general principle of the courts' role in the United States' tripartite form of government, the erosion of the judiciary's authority to issue meaningful remedies through habeas review is alarming given the ability of the Executive to unilaterally authorize indefinite detentions of constitutionally-protected individuals. This concern, left largely unaddressed in the first petition for writ of certiorari, is addressed with greater and more explicit force in the new petition.1 92 Second, the aforementioned executive authority, for all the sweeping power it entails, rests on incredibly shaky legal foundations, namely immigration jurisprudence.

To implement an alternative approach, however, would necessitate reconciliation between two conflicting considerations. First, habeas is only as meaningful as the availability of release this is the habeas paradigm. Within the habeas framework are two seemingly opposing forces: the Munaf limitations on release, and the concept of functional release. Second, the executive branch has traditionally held near-absolute control over who may be excluded from entering the United States-this is the immigration paradigm. The immigration framework, much like its habeas counterpart, also requires acknowledgement of two conflicting analyses. There is the Mezei analysis, which held that the United States government had the authority to exclude anyone from its territory. There is also the Zadvydas and Clark analysis which, as will be discussed, argued against the possibility of indefinite detention even in the context of immigration.

In Kiyemba, the government's approach to reconciling these two paradigms was to interpret Munaf as limiting the availability of release-plus, and to use Mezei and the immigration paradigm as the legal basis for excluding the Kiyemba petitioners from the United States. In other words, in balancing the two paradigms, the government found a greater interest in preserving executive authority over immigration. Given the problematic application of Mezei as the framework for this immigration-based argument, the government's approach is both unconvincing and troubling. Giving courts the unlimited ability to order release into the United States may not be a desirable remedy in all cases, but there must, at the very least, be exceptions to that general rule. Such an exception should be applied in Kiyemba.

The primary concern, noted earlier, is that the government's application of immigration law in Kiyemba may be more than inappropriate; it may be unconstitutional. In Boumediene, the Supreme Court held that because the Guantanamo detainees were entitled to habeas review, limitations contained in the MCA on the Court's ability to issue such a writ violated the Suspension Clause and were therefore unconstitutional. 9'3 The D.C. Circuit Court, in Kiyemba, held that the Uighurs were legally entitled to habeas review, but also asserted that their request to be released into the United States was not constitutionally guaranteed. 94 Therefore, in order for the Kiyemba holding to be deemed unconstitutional, the refusal to grant functional release would have to amount to a de facto suspension of habeas corpus. To arrive at such a conclusion, there needs to be a nexus connecting Boumediene's holding with the requirement that courts be allowed to issue orders of functional release where appropriate-this would link the constitutional guarantee of habeas with the availability of release as a remedy. Indeed, as the analysis in Part II demonstrated, there is a historical nexus linking the writ with the availability of release stemming from the legal traditions of Great Britain and the United States. Therefore, it is logical to conclude that precluding the courts from ordering an unlawfully detained prisoner to be released is, effectively, a suspension of the writ of habeas corpus. However, this conclusion runs in direct contravention to Munafs release-plus analysis and the immigration paradigm.

Limiting the availability of release-plus, as a general proposition, is not particularly problematic-especially given the Munaf context. Yet, there are undesirable consequences in making release-plus unavailable to the Kiyemba petitioners. It is necessary, therefore, to distinguish between the "plus" that was sought in Kiyemba from that in Munaf. Zadvydas helps in making that distinction.

A. Zadvydas and an Alternative View of Immigration in Kiyemba

As a sub-category of foreign relations, immigration is an area of law where the Executive has traditionally established itself as the final authority-much like national security. 95 Classic immigration cases have regularly held that the Executive's authority to exclude is both exclusive and absolute. 196 However, in Zadvydas v. Davis, the Supreme Court conditioned that exclusivity on liberty interests and reasonableness grounds. 97 There, the Executive ordered the removal of resident non-citizens.9 8 A provision in the Immigration and Nationality Act (INA) created a 90-day removal period during which the non-citizens were to be held pending removal.199 The Executive was unable to remove the non-citizens within the ninety day period, after which they filed a habeas petition seeking release 00 The Court held that because continued detention was "potentially permanent," ' 0 and therefore undesirable, the judiciary's role was to determine the reasonable likelihood of securing removal.2 In making that determination, period of time has passed.2 °3 If a court indeed finds that the Executive has detained non-citizens beyond a reasonable period, the court must carry out its "historic purpose ' 20 4 and order a conditioned release of the non-citizens.2 5 The Court did recognize that it was intruding on an area traditionally within the sole province of the Executive.0 6 Indeed, it pointed out that immigration law is most efficiently addressed by the executive branch.0 7 However, the Court concluded that the government's interest was sufficiently protected by creating a "presumptively reasonable period of detention" which would limit when the courts are entitled to act.2 °8 Ultimately, it decided that six months was a reasonable period for which to hold an alien pending removal.2 9 The Court reaffirmed and subsequently extended this analysis in Clark v. Martinez by applying it to inadmissible non-citizens.210

If it is, in fact, proper to apply the immigration detention framework to terrorist detentions,211 then Kiyemba is more appropriately analogized to Zadvydas than to Mezei. Ignatz Mezei was resident non-citizen who was barred from re-entering the United States and detained at Ellis Island.212 By staying abroad for eighteen months, Mezei had violated a statute that required resident aliens to return from any trips abroad within a year, thereby relinquishing his right to be in the United States.213 Furthermore, the Supreme Court determined that Mezei's detainment at Ellis Island did not serve the purpose of "entry" into the United States, and characterized his hearing as an exclusion proceeding and not a deportation.214 That is to say, the Court was distinguishing between one who had "passed through our gates '215 and one "on the threshold of initial entry."2 16 The petitioners in Zadvydas were considered within the former category. In that case, petitioners were resident non-citizens who were in deportation proceedings, as opposed to exclusion proceedings.217 In Clark, the petitioners were Cuban refugees seeking to adjust their status to lawful permanent residents, but became inadmissible because of criminal convictions.218 They, too, were considered in the former category. As a practical matter, this meant that the Zadvydas and Clark petitioners were entitled to greater constitutional and statutory protections that were not available to Mezei.219

Therefore, the petitioners' liberty interests turned primarily on the nature of their detainment and less with their right to be in the United States. The two immigration concepts being represented in these cases are exclusion and deportation, where the former represents removal of an individual who has not yet "entered" the United States, and the latter represents the removal of an individual who has.22° Mezei was detained while attempting to re-enter the United States in violation of a statute,22' whereas the Zadvydas and Clark petitioners were already within the United States for immigration purposes.222 The primary difference was the right at issue-Mezei had no right to be in the United States, whereas deportation meant that the Zadvydas and Clark petitioners' right to be in the United States was being revoked. The difficulty with analogizing Kiyemba to these cases is that the petitioners do not fall under either of those characterizations. Regardless of whether the Kiyemba petitioners were captured at the "gates" or beyond them, the fact that they were forced into the jurisdiction of the United States is relevant, 223 given the Court's emphasis on the underlying rationale for the detention. Mezei was attempting to re-enter the country in violation of the law and was considered a national security threat.224 This is in contrast with the Zadvydas petitioners who posed no such threat and were in the United States lawfully. 225 The Court even extended the remedial protections of habeas review to the petitioners in Clark despite their unlawful presence. 226 The Court allowed their release into the United States solely on the basis of their indefinite detention.

Furthermore, as the Kiyemba petitioners pointed out, the concern in Mezei that the United States would be forced to take in foreigners once they "sailed past [our] horizon" is not pertinent because it was is the Executive that ordered them here.227 Indeed, it seems that while Mezei supported broad executive authority over immigration, it did not sanction broad detention authority. 228 This is particularly true when viewed in light of the decision in Zadvydas and Clark-both suggested that liberty interests trump immigration authority under certain circumstances. Kiyemba, therefore, is arguably more comparable to Zadvydas and Clark because the liberty interests of the Kiyemba petitioners were stripped when they were "shackled" and delivered into United States jurisdiction.229

### 1AC Plan – Draft

**The United States federal judiciary should restrict the President’s war powers authority by mandating that a victory in habeas corpus petitions in the third Kiyemba v. Obama case necessitates “release-plus” status.**

## 2AC

### 2AC Circumvention

#### Courts don’t get circumvented – prefer our evidence it has ROBUST STATISTICAL ANALSYS on the issues of detention. Specifically forces congressional involvement which forces the president’s hand – this card is dank fire

Landau 09 (Associate-in-Law, Columbia Law School, “MUSCULAR PROCEDURE: CONDITIONAL DEFERENCE IN THE EXECUTIVE DETENTION CASES”, 84 Wash. L. Rev. 661 2009)

Many commentators have criticized the Supreme Court's executive detention decisions as "merely" procedural rulings, pointing out that the Court has generally addressed itself to questions about adjective law or the ground rules of litigation: whether the Court has jurisdiction; whether detainees can access the courts; and whether the government is required to provide discovery, and if so, how much. Far fewer decisions have resolved substantive questions such as the scope of executive power and the content of individual liberty-that is, whom the Executive can hold and for how long, and the specific constitutional protections that apply. But regardless of whether a particular decision turns on "process" or "substance"-an age-old distinction that resists clear definition 5 -courts have affected the law of national security in profound ways by explicitly requiring the political branches to adhere to a judicially imposed standard of transparency and deliberation. In individual cases, rulings about seemingly mundane procedural issues such as discovery and evidentiary standards have accelerated the release of enemy combatant detainees who were held at Guantdnamo Bay years after being cleared of any wrongdoing. 6 More broadly, procedural devices have been used to smoke out and put in check Congress's lack of oversight of the executive branch and its misguided interpretations and implementation of authorizing legislation.7

In a number of these cases, courts have resolved the merits of an enemy combatant8 challenge by scrutinizing the Executive's adherence to baseline procedural safeguards-rejecting determinations based on absolute secrecy, innuendo, tentativeness, or multiple levels of hearsay, while affirming executive branch decisions satisfying minimal standards of reliability.9 In the process, the judiciary has rebuffed the President's extreme interpretations of vague authorizing legislation,'0 reexamined inadequately reasoned decisions by various arms of the executive branch in implementing a congressional delegation," and stimulated legislative action where Congress has failed to oversee executive decision-making through the legislative process.' 2 Throughout these decisions, procedure functions as a corrective to decision-making by one (or both) of the political branches that, if left undisturbed, would violate a judicially imposed standard requiring lucid, intelligible procedures.

Sometimes judicial review is overtly exacting in these cases, with courts imposing burdensome procedural obligations on a party to litigation (usually the government).' 3 Other times the review is relatively light-as in the imposition of a relaxed standard of review when ruling on an enemy combatant designation-but heavy enough to invalidate executive branch decisions lacking sufficient indicia of reliability.' 4 Still other times the review is moderately demanding, requiring a co-equal branch to reconsider its interpretation of a statute (in the case of the Executive) 5 or to reaffirm its position through clear and more purposeful language (in the case of the legislature).' 6 These varying procedural demands are generally consistent with the deference norms that obtain under prevailing doctrine, 17 but they impose enhanced procedural conditions that require the political branches to satisfy a judicially imposed level of transparency and deliberation-conditions that make procedural review far more muscular than might otherwise be expected.

Muscular procedure highlights a process-oriented approach 18 to legal decision-making in national security through a judicial insistence on procedural regularity, a matter over which the judiciary has a comparative advantage in expertise. 19 The theory presents an alternative to much of the conventional wisdom within the relevant literature. Although the prevailing frameworks advocate either blind deference to the collective expertise of the political branches or judicial resolution of large, complex, and highly fractious substantive questions, courts have put procedure to muscular uses by focusing on the means of coordinate branch decision-making, while still allowing the political branches to define the content of the substantive law. The cases discussed in this article, by integrating baseline procedural standards into cases of interbranch importance, present new ways of thinking about the relationship between judicial decision-making and procedural values such as transparency and deliberation, with implications beyond the national security context.2°

### Democracy

#### Judicial globalism is inevitable—the only question is how the US shapes it—resting authority in the executive models judicial inaction

Krotoszynski 09 (John C. Stone Chair, Director of Faculty Research, and Professor of Law, University of Alabama School of Law, 2009, Ronald J. Krotoszynski is a John C. Stone Chair, Director of Faculty Research, and Professor of Law, University of Alabama School of Law, “The Perils and the Promise of Comparative Constitutional Law: The New Globalism and the Role of the United States in Shaping Human Rights”, 61 Ark. L. Rev. 603)

In thinking about the reality and effects of the new globalism, we should be proactive and thoughtful. This means defending our values, even if they appear exceptionalist from a global or comparative perspective, as much, if not more, than modifying our legal rules to square them with foreign views. Just because Germany has a different rule does not imply that the German rule is better, or a better rule for the United States. That said, we do need to at least think about the possibility that things could be different than they are presently. The fact that other democratic societies value rights more, or less, highly than we do should at least make us pause. It seems rude either to pretend these differences do not exist or, worse yet, that these differences simply do not matter. As I have observed in another context, "[A] circular jurisprudence that posits its own conclusions as justifications is intellectually indefensible." n52 The alternative to active global engagement, attempting to maintain a kind of intellectual isolationism, is neither attractive nor feasible because ideas travel faster and more easily than superbugs. We should be just as actively concerned and engaged about the transnational marketplace of ideas as we are about the transnational sale of pet food, lead-painted toys, or the safety of air travel. As scholars like Anne-Marie Slaughter and Harold Koh have suggested, it is not a question of whether transnational legal rules will develop - it is a question of how they will develop and the role that the United States will play in their [\*617] development. n53 In the case of freedom of expression, foreign law is very different, in myriad ways, and the United States contributes to the global discussion of this human right as much by refusing to get with the program as it would by redefining domestic First Amendment law to bring it into conformity with prevailing foreign attitudes. The development of new global legal understandings of fundamental human rights is not limited to courts. Courts are not the only source of transnational understanding of human rights, as the behavior of Congress and the executive branch also signals the content and scope of our commitment to human rights. To say that we oppose torture generally but not in the specific context of the war on terrorism has the effect of undermining the norm against torture as inconsistent with fundamental human rights. Similarly, holding persons in indefinite detention, without access to lawyers or judicial process sends a very mixed message. When the Soviet government engaged in this sort of behavior, the United States denounced it. n54 Our credibility in arguing for a right to a fair trial by an impartial tribunal, to the assistance of counsel, and to the right to be free of unreviewed (and unreviewable) executive detention has taken a hit lately. Our behavior and our practices have the effect of modeling acceptable government practices, whether we wish them to have that effect or not. We should be cautious in accepting an argument that observance of the rule of law lies within the discretion of the executive branch of government. It is said that "as one sows, so shall one reap." n55 The new legal globalism will reflect this truism. Simply put, if we ever had the luxury of saying one thing while doing another, that time has come and gone. The best way of convincing others that they must observe a particular human right would be that we observe it ourselves as a matter of course. Thus, the process of exporting legal rules is not solely a job for the judiciary, nor should it be. [\*618] V. AMERICAN CONTRIBUTIONS Over the last 200 years, the United States has been remarkably successful at exporting its legal ideas. Since World War II, the notion of limited government, checked by a written constitution with judicially enforceable rights, has become the most commonly accepted model of legitimate government. n56 The old British model of parliamentary supremacy, as a means of securing democratic control, has fallen into something of a rut. n57 The modern trend has been entirely in favor of judicial review (judicial supremacy, some might say) with democratically elected legislatures being limited by enumerated constitutional rights. n58 The separation of powers is another structural innovation of the United States that has proven quite popular. The British model of legislative, executive, and judicial power all being vested in a single body (like the Parliament) no longer seems a successful way to run a railroad. Although parliamentary systems remain popular, and involve the merger of executive and legislative power, the structural separation of courts has become a standard feature of modern democracies. In this sense, the separation of powers has become the global norm rather than the exception. Federalism provides a third major contribution to constitutionalism that the United States pioneered and which has achieved substantial adoption abroad. In a nation featuring ethnic, religious, or cultural differences, federalism provides a means of securing some measure of local autonomy that can accommodate these differences. Additionally, even in the contemporary United Kingdom, federalism has found a foothold, with local parliaments now sitting for Scotland, Wales, and Northern Ireland, and plans for an English Parliament. n59 The European Union itself represents a federalism solution to [\*619] the problem of a divided, and less efficient, Europe. By dividing power among various levels of government, centralization can coexist with local autonomy and choice. Judicial review, the separation of powers, and federalism are all contributions that the United States has made to constitutional democracy. Indeed, it would not be an overstatement to suggest that the American model of constitutionalism is to modern government as the Microsoft Corporation's "Windows" operating system is to computing. Having had so much success in defining the institutions and structures of a just government with reference to the structures and doctrines reflected in our own Constitution, why should we fear the outcome of constructive engagement with the world? n60 In this regard, it bears noting that our own framers, meeting in Philadelphia during the summer of 1787, were themselves very familiar with government structures dating back to ancient Rome and Athens. The Framers consciously considered various constitutional arrangements, including those of Great Britain, but also of Athens, Sparta, and Rome. n61 To be sure, the Framers did not overtly borrow any particular constitutional system, but developed one of their own self-styled a new order for the ages ("novus ordo seclorum"). Given this history of familiarity with comparative constitutional law, the success of American constitutional innovations, and the stakes, why should we shrink from engaging the world in defense of our domestic conception of fundamental human rights? VI. CONCLUSION We must recognize that we will participate in the new legal globalism whether we choose to be active participants in the process or passive recipients of the results. If the United States wants to impact the content of emerging human-rights norms, we need to join the conversation, even if we do so as defenders [\*620] (or exporters) of our legal norms. n62 The alternative, a kind of default, will simply mean that the United States has less impact on the development and content of both emerging legal systems and the scope and content of transnational human rights. n63 To engage the world does not require the United States to abandon its own idiosyncratic legal values, any more than consideration of American legal norms requires the Supreme Court of Canada or the German Federal Constitutional Court to abdicate responsibility for articulating and enforcing local legal imperatives.

#### Democratic spread solves war – No other factor is as statistically significant

Valerie Epps, Professor of Law, Suffolk University Law School, Boston, Spring, ’98  
4 ILSA J Int'l & Comp L 347

One scholar who has perhaps tried the hardest to separate out other possible influences on conflict is Professor Bruce Russett. Through a series of calibrated tables he has looked at the influence of a variety of factors as well as the fact of democracy itself on conflict. He tests such factors as wealth, economic growth, alliances, contiguity, and military capability ratio. What he finds is that "the effect [of democracy] is continuous, in that the more democratic each member of [any two possible warring states] is, the less likely is conflict between them." n32 He also looks at such variables as political stability, structural/institutional constraints, normative cultural restraints, and even the levels of deaths resulting from political conflict within countries. From his studies he  [\*354]  concludes that: The more democratic are both members of a pair of states, the less likely is it that a militarized dispute will break out between them, and the less likely it is that any disputes that do break out will escalate. This effect will operate independently of other attributes such as the wealth, economic growth, contiguity, alliance or capability ratio of the countries. n33 Russett concludes that the "results do suggest that the spread of democracy in international politics . . . can reduce the frequency of violent conflicts among nations." n34

### AT: Environment

**Democracy solves deforestation – controlled for all other variables – including growth**

**BUITENZORY & MOL 11**

[Meilanie Buitenzorgy · Arthur P. J. Mol, Does Democracy Lead to a Better Environment? Deforestation and the Democratic Transition Peak, Environ Resource Econ (2011) Volume 48, Number 1, 59-70]

5 Income or Democracy?

Income lost its significance if we put it as independent variable together with Democracy. Model 7 suggests that it is only when all other independent variables are removed from the model that Income and Income-square becomes statistically significant in explaining deforestation. The magnitude (as reﬂected by the standardized coefﬁcient) of Democracy in Model 2–5 consistently appears as the largest one, compared to all other independent variables. Furthermore, the adjusted R-square of Model 1 (Pure Democracy) is higher than the adjusted R-square of Model 7 (Pure Income). It can be concluded that democracy is more powerful in explaining deforestation rates than income. Comparing the adjusted R-square from Model 5 (includes all variables) with the much lower one from Model 6 (which excludes the democracy variable) shows that excluding the democracy variable strongly reduces the explanatory power of the model. In other words, democracy is an important factor that should be taken into account to explain the rate of deforestation of countries.

Furthermore, income and income square are jointly significant in Model 7 with negative sign for the linear term and positive sign for the quadratic term suggesting that the relationship between deforestation rate and income is the form of U-shaped and not inverted U-shaped curve. Meyer et al. (2003) also found a U-shaped relationship between the rate of deforestation and PPP-weighted GDP per capita. Similarly, Li and Reuveny (2006) found a U-shaped relationship between forest area (as share of land area) and PPP-weighted GDP per capita. It should be noted that democracy and income are significantly correlated, but not high (with correlation coefﬁcient 0.486). This might point to the problem of multicollinearity with our regression model.

Hence, we tested the Model 3 and 4 for three potential problems: multicollinearity, the inﬂuence of cases that lie far outside the model, and homoscedasticity. The variance inﬂation factor (VIF) value for all significant variables of both models are <5, so multicollinearity is not likely to play a role. The maximum hat-values for both models are <0.2, thus outliers (countries with extreme deforestation rates) are not significantly inﬂuencing the results. Finally, the homoscedasticity assumption for both models is satisﬁed, considering that 95% of the residuals fall between −2 and +2.

#### No extinction due to environment loss

**Easterbrook 95** Distinguished Fellow, Fullbright Foundation (Gregg, A Moment on Earth pg 25)

IN THE AFTERMATH OF EVENTS SUCH AS LOVE CANAL OR THE Exxon Valdez oil spill, every reference to the environment is prefaced with the adjective "fragile." "Fragile environment" has become a welded phrase of the modern lexicon, like "aging hippie" or "fugitive financier." But the notion of a fragile environment is profoundly wrong. Individual animals, plants, and people are distressingly fragile. Theenvironmentthat contains themis close to indestructible**.** The living environment of Earth has survived ice ages; bombardments of cosmic radiation more deadly than atomic fallout; solar radiation more powerful than the worst-case projection for ozone depletion; thousand-year periods of intense volcanism releasing global air pollution far worse than that made by any factory; reversals of the planet's magnetic poles; the rearrangement of continents; transformation of plains into mountain ranges and of seas into plains; fluctuations of ocean currents and the jet stream; 300-foot vacillations in sea levels; shortening and lengthening of the seasons caused by shifts in the planetary axis; collisions of asteroids and comets bearing far more force than man's nuclear arsenals; and the years without summer that followed these impacts. Yet hearts beat on, and petals unfold still. Were the environment fragile it would have expired many eons before the advent of the industrial affronts of the dreaming ape. Human assaults on the environment, though mischievous, are pinpricks compared to forces of the magnitude nature is accustomed to resisting.

## T

### 2AC T-Restrict = Prohibit

#### 2) C/I – Restriction means a limit or qualification, and includes conditions on action

CAA 8,COURT OF APPEALS OF ARIZONA, DIVISION ONE, DEPARTMENT A, STATE OF ARIZONA, Appellee, v. JEREMY RAY WAGNER, Appellant., 2008 Ariz. App. Unpub. LEXIS 613

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.

#### 3) “Statutory restriction” means limits imposed by legislation

Black’s Law

“statutory restriction”, <http://thelawdictionary.org/statutory-restriction/>, accessed 6-2-13

Limits or controls that have been placed on activities by its ruling legislation.

#### 4) “Area” means a field of study – their def is about LOST

Dictionary.Com – No specific Date Included

Updated in 2013 but no specific date given, http://dictionary.reference.com/browse/area

ar•e•a [air-ee-uh] noun 1. any particular extent of space or surface; part: the dark areas in the painting; the dusty area of the room. 2. a geographical region; tract: the Chicago area; the unsettled areas along the frontier. 3. any section reserved for a specific function: the business area of a town; the dining area of a house. 4. extent, range, or scope: inquiries that embrace the whole area of science. 5. field of study, or a branch of a field of study: Related areas of inquiry often reflect borrowed notions.

#### 5) “In” means within a set of limits

Dictionary.Com – No specific Date Included

Updated in 2013 but no specific date given, http://dictionary.reference.com/browse/in

In [in] preposition, adverb, adjective, noun, verb, inned, in·ning. preposition 1. (used to indicate inclusion within space, a place, or limits): walking in the park. 2. (used to indicate inclusion within something abstract or immaterial): in politics; in the autumn. 3. (used to indicate inclusion within or occurrence during a period or limit of time): in ancient times; a task done in ten minutes. 4. (used to indicate limitation or qualification, as of situation, condition, relation, manner, action, etc.): to speak in a whisper; to be similar in appearance. 5. (used to indicate means): sketched in ink; spoken in French. 6. (used to indicate motion or direction from outside to a point within) into: Let's go in the house. 7. (used to indicate transition from one state to another): to break in half. 8. (used to indicate object or purpose): speaking in honor of the event.

#### Counterinterp --- restrict is to limit not to prohibit

**Oklahoma Attorney General 04** Opinions - 3/19/2004, Question Submitted by: The Honorable Mark Campbell, District Attorney, 19th District; The Honorable Jay Paul Gumm, State Senator, District 6, 2004 OK AG 7, [http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=43849](http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=438494" \t "_blank)

Accordingly, we must look to the plain and ordinary meaning of the term.*Webster's New International Dictionary*defines restrictions as follows: "something that restricts" and "a regulation that restricts or restrains." *Id.* at 1937 (3d ed. 1993). Restrict is defined as follows: "to set bounds or limits to: hold within bounds: as a : to check free activity, motion, progress, or departure." Id. Restrain is defined as to "prevent from doing something." *Id.* at 1936. Therefore, as used in Section 1125, "restrictions" is meant to describe those conditions of parole or probation which are intended to restrain or prevent certain conduct of the person subject thereto.

#### And authority is the permission to act not the ability to act

**Taylor, 1996**  (Ellen, 21 Del. J. Corp. L. 870 (1996), Hein Online)

The term authority is commonly thought of in the context of the law of agency, and the Restatement (Second) of Agency defines both power and authority.'89 Power refers to an agent's ability or capacity to produce a change in a legal relation (whether or not the principal approves of the change), and authority refers to the power given(permission granted) to the agent by the principal to affect the legal relations of the principal; the distinction is between what the agent can do and what the agent may do.

## Counter Plans

### Hmm I didn’t read a card on the XO CP... Problematic?

## Disads

### 2AC WOT DA

#### 2) Courts will constrain Obama on detention now- Hedges ruling coming- but it isn’t sufficient to solve the aff

RT 9/3 (Supreme Court to rule on fate of indefinite detention for Americans under NDAA http://rt.com/usa/ndaa-scotus-hedges-suit-359/)

The United States Supreme Court is being asked to hear a federal lawsuit challenging the military’s legal ability to indefinitely detain persons under the National Defense Authorization Act of 2012, or NDAA. According to Pulitzer Prize-winning journalist Chris Hedges — a co-plaintiff in the case — attorneys will file paperwork in the coming days requesting that the country’s high court weigh in on Hedges v. Obama and determine the constitutionality of a controversial provision that has continuously generated criticism directed towards the White House since signed into law by President Barack Obama almost [two years ago](http://rt.com/trends/national-defense-authorization-act-indefinite-detention/" \t "_blank) and defended adamantly by his administration in federal court in the years since.

#### 3) No deference now---Hamdi and Hamdan pounds

Leitner 11 Martin S., Professor of International Law, Fordham Law School, Judicial Foreign Relations Authority, 2011,¶ “After 9/11,” <http://www.nylslawreview.com/wordpress/wp-content/uploads/2011/08/Flaherty-56-1.pdf>

For a time the forces of judicial isolationism appeared to have gained traction and may yet carry the day. It is all the more surprising, then, that the Supreme Court reasserted the judiciary’s traditional foreign affairs role in the areas in which its opponents assert deference is most urgent—national security, terrorism, and war. Yet so far, in every major case arising out of 9/11, the Court has rejected the position staked out by the executive branch, even when supported by Congress. At critical points, moreover, each of these rejections involved the Court reclaiming its primacy in legal interpretation, an area in which advocates of judicial deference have appeared to make substantial progress. The Court nonetheless rejected deference in statutory construction in Rasul v. Bush. 16 It took the same tack with regard to treaties in Hamdan v. Rumsfeld.17 It further rejected deference in constitutional interpretation in both Hamdi v. Rumsfeld18 and Boumediene v. Bush. 19 Together, these cases represent a stunning reassertion of the judiciary’s proper role in foreign relations. Whether reassertion will mean restoration, however, still remains to be seen.

#### 3) No link – plan is procedural – Muscular Procedure by the court doesn’t defer all authority – but it resolves plenary powers. Prez still has flex

Landau 09 (Associate-in-Law, Columbia Law School, “MUSCULAR PROCEDURE: CONDITIONAL DEFERENCE IN THE EXECUTIVE DETENTION CASES”, 84 Wash. L. Rev. 661 2009)

Muscular procedure is not a cure-all for the vast, intractable problems that arise within the national security context. However, it is an effective midway point between deferring wholesale to the coordinate branches on the one hand and dictating substantive outcomes on the other. It combines the idea of deference to the coordinate branches with an examination of the procedures those branches adopt in implementing policy-spanning both the legislative process and the Executive's implementation of delegated authority. These procedural demands are generally consistent with the deference courts must accord the political branches, while still requiring them to employ a modicum of transparency or deliberation when implementing a given policy. By requiring adherence to these procedural standards in contexts where one might find pure deference, the judiciary articulates a basis for more muscular judicial review and a normative reinforcement for its involvement in areas generally committed to the plenary power of one or both of the political branches.21 4

#### The plan has no negative effect on the military – Boumediene should have already caused the link

ACLU 09 ([American Civil Liberties Union, Brief Amicus Curiae of the American Civil Liberties Union in Support of Petitioners, [www.americanbar.org/content/dam/aba/publishing/preview/publiced\_preview\_briefs\_pdfs\_09\_10\_08\_1234\_PetitionerAmCuACLU.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_09_10_08_1234_PetitionerAmCuACLU.authcheckdam.pdf))

The third Boumediene factor, the practical obstacles involved, again weighs more heavily in favor of these Petitioners than it did in Boumediene. In Boumediene, the Court acknowledged that recognizing habeas jurisdiction in domestic courts for Guantanamo detainees could impose some costs — both economic and non-economic — on the military. But it stressed that Boumediene did not pose the risks that the Eisentrager Court apparently perceived regarding 'judicial interference with the military's efforts to contain 'enemy elements, guerilla fighters, and "were-wolves,"' noting that although the detainees were "deemed enemies of the United States," who might be "dangerous ... if released," they were "contained in a secure prison facility located on an isolated and heavily fortified military base." Id. at 2261 (quoting Eisentrager, 339 U.S. at 784). In this case, allowing the Petitioners to assert their due process claim would add nothing, or virtually nothing, to the economic and procedural burdens that the Government already faces by virtue of the Petitioners' undeniable right to habeas corpus. Nor would it interfere with the military's activities against our enemies, since the United States does not even claim that the Petitioners are enemies — or, for that matter, that the military has any desire to continue to detain them. Finally, neither this case nor Boumediene raises the specter of "friction with the host government," because the United States is "answerable to no other sovereign for its acts on the "answerable to no other sovereign for its acts on the base." Id. at 2261. The Boumediene factors, then, show that recognizing the Petitioners' due process right to be free from indefinite arbitrary detention raises fewer and less substantial functional concerns (if any) than recognizing the Boumediene petitioners' habeas rights did. Nor do any other factors from the Court's extraterritoriality cases — such as the possibility of cultural or legal incompatibility between the right recognized and the location of the person asserting that right, see, e.g., Dowries, 182 U.S. at 282 — raise any significant obstacle to recognizing the due process right at issue here. Boumediene s anatysis thus compels the conclusion that the Petitioners are entitled to challenge their ongoing detention under the Due Process Clause.10

#### Detention causes terrorism- perpetuates the root cause of extremisim

Combs 12 (Casey- writer for the Diplomatic Courier and freelance associate for the Foreign Policy Association, citing Martin Sheinin, professor of international law and UN Special Rapporteur on human rights and counterterrorism from 2005 to 2011, January 12, “US Counterterrorism Law May “Backfire”: UN”, <http://foreignpolicyblogs.com/2012/01/12/new-us-counterterrorism-law-may-backfire-un/>)

When the “global war on terror” was waged following 9/11, he said, the possibility of indefinite detention was extended to terrorism, “far beyond genuine situations of international or even non-international armed conflict. And it extends indefinite detention to persons who are not combatants. For instance, persons who are held to have provided substantial support to terrorism would be subject to indefinite detention.” Against that background, Mr. Sheinan suggested several ways in which violating human rights in the course of countering terrorism can “backfire.” Rights violations can “add to causes of terrorism,” he said, “both by perpetuating ‘root causes’ that involve the alienation of communities and by providing ‘triggering causes’ through which bitter individuals make the morally inexcusable decision to turn to methods of terrorism.” Further, “these kinds of legal provisions are always open for bad faith copying by repressive governments that will use them for their own political purposes.” Though such copying was found to be less common than expected, “repressive governments may do so for their own political purposes.” “It is hard to see any practical advantage gained through the NDAA. It is just another form of what I call symbolic legislation, enacted because the legislators want to be seen as being ‘tough’ or as ‘doing something.’ The law is written as just affirming existing powers and practices and hence not providing any meaningful new tools in the combat of terrorism,” he concluded. With Washington simultaneously fostering democratic transitions across the Middle East and North Africa and gambling on military exits from Iraq and Afghanistan, such “backfires” may well hamper development of the rule of law and respect for human rights when they are needed most.

#### War on Terror structurally fails---empirics prove military force cannot defeat AQ

Dan Kovalik 8, USW Counsel, Workers Uniting Colombia Committee, "Rand Corp -- War On Terrorism Is A Failure", July 31, www.huffingtonpost.com/dan-kovalik/rand-corp----war-on-terro\_b\_116107.html

The Rand Corporation, a conservative think-tank originally started by the U.S. Air Force, has produced a new report entitled, "How Terrorist Groups End - Lessons for Countering al Qaida." This study is important, for it reaches conclusions which may be surprising to the Bush Administration and to both presidential candidates. To wit, the study concludes that the "war on terrorism" has been a failure, and that the efforts against terrorism should not be characterized as a "war" at all. Rather, Rand suggests that the U.S. efforts at battling terrorism be considered, "counterterrorism" instead.¶ And, why is this so? Because, Rand concludes, after studying 648 terrorist groups between 1968 and 2006, that military operations against such groups are among the least effective means of success, achieving the desired effect in only 7% of the cases. As Rand explains, "[a]gainst most terrorist groups . . . military force is usually too blunt an instrument." Moreover, "[t]he use of substantial U.S. military power against terror groups also runs a significant risk of turning the local population against the government by killing civilians."¶ In terms of this latter observation, there is no better case-in-point right now than Afghanistan - the war that both candidates for President seem to embrace as a "the right war" contrary to all evidence. In Afghanistan, the U.S. military forces should properly be known as, "The Wedding Crashers," with the U.S. successfully bombing its fourth (4th) wedding party just this month, killing 47 civilians. According to the UN, 700 civilians have died in the Afghan conflict just this year. Human Rights Watch reports that 1,633 Afghan civilians were killed in 2007 and 929 in 2006. And, those killed in U.S. bomb attacks are accounting for a greater and greater proportion of the civilian deaths as that war goes on. As the Rand Corporation predicts in such circumstances, this has only led to an increase in popular support for those resisting the U.S. military onslaught. In short, the war is counterproductive.¶ Consequently, as the Rand study reports, the U.S. "war on terrorism" has been a failure in combating al Qaida, and indeed, that "[a]l Qaida's resurgence should trigger a fundamental rethinking of U.S. counterterrorism strategy." In the end, Rand concludes that the U.S. should rely much more on local military forces to police their own countries, and that this "means a light U.S. military footprint or none at all." If the politicians take this study seriously, and they should, they should abandon current plans for an increase in U.S. troop involvement in Afghanistan. Indeed, the U.S. military should be pulled out of Afghanistan altogether, just as it should be pulled out of Iraq.¶ Interestingly, the current study from Rand, a group not considered to be very dovish, mirrors its much earlier study which also declared that the U.S.'s "war on drugs" - that is, the effort to eradicate drugs at the source (e.g., cocaine in Colombia and heroin in Afghanistan) thorugh military operations -- is a failure. Instead, Rand opined, the U.S. would do better to concentrate its resources at home on drug addiction treatment - a measure the Rand Corporation concluded is 20 times more effective than the "war on drugs." Sadly, the U.S. did not pay attention to that study then, and it remains to be seen whether it will pay attention to Rand's current study.¶ Again, (and if you read my posts you will see me quote this passage often) Senator Obama was correct, both as a matter of morality as well as practicality, in calling for an "end [to] the mindset which leads us to war." This is so because war has profoundly failed us. Unfortunately however, the United States, and those running for its highest office, appear unable to escape from this mindset.¶ Instead, they continue to search for military options for problems which have no military solutions. In the process, U.S. soldiers die and thousands upon thousands of civilians are killed abroad. Meanwhile, the stated objective of the U.S., whether it be fighting drugs or fighting terror, is only further undermined. One look no further than Al Qaida itself -- which evolved from the U.S.'s military support for the Afghan mujahideen in pursuit of its "war on communism" -- as proof of this fact.¶ In short, we continue to create and re-create our own enemies through our addiction to war and force. It is indeed high time to "end the mindset which leads us to war." However, we as citizens in this ostensible democracy will have to work hard to push our leaders toward this end, for they appear unwilling and/or unable to even begin the process of moving toward such an objective.

## Politics

### 2AC Immigration Reform – Harvard

#### Empirics prove no war.

Miller 1—Morris Miller is an adjunct economics professor at the University of Ottawa [Jan.-Mar, 2001, “Poverty: A Cause of War?” *Peace Magazine*, <http://peacemagazine.org/archive/v17n1p08.htm>]

Economic Crises?

Some scholars have argued that it is not poverty, as such, that contributes to the support for armed conflict, but rather some catalyst, such as an economic crisis. However, a study by Minxin Pei and Ariel Adesnik shows that this hypothesis lacks merit. After studying 93 episodes of economic crisis in 22 countries in Latin American and Asia since World War II, they concluded that much of the conventional thinking about the political impact of economic crisis is wrong:

"The severity of economic crisis—as measured in terms of inflation and negative growth—bore no relationship to the collapse of regimes ... or (in democratic states, rarely) to an outbreak of violence... In the cases of dictatorships and semi-democracies, the ruling elites responded to crises by increasing repression (thereby using one form of violence to abort another)."

#### No actual skills shortage --- problem is wages aren’t rising enough to attract the people with talent.

Adam Davidson, 11/20/2012. Co-founder of NPR’s “Planet Money,” a [podcast](https://itunes.apple.com/us/podcast/npr-planet-money-podcast/id290783428) and [blog](http://www.npr.org/blogs/money/). “Skills Don’t Pay the Bills,” New York Times, http://www.nytimes.com/2012/11/25/magazine/skills-dont-pay-the-bills.html?hp.

Eric Isbister, the C.E.O. of GenMet, a metal-fabricating manufacturer outside Milwaukee, told me that he would hire as many skilled workers as show up at his door. Last year, he received 1,051 applications and found only 25 people who were qualified. He hired all of them, but soon had to fire 15. Part of Isbister’s pickiness, he says, comes from an avoidance of workers with experience in a “union-type job.” Isbister, after all, doesn’t abide by strict work rules and $30-an-hour salaries. At GenMet, the starting pay is $10 an hour. Those with an associate degree can make $15, which can rise to $18 an hour after several years of good performance. From what I understand, a new shift manager at a nearby McDonald’s can earn around $14 an hour.

The secret behind this skills gap is that it’s not a skills gap at all. I spoke to several other factory managers who also confessed that they had a hard time recruiting in-demand workers for $10-an-hour jobs. “It’s hard not to break out laughing,” says Mark Price, a labor economist at the Keystone Research Center, referring to manufacturers complaining about the shortage of skilled workers. “If there’s a skill shortage, there has to be rises in wages,” he says. “It’s basic economics.” After all, according to supply and demand, a shortage of workers with valuable skills should push wages up. Yet according to the Bureau of Labor Statistics, the number of skilled jobs has fallen and so have their wages.

In a recent study, the Boston Consulting Group noted that, outside a few small cities that rely on the oil industry, there weren’t many places where manufacturing wages were going up and employers still couldn’t find enough workers. “Trying to hire high-skilled workers at rock-bottom rates,” the Boston Group study asserted, “is not a skills gap.” The study’s conclusion, however, was scarier. Many skilled workers have simply chosen to apply their skills elsewhere rather than work for less, and few young people choose to invest in training for jobs that pay fast-food wages. As a result, the United States may soon have a hard time competing in the global economy. The average age of a highly skilled factory worker in the U.S. is now 56. “That’s average,” says Hal Sirkin, the lead author of the study. “That means there’s a lot who are in their 60s. They’re going to retire soon.” And there are not enough trainees in the pipeline, he said, to replace them.

#### Logical policy maker can do both.

#### Courts shield

Whittington 5 Keith E., Cromwell Professor of Politics – Princeton University, ““Interpose Your Friendly Hand”: Political Supports for the Exercise of Judicial Review by the United States Supreme Court”, American Political Science Review, 99(4), November, p. 585, 591-592

There are some issues that politicians cannot easily handle. For individual legislators, their constituents may be sharply divided on a given issue or overwhelmingly hostile to a policy that the legislator would nonetheless like to see adopted. Party leaders, including presidents and legislative leaders, must similarly sometimes manage deeply divided or cross-pressured coalitions. When faced with such issues, elected officials may actively seek to turn over controversial political questions to the courts so as to circumvent a paralyzed legislature and avoid the political fallout that would come with taking direct action themselves. As Mark Graber (1993) has detailed in cases such as slavery and abortion, elected officials may prefer judicial resolution of disruptive political issues to direct legislative action, especially when the courts are believed to be sympathetic to the politician’s own substantive preferences but even when the attitude of the courts is uncertain or unfavorable (see also, Lovell 2003). Even when politicians do not invite judicial intervention, strategically minded courts will take into account not only the policy preferences of well-positioned policymakers but also the willingness of those potential policymakers to act if doing so means that they must assume responsibility for policy outcomes. For cross-pressured politicians and coalition leaders, shifting blame for controversial decisions to the Court and obscuring their own relationship to those decisions may preserve electoral support and coalition unity without threatening active judicial review (Arnold 1990; Fiorina 1986; Weaver 1986). The conditions for the exercise of judicial review may be relatively favorable when judicial invalidations of legislative policy can be managed to the electoral benefit of most legislators. In the cases considered previously, fractious coalitions produced legislation that presidents and party leaders deplored but were unwilling to block. Divisions within the governing coalition can also prevent legislative action that political leaders want taken, as illustrated in the following case.

#### Healthcare website problems drain Obama’s capital

Todd 10/21 [Chuck Todd, Mark Murray, Domenico Montanaro, and Jessica Taylor, NBC News, First Thoughts: Admitting there's a problem, <http://firstread.nbcnews.com/_news/2013/10/21/21063152-first-thoughts-admitting-theres-a-problem>, jj]

\*\*\* But still not knowing exactly what the problem is: The only question is how long it takes to fix the problem. Two weeks? Not a major long-term problem. Two months, that’s a political five-alarm fire. And this HHS blog post, which says it’s making improvements to the website, might suggest this isn’t a two-week fix. “Our team is bringing in some of the best and brightest from both inside and outside government to scrub in with the team and help improve HealthCare.gov.” To us, that means while they’ve admitted they have a problem, they STILL don’t know what that problem is. We can picture how in the world of government bureaucracy and in this climate of fear of ever taking the blame personally, that these deficiencies could have been kept from the White House and even senior leaders at HHS. But that shouldn’t be the excuse. Somebody either failed to tell the truth to someone up the chain of command, or the White House and HHS knowingly misled reporters about the viability of this web site. The president earned some political capital after the shutdown but instead of using it for immigration or getting a better budget agreement, he may have to use it on health care.

#### Won’t pass and thumpers

Jones, 10/24/13 (Allie, “The Slim Chance for Immigration Reform,” http://www.theatlanticwire.com/politics/2013/10/slim-chance-immigration-reform/70892/, bgm)

Most pundits would tell you that immigration reform won't get done this year or next year. The House GOP is still obsessed with Obamacare; Boehner was tweeting about the health care law during Obama's speech. Beyond that, Congress needs to reach a budget agreement sooner than it needs to pass immigration reform. As Republican Rep. Aaron Schock said last week, "I know the president has said, well, gee, now this is the time to talk about immigration reform. He ain't gonna get a willing partner in the House until he actually gets serious about ... his plan to deal with the debt." At issue is a "path to citizenship," or what some conservatives call amnesty for illegal immigrants. Social conservatives in the House do not support a path to citizenship, but it is one of the key parts of Obama's plan. Heritage Action, the activist group that bankrolls many Tea Partiers, made it clear during Obama's speech that path to citizenship is a contentious issue.

#### Immigration will happen next summer after GOP primaries

BUSINESS MIRROR 10 – 26 – 13 Republicans after shutdown seen losing again on immigration, <http://businessmirror.com.ph/index.php/en/features/global-eye/21717-republicans-after-shutdown-seen-losing-again-on-immigration>

Limited window

“NOW, this notion that they’re going to get in a room and negotiate a deal with the president on immigration is much more difficult to do,” Rubio said in the October 20 interview, “because of the way that president has behaved toward his opponents over the last few weeks.”

Advocates for an immigration overhaul, including Jacoby, see a limited congressional window for movement on comprehensive legislation, possibly limited to the next several weeks before new fiscal deadlines hit in the coming months.

Some Democrats have hinted that action could come further in the future, possibly in the early summer after primary election filing deadlines are past. Then, they say, Republicans will begin turning their focus to the general election, making them more eager to take up the legislation as a way to woo Hispanic voters in battleground states such as Florida, Nevada and Colorado.

“I’m going to do everything I can to get it done this year,” Senate Majority leader Harry Reid, a Nevada Democrat, told Univision television on October 18. “But remember this is a two-year Congress.”

#### Won’t pass – and Obama irrelevant

STILES 10 – 21 – 13 National Review [Andrew Stiles, Conservatives warn House leaders against the Senate bill on comprehensive immigration reform. , <http://www.nationalreview.com/article/361716/dug-against-gang-eight-andrew-stiles>]

Still, there are valid reasons to think that immigration reform is doomed. Following the political debacle of the past few weeks, which culminated in Boehner’s violating the so-called Hastert rule and allowing a Senate-brokered budget agreement to pass with primarily Democratic support, some doubt that he will have enough political capital to take any action on immigration reform that could rile his conservative flank. There is also no deadline to force Boehner’s hand. “It’s not like blocking immigration reform prevents a government shutdown or default on the debt,” says a conservative aide. “I don’t see how Boehner would have the political leverage to force it through.”

The recent budget talks have also, to the extent that it is even possible, increased House Republicans’ dislike and distrust of President Obama. Representative Raul Labrador (R., Idaho), a prominent supporter of immigration reform and a member of the (now disbanded) House version of the Gang of Eight, has said “it would be crazy” for House Republicans to negotiate with Obama on immigration reform, because the president would never do so in good faith.

“He’s trying to destroy the Republican Party . . . and I think that anything that we do right now with this president on immigration will be with that same goal in mind, which is to destroy the Republican party, and not to get good policies,” Labrador said last week during a meeting with conservative lawmakers hosted by the Heritage Foundation.

One thing is certain: John Boehner’s job won’t be getting any easier anytime soon.

#### Winners win on immigration

DAILY CALLER 10 – 21 – 13 US Chamber of Commerce pleads for Obama’s help to pass immigration boost, <http://dailycaller.com/2013/10/21/u-s-chamber-of-commerce-pleads-for-obamas-help-to-pass-immigration-boost/>

Obama could build trust “by getting involved and helping us come to a satisfactory and progressive — meaning moving forward — set of solutions on tax and spending, and on entitlements,” Donohue said.

“He will not get there if he doesn’t do what he says he’ll do — get involved and negotiate,” Donohue said.

However, White House press secretary jay Carney strongly hinted last week that the president would not play a leadership role in the budget talks. (Related: Obama WALKS AWAY from new budget talks, setting stage for next shutdown showdown)

“The president will be as involved as he and members of the Congress believe to be useful,” he said.

“Our view is that [in 2013] the House passed a budget, the Senate passed a budget; that’s how the process is supposed to work,” Carney said. “The president has already demonstrated a level of seriousness through the budget he put forward.”

“Flacks do [say] that, don’t they?” Donohue responded when The Daily Caller cited Carney’s comments.

“History is very clear, the most successful administrations… are those that get intimately involved in leading and working with the other leaders in town,” he said.

## Critique

### 2AC

#### Security as a global public good helps avoid politics dominated by fear. Abandoning liberal security only empowers neocons.

Ian **LOADER** Criminology All Souls College @ Oxford (England) **AND** Neil **WALKER** Regius Professor of Public Law and the Law of Nature and Nations @ Edinburgh Law **‘7** *Civilizing Security* p. 5-18

Faced with such inhospitable conditions, one can easily lapse into fatalistic despair, letting events simply come as they will, or else seek refuge in the consolations offered by the total critique of securitization practices – a path that some critical scholars in criminology and security studies have found all too seductive (e.g. Bigo 2002, 2006; Walters 2003). Or one can, as we have done, supplement social criticism with the hard, uphill, necessarily painstaking work of seeking to specify what it may mean for citizens to live together securely with risk; to think about the social and political arrangements capable of making this possibility more rather than less likely, and to do what one can to nurture practices of collective security shaped not by fugitive market power or by the unfettered actors of (un)civil society, but by an inclusive, democratic politics. Social analysts of crime and security have become highly attuned to, and warned repeatedly of, the illiberal, exclusionary effects of the association between security and political community (Dillon 1996; Hughes 2007). They have not, it should be said, done so without cause, for reasons we set out at some length as the book unfolds. But this sharp sensitivity to the risks of thinking about security through a communitarian lens has itself come at a price, namely, that of failing to address and theorize fully the virtues and social benefits that can flow from members of a political community being able to put and pursue security in common. This, it seems to us, is a failure to heed the implications of the stake that all citizens have in security; to appreciate the closer alignment of self-interest and altruism that can attend the acknowledgement that we are forced to live, as Kant put it, inescapably side-by-side and that individuals simultaneously constitute and threaten one another’s security; and to register the security-enhancing significance and value of the affective bonds of trust and abstract solidarity that political communities depend upon, express and sustain. All this, we think, offers reasons to believe that security offers a conduit, perhaps the best conduit there is, for giving practical meaning to the idea of the public good, for reinventing social democratic politics, even for renewing the activity of politics at all. These, of course, may prove to be naïve hopes, futile whistling in a cold and hostile wind. It is in addition true that the project of civilizing security is ultimately a question not of social theory but of political praxis. But if such a project is ever to be thematized as a politics it requires, or at least can be furthered by, some form of theoretical articulation; one which reminds us, as C. L. R. James (1963) might have said, that those who know only of security of security nothing know. It is with this overarching purpose in mind that we have been moved to write in the way that we have about security today. Our argument in this book is that security is a valuable public good, a constitutive ingredient of the good society, and that the democratic state has a necessary and virtuous role to play in the production of this good. The state, and in particular the forms of public policing governed by it, is, we shall argue, indispensable to the task of fostering and sustaining liveable political communities in the contemporary world. It is, in the words of our title, pivotal to the project of civilizing security. By invoking this phrase we have in mind two ideas, both of which we develop in the course of the book. The first, which is relatively familiar if not uncontroversial, is that security needs civilizing. States – even those that claim with some justification to be ‘liberal’ or ‘democratic’ – have a capacity when self-consciously pursuing a condition called ‘security’ to act in a fashion injurious to it. So too do non-state ‘security’ actors, a point we return to below and throughout the book. They proceed in ways that trample over the basic liberties of citizens; that forge security for some groups while imposing illegitimate burdens of insecurity upon others, or that extend the coercive reach of the state – and security discourse – over social and political life. As monopoly holders of the means of legitimate physical and symbolic violence, modern states possess a built-in, paradoxical tendency to undermine the very liberties and security they are constituted to protect. Under conditions of fear, such as obtain across many parts of the globe today, states and their police forces are prone to deploying their power in precisely such uncivil, insecurity instilling ways. If the state is to perform the ordering and solidarity nourishing work that we argue is vital to the production of secure political communities then it must, consequently, be connected to forms of discursive contestation, democratic scrutiny and constitutional control. The state is a great civilizing force, a necessary and virtuous component of the good society. But if it is to take on this role, the state must itself be civilized – made safe by and for democracy. But our title also has another, less familiar meaning – the idea that security is civilizing. Individuals who live, objectively or subjectively, in a state of anxiety do not make good democratic citizens, as European theorists reflecting upon the dark days of the 1930s and 1940s knew well (Neumann 1957). Fearful citizens tend to be inattentive to, unconcerned about, even enthusiasts for, the erosion of basic freedoms. They often lack openness or sympathy towards others, especially those they apprehend as posing a danger to them. They privilege the known over the unknown, us over them, here over there. They often retreat from public life, seeking refuge in private security ‘solutions’ while at the same time screaming anxiously and angrily from the sidelines for the firm hand of authority – for tough ‘security’ measures against crime, or disorder, or terror. Prolonged episodes of violence, in particular, can erode or destroy people’s will and capacity to exercise political judgement and act in solidarity with others (Keane 2004: 122–3). Fear, in all these ways, is the breeding ground, as well as the stock-in-trade, of authoritarian, uncivil government. But there is more to it than that. Security is also civilizing in a further, more positive sense. Security, we shall argue, is in a sociological sense a ‘thick’ public good, one whose production has irreducibly social dimensions, a good that helps to constitute the very idea of ‘publicness’. Security, in other words, is simultaneously the producer and product of forms of trust and abstract solidarity between intimates and strangers that are prerequisite to democratic political communities. The state, moreover, performs vital cultural and ordering work in fashioning the good of security conceived of in this sense. It can, under the right conditions, create inclusive communities of practice and attachment, while ensuring that these remain rights-regarding, diversity respecting entities. In a world where the state’s pre-eminence in governing security is being questioned by private-sector interests, practices of local communal ordering and transnational policing networks, the constitution of old- and new-fashioned forms of democratic political authority is, we shall argue, indispensable to cultivating and sustaining the civilizing effects of security. Security and its discontents Raising these possibilities is, of course, to invite a whole series of obvious but nonetheless significant questions: what is security? What does it mean to be or to feel secure? Who or what is the proper object of security – individuals, collectivities, states, humanity at large? What social and political arrangements are most conducive to the production of security? It is also to join – in a global age that is now also an age of terror – a highly charged political debate about the meanings and value of security as a good, and about how it may best be pursued. It is these questions, and this debate, that we want to address in this book. Security has become the political vernacular of our times. This has long been so in respect of ‘law and order’ within nation states. Authoritarian regimes are routinely in the habit of using the promise and rhetoric of security as a means of fostering allegiance and sustaining their rule – delivering safe streets while (and by) placing their citizens in fear of the early morning knock at the door (Michnik 1998). Democratic societies too have over the last several decades come to be governed through the prism of crime – a phenomenon especially marked in the USA, Britain and Australasia, though not without resonance in other liberal democratic states (Garland 2001; Simon 2006; see also Newburn and Sparks 2004). But security has also since 9/11, and the ‘war on terror’ waged in response to it, become a pervasive and contested element of world politics, impacting significantly on the ‘interior’ life of states and international and transnational relations in ways, as we shall see, that escalate the breakdown of once settled distinctions between internal and external security, war and crime, policing and soldiering (Kaldor 1999; Bigo 2000a). Today, security politics is riven by disagreements over the pros and cons of self-consciously seeking security using predominantly policing and military means; by disputes about how and whether to ‘balance’ security with such other goods as freedom, justice and democracy; and by conflicts between a conception of security as protection from physical harm and wider formulations of ‘human’ or ‘global’ security. In the face of these debates we are aware that the title and ambitions of this text are likely to meet with one of three possible responses. They will be seen by some as offensive to the benign intentions and purposes of governments and security actors. They may be viewed, alternatively, as the naïve, wrong-headed pursuit of an oxymoron. Or they may be dismissed – by those who share our broad ambition to civilize security – as too limited in their grasp of what the idea of security can and should mean. We want to probe a little further into each of these anticipated reactions. In so doing, we can begin to pinpoint the limitations of certain established dispositions towards, and public discourses about, security, as well as indicating how the debate about security can be moved to a different – we think more fruitful – place.1 The first – currently hegemonic – response issues from a lobby that seeks fairly unambiguously to promote security and that takes exception to the idea that security needs civilizing. Security, on this view, is an unqualified human good. The protection of its people from internal and external threats stands consequently as the first and defining priority of government. Far from needing to be balanced with democratic rights and freedoms, security is a precondition for the enjoyment of such goods. Far from needing ‘civilizing’, security is the foundation stone and hallmark of civilization. Security, moreover, can and should be directly and consciously pursued using what Joseph Nye (2002) calls ‘hard power’ – by enabling, resourcing and enthusiastically backing the military, intelligence agencies and the police. It is these agencies that will protect the state and its citizens, and these agencies whose purposes and effectiveness must not be hamstrung by excessive legal rights and safeguards that give succour to the enemy, or by forms of democratic deliberation that obstruct decisive executive action. This – stripped to its essentials – is the discourse that has animated countless ‘wars on drugs’ and ‘crackdowns’ on crime and disorder in both democratic and authoritarian states over recent decades, and which since 9/11 has fuelled and justified what may turn out to be a permanent ‘war on terror’. This disposition towards, and identification with, security has long antecedents dating back to Jean Bodin and Thomas Hobbes, and is deeply sedimented in the present (Robin 2004). It represents the clearsighted and hard-headed outlook of a good many politicians and police officers. It holds – for anxious citizens – a deep emotional allure. But it is not without some serious shortcomings, two of which warrant an introductory note. It proceeds, first of all, in ways that gloss over the paradoxes that attend the pursuit of security (Berki 1986: ch. 1; Zedner 2003). It has little to say, and rarely pauses to reflect upon, the most profound of these; namely, that the state’s concentration of coercive power makes it simultaneously a guarantor of and a threat to the security of individuals. Security, as Berki (1986: 13) puts it, is inescapably a problem for and a problem of the state – a condition we deal with more fully in later chapters (see also N. Walker 2000: ch. 1). Nor does the security lobby grasp clearly the implications of how human beings are mutually implicated in one another’s in/security – as both an everpresent potential threat to the security of each, and at the same time a necessary precondition for giving effect to such security. Still less does the security lobby register and absorb the fact that security is, in an important sense, destined to remain beyond our grasp – ‘more within us as a yearning, than without us as a fact’ (Ericson and Haggerty 1997: 85). Not only does this mean that there can never – in a paradox rich with implications – be ‘enough’ security measures, which hold out a promise of protection while always also signifying the presence of threat and danger. It also warns us that responding to demands for order in the terms in which they present themselves (i.e. zero-tolerant police, tougher sentencing, more prisons, ‘wars’ against drugs, or crime, or terror) can be little more than a bid to quench the unquenchable. The effacing of paradoxes such as these is closely connected to – indeed a key contributor towards – the second and most deleterious shortcoming of the security lobby. This is its tendency to make security pervasive, to proceed in ways that treat and thereby produce ‘security’ – or, more accurately, security rhetoric and activity – as a dominant, emotionally charged element of political culture and everyday life. Security – as Buzan et al. (1998) usefully remind us – is not only a condition of social existence, a description of social relations marked by order and tranquillity. It is also a political practice, a speech act, one way of framing and naming problems. To call something ‘security’ – to make what Buzan et al. (1998: 25) call a ‘securitizing move’ – is to suggest, and to seek to mobilize audiences behind, the idea that ‘we’ face an existential threat that calls for immediate, decisive, special measures. It is, in other words, to seek to lift the issue at hand – whether it is crime, or drugs, or migration – out of the realm of normal democratic politics, to claim that as an emergency it demands an urgent, even exceptional, response. The security lobby – blessed as it invariably is with ‘blind credulity and passionate certainty’ (Holmes 1993: 250) – makes precisely this move. It connects with and articulates public insecurities about crime, or disorder, or terror in terms that institutionalize anxiety as a feature of everyday life and link security to a conception of political community organized around binary oppositions between us/them, here/there, friends/enemies, inside/outside. In encouraging ‘emotional fusion between ruler and ruled’ around the question of fear (Holmes 1993: 49), it generates a climate that inhibits – even actively deters – critical scrutiny of the state’s claims and practices. By translating security into Security, into a matter of cops chasing robbers, soldiers engaging the enemy, it risks fostering vicious circles of insecurity (atrocity – fear – tough response – atrocity – fear – and so on) that ratchet up police powers, security technologies and their attendant rhetoric in ways that it becomes difficult then to temper or dismantle. In all these ways, the security lobby makes ‘security’ talk and action pervasive, or what we shall call shallow and wide, reproducing ‘security’ on the surface of social consciousness and rendering it dependent on the visible display of executive authority and police power. In so doing, it fails to get close to the heart of what it is that makes individuals objectively (or intersubjectively) and subjectively secure – it is unable, that is, to understand, still less to create, the conditions under which security becomes axiomatic, or deep and narrow. For us, these are vital distinctions, ones that we revisit and develop as our argument unfolds. The second response to our stated ambitions – the one likely to regard the enterprise as hopelessly misplaced – is concerned above all to counter security. This emanates from what we may call the ‘liberty lobby’ which disputes the suggestion that security can be civilized. Security, on this view, is a troubling, dangerous idea. Security politics – especially in the form we have just set out – is seen as authoritarian and potentially barbarous – ‘contrary to civil well-being’ (Keane 2004: 46). It is a politics that privileges state interests (and conceptions of security) over those of individuals; that is inimical to democratic values; that possesses a seductive capacity to trample – in the name, and with the support, of ‘the majority’ – over civil liberties and minority rights; that is, in short, conducive to the very violence that it purports to stamp out. Security, consequently, is something that must either be curbed in the name of liberty and human rights or, given its close police and military associations, abandoned as a value altogether. Let us briefly introduce two strands of this critical disposition. The first – common to human rights movements across the globe – seeks to constrain the power of security by questioning its imperatives, and fencing in its demands, with an insistence on protecting or enhancing the democratic freedoms and individual rights that security politics is indifferent to, throws into a utilitarian calculus, chips away at, or suspends. From this standpoint, habeas corpus, access to legal advice, limits on detention and police interrogative powers, jury trials, rights of appeal and the like are the expression and tools of a desire to preserve a space for individual liberty in the face of the forceful demands of an overweening state and global state system – whether in ‘normal’ or ‘exceptional’ times.2 A second stance – associated with those working under the loose banner of ‘critical security studies’ (Krause andWilliams 1997) – deepens and radicalizes the impulse and insights of the first. This holds that security is irredeemably tainted by its police/military parentage, and by its authoritarian desires for certainty. On this view, security is a political technology that must ‘continue to produce images of insecurity in order to retain its meaning’ (A. Burke 2002: 18) in ways that make it, at a conceptual level, inimical to democratic politics; or else it is a practice deeply tarred by its intimate empirical relation to the formation and reproduction of state-centric interests and xenophobic, anti-democratic political subjectivities and collective identities (R. B. J. Walker 1997). The conclusion in either case is the same. Security, it is claimed, has to be abandoned, the dual analytical and political task being to unsettle and deconstruct security as a category so as to find ways of thinking and acting beyond it (Dillon 1996; Aradau 2004). There is much of value in this critique of uncivil security – a great deal, in fact, which we are sympathetic towards. But these critical stances also share certain lacunae. Each, in particular, expressly or implicitly intimates that security – understood as being and feeling free from the threat of physical harm – is a problem, a conservative sensibility and project that is all too often hostile to the values and institutional practices of democracy and liberty (Huysmans 2002). The result is that each operates as a negative, oppositional force, one that evacuates the terrain that the security lobby so effectively and affectively occupies in favour of a stance that strives either to temper its worst excesses, or to trash and banish the idea altogether – a stance that appeals in part because so few others appear motivated to defend the liberties which are being imperilled. There is, on this view, little or no mileage in seeking to think in constructive terms about the good of security and the kind of good that security is. There is little point in fashioning a theory and praxis that explores the positive – democracy and liberty-enhancing – ways in which security and political community may be coupled; in reflecting upon what it means, and might take, to make security axiomatic to lived social relations. There can, in short, be no politics of civilizing security. Proponents of the third – ‘human’ or ‘social security’ – response share with us both a desire to transcend this received security–liberty dichotomy and, in their own way, an ambition to civilize security. On this view, however, such a project requires that security be rescued from a taken-for-granted association with the ‘threat, use and control of military force’ (Walt 1991: 212), and extended to other domains of social and political life (e.g. de Lint and Virta 2004).3 We can usefully highlight two variants of this position – one international, the other domestic. The former takes its cue from the United Nations Human Development Report 1994, which introduced, and sought to mobilize opinion behind, the concept of ‘human security’, an idea which has subsequently been taken up in further work conducted under the auspices of the United Nations and the European Union (Commission on Human Security 2003; Barcelona Group 2004; cf. Paris 2001). It seeks to decouple security from questions of war and peace and deploy it as a device aimed at urging governments to treat as emergencies such chronic threats as hunger, homelessness, disease and ecological degradation – the latter, for instance, being described by the Commission on Global Governance (1995: 83) as ‘the ultimate security threat’. The domestic version of the argument draws from the insight that there is no policing or penal solution to the problem of order the conclusion that crime control – or harm reduction – is ultimately a matter of, and dissolves into, questions of economic and social policy more generally. This is a commonly held disposition within both sociological criminology and social democratic politics, one which has in recent years informed a critique of situational crime prevention, crime science and other forms of technocratic crime control, and underpinned the promotion of multi-agency, social crime prevention (Crawford 1997; Hope and Karstedt 2003). On this view, security conceived of in a ‘shallow’ manner as freedom from physical harm or threat is both inseparable from a more profound sense of ‘well-being’ or ‘ontological’ security and, therefore, also dependent upon the broader institutions and services of social welfare (Fredman forthcoming). There is, once more, much to applaud in this attempt to extend the meanings and application of the idea of security. It reminds us that freedom from physical coercion is but a part of any rounded conception of human flourishing. And it pinpoints the limited and often counter-productive role that security politics and policing institutions play within this wider project. But there are difficulties with this attempt to broaden and extend security. It too – like the liberty lobby – tends to abandon the contest over how to render individuals and groups free from the threat and fear of physical coercion – in this case by a hasty and undue relegation of the significance of security in its ‘shallow’ sense. But it also, more importantly, transcends the security–liberty opposition in a fashion that risks making security pervasive in new ways. It does so, in respect of intranational crime, by connecting security to better education, full employment, or improved social conditions in a manner that tends to colonize, or ‘criminalize’, public policy such that the latter loses sight of its own values and objectives and comes instead to be thought about, funded and judged as an instrument of crime or harm reduction. The quest for ontological security, in other words, itself risks being ‘securitized’ in ways that render security pervasive in a more expansive sense than already indicated: as simultaneously deep and wide, such that any reconsideration of its preconditions is treated as a threat, prompting both parochial, xenophobic reactions and calls for more security in the shallow – police- and punishment centred – sense. Internationally, human security discourse likewise risks extending the dynamics and dangers of ‘securitization’, with all its antipolitical talk of existential threats and attendant calls for emergency measures, from the military to the political, economic, societal and environmental sectors (Buzan 1991; Buzan et al. 1998). By extending the reach of security in these ways, this position evacuates the terrain of contemporary security politics (and with it the struggle to make security axiomatic) in favour of a politics that risks turning all politics into security politics. In this book we take up the challenge of developing a fourth position – of thinking constructively about the relationship between security and political community through reconceptualizing security not as some kind of eigen-value embracing the whole of politics, but as a more modestly conceived but still ‘thick’ public good. We also indicate how – under conditions of pluralization and globalization – we may realize this revised conception of security in terms of institutional principles and design. In making good on these ambitions, we clearly need to counter the charge that ‘civilizing’ security (or anything else for that matter) inevitably carries with it a class and colonial baggage – amounting to a mission to bring ‘our’ standards and ways of doing things to a backward, barbarian ‘them’, whether at home or abroad. We try to do so as the book unfolds. For now it is sufficient to record the intuition that guides our enquiry: namely, that there is something to be gained from thinking through the connection between a family of words – civil, civility, civilizing, civilization – that have to do with taming violence and fostering respectful dialogue, and another family – politics, polity, policy, police – that have to do with the regulatory and cultural frameworks within which such democratic peace building may best take place (Keane 2004: chs. 3–4).4 Our aim is not to effect a banal compromise, or occupy some implausible middle ground, between the outlooks of the security and liberty lobbies. We want instead to step outside the terms of the confrontation in a bid to move discussion of security to a different place altogether. In his work on authenticity, Charles Taylor describes this as an ‘act of retrieval’, a phrase that captures well the activity we have in mind. A work of retrieval, Taylor says: suggests . . . that we identify and articulate the higher ideal behind the more or less debased practices, and then criticize these practices from the standpoint of their own motivating ideal. In other words, instead of dismissing this culture altogether, or just endorsing it as it is, we ought to attempt to raise its practice by making more palpable to its participants what the ethic they subscribe to really involves. (1991: 72) To engage in such retrieval in respect of security requires neither ‘root and branch condemnation’, nor ‘uncritical praise’, still less ‘a carefully balanced trade-off’ between the received ideas and practices of security and liberty (1991: 23). It demands instead taking security seriously as a ‘moral’ category and engaging in a struggle to define its ‘proper meaning’ as a ‘motivating ideal’ (1991: 73). This requires, or so it seems to us, that we recover and develop two somewhat buried or neglected meanings of security. We need, first of all, to emphasize, as the human security scholars have rightly done, the idea of the individual as the basic moral unit and referent of security – an idea that originates in the political theory of modernity.5 That individuation of security necessarily implies and so alerts us to the irreducibly subjective dimension of security, an idea that led Montesquieu to opine that ‘political freedom consists in security, or at least in the opinion one has of one’s security’ (cited in Rothschild 1995: 61; see also McSweeney 1998: ch. 1). This in turn provides a cue for a second act of retrieval; namely, of the root Latin meaning of securitas as freedom from concern, care or anxiety, a state of self-assurance or well-founded confidence. What this recovered cluster of meanings indicates is that security possesses subjective as well as objective dimensions, and that in both dimensions the ‘surfaces’ of physical security are intricately connected to the ‘depths’ of ontological security. And it is this intimate link between security and generic questions of social connectedness and solidarity that elevates it above terms like order, protection and safety as an orchestrating theme for our enquiry. The sense that security is about the relationship individuals have to the intimates and strangers they dwell among and the political communities they dwell within, and that it may therefore be connected in mutually supportive ways to the values and practices of ‘belonging’ and ‘critical freedom’ (Tully 2002), is what inspires our attempt to construct an alternative theory and praxis of security.

#### No root cause of war so changing existing norms alone fails– counter-cultural pressures require political agency that respects the power of dominant systems.

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The end of the Cold War has given rise to hopes among many international relations scholars and public activists that a dramatic transformation in world politics is now unfolding. They contend that changes in norms, ideas, and culture have the power to tame the historically war-prone nature of international anarchy. ' This analysis and the prescriptions that follow from it exaggerate the autonomy of ideas and culture in shaping behavior in anarchy. A rich body of research on war by anthropologists suggests that ideas and culture are best understood not as autonomous but as embedded in complex social systems shaped by the interaction of material circumstances, institutional arrangements, and strategic choices, as well as by ideas and culture. Cultural prescriptions that ignore these multifaceted interactions will provide a poor road map to guide strategies of global change. Those who foresee substantial opportunities to transform the war-prone international system into a realm governed by benign norms

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contend that "anarchy is what states make of it."2 In their view, culture, defined as shared knowledge or symbols that create meaning within a social group, determines whether behavior in the absence of a common governing authority is bloody or benign. If more benign ideas and identities are effectively spread across the globe through cultural change and normative persuasion, then "ought" can be transformed into "is". Support for warlike dictators can be undermined, perpetrators of war crimes and atrocities can be held accountable, benign multicultural identities can be fostered, and international and civil wars w ill wane3 These academic concepts have a potent counterpart in the international human rights approach of activist organizations 4 In contrast, skeptics about such transformations argue that anarchy, whether among states coexisting in a self- help system or among contending groups inside collapsed states , gives rise to an inescapable logic of insecurity and competition that culture cannot trump5 These skeptics fear that a transformative attempt to supersede self-help behavior amounts to reckless overreaching that will create backlashes and quagmires. Ironically, in this view, the idealist vanguard of the new world order will need to rely increasingly on old-fashioned military and economic coercion in a futile effort to change world culture for the better.6 This is a debate of compelling intellectual and practical import. It lays bare the most fundamental assumptions about the nature of world politics that underpin real policy choices about the deployment of the vast military, economic, and moral resources of the United States and other wealthy democraci es. However, some of the leading voices in this debate, both in academic and broader public settings, overlook the decisive interplay between situational constraints and the creation of culture. Prophets of transformation sometimes assert that politics in anarchy and society is driven by " ideas almost all the way down." They dismiss as negligible what Alexander Wendt ca lls "rump" material constraints rooted in biology, the physical environment, or other circumstances unalterable through changes in symbolism.7 For them, "agency" by political actors committed to social change consists primarily in working to alter prevailing principled ideas, such as promoting the norm of universal jurisdiction in the case of crimes against humanity. In contrast, working for improved outcomes within existing constraints of material power, for example, by bargaining with still powerful human rights abusers, does not count for them as true "agency"; rather it is mere myopic "problem solving" within constraints8 Conversely, when prophets of continuity discuss culture at all, they treat it as a largely unchangeable force that may have some effect in constituting the units competing for security but that has at most a secondary effect on strategic interactions between those units, which are driven mainly by the logic of the anarchical situation9 This is an unnecessarily truncated menu of possibilities for imagining the relationship between anarchy and culture. Ironically, in light of the ambitiously activist agenda of the proponents of cultural approaches to international relations, their one-dimensional approach limits agents to a peculiarly circumscribed set of tools for promoting political change. A more promising approach would integrate the material, institutional, and cultural aspects of social change, drawing on the insights of theories of complex systems. Robert Jervis reminds us that the elements of complex systems, such as international anarchy, are highly interconnected and consequently the behavior of the system as a whole cannot be understood just by examining its separate parts.10 In a tightly coupled system, a change in one of its aspects, such as norms or ideas, is unlikely to have simple, linear effects . T he consequences of any change can be predicted only by considering its interaction with other attributes of the system. For example, whether the spread of the concept of national self-determination promotes peace or war may depend on the material and institutional setting in which it occurs. Negative feedback may cancel out a change that is at odds with the self-correcting logic of the system as a whole. Conversely, in unstable systems, positive feedback may amplify the effects of small changes. More complicated feedback effects may also be possible, depending on the nature of the system. Actions in a system may have different consequences when carried out in different sequences. In social systems, outcomes of an actor's plans depend on strategic interactions with the choices of other independent decision nl.akers. For example, projects for cultural change are likely to provoke cultural counterprojects from those threatened by them. Even in "games against nature," changes in behavior may transform the material setting in ways that foil actors' expectation s. For all these reasons, system effects are likely to skew or derail transformative efforts that focus narrowly on changing a single aspect of social life, such as norms and ideas. All of these system effects are relevant to understanding the effect of culture on conflict in anarchy. As I describe later, anthropological research on war shows that ideas, norms, and culture are typically interconnected with the material and institutional elements of anarchical social systems in ways that produce the full panoply of Jervis's system effects. In such systems, efforts to promote cultural transformation need to take into account the material and situational preconditions that sustain these developments; otherwise they are likely to produce unintended consequences. Underestimating situational constraints is just as dangerous and unwarranted as reifying them. Testing the effects of culture: insights from the anthropology of war Current debates about anarchy and culture have been carried out largely at the level of abstract philosophy and visceral morality. Ultimately, however, the impact of culture on war in anarchy is an empirical question. What evidence should be examined? To assess the claim that behavior in an anarchical system is what the units and their culture make of it, the obvious methodological move is to vary the culture of the units or of the system as a whole and then assess the effect on behavior. Reasonably enough, some scholars who see anarchical behavior as culturally constructed examine contemporary changes, such as the peaceful end of the Cold War, the emergence of the democratic peace, and the purported current strengthening of human rights norms. 11 In assessing such developments , it is difficult to distinguish the hopes of transitional moments from enduring trends . These kinds of tests, while not irrelevant , are not well designed to disentangle the effects of autonomous changes in ideas and culture from the effects of selfjustifying US hegemonic power, an ideological pattern that was quite familiar in the old world order. Other scholars try to show that the progenitor of the contemporary international system-the historical European balance-of-power system among sovereign states-was itself a by-product of ideas, such as the Protestant Reformation or analogies between sovereignty and individual property rights.12 The implication is that whatever has been established by ideas can also be dismantled by ideas. However, it is not a simple task to disentangle the effects of war, state formation, and ideological change on the emergence of the competitive states system. 13 Arguably, a comparison of the European system with behavior in other anarchical state systems offers a methodologically cleaner way to vary culture and assess its effects. However, when cultural constructivists do look at behavior in anarchies in cultural settings radically different from our own, they sometimes fail to exploit obvious opportunities for focused comparison. For example, Ian Johnston's prominent book Cultural Realism shows how the strategic wisdoms of the anarchical ancient Chinese Warring States system were passed down to future generations to constitute a warlike strategic "culture." His adherence to a cultural account of Chinese strategic practices remains untroubled by the fact that these ideas and practices are similar to those of the anarchic European balance- ofpower system, the ancient Greek city-states, and the ancient Indian states system described by Kautilya, a set of cultures diverse in almost every way except their strategic behavior. 14 At a first approximation, it would seem from this evidence that state behavior in anarchy is not fundamentally altered by variations in culture. This is not to deny that cultural differences may have influenced the meaning the actors imputed to their military behavior, some of the goals for which they fought, and some political features of these anarchical systems. Nonetheless, the evidence from historical state systems strongly suggests that the situational incentives of anarchy have significantly shaped strategic behavior in ways that transcend culture. Constructivists have paid less attention to another body of evidence ideally suited to assessing the effects of variations in culture on behavior in anarchy. For decades, anthropologists have been amassing a theoretically rich, empirically substantial, and methodologically self-aware body of statistical and case- study research on the relationship between war and culture in stateless societies and preindustrial anarchic systems. 15 Many of the causal factors and processes they examine will seem strikingly familiar to students of modern international relations-for example, security fears, economic rivalry between groups, economic interdependence, the institutionalization of cooperative ties across political units, the popular accountability of decision makers, and the nature of identities and cultural symbolism of the political units and of the anarchic system as a whole. Notwithstanding the familiarity of these categories, the kinds of societies anthropologists of war study differ vastly from contemporary, industrialized, bureaucratized societies, and thus research findings on the anthropological history of war can not simply be read off and applied to debates about the construction of culture in today's "new world order." Indeed, a central part of the constructivist claim is that the spread of a new democratic culture may be on the verge of making obsolete all those old cultural patterns, whether those of the Cold War, the ancient Chinese Warring States, or warring villages in the Venezuelan jungle. 16 Moreover, evidence based on technologically primitive societies, some of which lack the minimal economic resources needed for assured survival, may load the dice in favor of explanations based on material pressures. However, following the arguments ofDurkheim or Weber, one could also argue that this type of evidence is biased in favor of cultural explanations on the grounds that social solidarity in such societies is achieved more through cultural rituals than through differentiated, rational- legal institutions

#### problemetizing isn’t sufficient. Security framing is a pre-requisite for changing authority.

David **COLE** Law @ Georgetown **’12** “Confronting the Wizard of Oz: National Security, Expertise, and Secrecy” CONNECTICUT LAW REVIEW 44 (5) p. 1629-1633

Rana is right to focus our attention on the assumptions that frame modern Americans' conceptions about national security, but his assessment raises three initial questions. First, it seems far from clear that there ever was a "golden" era in which national security decisions were made by the common man, or "the people themselves," as Larry Kramer might put it.8 Rana argues that neither Hobbes nor Locke would support a worldview in which certain individuals are vested with superior access to the truth, and that faith in the superior abilities of so-called "experts" is a phenomenon of the New Deal era. 9 While an increased faith in scientific solutions to social problems may be a contributing factor in our current overreliance on experts,' 0 I doubt that national security matters were ever truly a matter of widespread democratic deliberation. Rana notes that in the early days of the republic, every able-bodied man had to serve in the militia, whereas today only a small (and largely disadvantaged) portion of society serves in the military." But serving in the militia and making decisions about national security are two different matters. The early days of the Republic were at least as dominated by "elites" as today. Rana points to no evidence that decisions about foreign affairs were any more democratic then than now. And, of course, the nation as a whole was far less democratic, as the majority of its inhabitants could not vote at all. 12 Rather than moving away from a golden age of democratic decision-making, it seems more likely that we have simply replaced one group of elites (the aristocracy) with another (the experts). Second, to the extent that there has been an epistemological shift with respect to national security, it seems likely that it is at least in some measure a response to objective conditions, not just an ideological development. If so, it's not clear that we can solve the problem merely by "thinking differently" about national security. The world has, in fact, become more interconnected and dangerous than it was when the Constitution was drafted. At our founding, the oceans were a significant buffer against attacks, weapons were primitive, and travel over long distances was extremely arduous and costly. The attacks of September 11, 2001, or anything like them, would have been inconceivable in the eighteenth or nineteenth centuries. Small groups of non-state actors can now inflict the kinds of attacks that once were the exclusive province of states. But because such actors do not have the governance responsibilities that states have, they are less susceptible to deterrence. The Internet makes information about dangerous weapons and civil vulnerabilities far more readily available, airplane travel dramatically increases the potential range of a hostile actor, and it is not impossible that terrorists could obtain and use nuclear, biological, or chemical weapons. 13 The knowledge necessary to monitor nuclear weapons, respond to cyber warfare, develop technological defenses to technological threats, and gather intelligence is increasingly specialized. The problem is not just how we think about security threats; it is also at least in part objectively based. Third, deference to expertise is not always an error; sometimes it is a rational response to complexity. Expertise is generally developed by devoting substantial time and attention to a particular set of problems. We cannot possibly be experts in everything that concerns us. So I defer to my son on the remote control, to my wife on directions (and so much else), to the plumber on my leaky faucet, to the electrician when the wiring starts to fail, to my doctor on my back problems, and to my mutual fund manager on investments. I could develop more expertise in some of these areas, but that would mean less time teaching, raising a family, writing, swimming, and listening to music. The same is true, in greater or lesser degrees, for all of us. And it is true at the level of the national community, not only for national security, but for all sorts of matters. We defer to the Environmental Protection Agency on environmental matters, to the Federal Reserve Board on monetary policy, to the Department of Agriculture on how best to support farming, and to the Federal Aviation Administration and the Transportation Security Administration on how best to make air travel safe. Specialization is not something unique to national security. It is a rational response to an increasingly complex world in which we cannot possibly spend the time necessary to gain mastery over all that affects our daily lives. If our increasing deference to experts on national security issues is in part the result of objective circumstances, in part a rational response to complexity, and not necessarily less "elitist" than earlier times, then it is not enough to "think differently" about the issue. We may indeed need to question the extent to which we rely on experts, but surely there is a role for expertise when it comes to assessing threats to critical infrastructure, devising ways to counter those threats, and deploying technology to secure us from technology's threats. As challenging as it may be to adjust our epistemological framework, it seems likely that even if we were able to sheer away all the unjustified deference to "expertise," we would still need to rely in substantial measure on experts. The issue, in other words, is not whether to rely on experts, but how to do so in a way that nonetheless retains some measure of self-government. The need for specialists need not preclude democratic decision-making. Consider, for example, the model of adjudication. Trials involving products liability, antitrust, patents, and a wide range of other issues typically rely heavily on experts.' 4 But critically, the decision is not left to the experts. The decision rests with the jury or judge, neither of whom purports to be an expert. Experts testify, but do so in a way that allows for adversarial testing and requires them to explain their conclusions to laypersons, who render judgment informed, but not determined, by the expert testimony. Similarly, Congress routinely acts on matters over which its members are not experts. Congress enacts laws governing a wide range of very complex issues, yet expertise is not a qualification for office. Members of Congress, like many political appointees in the executive branch, listen to and consider the views of experts to inform their decisions. Congress delegates initial consideration of most problems to committees, and by serving on those committees and devoting time and attention to the problems within their ambit, members develop a certain amount of expertise themselves. They may hire staff who have still greater expertise, and they hold hearings in which they invite testimony from still other experts. But at the end of the day, the decisions about what laws should be passed are made by the Congress as a whole, not by the experts. A similar process operates in the executive branch. The President and Vice-President generally need not be experts in any particular field, and many of the cabinet members they appoint are not necessarily experts either. They are managers and policy makers. They spend much of their day being briefed by people with more specialized expertise than they have. But at the end of the day, the important decisions are made by politically accountable actors. Thus, deference to experts need not preclude independent or democratically accountable decision-making. The larger problem may be one that Rana notes but does not sufficiently emphasize-an inordinate reliance on classified information and covert operations. 5 Secrecy is in many ways the ultimate enemy of democracy in the national security realm. 16 As Judge Damon Keith has written, "democracy dies behind closed doors.' ' 7 The experts in the intelligence community have the power to hide their decisions from external review and checks by classifying the information they consider or the actions they take.18 Even if they do so in good faith, the inevitable result is that their actions are increasingly insulated from scrutiny by others and immune from democratic checks. Virtually everyone who has had access to classified information concedes that the system leads to massive over-classification. 19 Our overreliance on secrecy may well be more central to the problem of inordinate deference than assumptions about the nature of knowledge regarding security. And in any event, the problems are mutually reinforcing. The inaccessibility of the information the experts rely upon compels us to defer to them because we lack sufficient grounds to question them. And that, in turn, may well make the experts more protective of their information and more likely to classify their actions, decisions, and considerations.

#### Call for end of security frame sparks American natioanalist backlash and international chaos – we should channel American identity productively.

Michael **HUNT** History @ UNC (Chapel Hill) **‘9** *Ideology and U.S. Foreign Policy* p. 214-218

The third and last facet of the momentous U.S . encounter with the world was the establishment of pervasive economic and cultural influence-what might be described as hegemony. Woodrow Wilson gave voice to hege- monic aspirations that had in view (prematurely, to be sure) nothing less than the remaking of the world. Already in the 1920s American values and institutions were having a widening impact, and they grew even greater after World War II. Washington's success at establishing an international leadership historically unprecedented in its breadth had important ideological consequences. Above all, it confirmed long-standing assumptions about an exceptional U.S. role in the world: people everywhere must deep down admire Americans, would gladly (if possible) become American, and surely looked to Washington as a repository of wisdom to which all countries should defer. Less noticed was how this special postwar standing created problems at home and set limits on U.S. action abroad. Dominance spawned resentments that on occasion inspired direct resistance and made hegemony more difficult to exercise. Faced with surly foreigners, perplexed officials tried to speak more clearly or more loudly. But the angry voices persisted, while a consumer-minded electorate wondered why bother with a benighted and ungrateful world. More serious still, these claims to international leadership imposed constraints on U.S. policymakers and their public. Americans had to actually know something about the world they claimed to lead. This was an inherently difficult task given the breadth of the U.S. reach. Making it even more trying was the notoriously insular nature of U.S. society, with its strongly nationalist bent shaped by animosity to one external threat after another. Compounding the problem, the public put an ever-higher value on individualism and consumerism. Citizens devoted to their distinctly materialist and individualist sense of the good life wanted ever-rising abundance and proved allergic, even phobic, when faced with military service or higher taxes. Further complicating the exercise of hegemony, policymakers limited their own freedom of action by paying obeisance to the invisible hand of the marketplace and embracing the utopian notion of a world turned over to international market forces in which corporations rather than states represented the highest form of human organization and activity. Policymakers operating on the global stage found themselves bound in yet another way-by the need to pay attention to the opinion of other international leaders as the price for securing deference and maintaining legitimacy. These crosscurrents engulfing U.S. policymakers over the twentieth century are an important part of any effort to understand the career of my core policy ideas. These several neglected dimensions to my argument have major implications for the controversial call in the concluding chapter of Ideology for a more modest (some might say "isolationist") foreign policy. I now have to concede that I was on the wrong trail. The United States is now implicated in world affairs in such a deep and complex fashion that a retreat is hard to imagine and if attempted might produce dire consequences overseas, notably a breakdown of global integration, with international anarchy a likely prospect. Moreover, an assertive U.S. nationalism is so important in providing social glue for a diverse, mobile people that a repudiation of the country's leading role on the international stage might well prove deeply divisive at home and spawn bitter cries of betrayal. Finally, pressing domestic problems are now inextricably entangled with international trends and pressures, ranging from climate change to global finance and trade to resource scarcity to immigrant pressures generated by failed states and stagnant economies. Rather than calling for a more modest foreign policy, I would now praise mid-twentieth-century U.S.leaders for following a visionary policy that included the Bretton Woods reforms for the international economy, the creation of the United Nations and other international organizations, the assertion of basic human rights, the decision to hold state leaders responsible for their crimes, and the priority given to economic recovery and relief. These measures were all conducive to world order and prosperity. U.S. leaders in recent decades deserve censure precisely because they neglected or even repudiated the public goods that the United States as hegemon is obligated to provide. A policy at once more territorially interventionist (imperial) and hands-off (neoliberal) in matters of global governance endangers the system of values and institutions promoted in the wake of World War II. The problem I am left with today is not much different from the one that haunted me in the conclusion of Ideology twenty years ago. How does one create an ideological foundation for a different kind of policy-one that serves the American people well while also advancing the cause of human welfare? Reflecting on this question has provided a chastening but useful reminder that ideologies are a lot easier to identify and explore than to construct or transform.

#### Science disproves it

Bunge 10 (Mario, philosopher at McGill University in Montreal, Canada, “Should Psychoanalysis Be in the Science Museum?” <http://stirling-westrup-tt.blogspot.com/2010/11/tt-ns-2780-robert-bud-and-mario-bunge.html>

We should congratulate the Science Museum for setting up an exhibition on psychoanalysis. Exposure to pseudoscience greatly helps understand genuine science, just as learning about tyranny helps in understanding democracy. Over the past 30 years, psychoanalysis has quietly been displaced in academia by scientific psychology. But it persists in popular culture as well as being a lucrative profession. It is the psychology of those who have not bothered to learn psychology, and the psychotherapy of choice for those who believe in the power of immaterial mind over body. Psychoanalysis is a bogus science because its practitioners do not do scientific research. When the field turned 100, a group of psychoanalysts admitted this gap and endeavoured to fill it. They claimed to have performed the first experiment showing that patients benefited from their treatment. Regrettably, they did not include a control group and did not entertain the possibility of placebo effects. Hence, their claim remains untested (The International Journal of Psychoanalysis, vol 81, p 513). More recently, a meta-analysis published in American Psychologist (vol 65, p 98) purported to support the claim that a form of psychoanalysis called psychodynamic therapy is effective. However, once again, the original studies did not involve control groups. In 110 years, psychoanalysts have not set up a single lab. They do not participate in scientific congresses, do not submit their papers to scientific journals and are foreign to the scientific community - a marginality typical of pseudoscience. This does not mean their hypotheses have never been put to the test. True, they are so vague that they are hard to test and some of them are, by Freud's own admission, irrefutable. Still, most of the testable ones have been soundly refuted. For example, most dreams have no sexual content. The Oedipus complex is a myth; boys do not hate their fathers because they would like to have sex with their mothers. The list goes on. As for therapeutic efficacy, little is known because psychoanalysts do not perform double-blind clinical trials or follow-up studies. Psychoanalysis is a pseudoscience. Its concepts are woolly and untestable yet are regarded as unassailable axioms. As a result of such dogmatism, psychoanalysis has remained basically stagnant for more than a century, in contrast with scientific psychology, which is thriving.

#### Psychoanalysis causes passivity, fatalism and inaction

#### Gordon, 2001 (Paul, psychotherapist living and working in London, author of Face to Face: Therapy as ethics, RACE & CLASS, v42, n4, p. 30/1)

The postmodernists' problem is that they cannot live with dis-appointment. All the tragedies of the political project of emancipation--the evils of Stalinism m particular – are seen as the inevitable product of men and women trying to create a better society. But, rather than engage in a critical assessment of how, for instance, radical political movements go wrong, they discard the emancipatory project and impulse itself. The postmodernists, as Sivanandan puts it, blame modernity for having failed them: ‘the intellectuals and academics have fled into discourse and deconstruction and representation - as though to interpret the world is more important than to change'it, as though changing the interpretation is all we could do in a changing world'.58 To justify their flight from a politics holding out the prospect of radical change through self-activity, the disappointed intellectuals find abundant intellectual alibis for themselves in the very work they champion, including, in Cohen's case, psychoanalysis. What Marshall Berman says of Foucault seems true also of psychoanalysis; that it offers 'a world-historical alibi' for the passivity andhelplessness felt by many in the ly/Os, and that it has nothing out contempt for those naive enough to imagine that it might be possible for modern human¬kind to be free. At every turn for such theorists, as Berman argues, whether in sexuality, politics, even our imagination, we are nothing but prisoners: there is no freedom in Foucault's world, because his language forms a seamless web, a cage far more airtight than anything Weber ever dreamed of, into which no life can break . . . There is no point in trying to resist the oppressions and injustices of modern life, since even our dreams of freedom only add more links to our chains; how¬ever, once we grasp the futility of it all, at least we can relax. In their move from politics to the academy and the world of 'discourse', the postmodernists may have simply exchanged one grand narrative, historical materialism, for anotner, psychoanalysis. For psychoanalysis is a grand narrative, par excellence. It is a theory that seeks to account for the world and which recognises few limits on its explanatory potential. And the claimed radicalism of psychoanalysis, in the hands of the postmodernists at least is not a radicalism at all but a prescription for a politics of quietism, fatalism, and defeat. Those wanting to change the world, not just to interpret it need to look elsewhere.

## 1AR

### 1AR W/M

#### They have NO evidence that define statuory restriction – procedure is a statutory check.

Mortenson 11, Julian Davis Assistant Professor, University of Michigan Law School, “Review: Executive Power and the Discipline of History Crisis and Command: The History of Executive Power from George Washington to George W. Bush John Yoo. Kaplan, 2009. Pp vii, 524,” Winter 2011, University of Chicago Law Review 78 U. Chi. L. Rev. 377

At least two of Yoo's main examples of presidential power are actually instances of presidential deference to statutory restrictions during times of great national peril. The earliest is Washington's military suppression of the Whiskey Rebellion (III, pp 66-72), a domestic disturbance that Americans viewed as implicating adventurism by European powers and threatening to dismember the new nation. n60 The Calling Forth Act of 1792 n61 allowed the President to mobilize state militias under federal control, but included a series of mandatory procedural checks--including judicial [\*399] approval--that restricted his ability to do so. n62 Far from defying these comprehensive restrictions at a moment of grave crisis, Washington satisfied their every requirement in scrupulous detail. He issued a proclamation ordering the Whiskey Rebels to disperse. n63 When they refused to do so, he submitted a statement to Justice James Wilson of the Supreme Court describing the situation in Pennsylvania and requesting statutory certification. n64 Only when Wilson issued a letter precisely reciting the requisite statutory language (after first requiring the President to come back with authentication of underlying reports and verification of their handwriting n65) did Washington muster the troops. n66 Washington's compliance with statutory restrictions on his use of force continued even after his forces were in the field. Because Congress was not in session when he issued the call-up order, Washington was authorized by statute to mobilize militias from other states besides Pennsylvania--but only "until the expiration of thirty days after the commencement of the ensuing [congressional] session." n67 When it became clear that the Pennsylvania campaign would take longer than that, Washington went back to Congress to petition for extension of the statutory time limit that would otherwise have required him to [\*400] disband his troops. n68 Far from serving as an archetypal example of presidential defiance, the Whiskey Rebellion demonstrates exactly the opposite. FDR's efforts to supply the United Kingdom's war effort before Pearl Harbor teach a similar lesson. During the run-up to America's entry into the war, Congress passed a series of Neutrality Acts that supplemented longstanding statutory restrictions on providing assistance to foreign belligerents. Despite these restrictions, FDR sent a range of military assistance to the future Allies. n69 Yoo makes two important claims about the administration's actions during this period. First, he claims the administration asserted that "[a]ny statutory effort by Congress to prevent the President from transferring military equipment to help American national security would be of 'questionable constitutionality'" (III, p 300). Second, he suggests that American military assistance in fact violated the neutrality statutes (III, pp 295-301, 310, 327-28).

### 1AR UQ

#### Review inevitable – now is better for flexibility

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(Benjamin, The Necessity and Impossibility of Judicial Review, https://webspace.utexas.edu/rmc2289/National%20Security%20and%20the%20Courts/Law%20and%20the%20Long%20War%20%20Chapter%204.pdf)

WE COME, then, to the question of what judicial review ought to look like in the war on terror if one accepts that it should exist more robustly than the administration prefers but should not be of an unbridled or general nature, as human rights advocates wish to see. The answer is conceptually simple, though devilishly complicated in operation: Judicial review should be designed for the relatively narrow purpose of holding the executive to clearly articulated legislative rules, not to the often vague standards of international legal instruments that have not been implemented through American law. Judges should have an expanded role in the powers of presidential preemption in the antiterrorism arena, for the judiciary is essential to legitimizing the use of those powers. Without them, the powers themselves come under a barrage of criticism which they cannot easily withstand. And eventually the effort to shield them from judicial review fails, and the review that results from the effort is more intrusive, more suspicious, and less accommodating of the executive's legitimate need for operational flexibility. Judges, in other words, should be a part of the larger rules the legislature will need to write to govern the global fight against terrorism. Their role within these legal regimes will vary-from virtually no involvement in cases of covert actions and overseas surveillance to extensive involvement in cases of long-term detentions. The key is that the place of judges within those systems is not itself a matter for the judges to decide. The judiciary must not serve as the designer of the rules.

### AT: Deference

#### Speed is bad

Knowles 09 (Robert, 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, October)

But there are limits. Although speed matters a great deal during crises, its ¶ importance diminishes over time and other institutional competences ¶ assume greater importance. When decisions made in response to ¶ emergencies are cemented into policy over the course of years, the courts’ ¶ institutional capabilities—information-forcing and stabilizing characteristics—serve an important role in evaluating those policies.393¶ Once a sufficient amount of time has passed, the amount of deference given ¶ to executive branch determinations should be reduced so that it matches ¶ domestic deference standards.

One of the core realist arguments for deference, the risk of collateral ¶ consequences, carries far less weight under a hegemonic model. Court ¶ decisions have consequences for third parties in the domestic realm all of ¶ the time. Given the hierarchical nature of U.S. hegemony, the response from ¶ other nations is likely to be more similar to the response by domestic parties ¶ than in the past. A typical example invoked by deferentialists involves a ¶ court decision—for example, recognizing the government of Taiwan—that ¶ angers the Chinese government.394 Although such a scenario is not out of ¶ the question, there are several reasons why the consequences would not be ¶ as dire as often predicted by deferentialists. American military dominance ¶ makes it highly unlikely that war would result from such an incident.395¶ China, too, cares about legitimacy and is far more likely to retaliate in some ¶ other way, possibly harming the United States’ interests, but through means ¶ that would capture attention in the U.S. domestic realm, leading to ¶ accountability opportunities. Assuming that the decision is nonconstitutional, the Chinese government could seek to have its preferred ¶ interpretation enacted into law.

Moreover, it is entirely possible that other nations would be content with ¶ conflicting decisions from different branches of the U.S. government. ¶ Suppose that the President roundly condemns the offensive court decision ¶ and declares the judge to be an “activist.” If the damage done by the court ¶ decision was largely dignitary, an angry denouncement from the executive ¶ branch may be all that is needed. Past empires relied on multi-vocal ¶ signaling to maintain imperial rule.396 But with the advent of globalization, ¶ intra-executive branch multi-vocality is much more difficult because ¶ advances in communication permit various parts of the “rim” to ¶ communicate with one another.397 The American separation-of-powers ¶ system provides a way around this problem, allowing the U.S. government ¶ to “speak in different voices” at once.

### AT: Flex

#### 4) The aff is key middle ground---total flex causes worse decision-making in crises

Deborah N. Pearlstein 9, lecturer in public and international affairs, Woodrow Wilson School of Public & International Affairs, July 2009, "Form and Function in the National Security Constitution," Connecticut Law Review, 41 Conn. L. Rev. 1549, lexis nexis

It is in part for such reasons that studies of organizational performance in crisis management have regularly found that "planning and effective [\*1604] response are causally connected." n196 Clear, well-understood rules, formalized training and planning can function to match cultural and individual instincts that emerge in a crisis with commitments that flow from standard operating procedures and professional norms. n197 Indeed, "the less an organization has to change its pre-disaster functions and roles to perform in a disaster, the more effective is its disaster [sic] response." n198 In this sense, a decisionmaker with absolute flexibility in an emergency-unconstrained by protocols or plans-may be systematically more prone to error than a decision-maker who is in some way compelled to follow procedures and guidelines, which have incorporated professional expertise, and which are set as effective constraints in advance.¶ Examples of excessive flexibility producing adverse consequences are ample. Following Hurricane Katrina, one of the most important lessons independent analysis drew from the government response was the extent to which the disaster was made worse as a result of the lack of experience and knowledge of crisis procedures among key officials, the absence of expert advisors replacing those rules with more than the most general guidance about custodial intelligence collection. available to key officials (including the President), and the failure to follow existing response plans or to draw from lessons learned from simulations conducted before the fact. n199 Among the many consequences, [\*1605] basic items like food, water, and medicines were in such short supply that local law enforcement (instead of focusing on security issues) were occupied, in part, with breaking into businesses and taking what residents needed. n200¶ Or consider the widespread abuse of prisoners at U.S. detention facilities such as Abu Ghraib. Whatever the theoretical merits of applying coercive interrogation in a carefully selected way against key intelligence targets, n201 the systemic torture and abuse of scores of detainees was an outcome no one purported to seek. There is substantial agreement among security analysts of both parties that the prisoner abuse scandals have produced predominantly negative consequences for U.S. national security. n202 While there remain important questions about the extent to which some of the abuses at Abu Ghraib were the result of civilian or senior military command actions or omissions, one of the too often overlooked findings of the government investigations of the incidents is the unanimous agreement that the abuse was (at least in part) the result of structural organization failures n203 -failures that one might expect to [\*1606] produce errors either to the benefit or detriment of security.¶ In particular, military investigators looking at the causes of Abu Ghraib cited vague guidance, as well as inadequate training and planning for detention and interrogation operations, as key factors leading to the abuse. Remarkably, "pre-war planning [did] not include[] planning for detainee operations" in Iraq. n204 Moreover, investigators cited failures at the policy level- decisions to lift existing detention and interrogation strictures without n205 As one Army General later investigating the abuses noted: "By October 2003, interrogation policy in Iraq had changed three times in less than thirty days and it became very confusing as to what techniques could be employed and at what level non-doctrinal approaches had to be approved." n206 It was thus unsurprising that detention and interrogation operations were assigned to troops with grossly inadequate training in any rules that were still recognized. n207 The uncertain effect of broad, general guidance, coupled [\*1607] with the competing imperatives of guidelines that differed among theaters of operation, agencies, and military units, caused serious confusion among troops and led to decisionmaking that it is overly kind to call arbitrary. n208¶ Would the new functionalists disagree with the importance of government planning for detention operations in an emergency surrounding a terrorist nuclear attack? Not necessarily. Can an organization anticipate and plan for everything? Certainly not. But such findings should at least call into question the inclination to simply maximize flexibility and discretion in an emergency, without, for example, structural incentives that might ensure the engagement of professional expertise. n209 Particularly if one embraces the view that the most potentially damaging terrorist threats are nuclear and biological terrorism, involving highly technical information about weapons acquisition and deployment, a security policy structure based on nothing more than general popular mandate and political instincts is unlikely to suffice; a structure that systematically excludes knowledge of and training in emergency response will almost certainly result in mismanagement. n210 In this light, a general take on role effectiveness might suggest favoring a structure in which the engagement of relevant expertise in crisis management is required, leaders have incentives to anticipate and plan in advance for trade-offs, and [\*1608] organizations are able to train subordinates to ensure that plans are adhered to in emergencies. Such structural constraints could help increase the likelihood that something more than arbitrary attention has been paid before transcendent priorities are overridden.